COMMISSION STAFF WORKING DOCUMENT
PUBLIC CONSULTATION
"*TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS*"

- UGAL COMMENTS -

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EXECUTIVE SUMMARY

Please find herewith the UGAL response to the public consultation on the Commission Staff Working Document "*Towards a Coherent European Approach to Collective Redress*".

In its response to this public consultation, UGAL stresses that the following points must be taken into account by the European Commission in its discussions on collective redress:

➔The development of a European system of collective redress would not add any value to the enforcement of EU law. More specifically, a system of collective redress would not add any value for parties wishing to respond to breaches of EU consumer protection law or breaches of competition law.

➔ Collective redress is not an appropriate tool for consumers to use to enforce their rights. In practice, much simpler options exist. In a business or retail context, disputes are often solved by a refund, a replacement product or other gesture of goodwill.

➔ Evidence of the need for a collective redress regime is currently lacking. The *Civic Consulting (2008): Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – Final Report* shows that there is little demand for collective redress proceedings at national level and there is even less demand for such an initiative in a cross-border context.

➔ With regard to the consultation responses received by the European Commission responding to the Single Market Act, it appears that the vast majority of EU interest representations do not view a system of collective redress as a policy initiative that should be given any priority in the re-launch of the Single Market. Public funds should not be spent launching initiatives that will not add any value to the general public.

Q 1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

A. COLLECTIVE REDRESS FOR BREACHES OF CONSUMER PROTECTION LAW

1.1 UGAL firmly believes that a European system of collective redress would not add any value for the enforcement of EU law, particularly from the point of view of businesses.

1.2 On the contrary, a system of collective redress would be a disproportionate measure to enforce EU law. UGAL notes the outcome of the recent Civic Consulting study (1) that proved only a small number of cases using a mass claims procedure exist and that only a very low portion of these claims contain a cross-border element.

No added value

1.3 UGAL fails to understand why a collective redress instrument would be necessary in a commercial environment that exists within a gold standard consumer protection framework.

1.4 UGAL notes that judicial collective redress for consumer complaints is only appropriate in jurisdictions where levels of consumer protection are low and where substantive provisions of consumer protection law are absent, such as in the USA.

1.5 In such jurisdictions, collective redress has led to problems. UGAL urges the European Commission to fully recognise the negative impact of judicial collective redress in the USA. Negative elements include ill-intended consumers and law firms commencing unsubstantiated legal actions in order to threaten retailers. The objective of such threats is the attainment of “easy compensation” from a retailer reluctant to enter into a long, drawn out and potentially damaging court procedure.

1.6 As an added detrimental effect, a system of collective redress used against retailers would damage the relationship of trust and understanding that has developed between businesses and consumers over a substantial number of years.

Respecting the Small Business Act

1.7 Implementing a broad system of collective redress could reduce the value of the Small Business Act (SBA) as cross-border collective redress claims could potentially be made against SMEs. SMEs must therefore prepare for the

(1) Civic Consulting (2008): Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – Final Report (see in particular from p. 14 overview of cases collected).

possibility of collective redress claims being made against them. This is time consuming and costly. It is completely unacceptable for the European Commission to increase SME burdens, as an unintended consequence of a collective redress regime.

➔ UGAL looks forward to the publication of a robust SME test for any initiative in the field of collective redress for consumer complaints. This test must be carried out in accordance with the principles stated in the SBA to ensure that impacts on SMEs are thoroughly analysed and taken into account.

Adding value

1.8 If the European Commission is seeking to deal with the problem of how to easily deal with claims that are too small for an individual consumer to use traditional enforcement mechanisms, such as judicial complaints procedures, then it must be acknowledged that:

➔ Most consumer complaints (small or large) are already resolved through very fast and extremely cost efficient informal processes. For instance, in a retail context consumer complaints are often resolved quickly and easily through refunds, replacement products or simple gestures of goodwill.

1.9 UGAL believes that real value could only be added by reviewing (and where appropriate improving) the implementation and enforcement of the Injunctions Directive 98/27/EC, Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection and Regulation 861/2007 on European Small Claims. These tools, along with the work of SOLVIT (2), ECC-NET (3) and informal complaints resolution procedures between two parties, are sufficient to ensure quick and effective redress for breaches of EU consumer protection law.

➔ UGAL urges the European Commission to make use of the Article 28 review clause contained within Regulation 861/2007 to ensure that consumers have quick, efficient and cost-effective redress throughout the EU.

B. COLLECTIVE REDRESS FOR BREACHES OF COMPETITION LAW

1.10 Collective redress would also be unlikely to add value in the field of enforcement of competition law as an effective enforcement regime already exists via the European Commission and national competition authorities. It also relies on private enforcement by the victims of anti-competitive conduct.

1.11 The European Commission must be conscious of the negative effects which proposed “stand-alone” collective redress actions would have. Negative effects would include drawing negative media attention to certain firms or

(2) An innovative tool that has added value to the enforcement of EU law.
(3) The European Consumer Centres Network (ECC-Net) is an EU-wide network co-sponsored by the European Commission and the Member States. It is made up of 29 centres, one in each of the 27 EU Member States and also in Iceland and Norway.

sectors under investigation by competition authorities even though no violation has yet been proven.

1.12 UGAL agrees with the case-law of the European Court of Justice according to which the right to claim damages guarantees the effectiveness of European competition rules.

1.13 Imposing a system of collective redress on top of this already well-functioning enforcement regime is illogical and must be prevented. UGAL sees no need to cause additional confusion in, or fragmentation of, competition rules so long as the existing system of enforcing competition law functions well. A clear evidence-based system currently exists that allows for i) harm to be proven as a result of anti-competitive conduct and ii) a remedy to then be imposed.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

2.1 Without prejudice to the UGAL response to Q 1 above where UGAL states its opposition to an EU system of collective redress, if a collective redress mechanism is set up, then public bodies, such as ombudsmen, could have a role to play. This role does not necessarily need to be one of additional public enforcement as any court decision will already be binding on, and enforced upon, the two parties to which that court decision is addressed. The role of the ombudsman could be to filter abusive claims out of the system.

➔ An independent ombudsman could play a role in assessing claims as to their credibility and removing abusive claims from the system. Any decision of such an ombudsman would still be subject to court approval and oversight.

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?

A. COLLECTIVE REDRESS FOR BREACHES OF CONSUMER PROTECTION LAW

3.1 UGAL welcomes the fact that today the European Commission is willing to examine how EU consumer protection law is enforced. If EU consumer protection law is properly enforced by Member States, then consumer protection rules would be better respected and this would reinforce the fact that a system of collective redress is not useful.

3.2 However, for reasons mentioned throughout this consultation response, indirect enforcement of consumer protection provisions using the threat of collective actions cannot and should not be the way forward.

B. COLLECTIVE REDRESS FOR BREACHES OF COMPETITION LAW

3.3 UGAL emphasizes, and welcomes, the fact that enforcement by public bodies (as well as private enforcement) provides a gold standard in competition law enforcement. This high and effective level of enforcement negates the need to strengthen the role of national public bodies and/or private representative organizations in the enforcement of EU competition law, especially via collective redress.

Q 4 What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

4.1 It is clear that concrete evidence is needed for any action at European level on collective redress, particularly in a cross-border context. This statement is applicable for all areas in which action may be taken.

4.2 UGAL emphasizes that evidence is currently lacking. Data gathered from in-depth studies commissioned by the European Commission such as the Civic Consulting (2008) Evaluation Study (4) shows that there is little demand for collective redress proceedings at national level and there is even less demand for such cases in a cross-border context.

4.3 The European Commission needs to acknowledge the overwhelming support in previous public consultations for no action in the field of collective redress.

4.4 It is clear that the overwhelming majority of stakeholders see such a mechanism as i) disproportionate due to the absence of evidence for an intervention and ii) inefficient due to previous bad experiences of national collective redress mechanisms in EU Member States and the USA.

4.5 Moreover, it has become clear from previous consultation responses on this issue that existing mechanisms such as the Injunctions Directive 98/27/EC, Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection and Regulation 861/2007 on European Small Claims are sufficient guarantors of effective redress for consumer rights.

(4) Civic Consulting (2008): Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – Final Report (see in particular from p. 14 overview of cases collected).

Q 5 Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?

5.1 UGAL believes that there is no need to extend the scope of existing EU rules on collective injunctive relief to other areas. UGAL notes the fact that consumer protection authorities and consumer organizations are already entitled to take action for injunctive relief in another Member State is already sufficient to guarantee effective redress for breaches of consumer protection law.

Collective compensatory redress at EU level

5.2 For the reasons mentioned earlier in this consultation response, UGAL opposes any new initiative on collective compensatory redress at EU level.

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

6.1 Although UGAL does not see any need for action, a non-binding approach is the least intrusive approach.

6.2 A set of good practices guidance could help, in particular, businesses to better understand how collective redress for consumer complaints is supposed to work in practice. If non-binding good practices are elaborated then these must be subject to a full public consultation with a long deadline for response.

➔ Certain recommendations found in the 2010 European Commission Green Paper on European Contract Law are possibly useful examples of non-binding policy approaches. For example, as a non-binding approach, the European Commission could consider developing a “tool box” for Member States who wish to establish national collective redress mechanisms.

Q 7 Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

7.1 Although UGAL does not support a system of collective redress at EU level, should an initiative on collective redress be put forward then the following principles must be taken into account:

A. PRINCIPLES GENERALLY APPLICABLE TO BOTH COLLECTIVE REDRESS FOR BREACHES OF CONSUMER PROTECTION LAW AND BREACHES OF COMPETITION LAW

Launching a collective action

7.2 To discourage abusive and/or unfounded claims, a collective action should only be launched if a Court has already conclusively decided (i.e. there is no possibility to appeal that decision) at national or EU level that a breach of consumer protection or competition law has occurred.

Opt-in

7.3 Should any system of collective redress be developed, it must be on an opt-in basis for claimants.

7.4 Only identifiable victims can be a party to a claim. An opt-in system, where identified persons join their claim in one single proceeding (if the claim relates to the same facts and same authors) would ensure that potential victims are identifiable.

Pre-selection/vetting

7.5 As a means to combat abusive claims, a vetting mechanism must be implemented. This must be able to guarantee the removal of abusive claims from the system.

Loser pays

7.6 The principle that the loser pays in court proceedings is fundamental to a well-functioning justice system. This principle reflects basic fairness, ensures an innocent party is not penalized, deters tactical, poorly founded or abusive claims and provides an incentive for the early settlement of claims.

Excusable error

7.7 Any damages actions must be based on a requirement that a breach of rules has been proven.

7.8 However, the complexity of consumer protection rules (where no harmonization exists across the EU) and competition rules (where the ever changing economic position of market players has previously been acknowledged by DG Competition in its previous White Paper on “Damages actions for breach of EC antitrust rules” as complex) can lead to accidental breaches of the law.

7.9 Due to the difficulty in interpreting and applying those rules, a principle of “excusable error” must be implemented in any system of collective redress

focusing on consumer protection law or competition law breaches. This principle must have a very broad scope when applied to scenarios that are novel or scenarios that have no previous precedent in the case law of the European Court of Justice.

B PRINCIPLES APPLICABLE TO COLLECTIVE REDRESS FOR BREACHES OF COMPETITION LAW

Damages

7.10 In cases of collective redress for breach of competition law, the compensation granted within the framework of an action for damages should be part of the fine already imposed upon a company for competition rules infringements and not be an additional amount. Any deviation from this principle would mean that a company would be punished twice for the same breach of law, which would be disproportionate. Any positive decision regarding a right to damages should not preclude the possibility to appeal the sum of the damages that must be paid.

Access to evidence

7.11 It is an established legal principle that the burden of proof rests on a claimant to provide evidence that he has been wronged.

7.12 In a competition context, this disclosure of evidence must be carefully evaluated. The disclosure of confidential, sensitive, commercial information by companies can be hugely damaging to those companies. Indeed, if companies would be unable to even protect their own trade secrets, due to the potential risk of disclosure as part of a “fishing expedition” during a collective action, not only innovation would be irreparably damaged.

7.13 As such, disclosure of confidential, sensitive commercial information (in some cases, even trade secrets) cannot be justified if a competition infringement has not yet been proven.

7.14 That being the case, evidence should only be disclosed if there has been a prior decision demonstrating a breach of competition law by a competent enforcement body.

7.15 This means that evidence can only be disclosed to a claimant if it would help him/her prove and evaluate the harm suffered, due to a breach of competition rules, via a **follow-on** action. By necessity this means that only follow-on collective actions i.e. collective actions stemming from a previous court decision on a breach of competition law can be allowed.

Limitation periods

7.16 The limitation period to bring a claim should start from the publication of the decision regarding the competition law infringement. This would provide legal certainty to companies and would ensure that a potential claimant can be aware of an infringement and any relevant deadlines for further actions.

National margin of appreciation

7.17 Any EU system of collective redress would need to respect national legal traditions and systems.

Q 8 As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?

8.1 UGAL cautions that what may have been relevant in one Member State may be completely ill-suited to another Member State and even less suited to a harmonized EU approach. This is a further reason to warn against an EU initiative in the field of collective redress.

Q 9 Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?

9.1 Access to justice will help complainants to seek redress in case of a breach of their rights. However, justice served through the courts can be an expensive and time consuming process for all parties involved.

9.2 Improving access to justice through the development of a voluntary Alternative Dispute Resolution (ADR) system, such as mediation, which addresses specific concerns raised on specific issues could be more appropriate. This might ensure that redress is adapted to specific sectors by offering consumers a potentially quick, uncomplicated, easily-accessible and cheap means of redress. It could avoid the complexities and delays of a non-specific, collective, judicial process. However, such systems do have their downsides for example in terms of parties needing to decide inter alia on whether or not the results of ADR are binding on the parties.

9.3 Nevertheless, UGAL doubts the utility of such a system in a retail context where even simpler, informal dispute resolution mechanisms (notably refunds and replacement products) exist.

Q 10 Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

See response to Q 8 above.

Q 11 In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

See responses to 2,5,6,7 and 9 above.

Collective redress for SMEs

11.1 The scope of any collective redress mechanism has to be limited. A one size fits all approach will lead to a poor legislative outcome. UGAL cautions that what ***could*** be appropriate for consumers is ***not*** appropriate for SMEs.

Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?

See response to Q 1 and Q 9 above.

Q 13 How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

13.1 The implementation of an EU wide system of collective redress would be rendered redundant without adequate education initiatives on its existence and its *modus operandi*. This burden of informing consumers must not be borne by companies.

Q 14 How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

N/A

Q 15 Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

Q 16 Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

Q 18 Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

15.1 A potential ADR regime complements the fact that consumers and businesses do not exist in isolation. Rather, the relationship is one of long term mutual understanding, benefit and trust. Effective complaints resolution is an essential part of this relationship.

15.2 An independent, transparent and effective ADR scheme might be a more constructive approach to complaints resolution. That said, UGAL cautions that the development and implementation of any such scheme must first be subject to an extensive cost/benefit analysis and its practicality must be fully tested in advance.

15.3 It must be remembered that the costs involved when implementing systems of alternative dispute resolution can be high. For groups of independent retailers, UGAL warns that such costs would be difficult to bear.

15.4 UGAL rejects the argument that an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation.

15.5 Such a proposal would make complaints resolution procedures slower and more expensive than is already the case.

Q 20 How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

See response to Q 2 and Q 7 above.

Q 21 Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

See response to Q 7 above.

Q 22 Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

22.1 In addition to the UGAL response to Q 7 above, the right to bring an action should be reserved for a public official acting on the basis of a public interest test. Third party representatives (such as law firms, consultancies etc.) should not be allowed to bring a redress action. Ill-intended parties, such as law firms wishing to make a quick profit, must be prevented from pursuing unfounded claims.

Q 23 What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognized as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?

23.1 A judge could help to prevent abusive claims by carrying out a pre-trial test of a claim. Should a claim fail the test it must be abandoned.

23.2 UGAL also believes that if any collective redress regime were to be set up, that training of judges in the complex nature of collective redress litigation is a pre-requisite.

Q 24 Which other safeguards should be incorporated in any possible European initiative on collective redress?

See response to Q 2 and Q 7 above.

Q 25 How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

Q 26 Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

Q 27 Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

Q 28 Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

28.1 In addition to the UGAL response to Q 7 above, the fundamental importance of the loser pays principle must be emphasized. This principle is essential to discourage abusive and/or speculative litigation across the EU. Existing rules on (legal) costs in the court systems at national level should continue to be applicable.

Q 29 Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgments? What consequences did these problems have and what counter-strategies were ultimately found?

Q 30 Are special rules on jurisdiction, recognition, enforcement of judgments and/or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

29.1 Due to the Brussels 1 Regulation (Regulation 44/2010 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), when a judgment is given on a national collective action, it becomes potentially binding in other jurisdictions. Accordingly, UGAL does not see the necessity of special rules on enforcement of judgments.

Q 31 Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

31.1 No special rules are needed.

Q 32 Are there any other common principles which should be added by the EU?

N/A

Q 33 Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

33.1 UGAL emphasizes that a European system of collective redress would not add any value for the enforcement of any areas of EU law in the retail sector.

Q 34 Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

34.1 For the reasons mentioned in this consultation response, UGAL opposes the development of an EU initiative on collective redress.

34.2 With regard to the consultation responses received by the European Commission responding to the Single Market Act, it appears that the vast majority of EU interest representations share this view. Indeed, the majority of respondents to that consultation do not view a system of collective redress as a policy initiative that should be given any priority in the re-launch of the Single Market.

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