

## III

(Preparatory Acts)

## EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

## 442nd PLENARY SESSION HELD ON 13 AND 14 FEBRUARY 2008

**Opinion of the European Economic and Social Committee on Defining the collective actions system and its role in the context of Community consumer law (Own-initiative opinion)**

(2008/C 162/01)

On 16 February 2007, the European Economic and Social Committee acting under Rule 29(2) of its Rules of Procedure, decided to draw up an own-initiative opinion on:

*Defining the collective actions system and its role in the context of Community consumer law.*

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 31 January 2008. The rapporteur was Mr Pegado Liz.

At its 442nd plenary session, held on 13 and 14 February 2008 (meeting of 14 February), the European Economic and Social Committee adopted the following opinion by 134 votes to 94 with 6 abstentions.

**1. Conclusions and recommendations**

1.1 The EESC has decided to reopen the debate on the need for an in-depth appraisal — and the advisability of carrying out such an appraisal — of the role of and legal arrangements for a form of collective group action, harmonised at Community level, in particular in the area of consumer law and competition law, at least at an initial stage.

1.2 The EESC has always advocated the definition at Community level of a collective action designed to secure effective compensation in the event of the infringement of collective or diffuse rights. Such a measure would usefully complement the protection already afforded by both legal remedies and alternative remedies, a notable example of the former remedy being actions for injunction, as defined by Directive 98/27/EC of 19 May 1998.

1.3 The EESC has, on a number of occasions, advocated the need for the EU to take action in this field since, in its view, such action:

- may make a decisive contribution towards removing obstacles hampering the operation of the internal market which are brought about by the divergences in the various national legal systems; action by the EU would thus give consumers a renewed confidence in the benefits of the single market and also provide the requisite conditions for genuine, fair competition between enterprises (Articles 3(1) (c) and (g) of the EC Treaty);
- would make it possible to step up consumer protection, thus making it easier for consumers to more effectively invoke their rights to institute legal proceedings, whilst also ensuring that EU laws are implemented more effectively (Article 3(1)(t) of the EC Treaty);
- would comply with the basic principle of ensuring the right to an effective remedy and a fair hearing by an impartial tribunal, a right which is guaranteed under the Charter of Fundamental Rights of the European Union (Article 47).

1.4 The fact that several EU Member States have, over the last few years, adopted disparate judicial systems for representing the collective interests of consumers, whereas other Member States have yet to introduce provisions in this field, leads to inequalities as regards access to justice and has a detrimental effect on the achievement of the internal market. The EESC deplores this state of affairs, all the more since public satisfaction and confidence represent one of the widely publicised objectives of the achievement of the internal market in the twenty-first century. The EESC is all too aware of the effects that any possible steps might have on the competitiveness of European companies and the knock-on effect that disproportionate costs would eventually have on workers and consumers.

1.5 The EESC therefore intends to make its contribution to this appraisal by putting forward concrete proposals in respect of the legal arrangements for such collective actions, taking account not just of the national systems applicable in European states but also of the experience gained by other states which have developed such measures. The Committee takes particular account of the principles set out in Recommendation C(2007) 74 of the Council of Ministers of the OECD on Consumer Dispute Resolution and Redress, of 12 July 2007.

1.6 In defining the proposed parameters for an EU legislative initiative, the EESC has taken account of the common legal tradition of European judicial institutions and the common principles underlying civil procedure in the EU Member States; the EESC has therefore rejected the features of US-style 'class actions', which are incompatible with the abovementioned traditions and principles. The EESC considers particularly harmful any practice of giving a substantial share of sums won as compensation or punitive damages from cases championing consumer interests to third party investors or lawyers, mirroring American class actions.

1.7 In the light of the aims and purposes of such an instrument, the EESC has analysed the main possible options as regards: the legal arrangements to be introduced (advantages and disadvantages of an opt-in, opt-out or combined scheme); the role of the court; the question of compensation; appeals and the financing of the measures.

1.8 The legal basis for such an initiative and the legal instrument to be employed are further key issues which have also been analysed and in respect of which proposals have been put forward.

1.9 The EESC would also point out that this appraisal of the establishment of machinery for collective actions is in no way at variance with the existence and development of alternative dispute resolution (ADR) methods, indeed the opposite is the case. The EESC was one of the first bodies to express the need to set up effective instruments to enable consumers to invoke their rights — both individual and collective rights — without involving the courts. In this respect, the EESC would state the case for improved alignment of ombudsman and related systems in the various sectors of consumer society, particularly in places where cross-border trade is most developed or most likely to develop.

1.10 There is a whole range of collective remedies for consumers who have suffered loss, from individual, voluntary and consensual actions to collective and legal remedies. Each of these levels of dispute settlement must work optimally, facilitating compensation for loss suffered at the level which is the most accessible for victims.

1.11 The EESC welcomes the European Commission's declared intention to continue to study this issue. The EESC does, however, underline the need for this intention to be matched by a real political will, leading to the introduction of appropriate legislative measures.

1.12 Voicing the wishes of the representatives of organised civil society, the EESC also calls upon the European Parliament, the Council and the Member States to ensure that this appraisal is carried out taking into consideration the interests of the various parties and complying with the principles of proportionality and subsidiarity and is followed by the vital political decisions which have to be taken in order to enable an initiative along the recommended lines to be adopted as soon as possible

## 2. Introduction

2.1 The purpose of this own-initiative opinion is to promote a broad-based discussion on the role and legal arrangements for collective action <sup>(1)</sup> at Community level, in particular in the area of consumer law and competition law, at least at an initial stage <sup>(2)</sup>. Its ultimate aim is to encourage civil society and the competent institutions of the European Union to study the need for and the impact of such an initiative, to think about the definition of its legal nature and the terms and conditions of its implementation, in the framework of a European legal area.

2.2 The methodology used is based on a prior analysis of needs in the single market and the conformity of the initiative with Community law. Its capacity to resolve cross-border disputes, particularly those involving the economic interests of consumers, effectively and rapidly, is then studied.

## 3. The single market and the collective interests of consumers

3.1 The development of 'mass' commercial transactions following the development of mass production from the second half of the last century brought about major changes in methods of entering into contracts and obtaining agreements for the sale and provision of services.

The advent of the information society and the opportunities thus created for distance selling and electronic commerce have brought new benefits to consumers, but they are now potentially subject to new forms of pressure and new risks when entering into contracts.

3.2 Where they have become established, public offers, standard contracts, more and more aggressive forms of advertising and marketing, unsuitable pre-contractual information, widespread unfair practices and anti-competitive practices may cause harm to key groups of consumers who are most often not identified and may be difficult to identify.

3.3 In the legal systems based on traditional procedural law, derived from Roman law, homogeneous individual interests, the collective interests of groups and the diffuse interests of the public are not always served by suitable forms of judicial action which may be described as easy, rapid, inexpensive and effective <sup>(3)</sup>.

3.4 Almost everywhere in the world, particularly in the EU Member States, legal systems provide judicial remedies to protect collective or diffuse interests.

3.4.1 However these systems are rather disparate and give rise to clear differences in the protection of these interests. These disparities are the cause of distortions in the operation of the internal market.

<sup>(1)</sup> In the sense of civil procedure, having the aim of defending collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Another meaning of the expression 'collective action' can be found in British and US legal literature to denote the sociological roots of associability (see *Collective action in the European Union; interests and the new politics of associability*, Justin Greenwood and Mark Aspinwall, Routledge, London, 1998), which is particularly informative about the sociological origins and social needs leading to collective actions in the strict procedural sense.

<sup>(2)</sup> The possibility, which already exists in several national legal systems, of enlarging the scope of collective actions to include all collective or diffuse interests in areas such as the environment, the cultural heritage, spatial planning etc should not be excluded, irrespective of whether such actions are brought against private-law or public-law bodies, including administrations or public authorities.

<sup>(3)</sup> It is rare to find such a concise form of words in the legal literature as that used by an eminent lawyer and Portuguese member of Parliament, during a parliamentary debate, to support the introduction of collective actions in Portugal.

Referring to the new second and third-generation forms of law: labour law, consumer law, environmental law, spatial planning law, law for the protection of the cultural heritage, 'universal forms of law which belong to many if not all', Mr Almeida Santos said:

*'These forms of law belong to everyone, or at least to a large number of people. Is it therefore right that the protection of these rights should be so parsimonious, with plaintiffs forced to wait for their case to come to court, a case which might be identical to that of their colleague or neighbour, sometimes winning their case only when the result no longer has any meaning, when the compensation awarded has already been eroded by inflation, or when the restoration of their honour comes too late to prevent divorce or irreparable damage to their financial standing, or when the final arrival at their destination at the end of a long procedural calvary perfectly sums up the ineffectiveness and futility of the legal process? Should we accept this Kafkaesque judicial purgatory as the status quo?' 'Suddenly we realise that exclusively individual legal protection is no longer enough; that there are 'meta-individual' rights and interests, mid-way between individual rights and collective interests; that the right of those directly or indirectly harmed to go to court is insufficient; that the individualistic concept of law and justice is approaching its end, that the dawn of a new pluralism and a new law is on the horizon'* (in D.A.R. Series I, No. 46, 21/2/1990, p. 1617).

3.5 Because of a lack of harmonisation at EU level, national judicial systems have, in the recent past, developed along very different lines. These differences cannot be attributed so much to divergences in basic principles but rather to different traditions as regards procedural law. The tables appended to this document illustrate the key differences at national level <sup>(4)</sup>.

3.6 A number of parties, in particular organisations representing consumer interests but also many legal practitioners and professors of Community law, lost no time in denouncing the disadvantages to which this situation gives rise, in terms of creating inequality amongst European citizens as regards access to law and justice <sup>(5)</sup>.

3.7 Within the EU Institutions, it was only in 1985, however, following a seminar held in Ghent in 1982 under the auspices of the Commission, that the memorandum on *Consumer access to justice* <sup>(6)</sup> was published, in which the Commission for the first time looked, inter alia, at systems for the legal defence of collective interests.

3.8 However, it was only in its Supplementary Communication of 7 May 1987 that the Commission, following a Resolution of the European Parliament of 13 March 1987 <sup>(7)</sup>, actually announced its intention of looking at the possibility of a framework directive introducing a general right for associations to defend their collective interests before the courts and calling on the Council to recognise the prominent role of consumer organisations, both as intermediaries and as direct agents in relation to consumer access to justice.

3.9 In its Resolution of 25 June 1987, exclusively devoted to consumer access to justice, the Council stressed the important role which consumer organisations were required to play, calling on the Commission to consider whether a Community-level initiative in that area might be appropriate <sup>(8)</sup>.

3.10 Finally, in 1989, when preparing its *Future priorities for a relaunch of consumer protection policy*, the Commission expressed the view in its Three Year Programme (1990-1992) <sup>(9)</sup> that the arrangements for access to justice and compensation were inadequate in a large number of Member States because of their cost, complexity and the time involved, and that there were problems linked to cross-border transactions. It announced that it would be carrying out studies on measures to be adopted, with particular attention for the possibility of collective actions for compensation for losses sustained by consumers <sup>(10)</sup>.

3.11 It was, however, only in 1993 that the Commission relaunched a public debate on this issue with the publication of the significant *Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market* <sup>(11)</sup>.

<sup>(4)</sup> The study of the Centre for Consumer Law of the Catholic University of Leuven prepared for the Commission (DG Sanco) is an excellent summary which illustrates the consequences of the different national approaches to the settlement of cross-border disputes, particularly where consumers from several Member States are affected by the same unfair cross-border commercial practices, by defects in the same products or by contracts negotiated at a distance including the same unfair general contractual clauses.

<sup>(5)</sup> When examining the literature on this subject, mention must be made of the pioneering work by Jacques van Compernelle entitled *Le droit d'action en justice des groupements*, Larcier, Brussels 1972 and the collaborative work entitled *L'aide juridique au consommateur* by T. Bourgoignie, Guy Delvax, Françoise Domont-Naert and C. Panier, CDC Bruylant, Brussels, 1981.

<sup>(6)</sup> Sent to the Council on 4 January 1985 and supplemented on 7 May 1987 by a *Supplementary Communication on consumer access to justice*. Moreover, in the Commission Communication of 4 June 1985 entitled *A new impetus for consumer protection policy* (COM(85) 314 final), the outlines of which were approved by the Council on 23 June 1986 (OJ C 167, 5.6.1986), it was stressed that traditional legal procedures were slow and often expensive compared with the amounts at stake in consumer cases and that appropriate means of consultation and redress were needed to ensure that consumer rights were duly protected.

<sup>(7)</sup> The rapporteur was the Dutch MEP Ms Boot. One of the aspects of the text which should be stressed, following the amendments tabled by MEPs Squarcialupi and Pegado Liz, was the appeal to the Commission to propose a directive harmonising the laws of the Member States so as to safeguard the defence of the collective interests of consumers, by giving consumer associations the opportunity to bring legal action in the interests of the category they represented and of individual consumers (A2-152/86 of 21 November 1986 (EP 104.304).

<sup>(8)</sup> Resolution 87/C, OJ C 176, 4.7.1987.

<sup>(9)</sup> Approved by the Council on 9 March 1989 (OJ C 99, 13.4.1989).

<sup>(10)</sup> COM(90) 98 final of 3 May 1990. This was the first reference to collective actions in an official Commission document.

<sup>(11)</sup> COM(93) 576 final of 16 November 1993. In order to understand this document, it is important to recall that, between 1991 and 1992, there were a number of initiatives in the debate on questions connected with access to law and justice, including the Conference on consumer compensation mechanisms held by the *Office of Fair Trading* in London in January 1991, the third Conference on consumer access to justice held in Lisbon on 21-23 May 1992 under the auspices of the Commission and the *Instituto do Consumidor*, as well as the seminar on the *Protection of the cross-border Consumer* held in Luxembourg in October 1993 by the Ministry of the Economy, and that on the Family and solidarity supported by the Commission, which resulted in reports which are still of great relevance today. During the same period a number of leading academics and legal experts set down their views on the issue (see, inter alia, *Group Actions and Consumer Protection*, Thierry Bourgoignie (Ed.), Col. Droit et Consommation, Vol XXVIII, 1992; *Group Actions and the Defence of the Consumer Interest in the European Community*, Anne Morin, INC, France, 1990).

It was on this occasion that the question of the establishment of a uniform system for actions for injunctions was examined in detail for the first time. Many people thought at the time that this would serve as a basis for a true system of collective action in defence of consumer interests <sup>(12)</sup>.

3.12 In its Resolution of 22 April 1994 <sup>(13)</sup>, the European Parliament concluded that it would be appropriate to carry out a degree of harmonisation of the procedural rules of the Member States, making provision for the right, in cases involving amounts below a certain threshold, to launch Community proceedings which would permit the rapid resolution of cross-border disputes. The Parliament also indicated that it would be appropriate to harmonise, to a certain extent, the conditions applicable to bringing actions for injunctions against illegal commercial practices.

3.13 Similarly, the EESC, in an opinion adopted unanimously at the plenary session of 1 June 1994 <sup>(14)</sup>, referred, *inter alia*, to the principle of: 'general recognition of the active legal right of consumer associations to represent collective and diffuse interests, before any judicial or out-of-court authority in any Member State, irrespective of the nationality of the interested parties and the associations themselves, or of the place where the dispute arises'. It expressly called on the Commission to establish a uniform procedure for collective actions and joint representation, not only to put a stop to illegal practices but also for actions for damages <sup>(15)</sup>.

<sup>(12)</sup> It should, however, be pointed out that the Green Paper is based on several earlier decisions and documents, which underpin it and give it the necessary basis of political support. In March 1992 the Commission had entrusted to a group of independent experts, led by Peter Sutherland, the task of drawing up a report on the operation of the internal market in order to assess the impact of the implementation of the White Paper on the Internal Market. The report, published on 26 October 1992, looked in particular at the question of access to justice. It stated that there was no certainty as to the effectiveness of the protection of consumer rights and drew attention to concerns about the ineffectiveness of the Brussels Convention of 1968 on mutual recognition of court judgments and the resulting difficulty of obtaining the enforcement in a Member State of a judgment delivered by a court in another Member State. It recommended (Recommendation No 22) that the Community look into the question as a matter of urgency. This recommendation gave rise to the Communication from the Commission to the Council and the European Parliament: *The Operation of the Community's Internal Market after 1992: Follow up to the Sutherland Report* (SEC(92) 2277 final). The *Working Document of the Commission on a Strategic Programme on the Internal Market*, submitted by the Commission in June 1993, recognised the need for a coherent operational framework for access to justice which would need to include a number of measures regarding the dissemination, transparency and application of Community law (COM(93) 256 final). Moreover, the Commission Communication to the Council of 22 December 1993 drew attention to the fact that completion of the internal market could lead to an increase in the number of cases where residents of one Member State were asking for their rights to be respected in another Member State (COM(93) 632 final).

As the Commission argued that it was not up to the Community to seek a harmonisation which would have abolished the specific characteristics of different national legal systems, the Commission expressed its intention of focusing on the provision of information and training on Community law, transparency, effectiveness and rigour in the application of that law, and on coordination and cooperation in judicial matters between Member States and the Commission, facilitated by the entry into force of the Maastricht Treaty, and in particular of its 'third pillar'. These efforts resulted in the publication of the Green Paper and in the large-scale consultation which was launched in its wake. At its meeting of 27 September 1993 (686<sup>th</sup> internal market session), the Council had already concluded that it was essential to develop the debate on access to justice, in particular on the basis of a Green Paper announced by the Commission for the end of the year which would look at the question of procedural means and, if appropriate, that of increased transparency of sanctions. It was at this time that a major study was drawn up for the Commission by E. Balate, C. Nerry, J. Bigot, R. Techel, M.A. Munge, L. Dorr and P. Pawlas, with the assistance of A.M. Pettovich, on the subject of *A right to group actions for consumer associations throughout the Community* (Contract B5-1000/91/012369), which remains a standard work in this field.

<sup>(13)</sup> PE 207.674 of 9 March; rapporteur: Mr Medina Ortega.

<sup>(14)</sup> CES 742/94; rapporteur: Mr Ataíde Ferreira (OJ C 295, 22.10.1994). The ESC's interest in the subject was not new. In other documents, for example two own-initiative opinions on the completion of the internal market and consumer protection drawn up by Mr Ataíde Ferreira and adopted respectively on 26 September 1992 (CES 1115/91, OJ C 339, 31.12.1991) and 24 November 1992 (CES 878/92, OJ C 19, 25.1.1993), the Commission's attention had already been drawn to the need to identify opportunities for action in relation to the regulation of cross-border disputes and to recognise the powers of representation of consumer organisations in both national and transfrontier disputes (CES 115/91, point 5.4.2; CES 878/92, point 4.12, and section 4 of the interesting study appended to it, carried out jointly by Eric Balate, Pierre Dejemeppe and Monique Goyens and published by the ESC, pp. 103 et seq.).

<sup>(15)</sup> This subject was subsequently taken up by the EESC in several of its opinions, the most significant of which were the own-initiative opinion on the *Single market and consumer protection: opportunities and obstacles* (rapporteur: Mr Ceballos Herrero), adopted at the session of 22 November 1995, which noted that at that date there had been no follow-up to the suggestions and proposals put forward by the ESC in its previous opinion on the Green Paper (CES 1309/95); the opinion on the *Single Market in 1994 — Report from the Commission to the European Parliament and the Council* (COM(95) 238 final) (rapporteur: Mr Veveř), which pointed to delays in the effective implementation of the internal market, particularly regarding consumer legislation, and in particular for cross-border relations (CES 1310/95, OJ C 39, 12.2.1996); the opinion on the *Communication from the Commission: Priorities for Consumer Policy (1996-1998)* (rapporteur: Mr Koopman), in which the Committee, while welcoming the proposal for a directive on actions for injunctions and the action plan presented by the Commission on consumer access to justice, said that it awaited with interest developments in the area, that, in that area, the single market was far from complete and that a 'conscious adherence to consumer rights' was a basic condition for gaining that confidence from the consumer (CES 889/96, OJ C 295, 7.10.1996). The same kind of concern was also expressed in the ESC's opinion on the *Communication from the Commission to the European Parliament and the Council on the impact and effectiveness of the single market* (COM(96) 520 final of 23 April 1997) (rapporteur: Mr Pasolli, CES 467/97 — OJ C 206, 7.7.1997).

3.14 For her part Commissioner Emma Bonino, from the moment she set out her priorities, focused on the establishment of a Community procedure for the rapid resolution of cross-border disputes and the harmonisation of conditions for bringing actions for injunctions against illegal commercial practices, together with the mutual recognition of the right of consumer organisations to bring legal action <sup>(16)</sup>.

3.15 Subsequently a Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests was published on 25 January 1996 <sup>(17)</sup>.

With this directive the Commission took up the recommendation of the Sutherland Report and responded to the suggestion, which enjoyed widespread support, contained in the Green Paper <sup>(18)</sup>, <sup>(19)</sup>.

3.16 The directive undeniably a revolutionised Community law, as for the first time the Community was legislating in a general way on a matter relating to civil procedural law <sup>(20)</sup>.

The suggestion that the scope of application be extended to include damages was not however followed up.

3.17 In parallel, the Commission drew up an *Action plan on consumer access to justice and the settlement of consumer disputes in the internal market*, presented on 14 February 1996, in which, having defined and described the problem of consumer disputes and studied the various solutions available at national level in the Member States, it listed a number of initiatives which it planned to launch. These included studying the possibility of consumers suffering loss at the hands of the same commercial operator to instruct consumer organisations to group their complaints *ex ante* in order to pool homogeneous individual cases with a view to submitting them simultaneously to the same court <sup>(21)</sup>.

3.18 In this context, the European Parliament, in its Resolution of 14 November 1996, expressed the view that access to justice was a fundamental human right and a precondition for guaranteeing legal certainty, either at national or Community level. It recognised the importance of out-of-court procedures for

<sup>(16)</sup> In her first public statement, at a European Parliament hearing on 10 January 1995, the new Commissioner for consumer affairs recognised that consumer policy was a matter of the first importance for the construction of a Citizens' Europe and made a personal commitment to follow-up the consultations already carried out in connection with the Green Paper on Access to Justice.

In reply to specific questions about the situation with regard to access to justice, the Commissioner acknowledged that consumer access to justice was far from satisfactory and that the time taken for court proceedings in certain Member States was likely to compromise seriously the effectiveness of consumer law.

<sup>(17)</sup> COM(95) 712 final.

<sup>(18)</sup> Taking as a basis Article 100a of the Treaty on European Union, and having regard to the principles of subsidiarity and proportionality, the Commission made provision for the harmonisation of the procedural rules of the various Member States relating to certain forms of legal redress, with the following objectives:

- the cessation or prohibition of any act infringing consumer interests protected by the various directives listed in an annex;
- measures necessary to correct the effects of the infringement, including publication of the decision; and
- the imposition of a financial penalty on the losing party to the dispute in the event of non-compliance with the decision by the deadline set.

The same proposal provided that any body representing the interests of consumers in a Member State, when the interests it represented were affected by an infringement originating in another Member State, could apply to the court or competent authority of that Member State to enforce the rights it represented.

<sup>(19)</sup> The final text of the directive was adopted at the Consumer Council held in Luxembourg on 23 April 1998, by a qualified majority with Germany voting against, and its final version, which includes most of the suggestions and criticisms made, was published on 11 June 1998.

<sup>(20)</sup> Directive 98/27/EC of 19 May 1998, OJ L 166, 11.6.1998. It should be remembered that the European Parliament was very critical of the scope and limitations of the proposal and made various changes to the initial text, including:

- extending the scope of a directive to cover all future directives concerning the protection of consumer interests;
- including among the recognised bodies organisations and federations representing consumers or firms acting at European and not exclusively national level.

In an opinion drawn up by Mr Ramaekers, the EESC criticised the legal basis of the proposal, considering that it should have been Article 129a rather than Article 100a of the Treaty, as well as its limited scope and the requirement for prior application to a national body in the country where the proceedings had to be brought, which would significantly and unnecessarily delay the proceedings (CES 1095/96 — OJ C 30, 30.1.1997).

<sup>(21)</sup> COM(96) 13 final.

settling consumer disputes but drew attention to the need for the consumer, having exhausted all the out-of-court conciliation procedures, to be able to resort to ordinary court procedures in accordance with the principles of legal effectiveness and certainty. Consequently, it called on the Commission to draw up other proposals to improve the access of non-resident European citizens to national judicial procedures, and encouraged the Member States to promote the involvement of consumer associations as the authorised representatives of persons empowered to bring claims before the courts and to recognise these associations as being entitled to bring collective actions in response to certain illegal commercial practices <sup>(22)</sup>.

3.19 Since then the question would appear to have been effectively left in abeyance by the European Commission <sup>(23)</sup>.

At the EESC, however, the question has been taken up on several occasions, with a view to demonstrating the need for a Community-level civil procedural instrument for the legal defence of diffuse, collective or homogeneous individual interests <sup>(24)</sup>.

3.20 Only recently the Commission reopened the question in its *Green Paper on Damages actions for breach of the EC antitrust rules* <sup>(25)</sup> in terms which are worth quoting:

*'It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.'*

3.21 In its opinion of 26 October 2006, the EESC expressed its support for this Commission initiative and confirmed the need for collective actions where they *'provide a perfect example of some key objectives: i) effective compensation for damages, facilitating claims for damages by organisations on behalf of the consumers affected, thus helping to provide real access to justice; ii) the prevention and deterrence of antitrust behaviour, given the greater social impact of this type of action'* <sup>(26)</sup>.

3.22 The Commission entrusted to the Consumer Law Studies Centre of the Catholic University of Leuven the task of drawing up a major study, recently published, on alternative dispute resolution (ADR) methods. A not inconsiderable part of the study, which runs to 400 pages, is devoted to a description of 28 national systems of collective legal means for the defence of consumer interests, those of the 25 Member States plus those of the USA, Canada and Australia <sup>(27)</sup>.

<sup>(22)</sup> A-0355/96 (PE 253.833).

<sup>(23)</sup> Certain directives nonetheless contain references to collective actions as a suitable and effective way of guaranteeing compliance with their provisions. This is true, for example of Directive 97/7/EC of 20.5.1997 (distance contracts), Article 11 or Directive 2002/65/EC of 23.9.2002 (distance marketing of consumer financial services), Article 13.

<sup>(24)</sup> Reference should be made here to the following EESC opinions:

— Own-initiative opinion CESE 141/2005 — OJ C 221, 8.9.2005 on Consumer policy post-enlargement (point 11.6).

— Opinion CESE 230/2006 — OJ C 88, 11.4.2006, on the Programme of Community action in the field of health and consumer protection 2007-2013, point 3.2.2.2.1.

— Opinion CESE 594/2006 — OJ C 185, 8.8.2006 on a Legal framework for consumer policy.

<sup>(25)</sup> COM(2005) 672 final of 19.12.2005.

<sup>(26)</sup> Opinion CESE 1349/2006 — OJ C 324, 30.12.2006 (rapporteur: Mr Sánchez Miguel). This subject was also tackled in the Committee's own-initiative opinion on *Regulating competition and consumer protection* (CESE 949/2006 — OJ C 309, 16.12.2006).

<sup>(27)</sup> The study was referred to in footnote 4. Although very comprehensive, this comparative study does not cover the situation in Bulgaria or Romania, nor does it take account of the most recent development in Finland, or of the highly advanced systems in Brazil, Israel and New Zealand, or of the proposals being debated in France and Italy. For an account of the Australian system, see the collaborative work *Consumer Protection Law*, by J. Goldring, L.W. Maher, J. McKeough and G. Pearson, The Federation of Press, Sydney, 1998; on the New Zealand system, see *Consumer Law in New Zealand*, by Kate Tokeley, Butterworth, Wellington, 2000; for an account of developments in Asia, and in particular India, the Philippines, Hong Kong, Bangladesh, Thailand and Indonesia, see *Developing Consumer Law in Asia*, record of the IACL/IOCU seminar, Kuala Lumpur, Faculty of Law, University of Malaya, 1994. It appears that the Commission has recently launched another study on Evaluating the effectiveness and efficiency of collective redress mechanisms in the EU (2007/S 55-067230, 20.3.2007).

3.23 The new European Commissioner with responsibility for consumer affairs, Meglena Kuneva, has announced in several declarations that this issue was one of the priorities of her term of office. This issue is also addressed in the recent communication on the *EU Consumer policy strategy 2007/2013* <sup>(28)</sup>. The issue was further reaffirmed by both Commissioner Neelie Kroes and Commissioner Meglena Kuneva at a recent conference in Lisbon organised at the initiative of the Portuguese presidency of the European Council <sup>(29)</sup>.

3.24 The Council of Ministers of the OECD has also recently adopted a Recommendation on Consumer Dispute Resolution and Redress [C(2007) 74 of 12 July 2007], which acknowledges that most existing frameworks for consumer dispute resolution and redress in the Member States were developed to address domestic cases and are not always adequate to provide remedies for consumers from another Member State.

#### 4. Why should collective actions be introduced at Community level?

4.1 If the interests of consumers are to be taken into account from a legal standpoint in the EU Member States and at EU level, it is essential not only that material rights be recognised but also that appropriate procedures are available for upholding these rights.

It should also be pointed out that the increase in the volume of cross-border trade has brought about an expansion of consumer litigation at EU level.

In many cases, it is recognised that the settlement of litigation on an individual basis is an inadequate measure. The cost and the slowness of such settlements are major contributory factors in rendering consumer rights ineffective, particularly in cases where a multitude of consumers (i.e. several thousand or even several million) suffer injury as a result of one and the same practice and in cases where the amounts represented by the individual damages are relatively small. The gradual development of the 'European company' also gives rise to problems when it comes to determining which law is applicable; EU citizens should be able to invoke their rights in a uniform way. As things stand at present, improper practices which occur under identical circumstances and cause identical damage in several Member States may give rise to compensation only in those few Member States which have introduced a system of collective actions.

4.2 Furthermore, the constitutions of all the EU Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms affirm the right to a fair trial. This right includes, inter alia, the right to have meaningful and effective access to the courts.

4.3 Under the existing legal systems, citizens cannot always contest, in concrete, practical terms, certain practices which are injurious to them and initiate court proceedings.

Over a period of several decades, a number of Member States have introduced two types of response to address this problem.

Initially, they recognised the right to protect the collective interests of consumers by bringing actions before administrative bodies or before courts and tribunals. A further appropriate response has also taken the form of recognition of a procedure under which individual actions are lumped together. These actions mainly seek to bring about procedural savings by lumping together all of the actions and synthesising them into a single procedure.

<sup>(28)</sup> COM(2007) 99 final of 13.3.2007, point 5.3; the EESC has just published an opinion on this document — Rapporteur: Ms Darmanin.

<sup>(29)</sup> 'Conference on Collective Redress: Towards European Collective Redress for Consumers?' (9/10 November 2007) during which Commissioner Kroes made the following observation: 'Consumers not only have rights, but should also be able to effectively enforce them, if necessary through court action. And when court action can only be taken by each consumer individually, no consumer will ever make it to the court room: **collective redress mechanisms are therefore an absolute must!** It is only then that (consumers) will be able to fully benefit from the Single Market.' Commissioner Kuneva, for her part, rightly stressed that: 'Consumers will not be able to enjoy the full benefits of the Single Market unless effective systems are in place to address their complaints and to give them the means for adequate redress. Collective redress could be an effective means to strengthen the redress framework that we have already set up for European consumers, through the encouragement of ADR mechanisms and the establishment of a cross-border small claims procedure'.



4.4 The creation of a European collective action would make it possible to provide access to justice to all consumers, irrespective of their nationality and financial situation and the amount of individual damage which they have suffered. It would also be beneficial to commercial operators in view of the procedural savings which could be achieved. The costs of such an action would be lower than the costs liable to be incurred as a result of a multitude of individual actions. This procedure would also have the advantage of providing legal certainty by virtue of the fact that an extremely large number of similar complaints would be resolved under a single ruling<sup>(30)</sup>. Finally, such a measure would avoid contradictions in jurisprudence between courts in the different EU Member States called upon to settle similar cases.

The introduction of a common system for all European countries would therefore make it possible to provide consumers with improved protection, whilst enhancing the confidence of the business world and, as a result, boosting trade within the EU.

4.5 The introduction of a European collective action, as defined above, would have a beneficial effect in respect of private international law in view of the difficulties in interpreting and applying the standards for resolving contractual and extra-contractual disputes (Rome I and Rome II). Such an action would also make it possible to set out precise definitions of the rules governing jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Regulation 44/2001)<sup>(31)</sup>.

4.6 Consumer law would therefore be strengthened by increased initiation of legal proceedings which make it possible to provide consumers with fair compensation and to give effective protection to the 'weak party', which is a fundamental principle of EU law. This would apply, in particular, to the recent Unfair Commercial Practices Directive. Such practices are often used simultaneously in several Member States, causing harm to many consumers but giving them no opportunity to seek collective redress. Group action is a complementary procedure vital to the effective implementation of this directive.

All of the currently known directives in the field of consumer protection, as transposed into national law by the Member States, would therefore be made more effective by the recognition of collective actions in the fields covered by these directives.

It would be desirable for small and medium-sized enterprises (SMEs) also to benefit from the application of the provisions in question as they, too, find themselves in a similar situation.

4.7 It goes without saying that the bringing of collective actions at EU level, as a final means of seeking to resolve disputes, in no way precludes recourse to systems of out-of-court settlement of consumer disputes. The latter measures have received the unqualified support of the EESC and their potential should be further explored in detail and further developed.

## 5. Terminology

5.1 In order to be able to properly identify the subject of the proposal, agreement must be reached on the type of legal action in question.

As the survey of the different systems adopted in the various Member States demonstrates, the designation and contents of the various types of action vary considerably. Distinctions must therefore be drawn between 'representative actions', 'public interest actions' and 'collective actions'.

<sup>(30)</sup> Patrick von Braunmühl rightly pointed out at the 'Leuven Brainstorming Event on Collective Redress', organised by the Commission on 29 June 2007, that 'collective actions could reduce the number of individual cases resulting from a specific incident. Especially in an opt out system a company can settle a large number of consumers claims in one proceeding. It can negotiate with a group representative of all consumers concerned and it can concentrate its resources on one court case rather than on several different cases. Even if a voluntary settlement is not possible and the court has to decide there is more legal certainty if the decision covers all cases related to the same incident or breach of law'.

<sup>(31)</sup> This point was explained in detail at the seminar on Rome I and Rome II, held in Lisbon on 12 and 13 November 2007 and organised by the Portuguese presidency, in conjunction with the German and Slovenian presidencies, and the Academy of European Law (Europäische Rechtsakademie — ERA).

5.2 Representative actions can be brought only by consumer associations or administrative bodies (the Ombudsman and similar bodies), with a view to securing the cessation of acts which infringe the rights of the consumer and even, in the case of some countries, securing the abolition of unfair or unlawful terms in consumer contracts.

5.3 'Public interest actions' provide consumer associations with the opportunity to decide whether or not to bring an action before a court in cases where the public, general interest of consumers is damaged by the infringement of either a specific provision of substantive law or a general standard of behaviour. 'Public interest' does not represent the sum of the individual interests of consumers but is similar to 'general interests'.

5.4 'Collective actions' are legal actions which enable a large number of persons to have their rights recognised and to obtain compensation. From a technical standpoint, 'collective actions' therefore represent a collective procedural application of individual rights.

5.5 Recourse to collective actions is not necessarily limited to just the fields of consumer protection and competition.

However, in the case of this opinion, the use of the term 'collective action' is confined to the material field, as recognised under Community law.

5.6 It is therefore proposed that the term 'collective action' be used in this opinion <sup>(32)</sup>.

## 6. Legal basis

6.1 The legal basis for the policy of defending the interests of consumers is to be found in Title XIV of the EC Treaty, which is entitled 'Consumer protection'.

Article 153 clearly provides important points for consideration.

6.2 As things stand at present, even though consumer law has mainly come into being on the basis of the benchmark Article 95 of the EC Treaty, consumer protection policy, as envisaged here, clearly represents a measure designed to promote the economic interests of consumers.

6.3 There is no doubt that collective actions will provide a high level of protection and will enable consumer organisations to organise themselves with a view to protecting the interests of consumers, i.e. to provide them with fair compensation in the event of the infringement of rights accorded to them under all Community law, including competition law.

6.4 The introduction of collective actions at EU level will also help to improve the operation of the internal market for the benefit of consumers, which is one of the goals of the 'internal market review'. This will, in turn, give consumers greater confidence in respect of the expansion of cross-border trade <sup>(33)</sup>.

<sup>(32)</sup> A comparative analysis of the different terms used in several EU Member States and what they mean in the respective languages is set out in an article entitled *Class System* by Louis Degos and Geoffrey V. Morson, published in the Los Angeles Lawyer Magazine, edition of November 2006, pages 32 et seq. The terms used in certain countries are as follows: Ireland — *multi-party litigation* (MPL); the UK — *group litigation order* (GLO) or simply *group action*; in Germany — *Gruppenklage*; in Sweden — *grupptalan* or *collective lawsuit*; in Portugal — *popular lawsuit*; and in Hungary — *combined lawsuit*.

<sup>(33)</sup> Cf. Communication from the Commission on a Single market for 21<sup>st</sup> century Europe (COM(2007) 724 final of 20 November 2007).

6.5 It could also be argued that, as we are dealing here with a purely legal instrument, Articles 65 and 67 could possibly be selected as an appropriate legal basis. It was on the basis of these articles that, from 1996 onwards, the Commission proposed and the European Parliament adopted a whole series of legal instruments in the field of civil procedural law at EU level <sup>(34)</sup>.

This solution could be considered since collective actions could be used in the case of both cross-border disputes and national litigation and in fields other than that of consumer law.

6.6 The collective action should, at all events, respect the principles of subsidiarity and proportionality; it should never go beyond the bounds of what is required to meet the objectives set out in the Treaty, insofar as such objectives cannot be adequately achieved by the Member States and are thus better realised by taking action at Community level.

6.7 The collective action should also follow the principles and mechanisms highlighted in the Recommendation of the Council of Ministers of the OECD (Rec. C(2007) 74 of 12 July 2007), which are presented as common principles despite the diversity of legal cultures that exist in the Member States.

<sup>(34)</sup> These legal instruments include the following:

- Green Paper on access of consumers to justice and the settlement of consumer disputes in the Single Market (COM(93) 576 final);
- Recommendation of the Commission of 12 May 1995 on payment periods in commercial transactions and the associated Commission Communication — OJ L 127, 10.6.1995 and OJ C 144, 10.6.1995 respectively;
- Communication from the Commission on the Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market — COM(96) 13 final, 14 February 1996;
- Communication from the Commission to the Council and the European Parliament entitled: 'Towards greater efficiency in obtaining and enforcing judgments in the European Union' — COM(97) 609 final — OJ C 33, 31.1.1998;
- Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests — OJ L 166, 11.6.1998;
- Council Regulation (EC) 1346/2000 on insolvency proceedings — OJ L 160, 30.6.2000. The rapporteur of the EESC opinion on this subject was Mr G. Ravoet (CESE 79/2001 of 26 January 2000 — OJ C 75, 15.3.2000);
- Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses — *idem*. The rapporteur for the EESC opinion on the matter was Mr Braghin (CES 940/1999 of 20 October 1999 - OJ C 368, 20.12.1999);
- Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters — *idem*. The rapporteur for the EESC opinion on the matter was Mr Hernandez Bataller (CES 947/1999 of 21 October 1999 — OJ C 368, 20.12.1999);
- Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions — OJ L 200, 8.8.2000;
- Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters — OJ C 12, 15.5.2001;
- Council Decision of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters — OJ L 174, 27.6.2001. The rapporteur for the EESC opinion on the subject was Mr Retureau (CESE 227/2001 of 28 February 2001 — OJ C 139, 11.5.2001);
- Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters — OJ L 174, 27.6.2001. The rapporteur for the EESC opinion on this subject was Mr Hernandez Bataller (CESE 228/2001 of 28 February 2001) — OJ C 139, 11.5.2001;
- 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 I), OJ L 12, 16.1.2001. The rapporteur for the EESC's opinion on this subject was Mr Malosse (CESE 233/2000 of 1 March 2000 — OJ C 117, 26.4.2000);
- Green Paper on Alternative Dispute Resolution in civil and commercial Law — COM(2002) 196 final, 19 April 2002;
- Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims — OJ L 143 of 30 April 2004. The rapporteur for the EESC's opinion on this subject was Mr G. Ravoet (CESE 1348/2002 of 11 December 2002 — OJ C 85, 8.4.2003);
- Proposal for a Regulation establishing a European Small Claims Procedure (COM(2005) 87 final of 15.3.2005). The rapporteur for the EESC opinion on this subject was Mr Pegado Liz (CESE 243/2006 of 14.2.2006);
- Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts, COM(2006) 618 final. The rapporteur for the EESC opinion on the subject was Mr Pegado Liz (CESE 1237/2007 of 26 September 2007);
- Regulation 1896/2006/EC of 12 December 2006 (OJ L 399, 30.12.2006) creating a European order for payment procedure (COM(2004) 173 final of 19 March 2004). The rapporteur for the EESC opinion on the matter was Mr Pegado Liz (CESE 133/2005 of 22 February 2005).

## 7. The parameters of collective actions at Community level

7.1 *Collective actions must not take the following forms:*

7.1.1 Collective actions must not take the form of representative actions:

7.1.1.1 Representative actions are open only to a number of specially authorised bodies (consumer associations and the Ombudsman). Under this procedure consumers are generally not able to obtain redress for damage suffered by individuals.

7.1.1.2 The main aim of these procedures is to secure the cessation of acts which infringe consumer rights and even, in some countries, to secure the abolition of unfair or unlawful terms in consumer contracts in respect of which the courts are unable to make provision for any compensation.

7.1.1.3 Certain countries have made adjustments to these mechanisms in order to make it possible to compensate consumers. Such compensation is not, however, paid to individual consumers but retained by the representative bodies or paid to the State to be used for social purposes.

7.1.1.4 Representative actions are thus, in practice, not to be equated with real collective actions, in which all consumers are compensated in a single legal proceeding.

7.1.2 Collective actions must not take the form of the 'class actions' employed in the USA:

7.1.2.1 The introduction of a European collective action must not result in the establishment in Europe of US style class actions. The US judicial system is very different from the judicial systems of the EU Member States. The weaknesses of 'class actions', which are accused of giving rise to excessive settlements, are peculiar to this judicial system and could not occur in Europe.

7.1.2.2 In the USA, court decisions are delivered by people's juries and elected judges. The special make-up of the US system, which differs from that of the majority of the EU Member States (which have professional judges), very frequently leads to certain State courts authorising fanciful actions and handing down decisions which are excessively favourable to the plaintiff; this, in turn, results in consumers submitting their claims to particular courts, rather than other courts which have the reputation of adopting a less favourable approach ('forum shopping').

7.1.2.3 European 'collective actions', on the other hand, would serve as a bastion which would halt forum shopping in its tracks since a single type of legal procedure would be created and set up in each EU Member State, as a result of which, irrespective of the court or the State selected by the claimants, the legal action would proceed in the same way and the court rulings would be of a similar nature.

7.1.2.4 In the USA, the compensatory damages awarded may be accompanied by punitive damages. These damages, which are set by the juries and elected judges, frequently attain astronomical proportions. Punitive damages are not applied in most EU Member States.

7.1.2.5 Lawyers in the USA are remunerated by means of a generally applicable system of *contingency fees*. This system constitutes a sort of 'champerty', under which lawyers, who may themselves be the claimants, have an interest in the outcome of the claim. This system is prohibited — either by law or under lawyers' codes of professional conduct — in the majority of EU Member States.

7.2 *The basic choice: 'opt-in' or 'opt-out'*

In the light of an examination of the collective action procedures adopted in the Member States, these procedures may be classified into two categories, depending on the main mechanism which underpins the initiation of the action and the intervention of the consumer in the procedure. If the consumer has to make deliberate representations in order to be a party to the procedure, an 'opt-in' system is adopted. If, on the other hand, the initiation of the action automatically involves the participation of the consumer in the procedure, without it being necessary for him or her to make themselves known, an 'opt-out' system is adopted. In the latter case, the consumer always retains the right to choose not to be covered by the procedure. The drawing-up of a European collective action thus inevitably involves selecting the mechanism which is to underpin such an action.

### 7.2.1 'Opt-in' and test cases

7.2.1.1 Under the *opt-in* system the persons concerned have to make known their desire to be party to the procedure. The persons concerned must therefore make themselves known and expressly ask to be part of the action before the decision is delivered.

Alongside the *opt-in* system, the mechanism known as 'test cases' or which is based on an initial declaratory ruling has also come into being. These procedures are similar to collective actions based on the *opt-in* principle since, in the case of test cases too, the persons concerned must make themselves known in order to be able to be party to the procedure and to lodge individual claims. The distinctive feature of the test case mechanism does, however, lie in the fact that the judge selects one of the individual claims and gives a ruling on that claim alone. The ruling given under the test case procedure will then be applicable to all the other individual claims lodged with the court.

#### 7.2.1.2 Advantages of these mechanisms

7.2.1.2.1 Each member of the group in question has to make himself or herself known in order to be party to the procedure; the way in which this is done is generally by signing a register. It is therefore a question of making known an express desire to participate; this enables the procedure to be in line with the principle of freedom to take legal proceedings. The plaintiff only takes action on behalf of the persons concerned once they have given their formal agreement.

7.2.1.2.2 Under the *opt-in* method, the foreseeable extent of the damages at stake may be determined *ex ante*. This is important for the defendants who are directly concerned by the claim for compensation, generally, and it enables them to take out insurance policies to cover part of the potential damages. Sufficient funds will therefore be held in reserve to meet legitimate compensation claims.

7.2.1.2.3 With regard to the *test case* procedure, a single individual case is submitted to the judge in order to enable him/her to make an assessment of the problem; this represents a saving of time and a more effective approach for the judge since he/she will be able to take a decision on the liability of the commercial operator concerned on the basis of one case only.

#### 7.2.1.3 Drawbacks of these mechanisms

7.2.1.3.1 These mechanisms are difficult to administer and are expensive: the persons concerned have to make themselves known in order to be party to the procedure and to draw up an individual file. The management of the individual files becomes a complex matter once a large number of persons is involved.

7.2.1.3.2 This leads to very long procedural delays since the court has to organise and deal with each of the individual dossiers. In the case of mass litigation, from which most collective actions derive, the damages suffered by individuals are relatively homogenous and frequently do not need to be examined on an individual basis.

7.2.1.3.3 Turning to the *test case* procedure, the judge does not always lay down the amount of compensation due and sometimes transfers cases to individual procedures. This gives rise to administrative problems and extends the time limits of the procedure.

7.2.1.3.4 Furthermore, an analysis of collective actions under the *opt-in* procedure and the *test cases* instigated in those states which provide for such a mechanism shows that a large proportion of consumers do not lodge a claim before the courts because they do not have proper information on the existence of the procedures in question. A large proportion of the persons concerned also refuse to initiate legal proceedings because of the material, financial and psychological obstacles thrown up by legal proceedings (demands as regards time and money and the fact that the whole matter is extremely complex).

7.2.1.3.5 There is therefore a sizeable drop-out rate between the number of persons who really do take action and the potential number of persons concerned. The compensation for damages awarded to consumers is therefore incomplete and any profit unlawfully acquired by commercial operators as a result of the practice in question may, in large, part be retained by them. The deterrent goal of the procedure is not achieved.

7.2.1.3.6 These procedures also give rise to a problem with regard to the relative effect of the judgement delivered. The decision delivered in connection with a collective action will be applicable only to those persons who were party to the action. Consumers who had not made themselves known will therefore be fully at liberty to initiate individual actions which could give rise to decisions which are in contradiction with those secured in the case of the collective action.

## 7.2.2 Opt-out

7.2.2.1 Traditional collective actions are based on a system known as 'opt-out', under which all the persons who are the victims of a particular conduct are included in the action by default; the only persons excluded are those who have expressly made known their desire to be excluded.

A number of European States have drawn up a *sui generis* procedure in respect of collective actions based on the abovementioned system.

### 7.2.2.2 Advantages of this mechanism

7.2.2.2.1 An analysis of national systems based on the *opt-out* principle shows that this procedure is simpler to administer and more effective than the other procedures adopted by some Member States.

7.2.2.2.2 The system in question ensures that the persons concerned have real access to justice and, consequently, goes so far as to provide fair and effective compensation to all consumers who are the victims of particular practices.

7.2.2.2.3 This procedure also avoids administrative difficulties for both the plaintiff and the courts (the members of the group covered by the collective action make themselves known only at the end of the procedure and not in advance of the procedure).

7.2.2.2.4 The procedure also has a real deterrent effect on the liable party, since the latter is obliged to compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the practice in question.

7.2.2.2.5 Account should also be taken of the advantages which this type of procedure offers to the commercial operator against whom the case is brought. Having recourse to collective actions makes it possible to achieve savings in human resources and financial savings with regard to the defence of the commercial operator involved and to organise the defence in a much more effective way. Rather than having to manage, simultaneously a vast number of similar cases being tried by a whole range of different courts, the party in question prepares his or her defence before a single court.

### 7.2.2.3 Drawbacks of this mechanism

7.2.2.3.1 This mechanism could be regarded as being at variance with the constitutional principles of a number of states and with the European Convention on Human Rights and, in particular, with the principle of the freedom to take legal proceedings, insofar as persons are deemed to be automatically part of the group covered by a collective action without having given their express agreement to be so included. If the persons concerned do not ask to be excluded, they could be bound by the decision that is delivered.

It is, however, perfectly possible to preserve this individual freedom. This could be achieved in one of two ways: either by forwarding to the persons concerned information addressed to them by name, which would make it possible to regard those persons who subsequently do not ask to be excluded as having given their tacit authorisation for the action. The other way in which this goal could be achieved is by giving members of the group concerned the right to ask to be excluded from the procedure at any time, even after the decision has been delivered and, if the decision taken is not favourable to them, to enable them to initiate individual actions.

7.2.2.3.2 The rights of the defence, such as the principle of an adversarial process and the principle of equality of arms would also be safeguarded: the commercial operator involved must be able to invoke individual means of defence against one of the victims who is a member of the group covered by the collective action. This principle is linked to that of having a 'fair trial' (Article 6 of the European Convention of Human Rights). Under the *opt-out* system it is indeed the case that all the persons concerned would perhaps not be designated by name and would not be known to the commercial operator against whom the action has been brought. The latter party could therefore find it impossible to invoke individual means of defence.

However, in the context of a collective action, the individual situations are inevitably homogeneous and the judge is the guarantor that this shall be the case. Litigation linked to consumer rights and competition mainly derives from contracts and the situation of the interested parties is therefore virtually identical. The legal issue (*causa petendi*) is one and the same. It is therefore difficult to see how the commercial operator could invoke a specific means of defence in respect of a single consumer.

Throughout the procedure the judge may have the possibility of throwing out an action in cases where he establishes that the situations of the claimants are characterised by considerable differences of law and fact.

Finally, when it comes to setting compensation, the judge has the possibility of establishing sub-groups in order to adjust, for example, the amount of compensation in the light of individual situations and therefore also in the light of possible reductions in liability.

### 7.2.3 Opt-out and opt-in according to the type of litigation

7.2.3.1 The system recently selected by both Denmark and Norway makes provision for both *opt-in* and *opt-out* procedures. The judge may decide to have recourse to an *opt-out* system if the litigation in question involves small amounts, if the claims are similar and if it would be difficult to pursue an *opt-in* procedure. There are many cases of consumer litigation in which consumers are unable to obtain an effective individual remedy because of the large number of individuals concerned and the small financial sums involved. Use of the *opt-out* procedure makes it possible to take account of all the persons concerned and to secure a penalty which is on a par with the level of unlawful profit which may have been made. In the case of litigation involving high levels of individual damage, the *opt-in* system is selected, making it necessary for each consumer to make themselves known in order to be party to the procedure.

#### 7.2.3.2 Advantages of this procedure

The administration of the procedure is rendered easier in the case of mass litigation. The goal of providing redress is achieved if effective publicity is provided. The goal of serving as a deterrent is likewise achieved.

Any possible infringements of constitutional principles or the European Human Rights Convention are offset by the effectiveness of the process in respect of providing redress and serving as a deterrent.

#### 7.2.3.3 Drawbacks of the mechanism

Attention should be drawn first of all to the difficulty in defining the boundary between the two procedures of *opt-in* and *opt-out*. The two states which have adopted these procedures have done so only recently and no concrete cases are yet available. The relevant laws refer only to: '*mass litigation in respect of small sums in the case of which the use of individual procedures should not be expected*'.

This problem of the lack of a clearly-defined boundary could give rise to very long debates during the procedure and to appeals which would extend the length of the procedure.

## 7.3 The role of the judge

7.3.1 In this particular type of procedure, which pits a large number of claimants against each other, the powers that are vested in the judge are of crucial importance.

7.3.2 In the majority of the procedures involving the *opt-out* principle, an initial phase of the procedure involves an examination carried out by the judge to determine whether the action is admissible. This same aim is served by the examination of the individual file in respect of *test cases*.

7.3.2.1 The importance of the stage involving verification of whether or not a case is admissible lies in the fact that this stage makes it possible to halt, at the beginning of the procedure, any claims which are manifestly unjustified or of a fanciful nature and which could unlawfully damage the image of the opposing party; this objective is achieved by preventing abusive or inappropriate procedures from being taken further.

7.3.2.2 It is the judge who guarantees that this stage of verifying whether a procedure is admissible is properly carried out. In concrete terms, he has the task of verifying whether the conditions set out in law for undertaking collective actions are respected.

7.3.2.3 In particular, the judge has to check whether:

- there are indeed grounds for a legal dispute (the proceedings initiated by the claimant must not be barred);
- the composition of the group makes it impracticable to engage in a joint procedure or a procedure involving a mandate;
- there are matters of law or of fact which are common to the members of the group (the same *causa petendi*);
- the claim against the commercial operator is consistent from the point of view of the alleged facts (the criterion of the probability of the alleged claim — '*fumus boni iuris*');
- the plaintiff is able to adequately represent and protect the interests of the members of the group.

7.3.3 At a later stage, it is also important that the judge is able to validate any proposed transaction or reject it if, in his estimation, it is not in the interests of the members of the group. To be in a position to do this, he must have greater powers than simply those of approving transactions, which are the powers usually vested in judges by law under the majority of judicial systems which apply in the EU Member States.

7.3.4 Given the particular nature of this procedure, there is also a need to make provision for appropriate procedures for the production of evidence. The judge must be able to use powers of injunction with regard to the opposing party or third party in order to secure the production of documents or he must be able to order measures of inquiry with a view to establishing new evidence. The legislation establishing collective actions must expressly stipulate that the judge may not refuse to take the abovementioned action once it has been requested by the claimants.

7.3.5 In order to enable judges to take on these powers in the most effective way possible, it would appear to be necessary to stipulate that only particular courts, designated by name, will have jurisdiction for collective actions. The judicial structures of the Member States should therefore be adapted accordingly and provision also needs to be made for judges sitting in the courts in question to receive special training.

#### 7.4 *Effective compensation for damage*

7.4.1 Collective actions must enable claims to be made for compensation for material damage (financial damage), physical damage and compensation for pain and suffering and other forms of non-pecuniary loss. Since the aim of the action is both to compensate consumers and to provide a deterrent, it seems necessary to make provision for compensation of all forms of damage if this goal is to be achieved. It should also be possible to provide courts with simple, inexpensive and transparent evaluation methods, without abandoning the principle of compensation for damages.

7.4.2 Claimants involved in collective actions must also be able to secure several forms of damage from the court. In addition to stipulating the cessation of particular behaviour or the invalidity of an act which can still be carried out, compensation of damages must be able to take a direct or indirect form. Provision must also be made for compensation to be backed up by other forms of remedy, such as advertising the publication of the court's findings, public notices etc.

7.4.3 Direct, individual compensation must not be the only form of compensation envisaged, as under certain hypotheses, it would be difficult — if not impossible — to bring about, either because the members of the group concerned cannot be identified under the *opt-out* mechanism or because there are too many such persons, or yet again, because the amount represented by their individual damages is too low. The key requirements are that the persons involved should always be compensated — even indirectly — and that the deterrent effect should be achieved.

7.4.3.1 Appropriate machinery should be devised to address the following cases: the judge is able to calculate the amount of compensation to be paid to identified or identifiable members of the group (under the *opt-in* scheme, test cases or even under *opt-out* arrangements, in cases where the commercial operator has provided a list of the customers concerned, for example). Appropriate machinery should likewise be devised to address cases where distribution of payments to individuals proves to be too expensive in view of the small amounts of individual damages involved.

7.4.3.2 In the same way, if the sums are not all distributed, priority should be given to a measure of indirect compensation in respect of the residue of the compensation. In his decision the judge should set out in detail the action to be funded by the residue and he should adopt the procedures for monitoring this operation; responsibility for implementing these procedures may be delegated to a third party.

7.4.3.3 Should even this measure of indirect compensation prove to be impossible, the total amount of the residue determined by the judge shall be paid into a fund for supporting collective action in order to enable it to finance new actions.

7.4.3.4 If the judge is unable to calculate the amount to be paid to each individual by way of compensation in cases in which it is not possible to identify all the members of the group (this applies solely in the case of the *opt-out* mechanism), he must be able to establish an assessment grid for the different categories of damages. Responsibility for distributing the compensation sums may be delegated to the court registry, the lawyer representing the group or a third party (insurance agent, account, etc.); such arrangements have the advantage of relieving the court of responsibility for this long and complex stage of analysing individual claims.

7.4.3.5 In the case of the second hypothesis, the judge must be able to make provision for individual compensation for members of the group who have made themselves known following the publication of information on the judgement; the residue of the compensation is to be allocated to actions providing indirect compensation for the damage suffered by the group.

7.4.3.6 If no indirect measure is possible, the residue must be paid to the support fund.



## 7.5 Appeals

7.5.1 Collective actions must recognise the rights of either party to lodge an appeal.

7.5.2 Bearing in mind the importance of (a) the need to ensure that victims are compensated without delay and (b) making certain that the rights of each of the parties have been properly appreciated, there is a need to reconcile each party's right to lodge an appeal against the decision with the abovementioned overriding needs.

7.5.3 The recognition of this right of appeal should therefore oblige the Member States to establish a rapid appeal procedure in order to avoid the application of a purely stalling mechanism.

7.5.4 Furthermore, having the certainty that proper provision has been made in the accounts of the liable party for the compensation which it has been ordered to pay also provides a guarantee for the victims in the event of an appeal.

## 7.6 Financing the system

7.6.1 The collective action system must ultimately be self financing.

7.6.2 Given that it is not desirable, or even possible, to introduce a blanket system of US-style *contingency fees*, since such a system runs counter to the European legal system, it is essential to make provision for a form of financing which would enable claimants who do not have the requisite funds to instigate a collective action to obtain an advance in respect of their legal costs (lawyer's fees, cost of expert opinion in connection with the inquiry measures undertaken by the judge, etc.).

7.6.3 One of the ways of funding this system would be by establishing a 'support fund for collective action', provisioned by the sum of the 'unlawful profits' made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed by identified persons who have suffered direct injury <sup>(35)</sup>.

7.6.4 The support fund may also (a) have the role of centralising all the information relating to ongoing collective actions and (b) be instructed to pass on information relating to the steps to be taken by the persons concerned with a view to making themselves known, excluding themselves from a collective action or securing compensation.

## 7.7 Additional procedural rules

From a detailed point of view, there will be a vast range of procedural rules which will have to be laid down but they will be listed only as a 'token entry'.

Such procedural rules will have to be drawn up in the case of:

- the arrangements in respect of notifying interested parties;
- legal expenses and legal aid;
- cooperation between judicial and administrative authorities in the Member States;
- deadlines in respect of the instigation of legal proceedings and prescribed periods;
- the use of the internet (ejustice).

## 8. Legal instrument to be employed: a regulation or a directive?

8.1 Provision could be made for the introduction of collective actions at EU level by having recourse to either a directive or a regulation; it is considered that a mere recommendation would, by definition, fall short of what is required for creating the conditions for effective, uniform action which are necessary to enable such a measure to be adopted in a harmonised way in 27 Member States.

<sup>(35)</sup> A good example in this context is the 'support fund for collective action' set up in Quebec; this fund is regarded as playing a vital role in the development of collective actions. It is provisioned by the reimbursement of sums advanced to claimants who win their collective actions and from the residue of compensation payments not claimed by members of groups involved in collective actions. Claimants who instigate collective actions are able to secure from the judge the reimbursement of expenditure incurred in instigating the action only on condition that they provide supporting documents.

8.2 Provided that the content envisaged is extended to cover other matters and not only consumers' rights, and provided that Articles 65 and 67 of the EC Treaty are selected as the legal basis, the adoption of a regulation could be considered, on a par with, for example, the regulations on: insolvency procedures; the European enforcement order; the European order for payment procedure; the European small claims procedure; and the attachment of bank accounts.

8.3 If, however, it is decided to restrict — at least for an initial period — the field of application of this initiative to that of consumer rights, the most appropriate way of making provision for collective actions at EU level would appear to be by means of a directive; such a directive would follow up the directive on actions for injunction.

8.4 Considerable differences as regards procedural rules continue to exist between the Member States. The basic principles underlying collective actions should therefore be set out in general terms since the Member States would apply the directive having due regard to their usual procedural principles.

It is indeed not certain that, for example, harmonisation will be possible since the courts given jurisdiction to hear these actions would themselves depend on the rules applicable in each Member State as regards the administration of justice.

The methods of referral must be in line with the specific provisions of the Member States. The use of a regulation would therefore not be appropriate.

8.5 It would also appear to be self-evident that, in this case, the proposed directive must provide for full harmonisation in order to prevent Member States from making the system more binding to the detriment of enterprises which have their head office in the said Member States.

Brussels, 14 February 2008.

The President  
of the European Economic and Social  
Committee  
Dimitris DIMITRIADIS

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## APPENDIX

**to the Opinion of the European Economic and Social Committee**

The following amendments, which were supported by at least a quarter of the votes cast, were rejected in the debate:

**1. Point 7.2.2.4**

~~'The procedure also has a real deterrent effect on the liable party, since the latter is obliged to compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the practice in question.'~~

*Reason*

See point 7.6.3.

*Result of the vote*

Votes in favour: 104 Votes against: 114 Abstentions: 13

**2. Point 7.6.1.**

Delete:

~~'The collective action system must ultimately be self-financing.'~~

*Reason*

Access to justice is the responsibility of the public authorities and must not depend on the success of previous actions which are unconnected with subsequent cases (see also reason for amendment to point 7.6.3).

*Result of the vote*

Votes in favour: 107 Votes against: 116 Abstentions: 10

**3. Point 7.6.3**

Replace:

'One of the ways of funding this system would be by establishing a 'support fund for collective action', provisioned by the sum of the "unlawful profits" made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed by identified persons who have suffered direct injury. It is up to the public authorities to guarantee access to justice, for example by assigning revenue from fines for contraventions of consumer law to financing collective actions.'

*Reason*

The form of recourse envisaged aims to provide compensation for damage suffered by consumers, but excluding 'punitive damages'. This concept borrowed from US practice inappropriately combines civil interests and criminal law. The mere fact of fully compensating consumers for their loss constitutes an effective deterrent for the liable party.

The question of whether a profit has been made as a result of contravention of the law or fraud is a matter for sanctions imposed by the public authorities. They may assign revenue from fines levied to facilitate access to collective actions. Responsibility for ensuring access to justice lies with government, which is subject to democratic scrutiny, rather than with private law individuals and organisations.

As the damages due will have been paid to the consumers who suffered the loss, it would be inappropriate to create an artificial link between the surplus from one action and actions in subsequent cases, particularly where the objective was no longer to obtain fair reparation for the consumers who had suffered loss in the case in question.

*Result of the vote*

Votes in favour: 104 Votes against: 106 Abstentions: 18

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