

## **TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS**

### **European Commission's Consultation**

#### ***EuroInvestors Reply***

EuroInvestors (the European Federation of Investors or EFI) was created in the summer of 2009, following the financial crisis which demonstrated the limits of the almost exclusive dialogue between regulators and the financial industry, largely ignoring the user side. EFI aims at representing and defending at the European level the interests of financial services users in order to promote training, research and information on investments, savings, borrowings and Personal Finances of individuals in Europe, by grouping the organizations pursuing the same objectives at a national or international level. Already about 45 national organizations of investors and other financial services users have joined us, and EFI already represents about two million European citizens.

*For the purpose of this answer, “investor” refers to each individual or household buying financial services; this investor can be a shareholder, a retail investor, a saver, an insurance policy holder, a pension plan participant, a borrower etc.*

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EuroInvestors welcomes the opportunity to comment on the above consultation. Nevertheless, we regret that the European Commission despite its long term awareness of the existing problems facing investors and all other users of financial services including SMEs (hereafter referred to as “investors” as a whole) in mass detriment situations (as confirmed by the findings of the Civic Consulting studies<sup>1</sup>), and despite recognition that the performance of the existing EU enforcement tools in those situations is not satisfactory<sup>2</sup>, has not yet taken any concrete measure but chose to engage into a consultation again.

As stated in the Civic Consulting studies, **the most relevant sector concerning observed mass claims/issues is the financial services sector and this was observed before the financial crisis reached its peak.**

Collective redress covers a specific situation where the (same) illegal behaviour (fraudulent or not) of a provider or an issuer harms several individuals. Those individuals should be able to gather their claims to act against the provider/issuer for compensation of the damage they have suffered individually.

Judicial collective redress for investors currently operates nationally only in 14 Member States; as regards collective redress against issuers there is only the Dutch model (WCAM<sup>3</sup>) that investors can rely on within the EU. Even where it is available, the effectiveness of the mechanisms varies significantly. This leads to a significant discrimination in access to justice to the detriment of individual investors. Consequently, cross-border redress is currently hard to implement and investor confidence in the internal market is put in doubt. The same applies to the retail investors’ confidence in the financial markets and industry, especially following the 2008 financial crisis, and lack of any significant indemnification of non –insider retail investors since then.

Lack of compensation is a major loophole in a legal system and allows for illegal profit to be retained by businesses. In EU anti –trust situations alone, unrecovered damages are estimated to surpass €20 billion each year<sup>4</sup>. Beyond these figures, the current situation is not only unacceptable from the point of view of victims, but also imposes unequal market conditions on those businesses who abide by the rules. Therefore, EuroInvestors believes the introduction of collective redress for mass damages in the EU would help not only investors, but businesses as well.

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<sup>1</sup> Study regarding the problems facing consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (August 2008) [http://ec.europa.eu/consumers/redress\\_cons/finalreport-problemstudypart1-final.pdf](http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf)

<sup>2</sup> EC Green Paper

<sup>3</sup> Wet Collectieve Afwikkeling Massaschade (“Collective Settlements Act”)

<sup>4</sup> DG Competition figures

EuroInvestors has not developed specific replies for all 34 questions of the questionnaire, but refers to the more detailed reply from the Financial Services User Group of the European Commission.

**1. EuroInvestors's key demand is for a binding instrument at the Community level. A collective redress mechanism should be available to every European investor for both national and cross border cases irrespective of the value of the claim.**

We are convinced that a European initiative setting the main features that a judicial group action mechanism must respect is the way forward and the most efficient tool to improve the functioning of the market in favour of both investors and law-abiding financial services' providers.

At a minimum, the EU should ensure that investors and all other users of financial services have access to collective redress with minimum standards whatever Member States they are residents of, and that every EU citizen or group is eligible to any collective action in every member state if the damage occurred with a provider domiciled in that member state.

The right to compensation and the right to access to justice (recognized at the EU level<sup>5</sup>) should not remain theoretical. In practice, many consumers are unable to exercise these rights because of the inadequacy of existing means of redress to mass claim situations. The right to act collectively should be recognized at the EU level.

This is even more critical in the area of financial services since:

- financial products and services have a tremendous impact on the well being of the EU citizens, active and retired, as the EC Green Paper on Pensions and our reply to it<sup>6</sup> underline.
- financial products and services are often quite technical and complex. The damage itself is often quite difficult to quantify, even for lawyers (see the example of the French pension fund damage case in the annex).

Experience in the Member States with effective collective redress mechanisms also demonstrates that consumers make use of it. For example, in Spain, EuroInvestors member Asociación de Usuarios de Bancos, Cajas y Seguros de España (ADICAE) launched a collective action against the minimum interest mortgage repayment clause imposed by tens of Spanish banks, more than 20,000 consumers have already joined the action.

An EU legislative initiative on collective redress is necessary to set the minimum features and safeguards of a collective redress mechanism and to ensure its availability in all Member states for both national and cross-border cases. According to DG SANCO *"consumers in Member States, which do not have collective redress mechanisms in place, are likely to suffer a detriment as a result of the unavailability of such mechanisms"*<sup>7</sup>.

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<sup>5</sup> Article 6 of the European convention on Human rights: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

<sup>6</sup><http://euroinvestors.org/upload/positions/EuroInvestors%20reply%20to%20the%20Green%20paper%20toward%20adequate,%20sustainable%20and%20safe%20European%20pension%20systems1289909049.pdf>

<sup>7</sup> Study Part I, page 16 (see reference above)

Existing individual redress mechanisms are not suitable for the mass investor claims. This position is fully reflected by the European Commission's own assessment in the previous consultation paper, when defining the lack of efficiency of the current legal framework<sup>8</sup>.

## **2. EuroInvestors asks for a “European-style” collective redress scheme that has nothing to do with the US style “class actions”.**

EuroInvestors is very concerned that, after decades of debates in Europe, some bodies are still trying to confuse the very legitimate demand from all consumer and investor organizations in the EU with the US class actions scheme, and its abuses. Neither EuroInvestors nor any other significant EU consumer organization has ever asked for that or something remotely resembling it. EuroInvestors, on the contrary, is asking for an EU –wide collective redress scheme that would draw upon some EU Member States experiences (while improving them and adding the cross –border capability), in particular the Dutch one, which has often provided retail investors with effective indemnification of collective damages, mostly through settlements with providers and issuers, without any significant issues raised by the Dutch financial industry or securities' issuers. Hereby we refer to the reply of our Dutch member VEB for more detailed analysis and proposals.

## **3. A crucial success factor for the actual enforcement of the European financial regulations**

Most of the national financial supervisors do not consider investor protection as one of their priorities, even if they state the contrary (see FIN-USE 2010 report on the voice of financial services users<sup>9</sup>). It is not too surprising as even the Level 3 European Financial Supervisors rank client protection as only number six and very last objective. Besides, financial services users are very much underrepresented in these European<sup>10</sup> and national financial supervisors, if represented at all. This means that several EU legislations applicable to financial services providers like MiFID, consumer credit directive, unfair commercial practices, etc. are not properly enforced at the national level<sup>11</sup>. In 2011-2012 several new directives and regulations will be adopted at the EU level (capital markets, corporate governance, PRIps, Insurance mediation, mortgage credit, investor protection, etc.). This set of legislation requires the EU regulator to ensure that they will be properly enforced everywhere in the EU. Each Member States should be obliged to set up a real Financial User Protection body, whatever its legal structure, in order to enforce consumer rights in the financial services area. Such requirement should not prevent private organizations to claim for compensation of victims of infringements.

European investors' confidence cannot be restored unless they can really get indemnified for collective damages.

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<sup>8</sup> GREEN PAPER ON CONSUMER COLLECTIVE REDRESS (COM(2008) 794 final)

<sup>9</sup> [http://ec.europa.eu/internal\\_market/fin-use\\_forum/docs/reforming\\_eu\\_fin\\_markets\\_en.pdf](http://ec.europa.eu/internal_market/fin-use_forum/docs/reforming_eu_fin_markets_en.pdf)

<sup>10</sup> For example only two out of 30 member Pension Stakeholder Group of the EIOPA

<sup>11</sup> [See EuroInvestors reply to the MiFID review EC consultation for example](#)

**4. “ADR” must be pursued, as long as it really is an “alternative” dispute resolution option.**

As one of the crucial principles, parties to a dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the complaint. However, for collective ADR to be efficient and allow a fair settlement for investors there must indeed be an “alternative”: ‘back-up’ by a judicial collective redress mechanism. The ADR alone is not sufficient and does not provide enough incentive for businesses to participate. Furthermore, the use of ADR in Europe is diverse and closely linked to cultural traditions. The very name of “ADR” should not apply where the alternative, i.e. Collective Redress, is not really accessible to investors.

**5. All bodies representing investors must be eligible for collective redress schemes.**  
(question 14 in particular)

EuroInvestors would like to stress that the existing and well –established organizations representing interests of retail investors must and can be considered as a “safety net” in the system. Their experience with enforcement actions, their limited resources and their reputation towards the public will ensure that only meritorious claims are pursued. As experience has proven, those organisations will think twice before engaging resources in such litigation. This can be notably demonstrated by the high proportion of successful claims that retail investor organisations win when taking providers to court in the few Member States where this is possible.

What regards the designation of the representative bodies that are granted standing in collective actions, we believe these bodies might be both:

- officially designated in advance according to the criteria laid down by Member States, as long as those do not use it to restrict collective action access to general purpose organizations only excluding retail investor and SMEs groups
- and/or certified by courts on ad hoc basis.

**6. The Scope of a Coherent European Approach to Collective Redress must include all financial services.** (question 33)

The Commission’s work should not be limited to “competition and consumer protection” in a restricted sense. As stated above, it should at a minimum include all financial services users, such as shareholders, bond and fund holders, savers, retail investors, life insurance and policy holders, pension fund participants, small and individual shareholders, employee shareholders, SMEs and local governments. As mentioned above, this is not only fair, but also vital for the living standards and safety of current and future European senior citizens and to restore investor confidence.

## **Annex to EuroInvestors response to the EC consultation on collective redress:**

### **An example of the damaging consequences of the lack of collective redress scheme for financial services users - The case of CREF (French pension fund)**

CREF was a non –mandatory pension fund open to most French civil servants. It provided a very exceptional commitment to the subscribers: the savings and the retirement annuities were indexed on civil servants general salary increases, therefore providing a quite unique protection against future long term inflation. In 1989, the French Government granted it also a very exceptional tax advantage: the contributions were deductible from the taxable income of participants. Therefore, CREF could attract as many as 450 000 subscribers by the end of the nineties.

In 1999, a late control from the Government supervisor found that the fund was largely and illegally underfunded, by at least € 1.6 billion.

In 2001 CREF lowered all current and future benefits by 17 %. In 2002, it dissolved itself and transferred its assets, liabilities and deficit to a newly formed institution pushing about 80 000 pension savers of CREF to withdraw and loose more than half of the value of their savings.

For those who remained, the indexation guarantee was repelled and since then the subscribers have lost an additional 11% of the value of their savings and pension annuities.

An association of the CREF victims was formed in 2001 to help them defend their rights. Now – 10 years later – about 6000 individual claims have been filed against the CREF institution and its successor and also against the French State for failing to supervise the fund properly. These plaintiffs had to pay around € 90 to € 130 of a lawyer’s fee and pay 30 to 40 € every year since 2001 as membership fees to the association defending them.

This is because the association had to hire up to 6 FTEs to manage thousands of individual files. The lawyer did not have the means to do that. Also, the lawyer could get only benevolent help to evaluate the damages, which were quite complex and technical to assess and quantify.

In June 2010, the Administrative court of appeal of Paris condemned the French State to indemnify 20% of the quantified prejudice of a few hundreds of plaintiffs. The legal procedures against the mutual insurer and his successor are still before the civil Court of Appeal of Paris.

As a result, 10 years after the initiation of the proceedings, many of the victims are already dead, and only very few have been indemnified and very partially. The Pension Institution still does not inform the participants about the real reasons for the damages, and has not informed them of the possibility to get indemnified partially by the French State.