

Our position

AmCham EU's response to the Commission's 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 focus on areas where real concerns have been identified and take into account existing remedies already available to EU citizens.

In view of the potential rise of collective actions in the EU, any initiative should focus on the proper implementation of the existing EU recommendations to ensure access to justice and legal certainty for consumers and traders alike.

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

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) supports the European Commission's efforts to facilitate access to justice and guarantee a high level of consumer protection in the EU. Compliance with applicable rules and regulations is important. To the extent individuals have been harmed, collective redress mechanisms may be relevant to ensure they receive appropriate compensation.

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 existing range of 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 been identified. It is apparent that access to justice is becoming a business. Thus it is crucial that safeguards against potential excesses are maintained, strengthened and enforced, and that the regulatory framework is adapted to avoid abuses.

The 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*) recognises a number of grey areas within national systems. It proposes safeguards aimed at deterring abusive litigation by keeping checks and balances.

These safeguards remain relevant. Any initiative on collective redress should focus on their effective implementation in the Member States.

In this position paper, AmCham EU sets out specific items of concern to the US business community. We look forward to working with the Commission on striking the right balance between consumer protection and the development of the Single Market.

Implementing the relevant safeguards is essential

The US Chamber Institute for Legal Reform's (ILR) Survey¹ on collective redress systems finds that the implementation of recommended safeguards remains limited or non-existent in some Member States. However, they remain relevant and necessary.

AmCham EU members encourage Member States to:

- **Ensure the claimant and beneficiary of a collective claim remains the injured party and not the representative body;**
- **Favour opt-in over opt-out actions.** 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 unwanted claims.

In addition, the growth of third-party litigation funding is also an issue of concern as it compounds the risk of abuse in collective redress actions. If not checked, those who finance it – 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 (eg. conflicts of interest between third-party funders and claimants, no cap on the amounts third-party funders may take from damage awards, etc). In countries with extensive experience with collective redress, third-party funding has been identified as a key cause of litigation abuse. Some Member States, such as the UK, have introduced a voluntary code of conduct for third-party funds which could be encouraged 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 should include:

- placing limitations on recovery by funders;
- holding litigation funders liable for cost recovery;
- imposing sanctions and other forms of relief if a funder knowingly or recklessly finances fraudulent claims or uses fraudulent litigation tactics;
- requiring disclosure of the identity of funders and funding arrangements;
- 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 ILR Survey also underlines the need to uphold the “loser-pays” principle to strike the right balance 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;

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

- restricting contingency fees (not only for lawyers but also for third party litigation funders);
- banning punitive damages; and
- 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 such cases. The survey does not acknowledge the pressure to settle a case 'out of court' when faced with a potentially inflated claim (eg. in case of an opt-out lawsuit) even if the defendant believes it has acted correctly.

Consequently, AmCham EU urges the Commission to work closely with Member States and ensure the recommended safeguards are properly implemented. 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 small claims procedures or alternative dispute resolution (ADR) mechanisms. ADR mechanisms have been developed for online and off-line transactions and have proven to be useful alternatives to lawsuits. Consumers should be encouraged to explore the benefits that may arise from using ADR.

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

- **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 a dispute and allow for the enforcement of small claims. ADR can also help maintain business reputation while preserving customer trust.
- **Collective settlement mechanisms** are a useful alternative to collective redress, although they require the parties to acquiesce to the result reached. A collective settlement of an opt-out nature allows the parties to achieve finality in a dispute, thereby providing legal certainty to all those 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, with some minor differences between countries. Ombudsmen are generally constituted as an independent body in charge of controlling and monitoring public administration in its interaction with citizens.

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

Respecting national legal traditions

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

Conclusion

A high level of consumer protection in the EU is certainly necessary.

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 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 in the questionnaire in favour of collective redress at EU level. There seems to be no proper reflection about the risks and downsides for consumers, industry and national judicial systems resulting from greater recourse to collective redress actions. Legislators should avoid opening the door to a culture of abusive litigation by lowering safeguards.

Therefore, AmCham EU emphasises the need to uphold and strengthen existing safeguards in light of the developments in the legal market across the EU. The 2013 Recommendations should be updated to respond to current challenges and the Commission should work with Member States to ensure their application.

However, we would not be in favour of binding EU rules being imposed on Member States and would prefer to refine the current approach through constructive dialogue at national level, rather than through EU wide legislation.