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RENFORCER LA COHERENCE DE L'APPROCHE EUROPEENNE EN MATIERE DE RECOURS COLLECTIF : PROCHAINES ETAPES

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Destinataires : Membres de la Commission
Directeurs généraux et chefs de service

Towards a Coherent European Approach to Collective Redress: Next Steps

Joint information note by
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Towards a Coherent European Approach to Collective Redress: Next Steps

The European Commission's Legislative and Work Programme 2010 foresees the launching of a public consultation on a European approach to collective redress. We – the EU Commissioners for Justice, Competition and Consumer Policy – have been thinking about this issue together and would like to share with you our reflections on the best way forward.

A. Collective redress as an instrument to strengthen the enforcement of EU law

1. Effective enforcement of EU law is of utmost importance for citizens and businesses alike. As the Europe 2020 strategy and the Stockholm Programme emphasize, we need to ensure that citizens and businesses can use in practice the opportunities offered to them by the Single Market and the European area of justice. Rights which cannot be enforced in practice are worthless. Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation.

2. An important instrument for ensuring effective enforcement of EU law in such cases is public enforcement by the European Commission (e.g. infringement action or competition proceedings), often based on complaints of citizens or businesses. As guardian of the Treaties, the Commission can ensure that not only individual, but also public interests and, more broadly, the Union interest are taken into account.

3. However, with the enlargement of the European Union the number of cases requiring enforcement has increased substantially because of the larger territorial scope of application of EU law. This has accentuated the need for a more decentralised enforcement of EU law. This has brought the issue on the agenda whether further mechanisms of private enforcement should be added to the current system of EU remedies in order to strengthen the enforcement of EU law.

4. Private enforcement of EU law can be pursued, first of all, by way of *individual* redress: natural or legal persons could initiate individually legal proceedings to enforce their EU law rights. However, where the same breach of EU law harms a large group of citizens and businesses, individual lawsuits are not always an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices. Citizens and businesses are also often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices cause significant aggregate loss to European citizens and businesses.

5. Moreover, where breaches of EU law do trigger a mass of individual lawsuits, the procedural laws of many Member States leave the courts ill-equipped to deal with the case-load efficiently and within reasonable delay.

6. Mechanisms of *collective* redress could be considered because of these reasons to remedy the current shortcomings in the enforcement of EU law.

B. What is meant by "collective redress"?

7. EU citizens and businesses should be able to take action when harmed by a breach of any EU legislation creating substantive rights. When citizens and businesses are victims of the same breach committed by the same company, bundling of their claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or a body acting in the public interest, could simplify the process and reduce costs. "Collective redress" is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of *injunctive relief*, claimants seek to stop the continuation of illegal behaviour; by way of *compensatory relief*, they seek damages for the harm caused. Collective redress procedures can take a variety of forms, including out-of-court mechanisms for dispute resolution or the entrustment of public or representative entities with the enforcement of claims.

C. Existing forms of collective redress in the European Union

8. Collective redress is not a novel concept in the European Union. Existing EU legislation and international agreements require Member States to provide for collective injunctive redress in certain areas. As a consequence, all Member States have procedures in place which grant representatives or groups of claimants the possibility to seek an injunction to stop illegal practices. In the area of consumer law, as a result of the Directive on Injunctions, consumer protection authorities and consumer organisations are entitled to put an end to practices that infringe national and EU consumer protection rules in all Member States. In the area of environmental law, the Aarhus Convention requires Member States to ensure access to justice against infringements of environmental standards. Several Member States like Portugal, UK, Ireland, Latvia, Spain, Estonia and Slovenia have implemented this through different forms of collective injunctive relief (actio popularis).

9. Procedures for the collective claim of *compensatory* relief in certain areas have been introduced in the majority of Member States, most recently in Poland. The existing mechanisms to compensate a group of victims harmed by illegal business practices vary widely throughout the EU. Essentially, every national system of compensatory redress is unique and there are no two national systems that are alike in this area. Some of the procedures only apply in very specific sectors (e.g. the recovery of capital investments losses in Germany or damage caused by anti-competitive practices in the United Kingdom), others have a larger scope (e.g. the Spanish collective redress procedures). A second difference concerns the legal standing in compensatory redress proceedings: some Member States have vested public authorities with the power to institute proceedings in certain areas (e.g. the Ombudsman in Finland), others grant standing to private organisations such as consumer associations (e.g. Bulgaria) or to individuals acting on behalf of a group (e.g. Portugal). Many Member States have a combination of

several rules on standing. A further difference concerns the category of victims that can make use of collective compensatory redress. Most of the national systems referred to above allow for compensatory redress for consumers, whereas only a few also allow for compensatory redress for other victims, such as small businesses. Differences also relate to the effect of a judgment on the members of the group concerned: in most Member States, the decision only binds those who have expressly consented to the proceedings ("opt-in", e.g. Sweden, Italy). In a few Member States, the decision becomes binding for all members of the group unless they opted out (Portugal, Denmark, Netherlands). In addition, there are differences between Member States as to the moment at which those entitled to claims are individually identified: in some Member States, the identification must take place when the representative action is brought (e.g. the United Kingdom), whilst in others, it can take place at a later stage (e.g. Poland and Spain). There are also notable differences governing the funding of collective redress actions, the distribution of proceeds and the use of alternative dispute resolution mechanisms. The impact of any future European measure on the national legal systems would vary depending on whether the Member State concerned already has a system of collective redress in place and what the defining features of this system are.

D. A coherent European approach to collective redress

10. Given the diversity of existing national systems and their different levels of effectiveness, a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights. A coherent European framework drawing on the different national traditions could facilitate strengthening collective redress in targeted areas. In any event, such a framework should contain common principles which any potential future EU initiatives on collective redress in any sector would respect. The objective is to ensure from the outset that any future proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law.

11. Within the European Commission, work has been undertaken for several years to develop European standards of compensatory collective redress in the field of consumer and competition law. The Commission adopted a Green Paper on anti-trust damages actions in 2005 and a White Paper in 2008. In 2008, the Commission also published a Green Paper on consumer collective redress. Stakeholders' positions on the main issues are known: most consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation. Stakeholders also warned against an inconsistency between the different Commission initiatives on collective redress, which pleads for the development of a more coherent approach.

E. Common principles to guide EU initiatives on collective redress

12. Based on the outcome of previous consultations, we have identified a first set of core principles which could form part of a European framework for collective redress:

13. Any EU initiative on compensatory collective redress should first and foremost ensure that any right of injured parties to compensation can be effectively and efficiently obtained. In a mass claim situation, bundling of individual claims in a single collective redress procedure should allow savings for the parties involved and increase the efficiency of both judicial and out-of-court redress schemes.

14. Parties should have the possibility to resort to a collective consensual resolution of their dispute by either settling among themselves or using an Alternative Dispute Resolution (ADR) mechanism in connection to a collective court case. In some fields it should be explored whether resorting to ADR could become a legal requirement. The effectiveness of ADR and the fairness of its outcome depend, however, significantly on the incentives of the parties to engage in the process. The availability of an effective judicial collective redress system should act as a strong incentive for parties to agree out-of-court which is likely to solve a considerable number of cases thereby avoiding litigation. An initiative on ADR which deals with individual and collective ADR in consumer matters is under preparation.

15. The rules on European civil and procedural law should work efficiently for collective actions and judgements should be enforceable throughout the EU.

16. Adequate means of financing should be available to allow citizens and businesses to have access to justice. Those means should allow for the funding of meritorious claims but avoid any incentive to pursue unmeritorious claims, the risks of which have been obvious in the US system.

F. Avoiding the risk of abusive litigation

17. Any European approach to collective redress would have to avoid from the outset the risk of abusive litigation. Such abuses have occurred in the US with its "class actions" system. This form of collective redress contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties) the possibility of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence. Because of the increased risk of abusive litigation resulting from these combined incentives, we believe that these features are not compatible with the European legal tradition. We therefore firmly oppose introducing "class actions" along the US model into the EU legal order.

18. A European collective redress scheme should not give any economic incentives to bring abusive claims. In addition, effective safeguards to avoid abusive collective actions should be defined. This should be inspired by the existing national judicial redress systems. For instance, one commonly used safeguard is the 'loser pays' principle which means that the losing party pays the court and lawyers fees of both parties. The judge could also be given a prominent role in the process. This role could consist in assessing

the admissibility of the collective actions or verifying if a representative entity bringing the action respects a number of strict criteria.

G. Next Steps: Launching a public consultation

19. As set out in the Commission Legislative and Work Programme 2010, we will launch a public consultation on a European approach to collective redress in order to identify which forms of collective redress could fit into the EU legal system and into the legal orders of the 27 EU Member States. The purpose of the consultation will be to elaborate the common legal principles laid out above and to identify other common principles which should guide any future proposals for collective redress in EU legislation. The public consultation will also explore in which fields different forms of collective redress could have an added-value for improving the enforcement of EU legislation or for better protecting the rights of victims.

20. Our departments (DG JUSTICE, DG COMP and DG SANCO) will consult all Commission departments concerned on the draft consultation paper. We intend to launch the public consultation in November and run it until the end of February 2011. In addition, in January 2011, we will hold a public hearing. Upon conclusion of the consultation, we will present to you the results and our suggestions on the way forward. It goes without saying that any legislative initiative in this field would have to be preceded by an impact assessment.