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| to:              | Mr Uwe CORSEPIUS, Secretary-General of the Council of the European<br>Union                  |

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**"Towards a European Horizontal Framework for Collective Redress"**

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**"Towards a European Horizontal Framework for Collective Redress"**

**1. INTRODUCTION**

**1.1. Objectives of this Communication**

In economically challenging times, a sound legal environment and efficient justice systems can contribute decisively to the European Union's goal of achieving competitive growth. The major policy objective for the EU is to remain competitive at global level and to have an open and functioning single market, as stressed in the Europe 2020 strategy and in the Single Market Act. Legal certainty and a reliable legal environment are of key importance in this context.

EU justice policy aims to develop a genuine area of freedom, security and justice that serves citizens and businesses<sup>1</sup>. Both citizens and businesses should be able to obtain effective redress, in particular in cross-border cases and in cases where the rights conferred on them by European Union law have been infringed. This may require procedural law solutions on the basis of EU law. Work carried out in the area of procedural law so far has produced a number of solutions facilitating effective redress: the European Small Claims Procedure<sup>2</sup> is a simplified and cost-effective European civil procedure that facilitates consumer claims resulting from cross-border sales. The European Order for Payment Procedure<sup>3</sup> contributes to fast cross-border debt recovery, making it easier for businesses to manage their claims. The Mediation Directive<sup>4</sup>, which is applicable in all cross-border civil disputes, promotes Alternative Dispute Resolution that saves costs and efforts and reduces the time needed for cross-border litigation. In the field of consumer policy<sup>5</sup> the recently adopted Directive on consumer Alternative Dispute Resolution<sup>6</sup> together with Regulation on consumer Online Dispute Resolution<sup>7</sup> go further by requiring Member States to ensure that contractual disputes

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<sup>1</sup> See the Commission's Communication "Action Plan Implementing the Stockholm Programme" COM (2010) 171 20.4.2010. See Stockholm Programme — An open and secure Europe serving and protecting citizens, adopted by the European Council on 9.12.2009, OJ C 115, 4.5.2010, p.1.

<sup>2</sup> Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007.

<sup>3</sup> Regulation (EC) No 1896/2006 creating a European Order for payment procedure, OJ L 399, 30.12.2006.

<sup>4</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008.

<sup>5</sup> Communication from the c-Commission to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy strategy 2007-2013 Empowering consumers, enhancing their welfare, effectively protecting them", COM(2007)99final, {SEC(2007)321}, {SEC(2007)322}, {SEC(2007)323}, 13.03.2007 and Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "A European Consumer Agenda - Boosting confidence and growth", COM(2012)225final, {SWD(2012) 132 final}, 22.05.2012.

<sup>6</sup> P7\_TA(2013)0066 Alternative consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.749 European Parliament legislative resolution of 12 March 2013 on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2011)0793 – C7-0454/2011– 2011/0373(COD)).

<sup>7</sup> P7\_TA(2013)0065 Online consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.752 European Parliament legislative resolution of 12 March 2013 on the proposal for a regulation of the European Parliament and of the Council on online dispute resolution for

between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an alternative dispute resolution entity.

The above-mentioned legal instruments, together with other instruments that go to make up the European Union's *acquis* in the area of justice and consumer protection, respond to very concrete and well identified needs of citizens and businesses. In accordance with the principle of subsidiarity, they leave room also for national judicial solutions and redress systems.

Collective redress is one of the mechanisms that has been analysed since several years by the EU institutions on the basis of experience made in several Member States as to its capacity to contribute to the development of the European area of justice to ensure a high level of consumer protection and to improve the enforcement of the EU law in general, including the EU's competition rules, while serving economic growth and facilitating access to justice. The Commission has continued and deepened this analysis between 2010 and 2012 to provide answers to three basic questions:

- (1) what is the problem that is not yet satisfactorily addressed by existing instruments,
- (2) could a particular legal mechanism, such as a possible European collective redress mechanism, solve this problem?
- (3) how could such a mechanism be reconciled with the requirement of Article 67(1) TFEU, according to which the Union, while establishing a European area of freedom, justice and security, is asked to respect the different legal systems and traditions of the Member States, in particular in areas (such as procedural law) which are well established at national level while being rather new at EU level.

For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.

In 2011, the Commission carried out a horizontal public consultation 'Towards a coherent European approach to collective redress'. Its aim was, inter alia, to identify common legal principles on collective redress and to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States. The consultation also explored the areas in which different forms of collective redress could help to better enforce EU legislation or protect the rights of EU citizens and businesses.

The European Parliament decided to provide its input to the European debate by adopting a resolution based on a comprehensive own-initiative report on collective redress<sup>8</sup>.

This Communication reports the main views expressed in the public consultation and reflects the position of the Commission on some central issues regarding collective redress. It is accompanied by a Commission Recommendation, which recommends that all Member States of the European Union have national collective redress systems based on a number of common European principles. The Recommendation advocates a horizontal approach, and its content therefore also applies to the field of competition law, an area for which specific rules

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consumer disputes (Regulation on consumer ODR) (COM(2011)0794 – C7-0453/2011–2011/0374(COD)) (Ordinary legislative procedure: first reading)

<sup>8</sup> European Parliament resolution of 2 February 2012 "Towards a Coherent European Approach to Collective Redress".

– justified by the specificities of competition law – are included in a proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union<sup>9</sup>. While the Recommendation encourages all Member States to follow the principles suggested therein, the proposed Directive leaves it to Member States whether or not to introduce collective redress actions in the context of the private enforcement of competition law.<sup>10</sup>

## 1.2. What is collective redress?

Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.

Depending on the type of claim, collective redress can take the form of *injunctive* relief, where cessation of the unlawful practice is sought, or *compensatory* relief, aimed at obtaining compensation for damage suffered. This Communication and the Commission Recommendation accompanying this Communication address both forms of collective redress, without interfering with means of injunctive relief already in place in Member States on the basis of Union law.

It is indeed important to bear in mind that actions seeking injunctions or damages for alleged violations of different rights or cessation of unlawful practice are civil disputes between two private parties<sup>11</sup>, including when one party is a ‘collective’, e.g. a group of claimants. Any violation of rights and any consequent injunction or compensation for damage is determined only at the time of the court decision<sup>12</sup> in the case<sup>13</sup>. In line with the principle of the rule of law, the defending party (respondent) to the civil litigation is not considered as having acted improperly or violated any rights unless and until this is ruled by the court<sup>14</sup>.

## 1.3. State of play on collective redress in the European Union

EU legislation and international agreements ratified by the EU require Member States to provide for collective *injunctive* relief in certain areas. In the area of consumer law, as a result of the Directive on Injunctions<sup>15</sup>, qualified consumer protection authorities and consumer organisations are authorised to commence proceedings before the courts or public authorities

<sup>9</sup> [ADD reference COM(2013)XXX when known]

<sup>10</sup> For the Commission, the horizontal Recommendation and the sector-specific Directive are a "package" that, seen as a whole, reflects a balanced approach deliberately chosen by the Commission. While the adoption procedures differ for both measures under the Treaties, significant changes to this balanced approach would require the Commission to reconsider its proposal.

<sup>11</sup> Also a public authority could be a claimant or defendant in civil disputes when it is not exercising its public power but acting under civil law.

<sup>12</sup> Unless it is a ‘follow-on’ damages action that requires the prior finding of an infringement by a competent public authority, such as a competition authority.

<sup>13</sup> For this reason, it is not appropriate to refer to ‘victims’, ‘harm’ or ‘infringements’ in the context of private collective actions before the court decides that damage has been caused by a particular violation of the law.

<sup>14</sup> Research carried out in Germany showed that around 60 % of (injunctive) actions brought by consumer protection authorities or associations were successful in a given time period. This percentage is high because the claimants select the cases carefully. Nevertheless, in 40 % of the cases no violation or illegal activity was found by the court. See Meller-Hannich: Effektivität kollektiver Rechtsschutzinstrumente, 2010.

<sup>15</sup> Directive 2009/22/EC, OJ L 110, 1.5.2009, p. 30.

in all Member States to request the prohibition of practices that infringe national and EU consumer protection rules. In the area of environmental law, the Aarhus Convention requires Member States to ensure access to justice with regard to infringements of environmental standards<sup>16</sup>. All Member States thus have procedures in place which allow claimant parties, acting in a collective or representative way, to seek an injunction to stop illegal practices.

Procedures to bring collective claims for *compensatory* relief have been introduced also in a number of Member States, so far as a result of national developments in justice policy. Instruments on collective compensatory relief do not yet exist at EU level. Existing mechanisms whereby compensation can be claimed by a group of individuals harmed by illegal business practices vary between the Member States<sup>17</sup>. Major differences in the mechanisms have to do with their scope, their availability to representative organisations or individuals as claimants, their availability to businesses and in particular SMEs, how the claimants group is formed ('opt-in' or 'opt-out'), how an action is financed and how an award is distributed.

The Commission has worked for several years to develop European standards of compensatory collective redress in the field of competition and consumer law. It adopted a Green Paper on antitrust actions in 2005<sup>18</sup> and a White Paper in 2008<sup>19</sup>, examining the idea of integrating collective redress as a further instrument for the enforcement of EU competition rules by private parties. In 2008, the Commission also published a Green Paper on consumer collective redress<sup>20</sup>.

Stakeholders raised the issue of inconsistencies between the different Commission initiatives on collective redress, a fact which points to the need for a more coherent system. Indeed, collective redress is a procedural tool that can be relevant for EU policies in areas other than competition or consumer protection. Good examples are financial services, environmental protection, data protection<sup>21</sup> or non-discrimination. The Commission therefore deems it necessary to increase policy coherence and to take a horizontal approach on collective redress on the basis of a public consultation carried out in 2011<sup>22</sup>.

## **2. MAIN OUTCOMES OF THE PUBLIC CONSULTATION**

### **2.1. Stakeholders' contributions**

The Commission's public consultation on collective redress met with a considerable response: 310 replies were received from other stakeholders, and 300 people attended a public hearing on 5 April 2011. In addition, over 19 000 replies were received in the form of mass mailing

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<sup>16</sup> The Member States have implemented this by giving non-governmental organisations standing to challenge administrative decisions in environmental matters before the courts.

<sup>17</sup> See e.g. the 2008 study 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' requested by the Commission and available at [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm#Studies](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Studies).

<sup>18</sup> COM(2005)672, 19.12.2005.

<sup>19</sup> COM(2008)165, 2.4.2008.

<sup>20</sup> COM(2008)794, 27.11.2008.

<sup>21</sup> A form of representative collective redress has been proposed by the Commission in its proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). Here, the judicial remedy for data protection violations could be exercised by any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data, if they act on behalf of one or more data subjects (see COM(2012)11, 25.1.2012, Articles 73(2) and 76). In these cases, the action is thus brought on behalf of the represented data subject and only goes as far as the data subject himself/herself would be entitled to bring an action.

<sup>22</sup> COM(2010)135, 31.3.2010.

from citizens<sup>23</sup>. The quality of most responses demonstrates the substantial interest in and the importance of this issue. The contributions informed the Commission's understanding of the varying positions taken by stakeholders, and highlighted which issues are controversial and which are more consensual.

The primary difference of opinion concerning the benefits that could flow from introducing new mechanisms of collective redress for the enforcement of EU law is between citizens/consumers and business: consumers are generally in favour of introducing new mechanisms, while businesses are generally against. Academics are generally in favour. Lawyers are divided on this issue, although those who are sceptical or opposed outnumber those in favour.

The Member States<sup>24</sup> which responded to the consultation also expressed diverging views, ranging from support for binding EU rules on collective redress to strong scepticism.

Some Member States would consider binding EU rules with regard to specific policy fields or issues only (Denmark – with regard to cross-border collective redress, the Netherlands– with regard to private international law aspects of collective redress, Sweden – in policy fields with harmonised substantive rules, such as competition, the UK - in the competition field; Latvia would consider a set of binding minimum requirements in the area of consumer and competition law for cross-border cases).

Several contributors, representing various categories of stakeholders, took the view that collective redress as a form of private enforcement should normally be independent of enforcement by public bodies, but that a certain level of coordination is required between public and private enforcement; in effect they should complement each other. Some contributors argued that collective redress should only come into play after public enforcement, as "follow on" actions.

Most stakeholders agree that establishing common principles for collective redress at EU level is desirable. However, such principles should fit into the EU legal system and the legal orders of the 27 Member States, and take into account the practical experience of collective redress systems already operating in several Member States. According to many stakeholders, the principles should ensure effective proceedings, prevent threats of abusive litigation, encourage collective consensual resolution of disputes, and provide a mechanism for the cross-border enforcement of judgments.

More specifically, many stakeholders agree with the following basic parameters of a collective redress system in terms of effectiveness and safeguards: any collective redress mechanism should first and foremost be capable of effectively resolving a large number of individual claims that raise the same or common issues and relate to a single alleged infringement of rights granted under EU law. It should be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved. At the same time, it should incorporate safeguards against abusive litigation and avoid any economic incentives to bring speculative claims. In examining the concrete building blocks needed to ensure effectiveness and safeguards, the public consultation has confirmed that collective redress mechanisms vary significantly amongst Member States. These mechanisms differ from each other as regards the type of available collective action and its main features, such as admissibility, legal standing, the use of an opt-in or an opt-out system, the role of the judge in collective proceedings and requirements on informing

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<sup>23</sup> Almost all were uniform responses from French and German citizens.

<sup>24</sup> 15 Member States responded to the public consultation (AT, BG, CZ, DE, DK, EL, FR, HU, IT, LV, NL, PL, PT, SE, UK).

potential claimants about a collective action. Furthermore, each collective redress mechanism operates in the broader context of general civil and procedural rules, rules regulating the legal profession and other relevant rules, which also differ amongst Member States. Given this diversity, stakeholders naturally have very different views as to whether any specific national system of collective redress — or its features — may be particularly instructive when formulating EU-wide standards on effectiveness and safeguards.

## **2.2. Potential advantages and disadvantages of collective redress according to the public consultation**

In numerous responses, various stakeholders pointed out the inherent advantages and disadvantages of collective redress mechanisms. These potential advantages and disadvantages are to be viewed in the context of the values and policies of the European Union, in particular as expressed in the Treaties and legislation. Advantages can be achieved and the disadvantages can be mitigated if the common principles to be followed under the Commission Recommendation are appropriately implemented.

### *2.2.1. Advantages: access to justice and stronger enforcement*

Under Article 47(1) of the Charter of Fundamental Rights, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. Effectiveness of the remedy depends on various factors, including practical accessibility to the remedy offered by the legal system.

The European Council emphasised in the Stockholm Programme that access to justice in the European judicial area should be made easier, particularly in cross-border proceedings. One obstacle to access to justice can be the cost of judicial proceedings. Where a large number of persons claim to be harmed by an alleged infringement of rights granted under EU law but the potential loss of each individual is small in comparison to the potential costs for each claimant, the pooling of similar claims in a collective redress scheme allows persons claiming damages to share the costs, thereby reducing the financial burden on individual claimants. The possibility of collectively bringing an action encourages more persons who have been potentially harmed to pursue their rights for compensation<sup>25</sup>. The availability of collective court action in national legal systems — together with the availability of collective consensual dispute resolution methods — may therefore contribute to improving access to justice.

In addition, when potential claimants can enforce their rights granted under EU law against possible violators more effectively, this contributes to the overall level of enforcement of EU law. In policy areas where the designated public authorities have powers to enforce the rules in the public interest, public and private enforcement are complementary: while the former is aimed at prevention, detection and deterrence of infringements, the latter aims to secure compensation for victims. In policy areas with weaker public enforcement, collective actions may, besides their compensatory or preventive function, also serve a deterrence function.

### *2.2.2. Disadvantage: risk of abusive litigation*

The main concerns voiced against the introduction of collective judicial redress mechanisms were that it would attract abusive litigation or otherwise have a negative impact on the economic activities of EU businesses<sup>26</sup>. Litigation can be considered abusive when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them.

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<sup>25</sup> According to a 2011 Eurobarometer survey, 79% of those polled in the 27 Member States stated that they would be more willing to defend their rights in court if they could join with other consumers. Flash Eurobarometer ‘Consumer attitudes towards cross-border trade and consumer protection’, March 2011.

<sup>26</sup> Opinion expressed by the majority of all stakeholders, in particular businesses.



There is the risk that the mere allegation of infringements could have a negative influence on the perception of the defendant by its existing or potential clients. Law-abiding defendants may be prone to settle the case only in order to prevent or minimise possible damage. Furthermore, the costs of legal representation in a complex case may constitute substantial expenditure, in particular for smaller economic operators.

‘Class actions’ in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation. Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded. Such features are for instance contingency fees of attorneys or the discovery of documents procedure that allows ‘fishing expeditions’. A further important feature of the US legal system is the possibility to seek punitive damages, which increases the economic interests at stake in class actions. This is enhanced by the fact that US class actions are legally ‘opt-out’ procedures in most cases: the representative of the class can sue on behalf of the whole class of claimants possibly affected without them specifically requesting to participate. In recent years, U.S. Supreme Court decisions have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation.

### **2.3. The 2012 Resolution of the European Parliament**

The European Parliament's resolution ‘Towards a Coherent European Approach to Collective Redress’ of 2 February 2012<sup>27</sup> takes well note of the widely divergent opinions of stakeholders expressed on the issue of collective redress.

The European Parliament welcomes the Commission's work towards a coherent European approach to collective request stressing that "victims of unlawful practices – citizens and companies alike – must be able to claim compensation for their individual loss or damage suffered, in particular in the case of scattered and dispersed damages, where the cost risk might not be proportionate to the damages suffered".<sup>28</sup> Moreover, it underlines "the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims"<sup>29</sup>.

However, the Parliament also calls on the Commission to first of all carry out a thorough impact assessment before any further regulatory action is undertaken.<sup>30</sup> According to the European Parliament, the Commission should demonstrate in this impact assessment "that, pursuant to the principle of subsidiarity, action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus to contribute to consumer confidence and smoother functioning of the internal market." The European Parliament also recalls "that, currently, only Member States legislate on national rules quantifying the amount of compensation that can be awarded".<sup>31</sup> The European Parliament furthermore calls on the

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<sup>27</sup> European Parliament Resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)).

<sup>28</sup> Point 1 of the Resolution.

<sup>29</sup> Point 5 of the Resolution.

<sup>30</sup> Point 4 of the Resolution.

<sup>31</sup> Point 7 of the Resolution.

Commission "to examine thoroughly the appropriate legal basis for any measure in the field of collective redress"<sup>32</sup>.

The European Parliament concludes by calling "in the event that is decided after detailed consideration that a Union scheme of collective redress is needed and desirable", for any proposal in the field of collective redress to take the form of **a horizontal framework** including a common set of principles providing uniform access to justice via collective redress within the EU and specifically but not exclusively dealing with the infringement of consumer rights."<sup>33</sup> The Parliament also stresses "the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States"<sup>34</sup>.

As regards the scope of the possible horizontal framework on collective redress, the European Parliament finds that EU action would deliver most benefit in cross-border cases and in cases involving infringements of EU law.

The Parliament also finds that the European rules of private international law should apply to collective actions in general; however, the horizontal framework itself should lay down rules to prevent forum shopping. It points to the need to examine conflict of law rules.

Furthermore, the European Parliament raises several issues concerning specific features of collective redress. It supports the 'opt-in' principle as the only appropriate European approach to collective redress. Legal standing should be given to representative organisations that should be qualified in advance. Punitive damages should be clearly prohibited and full compensation should reach individuals once the court confirms that they are right in their claims.

It stresses that one way of fighting abusive litigation is to exclude certain features from the scope of the horizontal framework, in particular punitive damages, third-party financing of collective redress and contingency fees for lawyers. As one of the central safeguards against abusive litigation, the European Parliament points out that the 'loser pays' principle usually prevailing in civil disputes should apply also in collective cases. The European Parliament is not in favour of setting out conditions or guidelines for the private funding of damages claims at EU level.

### 3. ASPECTS OF A EUROPEAN HORIZONTAL FRAMEWORK ON COLLECTIVE REDRESS

Careful analysis of the views and arguments put forward during the public consultation, and notably of the position of the European Parliament, together with the expertise gathered by the Commission in the course of previous activities in the area of consumer protection and competition, makes it possible to identify the main issues that must be addressed in a coherent manner in a European horizontal framework on collective redress.

In particular, it is common ground that any European approach should:

- be capable of effectively resolving a large number of individual claims for compensation of damage, thereby promoting procedural economy;
- be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved;
- provide for robust safeguards against abusive litigation; and

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<sup>32</sup> Point 8 of the Resolution.

<sup>33</sup> Point 15 of the Resolution.

<sup>34</sup> Point 16 of the Resolution.

- avoid any economic incentives to bring speculative claims.

### **3.1. The relationship between public enforcement and private collective redress — compensation as an object of collective action**

There is a consensus among stakeholders that private and public enforcement are two different means that should normally pursue different objectives. Whereas it is the core task of public enforcement to apply EU law in the public interest and impose sanctions on infringers to punish them and to deter them from committing future infringements, private collective redress is seen primarily as an instrument to provide those affected by infringements with access to justice and — as far as compensatory collective redress is concerned — possibility to claim compensation for harm suffered. In this sense, public enforcement and private collective redress are seen as complementing each other.

Collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punishment and deterrence functions should be exercised by public enforcement. There is no need for EU initiatives on collective redress to go beyond the goal of compensation: Punitive damages should not be part of a European collective redress system.

### **3.2. Admissibility of collective redress**

Conditions for the admissibility of collective actions vary in Member States depending on the concrete type of collective redress mechanism. Typically, the basic conditions are set by the law regulating a given type of collective action. There are also systems leaving the assessment of admissibility to the discretion of the courts. The extent of discretion given to the court to decide on admissibility conditions varies between Member States, also when the legal conditions are codified in a law.

Some collective actions are available for all types of civil damages claims; others are only available for claims concerning damages for alleged breaches of specific legal rules: consumer protection rules, environmental protection, investor protection, competition law, etc. There are also systems in which particular types of collective action are only admissible once a public authority has established an infringement of the relevant rules: i.e. follow-on actions<sup>35</sup>.

It should be ensured that collective actions for damages (compensatory relief) can only be brought when certain admissibility conditions are fulfilled. In any event, the court should decide on the admissibility of a concrete collective action at a very early stage of the proceedings.

### **3.3. Legal standing**

Legal standing to bring a collective action in the Member States depends on the concrete type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is fairly straightforward. In the context of representative actions, the issue of legal standing needs to be defined. A representative damages action is an action which is brought by a representative entity (which in some systems can also be a public authority) on behalf of a defined group of individuals or legal persons who claim to have been harmed by the same alleged infringement. The individuals are not parties to the proceeding; only the representative entity acts on the claimant side. It should therefore be ensured that the representative entity acts genuinely in the best interest of the group represented, and not for own profit. The

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<sup>35</sup> E.g. the UK follow-on representative action for damages arising from breaches of competition law that have been determined by competent authorities.

Commission believes that under a European horizontal framework on collective redress it is desirable that collective actions are available in all Member States to natural or legal persons as a means of collectively asking for injunctions or claiming compensation for harm caused to them by infringements of rights granted under EU law.

There are different systems as regards qualifying criteria for representative entities which are not public authorities. One possible approach is to let the court check whether the representative entity is fit for purpose on a case-by-case basis (*ad hoc* certification). Another approach is to set certain qualification criteria by law and, thus, define the standing upfront. It can be left to the court to check whether such qualification criteria are met, or an authorisation system can be introduced where a public authority is in charge of checking the fulfilment of qualification criteria. Mass harm situations could span across the border, especially in the context of a further developed digital single market, therefore representative entities originating from other Member States than the one where a collective action is brought before the court should have the possibility to continue performing their role.

Whereas some stakeholders, in particular businesses, are strongly in favour of granting the standing to bring representative actions only to qualified entities that fulfil express criteria, other stakeholders are opposed to determining standing by law, arguing that this might unnecessarily restrict access to litigation seeking compensation for all those who have potentially suffered harm. The Commission considers it desirable to define the conditions for legal standing in representative actions in the Commission Recommendation.<sup>36</sup>

### 3.4. ‘Opt-in’ vs. ‘opt-out’

There are two basic approaches to the way in which the represented group is composed: ‘opt-in’, where the group includes only those individuals or legal persons who actively opt in to become part of the represented group, and ‘opt-out’, where the group is composed of all individuals who belong to the defined group and claim to have been harmed by the same or similar infringement unless they actively opt out of the group. In the ‘opt-in’ model, the judgment is binding on those who opted in, while all other individuals potentially harmed by the same or similar infringement remain free to pursue their damages claims individually. Conversely, in the ‘opt-out’ model, the judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out. The ‘opt-in’ model is used by most Member States that provide for collective redress. The ‘opt-out’ model is used in Portugal, Bulgaria and the Netherlands (in collective settlements) as well as in Denmark in clearly defined consumer cases brought as representative actions<sup>37</sup>.

A significant number of stakeholders, in particular businesses, strongly oppose the ‘opt-out’ model, arguing that it is more prone to abuse and that it may be unconstitutional in some Member States, or at least incompatible with their legal traditions. On the other hand, some consumer organisations argue that ‘opt-in’ systems may fail to deliver effective access to justice for all consumers who have been harmed<sup>38</sup>. In their view, the availability of ‘opt-out’ is therefore desirable, at least as an option in appropriate cases and subject to approval by the court.

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<sup>36</sup> See points 6-9 of the Commission Recommendation.

<sup>37</sup> The ‘opt-out’ system has two advantages that explain why some Member States have introduced it: first, it facilitates access to justice in cases where individual damage is so small that some of the potential claimants would not opt in to the proceedings. The second is that ‘opt-out’ proceedings give more certainty to the defendant, since the judgment would not bind only those who opted out.

<sup>38</sup> The UK consumer organisation Which? refers to its experience in the Replica Football Shirts case, where an ‘opt-in’ collective action (follow-on damages action in the competition field) ultimately secured compensation for only a tiny percentage of those harmed in the terms of the decision of the competent authority.

In the Commission's view, it should be ensured that the represented group is clearly defined so as to allow the court to conduct the proceedings in a manner consistent with the rights of all parties, and in particular with the rights of the defence.

The 'opt-in' system respects the right of a person to decide whether to participate or not. It therefore better preserves the autonomy of parties to choose whether to take part in the litigation or not. In this system the value of the collective dispute is more easily determined, since it would consist of the sum of all individual claims. The court is in a better position to assess both the merits of the case and the admissibility of the collective action. The 'opt-in' system also guarantees that the judgment will not bind other potentially qualified claimants who did not join.

The 'opt-out' system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate. The right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not. In addition, an 'opt-out' system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them.

The Commission therefore takes the view in the Commission Recommendation that under the European horizontal framework on collective redress the claimant party should be formed on the basis of the 'opt-in' method and that any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

### **3.5. Effective provision of information to potential claimants**

Effective information on collective action is a vital condition for ensuring that those who could claim to have been harmed by the same or similar alleged infringement learn of the possibility to join a representative action or a group action and, thus, can make use of this means of accessing justice. On the other hand, it cannot be overlooked that advertising (e.g. on TV or via flyers) of the intention to bring collective action may have a negative impact on the reputation of the defendant, which could have adverse effects on its economic standing.

There is a consensus among stakeholders on the importance of rules stipulating that a representative entity has an obligation to effectively inform potential members of the represented group. Many stakeholders suggest that the court should play an active role in checking that this obligation is fulfilled.

For any type of collective action, any rules regarding the provision of information to potential claimants should balance concerns regarding freedom of expression and the right to access information with the protection of the reputation of the defendant. The timing and conditions in which the information is provided will play an important role in ensuring that this balance is kept.

### **3.6. Interplay of collective redress and public enforcement in specific policy areas**

With regard to EU policy fields where public enforcement plays a major role — such as competition, environment, data protection or financial services — most stakeholders see the need for specific rules to regulate the interplay between private and public enforcement, and protect the effectiveness of the latter<sup>39</sup>.

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<sup>39</sup> In the competition field, many stakeholders emphasise the need to protect the effectiveness of leniency programmes applied by the Commission and national competition authorities when enforcing EU rules against cartels. Other issues frequently mentioned in this context include the binding effect of infringement decisions by national competition authorities with regard to follow-on collective damages actions and setting specific limitation periods for bringing such follow-on actions.

Collective damages actions in regulated policy areas typically follow on from infringement decisions adopted by public authorities and rely on the finding of an infringement, which is often binding on the civil court before which a collective damages action is brought. For example, in the competition field, Regulation (EC) No 1/2003 provides that when national courts rule on issues concerning EU antitrust rules which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

In such cases, follow-on actions essentially concern the questions of whether damage has been caused by the infringement and, if so, to whom and in what amount.

It is necessary to ensure that the effectiveness of public enforcement is not put into jeopardy as a result of collective damages actions or actions that are brought before courts while an investigation by a public authority is still on-going. This may typically require rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation, or specific rules on limitation periods allowing potential claimants to wait with a collective action until the public authority takes its decision as regards infringement. Beyond the purpose of protecting public enforcement, rules of this kind also facilitate effective and efficient redress through collective damages actions. Namely, the claimants in a follow-on action can to a significant extent rely on the results of public enforcement and, thus, avoid the (re-)litigation of certain issues. Due account should be taken of the specificities of collective damages actions in policy areas where public enforcement plays a major role, to achieve the twofold goal of protecting the effectiveness of public enforcement and facilitating effective private collective redress, particularly in the form of follow-on collective actions.

### **3.7. Effective enforcement in cross-border collective actions through private international law rules**

The general principles of European international private law require that a collective dispute with cross-border implications should be heard by a competent court on the basis of European rules on jurisdiction, including those providing for a choice of court, in order to avoid forum shopping. The rules on European civil procedural law and applicable law should work efficiently in practice to ensure proper coordination of national collective redress procedures in cross-border cases.

With regard to jurisdictional rules, many stakeholders asked for collective proceedings to be specifically addressed at European level. Views differ, however, as to the desirable connecting factor between the court and the case. A first group of stakeholders advocate a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a collective claim. A second category argues that jurisdiction at the place of the defendant's domicile is best suited since it is easily identifiable and ensures legal certainty. A third category suggests creating a special judicial panel for cross-border collective actions with the Court of Justice of the European Union.

In this respect, the Commission considers that the existing rules of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation')<sup>40</sup>, should be fully exploited. In the light of further experience involving cross-border cases, the report foreseen on the application of the Brussels

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<sup>40</sup> As amended by Regulation (EC) no 1215/2012 that will enter into application 10 January 2015. OJ L 351, 20.12.2012.

I Regulation should include the subject of effective enforcement in cross-border collective actions.

Finally, some stakeholders raised the problem that, under the EU's current conflict of law rules<sup>41</sup>, a court to which a collective dispute is submitted in a case involving claimants from several Member States would sometimes have to apply several different laws to the substance of the claim. The general rule for tort cases is that the law applicable for the obligations arising out of tort is the law of the country in which the event giving rise to the damage occurred. In tort cases concerning product liability, the law is determined by the habitual residence of the person sustaining the damage. Furthermore, for cases on unfair competition, the law applicable is the law of the country where competitive relations or the collective interests of consumers are or are likely to be affected. Admittedly, there can be situations where the conflict of law rules can render cross-border litigation complex, in particular if the court has to apply several compensation laws to each group of persons sustaining the damage. However, the Commission is not so far persuaded that it would be appropriate to introduce a specific rule for collective claims which would require the court to apply a single law to a case. This could lead to uncertainty when this is not the law of the country of the person claiming damages.

### **3.8. Availability of collective consensual dispute resolution**

Stakeholders agree that consensual dispute resolution can provide parties with a fast, low-cost and simple means of resolving their disputes. Consensual dispute resolution can also reduce the need to seek judicial redress. Parties to collective proceedings should therefore have the possibility to resolve their disputes collectively out of court, either with the intervention of a third party (e.g. using a mechanism such as arbitration or mediation) or without such intervention (e.g. settlement among the parties concerned).

The large majority of stakeholders including small and medium enterprises (SMEs) are of the opinion that the consensual collective resolution of disputes should not be a mandatory first step before going to court. Indeed, this approach could trigger unnecessary costs and delays and may in certain situations even undermine the fundamental right of access to justice<sup>42</sup>. Resorting to the consensual collective resolution of disputes should therefore remain voluntary, with due regard to existing EU law in the ADR area. However, judges in collective redress proceedings should not be prevented from inviting the parties to seek a consensual collective resolution of their dispute<sup>43</sup>.

Verification of the legality of the outcome of consensual collective resolution of the dispute and its enforceability is of particular importance in collective cases, as not all members of the group claiming to be harmed by an alleged illegal practice are always able to directly take part in the consensual collective resolution of the dispute. The court should therefore confirm the outcome. The Commission recommends this to the Member States.<sup>44</sup>

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<sup>41</sup> Regulations (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, and (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007.

<sup>42</sup> Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>43</sup> This is already the case for mediation in cross-border disputes, where, in accordance with Article 5 of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, courts before which an action is brought may invite the parties to use mediation in order to settle the dispute.

<sup>44</sup> See point 30 of the Commission Recommendation. In cross-border civil and commercial disputes, under Directive 2008/52/EC, the content of an agreement resulting from mediation is to be made enforceable by the court requested unless it is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

The Commission sees therefore that a useful complementary role can be played by consensual dispute resolution mechanisms. Building on the steps that have already taken in this direction, namely the Mediation Directive, Directives on consumer Alternative Dispute Resolution and Regulation on consumer Online Dispute Resolution, the Commission considers that it is a useful further step to recommend to the Member States to develop collective consensual dispute resolution mechanisms<sup>45</sup>.

### **3.9. Funding of collective action**

In the case of collective redress, costs<sup>46</sup> usually borne by parties engaged in civil litigation could be relatively high, in particular where there are many claimants. While lack of funding should not limit access to justice<sup>47</sup>, funding mechanisms available for collective actions should not create incentives for abusive litigation.

#### *3.9.1. Third-party financing*

Financial support by a private third party who is not a party to the proceedings could take different forms. Direct third-party financing of collective actions is seen as a potential factor driving abusive litigation, unless it is properly regulated. Legal expenses insurance is perceived by some as more neutral and ‘after-the-event’ insurance could have some relevance for collective actions.

Contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management constitute *de facto* third-party financing. The variety of the solutions adopted in this sphere by the Member States ranges from prohibition to acceptance. Some stakeholders consider the abolition of contingency fees as an important safeguard against abusive litigation while others see contingency fees as a useful method of financing collective actions.

Third-party financing is an area which needs to be designed in a way that it serves in a proportionate manner the objective of ensuring access to justice. The Commission therefore takes the view in the Commission Recommendation that it should be made subject to certain conditions. An inappropriate and non-transparent system of third party financing runs the risk of stimulating abusive litigation or litigation that does little to serve the best interests of litigants.

#### *3.9.2. Public funding*

In the public consultation some stakeholders, namely consumer organisations and some lawyers, favoured the creation of public funds that would provide financial support for potential claimants in collective redress cases.

However, given that collective redress would be a procedure arising in the context of a civil dispute between two parties, even if one of them is composed of a number of claimants, and deterrence will be a side-effect of the proceedings, the Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs.

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<sup>45</sup> See points 27-30 of the Commission Recommendation. The Directive on consumer Alternative Dispute Resolution does not prevent Member States maintaining or introducing alternative dispute resolution procedures that deal jointly with identical or similar disputes between a trader and several consumers, thus enabling collective alternative dispute resolution procedures to develop.

<sup>46</sup> Such costs include court fees, remuneration of legal representatives, costs of participation in the hearing, costs of general case management, costs of expert’s analyses.

<sup>47</sup> The national legal aid systems should be appropriately used to prevent this.



### 3.9.3. *'Loser pays' principle*

The principle that the losing party should bear the costs of the court proceedings is well embedded in the European legal tradition, although it is not present in every jurisdiction of the European Union and the way in which it is applied differs between jurisdictions.

In the public consultation all stakeholders agreed that the 'loser pays' principle should apply to collective redress cases. The Commission has no doubt that the 'loser pays' principle should form part of the European approach to collective redress, and thus it recommends to follow that principle in collective actions.<sup>48</sup>

## 4. CONCLUSIONS

The Commission's public consultation in 2011, the European Parliament Resolution of 2 February 2012 and the Commission's own analyses have made it possible to identify particular issues to be addressed in developing a European horizontal framework for collective redress. As a principal conclusion the Commission sees the advantage of following a horizontal approach in order to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules, in the interest of the functioning of the internal market.

Taking into account the complexity on the one hand and the need to ensure a coherent approach to collective redress on the other hand, the Commission adopts, in parallel with this Communication, a Recommendation on the basis of Article 292 TFEU that suggests horizontal common principles of collective redress in the European Union that should be complied with by all Member States. After adoption and publication of the Commission Recommendation, the Member States should be given two years to implement the principles recommended by the Recommendation in national collective redress systems. On the basis of practical experience to be made with the Recommendation, the Commission will, four years after the publication of the Recommendation, assess whether further legislative measures to consolidate and strengthen the horizontal approach reflected in the present Communication and in the Recommendation should be proposed. The Commission will in particular assess the implementation of the Recommendation and its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust.

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<sup>48</sup> See point 15 of the Commission Recommendation.