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Note on
European Commission Green Paper on Consumer Collective Redress

This Note summarises the European Commission's Green Paper of November 2008 on Consumer Collective Redress, and associated Studies. The Commission outlines four Options for future policy, or combination of options, ranging from no action to cooperation between Member States, a mix of policy instruments, and judicial procedures. Responses are requested by 1 March 2009.

The approach is notably wide-ranging and imaginative, signalling preference for new approaches and combinations. The data confirms that mass consumer problems involve modest sums, individually and in total detriment, and this raises questions about Community competence to legislate. The author comments on the options and identifies a possible future policy.

The Green Paper was published by the Directorate General on Consumer Affairs (DG SANCO) on 27 November 2008,[1] after lengthy consultation on possible benchmarks for evaluating consumer collective redress mechanisms. Surprisingly, the Green Paper made no statement on the outcome of such consultation, nor on any further or revised proposed benchmarks.

The Commission published at the same time a Questions and Answers document[2] and two studies by external contractors:

1. the Problem Study,[3] which evaluates the problems faced by consumers in obtaining redress, and the economic consequences;

[1] COM (2008) 794, 27.11.2008. http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm
[2] MEMO/08/741, 27.11.08.
[3] Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, by Civic Consulting and Oxford

2. the Evaluation Study,[4] which evaluates the effectiveness and efficiency of existing evaluates the effectiveness and efficiency of existing collective redress mechanisms in the EU.

Basis for proposing policy: arguments on identification of need

The Commission needs to identify a barrier to trade, and in particular a cross-border problem, in order to found a basis for proposing any action. It founds its position on this issue on two arguments, one that existing national judicial and other collective redress mechanisms are inadequate, and the other that a cross-border problem is inevitable and uncatered for.

On the first point, the Green Paper asserts that existing civil justice procedures, whether individual or collective, involve barriers in terms of *access, effectiveness and affordability*,[5] and do not provide solutions for multiple low value claims. It is argued that existing national mechanisms are weak and that a significant number of consumers who have suffered damage do not obtain redress. Thirteen of the 27 Member States have judicial collective redress mechanisms, but they are found to be very different and to have diverse results. The studies and consultations showed that "the vast majority of the existing collective redress mechanisms tend to have some elements that work, and some that do not. Almost all existing collective redress mechanisms have some added value compared to individual judicial redress and alternative dispute resolution schemes. But their efficiency and effectiveness could be improved. The mechanisms have been applied in relatively few cases." The Evaluation Study cites 326 cases over the past 10 years in the thirteen states.

On the second assertion, the Evaluation Study finds that 10% of collective redress claims have a cross-border element, and the Commission simply states that that percentage can be expected to rise as markets become more cross-border in nature.

Hence, the Green Paper states that it focuses on collective redress as a tool that *could* help solve the problems that consumers face in obtaining redress for mass claims in *both national and cross-border contexts.*

Options

Economics, 2008, http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf

[4] Study on the Evaluation of the effectiveness and efficiency of CR mechanisms in the European Union, by GHK, Civic Consulting and Van Dijk Management Consultants, http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf

[5] The Q&A memo states that consumers face high litigation costs, and complex and lengthy judicial procedures.

Given the confusing diversity of national approaches towards collective redress, many of which are relatively recent and unevaluated, the Commission faced considerable difficulty in identifying any given approach as a preferred solution. The Green Paper effectively side-steps this selection issue, by setting out a number of alternative options, on which consultation is sought, without at this stage making a decision. It tellingly cited near its start the recommendation of the OECD on consumer dispute resolution and redress that countries should provide *different* means of redress, including collective redress mechanisms. In an important change from many previous discussions on this issue, the options set out include not just judicial, court-based private litigation (reminiscent of a U.S. class action, even if differing technically) but also encompass the involvement of public authorities in delivering redress and compensation, as well as the encouragement of voluntary and self-regulatory mechanisms.

Four policy options set out are:

1. **No EC action**

Reliance on existing national and EC measures, taking account of the facts that the new mechanisms of the Mediation Directive and the European Small Claims Regulation are to be implemented by 2011 and January 2009 respectively. This option would await evaluation of those and other developments, but "would possibly not provide satisfactory redress to a number of consumers", and leave a fragmented situation across the EU market.

2. **Cooperation between Member States**

This option involves utilising the existing national collective redress procedures, and opening them up to consumers from other Member States, by means of a cooperation network of entities (public authorities and consumer organisations) that have powers of initiation, coupled with launching information campaigns about pending collective redress actions and enabling people to join them. Any such network would need to involve an equitable mechanism for bearing the costs of proceedings (and distribution of moneys) to national and foreign consumers entitled; national entities might be reluctant to pay for foreign claimants. The recent European Consumer Centres Network (ECC-Net) might be a facilitative model. Alternatively, a new network might be created, perhaps with its own funding.

3. **Mix of policy instruments**

This would involve a mix of policy tools, binding and non-binding, which could collectively address the identified barriers of high litigation costs, complexity and length of proceedings, and consumers' lack of information on available means of redress. It involves improving alternative dispute resolution (ADR) mechanisms, extension of the scope of the Consumer Protection Cooperation Regulation (CPCR), encouraging businesses to improve their complaint handling schemes, and taking actions to raise consumers' awareness of existing means of redress.

The Green Paper states that ADR has proved efficient in low and medium value cases, provided both parties have sufficient incentives to use it. Small claims procedures are also good for individual low and medium value claims. Action by public enforcement authorities is also efficient, particularly in very low value cases where consumers have little incentive to take action. The Green Paper discussed possible extensions of these procedures.

4. **Judicial collective redress procedure**

This Option would be a non-binding or binding EU measure to ensure that a collective judicial mechanism exists in all Member States. However, "this option should avoid elements which are said to encourage a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements."

> "A EU mechanism should facilitate meritorious claims and benefit consumers. At the same time, it needs to discourage a litigation industry …, as this would benefit lawyers rather than consumers and create high costs for defendants. In order to avoid the possibility of abuse of a collective redress mechanism, various elements qualify as safeguards and help to **prevent unmeritorious claims**. The judge can play an important role by deciding whether a collective claim is unmeritorious or admissible. Certification of the representative entity acts as a gatekeeper, as does the loser-pays-principle in the Member States where it exists. Public authorities could be potential gatekeepers when funding collective redress, refusing to allocate resources to unmeritorious claims."

The abuse issue is also cited in relation to the debate on whether to adopt opt-in or opt-out procedures. An opt-in approach can be burdensome but does not involve the risk of promoting excessive or unmeritorious claims. Opt-out solutions are often viewed negatively in Europe due to the perceived risk of encouraging the excessive litigation experienced in some non-European jurisdictions. In opt-out scenarios consumer organisations may face a burden in identifying the victims and distributing compensation. These problems could be solved by the court distributing the compensation and allowing consumers to join a mass action after judgment in a test case.

Legal standing could be given to consumer organisations or ombudsmen. Various options are canvassed for deciding which court and national law might apply in cross-border cases.

The issue of funding is identified as crucial: possibilities are canvassed of allocating shares of recovery to representative entities, of third party funding, or public body loan.

The Commission asks whether a combination of options might be advisable.

Further points included in the Memo and Studies

The main conclusions of the Effectiveness Study are as follows (quoting the wording of the Studies).

1. *326 consumer-relevant collective redress cases were documented during the past 10 years in the 13 Member States that have collective mechanisms*. The highest numbers were in France, Spain, Germany and Austria.[6] The main economic sectors involved were financial services and telecommunications. Cases varied significantly in the value of claims, with most having a total value between €10,000 and €99,000. Around 10% of cases brought involved some cross-border element.

2. *The objectives of national collective systems vary considerably, and few mechanisms fulfil such objectives*. The most positive consumer experiences were reported from Spain, Austria and the Netherlands. The Dutch mechanism has produced significantly higher direct benefit to affected consumers than other states.

    a. Individual consumers have only benefited in group actions pursued by representatives, in traditional representative actions, and in test case procedures. In large-scale low-value damage cases, the damage suffered by individual consumers appears to be too low to motivate consumer participation in an opt-in group action. Only Portugal, the Netherlands (after settlement reached) and Denmark (only for low value claims) make opt-out actions available. Other mechanisms do not aim at obtaining compensation for individual consumers.

    b. Some Member States report positive experiences, often due to media coverage of collective action. Overall, existing collective redress mechanisms do not seem to ensure a change in the behaviour of the defendant. This is because: not all defendants are wary of their reputation; the amount may fall far below the damage caused or profit gained from unlawful behaviour; collective actions are unsuccessful because of difficulties in establishing liability (e.g. in product liability cases).

    c. Most of the existing mechanisms do not seem to constitute a significant deterrent unless they receive particular media coverage, which affects the business climate and public awareness.

    d. All collective redress mechanisms discourage unmeritorious claims through some sort of 'gatekeeper procedure' and/or application of the

[6] The number of actions filed differs significantly between Member States, because of factors such as: the collective mechanism was introduced recently, uncertainty over legal aspects, availability of ADR mechanisms, and lack of incentives for claimants.

'loser pays principle'. The risk of abuse by intermediaries such as consumer organisations is very low.

e. Group actions pursued by representatives and traditional representative actions are relatively easy to join. Consumer associations are increasingly effective in organising the process of joining. Mechanisms that merely group individual claims into one collective procedure do not seem to reduce barriers to litigation.

3. *The financing of collective actions is a very significant obstacle to their use, since budgets of all potential intermediaries are limited and the risk of severe loss is high due to the 'loser pays principle'.* This is even true where representatives are paid from the state budget, like the Scandinavian ombudsmen. Third party financing is rare in consumer claims (except in Austria) and only of interest where the aggregate value of a claim is high. Contingency fees are often prohibited in Member States but even where they are allowed, lawyers are likely to be mainly interested in high value cases or in spectacular cases with extensive media coverage.

4. *Collective redress mechanisms do not produce disproportionate costs for consumers but may be very costly for representatives.* Court costs are not normally disproportionate but lawyers' fees can be very high where they are freely negotiable, so that mass litigation on small claims is too expensive. Also, the internal costs for the collection of claims, the management of the file etc. can be high, and indeed a barrier to taking action, where this is the responsibility of the representative.

5. *None of the collective redress mechanism*

traditional representative actions seem to be mainly viable above a certain threshold amount of the individual claim, but are then suitable mechanisms to lower litigation costs for consumers and to reduce financial and psychological barriers to taking action. Importantly, the use of collective redress mechanisms seems to attract much higher media coverage than individual litigation and ADR; which is an incentive to out-of-court settlement and also produces a preventive effect.

9. *Consumers in Member States which do not have collective redress mechanisms in place are likely to suffer detriment as a result of the unavailability of such mechanisms*. However, the experience is that such detriment is modest.

    a. Total annual consumer benefit, calculated for eight countries that had data, was €523.0 million. This equates to an average of €2.16 per head of population. Average annual individual benefit is some €910 per consumer represented in litigation. However, these figures were heavily influenced by the results for the Netherlands, where a few major cases distorted results. Excluding the Netherlands, consumer benefit was €10.2 million per annum, and individual benefit was €41 per represented litigant. There were many caveats associated with these results, but they indicate that the benefits to consumers of collective redress are relatively modest in the Member States where it is employed.

    b. For consumers as a whole across the 14 jurisdictions that do not have collective redress mechanisms, the loss of consumer welfare may be equal to around €2.1 million per annum, though a range of outcomes from €1,352 to €64 million per annum is also possible (based on extrapolation from data in the other Member States that do have mechanisms). The lower limit of the range was set by Germany: if the German experience is repeated in the non-CR countries, introduction of CR mechanisms will do little to reduce any structural or individual detriment suffered by consumers. The upper limit was set by Portugal.

10. *There is no evidence indicating an impact of the existing collective redress mechanisms on the competitive position of EU firms in comparison with non-EU rivals. The impacts of differing approaches on trade and competition between Member States appear to have remained very limited so far. The emergence of future obstacles to trade between Member States caused by differing approaches on collective redress appears to depend on the specifics of the mechanisms to be introduced.* The possible increase in liability costs of infringements cannot be considered to create an obstacle to trade. Obstacles can be created, however, if collective redress mechanisms do not prevent unmeritorious claims with an effective gatekeeper procedure or vague provisions lead to a long phase of initial legal uncertainty. If even more differing approaches occurred, this could influence the willingness of entry of firms in other markets into the EU.

The main conclusions of the Problem Study are as follows (ignoring points also mentioned above from the Evaluation Study, quoting the wording of the Studies).

1. *There is a significant number of mass claims/issues reported from Member States, of which only a part have been subject to a collective redress proceeding*. In the case of large-scale, very low-value claims (so-called "scattered mass claims"), but also for a significant number of low- to medium-value claims, it is likely that only a small proportion of the affected consumers take action and are compensated.

2. *The most relevant sector concerning observed mass claims/issues is the financial services sector*. Complaints data from the UK underline, however, the importance of the telecommunications sector as source of potential mass claims/mass issues. Other very relevant sectors are other consumer goods, package travel/tourism and transport.

3. *The study has identified a total of 25 potential obstacles preventing consumers from obtaining satisfactory redress in mass claims/mass issues. The costs of litigation are the most important obstacle*. Other very important obstacles are: the formal requirements of existing mechanisms; the length of judicial proceedings; the lack of awareness/information among consumers; and the fact that in some countries no collective redress mechanism exists. Obstacles that are relevant in a cross-border context include language barriers, and the lack of knowledge/information concerning legislation, collective redress mechanisms and collective claims brought in other Member States.

4. *Obstacles to obtaining satisfactory redress lead to significant adverse immediate economic consequences for consumers*. These include: a) Consumers are subject to uncompensated loss; b) Economic behaviour of consumers can be distorted; and c) Efficiency gains of ADR schemes and collective redress mechanisms compared with individual legal action are not fully exploited. ADR schemes are most relevant for a subset of low- to medium-value mass claims in which liability is relatively easy to establish. Potentially, collective redress mechanisms are more broadly applicable, including for complex high-value claims, and also for very low-value claims (the latter mainly when intermediaries can take action without necessarily involving consumers directly). Therefore more substantial efficiency gains for consumers are foregone if collective redress is unavailable or prevented by obstacles.

5. *There is a possibility that obstacles to the use of collective mechanisms prevent the occurrence of potential inefficiencies associated with these mechanisms*. Potential inefficiencies include the possibility of an increase in enforcement costs for consumers with little in return, and the bringing of less meritorious claims. However, the experience with existing collective redress mechanisms indicates that so far these problems have not been of relevance in the European context. Potential inefficiencies depend to a large extent on the design of the collective

mechanisms and a failure to have safeguards preventing or mitigating such problems.

6. *Obstacles to obtaining satisfactory redress may also lead to adverse immediate economic consequences for businesses*. These include: a) Distortion of incentives for businesses to avoid infringements of Consumer Law; b) Harming business strategies using contractual warranties;

organisations have to face when taking actions or the difficulties of effectively distributing the proceeds of an action.[9]

- The existing national collective redress mechanisms have only been applied in a few cases in recent years. The lowest number of consumers using a collective redress mechanism is in Germany, where on average only four in ten million people every year have participated in redress action. The collective redress scheme that reached the most people was in Portugal, where a telecoms company gave redress to some 3 million people involving €70 million.[10]

"Studies … have shown that there is no easy answer to the problem. All the current redress systems have their strengths and weaknesses and no single mechanism is ideal for all types of claims." [11]

"US style class action is not envisaged. EU legal systems are very different from the US legal system which is the result of a "toxic cocktail" – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures). … This combination of elements – "toxic cocktail" – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge's discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.

All the Green Paper options, and in particular a possible EU collective procedure outlined above, reflect EU legal traditions. The Commission seeks to encourage a competitiveness culture e.g. where businesses which play by the rules can realise their competitive advantages, not a litigation culture.

…

Businesses who play by the rules have nothing to fear from more effective systems for handling large scale consumers complaints – and to gain in terms of a fairer more competitive market." [12]

Comment

1. *Has the Commission established need?*

The Commission turns out to be on somewhat thin ice in establishing the requirement to show that barriers to trade exist in relation to collective redress between Member States, or in the internal market generally. Four arguments are made. First, it is asserted that

[9] MEMO/08/741, p 2.
[10] MEMO/08/741, p 2.
[11] MEMO/08/741, p 3.
[12] MEMO/08/741, p 4.

mass detriment of consumers occurs. Yet the estimated detriment is 'modest'. Given that collective redress mechanisms are new in all Member States,[13] and that it is found that such new approaches take time to overcome initial uncertainties, it remains to be seen whether the total detriment will fall as a result of the increased impact of these and further likely national developments in such mechanisms, or will rise as a result of increased infringing behaviour.

It is confirmed that *individual* consumer detriment is small. The Study figures show an average of €2.16 per head of population, and, excluding the seemingly unusual figures from the Netherlands, consumer benefit of €10.2 million per annum, and average annual individual benefit of €41 per consumer represented in litigation. Given those figures, the nagging question is at what level individual detriment is worth pursuing. The stronger point is that illicit profits should be removed from infringers, since that distorts market competition, but that may be better addressed through enforcement action, avoiding the costs of private dispute resolution and distribution and the risk of abuse that may be associated with privately funded solutions.

Secondly, it is said that 10% of collective redress claims have a cross-border element. A total of 326 cases in 13 jurisdictions over roughly ten years (which is an over-estimate, since the mechanisms have not existed for that long in some jurisdictions) gives a rough annual average of 32.5 cases per year. That would equate to 3 or 4 cross-border cases a year. Is that a significant number? Further, the distribution between Member States is uneven: Germany, the largest market, has very few cases. Might it be that the incidence of detriment will be greatest in those Member States where business standards have been low and need to rise, and where regulatory enforcement of the law has been poor and needs to improve? On the other hand, it is possible to identify a few individual cases that have involved large numbers of consumers. It is also possible to speculate that if cross-border trade and consumer shopping rises, there may be more cross-border cases. But is the hard data really convincing here?

Thirdly, most of the attack is directed at the effectiveness of *national* civil justice and alternative dispute resolution systems. In part, such an attack has an inherent weakness, since *every* legal system will have a threshold below which individual or collective claims are not financially viable to pursue in terms of a cost-benefit assessment. The same would be true of any EU mechanism that could be devised. In part, however, the essence of the Commission's concern is that this cost-benefit threshold is too high in many Member States' civil justice systems – and there is substance in that criticism. Yet it is apparent that many Member States are addressing such issues, and experimenting with improvements in their national systems (which would either reduce litigation costs or provide low-cost alternative to courts) and with innovative collective redress mechanisms.

[13] EU initiatives such as under the Consumer Protection Cooperation Regulation, the Mediation Directive and the Small Claims Directive have hardly come into effect, and national procedures on court-based systems are still only a few years old at best, plus several Member States have only just started experimenting with a new technique of public oversight of private compensation through enforcement action.

Civil justice issues are matters that should fall under the policy and competency powers of establishment of 'an area of freedom, security and justice'. In other words, DG FSJ would lead on such issues rather than DG SANCO. However, the Community's competence to legislate on civil justice issues is somewhat limited.

Fourthly, the Commission identifies – rightly – that the national mechanisms that are being adopted by Member States are all different. The mere existence of such diverse approaches is not good internal market policy. Yet they

situations. It is highly relevant that the Evaluation Study found that media coverage (rather than any particular judicial or ADR procedure) is effective in producing leverage on responsible businesses to provide redress. Rogue traders would not respond to media pressure, so some alternative approach would be required for them.

The inclusion of discussion on a public oversight of redress mechanism, based on cooperation between national authorities through extension of the CPCR is a significant new development in thinking. The innovative technique of oversight of compensation and restitution through regulatory enforcement has been adopted very recently by Denmark, Finland, Ireland, Norway, Sweden and UK. One of the case histories cited in the Memo is where the Irish Ombudsman ordered an insurance company to refund €25 to customers but was held by the High Court not to have the power to do so. How much quicker, simpler and cheaper it would have been if the Ombudsman had been able to wrap up public enforcement with compensation within the same procedure – as the English OFCOM and the Danish Consumer Ombudsman may now do. The Commission's assertion that public oversight techniques only work for low value claims is curious: there is no reason why it should not work for all values of case.

The argument that consumers do not trust public authorities might be thought to undermine any extension of reliance on public authorities in delivering redress, so it is important to examine this issue. Why might consumers have such lack of trust? Possible arguments would include: public authorities delegate the consumer protection injunction powers to consumer organisations so take little action themselves; the Injunctions Directive mechanism is still relatively new; public authorities may have limited resources to devote to injunction proceedings; public authorities may regard such injunction proceedings as of low priority, in line with the findings of the Problem Study that the effect on consumer and economic detriment appears to be modest; consumers' perception of limited trust in public authorities is in fact incorrect.

Use of consumer associations in enforcement of Community law is well established in theory, but not in practice (save where public funding is provided in Austria and Germany). This is primarily because of problems in funding litigation and distribution of awards. In order to overcome such problems, the options of removing loser-pays and introducing contingency fees are rejected. So there remains a question over whether reliance on consumer associations for collective redress could be effective. Permitting approved consumer associations, who are selected on the basis of their responsibility, to rely on litigation in which other intermediaries fund litigation for considerable commercial benefit, opens up issues of capture, lack of independence and of toxicity. These points tend to support a view that public funding should be made available for collective redress, in which case the most efficient option with lowest risk would be to fund public authorities rather than private entities.

Option 4 on its own is clearly unattractive to the Commission. It has recognised the paradox that a judicial procedure is only effective if it is supported by liberal funding and an opt-out approach, but if liberal funding and opt-out are adopted there is a significant

risk of abuse. Prioritising such a judicial approach is, therefore, unattractive, especially for economies that are facing serious recession.

In this respect, the U.S. class action model, and implicitly the U.S. model of 'private enforcement', are explicitly rejected. The Commission and national governments believe that those systems deliver extensive redress but the transactional costs are too high, and conflicts of interest can arise between consumers and intermediaries, which can lead to disproportionality between recoveries and costs, and 'blackmail settlements'. The 'toxic cocktail' is attributed explicitly to punitive damages, contingency fees, opt-out, pre-trial discovery procedures.

These views are highly significant. Traditional orthodoxy is that a court-based private law judicial solution is the only appropriate mechanism. The Green Paper signals a new direction in policy by considering a range and combination of alternatives. There is, of course, an argument that any civil justice system should have a private court-based mechanism as a matter of fundamental rights and social cohesion. Yet that does not mean that alternative mechanisms might not be prioritised, such as by imposing cost sanctions if court procedures are used when alternatives were available but were not reasonably tried by litigants.

It is significant that the Green Paper makes political statements strongly in favour of retaining 'loser pays', against contingency fees, and interestingly signals rejection of opt-out, despite theoretical advantages of opt-out, in view of the risk of abuse. Denmark is right in reserving the opt-out to cases where the Consumer Ombudsman and the court consider it appropriate.

The Commission supports the necessity of introducing anti-abuse mechanisms in any collective judicial procedure, to discourage unmeritorious claims. In this context, its assertion that "businesses who play by the rules have nothing to fear from more effective systems" is somewhat inconsistent: it is precisely concerned to avoid damaging the economy by encouraging a litigation culture and blackmail settlements.

It supports maintenance of both 'loser pays' and a 'gatekeeping' function. This is logical, but evidence on the effectiveness of a gatekeeping function in preventing unmeritorious claims is in fact not available. Indeed, there are some unresolved problems here. First, judicial models around the world do not include consideration of the merits of cases at certification stage, since it is often unrealistic for courts to attempt to evaluate merits then, because of cost or absence of evidence. Secondly, if defendants wish to settle unmeritorious claims on a commercial basis (i.e. give in to blackmail because that is cheaper) evidence of poor merits may not be produced to the court, and the court will be placed in the impossible quandary of approving an unjust payment or requiring parties to continue incurring litigation costs.

The Studies show that existing collective redress mechanisms do not generally impose costs on consumers, do need access to funding in order to be effective, and do not harm

business. Those three points are of considerable value to an economic and social system. The Commission has signalled that it does not wish to risk undermining them.

The Commission asks whether a combination of options might be advisable. One possible outcome would look like this:

1. The primary mechanism would be oversight of redress by public authorities. Such authorities need to have adequate resources and powers, and to operate under best practice guidelines.

2. Self-regulatory, voluntary and alternative solutions would be encouraged, especially for responsible businesses, which would be vulnerable to media attention and maintenance of brand reputation. Test cases may be satisfactory where media pressure provides enforceability.

3. Judicial solutions would be necessary to comply with fundamental rights requirements within a civilised society, and to provide case management for any multi-party cases as might arise. But they would be positioned as fall-back solutions. They would therefore be opt-in (save where public authorities reasonably requested opt-out), subject to loser-pays, claimants would not be awarded costs where alternative solutions (1 and 2 above) had not been reasonably pursued, and without contingency fees.

4. Regulatory and self-regulatory mechanisms should focus on those areas that involve most problems. The priority areas appear to be financial services and telecommunications. These findings may both avoid wasting expenditure and assist in its focussed allocation.

3. *Consistency of policy between consumer redress and competition damages?*

The Green Paper specifically excluded collective redress for EC antitrust law infringements, since these had been the subject of separate White Paper proposals from DG COMPETITION. That White Paper only contemplated the introduction of (two) private litigation court-based actions. Given the diversity implicit in DG SANCO's approach, potentially encompassing a mixture of public, private and voluntary mechanisms, various questions arise over why DG COMP's proposals are similarly not more pluralist.

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