

**The Challenge of**  
**transnational action on injunctions**  
**and collective redress**



- I. Introduction – Real problems for parties and courts**
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## I. Introduction - Real problems for parties and courts



## **II. EU Green Paper 2008 on Consumer Collective Redress**

- II.1 Purpose of the Green Paper COM(2008) 794
- II.2 Opinion of the European Economic and Social Committee 2009 (2010/C 128/18)
- II.3 Scope of Consumer Law (e.g. unfair commercial practices, unfair terms, etc)

## II.1 Purpose of the Green Paper COM(2008) 794

### The **purpose**

Analyzing cross border problems between claims of a **large group** of consumers against a **single** trader

Discussion of two collective redress mechanisms:  
opt-in collective action (**group action**), and  
**representative action**

Positive effects to collective redress:  
**Reducing high costs** of civil procedures  
**Bypassing strict formalities** of civil procedures

## II.1 Purpose of the Green Paper COM(2008) 794

Negative effects of normal civil procedures to collective redress:

insufficient **funding** and risk of high litigation fees

lack of **expertise** of consumer organizations

strict **formalities** regarding admissibility

**complexity** of collective redress

**lengthy proceedings** because of complexity

**delay** of proceedings

**Voluntariness** of ADR-Mechanisms

**Differences** between **group** and **particular** claim

## II.1 Purpose of the Green Paper COM(2008) 794

### Four options

**Option 1 – No EC action**

**Option 2 – Cooperation between Member States**

**Option 3 – Mix of policy instruments**

**Option 4 – Judicial collective redress procedure**

## II.1 Purpose of the Green Paper COM(2008) 794

**Q1:** What are your views on the role of the EU in relation to consumer collective redress?

**Q2:** Which of the four options set out above do you prefer? Is there an option which you would reject?

**Q3:** Are there specific elements of the options with which you agree or disagree?

**Q4:** Are there other elements which should form part of your preferred option?

**Q5:** In case you prefer a combination of options, which options would you want to combine and what would be its features?



## II.2 Opinion of the European Economic and Social Committee 2009 (2010/C 128/18)

Access to **effective judicial protection** is a fundamental right of consumers

Encourage businesses to develop **internal complaint handling system**

**less formal** and **less costly** procedure

ADR-systems ought to become **binding legislative tools**

Prompt, fair, **efficient and relatively low cost** resolution

## II.3 Scope of Consumer Law (e.g. unfair commercial practices, unfair terms, etc)

**Unfair business**-to-consumer commercial practices

Sale of consumer goods and associated **guarantees**

**Product liability** and safety of goods

**Distance contracts**

Distance marketing of consumer financial services

**Consumer credit**

### **III. Connected EU Directives on Consumer Redress**

III.1 Directive 2009/22/EC on injunctions

III.2 Recommendation 2001/310/EC on the principles for out-of-court bodies

III.3 Directive 2008/52/EC on aspects of mediation in civil and commercial matters

### III.1 Directive 2009/22/EC on injunctions

Approach: **NOT** by private international law (**conflict of law**), because of complexity or impossibility of **recognition of different bodies** in national civil procedure law (ombudsman, OFT, consumer organizations)

Approach of the Directive on injunctions: **Recognition of actions** (to protect collective interests of consumers) brought in by **Ombudsman** and similar state institutions  
**OFT** - Office of Fair Trading (London)  
**Consumer Organizations**

### III.1 Directive 2009/22/EC on injunctions

#### **Actions for an injunction (art 2)**

**Cessation** or prohibition of any infringement

**Publication of the decision**

**Payments into the public purse** (in the event of failure to comply with the decision in so far as the legal system permits)

#### **Provisions for wider action (art 7)**

Possibility of actions with "more extensive rights"

(claims for sums of money? → class action at national level?)

## III.2 Recommendation 2001/310/EC on the principles for out-of-court bodies

Recommendation applies to third party bodies responsible for **out-of-court consumer dispute resolution procedures**

**Principles** of out-of-court consumer dispute resolution

Impartiality

Transparency

Effectiveness

Fairness

### III.3 Directive 2008/52/EC on aspects of mediation in civil and commercial matters

**Objective** of maintaining and developing an area of **freedom, security and justice**

→ Consequence of this objective:

**Judicial cooperation in civil matters** that are necessary for the proper functioning of the internal market

Fundamental: **Principle of access to justice**

### III.3 Directive 2008/52/EC on aspects of mediation in civil and commercial matters

Because of **complex, lengthy and costly** judicial proceedings →  
Mediation can provide **cost-effective and quick** extrajudicial resolution (as part of ADR - Alternative Dispute Resolution)

**Relation** between mediation and judicial proceeding

No disadvantages to parties who choose **mediation**

No prevention from initiating **judicial proceedings** or arbitration

**No limitation** or prescription during meditation

Settlement agreement transnational **enforceable**



## **IV. Importance of a better approach for European Law**

IV.1 Advantage of US class action (possibility of claims for sums of money)

IV.2 Negative effects of US class action

IV.3 US class action and the search for a better European approach

## IV.1 Advantage of US class action (possibility of claims for sums of money)

### US Federal Rules of Civil Procedure - **Rule 23 a)**

One or more **members of a class may sue** or be sued as representative parties **on behalf of all** only if

(1) the class is **so numerous that** joinder of all members is impracticable,

(2) there are questions of law or fact **common to the class**,

(3) **the claims** or defenses of the representative parties **are typical** of the claims or defenses of the class, and

(4) the representative parties will **fairly and adequately protect** the interests of the class.

## IV.1 Advantage of US class action (possibility of claims for sums of money)

### US Federal Rules of Civil Procedure - **Rule 23 b)**

(in addition to Rule 23 a) ...

(3) the court finds that the **questions of law or fact** common to the members **of the class predominate** over any questions affecting only individual members, **and** that a **class action** is **superior to other available methods** for the fair and efficient adjudication of the controversy.

### US Federal Rules of Civil Procedure - **Rule 23 d)**

Court must **approve any settlement** or compromise of the claims

## IV.2 Negative effects of US class action

**Background** of US class action:

Strict **adversarial culture** of US legal system

US Federal Rules of Civil Procedure - **Rule 23 c)**

For any class certified under Rule 23(b)(3), the **court must direct to class members** the best notice practicable under the circumstances, including individual notice to all members who can be identified through **reasonable effort**.

**Opt-Out-System**

Court will exclude from the class **any member** who **requests exclusion** (23 c-2)

## IV.2 Negative effects of US class action

### **Conclusions:**

Regarding Continental Civil Procedural Law, the US Class Action System is in conflict with

procedural right and **freedom of choice** to sue or not to sue  
procedural **right to be heard**, and too often combined with  
problematic topic of '**punitive damages**'

On the other hand: persons profit **without any contribution** and  
effort to the case

## IV.3 US class action and the search for a better European approach

**Avoiding the negative effects** of US class action regarding European continental procedural law - possible topics

Recognition of **action brought by an association**

Recognition of **cumulated actions** with a **clear opt-in-rule**

**Fast, simple and low-cost proceedings** at the courts

Evaluation / combination of **judicial and extra-judicial framework**  
(search for a European '**best practice**')

## **V. Swiss approach to national and transnational consumer redress**

- V.1 Swiss Code of Civil Procedure (Swiss CCP) 2008  
(in force 1st Jan 2011)
- V.2 Action brought by an association (Swiss CCP 89)
- V.3 Several parties and cumulated actions (Swiss CCP 93)
- V.4 Mediation within litigation (Swiss CCP 214-218)  
mediation and settlements
- V.5 Conciliation within litigation (Swiss CCP 226 and 241)  
hearings and settlements

## V.1 Swiss Code of Civil Procedure (Swiss CCP) 2008 (in force 1th Jan 2011)

**Why reference** to new Swiss procedural law?

**Background** of Swiss law in general:

Long tradition of a **very cooperative culture** in the  
Swiss judicial and extra-judicial system

**Continuation** of this cooperative legal culture in the new  
Swiss Code of Civil Procedure, in force 1th Jan 2011.



## V.2 Action brought by an association (Swiss CCP 89)

### Section 1 (legitimation)

Associations and other **organisations** of Swiss **national or regional importance** that are by virtue of their statutes authorised to safeguard the **interests of particular groups** can bring an action in their own name

### Section 2 (possible actions)

**Prohibition** of a violation

**Cessation** of a violation

**Declaration** of illegality of a violation of rights

## V.2 Action brought by an association (Swiss CCP 89)

Section 3 (reservation)

**Specific statutory provisions** governing actions brought by associations remain reserved.

Important for **transnational consumer redress**:

Swiss Code of unfair competition (UWG 10):

Action of associations of **suppliers** (Article 10 lit a)

Action of associations of **consumers** (Article 10 lit b)

Action of Swiss **government** (Article 10 lit c; **restricted** action)

## V.2 Action brought by an association (Swiss CCP 89)

Important for **transnational consumer redress**:

Swiss Code of unfair competition (UWG 9 sect. 1):

**Prohibition** of a violation (Article 9 lit. a)

**Cessation** of a violation (Article 9 lit. b)

**Declaration** of illegality of a violation (Article 9 lit. c)

**Publication** of the judgment (Article 9 sect. 2)

**But no class action** (claim for sums of money) for associations;

Possible only **single members** of particular groups (Art 9 sect 3)

**see V.3 →**

## V.3 Several parties and cumulated actions (Swiss CCP 93)

**Addition of the raised claims** in cases of simple joinder and cumulated actions (**Swiss CCP 93**)

### **Simple joinder (Swiss CCP 71)**

#### Section 1

Where the rights and duties which are to be determined are based on **similar facts or legal grounds**, **several persons may sue** or be sued **together**.

The parties **may** appoint a **joint representative (Swiss CCP 72)**

## V.4 Mediation within litigation (Swiss CCP 214-218) mediation and settlements

Court **recommendation of mediation** at any time (CCP 214)

**Application of parties** for mediation at any time (CCP 214)

Organisation (incl. costs) of mediation **by parties** (CCP 215)

**Confidentiality** of mediation (CCP 216)

Formal ratification (and **transnational recognition !**) of any  
**settlement agreement** reached by means of mediation (CCP 217)

## V.5 Conciliation within litigation (Swiss CCP 226 and 241) hearings and settlements

### Court decision:

**preparatory hearings at any time** (CCP 226)

**free discussion of the matter in dispute** (CCP 226)

### Results of conciliation by the court:

**Res iudicata effect** of settlements in court conciliation

## **VI. Proposal for Continental Civil Procedure Law**

VI.1 Litigation

VI.2 Mediation

VI.3 Mixed System

European Justice Forum - Meeting in Zurich, 29 June 2010  
**The Challenge of transnational action on injunctions and collective redress**

**Negotiation**  
parties and attorneys



**Litigation**  
Courts and arbitration



**Mediation**  
parties and mediators





**The Challenge of transnational action on injunctions and collective redress**

<b>Negotiation</b> parties and attorneys	<b>Litigation</b> Courts and Arbitration	<b>Mediation</b> parties and mediators
<b>Voluntary</b>	<b>Not voluntary</b>	<b>Usually voluntary</b>
<b>Contract</b> enforceable	<b>Binding judgment</b> subject to appeal	<b>Settlement agreement</b> enforceable
<b>Parties in direct contact</b> no neutral person involved	<b>Imposed decision</b> Court's discretion	<b>Mediator selected (parties)</b> neutral position
<b>Informal</b>	<b>Formal and rigid rules</b>	<b>Informal</b>
Freedom to present evidence mostly focused on past	Rigid rules of evidence <b>focused on past</b>	Freedom to present evidence <b>focused on future</b>
Mutually acceptable agreement sought	Imposed decision supported by reasoned opinion	Mutually acceptable agreement sought
Parties or representatives	Parties may attend, but participate as subjects	Parties fully engaged in the process

## VI.1 Litigation

### Positive effect of litigation:

Binding judgments solving parties disputes with  
**transnational recognition and enforceability**

### Negative effect of litigation:

**Lengthy, complex and costly proceedings** (years not months !)

### Request for litigation:

**Fast, simple and low-cost proceedings** (months not years !)

## VI.2 Mediation

### Positive effect of mediation:

Parties fully engaged in the process with  
**mutually accepted settlement agreement**

### Negative effect of mediation:

**Solutions depending on goodwill of the parties (one party)**

### Request for mediation:

More binding character of the proceeding  
**➔ conciliation within litigation (see VI.3)**

## VI.3 Mixed System (for transnational collective redress)

<p><b>Large number of parties</b></p>	<p><b>Litigation</b> at court</p>	<p><b>Conciliation</b> within litigation</p>
<p><b>Simple joinder</b> (claims for sums of money) similar facts or legal grounds</p>	<p><b>task of court</b> decision of the <b>principles of facts and legal grounds</b> (judges and expert judges)</p>	<p><b>task of court</b> application of the principles of mediation to <b>court conciliation</b> (judges and expert judges)</p>
<p><b>opt-in system</b> clear identified persons for claims</p>	<p><b>general decision</b> regarding general facts and application of law (practice of Swiss Commercial Courts)</p>	<p><b>individual settlement</b> agreement by means of conciliation (practice of Swiss Commercial Courts)</p>

### VI.3 Mixed System (for transnational collective redress)

<b>Commercial Court</b>	<b>Expert Judges</b>	<b>Professional judges</b>
<b>Measurement of facts</b>	<b>Knowledge of expert judges within the Court</b>	
<b>Measurement of law</b>		<b>Knowledge of professional judges within the Court</b>

### VI.3 Mixed System (for transnational collective redress)

<b>Commercial Court</b>	<i>proceedings, which are normally fast, simple and costly for the parties, because of:</i>	
<b>Measurement of facts</b>	<b>Knowledge of expert judges within the Court</b>	
<b>Measurement of law</b>		<b>Knowledge of professional judges within the Court</b>