

COLLECTIVE REDRESS FOR CONSUMERS: TOWARD AN EU WIDE COLLECTIVE ACTION MECHANISM

MONICA CALU

Department of International Relations and European Integration
National School of Political and Administrative Studies
Expoziției Blvd 30A Bucharest
ROMANIA
monica.calu@apc-romania.ro www.apc-romania.ro

COSTEL STANCIU

Business Administration and Marketing Department
"Nicolae Titulescu" University
185, Calea Vacaresti, Sector 4, Bucharest
ROMANIA
costelstanciu@yahoo.com www.apc-romania.ro

Abstract: *At this moment there are strong signals that is a need for pursuing a solution for European consumers - by way of EU legislation - regarding a mechanism of collective redress of the mass harm produced to EU spread consumers. This study examines the different mechanisms available to consumers to resolve disputes, from private complaints handling to ADR and class actions. This paper aims to analyses the advantages and disadvantages of different approaches to dispute resolution and redress mechanisms, the limits of the out of court settlements and the current situation in the EU Member States, and the cross-border cases and solutions. It also approaches the enhance and the interconnection of the existing national ADR systems in creation of a powerful unified pan-EU mechanism, provided by Directive 2013/11/EU of the European Parliament and of the council on alternative dispute resolution for consumer disputes. At this moment there are strong signals that is a need for pursuing a solution for European consumers - by way of EU legislation - regarding a mechanism of collective redress of the mass harm produced to EU spread consumers.*

Keywords: *consumer disputes, collective redress, alternative dispute resolution, cross-border cases, settlement.*

1. Introduction

Even certain collective redress mechanisms exist all over Europe, their efficiency is contentious. Surveys such as "Fitness check of consumer law"³ and "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union"⁴

³ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

⁴ http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Studies

have revealed that the existing redresses are rarely used or they do not determined the expected results, in almost all Member States.

Collective redress for compensation, also known as a group action or a class action, reunites consumers who have suffered the same or very similar loss or harm caused by the same trader. They come in court as a group and seek redress, in one legal claim.

Alternative dispute resolution it's a collective term for the ways that parties can settle a dispute by means of extra-judicial mechanisms with (or without) the help of a third party.

Even if these two notions of „collective redress” and „ADR”, at first sight, apparently have little in common, these two topics have become closely related in disputes regarding consumers who have had their rights violated by traders.

Even if judicial collective redress procedures cannot be replaced by Alternative Dispute Resolution (ADR) or amicable settlements, we must put aside the assumption that the courts offer the only technique that can deliver redress or that is not possible an amicable settlement procedure for mass claims. Parties in dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the judicial claim, taking into account all available options.

According to international and European human rights law, the notion of access to justice obliges states to guarantee each individual's right to go to court - or, in some circumstances, an alternative dispute resolution body - to obtain a remedy if it is found that the individual's rights have been violated.

Non-judicial pathways to justice are also considered, including non-judicial bodies and alternative dispute resolution methods. Alternative dispute resolution (ADR) procedures, such as mediation and arbitration, provide alternatives to accessing justice via formal judicial routes. The EU has encouraged the use of ADR with legislation such as the EU Mediation Directive and a variety of consumer protection initiatives.

Dispute Resolution is one of the most talked-about topics nowadays. An area barely known or practiced a decade ago, it has now become the most reachable 'tool' for people who seek justice. Now we know that Court is not the only solution, and even more, we have begun to see it as a last resort solution.

The legal needs of ordinary people as consumers in their disputes with traders have changed over the last decade. After years of litigations and due to the large amounts of money and lengthy judicial procedures involved in the trial process, the consumers and the consumer's communities or consumer's associations have increasingly turned to legal alternatives that are more prompt, private and economical than the courtroom. Also, when the traders are faced with a dispute regarding the consumer's right, due to the changes in consumer protection legislation, the companies are learning that, whenever possible, it is more advantageous to them to solve their differences between themselves rather than relying on an expensive, time-consuming and sometimes inefficient judicial system. Now, the parties in dispute can reach practical and private agreements instead to fight for years and spend huge amounts of money in endless courtroom battles by using the ADR bodies and the Online Dispute Resolution (ODR) bodies have been created and linked together thorough the European Union. Almost all of the ADR systems use one or more of the same elementary dispute resolution techniques of negotiation, mediation, conciliation and arbitration.

Generally, the procedural rules regarding arbitration are more formal than the rules of mediation, but not as strict as procedural rules that govern litigation in court. Therefore, mediation is seen as a non-binding process and arbitration as a binding action, or,

simplifying, in ADR, binding arbitration replaces the trial process with the arbitration procedure.

2. Romania's experience in ADR

Alternative Dispute Resolution mechanism in Romania provides arbitration and mediation, according to Government Ordinance no. 38 of 26 August 2015 on Alternative Dispute Resolution between Consumers and Traders. While arbitration procedure is very similar to the common judicial procedure due to provisions regarding the arbitration from the Romanian Civil Procedural Code, that regulate notifications, summoning, compatibilities and binding effect (general legal framework on arbitration is governed by the Code of Civil Procedure, Law No. 134/2010 on the Civil Procedure Code, republished in articles 541-621), mediation is far more different due to the fact that the mediator's activity involves mostly counseling and the mediation agreement is essentially non-binding. Even that arbitration is less formal than court, though the claimant/ the consumer and the other party may present evidences, appear at hearings etc. Unlike mediation, an arbitrator or panel of arbitrators makes a decision and the decision may be legally binding. But, in case an alternative dispute resolution does not settle the problem, the consumer may choose to sue the trader.

Nowadays, after the explosion of the trials against the financial institutions, the insurers, cars producers telecom, internet or energy providers or even against governments illegal actions, we live in a changed reality where many judicial systems face increasing workloads and where access to courts can be expensive. And so, in many aspects of life when a conflict arise, due to the vast amounts of time and money involved in the trial process, the consumers and business communities start increasingly to choose the legal alternatives that are more prompt, private and economical than the courtroom. The principles of shared costs, and the power that multiple complainants can have, are well understood and appreciated by European consumers.

But, despite the advantages provided by these quasi-judicial procedures brought before the non-judicial bodies (these ADR methods are recognized as more expeditious, private, less formalistic and generally much cheaper than a trial), however, the large majority of non-judicial bodies do not have the power to issue binding decisions, and their powers of compensation are generally limited. Also, in case of consumers who have suffered the same or very similar damage from the same trader and gather in a group of claimants, the very large numbers of consumers complicates the evaluation of the case and of damages, and the total value of claim is so high that surpass the capacity of ADR bodies to provide proceedings for mass claims. There are a very few alternative dispute resolution bodies which developed the procedures for mass claims: Swedish and Finnish Consumer Complaint Boards, Spanish Arbitration System. Another limitation of the power of the ADR bodies is that it is impossible to take provisional measures during the negotiations, like to immobilize a company's assets. In these situations of multiple claims situations, ADR or the amicable settlements could be part of the „consumer toolkit”, but judicial collective redress procedures cannot be replaced by alternative dispute resolution.

As example of the limits of the ADR use are eloquent in the Volkswagen case, where the company refused to negotiate for compensation with consumers from European Union. In September 2015, in Dieseldgate scandal, Volkswagen admitted that 11 million of its vehicles were equipped with software that was used to cheat on emissions tests. In the

United States, where the scandal was uncovered, Volkswagen reached a settlement agreement with American consumers. The VW group has agreed to pay \$1,000 to 500,000 drivers. US owners of VW diesel cars with proposed to pay \$500 on a prepaid visa card and \$500 in dealership credits as compensation because it cannot yet remove the illegal software. Even if in Europe over 8 million cars have had this defeat device installed and VW may have broken two directives of EU legislation - the consumer sales and guarantees directive and the unfair commercial practices directive⁵, the carmaker has said rules in Europe are different and an engine repair is sufficient compensation.

This is one reason for in many EU's Member States jurisdictions, litigation culture still remains dominant; change may be resisted by parties unwilling to submit their disputes to an unfamiliar process, courts still strain under growing pileup of cases, even that the new consumer rights legislation adopted aims to reduce the burden and the pressure, and inspiring prospective litigants deterred by the prospect of a lengthy court process to pursue alternative options.

3. Collective redress for compensation

What is collective redress for compensation: also known as a group action or a class action, it's the situation when consumers who have suffered the same or very similar harm or loss, caused by the same trader, gather and seek redress in court as a group, in one legal claim. Consumer regress for compensation enables a group of consumers who have had their rights violated, to be represented by a third body (for example, by a consumer organization or by a state authority) which seeks remedies for them especially by litigation against the trader.

The role of collective redress results from the reality that, in our mass consumption society fueled by mass production and the globalization of the markets, violation of legal norms can affect a great number of consumers and individual consumers would not go to court fearing high financial costs, expensive or lengthy procedures, time consuming, emotionally draining process, even intimidating tactics and not to forget the unpredictable result.

Also, there are several advantages for what class action lawsuits can be preferable to individual litigation for consumers. Aggregating multiple suits into one suit expedites the legal process and makes it easier for a case to move through the court system, as a class action lawsuit is decided by one judge in one court. A class action is a unique procedure which implies lower litigation costs (costs will be divided among group members), the opportunity for plaintiffs to seek relief when claiming for small amounts of money and opportunity for all plaintiffs to receive damages. When violated rights have low value for each plaintiff, a class action will allow plaintiffs to seek relief who would not have found it financially prudent to do so in an individual lawsuit. This is the case, for example, in consumer lawsuits pertaining to deception or overcharging, where the only damage produced is monetary damage of low value. Also, the use of collective redress mechanisms

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

attract a large media coverage than individual litigation and/or individual ADR. In case a class action is won by consumers, the judicial precedent is so powerful that the corporation or the authority which would be tempted to abuse its power in the future will refrain from such type of abuse.

As example, after the financial crisis caused the inflation of class actions against the financial institutions, the defendants are increasingly wary of their reputation, and media coverage increases the deterrent effects caused by such collective cases than the concomitant abundance of individual litigation.

The downside of the class action brought in front of court is that if the plaintiff's litigator does not plead effectively or the class applicants do not have strong claims, then the legitimate claims of other class members can be hurt.

Also, if the group action is unsuccessful in their lawsuit then individual class members likely do not have the right to bring individual lawsuits in another trial (non bis in idem rule). This is the reason for what the group should consider as first option alternative dispute resolution procedures as a safer way of obtaining redress in mass harm situations. Collective alternative dispute resolution procedure should always be available alongside, or as a voluntary element of judicial collective redress. Even that the principle of party disposition remains the ground principle for the allegations and evidences, applications during the trial and appealing to remedies between the parties and the court in civil proceedings, there is an undeniable tendency, across the Member States, towards a more active role being played by the court. In the content of the principle of the active role of the judge comes in the obligation (and the right of the judge, of course) to put all the diligence as the parties to choose another way of solving the conflict between them, namely the amiable way.

4. Collective redress in Romania

Under Romanian law, class action is not expressly regulated nor collective redress action. Although, there is not currently explicit regulation of procedure in group action in Romanian law, the Civil Procedural Code allows collective actions considering the regulation of such institutions, as joinder of actions, joint claimants, co-plaintiffs, co-defendants, co-participation in trial etc. Also, the Romanian law does not offer a special proceedings for complex class action.

The notion of collective/class actions is not provided within the Civil Procedure Code, but some elements are regulated in certain special laws related to consumer law, labor rights and in Competition Code (modified recently by Emergency Ordinance 39/2017 on damage claims related to cases of competition law infringements and amending the Competition law no. 21/1996).

However, several persons may file a unique claim, according to article 37 of Romanian Civil Procedure Code, in case of the object of the trial is a mutual right or obligation, or if their rights and obligations have the same cause or if there is a close connection between them e.g. their claims derive from similar contracts concluded with the same person.

Unfortunately, in some situations - like it happened in Romania in the class actions regarding misleading the borrowers to CHF loans (between 2013-2015) - this type of cases are discouraged by administrative reasons of courts. In many of these class actions regarding the freezing of the exchange rate of CHF at the level from the time of the

concluding of the contracts, courts severed collective files in hundreds and even thousands of individual files, without scrutinized the identity of the legal issues raised collectively by hundreds of consumers and has disunited collective files in hundreds of individual actions.

Notwithstanding the above, a few type of class action developed in Romania and among them are the actions filed by consumer associations in the matter of infringement of consumers' legally established rights and interests. Social and economic sideslips led to infringements in consumers' rights by major economic actors such as commercial banks or non-banking financial institutions, by telecom, transport, touristic companies, by energy providers. The interest in collective claims has registered an increasing trend due to recent amendments in consume legislation. The Government Ordinance nr.21/1992 provides the possibility to establish consumer association, defined by law as non-profit legal persons founded in the purpose of representing the rights and interests of their members or as well as the general interest. On behalf on their members' rights and interests provided by the Government Ordinance 21/1992, Consumer's Code (Law 296/2004), Law no. 193/2000 regarding the abusive clauses in contracts concluded between consumers and traders and other relevant legislation, these associations, among other legal attributes, have the capacity to file claims before courts of justice for the protection of their members' rights and interests, to initiate claims when providers infringe their legal obligations and put to risk their members' rights and interests. Also, associations that meet legal requirements have the possibility to seek for judicial relief in matters of covering consumer's losses deriving from dangerous goods or inconsistent services, to obtain annulment of abusive clauses in contracts or to injunct dishonest practices that put consumers' rights and interests to risk.

In case of adhesion contracts that comprise abusive clauses, the law authorizes certain control authorities to notify the court from the professional's domicile or headquarters and to request asking to be bound by an order of court injunctions to change the contracts under development, by removing the abusive clauses, as it is provided by art.12 and 13 of Law no.193/2000. These authorities are represented according to art.8 of the law, by the National Authority for Consumers' Protection representatives, as well as by the authorized specialists of other public administration authorities, according to their competencies. Besides them, the consumers prejudiced through the respective contracts have the right to address to the court.

Especially after the amendment of Law no. 193/2000 by Law 76/2012, in the situation of an court action filed by the National Authority for Consumer Protection in front of a tribunal against a professional concerning abusive clauses in consumer contracts, if the court ruling confirms the abusive character of a contractual clause, the judicial decision will be mandatory for the professional with regard to all such on-going contracts and all pre-formulated standard agreements which are to be used. To receive compensation, if the injunction case was won by National Authority of Consumer Protection, a consumer must introduce a separate action in court, according to the Romanian Civil Procedural Code. The National Authority of Consumer Protection is not entitled to make these kind of request in court. Through a civil case, against a trader the professional need to fully repay the price (and interest) and to compensate damages to the consumer and also to pay the judicial charges.

Recently, in Romania, was adopted the Emergency Ordinance no. 39 of 31 May 2017 on the actions in damages in cases of breach of the provisions of the legislation in competition matters, as well as to change and completing Competition Law no. 21/1996. The Government Emergency Ordinance deals with the transposition into national law of

Directive 2014/104 / EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for compensation under the of national law in the event of infringements of the provisions of competition law in the Member States and the European Union.

5. Collective redress mechanisms and ADR in the European Union

An European Commission consultation⁶ from 2011 it has been Furthermore, it has been revealed that majority of consumers (an EU average of 79%, rising to 90% in Ireland) would be more willing to defend their rights in court if they could join a collective action. The same consultation showed the consumers strongly prefer collective actions in mass claim situations, 96% said they would certainly or likely join a group action with other persons affected by the same business behavior.

Also, in 2011, in all EU Member States (with the exception of Hungary), a majority of respondents agreed that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing, according to Flash Eurobarometer 299 “Consumer attitudes towards cross border trade and consumer protection”, March 2011

In conclusion, 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.

Therefore, existing individual redress mechanisms are unsuitable for mass consumer claims. For example, only the internal market of the European Union has 500 million potential consumers and the non-compliance of the producers or providers of services or of the sellers with the legal rules regarding the consumers’ rights produce mass harm or hazardous situation for the consumers. Only in a few EU Member States as Spain, Portugal, Belgium and Italy it was possible for consumers to make collective redress claims against the company because very few national mechanisms can really be used with positive results, even if there are an amalgam of national collective redress mechanisms currently in place in the European Union.

These inefficient mechanisms cause lack of compensation for harm suffered by the mass of consumers and is an elapse of the legal system that allows for illegal profit to be retained by unfair traders. Moreover, there are numerous cross border mass detriment situations where consumers are not protected because lack of an appropriate mechanism. But, do collective redress in court works? Does obtains cheaply, rapidly and effective mass solutions? Collective actions also take long time and are also expensive.

In the OECD’s Recommendation on Consumer Dispute Resolution and Redress⁷, OECD recommends that all states should adopt mechanisms that enable consumers to be able to resolve disputes effectively, whether individually, collectively or through public authorities, and accentuates the need for a combination of mechanisms, preferring direct negotiation as the first option. Early settlement of disputes should be encouraged whenever possible, and the litigation in court should be viewed as a last choice.

⁶ http://ec.europa.eu/competition/consultations/2011_collective_redress/ocu_en.pdf

⁷ OECD Recommendation on Consumer Dispute Resolution and Redress (Paris: OECD, 2007) at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>

Collective out-of-court dispute resolution schemes should take into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters⁴³ but should also be specifically tailored for collective actions.

In the past decade, and especially after adopting the Directive 2013/11/EU on alternative dispute resolution (ADR), alternative dispute resolution has been included within court procedures and separate structures of Consumer ADR have been constructed that are set to expand considerably (Hodges et al. 2012a). Alternative dispute resolution bodies have to meet strict EU quality criteria, which guarantee that they handle the disputes between traders and consumers dispute in an effective, fair, independent and transparent way. Also, under European Union law, consumers can use these bodies to handle all contractual disputes they have with a trader established in the European Union. Alternative dispute resolution can be used for any market sector (such as financial services, e-commerce, tourism, transport, telecoms and energy).

Some of them reached a pan-European coverage, as FIN-NET. FIN-NET is a network of national organizations responsible for settling consumers' complaints in the area of financial services out of court. The network covers the countries of the European Economic Area⁸ (the European Union, Iceland, Liechtenstein and Norway). As good example of instrument in consumer tool-kit, FIN-NET was set up by the European Commission in 2001 to promote cooperation among national ombudsmen in financial services provide consumers with easy access to alternative dispute resolution (ADR) procedures in cross-border disputes about provision of financial services.

On 11 June 2013, European Commission adopted a Recommendation 9 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. The purpose of this Recommendation is “to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation”. The Recommendation is a proposed framework, is not mandatory and many aspects remained subject to internal national rules for each of Member States. Also, European Commission has published on 26th January 2018 a report¹⁰ regarding the progress made by Member States on the implementation of collective redress measures following the Commission’s 2013 Recommendation¹¹.

The Commission’s 2013/396/EU Recommendation stresses that all Member States should have collective redress mechanisms at national level, both injunctive and

⁸ In Romania, Center of Alternative Solution of litigations in Banking System (CSALB) was constituted according the Government Ordinance no. 38/2015 with the purpose of organizing and managing the alternative solution of litigation in banking sector, respectively between the consumers and credit institutions. *Since September 2017 the Ministry of Economy has the responsibility to analyze the requests of bodies wishing to be alternative solution entities litigation, to ensure that they comply with the legal provisions and to notify the list entities admitted to the European Commission.* This is the first step of including the Alternative Dispute Resolution Center for Banking (CSALB) in the European Alternative Dispute Resolution Platform, FIN-NET.

⁹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) (OJ L 201 of 26.7.2013)

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:40:FIN>

¹¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013

compensatory, available in all cases where rights granted under Union law are, or have been, violated to the detriment of more than one person.

Regarding collective out-of-court dispute resolution, the 2013/396/EU Recommendation requests Member States to encourage parties to settle their disputes consensually or out-of-court, before or during the litigation and to make collective out-of-court dispute resolution mechanisms available alongside or as a voluntary element of judicial collective redress. Also, suggests that limitation periods applicable to the claims should be suspended during the alternative dispute resolution procedure. Regarding the binding outcome of a collective settlement, the Commission proposes it should be controlled by a court (paragraphs 25 to 28 of the Commission Recommendation, Collective alternative dispute resolution and settlements). Recommendation also provides that the use of collective out-of-court dispute resolution should depend on the express consent of the parties involved, whereas in relation to individual claims it may be mandatory.

The advantages of introducing such schemes of collective alternative dispute resolution and settlements in collective redress mechanisms are the potential positive effects on the length of the proceedings, lowering the costs for parties and for judicial systems, and I foresee them as being an efficient way of dealing with mass harm situations. Using ADR procedures does not prevent parties from exercising their right of access to the judicial system in case does not settle the problem by out-of-court resolution. At the last resort, the only truly convincing incentive for traders to respond seriously and in good faith to collective redress ADR is the final threat of collective redress.

As we see, in fact these two solutions – alternative dispute resolution and collective redress – have become recently closely connected, promoted politically and put in practice.

The report shows that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU. „Collective redress in the form of injunctive relief exists in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive¹²” (...) Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK) but in over half of them it is limited to specific sectors, mainly to consumer claims.” The scope of the Injunctions Directive covers infringements of EU consumer laws as enumerated in its Annex I.

But, also the report reveals that “among the 19 Member States that have compensatory relief schemes, 11 have introduced specific provisions on collective out-of-court dispute resolution mechanisms (BE, BG, DK, FR, DE, IT, LT, NL, PL, PT, UK). This list includes the three Member States that have adopted new legislation after the adoption of the Recommendation (BE, FR and LT) as well as the UK which introduced a specific provision on out-of-court dispute resolution in the competition mechanism. In its legislative proposal, SI is largely following the Recommendation. The remaining 8 Member States that have collective redress schemes apply general provisions on out-of-court dispute resolution to such situations, for instance as implemented in the national legislation pursuant to Directive 2008/52/EC.

Regarding *cross-border cases*, the Recommendation requires Member States to not prevent, through national rules on admissibility or standing, participation of foreign groups of claimants or foreign representative entities in a single collective action before their

¹² Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

courts. In present, in cross border situations, consumers have to act individually to obtain compensation. But, European Court of Justice, in the recent judgment in Case C-498/16 Maximilian Schrems v Facebook Ireland Limited, stated that European consumers cannot group their claims and go to one single court in their home country collectively when faced with the same misconduct and resulting damages by a company.

As still are a large number of European consumers which are deprived from using a collective redress tool, as several Member States have not introduced collective redress mechanisms in their national system, the ruling issued by the European Court of Justice has limited consumer options for better access to justice in mass harm cases. A great divergence between the Member States persists in terms of the availability and the nature of collective redress mechanisms,

Just few EU countries have introduced or amended legislation in this area following the European Commission's recommendation, and 9 countries still do not provide any possibility for consumers to claim compensation collectively.

For example, the Romanian procedural law does not provide expressly for a mechanism for class action or for collective redress and Romanian law does not offer special proceedings for complex class action litigations. The Civil procedure code only provides the legal possibility for claims between different Parties to be united and the fact that the Romanian procedural law allows multiple claimants, it contains no actual legal provisions implementing the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

The consumers that suffered damages due to the inclusion of unfair terms in their respective agreements concluded with professionals may claim damages from the professional.

The Government Ordinance nr.21/1992 provides the possibility to establish Consumer Association defined by law as non-profit legal persons founded in the purpose of representing the rights and interests of their members or as well as the general interest.

On 31 May 2017, the Romanian government adopted Government Emergency Ordinance no. 39/2017 on damage claims related to cases of competition law infringements and amending the Competition law no. 21/1996, which transposes to Romanian law Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive"). The 39/2017 GEO establishes the right of any person that suffered harm caused following an infringement of competition law by an undertaking or association of undertakings to claim full compensation before the competent courts.

6. Toward a New Deal for Consumers

The proposal for the Directive (New Deal for Consumers Directive) allows "qualified entities", such as consumer organisations but also ad hoc bodies, to initiate actions on behalf of all consumers. These entities will have to satisfy minimum reputational criteria (they must be properly established, not for profit and have a legitimate interest in ensuring compliance with the relevant EU law). Compensatory collective redress actions will also be available. A very important feature of these actions is that, in order to protect the interests of consumers, the above-mentioned entities will be entitled to

seek redress to seek redress, such as compensation, replacement or repair, on behalf of a group of consumers that have been harmed by an illegal commercial practice. A very challenging novelty is that if a prior administrative or court decision has assessed an infringement, it should be taken as incontestable evidence in any further redress action, not just in the same, but also in other Member States. This acceptance of court and administrative decisions should avoid legal uncertainty and unnecessary costs for all parties, including the ones involved in litigation. This new development could positively remodel the redress tools for consumers. Collective actions will be made possible in all EU countries. To ensure that it is different from US-style class actions, representative actions according to the New Deal for Consumers will not be open to law firms, but only to organisms such as consumer organisations that are non-profit and accomplish strict eligibility criteria, checked by a public authority¹³.

7. Conclusions

At this moment, there are powerful consumer protection rules in place in European Union, but regarding public enforcement by way of ceasing infringements and imposing fines, does not in itself enable consumers to be compensated for damage suffered. Through injunctive actions, consumer organizations and/ or national authorities for consumer protection act in court to put an end to illegal practices. European consumers suffering from damage caused by the same trader should be able to coordinate their claims effectively and efficiently into one single action in all European Member States. The integration of European markets and the consequent increase in cross-border activities highlight the need for EU-wide, consistent, redress mechanisms, available in out-of-court, alternative dispute resolution system and also in judicial system. Because of the demand is for a binding instrument at Community level. A collective redress mechanism should be available to every European consumer, for both national and cross border cases, irrespective of the value of the claim. Without functioning collective redress procedures, consumers do not have chances to get remedies even in cases of evident infringements of their rights. The introduction both to judicial and out-of-court of more effective collective actions and collective redress mechanisms that should be common across the Union, while respecting the different legal traditions of the Member States, could yield benefits to consumers in countries where collective redress mechanisms have not been introduced yet, as well as to consumers in countries where collective redress mechanisms are already available.

It is possible that the existence of collective redress mechanisms at Community level to create a higher exposure to liability for a company, because other means of redress (such as individual court action) may be in practice unavailable to consumers due to the costs of litigation or other obstacles. Also, existing collective redress mechanisms, both out-of-court or by litigation, may decrease rather than increase the costs for traders, in case that a multitude of separate litigations, potentially in different courts, is replaced by one collective procedure. Therefore, a procedure is necessary to be available in all EU Member States, based on minimum requirements: an equilibrium between the rights of both parties and not making the system too complex and overburdened with procedural requirements

¹³ https://ec.europa.eu/info/files/proposal-directive-representative-actions-protection-collective-interests-consumers_en

and rules. to address certain identified shortcomings of the Consumer Rights Directives could be beneficial by introducing EU-level rights to remedies (such as right to terminate the contract or to receive a refund of the price paid) for victims of unfair commercial practices, improving the awareness, enforcement of the rules and redress opportunities to make the best of the existing legislation.

As the Report on the implementation of collective redress mechanisms by Member States shows that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU. Without simple, clear and performable collective redress mechanisms, the enforceability of consumer rights will not improve in the situation of the mass harm produced by the same trader across the EU. At the same time, this is a strong signal for other EU institutions that there should be no hesitation in encouragement a EU wide collective action mechanism that effectively compensates harmed consumers.

References:

- [1] Christopher Hodges, *Collective Redress: A Breakthrough or a Damp Squibb?* in *Journal of Consumer Policy* 37(1), March 2013;
- [2] Christopher Hodges, *Current discussions on consumer redress: collective redress and ADR*, Published online: 11 January 2012, https://www.law.ox.ac.uk/sites/files/oxlaw/here_2_2.pdf
- [3] https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en
- [4] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013
- [5] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:40:FIN>
- [6] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847
- [7] https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/financial-dispute-resolution-network-fin-net_en
- [8] http://www.civic-consulting.de/reports/collective%20redress_study.pdf