

Our position

AmCham EU's response to the European Commission Public Consultation on Collective Redress



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's public consultation on collective redress.

However, this initiative should be more precisely focused on areas where real concerns have been identified and take into account the existing remedies already available to EU citizens. Furthermore, in view of the potential rise of collective actions in the EU, any initiative should focus on the implementation of the existing EU recommendations to ensure access to justice and legal certainty for consumers and traders alike.

AmCham EU urges the European Commission to maintain, strengthen and enforce the current approach to collective redress intended to avoid an abusive litigation culture while ensuring that the proposed rules do facilitate easier consumer redress, benefitting business, consumers and society as a whole.

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's efforts to facilitate access to justice as well as to ensure a high level of consumer protection in the EU.

AmCham EU supports the need to ensure compliance with applicable rules and regulations. To the extent individuals have been harmed, collective redress mechanisms may be relevant to ensure they receive appropriate compensation for harm caused by such wrongdoings.

More specifically, AmCham EU supports the Commission's initiative to improve the quality and coherence of national collective redress regimes; however, we are concerned that insufficient weight has been given to the range of existing mechanisms that already provide remedies to those affected.

Furthermore, as the number of collective redress cases and complaints are increasing in the EU, some abuses have already been identified and it is apparent that access to justice is becoming a business. It is crucial to ensure that safeguards against potential excesses are maintained, strengthened and enforced, and that the regulatory framework is adapted to avoid abuses.

The European Commission Recommendation of 11 June 2013 (on common principles for injunctive and compensatory collective redress mechanisms in the Member States in relation to violations of rights granted under Union Law) recognizes a number of grey areas within national systems. The Recommendation proposes safeguards aimed at deterring abusive litigation by keeping checks and balances.

AmCham EU believes that the recommended safeguards remain relevant and that any initiative on collective redress should primarily focus on their effective implementation in Member States to avoid the development of an abusive litigation culture in the European Union.

In this position paper AmCham EU sets out specific items that are of concern to the US business community and looks forward to working with the European Commission to strike the right balance between consumer protection and the development of the Internal Market.

Implementing the relevant safeguards

The US Chamber Institute for Legal reform survey¹ (the survey) on collective redress systems in Member States finds that implementation of the recommended safeguards remains limited or non-existent in certain Member States. However, the survey also finds that the recommended safeguards remain relevant and necessary.

Member States should particularly ensure that the claimant and beneficiary of a collective claim remains the injured party and not the representative body. Moreover, as regards to the claimant party, opt-in systems should prevail over opt-out ones that lead to abusive cases. The mechanisms to join or exit a claim should be strictly controlled to avoid potential unwanted claims.

In addition, the growth of third party litigation funding is also an issue of concern. Litigation funding compounds the risk of abuse in collective redress actions. If not checked, those who finance litigation – whether individuals, third-party funders, or law firms – may use confidentiality agreements to evade accountability and press meritless claims tantamount to extorting corporate defendants. Little or no safeguards currently exist in Member States to mitigate the risks posed by third party funding (e.g. conflicts of interests between third party funders and claimants, no cap on the amounts third party funders may take from damages awards, etc). In countries with extensive experience with collective redress, third party funding has been observed to be one of the key causes of litigation abuse. Some Member States, such as the UK, have introduced a voluntary code of conduct for third party funds which would be helpful to encourage across the EU.

Even if funders remain self-regulated, collective redress schemes should include rigorous safeguards to protect against the increased risk of abuse. These safeguards should include: placing limitations on recovery by funders; holding litigation funders liable for cost recovery; imposing sanctions and other relief if a funder knowingly or recklessly funds fraudulent claims or fraudulent litigation tactics; requiring disclosure of the identity of funders and funding arrangements; and requiring that funders perform stringent due diligence, obtain an independent opinion of counsel before funding, engage in continued monitoring of litigation, and withdraw from meritless actions.

The survey also underlines the need to uphold the “loser pays” principle to ensure the right balance is maintained between legitimate and spurious claims.

Last but not least, current systems allow plaintiffs to shop between different legal jurisdictions in the search for a preferential outcome to their complaint. Therefore, Coherent implementation of existing safeguards by Member States would reduce incentives for forum-shopping.

In summary, Member States should provide the following collective redress safeguards:

- ✓ preserving the loser-pays principles,
- ✓ favoring opt-in over opt-out actions;
- ✓ restricting contingency fees (not only for lawyers but also for third party litigation funders);
- ✓ banning punitive damages and

¹ The Growth of Collective Redress in the EU, Institute for Legal Reform, March 2017. Online version available [here](#)

- ✓ deterring forum-shopping.

Based on the experience of AmCham EU members, court-based approaches to collective redress are more expensive than other dispute settlement mechanisms and should not be encouraged. Our members also highlight the reputational, shareholder impact and time and resource implications for companies faced with collective action court cases. The survey does not acknowledge the pressure to settle a case 'out of court' when faced with a potentially inflated claim (for instance in case of an opt-out lawsuit) even if the accused company believes it has acted correctly.

Consequently, AmCham EU believes that the Commission should work more closely with the Member States to ensure the recommended safeguards are properly implemented and that this should be the focus of any work at EU level.

Promoting the use of alternative redress mechanisms

AmCham EU also encourages consumers to use other forms of redress mechanism, such as the small claims procedures or alternative dispute resolution mechanisms.

Alternative Dispute Resolution mechanisms have been developed for online and off-line transaction and have proven to be useful alternatives to lawsuits. Consumers should be encouraged to explore the benefits that may arise from using such alternative redress mechanisms.

In particular, the British Institute of International and Comparative Law² has referenced the following alternative mechanisms providing remedies:

- Alternative Dispute Resolution (ADR) mechanisms are available in many forms in Member States. Ranging from facilitation processes to binding decisions made by a third party; sectoral dispute resolution boards, ombudsmen, and government-run compensation schemes have also been established to provide alternative ways to resolve disputes, particularly for consumers. ADR has the potential to apply to collective claims as well as to single claims. Its utilisation could reduce both costs and time in dispute as well as allowing for the enforcement of small claims. ADR can also help maintain business reputations while preserving customer trust.
- Collective settlement mechanisms have proved to be a useful alternative to collective redress, although they naturally require the parties to acquiesce to the result reached. A collective settlement of an opt-out nature allows the parties to achieve finality in respect of a dispute, thereby providing legal certainty to all parties involved. For a respondent, complete finality to a dispute is a valuable outcome. Collective settlement procedures have attracted attention as a result of the success of the Dutch WCAM legislation (*Wet collectieve afwikkeling massaschade* 2005).
- Ombudsman mechanisms have been adopted throughout the EU and, although there are some small differences between countries. Ombudsmen are generally constituted as an independent body in charge of carrying out a form of control and monitoring of public administration activities in its interaction with citizens.

² <https://www.collectiveredress.org/collective-redress/alternative-mechanisms>

Respecting national legal traditions

AmCham EU also believes it is important to take into account the legal traditions and legal orders of the individual Member States. The characteristics of the tort and procedural laws in each Member State cannot be seen separately from the overall legal regime and tradition in a particular country. As a consequence, proposing a comprehensive mandatory EU collective redress regime would undermine these national characteristics as well as the existing legal certainty which applies to nationals, both potential claimants and respondents.

The focus should be on maintaining, strengthening and enforcing the current approach to collective redress intended to avoid an abusive litigation culture.

Conclusion

Overall, AmCham EU welcomes the Commission's efforts to ensure a high level of consumer protection in the EU.

At the same time, AmCham EU has serious concerns regarding the potential for encouraging speculative and unsubstantiated accusations of wrong-doing in a public environment as set out in the public consultation questionnaire (questions 19 and 24). The appropriate path for those impacted by an illegal practice is to seek redress via established judicial processes and/or to raise concerns with the appropriate national authorities. This would allow all sides the possibility to provide evidence and defend themselves, as legally appropriate.

We are also concerned by the apparent bias contained of the questionnaire in favour of collective redress at EU level, without appropriate reflection being given to the risks and downsides that encouraging greater recourse to collective redress actions may have for consumers, industry and national judicial systems. It should be avoided that the door is opened to a culture of abusive litigation by lowering safeguards in an effort to increase the number of collective redress actions.

Therefore, AmCham EU emphasises the need to uphold and strengthen existing safeguards in light of developments in the legal market across the EU. We believe that the Recommendation of 2013 should be updated to respond to current challenges and that the European Commission should work with Member States to ensure their application. However, we would not be in favor of binding EU rules being imposed on Member States and would prefer to refine the current approach through constructive dialogue at a national level, rather than through EU wide legislation.