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# AK Position Paper

## AK-position to the Consultation Paper of the EU Commission - "Towards a Coherent European Approach to Collective Redress in the EU"

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# About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

**Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

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Director

# Introduction

AK welcomes the initiative of the EU Commission to create mechanisms of collective redress

The Austrian Federal Chamber of Labour (referred to below as "AK", the abbreviation of its German designation) responds as follows to the Consultation Paper of the EU Commission of 4 February 2011 entitled "Towards a Coherent European Approach to Collective Redress in the European Union".

AK welcomes the initiative of the EU Commission to create mechanisms of collective redress. AK has been pushing for the implementation of such measures in national procedural law for many years. AK believes it is important for the further development of the Single Market that legal redress is ensured and that trust in the Single Market is built up in the process.

# The AK position in detail

In connection with investor scandals in recent years, the Chambers of Labour often represented several thousand injured parties

From the perspective of AK, the set of mechanisms for collective redress is not limited to group and collective actions alone. It also extends to test cases for the exemplary clarification of disputed legal issues. It is not clear from the outset whether breaches of Community law will have cross-border effects or only domestic ones. The regulation should therefore apply to domestic as well as cross-border mechanisms of collective redress. Collective mechanisms for the enforcement of law should improve legal redress for workers, consumers and other victims as well as streamlining proceedings and lowering the costs associated with them. The application of these mechanisms of collective redress should be subject to as few restrictions as possible. Their use should in any case extend to labour, consumer protection, law against unfair competition and the assertion of mass damages.

AK and its regional counterparts are receiving an increasing number of redress cases. Some are related to labour law, others to consumer protection. They involve cross-border issues and are filed by claimants residing in different member states. Standard regulations are called for, at least with regard to procedural principles. The implementation of collective redress in Community law is a necessary step to harmonise the law and to render procedural rules more understandable for those who apply the law. In cases involving cross-border situations, legal action may have to be taken in another member state. It would be advantageous to be able to resort to a uniform set of regulations and thereby ease access to the law for claimants.

AK responds to the following topics in the Consultation Paper as follows:

**Need for creating mechanisms of collective redress:**

In their scope of activity, AK and its nine counterparts at regional level are involved in many different ways in asserting a number of claims of this type against the same defendants.

- Labour law:

In labour law, mechanisms of collective redress apply to proceedings involving construction fraud and "wage dumping" and to the enforcement of claims associated with vested company retirement benefits and with disputes involving the transfer of business interests.

- Consumer law:

In connection with investor scandals in recent years, the Chambers of Labour often represented several thousand injured parties. In the enforcement of claims owing to inadmissible interest clauses, the Chambers of Labour have asserted a number of claims of the same kind against the same defendant.

The investment scandals in recent times in particular have vividly shown that many consumers throughout the EU can be harmed by the conduct of a single business and that there is a need for mechanisms of collective redress. Consumer studies show that many consumers shy away from individual lawsuits but would join in a collective action to enforce their claims. With mechanisms of collective redress, consumers could even assert small claims whose litigation would otherwise be non-economical for them as individuals. The collective redress mechanism would also help to correct competitive distortion caused by unlawful practices.

To enforce these types of collective claims, the Chambers of Labour utilise the "class action suit Austrian style", inter alia. This mechanism has substantial deficits in terms of affording redress:

- Issue of the admissibility of the lawsuit: Sued businesses regularly contest whether this lawsuit is admissible so admissibility has to be decided as a preliminary issue in each procedure. This step can cause substantial time delays.

- Individuals or institutions must present themselves as plaintiffs for the class action. This step entails a substantial risk of legal costs because the plaintiff is liable for legal costs. If no one is willing to step forward as a plaintiff, no group lawsuit is filed.

- A class action must be preceded by individual claims being bundled and assigned. These processes are elaborate and sometimes fail because not all stakeholders agree to have a representative entity bring the claims.

- Class action is not suitable for cross-border actions because the European Court of Justice and the Austrian Supreme Court rule that the consumer's jurisdiction is lost when collection is assigned.

The need for implementing collective redress is imperative to enable claimants have better access to the law, to create standard procedural rules across the EU and to ensure that legal proceedings are dealt with efficiently and economically.

**Scope of application:**

The scope of application for collective redress should be as broad as possible. Wherever collective damages/ claims arise and proceedings can be handled more efficiently with mechanisms of collective redress, these mechanisms should be allowed to be used, for example, also in the area of data privacy and in the entire financial services industry. This change would give workers, consumers and other injured parties better access to the law whilst also lightening the caseload of the courts.

**Legally binding regulation or a matter of personal responsibility:**

It is imperative that a legally binding regulation/EU directive be created. AK basically supports all out-of-court alternative dispute resolution schemes such as arbitration or mediation. Experience shows, however, that employers and traders are usually only prepared to engage in serious, results-oriented negotiations if they feel the pressure of an imminent lawsuit. The creation of a sharp mechanism for collective redress would actually help promote out-of-court alternative dispute resolution. AK has low expectations when it comes to employers or traders taking personal responsibility in this regard. They have already had this option the entire time yet have taken no initiative. The mandatory use of out-of-court dispute resolution schemes prior to conducting a lawsuit is problematic in mass proceedings in particular because of the danger of delay and protraction.

Each member state should approve suitable organisations and associations according to uniform criteria established EU-wide and have these bodies entered in an EU register

**Right of action:**

Private and public entities representing public interests should have the right of action and for lawsuits aimed at compensatory redress, any rightful claimants should be so authorised. AK believes a "concession system" should be given preference. Each member state should approve suitable organisations and associations according to uniform criteria established EU-wide and have these bodies entered in an EU register. Collective or group redress often entails a public interest such as preventing welfare fraud and "wage dumping", consumer protection or unfair competition. For this reason, no group plaintiffs that are solely profit oriented should be allowed.

By way of demonstration, the following list could be applied as criteria for the admission of a group plaintiff:

- Non-profit status
- Sufficient organisational resources and infrastructure
- Appropriate expertise
- Suitable financial resources

**Reimbursement of expenses:**

The "loser pays" principle should also be applied to group lawsuits. Mutual reimbursement of costs has a socio-political function in that plaintiffs whose claims win out are reimbursed the expenses of necessary prosecution instead of "being saddled with" trial expenses even though they won.

In addition, the "loser pays" principle is a safeguard against collective redress being abused.

The "loser pays" principle has a special preventive effect on the defendant because if found guilty, the defendant would otherwise only have to pay what he owed anyway.

Experience shows that defendants usually do not give plaintiffs the information needed for correctly determining the claim amounts. A provision must therefore be made to protect plaintiffs from costs resulting from suits being excessive through no fault of the plaintiffs' own. A model based on § 43.2 Austrian Code of Civil Procedure would be conceivable in this context.

If the group plaintiff wins, the organisation bringing the group action should also receive appropriate reimbursement of costs. Granting the reimbursement of this administrative expense appears reasonable because these additional expenses are set off by the cost-cutting effects of more concentrated proceedings.

**Security deposit for legal costs:**

AK is strongly opposed to a security deposit for legal costs for group plaintiffs. Paying a security deposit of this kind is a massive one-sided impediment to free access to the law. This demand is being pushed by the business community and would put workers and consumers at an unfair disadvantage. The proposal lacks any objective justification because the collectability of legal costs from the sued employer or business is not fully ensured either. If the proposal to establish a security deposit for legal costs can even be entertained, then the only acceptable approach would be to have the sued business also make a security deposit for legal costs prior to filing a defence.

**Opt-in/opt-out principle:**

From the standpoint of AK, the "opt-in" principle is the preferable approach. After all, the group action should be viewed as a supplementary legal mechanism and is not meant to make the individual assertion of claims more difficult.

**Legal venue for group action:**

It is imperative that clear rules be drawn up on who has the authority to bring group actions. These rules should be geared to rules already in place within jurisdictions for labour law disputes and consumer law disputes.

It should also be noted in this context that there are shortcomings in the current rules on juris-dictions for consumers that are not objectively justifiable and that make it much more difficult for consumers to obtain relief.

The exception regarding contracts of transport provided for in Art 15.3 Regulation (EC) No 44/2001 creates major problems in actual practice. There is regularly an overabundance of complaints precisely in connection with contracts of transport that are very difficult to assert in a lawsuit. Consumers constantly enter into cross-border contracts with low-fare airlines, for instance. These carriers often have no registered office domestically so if the passenger begins the flight abroad in a neighbouring country, he can only bring action in the airline's country of residence or in the country where he commenced the flight. This situation creates additional barriers and prevents the law from being enforced.

In addition, the plaintiff or defendant must personally be a consumer. Claims from assigned rights do not suffice. If an organisation entitled to bring action, such as the VKI (a major con-sumer information association in Austria) or AK, assigns a consumer's rights so that model case proceedings can be conducted, the consumer's jurisdiction is lost due to the assignment.

**AK believes that further mechanisms of collective redress are needed in addition to group action:**

With these test cases, one can avoid unreasonable lawsuits that ultimately merely serve to keep a term

• Test cases:

In many cases, it is in the common interest of the litigants to use "test cases" to settle a disputed legal issue affecting a large number of contractual relationships. Unless the defendant waives the statute of limitation in each similar case, the claims of all rightful claimants who did not bring action risk expiry by limitation. AK has therefore been demanding for several years that the statute of limitations be suspended for these kinds of test cases if brought by certain organisations yet to be defined that have locus standi in the matter. With these test cases, one can avoid unreasonable lawsuits that ultimately merely serve to keep a term. Test case proceedings of this kind would have rendered superfluous all collective actions brought against the banks in connection with the dispute on interest rates.

• Scope of effectiveness for actions brought by representative associations:

Under current law, rulings handed down in actions brought by representative associations only have an effect between litigants – AK/VKI as plaintiff and the business as defendant.

If the business ignores the court decision made in connection with the association action and keeps invoking an inadmissible contract clause in dealings with the consumer – cases of this kind have been observed in actual practice – the consumer is forced to bring an individual action for declaratory judgment or payment.

AK therefore demands that the judgments handed down in connection with actions brought by associations also be effective in the contractual relationship between the consumer and the trader.

• Skimming off excess profits:

In actual practice, businesses engage in unlawful conduct from which consumers incur massive minimal damages. These damages are trifle for the individual consumer so taking court action to collect these claims is not economical for the individual. Businesses of dubious repute speculate that these minimal damages will not be claimed and thus earn great profit from unlawful business practices.

This behaviour is extremely harmful to society and distorts competition.

AK therefore demands that the consumer associations named in § 29 of the Austrian Consumer Protection Act be empowered to bring action to skim off excess profits obtained through unlawful business practices.

The skimmed-off profits should flow to consumer organisations so they can benefit consumers.

Should you have any further questions please do not hesitate to contact

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