



The European Federation of Insurance Intermediaries

La Fédération européenne des intermédiaires d'assurances

BIPAR RESPONSE

European Commission's Consultation "Towards a Coherent European Approach to Collective Redress"

May 2011

BIPAR Register ID number : 58041461167-22

**Avenue Albert-Elisabeth 40
B-1200 Brussels**

Tel: +32/2/735 60 48

Fax: +32/2/732 14 18

bipar@skynet.be

www.bipar.eu

BIPAR, the European Federation of Insurance Intermediaries, is a non-profit European organisation grouping professional associations of insurance intermediaries in Europe. It presently has a membership of 50 national associations, established in 32 countries, and represents some 80,000 insurance agents and brokers, employing in all about 250,000 people. Founded in Paris in 1937, BIPAR headquarters were moved to Brussels in 1989. It is the single voice of insurance intermediaries with the European Institutions.

I. INTRODUCTION

BIPAR welcomes the opportunity to answer the European Commission's consultation "*Towards a Coherent European Approach to Collective Redress*".

BIPAR supports any initiative aimed at reinforcing consumer confidence across the European Union.

However, BIPAR is of the opinion that the introduction of new EU-wide mechanisms of collective redress, be it judicial or out-of-court, would not lead to the effective improvement of the compensation of consumers.

In the insurance sector, claims most of the time require an individual assessment, which makes the transferability of the individual case to a multitude of cases nearly impossible. We therefore believe that the European Commission should favour the development of non-litigious, individual resolutions of disputes between consumers and companies.

The Commission should also take measures to increase the visibility and awareness of ADRs (and of FIN-NET in the financial services sector) which are also the schemes preferred by consumers. According to the European Commission's 5th Consumer Conditions Scoreboard dated 11 March 2011, consumers in the EU prefer to use ADRs to obtain redress rather than to go to court.

We also refer in this respect to our position paper submitted to the Commission consultation on the use of Alternative Dispute Resolution. We believe that the outcome of this consultation should be taken into consideration in considering a possible EU-wide collective redress system.

II. BIPAR ANSWERS TO THE QUESTIONS

Potential added value of collective redress for improving the enforcement of EU law

1. What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?
2. Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?
3. Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?
4. What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?
5. Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?
6. Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

BIPAR welcomes any initiative aimed at reinforcing consumer confidence across the European Union and at providing efficient, balanced and proportionate mechanisms that would enable consumers to enforce their rights, not only in a national context, but also with regard to cross-border activities. Obstacles to such mechanisms (complex and long procedures, high litigation costs, etc...) should be tackled.

However, BIPAR is of the opinion that the introduction of new EU-wide mechanisms of collective redress, be it judicial or out-of-court, would not lead to the effective improvement of the compensation of consumers. On the contrary, it could lead to potential uninsurability of certain risks and might make procedures more complex. Complaints are not identical most of the time which makes collective complaints ineffective. This is the case for the insurance sector in particular, where individual complaints concern complex contracts and where therefore individual solutions are required.

BIPAR believes that the European Commission should favour the development of non-litigious individual resolutions of disputes between consumers and companies. In the insurance services sector, Alternative Disputes Resolution (ADR) mechanisms – whether based on mediation, arbitration, negotiation, etc...- are in place in most of the EU Member States and already deliver efficient and effective outcomes (see the CEIOPS' survey on the implementation of IMD and its provision on out-of-court settlement). We also refer to our position paper submitted to the European Commission on the use of Alternative Dispute Resolution.

As stated by the European Commission in a previous consultation paper on ADR in the financial services sector, issued in December 2008, ADR is the least costly and quickest way of resolving disputes for consumers, businesses and society in general and therefore helps to improve access to law. It also states that *“generally, the existence of ADR mechanisms is considered important in raising consumer confidence in buying financial services from local providers and particularly from providers from other Member States. Therefore, ADR schemes need to be effective, which would also directly contribute to the effectiveness of FIN-NET”*. One of the key conclusions of the Study on the use of ADR in the EU by Civic Consulting of October 2009, is that ADR schemes are a low-cost and quick alternative for consumers for the settling of disputes with businesses.

For the insurance (intermediation) sector, BIPAR believes that there is first a need to ensure that all EU Member States have an ADR system and become members of FIN-NET. The development of FIN-NET would make cross-border complaint procedures more accessible and would make them function more smoothly in the area of financial and insurance services. In the insurance sector only three Member States have no ADR schemes and seven are not members of FIN-NET. BIPAR believes that the European Commission should analyse the reasons for this situation.

The final report on the Evaluation of FIN-NET dated June 2009 by the Centre for Strategy & Evaluation Services, came to the following conclusions and recommendations:

- FIN-NET represents an appropriate mechanism to address the existing need for assisting consumers in the resolution of cross-border complaints related to financial services.
- FIN-NET has achieved high success rates in resolving cross-border complaints submitted to its members. There are very few cases reported of complaints that were not effectively handled.
- The current FIN-NET approach and the role of the Commission should be maintained (under the current circumstances there is neither reason nor much scope for changing the operational elements and the structure of FIN-NET).

- The current organisational structure and mechanisms should also be maintained (the current organisational structure operates quite efficiently and effectively and there does not seem any need for changes).
- The Commission and the FIN-NET members should take measures to increase the visibility and awareness of ADRs and of FIN-NET.
- The Commission should consider a campaign -largely through the Member States- that will promote the use of ADRs in financial services at national level.
We believe that the Commission should take these conclusions and recommendations into consideration.

At national and EU level, there is a strong supervisory architecture in place, which ensures effective and efficient consumer protection in the insurance sector. BIPAR does not see the need for any further enforcement by public bodies, which would weaken the existing instruments in the EU Member States.

In the insurance sector, there also exists an important number of EU measures that allow consumers to enforce their rights (e.g.: two recommendations on ADR, ECC-Net and FIN-NET, the Insurance Mediation Directive). We believe that the Commission should first assess the effects and practical value of these measures.

General Principles to guide possible future EU initiatives on collective redress

7. Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?
8. As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?
9. Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?
10. Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

If, on the basis of gathered evidence and data, there appears to be a clear need for an EU-wide collective redress mechanism, BIPAR believes that adequate safeguards like an opt-in system should be taken into consideration.

Based on the EU Treaty principles of subsidiarity and of proportionality, BIPAR believes that Member States should have the flexibility to agree on the design of a national collective redress mechanism.

The need for effective and efficient redress

12. In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?
13. How can effective redress be obtained, while avoiding lengthy and costly litigation?

As explained above, BIPAR sees no need for the set up of a collective redress mechanism at EU level. It believes that the first step should be the enhancement of the existing individual ADR systems.

As explained by the European Commission in its Communication on ADR in financial services, in Member States where it exists, individual ADRs deliver efficient solutions. They offer the potential for non-adversarial and prompt resolution of disputes. One of the key conclusions of the Study on the use of ADR in the EU by Civic Consulting of October 2009 is that ADR schemes are a quick alternative for consumers for the settling of disputes with businesses. We do not believe that collective redress can be as effective, efficient and quick as individual ADRs, in particular in the insurance sector.

In the insurance sector, a collective redress mechanism may have many unwanted non-tested or identified side effects.

The importance of information and of the role of representatives bodies

13. How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?
14. How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

As explained before, BIPAR is of the opinion that the introduction of new EU-wide mechanisms of collective redress, be it judicial or out-of-court, would not lead to the effective improvement of the compensation of consumers.

BIPAR believes that the way victims will be informed should be efficient and should depend on the design of the procedure, if introduced at EU level.

The need to take account of collective consensual resolution as alternative dispute resolution

15. Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?
16. Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?
17. How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

18. Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?
19. Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice

ADR systems in the insurance sector already cooperate at EU level within the framework of FIN-NET. However, consumers' awareness of national ADR systems and FIN-NET could be improved. We refer on this particular issue to our position paper which we submitted to the EC on the use of Alternative Dispute Resolution.

As mentioned before, BIPAR is of the opinion that the introduction of new EU-wide mechanisms of collective redress, be it judicial or out-of-court, would not lead to the effective improvement of the compensation of consumers. On the contrary, it could lead to potential uninsurability of certain risks and might make procedures more complex and costly.

Conciliatory resolution of disputes is the most cost-effective and quickest way to resolve disputes at both national and cross-border level, and provides an easier alternative to litigation.

Strong safeguards against abusive litigation

20. How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?
21. Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle¹⁵? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?¹⁶
22. Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).
23. What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?
24. Which other safeguards should be incorporated in any possible European initiative on collective redress?

As explained above, BIPAR do not believe that an EU-wide mechanism of collective redress could improve the compensation of consumers.

However, if on the basis of gathered evidence and data, there appears to be a clear need for an EU- wide collective redress mechanism, BIPAR believes that such a mechanism should be an opt-in system that would allow the consumer to decide whether or not he/she would want to be part of a collective redress action.

The mechanism should also respect the principles of independence, of transparency, of effectiveness, of legality and of representation.

Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs

25. How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?
26. Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?
27. Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?
28. Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

If, on the basis of gathered evidence and data, there appears to be a clear need for an EU-wide collective redress mechanism, BIPAR believes that it would be useful to assess via an independent study what is the most efficient way to fund collective redress mechanisms.

A way to avoid abusive use of collective redress could be to leave a financial burden/risk with the claimant. If the consumer would be allowed to join a collective action at no cost, this would represent an incentive for unmeritorious claims and could lead to unnecessary legal procedures and costs for society at large.

Procedural costs should, however, not be disproportionate to the amount in dispute, so that the consumer is not hindered from enforcing his/her rights.

Effective enforcement in the EU

29. Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?
30. Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?
31. Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

BIPAR is not aware of any cross-border problem in the field of existing collective redress schemes.