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Directorate-General for Justice and Consumers  
Unit A 1 Civil Justice – Secretariat  
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## **Public Consultation - Call for evidence on the operation of collective redress arrangements in the Member States of the European Union**

### **Response by the Confederation of Swedish Enterprise**

Dear Sir or Madam,

The Confederation of Swedish Enterprise ("Svenskt Näringsliv") is the main business organization in Sweden representing 50 member organizations and over 60.000 member companies with over 1.6 million employees. It represents almost all sectors of business with the exception of the banking industry. The Confederation of Swedish Enterprise was founded in 2001 through the merger between the Swedish Employers' Confederation ("SAF", founded in 1902) and the Federation of Swedish Industries ("Sveriges Industriförbund", founded in 1910).

The Confederation of Swedish Enterprise is pleased to provide the following reply to the ongoing Public Consultation - Call for evidence on the operation of collective redress arrangements in the Member States of the European Union.

In Sweden, the Group Proceedings Act (2002:599) entered into force on 1 January 2003. Important features of this Act are the opt-in rule, special preconditions that are required for group action suits, the so called English rule (that the party that loses the case has to pay the costs of the opposing party) and not allowing contingency fees. For more information, see the enclosed Fact Sheet. Until 2008 when a governmental committee reviewed the Act ten group action cases had been handled by the courts, but none of these cases had ended in a final judgment on the merits. The review has not resulted in any proposal from the Government to amend the Act. As far as we know there has been two final group action judgments since then but both judgments were given before the adoption of the Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

The Confederation of Swedish Enterprise considers that the very limited number of group actions having been pursued, and no sign of serious multiple consumer claims being systematically denied access to justice in Sweden, clearly indicate that the civil law mechanisms in place, alternative dispute resolutions (ADRs) included, function by and large fairly well.

Besides the mechanisms provided by the Group Proceedings Act, the National Board for Consumer Complaints can try a case between a group of consumers and a trader. The Board's decisions are drawn up as recommendations and are not legally binding. However, most traders do comply with the Board's recommendations. The Board is an ADR system.

Furthermore, the Swedish general procedural rules provides for test cases as well as for the cumulation of cases. Also, there is a simplified procedure available under the Swedish Small Claims Act.

In terms of redress instruments, for companies the most important is that any instrument in place meets the criteria of rapidity, efficiency and reasonable costs. The Confederation of Swedish Enterprise believes this can best be dealt with at Member State-level in a way suitable to the local legal system. Thus, we see no need for and oppose the introduction of any EU-wide collective litigation measure. We believe that EU legislation on this issue will not be able to achieve harmonization and will risk forum shopping, opportunistic litigation and abuse across the different Member States.

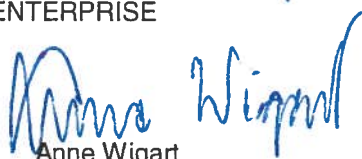
The Confederation of Swedish Enterprise agrees with BusinessEurope's reply to the Consultation (enclosed). As pointed out in BusinessEurope's reply, the Commission's questionnaire fails to address fundamental questions related to the effectiveness of redress systems in the Member States and to companies' perception (mostly as defendants) of safeguards in national systems and of third-party financing.

The Confederation of Swedish Enterprise considers that the restrictive shaping of the Group Proceedings Act is necessary to prevent misuse. To avoid abuse litigations, a collective redress mechanism must have safeguards, elements such as the opt-in rule, special preconditions that are required for group action suits, the loser pays principle-rule (the English rule), not allowing contingency fees etcetera.

THE CONFEDERATION OF SWEDISH ENTERPRISE



Göran Norén  
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17 August 2017

## Collective redress – public consultation 2017

### I. Introduction

- On 11 June 2013, the European Commission adopted a Communication "Towards a European Horizontal Framework for Collective Redress" and a Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.
- The Commission is now collecting information on stakeholders' practical experiences with collective actions, both injunctive and compensatory as well as on situations, where collective action could have been appropriate, but was not sought.
- BusinessEurope has been working together with EU institutions and other stakeholders for many years to find solutions towards better enforcement in the Single Market as well as effective and easily accessible redress mechanisms for consumers.
- BusinessEurope has throughout the years adopted several position papers expressing its views on:
  - Horizontal EU Judicial Collective Redress consultations (1999 and 2011);
  - European Small Claims Regulation revision (2013);
  - Entry into force of the EU Alternative Dispute Resolution Directive and entry into operation of the Online Dispute Resolution Platform Regulation (2015-16);
  - Revision of EU framework on cooperation between national consumer protection authorities (2016-17);
  - New enforcement approach to Competition Law (2017);
  - Single Market Compliance Package (2017).
- BusinessEurope takes this opportunity to offer its reply to the ongoing consultation on collective redress. This paper is divided into three parts: (1) general messages on collective redress; (2) useful facts on collective redress; (3) specific remarks on the Commission's evidence gathering exercise.



## II. General messages on Collective Redress

- BusinessEurope fully supports the objective of ensuring **better enforcement of EU law** whilst also working **towards effective and easy access to redress mechanisms**.
- It is in the interest of companies and markets that reparation is awarded if a damage is caused to consumers. **The question is not whether reparation is provided but how it can be provided more effectively.**
- Throughout the years **BusinessEurope's goal has been to identify those means of redress which are the quickest, less costly and effective for both parties involved**, and consequently to raise overall awareness around them.
- However, it is equally in the interest of companies and markets that **there are enough safeguards against the development of an abusive litigation culture which leads to undesirable societal and economic costs**. This is why BusinessEurope supported the 2013 Collective Redress Recommendation which precisely addressed the root causes of potential abuses in existing or future national collective redress systems.
- The **EU has recently adopted several measures which objectively increased the accessibility to redress for consumers**, also in a cross-border context:
  - The **EU Alternative Dispute Resolution Directive (ADRs)** aimed at extending the coverage of these means to more sectors as well as to improve the functioning (and transparency) of the existing ADR systems. It is our understanding that the offer of available ADR bodies keeps growing as well as their use.
  - The **EU Online Dispute Resolution Platform** links consumers and traders engaged in cross-border transaction to the best solution to settle their disputes. It has been in operation since a year with BusinessEurope continuously encouraging its awareness and uptake among companies.
  - The **revised EU Small Claims Procedure** has made these tools simpler and more accessible to consumers.
- The above measures (strongly supported by BusinessEurope) equipped European consumers with **cost effective means of redress** even in situations of compensatory claims of a low value which would normally deter consumers from going to courts.
- As regards an **EU-wide collective litigation measure**, BusinessEurope has consistently argued **against its introduction**. Doubts over Treaty powers, the concerns over subsidiarity and proportionality, and over the evidence of need



count as the main arguments. Some of these have also been highlighted in the [European Parliament Resolution on Collective Redress](#)<sup>1</sup>.

- The **impact** of the possible introduction of an **EU judicial collective instrument** on important aspects of Member States' **procedural and tort law should not be underestimated**. Rules related to central aspects of procedural law such as fact-finding, unlawfulness, burden of proof, causation and defences have been evolving gradually and performing their function within the context of the different Member States' legal systems. External intervention on such delicate aspects risks upsetting national legal systems with unforeseeable effects on their inner balance.
- **Any proposed model would not prevent the risk that more far-reaching and dangerous measures are introduced at national level** (like "loser does not pay" or "punitive damages" rules), together with all the dangerous collateral effects which the Commission itself correctly highlighted in its previous consultation papers.
- The **US experience with class actions** is a constant reminder of the economic costs imposed on society by a judicial system which fosters mass litigation. Considering that a European legislative approach to collective redress will avoid certain excesses is not sufficient. **Only a few elements of US class action system are required for the risk of abusive litigation to materialise**. Take the example of **third party funding** or of **contingency fees** widely developed in the US and, with some nuances, also admissible in some EU Member States. The first introduces a profit-motivated stranger into the traditional attorney-client relationship which can lead to opportunistic litigation as well as to unreasonably prolonging judicial proceedings (e.g. if the settlement is not profitable enough, a third-party funder might forbid the plaintiff to accept 'any' compensation). The second (contingency fees) works as an incentive for plaintiff lawyers to push for as many legal claims as possible to work in their benefit.
- **Judicial collective actions usually have limited merits for the plaintiffs**. They are with no exception costly, complex and lengthy. As a consequence, compensation is not fully awarded to those damaged, as a big part of it ends up in enriching intermediaries (e.g. lawyers or third-party funders). In addition to being rarely beneficial to consumers, they do not even facilitate the administration of justice: the inadequacy and inefficiency stemming from systemic problems and structural flaws of certain national courts and procedures are not going to be resolved by the introduction of judicial collective actions.
- We take the view that **legislation on this issue will not be able to achieve harmonisation and will risk causing forum shopping (backed by international plaintiff firms and litigation funds), opportunistic litigation and abuse** across the different Member States.

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<sup>1</sup> European Parliament Resolution 'Towards a coherent European approach to collective redress', 2011 - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>



- European companies agree on the need for a level playing field in terms of legislation and efficiency of enforcement. But when it comes to redress instruments, what matters is that any instrument in place meets the criteria of efficiency, rapidity and reasonable cost. We believe this can **best be dealt with at Member-State level in a way suitable to the local legal system.**
- BusinessEurope **does not consider the diversity of instruments to be a problem.** We do not support a one-size-fits-all approach, but are in favour of flexibility, pragmatism and efficiency. National legal traditions and specificities have to be respected.
- At most, the Commission could work towards updating the 2013 Recommendation in the light of the results of the ongoing evaluation, with a particular focus on the safeguards against an abusive litigation culture.
- Resources and efforts of EU policymakers should also concentrate on maintaining and improving public enforcement in Europe, **and not shifting towards a private enforcement system.** If there is a need to address problems with public enforcement, these should be addressed separately, but certainly the Commission and Member States should not abdicate from their responsibilities and transfer it to private parties.
- The **objective of achieving greater deterrence** is – in contrast to the full compensation of damage incurred – a socio-political objective and should therefore **be left to the public authorities of the state.** Rather than amending the legal system by passing on large sections of public law enforcement to private parties because the competent authorities do not have sufficient resources, these resources should be increased.
- BusinessEurope supports the **current revision of the Consumer Protection Cooperation Regulation**, now in the final stages of trilogue. This a welcomed step towards achieving better public enforcement within the Single Market.

### III. Some useful facts on collective redress<sup>2</sup>

- Empirical data (collected on a multiannual basis between 2009 and 2013) from the US class action system shows that:
  - **Not one of the class actions ended in a final judgment on the merits** for the plaintiffs;
  - **1/3 of class actions that have been resolved were dismissed** by a court on the merits— again, meaning that class members received nothing;

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<sup>2</sup> Source: Survey the Growth of Collective Redress in the EU, U.S. Chamber Institute for Legal Reform (ILR), March 2017. This study was presented in a joint BusinessEurope, Amcham EU and ILR event on collective redress which took place on 21 March 2017. The Member States chosen in the study (10) account for roughly 79% of the population and 82% of the GDP of the EU.



- Approximately **14% of all class action cases remained pending four years** with class members still to receive benefits (very unlikely that this will happen);
- Over **one-third of the class actions that had been resolved were dismissed voluntarily by the plaintiffs**, some ending up settling individually whilst class members received no benefits;
- In many cases, compensation is not delivered because the amounts in question are so negligible, **compensation is under coupons form**, or the terms so onerous, that class members do not come forward.
- One-third (33%) of resolved cases were settled on a class basis. In 3 of these cases the percentage of benefits allocated to the class were almost *Lilliputian* (**miniscule percentages for the class of 0.000006%, 0.33%, 1.5%**);
- The **majority of EU Member States already foresee some form of collective redress** which can differ in nature, scope or procedural requirements.
- There are some **alarming signs** in Europe showing that there is a risk of US style litigation culture on the verge of settling in. Some examples:
  - **Litigation funding industry is growing** in different Member States;
  - We see more and more **multiple billion EUR claims being filed** (e.g. a claim by the foundation 'East West Debt' in the Air Cargo litigation exceeding €500 million; a multibillion EUR claim brought in the Court of Rotterdam by Stichting Petrobras Compensation Foundation on behalf of - mainly - US based investors);
  - **New forms of unregulated and unvetted web-based claim platforms** are being developed which take up a share of the proceeds (e.g. in France ActionCivile or Weclaim are now helping advertising group actions on their websites demanding up to one third of the rewards).

#### **IV. Remarks on the European Commission evidence gathering**

- BusinessEurope considers the European Commission **evidence gathering exercise very timely and useful**.
- It is important not only to check the uptake by Member States of the 2013 Recommendation but also to get feedback on the development of collective redress cases at national level.
- However, the **Commission's questionnaire fails to address fundamental questions** related to the effectiveness of redress systems in the EU. Besides asking



which system exists in a specific Member State, it is **equally important to understand which are the relevant safeguards against meritless litigation and how are these safeguards performing.**

- Business organisations and **companies are not being asked important questions**, for example: What is their perception (mostly as defendants) on the safeguards of national systems (e.g. representative certification, loser pays principle, role of judges)? What is their experience with the phenomena of third-party funding?
- Although the Commission in its **2013 Recommendation rightly stressed** that the **goal should always be redress and restitution for victims**, and that **punitive actions should be prohibited**, the Call for Evidence includes no examination of this important issue, or whether Member States are seeking to expand litigation possibilities in this regard.
- The Commission's **evidence gathering should also include an examination of the compensation paid to representatives, lawyers and funders**, as opposed to (exclusively) the one paid to alleged victims.
- The **questionnaire seems to oversimplify the characterization of third party funding** by referring to it as a "*loan*". Such financing is closer to a contingency fee arrangement, entered into with an unregulated party with powerful incentives to initiate and control litigation. Practices such as an "after the event insurance" (ATE) should also fall under this concept. This insurance policy covers all or a part of the costs in case of an unsuccessful claim, such as the costs of the counterparty and the costs of the claim vehicle itself. Evidence is therefore needed on how this powerful unregulated industry is developing in Europe and whether further transparency is needed (in accordance with the 2013 Collective Redress Recommendation).

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# Group proceedings

ANNEX



## FACT SHEET

Ministry of Justice, Sweden

Ju 02.10e • December 2002

**On 1 January 2003 a representative form of legal action – the group action – will be introduced in Sweden when the Group Proceedings Act (2002:599) comes into force.**

### What are group proceedings and group action suits?

Group proceedings are legal proceedings in which a group action is brought. A group action is an action brought by a person or government authority acting as a representative for a considerable group of people. Judgements in group proceedings have legal effect for all members of the group, although they are not parties to the case. A group action may be instituted by private physical or legal persons (private group action), organisations (organisation group action) or authorities (public group action).

### In which cases can a group action be brought?

A group action can be brought for claims that are eligible for consideration by a district court under the provisions of the Code of Judicial Procedure concerning civil cases, e.g. cases concerning the purchase of goods and services or cases relating to rental or leasing agreements.

A group action can also be brought to claim damages for some types of environmental damages and to seek injunctions against continued operations or safety precautions or other precautionary measures under the provisions of the Environmental Code.

### Who can bring a group action?

A private group action can be brought by a person who belongs to the groups he or she wishes to represent. A public group action can be brought by certain specially designated government authorities. The Government has decided that two such authorities, the Consumer Ombudsman and the Swedish Environmental Protection Agency, may bring public group actions.

An organisation action can be brought by non-profit organisations devoted to the safeguarding of consumer or employee interests, if the action concerns some goods, service or other item sold to consumers. In cases concerning environmental issues, an organisation action can be brought by non-profit organisations

devoted to the safeguarding of nature conservation or environmental protection interests and by workers' associations in the fisheries, agriculture, reindeer husbandry and forestry industries.

### Special preconditions are required for group action suits

Group action suits are intended to complement conventional legal proceedings. A group action may therefore only be heard by the court if certain special preconditions for proceedings are satisfied.

- The issues addressed in the case must be the same or similar as regards the claims of all the members of the group.
- The case must not be evidently unmanageable on account of substantial differences in the legal basis of the claims of different members of the group.
- A group action must be more appropriate than other legal proceedings.
- The group must be appropriately defined, for example, in terms of its size and delimitation.
- The person bringing the action on behalf of the group must be an appropriate representative, which includes having the financial resources to bring an action. Moreover, the representative must not have interests of his or her own in the case that clash with the interests of other members of the group.

Unless all these special preconditions are satisfied, the court shall dismiss the group action.

### How is the group to be specified?

The general rule is that all members of the group are to be specified by name and address in the application for a summons. In certain cases, however, the group can be specified in some other way, for example, all subscribers to a newspaper during a certain period or—in environmental cases—all residents within a certain distance of a factory.

### Proceedings will cover the members of the group who have registered only

The persons specified in the application will be notified of the legal proceedings. Anyone who receives such notification and wishes to be covered by the

proceedings and the judgement subsequently given must send a written statement to this effect to the court. Only those who have made such a declaration will remain members of the group and only they can be covered by the group proceedings.

#### **Which courts can hear a group action?**

Those district courts that are land courts are authorised to hear group actions. In a private case, for example, the land court in whose jurisdiction the defendant lives or where damage has occurred can have such authority.

A group action addressing environmental issues shall be heard by one of the five district courts that are environmental courts.

#### **An attorney and qualified lawyer is obligatory**

A private group action and an organisation action must normally be pleaded by an attorney who is a qualified lawyer. If there are special reasons, e.g. if the person representing the group is accustomed to appearing in court, the court may allow the action to be brought without an attorney or waive the requirement that the attorney shall be a qualified lawyer.

#### **Agreement on the attorney's fees**

The person representing the group and the attorney may enter into a risk agreement stipulating that the fee will depend on the outcome of the case. The attorney will receive a particularly high payment if the group wins the case and little or no payment if the group loses. The financial responsibility for losing in court is thus shared between the plaintiff and the attorney, which makes it possible to engage the services of particularly skilful lawyers.

If the court has approved a risk agreement, the payment specified by the agreement can be paid out of the means won by the group in the proceedings.

#### **Settlement**

The person representing the group may settle out of court on behalf of the group. The settlement will be valid for the whole group only if the court confirms it by judgement. The settlement shall be confirmed, provided it is not discriminatory against particular members of the group or in another way manifestly unfair.

#### **Effect of the judgment**

The judgment in a group action has the same effect on the members of the group as on the parties to the proceedings. The members of the group covered by the judgment shall be specified in the judgment.

#### **Appeals**

Judgments in a group proceeding are subject to appeal to the same extent as decisions in normal legal proceedings. Any member of the group may lodge an appeal. If an appeal is made, also the court of appeal will consider the special preconditions required for group proceedings. If the preconditions are not fulfilled, the appeals will be dealt with as individual cases.

#### **Litigation costs**

Only the parties in the case are responsible for the costs. The usual rules regarding costs in civil cases — that the loser pays the costs of the opposing party — also apply to group proceedings. Since the members of the group are not parties to the proceedings they will not be responsible for the costs. There are some exceptions from this main rule. Members of the group may in some situations be required to pay certain costs, but these may never exceed the sum accruing to them as a result of the proceedings. If a member of the group causes costs by negligence or some similar fault, however, he or she can be required to pay more.



REGERINGSKANSLIET

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Additional copies of the fact sheet can be ordered from the Swedish Ministry of Justice, tel +46 8 405 10 00. Fax +46 8 20 27 34.  
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