

Consumer Law Enforcement Forum Project

*Guidelines for Consumer Organisations
on Enforcement and Collective Redress*



Prepared by
Professor G. Howells and Professor H.-W. Micklitz

September 2009



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Table of content

GENERAL INTRODUCTION	7
PART I - GENERAL GUIDELINES ON CONSUMER REDRESS	9
Executive summary	11
Section I - General considerations for consumer organisations' involvement in consumer redress	13
1. The Basic Tools	13
Case Studies: need for opt-out	14
A. A significant European Contribution – the Action for Injunction	14
B. The Member States leading role in the introduction of collective redress mechanisms	14
Case Studies: Skimming off action	15
C. The Cross-Border Dimension - Member States and Europe going together	15
2. What is the goal of your organisation?	15
3. Interaction with public authorities	16
A. Public authorities	16
Case Study: cooperation with authorities	16
a. Consumer protection authority	17
b. Public authorities competent for particular sectors	17
c. Relation between public authorities	18
B. Consumer organisations and public authorities	18
4. Access to information and confidentiality	19
5. Relationship with media	20
6. Relationship with members/consumers	20
7. Funding and finance	20
8. Sanctions and financial compensation	20
9. Follow-up and evaluation	22
Section II - Practical issues consumer organisations need to consider when embarking on collective litigation	23
1. Identification and investigation	23
2. Respect for complexity of collective litigation	23
Case Study: resource intensive litigation	23
3. Funding and finance	24
A. Awareness of financial risks	24
B. Available resources	24
C. Internal financing – profile building of consumer organisations	24
D. External financing – consumers; insurers and third party funders	24
4. Relationship with members/consumers	25
5. Relationship with media	26
6. Settlement and Alternative Dispute Resolution	26
Case Studies: settlements	27
Checklist for consumer organisations' collective redress strategy	28

Section III - General considerations on whether to take coordinated or cross-border action	29
1. Coordinated action	29
Case Studies: coordinated action	30
2. Cross-border action	31
A. Cross-border dimension	31
B. Jurisdiction and choice of law rules	31
Checklist for consumer organisations' collective redress strategy in transborder litigation	32
PART II - SPECIFIC GUIDELINES FOR COLLECTIVE ACTIONS IN COMPETITION, AND UNFAIR COMMERCIAL PRACTICES, CONTRACT TORT LAW, AND FINANCIAL SERVICES	33
Executive summary	35
Section I - Purpose of the specific guidelines	37
Section II - Competition and unfair commercial practices	39
1. Introduction	39
2. Particularities of collective enforcement in competition and unfair commercial practices cases	40
Case Studies	41
3. Legal environment and existing legal tools	41
4. Preparing the investigation	42
Case Study – Cartel mobile	42
Section III - Product liability and product safety	43
1. Preliminary remark: distinction between product liability and contract law and between product liability and product safety	43
2. Cooperation with product safety authorities	43
3. Speedy procedure	45
4. Expertise of lawyers	45
5. Building contracts with consumers	45
6. Negotiations	45
Case Studies	46
Section IV - Contract Law	47
1. Preliminary remarks	47
2. Cooperation with authorities in the area of contract law	47
3. Expertise of lawyers	47
4. Negotiation	47

Section V - Financial services	49
1. Introductory remarks on the particular nature of financial services	49
A. Remedies and enforcement	49
B. No coherent body of consumer financial services law	49
2. Expertise and specialisation of consumers' organisations	50
A. Expertise	50
B. Specialisation	50
C. Internationalisation of consumer problems	50
3. Where the problems lie	50
Case Study – UK bank charges	51
4. Risks and chances of involvement of consumers' organisations	52
5. Criteria for the choice of an enforcement strategy	52
A. Cooperation with financial supervisory authorities	52
B. Combination of available remedies	52
C. Financial services consumer ombudsman and Alternative Dispute Resolution (ADR)	53
Case Studies – Settlement	53
 CLEF GLOSSARY	 55

General introduction

The Consumer Law Enforcement Forum (CLEF) project allows consumer organisations to develop strategies on how to engage in enforcement, both at national and European level, and to improve their knowledge of different enforcement tools. The project deals with the role consumer organisations can play both in public enforcement - i.e. getting public authorities to more fully engage with consumer problems - and in private enforcement, i.e. bringing cases to courts via collective actions and advising and assisting consumers in individual cases.

These guidelines on enforcement and collective redress were prepared by Professor Geraint Howells (University of Manchester, UK) and Professor Hans-W. Micklitz (European University Institute, Italy). They are a compilation of the specific guidelines¹ elaborated throughout the project, and are introduced by general considerations on consumer organisations' involvement in consumer redress. The guidelines are highlighted by different case studies drawn up from partners' presentations during the various meetings.

CLEF project partners are sixteen consumer organisations from various Member States:

- Altroconsumo, Italy
- Association for Consumers' Protection - APC, Romania
- Consumentenbond, The Netherlands
- Cyprus Consumer Association
- Polish Consumer Federation National Council - FK
- Forbrugerrådet, Denmark
- Ghaqda tal-Konsumaturi, Malta
- National Association for Consumer Protection in Hungary - NACPH – OFE
- Latvia Consumer Association - PIAA
- Association of Polish Consumers - SKP
- Sdruzeni Obrany Spotřebitelu - SOS, Czech Republic
- Test-Achats, Belgium
- UFC Que Choisir, France
- Verein für Konsumenten-Information - VKI, Austria
- Verbraucherzentrale Bundesverband - vzbv, Germany
- Which?, United Kingdom

These guidelines consist of:

- General guidelines on consumer redress
The General Guidelines lay down recommendations for consumer organisations' involvement in consumer redress, in particular with regard to practical issues consumer organisations need to consider when embarking on collective litigation and/or when dealing with cross-border issues.
- Checklists for consumer organisations' collective redress strategy
The checklists should be seen as practical tools to help consumer organisations in preparing litigation.
- Specific guidelines for collective actions in competition, unfair commercial practices, contract law and tort law, and financial services

The specific guidelines take into consideration the particularities of different areas of consumer law and address collective action matters in the field of competition and unfair commercial practices, contract and tort law, as well as financial services.

While being aimed at consumer organisations, the CLEF Guidelines can also be considered as a great source of information and suggestion for public authorities and other stakeholders.

Note: The legal concepts used in this document have been defined in a glossary available at the end.

¹ Please note that the numerous presentations as well as all the specific guidelines drafted during the project are available and downloadable for free on the project website: www.clef-project.eu

Part I

General Guidelines on Consumer Redress

Executive summary

These General Guidelines aim at presenting the key elements to be considered by consumer organisations when reflecting on their involvement in consumer redress in Europe - including questions to help decide enforcement strategy. These Guidelines can also be considered as “food for thoughts” for public authorities and other stakeholders.

In a first section, the guidelines lay down general considerations for consumer organisations' involvement in consumer redress, be it individual or collective. The section addresses issues such as the available or requested basic tools, the goal of the organisations, the interaction with the public authorities. They deal with access to information, the relationship with the media, with members of the organisations and with complaining consumers, with funding and finance issues, with mechanisms of sanctions and financial compensation, last but not least with the need of follow-up action and evaluation.

In a second section, the guidelines fine tune and adapt the more general considerations on appropriate redress strategies to the particularities of collective actions.

In a third section, the guidelines recognise the distinction between national and cross-border collective actions. The latter requires not only particular tools, but also strategies which take fully into account the challenges and the difficulties of launching cross-border consumer collective actions.

Checklists, that have to be seen as practical tools, have also been included to help consumer organisations in making sure that they have paid due regard to the different issues that come up in collective actions, be they national or cross-border.

SECTION I. GENERAL CONSIDERATIONS FOR CONSUMER ORGANISATIONS' INVOLVEMENT IN CONSUMER REDRESS

This section addresses basic policy questions concerned with what legal remedies and instruments consumer organisations need to lobby for as a pre-condition to a well functioning system of legal redress within which consumer organisations can function effectively.

These comments relate to a wide range of consumer disputes and dispute resolution fora, although, in general, consumer organisations are more likely to get involved in disputes that have a collective significance and justify either a collective action or test case. These principles are found in many Member States but are worth rehearsing.

1. The Basic Tools

As a starting point, consumer organisations should make a preliminary reflection on whether their national legal systems have (all) the necessary tools for delivering consumer redress.

Amongst other things, national systems should provide the following tools:

- Consumers' access to appropriate legal advice and representation;
- Existence of special courts for consumers or simplified court procedures for small claims;
- Availability of Alternative Dispute Resolution (ADR) procedures (e.g. mediation, conciliation, arbitration....) for consumers that offer adequate protection and sufficient safeguards;
- Efficient injunction actions;
- Efficient means for resolving collective claims;
- Efficiency of redress tools for cross-border situations.

Of course, the blend of redress tools will vary from one Member State to another, depending on local/legal traditions and conditions. However, there are minimum standards to be respected, in legal terms under the existing European consumer law acquis², but also in policy terms under the notion of efficiency.³ In principle, a broader choice of remedies offers more opportunities to obtain effective consumer redress. There should be a consumer redress "toolbox" i.e. a redress tool adapted to each claim.

- ? Do you consider the existing legal instruments available in your country and/or at European level to be sufficient for proper enforcement of consumer protection rules?

² The European consumer law acquis refers to the existing body of EU consumer law which has to be respected by the Member States, i.e. implemented into national law and enforced. The European Court of Justice alone has jurisdiction to interpret and give shape to provisions and legal concepts enshrined in the EU consumer law rules.

³ Efficiency refers here to the fact that consumer organisations always have to make a choice between different strategies they want to use in a given case. The set of available legal rules are then to be integrated into a broader policy.

CASE STUDIES: Need for opt-out

- *Several of the CLEF case studies illustrated the need for an opt-out group action. For example, following a French competition court decision of 30 November 2005 finding a market-sharing agreement in the mobile sector, UFC Que Choisir created a website www.cartelmobile.org to help consumers calculate their injury. However, out of the 20 million mobile phone service subscribers who could have asked for compensation, only 12.521 consumers (less than 1 % of the victims) joined the action.*
- *Likewise in a competition law follow-on action involving price fixing of football shirts brought by Which? in the UK, despite an estimated 2 million football shirts being bought at an inflated price, only 600 people - owning a total of 1000 shirts - signed up to Which?'s action with several thousand consumers also obtaining compensation direct from the retailer under the settlement deal.*
- *By contrast, in Sweden, the Consumer Complaints Board was able to negotiate a settlement when it was alleged that mobile phone charges had been unfairly increased that meant all private consumers were compensated on average 45 SEK (= 4.5 Euro) per month.*

A. A significant European Contribution – The Injunction Directive

The most significant EU contribution to consumer redress has been in relation to injunctions⁴. Here the European Union managed to establish the action for injunction as some sort of a minimum standard which all Member States have to respect.

In particular, the following questions should be reflected upon:

- ? Are consumer organisations entitled to use this remedy at both national level and in cross-border claims?
- ? If so, what sort of requirements must consumer organisations meet to go to court?
- ? Is there a list of qualified entities where the consumer organisation has to be registered at national level?

B. The Member States leading role in the introduction of collective redress mechanisms

Whilst the European Commission is currently discussing the feasibility of introducing collective remedies European-wide,⁵ the decision currently lies in the hands of the Member States. Some Member States already have collective redress mechanisms such as representative actions, group actions, test cases or skimming-off actions. A broad number of Member States have recently introduced new collective redress means that allow for some sort of collective compensation claims. The CLEF glossary shall contribute to identify a common terminology.

- ? Are there remedies available at national level to address collective consumer problems?
- ? If yes, are these skimming off action, representative action and/or group action?
- ? Can they be brought in the same action as the injunction action or in a follow-on procedure?
- ? Who can use these additional remedies – the public authority and/or consumer organisations?

⁴ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, consolidated version Directive 2009/22 of 23 April 2009.

⁵ COM (2008) 794 final.

CASE STUDY: Skimming-off action

A rare example of a court “skimming-off profits” is the 2006 decision of the Appellate Court of Stuttgart⁶, in a case brought by the Federation of German Consumer Organisations VZBV. The case concerned a supermarket making a misleading internet advertisement for a mattress with an obsolete six years old good quality test result from a testing magazine Stiftung Warentest. The Court held that the defendant could not have relied solely on the information by wholesalers and would have had to verify a six years old product test. A difficulty with the German law is that profits can only be seized if intentional violation of unfair competition law is proven; but on this occasion the court found such an intention.

C. The cross-border dimension of the action for injunction – Member States and Europe going together

The growing number of cross-border consumer transactions leads to more and more cross-border consumer problems. Therefore consumer litigation may take a cross-border dimension. The cross-border dimension of consumer litigation has attracted much attention by the European Commission and led to the introduction of particular tools. This is also true with regard to the introduction of the small claims procedure⁷ which might complement collective redress. A separate section will be dedicated exclusively to practical issues consumer organisations need to consider when embarking on collective litigation (see section II).

2. What is the goal of your organisation?

Consumer organisations should have the opportunity to participate in delivering consumer redress. However, before embarking on litigation, consumer organisations need to be clear about what their goals are and what their best option for achieving it is, taking into account a range of factors (including resources constraints).

It is important to consider what role consumer organisations can play – whether they can take a leading role or a supporting role – and to what extent they can rely on partners like public authorities and/or lawyers in private practice.

Most of the time the extent of their activities depends on whether and to what point they have the necessary resources and skills in the particular field.

Consumer organisations' potential for actions can be quite extensive. They can, amongst other things, provide legal advice, information and/or assistance to consumers, support litigation, publish information (e.g. website, leaflets, press releases), take part in policy making (e.g. advocacy, lobby), initiate collective actions, etc.... Similarly, their objectives can range from seeking compensation for individuals harmed, promoting policy debate and reform, punishing wrongdoing, to raising the profile of the consumer organisation for instance.

The experience and resources of consumer organisations will have an impact on whether they can provide services themselves or merely lobby to ensure that the services are provided by a public entity within the national enforcement system.

Nonetheless, consumer organisations should be in the position to go on occasions to court and seek redress in an efficient way, be it on behalf of (groups of) individuals or in the collective interest

⁶ Case reference: 02.11.2006, AZ 2 U 58/06.

⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council, of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, 1.

of consumers. Most of the time, it would depend on resources but also on the type of procedure used/available and the specificities of the case.

For that reason, the following issues should be carefully considered before engaging an action:

- Resources available within the organisation ;
- Existing redress tools (including non-judicial redress tools such as mediation and conciliation procedures);
- Access to the necessary professional and financial resources to provide any legal advice and assistance;
- Availability of the necessary funds to support and/or undertake litigation;
- Possible involvement of public authorities or private parties such as lawyers and/or private insurers in financing litigation;
- Possibility for consumer organisations to be exempted from paying full court fees.

3. Interaction with public authorities

A. Public authorities

It is essential that public authorities play an active role in consumer policy and justice/redress. The simple fact that one or several authorities are responsible for consumer policy has an influence on consumer protection and on the role of consumer organisations. Some Member States have a single public authority that deals with consumer law; some have several public authorities that are competent. In the past in some Member States, consumer organisations were the only body responsible for enforcement of consumer protection law and remain important enforcers. This is particularly the case in the field of unfair commercial practices and unfair contract terms. A strong independent consumer organisation is not incompatible with a strong public authority.

If litigation is contemplated, consideration needs to be given to engaging with regulators. Regulators might be persuaded to take on the litigation or at least bring the main action leaving consumer organisations to bring follow-on actions to recover damages. In any event, regulators can be a useful resource in terms of information and experience.

CASE STUDY: Cooperation with authorities

Bank charges have been a source of consumer concern in the UK. Which? lobbied on the issue and many consumers organised themselves to bring claims which threatened to flood the county courts and the Financial Service Ombudsman. The Office of Fair Trading (OFT) also investigated the matter and an agreement was reached under which the OFT would bring a test case. This case was decided by the Supreme Court against the consumer interests.

a) Consumer protection authority

In some Member States, both consumer protection authorities and consumer organisations exist and often work in a complementary manner. However, some Member States in the past did not have a specific consumer authority. This situation has been changing as since January 2007, EC-Regulation 2006/2004 on Consumer Protection Cooperation obliges Member States to set up a network of national enforcement authorities with specific responsibilities to enforce the law that protect consumers' interests and act as single liaison offices in cross-border consumer conflicts. Member States are entitled, however, to delegate the enforcement tasks in cross-border consumer conflicts to e.g. consumer and/or business organisations (see section III on cross border issues). In such a case, Member States and the respective organisations might engage in contractual obligations. However, the residual responsibility remains with the Member States.

To assess consumer protection authority at national level, the following questions should be considered:

- ? Is there a consumer authority and if yes, what should its role be? – should it deal with trans-border issues alone, as foreseen in the Regulation 2006/2004, or should it also deal with national issues?
- ? Should the consumer authority take a leading role in consumer policy and justice or should the authority share powers and competence with consumer organisations? How should this cooperation in practice be organised?

The institutional design of a consumer authority is essential for the sound functioning of this authority but also in organising its relation with consumer organisations. A consumer authority should be impartial, accountable, transparent and work for the interest of consumers.

b) Public authorities competent for particular sectors

In many policy areas, such as telecommunications, energy, transport, financial services, but also in more horizontal fields like competition, distinct public authorities are established to supervise and monitor the market. There are considerable differences in the Member States in the degree to which sector related authorities and cartel offices fulfil enforcement tasks in the interests of the consumers, such as consumer complaints handling and complaint management. These bodies may not be explicitly consumer protection minded, therefore questions relating to their role and task in the control of the respective markets arise:

- ? Do these public authorities consider themselves to be – inter alia – a consumer authority?
- ? Do they have the legal obligation to deal with consumer complaints?
- ? If they do not have the legal obligation to do so, are they nevertheless engaged in consumer complaints handling?
- ? What kind of measures can these authorities take to solve concrete consumer problems in individual cases?
- ? Should there be one central consumer authority or should there be various sectoral consumer authorities?

c) Relation between public authorities

In each national context it is necessary to assess whether it is more efficient if enforcement is being dealt with by specialised authorities according to the policy concerned rather than by a horizontal consumer authority. In small Member States, it would, however, seem more efficient to have a single authority rather than various sector-specific ones.

Where several public authorities co-exist, issues of coordination between authorities and overlap/gap of competences arise. If authorities have to cooperate processes might take longer and affect efficiency. This might be an argument in favour of one central consumer authority.

Issues of coordination can also arise between authorities on a central and local level. If for example there is a lack of coordination at central level, this affects the coherence of the actions at local level.

It is difficult to assess whether a single consumer authority is better than sector regulatory authorities dealing with consumer matters, e.g. in the telecommunication and energy sectors. Nonetheless, if several public authorities are responsible for consumer law, it is indispensable that responsibilities are clearly determined and that appropriate coordination between them takes place. It is important that even where there are different agencies the protection of consumers is joined up.

In order to deliver better policy and enforcement, interaction between public enforcers and consumer organisations is needed. For instance, in one Member State a consumer database is being created between the consumer Ombudsman, consumer organisations and a public authority responsible for consumer protection to exchange information about what consumers' major problems are.

For the individual consumer, a single point of contact collecting all consumer complaints would be helpful, especially when several authorities are competent. The complaint could then be sent to the appropriate entity(ies).

B. Consumer organisations and public authorities

There are important differences regarding the (legal) position of consumer organisations in relation to different authorities. The rights and possibilities which consumer organisations have at their disposal may vary significantly from country to country and even within (federal) states depending on the context.

Consumer organisations may be explicitly designated and granted the status of an "interested party" in the procedures initiated by a consumer protection authority or by any other sector related authority in charge of consumer protection issues. They may be entitled to request certain measures be taken, to receive responses to complaints they filed with the authority within a certain time period and they may even have the right to challenge decisions taken by the authority before courts and/or specialised administrative tribunals. Consumer organisations can use such a "qualified" position to put pressure on public authorities and to render the enforcement system more efficient. Yet, particularly in relation to sector specific authorities other than consumer authorities, consumer organisations in many instances do not have a qualified legal position as described above. This will only be the case if the respective authorities are given the mandate to look also after consumer complaints.

Consumer organisations should seek full cooperation from public authorities e.g. by bringing cases to their attention and/or requesting investigations and enforcement action. Several strategic issues arise for consideration, such as:

- ? Should consumer organisations form partnerships with public authorities to deliver access to justice?
- ? Are consumer organisations able to influence public authorities?
- ? Do consumer organisations have a particular legal status which entitles them to file a complaint and/or to ask for action to be taken?

In the context of these guidelines, private enforcement means that consumer and/or business organisations are involved in law enforcement. In some Member States, only consumer organisations are competent; in this case, private enforcement thus replaces public enforcement. These consumer organisations are granted the right to take action, mostly in the form of the right to seek an injunction. Yet, they are not legally obliged to take action.

In the majority of the Member States, however, consumer organisations are standing side by side with consumer protection authority or other authorities with enforcement being shared according to local traditions between private and public entities.

4. Access to information and confidentiality

Whether or not consumer organisations will decide to take action and file a complaint in the courts will largely depend on whether they have the necessary information at hand – especially in competition and financial services cases for instance. Access to information is key. Without access to information stored, collected and filed by public bodies and companies, consumer organisations may be prevented from taking any action at all. Access to information is necessary even before formal procedures for disclosure can be invoked.

Enforcement authorities should, subject to reasonable confidentiality requirements, be prepared to share information with consumer organisations. However, confidentiality is often used as an excuse not to give access to information. The same is true with regard to businesses that should also be obliged to share relevant information, with the regulatory body potentially acting as a gatekeeper to monitor such requests.

The inherent tension between confidentiality and availability of information implies the need for public regulation. EU regulation only exists with regard to the accessibility of EU documents.⁸ However, there are no European rules laying down requirements under which consumers and consumer organisations shall be given access to information saved in national public authorities. More particularly there is no counterpart to Directive 2003/4/CE⁹ which regulates the access to information in environmental matters. Access to information depends on the specific rules in the particular Member States. The degree to which access to information is granted at the national level, varies widely.

National legislators should define the rules under which information must be disclosed and whether and to what extent consumer organisations might be given standing to file an action for disclosure which is often a prerequisite to filing an action for compensation. There should be some form of national consumer enforcement cases database.

Before taking action consumer organisation might check the following:

- ? Does your organisation have access to information which is filed in national authorities, including consumer authorities?
- ? Is there an opportunity to get the information from another Member State authority which is more open to information request?
- ? Is the information related to the case treated as confidential?
- ? Does your organisation have standing to file an action for disclosure?

If your organisation does not have access to information or if the national authorities reject access, your organisation might seek cross-border cooperation with consumer organisations in Member States where access is more easily granted.

⁸ EU regulation 149/2001 on the accessibility of EU documents.

⁹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

5. Relationship with media

Consumer organisations should develop strong media links as an integral part of overall litigation strategy. This is important to raise the profile of the issue, inform affected consumers about the proposed litigation and increase the impact of any decision. It is even more important if a given case pursues policy purposes i.e. demonstrate that the remedies/procedures currently available are not adequate. However, sometimes it may happen that some media organisations may be reluctant to feature prominent cases because of the possible threat of withdrawal of advertising by the targeted trader.

There is a difference between a press release demonstrating the organisations' involvement and an advertising requiring consumers to contact a consumer organisation. It seems that there are legal limits in some Member States to seeking victims to join the litigation via the media. Consumer organisations need to be aware of the rules that apply in their jurisdiction; but also consider which media is the most appropriate to contact consumers.

Before embarking on consumer redress, consumer organisations might want to raise the following questions:

- ? Are there established and stable links to the media?
- ? Are the media cooperating with your organisation?
- ? Does your organisation run risks when using the media (e.g. defamation action)?
- ? Is your organisation allowed to use the media to advertise a case?

6. Relationship with members /consumers

Consumer organisations should maintain good and strong relations with their members and the consumers they represent. Any involvement in litigation, in particular if the litigation raises awareness in the media, makes it necessary for the consumer organisations to seek support and backing from its members/harmed consumers. A strong consumer organisation which stands firm increases the legitimacy of consumer redress. In addition, members/consumers can often provide additional input via information into the case at issue.

7. Funding and finance

The issue of funding is at the very heart of consumer organisations activities: without proper funding, it is very difficult for them to play an active and effective role in enforcement.

Apart from the amount of the funding itself, serious issues arise in particular in the "new" Member States. Very often organisations from these countries have little or no access to public funding or, are financed on an annual basis or project by project, which prevent them from having a long-term vision of what their strategy could be and from taking action, such as court action, that are long-lasting.

Some funding is available at European level. However, financial support provided by the European Commission is aimed at co-financing specific activities and projects only. Moreover, projects usually require several partners, between which funds are distributed. In no way, does it provide for the support consumers organisations need for their operational activities on a day to day basis.

At national level, criteria have been developed for national funding. Definition or criteria that allow determining what a consumer organisation is at national level can be found, country by country, on the European Commission (DG SANCO) website¹⁰.

Available funding is unlikely to be sufficient to support an active litigation strategy and so consumer organisations may need to consider alternative ways to finance such activity they decide to engage in.

8. Sanctions and financial compensation

Under European law, Member States usually decide whether enforcement should be put into the hands of public authorities or private organisations. Sanctions must be made available to counter violations of the law with 'adequate, effective and proportionate' means. These may be administrative sanctions or private law sanctions. Roughly speaking, administrative sanctions go to the public purse whereas the situation is more complicated with regard to private law sanctions. Here the law of the Member States differ considerably. The CLEF glossary aims at clarifying what is meant by administrative and private law sanctions (see page 57).

An important question for the enforcement strategy of a consumer organisation therefore is whether it runs risks – including financial risks - from getting involved in private enforcement. Such a risk might result from the fact that consumer organisations get involved in private enforcement, spend resources on detecting violations of consumer law, but, in most cases, are not even reimbursed the costs they have incurred in bringing the case.

On the issue of access to compensation, the following points are important:

- ? In your country, are public authorities alone entitled to impose administrative and/or criminal fines on companies?
- ? What sort of fines exists in your country and are public authorities making use of their powers? Can your consumer organisation lobby for these powers to be used more effectively?
- ? In your country, are consumer organisations just like in Austria and Germany entitled to receive private law sanctions¹¹?
- ? Is your organisation benefiting from cy-près money¹² which is given to them via courts or administrations?

However, modern regulatory sanctions are being developed in some countries to allow more flexibility as to who can benefit of the money generated by the fines.

- ? Does or should the money which results from violations be distributed to those consumers who suffered from the violation?
- ? Does or should the money go to consumer organisations, allowing for example their work to be sponsored through these payments?

For instance, Member States have adopted different solutions for the distribution of ill-gotten-gains recovered by way of a skimming-off procedures: they can go to the public purse or be retained by consumer organisations.

- ? Are the existing sanctions available in your country sufficient for proper enforcement of consumer protection rules?

¹⁰ See http://ec.europa.eu/consumers/cons_org/associations/index_en.htm.

¹¹ In Germany, consumer organisations are entitled to file an action for injunction. Before going to court, German consumer organisations are obliged to ask for a private commitment of the trader to stop his illegal behaviour. If the trader agrees, such a commitment is regarded as a contract. If the trader violates the private commitment, consumer organisations may ask for contractual penalty which, if it is paid, goes to the purse of the consumer organisation.

¹² In this context, the so-called cy-près doctrine means that when literal compliance is impossible, impracticable, or illegal, i.e. the real victims cannot be compensated, the court can oblige the wrongdoer to pay the fine to a charity related to the matter at hand, for instance a consumer organisation.

- ? For instance, does your national system provide for skimming-off actions (recovery of ill-gotten gains) which allow consumer organisations and/or public authorities to take actions where violations of antitrust rules or of consumer protection provisions occur?

9. Follow up and evaluation

Any venture into litigation by consumer organisations is bound to give rise to challenging issues. It is important that organisations review previous experiences to assess whether their objectives have been achieved. They should reflect on how matters can be handled better as a result of their experience and how this experience should affect their future litigation strategy.

The following questions should help assessing whether litigation has been successful:

- ? What has been the original objective that your organisation wanted to achieve?
- ? What kind of measures has been chosen to realise the objective?
- ? Was the chosen remedy appropriate for the achievement of the objective?
- ? What kind of difficulties have come up? Could they be overcome by the use of other more appropriate remedies?
- ? If the action filed by your organisation was successful, what kind of action have you taken to find out whether the addressee of the judgment complies with the sentence?
- ? Is it feasible to take further action before a court or outside the court in case the supplier does not comply with a private commitment or a judgment which obliges him to stop the illegal behaviour?
- ? What have been the reactions in the media, by the members of the organisations and by the consumers in whose interests your organisation has taken action?

SECTION II. PRACTICAL ISSUES CONSUMER ORGANISATIONS NEED TO CONSIDER WHEN EMBARKING ON COLLECTIVE LITIGATION

In this section, we review more concretely the practical issues consumer organisations embarking on collective litigation may need to address.

1. Identification and investigation

At an early stage it is necessary to identify potential claims and investigate them both legally and factually. Much effort can be avoided if it turns out that the consumer claims cannot be supported legally or factually. It is therefore crucial to assess the strength of the case at an early stage. In addition to the viability of the claim, it is sensible to ascertain the value of such claims i.e. how many consumers are potentially affected and the degree of interest and cooperation they are likely to show. The expected consumer detriment caused by the illegal behaviour and the potential of winning the case are important elements to justify building an action.

In complex group litigation, there are quite often more than one potential addressees of the claim. Consumer organisations will have to find out the appropriate addressee(s). Suing too many parties in some systems may lead to costs exposure.

Several factors have to be considered:

- size of the company;
- degree to which it is publicly known – nationally and/or internationally.
- whether it is solvent enough to eventually pay for the requested compensation, etc.

2. Respect for complexity of collective litigation

Entering into collective litigation can be a difficult and expensive matter. Recognition of the complexity involved is needed in order to decide at an early stage whether the resources, in particular the skills, are available to embark into such litigation. The very technical difficulties of establishing matters such as damage and causation, even if the main allegation is well-founded, should not be underestimated. So there is a need to seek support by public authorities if they store relevant information and to rely on proper specialists within consumer organisations or outside the organisations to meet the challenge.

Consumer associations should likewise be aware of their obligations and be open with members/harmed consumers about the complexity and risks of the process including any potential costs liability.

CASE STUDY – Resource intensive litigation

A decision by the French competition court imposed a penalty (535 Millions Euros) on a market share agreement among mobile phone operators. Extraordinary resources were needed in UFC Que Choisir to handle the case, 20% of staff was involved for 6 months and 3 cubic meters of files had to be managed. 12.521 consumers joined the case.

3. Funding and finance

Particular funding issues arise when consumer organisations consider engaging in collective litigation.

A. Awareness of financial risks

Consumer organisations may run substantial financial risks if they engage into collective actions. These risks may result from different sources:

- If a consumer organisation decides to go to court, it must calculate the potential investments to be made in order to be able to run the case, often over several years.
- There may not only be legal costs, but often expensive expertise may be required.
- There may also be liabilities for the other parties' costs should the case be lost in full or in part.

B. Available resources

Collective redress actions due to their scale require more resources than other traditional actions taken by consumer organisations. Substantial resources are needed to prepare the case and manage it. If a consumer organisation generates more complaints that it can handle, it might easily face the problem of lack of manpower.

For instance, after Altroconsumo had found out that Italian car insurers were tied in a cartel to the detriment of consumers, Altroconsumo received thousands of calls from Members who sought advice on their individual contract. In the aftermath of the favourable decision of the Italian cartel authority on concerted actions, thousands of consumers went to court but largely failed. So again Altroconsumo was contacted by an overwhelming number of consumers.

C. Internal financing – profile building of consumer organisations

Consumer organisations may decide to finance a case themselves, if they have the resources, in order to – in addition to seeking consumer reparation – demonstrate their awareness of the sector and to highlight problems that need to be addressed. The motives may also include profile raising, the willingness to be independent and to attract new consumers as members, who in turn may finance the organisations.

D. External financing – consumers, insurers and third party funders

Mass cases may put a burden on consumer organisations, which they cannot bear alone and additional resources may need to be secured. For instance, consumer organisations may request a fee from **consumers** to deal with their cases (e.g. each consumer who wishes to participate in the collective action pays a fee or subscribes a membership fee when the organisation can only act on behalf of its members).

Consumer organisations may engage **external lawyers**. There are no common rules on how external lawyers are compensated for their advice. There seems to be a certain tendency in the Member States to grant lawyers in collective actions more leeway in how they obtain compensation for their advice. In some Member States, external lawyers work on a conditional fee basis according to which a success fee may be added to the lawyers' costs if the case is won. These are to be differentiated from contingency fees (common in the US) which relate to a percentage of the damages awarded and cannot be claimed in case of loss ("no win, no fee").

Consumer organisations or lawyers may also contact **insurers** financing collective actions. Insurers can either be used to finance individual actions which bear a test case character or individual actions which can be bundled together in one joint case. They can also finance some actions on behalf of claimants, whether organisations or individuals.

Third party funders are another recent development. They differ from insurers in that they are not necessarily insuring the payment of costs to the other party in case a claim is lost and can usually withdraw from the case upon notice. They may well be working for a percentage of damages. Such arrangements raise practical and ethical issues that need to be addressed.

4. Relationship with members/consumers

Consumer organisations need to be clear about their relationship with their members and other consumers they represent especially when the envisaged action concerns numerous consumers - members and non-members as well. In some Member States, established organisations are able to defend the interests of all the consumers who have suffered from a mass damage; in other Member States registered and established consumer organisations have standing to defend the interests of harmed consumers provided these have beforehand transferred their rights – via an individual mandate for instance - to the respective consumer organisation.

The nature of the relationship and the legal procedure that is being invoked by the consumer organisation need to be clearly explained so that consumers know what their potential liabilities are e.g. whether they will have to pay for being represented by the consumer organisations and whether the consumer organisations (or lawyers they mandate) intend to make a contingency agreement or use a legal insurance. It is important to inform consumers whether they have to participate financially to the action e.g. to give a certain amount of the compensation they might finally get out of the collective litigation to the consumer organisations or third parties.

The legal basis of the claim and the amount requested need to be clearly set out and in particular the differences between a collective mechanism and an individual litigation should be established. Issues about control of litigation and the objectives sought to be achieved need to be addressed. Consumer organisations should keep in touch with consumers, taking full advantage of new technology such as websites etc. Electronic registration of complainants – even more for collective redress procedure - is becoming a useful tool.

5. Relationship with media

Whilst a good and strong relationship with the media is important for consumer organisations, it becomes crucial in case of collective litigation. The media should be integrated as an actor in the overall strategy which is chosen to defend the collective interests of consumers. Support of the media is needed from the launching of the case until the successful end of litigation. Support is even more important if the litigation strategy suffers from a setback. Consumer organisations might be well-advised to develop a joint strategy, one in which litigation in court and support via the media runs in parallel.

There is a difference between a press release demonstrating the organisations' involvement and an advertisement requiring consumers to contact a consumer organisation. It seems that there are legal limits in some Member States to seeking victims to join the litigation via the media. Consumer organisations need to be aware of the rules that apply in their jurisdiction; but also consider which media is the most appropriate to contact consumers (including electronic means).

6. Settlement and Alternative Dispute Resolution

It is a well-known fact that most mass litigation ends up in some sort of out-of-court settlement when it comes down to deciding the amount of money individually affected consumers should recover. These forms of out-of court settlement during a law suit need to be kept separate from alternative dispute settlement (ADR) procedures in individual litigation. Depending on local traditions and experience, consumer organisations may be more or less enthusiastic regarding ADR schemes. Such schemes can reduce costs and be speedier and less formal than normal court procedures. However, ADR schemes currently work at the individual level and would need to be refined to deal with collective disputes.

The independence of ADR procedures needs to be (better) assured and the principles set out in the European Recommendations on ADR¹³ need to be better respected. These Recommendations set out non mandatory minimum requirements for individual dispute resolution. They are, however, not designed to deal with mass damages and mass litigation, in whatever form and under whatever remedy.

Consumers should not be forced to give up legitimate claims in order to compromise the dispute, neither for an individual complaint nor in mass litigation cases. Equally, there should be a cautious attitude as ADR mechanisms may impact on the freedom of consumer organisations to disclose the results of the settlement and may prevent precedent that can only be developed by legal proceedings. Some legal orders establish particular safeguard mechanisms to protect the consumers who are not able to participate individually in the ADR/mediation procedure. It is important that judicial approval is required for all sorts of out of court agreements. Consumer organisations should obtain such a "blessing" to ensure that the agreement is enforceable, but also that their conduct cannot be questioned, particularly if they are to receive some compensation themselves.

Transparency

If consumer organisations decide to engage in a possible settlement of the case, they have to pay the utmost attention to transparency. Otherwise they might be blamed later by consumers who are not satisfied with the deal and accused of not properly defending their individual interests.

¹³ Recommendation 98/275/EC: OJ 1998 OJ 1998 L115/31 and 2001 Recommendation 2001/310/CE: OJ 2001 L109/56.

Keeping consumers involved

The best shield from such criticism is to keep consumers involved and to spread the information as widely as possible.

Confidentiality

It is common for business to seek to “buy out” the key claimants, by making a deal with them, but insisting that the deal must be kept secret. Violation of confidentiality may then even be sanctioned under the settlement agreement. Consumer organisations have the opposite interests. These positions are difficult to reconcile, but consumer organisations need to be aware of this and may consider tactics to prevent their strongest cases being “bought off”.

Judicial approval

A possible way forward to protect consumer organisations from unfair agreements is that settlements need to be judicially approved. However, there are only a few countries which currently provide for such a procedure. Consumer organisations may be encouraged to fight for the introduction of judicial approval of settlements in collective actions as these provide some assurances that the settlements are balanced and more easily enforceable.

CASE STUDIES - Settlements

- *There is a tendency to settle large cases although the legal environment in the Member States differs considerably. This happened in the Dutch Dexia case, where thousands and thousands of consumers had bought securities lease products which turned out to be a financial disaster. Consumentenbond managed to settle the case with the support of the Amsterdam Court of Appeal which is necessary under Dutch law.*
- *The largest mobile phone operator in Sweden had increased its prices without appropriate prior information to consumers. The case was settled before the Consumer Complaint Board and private customers were compensated on average damage of 4,5 €. Settlement is not bound to compensation claims. It may equally become the dominant strategy in actions for injunctions.*
- *The Austrian Consumer Organisation VKI took action against 25 nursing home contracts for 600 infringements of unfair contract terms legislation. In all cases VKI sent a letter of notification and asked the companies for a declaration of cessation. Only 4 cases went to court.*

CHECKLIST FOR CONSUMER ORGANISATIONS COLLECTIVE REDRESS STRATEGY

- ✓ What collective redress tools are available? Is there only an injunction procedure or are there also different collective remedies aimed at compensating consumers?
- ✓ What are the respective national requirements to be respected if there are collective actions for compensation?
- ✓ What is the standing of consumer organisations and the relation to the public enforcement (regulatory) bodies?
- ✓ What proof is available (e.g. consumer complaints, market surveys)?
- ✓ How can information be accessed? Is a disclosure procedure available?
- ✓ Are resources within the organisation sufficient? For instance, should external lawyers be hired?
- ✓ Are alternative sources of funding available and required?
- ✓ Are there ways to prepare the evidence of infringement, calculation of damage and econometric studies?
- ✓ Has the financial risk of litigation been considered? Have the legal costs been calculated?
- ✓ Has a communication strategy been set up to communicate effectively with members of the group and the media?
- ✓ Have clear rules about settlement requirements been set up?

Personal notes:

SECTION III - GENERAL CONSIDERATIONS ON WHETHER TO TAKE COORDINATED OR CROSS-BORDER ACTION

Consumer organisations may detect that a problem has a cross-border or pan-European dimension. The pan European dimension is broader as in this situation consumer organisations all over Europe might face identical or similar consumer issues within their countries.

A cross-border action generally refers to an action taken by a consumer organisation before the court of another Member State where the trader is located.

A coordinated action refers to a concerted action taken simultaneously by two or more consumer organisations in their own Member State.

Coordinated action may be sensible when similar issues arise across borders (i.e. similar contract terms) and when national associations are considering taking action in their own country. There can be advantages to testing points in different legal systems. The litigation outcomes can be compared between Member States.

In some situations cross-border action may be the only choice e.g. where the trader is located in another Member State. However, the costs, complexity – e.g. dealing not only with the substantive issue, but also jurisdiction, choice of law and potentially foreign substantive law and certainly foreign procedural law - need to be borne in mind.

1. Coordinated action

Consumer organisations may wish to consider working with other consumer organisations at the national level or if there are cross-border dimensions with partners in other Member States. A great deal can be gained by pooling resources and experience. However, the organisational costs inherent in coordination should be borne in mind. Each organisation should be clear about what it expects from the other organisations and communicate this clearly to prevent problems emerging if high expectations are defeated. In particular, it needs to be understood whether there is a mere sharing of knowledge and experience or if there is to be a common litigation strategy and if so what that strategy should be (e.g. agreeing to settle the case or not) and in particular who should have control of the litigation and be responsible for costs and distributing any proceeds.

To assess whether a coordinated action with (an)other consumer organisation(s) from other Member States is the better solution, the following points need to be considered:

- Find problems which are common to several Member States and ensure facts and issues are sufficiently similar;
- Consider how to find partner organisations;
- Decide what the optimum number of partners is.

Whilst it may be possible to have a wide range of organisations involved, it may be more comfortable working with e.g. 3 to 5 organisations from similar legal tradition, same language and neighbourhood; on the other hand, involving different traditions may offer a wider range of legal possibilities. A lead organisation model may usefully be adopted.

- Select partners one feels comfortable working with.

This may in some cases turn on something as practical as language or existing contacts and confidence between organisations.

- Remain open to alliances and share information

The door should always be open to new cooperation and the need of Member States with less developed consumer organisations should be borne in mind. Consider whether, even at the national level, there is scope for cooperating with other domestic organisations. Be aware that organisations may have different levels of funding and may not want or be able to undertake coordinated legal action. However, they may still have useful information to share.

- Be clear at the outset about the objectives between the partners and the extent to which the partners are bound to a common strategy.

In particular be clear about what can and cannot be expected of different organisations. A common position on negotiating and settlement tactics should be agreed upon before starting the action, in particular to prevent strong claims in some jurisdictions being “bought off”; although the constraints of some legal systems that require negotiations should be noted. In some Member States negotiation may be sensible; in others, the media can be used effectively whilst the courts may be readily accessible in other states. If a reference to the European Court of Justice is considered desirable, again it may be easier to achieve this in some jurisdictions than others.

- The costs involved in cooperation should not be underestimated.
- Technology such as video conferencing can assist but there will be a need to ensure partners have technological capacity to do so.
- Language issues need to be addressed.
- Costs and quality of translation need to be taken into account and budgeted. While often the English language might be the means of communications, it might well be that suppliers are using different language versions e.g. the field of unfair contract terms and commercial practices.
- In some countries there is the possibility to work with public consumer authorities or specialist regulators to review cases (e.g. in UK Office of Fair Trading (OFT) will review cases).
- Tactical advantage of cooperation with public authorities should be taken where appropriate. It might also be possible to raise the matter with the European Commission.
- It may be that the partners decide to tackle the problem in different ways according to local circumstances.

CASE STUDIES – Coordinated action

- *Test Achats, DECO and UFC- Que Choisir united forces in improving air transport contract terms and stimulate them to act in a more consumer-friendly way. They decided to take coordinated action via six video conferences, where 3 lawyers and 6 representatives of the three consumer organisations participated, to strike down unfair contract terms via actions for injunction. Under the current legal system, they considered cross-border injunctions to be too costly and legally too complicated. Each consumer organisation thus sued its national airline and one or two low cost airlines in their Member State.*
- *In the aftermath of the bankruptcy of Lehmann Brothers consumer organisations were contacted by thousands of consumers all over Europe who lost their money. Consumer organisations are considering building a network to coordinate their activities.*

2. Cross-border action

A first consideration is whether it is necessary or desirable to bring a cross-border action. It must be stressed that a cross-border action is a very complex and costly step. While new procedures should be created to simplify cross-border actions, in current circumstances consumer organisations should consider whether the matter can be addressed in any easier way and whether the outcome justifies the necessary investment.

A. Cross-border dimension

There may be times when consumer organisations may find it desirable or necessary to take action in other states. They may, for instance, wish to take action in the state where the company is based to ensure any decision has maximum impact and can be followed up by the regulator of the country of origin. In other situations, it may be the case that the rules of private international law dictate that the consumer organisation only has jurisdiction to sue in the state where the company is based. Equally the consumer organisation may find it advantageous for reasons of procedural or substantive law, or because of the available remedies, to sue in another Member State than its own. Consumer organisations should be allowed access to the dispute resolution mechanisms (court and ADR) of all Member States under similar conditions to local entities.

B. Jurisdiction and choice of law rules

It may be necessary to bring a cross-border action due to the jurisdiction rules laid down in the Brussels Regulation¹⁴ and the Brussels Convention¹⁵. These decide over the competent court. It may also be desirable to take a cross-border action for reasons based on advantageous procedural or substantive law. However, just because the company is a foreign company does not mean that a cross-border action is always required.

In case a cross-border action is to be launched, the consumer organisation will have to research the public international law issues of jurisdiction and be clear about the relevant rules under the applicable law. It will also need knowledge of the procedural laws of the country where the action will be brought. This will usually involve engaging a local lawyer. Having a partner consumer organisation to assist in either providing legal services or recommending lawyers can be a great incentive to act cross-border. Costs such as translation will also have to be considered. Furthermore, attention will have to be paid to how any eventual decision can be effectively enforced.

? Do you consider the existing legal instruments at national or European level to be sufficient for proper cross-border enforcement of consumer protection rules?

¹⁴ Council Regulation(EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation).

¹⁵ Brussels Convention of 27 September 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters

**CHECKLIST FOR CONSUMER ORGANISATION
COLLECTIVE REDRESS STRATEGY IN CROSS-BORDER LITIGATION**

- ✓ Is your organisation facing a national, cross-border or pan-European situation?
- ✓ Is there a legal mechanism that grants consumer organisations or consumers standing in cross-border litigation?
- ✓ What is the standing of your organisation - and the relation to the public enforcements bodies - in cross-border litigation?
- ✓ Have you found out what is going on in other Member States?
- ✓ Would a coordinated action or a cross-border action be more efficient?
- ✓ Have you contacted potential partner organisations?
- ✓ Are there skills and resources available to handle international jurisdiction and international private law issues?
- ✓ What about language skills in your organisation? Is cooperation possible in other than native language(s)?
- ✓ Before starting any action, have you agreed with the partners on the objectives and on a common strategy?

Personal notes:

Part II

Specific Guidelines for Collective Actions in Competition, Unfair Commercial Practices, Contract and Tort Law, and Financial Services

Executive summary

This second part of the CLEF guidelines seeks to look at the specific challenges faced by consumer organisations in several particular contexts namely competition and unfair commercial practices, tort law litigation, product liability and product safety, contract law and financial services. Each area requires to be approached on its own merits taking into account factors such as the substantive and procedural law available, the nature of the relief sought and the size of the individual and collective detriment, the strength of regulators and the ability to engage with external lawyers. Thus consumer organisations should take into account both the General Guidelines (part I) and the specific issues raised in context.

SECTION I. PURPOSE OF THE SPECIFIC GUIDELINES

Whilst the General Guidelines set out the regime with regard to collective actions initiated by consumer organisations, the following part is designed to deal with the particularities in various areas of consumer law. It is the case that collective actions raises different questions in competition and unfair commercial practices law than in financial services or contract and tort law litigation.

The specific guidelines first deal with **competition and unfair commercial practices**. Both areas are more and more in the point of attention of consumer litigation. In competition law, this is mainly due to the strong involvement of the European Commission which is trying to set out a common regulatory frame for collective actions, in the interests of consumers amongst others. National consumer organisations are getting more and more involved into the search for ways and means to compensate the consumer for damages that result from illegal cartels, from the abuse of a dominant market position, or from unfair commercial practices. These activities depend largely on the possibility to take so-called follow-on actions, i.e. to use the decision of public authorities which declares a certain practices illegal as the starting point for compensation claims.

Then, the specific guidelines focus on a rather old though well known problem to consumer organisations. What shall happen in case a broader number of consumers have been injured by a defective product or are involved in the same accident. Here the individual damage of the consumer is in theory high enough for a consumer to go to court individually; in practice, however, collective litigation might bundle energies and save costs. **Product liability** cases are legally very complex and they require strong expertise of lawyers

Next, the specific guidelines tackle **contract law** issues, where collective action is needed due to a collective concern of consumers. A prominent field of activity concern standard terms not only to set an end to the use of unfair terms but also more and more to recover the damage consumers may suffer from the use of unfair terms.

Finally, the specific guidelines focus on **financial services** which benefit or suffer from a growing awareness of consumers in general but also because of the misconduct and misbehaviour of the providers in particular. In this particular field, collective actions are pending or are under preparation in quite a number of Member States. Access to information often stored in the regulatory authorities is key to the success of such collective actions.

Each part contains references to case studies which are meant to illustrate the particularities in each of the four fields.

SECTION II - COMPETITION AND UNFAIR COMMERCIAL PRACTICES

1. Introduction

This section addresses the situations where consumers are the victims of illegal cartels/abuse of dominant market position or unfair/misleading advertising practices. These areas are characterised by similar particularities which determine the feasibility of collective law enforcement.

Illegal cartels/abuse of dominant market position are fully harmonised by European Community law, via Articles 81 and 82 of the EC Treaty and the respective block exemption regulations. This means that the yardstick of control whether a cartel is illegal or whether a marketing practice is unfair or misleading, largely derives from EC law.

The same cannot be said with regard to enforcement requirements. In the field of competition/cartel law, the European Court of Justice (ECJ) set the tone in the case *Courage*¹⁶. Under this doctrine, consumers may be entitled to claim compensation in case they are affected by illegal practices. However, the ECJ had no opportunity to specify the conditions under which consumers may claim compensation. So far this issue is largely left to the Member States' national orders and major deficiencies can be found in nearly all Member States' legal orders¹⁷.

A political initiative of the European Commission regarding rights and remedies of competitors, rights and remedies of consumers, rights and remedies of consumer organisations and/or collective rights of individual consumers is on-going¹⁸.

The situation is relatively similar with regard to unfair commercial practices. Here EC law has set a certain minimum standard in directives on misleading and comparative advertising¹⁹, on distance selling²⁰ and on distance selling for financial services²¹ but also maximum standards in the directive on unfair commercial practices²². However, the only remedy Member States must make available is the right of public bodies and/or consumer/trader organisations - depending on who is in charge of enforcement matters - to file an action for injunction, that is, to set an end to illegal commercial practices.

EC law does not provide or oblige Member States to set up procedures for compensation although the ECJ has recognised the right of individuals to claim damages in competition cases²³, this has not so far been extended to unfair commercial practices. Some studies propose such developments²⁴. It is left to the Member States to decide whether they allow consumers, individually or collectively to claim compensation for damages they suffer from unfair or misleading advertising. The degree to which compensation claims are possible varies enormously and the remedies available are rather limited in scope and reach.

¹⁶ ECJ Judgment, 20.9.2001, Case C-453/99, ECR 2001, I-6297.

¹⁷ Ashurst Study the conditions of claims for damages in case of infringement of EC competition rules Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html

¹⁸ Green Paper, Damages action of the EC antitrust rules, COM (2005) 19.12.2005, 672 final and White Paper, COM (2008) 165 final.

¹⁹ Directives 84/450/EC on misleading advertising and 97/55/EC on comparative advertising.

²⁰ Directive 97/7/EC on distance selling.

²¹ Directive 2002/65/EC on distance selling for financial services.

²² Directive 2005/29/EC on unfair commercial practices.

²³ The ECJ has recognised this right in its jurisprudence *Manfredi*, *Courage* and *Crehan*.

²⁴ Research undertaken by the Leuven Centre of Consumer law on an analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report, Study for the European Commission, (hereinafter Stuyck Report), available at:

http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm and research by the by the Dutch Consumer Authority http://www.consumentenautoriteit.nl/English_summary/Press_releases/Press_release_archive_2008/Press_release_December_3_2008_Consumer_Authority_over_half_a_billion_euros_lost_as_a_result_of_unfair_commercial_practices

The European Commission has published a Green Paper on consumer collective redress considering whether and to what extent it is feasible to introduce collective compensation claims at EC level, inter alia in the field of unfair commercial practices law.²⁵

2. Particularities of collective enforcement in competition and unfair commercial practices cases

Competition and unfair commercial practices may be characterised by four particularities which determine the feasibility of collective law enforcement.

- a) **Competition between enforcers.** The major actor in the field is the respective public authorities – cartel offices/competition authorities and/or market surveillance authorities – which have to survey the market and take action in case of infringements. This is universally the case with regard to the control of infringements against the competition law. However, the situation is different with regard to unfair commercial practices, where most but not all Member States have established public bodies to survey and control the national market. For cross-border litigation, all Member States have to nominate a competent public authority (Part I – section I). Some Member States leave enforcement to consumer and trade organisations. That is why, in the majority of Member States, there is the potential for some sort of ‘competition’ between public and private enforcers as well as between private enforcers that has to be turned into cooperation. However, consumer organisations perform a role which public authorities cannot play – that of being an effective lobby and counterweight to the industry/business lobby and a ‘watchdog’.
- b) **The type of damage consumers suffer from.** In competition law, a distinction may be drawn between those cases where consumers are directly affected – e.g. a cartel meant to harm consumers – and those where they are indirectly affected only – e.g. a cartel between producers of vitamins aimed at harming producers of foodstuffs who use vitamins in the production process. In the latter the link may be hard to ascertain.

In unfair commercial practices law, consumers may suffer damage from unfair or misleading commercial practices, e.g. they conclude a contract which they would otherwise not have concluded or costs are imposed on them via marketing strategies (e.g. unsolicited fax, SMS) or they pay for a quantity they do not get. Other cases concern unfair commercial advertising which effects cannot be clearly measured but where companies are supposed to have made profits out of illegal tactics.

The true problem results from the fact that all the relevant information is held by the companies – including the identification of customers. So the point is whether and to what extent companies may be legally compelled to disclose available information (e.g. to consumer organisations).

- c) **Quantifying the damage to consumers who are individually and directly affected.** Once damage is recognised as attributable to breaches of competition or to unfair commercial practices, consumer organisations have to overcome the difficulty of quantifying the damage. This is relatively easy, or at least possible, when the number of consumers is identifiable. However, the individual damage might be too low for an individual consumer to take action/write a complaint. In such cases, consumer organisations have to find ways and means to specify the damage the affected consumers might have suffered from. Sometimes, consumers would only be identifiable in theory and to identify them individually in practice might require resources which are disproportionate to the damage occurred. In these cases, alternative solutions can be encountered. Furthermore, methods are needed to calculate the possible damage of an often unidentifiable group of consumers. The problems are even more acute when the group of consumers cannot be identified i.e. users of taxis during a certain period.

²⁵ Green Paper on Consumer Collective Redress COM (2008) 794 final and Consumer Policy Strategy 2007-2013 COM (2007) 99 final, 13.3.2007, p. 11

- d) **How to quantify the damage of illegal practices that do not directly affect consumers.**
In these cases a large number of consumers are concerned. Whilst it is in theory possible to identify all consumers who are suffering from a vitamin cartel or who have bought wine with less quantity than indicated, in practice such an undertaking may be very difficult to accomplish. That is why mechanisms are needed which would enable the courts to estimate the damage. There are no European rules on this issue and Member States laws differ considerably.

CASE STUDIES

- *Altroconsumo organised the claims of thousands of Italian consumers against overpriced premiums for car insurances which resulted from a price cartel. After the Italian cartel authority had declared the cartel to be illegal, the way was free for consumers to claim compensation. However, in the very end most of claims failed.*
- *The situation was similar in France where the decision of the French competition court on a market-share agreement amongst mobile phone operators triggered action by UFC Que Choisir. Whilst 20 million consumers were concerned only 12.521 registered to join the case.*
- *When the Portuguese telecom company introduced a new price system providing for a new activation fee, DECO relied on unfair commercial practices and consumer legislation to fight down the incriminated practices after the Supreme Court had declared the fee illegal as it violated price regulations.*
- *German consumer organisations traditionally use the action for injunction to set an end to unfair practices of dubious personal loan brokers, to attack opt-out clauses in credit agreements by which consumers are imposed unwanted products, or data transfer clauses in standard terms without there being any legitimate reason.*

3. Legal environment and existing legal tools

There is a strong relationship between the legal setting and the legal tools. This is particularly true with regard to the envisaged cooperation between consumer organisations and public bodies. The key question is whether and to what extent consumer organisations have legal rights to request the information held by the authority, or even to legally oblige the public authority to take action. Consumer organisations should press for such rights and use them when appropriate (see part I).

Consumer organisations should build competences in the competition and unfair commercial practices fields, in particular with regard to the ways and means they have for handling complaints, e.g. a super complaint like in the UK legal order with regard to competition litigation. The super complaint allows consumer organisations to request the competent authority to take action. If the competent authority refuses, the consumer organisation may even go to court and enforce its right.

Last, but not least, it is necessary to consider what tools are available in the respective Member States. Do collective remedies aimed at compensating consumers exist?

4. Preparing the investigation

The investigation should be prepared by proof of infringement, calculation of damage and econometric studies. For instance, in Spain, OCU carried out a comparative testing of the olive oil market/annual supermarket survey which allowed the detection of anticompetitive behaviours. OCU's surveys were at the basis of the competition authority's investigation.

Burden of proof

The burden of proof, i.e. bringing together the hard facts of the case and demonstrating that the professional has infringed the law, rests with the defendant i.e the consumer organisation. In injunctive relief proceedings some of the Member States restrict the burden of proof to demonstrating that consumers *might* have suffered damages, no concrete harm has to be shown. In compensation claims the situation is different. Consumer organisations must demonstrate that consumers actually *have* suffered damages. The European Commission White paper on private damages actions²⁶, envisages several measures aiming at lightening the burden of proof for defendants (e.g. divulgation *inter partes* (between the parties), binding effect of national competition authorities final decisions, presumption of fault...)

As the number of consumers affected by unfair commercial practices or antitrust injuries might be high or even unknown, a standard form could be developed which would allow one to record and collect the data under a common scheme. The standard form should at least cover the contact details of the consumer (name, address, email), the reason which led him to suffer the damage, the description of the damage covered and if possible a quantification of the individual damage.

Calculation of damages

The next step is to develop a scientifically proven method of how to calculate the damages. In case of cartel and unfair commercial practices law this will not be possible without using econometric studies. Consumer organisations in big Member States (e.g. UK, Germany, Italy) could give access to their expertise and the scientific methods they developed to their counterparts in other smaller States. The White Paper²⁷ suggests that the European Commission could issue guidelines on the quantification of damages.

Whilst the necessary tools to undertake such studies are in theory available, they are costly and time consuming. It is therefore important to establish whether and to what extent the burden of enforcement may be and in most cases – especially in smaller States – should be shared between the public enforcement authorities and the consumer organisations (see more generally under part I – section I).

CASE STUDY – Cartel mobile

The French consumer organisation UFC Que Choisir successfully initiated a group action as a follow-on action after a cartel case decision. An economic study was prepared to calculate the overall damage and consumers were able to calculate their individual damage through a website.

²⁶ White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008.

²⁷ Idem.

SECTION III - PRODUCT LIABILITY AND PRODUCT SAFETY

1. Preliminary remarks

Tort law and contract law

When it comes to product liability, the victim may or may not be the contractual partner. Both contract and tortious claims –action based on civil law - may be possible. The important point is that it will usually be a personal injury claim. These personal injury claims give rise to different considerations; they require specialist expertise and consumer organisations may be less well placed to contest these than contract claims.

In addition, claims for damage to property - other than the defective product - can be claimed in tort.

Public and private enforcement/ distinction between product safety and product liability

Product safety is understood as the public regulation of safety in contrast to product liability which is concerned with private redress. Product safety enforcement is usually put in the hands of public authorities. Depending on the nature of the product, different authorities may be involved (e.g. foodstuffs, chemicals, pesticides, drugs, or technical consumer goods). When there are public authorities involved, consumer organisations might build links and cooperate. By contrast, when consumers seek compensation based on private law rights, this is described as product liability litigation. It may involve allegations of breach of contract, but usually involves tort law in the form of negligence and strict product liability.

Different degree of concern

Consumers are affected to a different degree by physical injury and/or damage of property. Consumers feel very concerned about safety matters and consumer organisations should recognize the importance of physical safety. However, consumer associations also need to consider carefully whether they should become directly engaged or only play a supportive role in cooperating with enforcement authorities and building alliances with private sector lawyers.

2. Cooperation with product safety authorities

The Member States authorities or the European Commission

Product safety legislation is largely harmonised with regard to all sorts of products bearing an inherent risk. Most European directives provide for a mechanism under which the Member States and the European Commission are obliged to cooperate if a dangerous product has been notified to one of the national authorities. There is an ever stronger pressure on national product safety authorities to act jointly, which makes it more difficult for consumer organisations to build an appropriate cooperation partnership. The national authorities may delegate the issue to the European Commission where consumer organisations may have to negotiate new procedures to be allowed to participate in negotiations. The level playing field may change over time. The European Commission or some sort of a European product safety authority with a coordinating function may play an enhanced role above or alongside national authorities.

Competence of the authority

The big issue for consumer organisations is how to make use of the competence entrusted to product safety authorities. Two scenarios might be distinguished:

- If the consumer organisation has discovered the defective product, the question is how to get the authority involved as in most cases the competent authorities alone have the necessary resources to investigate the case. This will involve building links with the authorities (see below).
- If, however, the authorities take the initiative, the consumer organisations face the problem of how to get access to the data compiled and collected by the authorities.

Access to data

Most Member States have adopted consumer information legislation which allows consumer organisations and/or consumers to request access to data under certain conditions. So far there are no Europe-wide standards on access to information held by national authorities.

At European level, RAPEX – the EU rapid alert system for all dangerous consumer products – aims at creating a network between national authorities on regulatory actions which have been taken in one Member State to stop the marketing of a dangerous product. Consumer organisations should be granted access to the whole of RAPEX directly.

If the incriminated product is sold all over Europe, it might be best to seek the requested information from the most accessible product safety authority. In fact, there are considerable differences in the accessibility of data in the various Member States.

Management of data during litigation

Product liability litigation often takes years before a result becomes visible. During these years, more information will be generated by the product safety authorities. This information should ideally be shared with consumer organisations, in order to access joint information and risk management which serves the victims.

Warning the public : a liability

If the damage has not yet occurred, but a product is deemed to be unsafe, the question is not only to find out – preferably very quickly – whether the product is indeed unsafe, but also to decide whether the public should be warned and by whom - by the trader, public authorities or consumer organisations?

Warning the public might often be the most severe and the most efficient means of consumer protection. As it involves financial detriment to business, both public authorities and consumer organisations are faced with potential liability claims in case of an unjustified warning. Again, there are substantial differences in the Member States. Scandinavian authorities are generally more proactive. They are ready to issue a warning where other national authorities remain reluctant. It is for the consumer organisations to find out these differences and to make use of them to – maybe – indirectly inform the public.

Type of action and type of damage

There is a strong link between the type of action and the type of damage. Severe damages require more intensive type of action. On the contrary, if the damage/risk is minor and if the number of potential victims is limited, there may be less urgency about the means used to warn the public.

3. Speedy procedure

Time matters

One of the lessons to be drawn from litigation in the field of product safety, is that time matters. Quite often product liability litigation and negotiations may last for several years. It might be a strategy of the company concerned to extend the litigation, just hoping that over time public awareness declines and the claimants might lose impetus. It is here where consumer organisations have a central role to play, as watchdogs, keeping the issue hot, by constantly and regularly bringing it back under the spotlights. There is also a need to ensure that product safety regulatory action is taken immediately to prevent further harm, even if civil redress takes longer.

Transparency and access to information of all concerned

Throughout the whole procedure, from the first steps to be undertaken in the preparatory stage, up to the filing of the case and its execution, transparency must be safeguarded. There is an obvious tension between the need of consumer organisations to cooperate with public authorities and to negotiate with business – where there might be an opposition between a plea for confidentiality and the concern of all affected, to be kept informed of all relevant steps. It is for the consumer organisations to strike the right balance here.

4. Expertise of Lawyers

External competence in health and safety

External competence is often needed, in order to assess the degree of danger with the help and support of public authorities and/or laboratories and also to assess the legal issues that may arise. Product liability litigation is often complex and requires skills which are usually not at hand in consumer organisations. External lawyers and experts have to be found and financed.

5. Building contacts with consumers

Ways and means to seek consumers

In product liability cases, where the damages can be substantial, consumers may readily come forward, although there is still the problem of alerting them of their right to sue.

Management of consumer complaints

In the publicity campaign, the sheer number of consumers involved in the litigation matters, but in practice large number require intensive resources as each of the consumers has his or her own destiny and wishes to be treated as an individual (see part I).

6. Negotiations

Consumers who are suffering physical injury request a speedy procedure so that the danger of not being compensated in time can be eliminated or reduced. There is certainly pressure on consumer organisations to try to solve the issue expeditiously and that often involves entering into negotiations. Although negotiation in some systems will be key, in other traditions it may be more usual to go to court. Of course, where product safety issues result in product liability claims for severe injuries, long court procedures are the end result.

CASE STUDIES

Perhaps because of the high level of complexity, consumer organisations are not involved directly in product safety and liability issues. Often the regulatory authorities are competent to intervene in product safety matters and private sector lawyers are geared up to seek compensation for consumers physically injured. Nevertheless, some important work has been undertaken in this field by consumer organizations:

- *Altroconsumo in Italy was heavily involved with the issue of ITX contamination of baby milk and used its influence to push the regulators and publicise the problem.*
- *The Dutch Consumentenbond successfully sued two exhibitors of whirlpools whose equipment caused 242 people to become ill (32 persons died) following an epidemic of "legionella pneumophilia".*
- *Similarly, the broader interest in health as well as safety was evident in Austrian cases brought regarding health claims on food products.*

SECTION IV - CONTRACT LAW

1. Preliminary remarks

Consumers may have many contractual disputes. However, consumer organisations are most likely to be involved in legal action where the contractual issues have a collective dimension. Most obviously, it is the case with unfair terms in standard form contracts. However, there may be other contractual disputes that affect large numbers of consumers for example the mis-selling of property loans in Germany which led to numerous European Court of Justice cases under the Doorstep Selling Directive. Credit, insurance and banking law provides a fertile field for collective contract disputes. Product quality issues may also lead to collective disputes where many consumers suffer from the same defective product e.g. a generic quality defect on a new car.

2. Cooperation with authorities in the area of contract law

In principle enforcement of contract law lies in the hands of individual private parties, with the exception of unfair terms where collective enforcement is the rule. Consumer organisations alone are in charge of enforcement in Austria, Germany and Slovenia. In all other Member States, consumer organisations act as an alternative to authorities, at least in purely national conflicts. In Nordic countries, the ombudsmen have long played a crucial role. In the United Kingdom, the role of state authorities, such as the Office of Fair Trading, has increased over time as the European legislation required public authorities to be able to seek injunctions against breach of EC consumer law. Consumer organisations need to work with public authorities and consider how best they can place leverage on them to use their powers to the full. Typically though, government bodies will be more interested in using their injunctive powers than seeking financial redress, which is often left to individuals or consumer organisations.

Two steps procedure – first clarifying responsibilities, then compensation: It is useful for consumer organisations if there is a two stage procedure; once the breach of the legal obligation is established (perhaps by an injunction brought by a public authority), the consumer organisation will only have to file a follow-on action for damages. If consumer organisations work in partnership with other bodies under such procedures, there is a need to clarify who is responsible for what in the preparation of litigation.

3. Expertise of lawyers

Often consumer organisations may have enough resources to deal with contract law issues by themselves. This might be facilitated by the fact that contract law issues are quite often legally not too complex; for example, questions over the fairness or unfairness of contract terms may be relatively straight forward to assess. Of course, there are exceptions and if extended litigation is needed consumer organisations might want a public authority to become involved, especially in countries where the State does not fund consumer organisations to perform this supervisory role.

4. Negotiations

Standard contract and individual terms

Consumer organisations which file an action for injunction may be confronted with offers from the defendant to negotiate the case. If the subject matter is a standard term, negotiations can become complicated as the standard term might affect a large number of consumers who have no opportunity to participate in the negotiations. The 'public' character of the standard terms might entail the need to let the courts decide over the fairness or unfairness. This will often depend upon the national tradition as to whether it is easy and usual for matters to go to courts or whether it is preferable to negotiate and perhaps involve national authorities.

Awareness of consequences of engaging in negotiations

Negotiations raise an additional problem for consumer organisations, as they may face challenges to maintain their impartiality. The circumstances might cause them to be in conflict between issues of confidentiality resulting from the negotiating process and the need to be transparent towards those they represent. This may not be an argument against negotiations also negotiations require skills and resources on the side of consumer organisations to handle the delicate issues than can arise.

Numerous cases on contract law issues were presented during the three years of the project. They are all available on CLEf website (www.clef-project.eu).

SECTION V. FINANCIAL SERVICES

1. Introductory remarks on the particular nature of financial services

Heterogeneity of services

Financial services are characterised by their extreme heterogeneity and their growing complexity. The list below gives an overview of some of the main areas relevant from a consumer's perspective:

- **Credit services:** where the consumer requests money from the lender. Consumer credit can take various forms, including installment sales (including hire-purchase), pure money loans, credit cards, overdrafts etc. Mortgage credit and consumer credit are usually treated as separate issues. Hire can also be viewed as performing the same function as credit in some situations (e.g. if the consumer receives the product and pays for it in installments).
- **Securities for movable and immovable:** when the bank grants a credit, it often asks for financial guarantees. These can take various forms (e.g. an indemnity from a relative or a friend).
- **Investment services:** where the consumer invests money, usually via an intermediary, quite often a bank, to buy funds, shares etc. in order to receive a reasonable return.
- **Banking services:** these are usually related to the consumer's bank account and raise issues about the fees and charges imposed on the consumer and the services provided, in return for money transfers, direct debit, debit cards, overdrafts, deposits etc.

European and national requirements

The whole financial services area is characterised by a dense network of European and national rules but many gaps are still left. To improve consumers' protection in this field, what is first and foremost needed is a particular consumer policy with regard to financial services beyond merely consumer credit.

A. Remedies and enforcement

All EC Directives in the field of financial services are very weak with regard to granting consumer remedies and setting standards for private enforcement. To take just one example, the Consumer Credit Directive²⁸ has not been integrated in the scope of application of the Directive on Injunctions²⁹. These "financial services" directives mainly refer to the power of administrative authorities. This is particularly true in the field of investment services. Therefore private judicial enforcement, individually and/or collectively, remains largely in the hands of the Member States.

B. No coherent body of consumer financial services law

"Traditional" consumer protection law might be understood as a relatively coherent set of rules, which is often put together in a national consumer code or integrated in national civil codes. The same cannot be said with regard to consumer financial services. Some Member States until recently did not even have a law dealing with consumer credit.

Possibly consumer credit might be regarded as a separate - though coherent - field of law, but the other areas of financial services law are typically characterised by a twofold regulatory purpose with rules aiming at both the functioning of the financial market and customers' protection. The customer, however, can be either a business or a consumer. The result is a highly differentiated set

²⁸ Directive 2008/48/EC on Consumer Credit.

²⁹ Directive 98/27/EC on Injunctions.

of legal rules that might not properly address the consumers' needs. This also means that consumer protection rules are scattered over a large number of laws and regulations.

2. Expertise and specialisation of consumers' organisations

A. Expertise

The financial services area is characterised by its high complexity and ever changing legislation. Financial products are very difficult to understand for non specialised lawyers and all the more so for most individual consumers. As financial products are virtual, complex and sometimes sold to the consumer only once in his/her lifetime, often with high, not transparent commissions for intermediaries - which could lead to conflict of interest. The situation is made worse by the banks not informing consumers properly on the characteristics of the services they buy. Financial services are usually outside the education and training of young lawyers. Expertise is needed and must be built up. This requires cooperation between lawyers and economists. Such expertise is a scarce commodity in the consumer movement – and even more so in the case of the smaller Member States.

B. Specialisation

Consumers' organisations usually intervene in many areas and are rarely in a situation allowing them to specialise in a specific domain – financial services or other. Their field of action to a large extent depends on the current problems consumers encounter in their own Member State. It is nevertheless noteworthy to acknowledge that organisations dealing only with protecting investors have been created in some Member States – such as Spain. This problem of capacity building is, if anything, aggravated in the smaller Member States.

C. Internationalisation of consumer problems

Financial services very often have an international and cross-border dimension and so are the consumer problems they give rise to. In fact, financial service providers are often operating on a world-wide basis – as the recent worldwide financial crisis has highlighted. Local consumer problems therefore can bear an inherent transnational dimension. Financial services are an area that calls for cross-border cooperation and cross-border litigation under the auspices and with the support of consumer' organisations.

3. Where the problems lie

Consumers' organisations start bottom-up. Apart from when a new piece of legislation is being discussed, generally the trigger point for consumer organisations' involvement will be consumers' complaints. In the financial services sector, problems often give rise to quite large scale consumers' complaints against a particular company and/or on a particular consumer issue. In this context, organisation set up to gather claims in relation to particular problems (so-called "Special Purpose Vehicles") have proven particularly useful for the gathering of claims. Such entities already exist in Belgium and the Netherlands.

Bank charges

Worldwide bank charges are often unfair to consumers. The consumer most of the time will face difficulties in understanding the true costs of his or her bank account. In fact, the consumer should be able to differentiate between the main contract and additional services. He must know for what service he is paying a fee. There are, however, no EC rules on bank charges as such and consequently, legal rules differ from country to country. The newly adopted Payment Services Directive³⁰ only covers certain types of bank charges in particular for cross-border payment.

³⁰ Directive 2007/64/EC on payment services.

Over decades consumer organisations are fighting against hidden, overpriced or simply unfair bank charges, unauthorised overdraft charges and penalty clauses. Banks tend to 'hide' these additional costs in their contract terms.

The overall problem for consumers is first the lack of EU standard: first, the Directive on price indication³¹ does not apply to financial services. The second problem is the lack of transparency recently confirmed by a study commissioned on behalf of DG SANCO³². Thirdly, once the charges are transparent, the overall price of these services can nevertheless not be proportionate.

Thus, the issues facing consumers' organisations are twofold: (i) the extent to which transparency arguments can be used to challenge the substantive charges (on the basis that they have not been properly explained or justified) and (ii) once the charges are transparent, to what extent excessive charges can be subject to control under the unfair contract terms legislation or special legislation adapted to the banking sector.

(i) Non-transparent charges/ transparency test

The Directive on unfair contract terms³³ provides a clear answer with regard to the scope of control over unfair contract terms but does not clearly regulate the potential effects of non-transparent price clauses - for instance, are these void? While the European Court of Justice jurisprudence seems to go in that direction³⁴, it might well be that the law in the Member States is not yet settled with regard to the effects of non-transparent terms.

(ii) Transparent excessive charges/ fairness test

Excessive charges which are transparent are outside the scope of the transparency test. Such charges may, however, be submitted to the fairness control test under the unfair contract terms Directive. Nevertheless, it is worth noting that this option is not available in some Member States as they have exempted price clauses in standard terms from the fairness control when transposing the Directive.

CASE STUDY – UK bank charges

The most comprehensive effort to clarify the borderline between transparent and non-transparent contract terms in financial services contracts had been undertaken by the Office of Fair Trading (OFT) in the bank charges case. The OFT has analysed the contract terms in the sector of current accounts, has built groups of terms and then brought the case to court. However, in the very end, the Supreme Court decided that bank charges in question were not subject to judicial control under unfair contract terms regulation.

³¹ Directive 98/06/EC on price indication.

³² Data collection for prices of current accounts provided to consumers
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1341&format=HTML&aged=0&language=EN&quiLanguage=en>

³³ Directive 93/13/EC on unfair contract terms.

³⁴ ECJ case *Commission v. Netherlands* - ECJ, 10.5.2001 Case C-144/99 ECR 2001 I-3541.

4. Risks and chances of the involvement of consumers' organisations

Chances

When consumers' organisations become aware of large scale consumer complaints, or are approached *en masse* by individual consumers, they have the incentive to become involved. Consumers' organisations can then become prominent players by pushing financial supervisory authorities into action, by constantly providing new information to the media and by supporting individual and/or collective consumer actions. In addition, such activity can have a positive impact on the image of the consumers' organisations in demonstrating competence in the field of financial services. However, such an engagement is only possible, feasible and manageable, if the organisations have already built up the necessary expertise in the relevant field.

Risks

Consumers' organisations may run a risk, if they raise the expectations of consumers, who have suffered substantial loss from financial transactions, but ultimately do not have the competence or capacity to assist. However, even if the organisations have the necessary skills, the question remains whether they have enough resources to deal with mass conflicts often over periods of a couple of years or longer. The sums at stake in financial matters cases often act as a deterrent for consumers' organisations to intervene as if they lose the case, they would face unbearable costs. The main problem is therefore how to fund such a collective action.

5. Criteria for the choice of an enforcement strategy

A. Cooperation with financial supervisory authorities

Financial supervisory authorities may undertake – and pay for the necessary – investigation to define and determine the dimension of the consumers' problem(s). Here more than ever cooperation strategies with supervisory authorities are crucial (see part I – section 1).

B. Combination of available remedies

The first question for consumers' organisations is how best to combine the available remedies under national law to achieve collective compensation of consumer harm, even when a group action is not available. A long term strategy might be to combine injunction with compensation claims. Compensation claims of consumers, individually and/or collectively, may be more successful if the underlying advertising of financial services is unfair or misleading and/or if standard contract terms in investment contracts are unfair and therefore void. Consumers' organisations need to press for compensation to be available in all these situations.

The second step could be to launch a "test case" (see glossary) which helps to clarify common legal issues. However, such procedure is not available in all national procedural laws; where it is not, reforms to include such a procedure should be advocated.

The third step might then be reference to collective compensation claims if they exist or, if they do not, of bundled individual actions. Given the size of many financial services claims, there may be scope for consumers' organisations to liaise with private sector lawyers in bringing such claims.

C. Financial services consumer ombudsman and Alternative Dispute Resolution (ADR)

A financial services consumer ombudsman may be a possible way forward for consumers to resolve claims more speedily and effectively than through the ordinary courts. Ombudsmen normally have the advantage of being free or low cost to consumers and often only binding on the company. However, consumers need to be reassured of their independence and on the enforcement of the solutions found.

Experience in the United Kingdom, which has rather advanced rules, has shown that even where they are independent, financial services ombudsmen may be reluctant to issue decisions that have significant precedent value and therefore far-reaching consequences (e.g. in the UK bank charges litigation where thousands of very similar cases have been brought and needed to be taken to the High Court). They prefer cases with wider implications to be dealt with by the Financial Service Authority or by the OFT on the basis that there might be a problem in the market. Consumers' organisations might put more emphasis on the EC Recommendations on Alternative Dispute Resolution (ADR) which have most recently been the subject of a consultation,³⁵ and use them as a yardstick for checking whether and to what extent the existing ADR mechanism comply with the standards of independence as well as transparency, effectiveness, legality, and liberty.

CASE STUDIES - Settlement

- *Mass action conflicts in the financial sector tend to be settled, even after long litigation. This happened in the Dexia case where the consumer organisation, Consumentenbond prepared the ground for a settlement in court that affected thousands of consumer complaints against security lease products.*
- *It might also happen in the on-going German Telecom case where thousands of consumers are tied in group litigation for a couple of years now. However, the question whether the Telecom company held back detrimental information before the selling of the so-called second tranche of shares may still take years. Such a decision, however, is needed to provide the ground for settlement, if any.*
- *Similar experience can be reported from Austria. VKI put pressure on highly non-transparent 'secure' short term investment service contracts where neither the interest rate nor the length of the contract were clearly stated. Banks were ready to settle the conflict and return 72% of the market price.*

³⁵ Public consultation on ADR in the area of Financial Services: http://ec.europa.eu/internal_market/finservices-retail/docs/redress/consultation_summary_en.pdf

CLEF Glossary

CLEF Glossary

Disclaimer:

In the framework of the project this glossary serves as a tool to clarify different (European) legal concepts. As there are no water-proof definitions, it should be seen as a pragmatic attempt to set common standards for the discussions within the project. Where possible the glossary is based on EC law definitions.

Out of court settlements

Alternative Dispute Resolution (ADR)

Out of court mechanisms for resolving disputes, (no matter what they are called: consumer arbitration, conciliation, mediation etc...), which attempt to resolve a dispute between a consumer and a business party. This term does not apply to customer complaint mechanisms operated by a business and concluded directly with the consumer or to similar mechanisms carrying out such services operated by or on behalf of a business.

ADR schemes are of different forms:

Arbitration

Where a neutral third party that has been agreed upon by the parties decides on a claim and the decision is binding for the parties. Arbitration is most commonly used for commercial disputes, but not for consumer disputes.

Arbitration-type ADR

The European Commission with recommendation 98/257/EC on arbitration-type ADR has defined this type of ADR as the settling of a dispute through the active intervention of a third party, who imposes a solution.

Mediation

Any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law of a Member State.

Mediation-type ADR

The European Commission in recommendation 2001/310/EC on mediation-type ADR has first defined this type of ADR as a third party attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent. In cross-border litigation, the Directive on mediation provides for a binding regulatory framework for settling conflicts with the assistance of a mediator.³⁶

³⁶ Directive 2008/52/EC of 21 May 2008, on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3.

Ombudsman

A unique definition of Ombudsman across Europe does not exist. Its role and functions will vary from one country to another.

In the United Kingdom, it is used to identify an independent third party who offers a (usually) free service and whose decisions usually bind the business but not the consumer. These may be established on a private industry basis or be established by the state (e.g. Financial Services Ombudsman). It will be referred to as Private Sector Consumer Ombudsman.

In central Europe, it is often used by industry and commerce to designate an independent person, often a former judge, who is in charge of dealing with consumer complaints addressed to the respective industry sector (banking or insurances). It will be referred to as Industry Based Consumer Ombudsman.

In the Nordic countries, the Ombudsman is an enforcement body for marketing practices and contractual terms. The Ombudsman is appointed by the government and does not deal with individual consumer complaints. It will be referred to as Nordic Ombudsman.

Remedies, fines and sanctions

Remedy

Remedy, in the EU understanding, covers individual as well as collective actions, such as actions for injunctions, representative action, group action and skimming-off-procedures.

Fine

There is no harmonised definition of “fine” in EC law. We will refer to this term in the context of public authorities being given the right to oblige companies, which have violated the law, to pay a certain amount of money to the public purse.

Sanction

There is no harmonised definition of “sanction” in EC law. EC law usually does not indicate whether the sanctions are of a criminal, administrative or civil law nature. Member States are free to decide what sort of sanctions they introduce when implementing EC legislation. They can be of two types: administrative sanctions (by a public authority) or civil law sanction (by a court).

Administrative and civil law (judicial) sanctions

Administrative and civil law sanctions may range from injunction to compensation and fines. The crucial difference is that a public authority can take action out of its own motion, whilst civil law sanctions can only be applied by the courts. Member States differ in the set of sanctions made available to administrations and consumer organisations.

Collective actions

Group action

Group action on European level refers to a system where one claimant, either an individual consumer or a consumer organisation, can seek redress and ask for a decision on behalf of a group with equal or similar problems, giving the members of the group the right to enforce their rights in accordance with the decision. Some EC countries have introduced some sort of group action in their legislation, referred to as group action, multiparty action or collective action.

In opt-in group actions, consumers have to declare before the court that they intend to participate in the organised procedure. In opt-out group actions, all consumers affected are automatically regarded as belonging to the group unless they declare that they do not want to participate.

Representative action

A broad variety of consumers may be affected by the same type of accident, injury or violation of the law. These consumers might – instead of bringing the case to court themselves – transfer their rights to a representative who then acts instead of the consumers. The representative can either bring the action on behalf of consumers who will receive the damages themselves (traditional representative action) or the representative receives the damages (collective representative action). In some systems, the representative must be a member of the group, but in others it can be a consumer organisation or state authority.

US-style Class action

A US-style class action is in principle a group action but with very specific features that do not exist in European group action models. The lawyer (i.e. a law firm) plays a key role, in preparing, organising and financing the class action. His investments will be compensated for by contingency fees. Once the class is defined, consumers can only pursue their rights individually if they opt-out. A jury of laymen plays a key role in the decision-making process and may award punitive damages or treble damages.

Other Remedies

Test-Case

A test case is a procedure in which a case brought by one or more persons leads to a judgment that forms the basis of other cases brought by persons with the same interest against the same defendant.

Skimming-off actions

Skimming-off actions need claimants who act on behalf of consumers. These may be consumer organisations and/or public authorities. Skimming-off actions aim at asking the trader to pay back to the victims the ill-gotten gains. Skimming-off actions may differ in the degree to which consumers or consumer organisations benefit from the recovery of the ill-gotten gains.

Claims for injunctions

Under Directive 98/27/EC, it refers to a means to stop the use of unfair terms, commercial practices or other breaches of consumer law. Claims for injunctions have only a prospective effect; they are not meant to remedy the harm caused by the breach.



The Consumer Law Enforcement Forum (CLEF) project (www.clef-project.eu) is concerned with the role consumer organisations can play in making the consumer protection rules fully and equally effective throughout the European Union, in particular in the Member States from Eastern and Central Europe. Its main aim is to ensure consumer organisations are aware of the enforcement possibilities that are available, learning from the experience of others, and develop strategies on how to engage in enforcement.

CLEF project partners are:

- Altroconsumo, Italy
- Association for Consumers' Protection - APC, Romania
- Consumentenbond, the Netherlands
- Cyprus Consumer Association
- Polish Consumer Federation National Council - FK
- Forbrugerrådet, Denmark
- Ghaqda tal-Konsumaturi, Malta
- National Association for Consumer Protection in Hungary - NACPH – OFE
- Latvia Consumer Association - PIAA
- Association of Polish Consumers - SKP
- Sdruzeni Obrany Spotřebitelu - SOS, Czech Republic
- Test-Achats, Belgium
- UFC Que Choisir, France
- Verein für Konsumenten-Information - VKI, Austria
- Verbraucherzentrale Bundesverband - vzbv, Germany
- Which?, United Kingdom

These guidelines on enforcement and collective redress are the outcome of this 3 years project. They consist of:

- General guidelines on consumer redress;
- Checklists for consumer organisations' strategy on collective redress;
- Specific guidelines for collective actions in competition, unfair commercial practices, contract law and tort law, and financial services.

While being aimed at consumer organisations, these Guidelines can also be considered as a great source of information and proposition for public authorities and other stakeholders.