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BUSINESSEUROPE POSITION ON COLLECTIVE ACTIONS

SUMMARY

Over recent years, the debate on collective actions has increased at EU level, based on the European Commission's claim that consumers lack confidence in cross-border shopping at EU level due to their concerns about the effectiveness of redress mechanisms.

BUSINESSEUROPE strongly supports effective and easy access to justice for EU consumers, which is key to underpin European stakeholders' confidence in the Internal Market and to ensure fair competition. It is in the interest of companies, that adequate redress mechanisms exist and function well. This is why we consider it of primary importance that a balance is struck between the interests of the various players and that the legal and economic consequences of any proposal are taken into consideration.

The debate launched by the Commission is particularly necessary to answer to some questions - not yet clarified in our view - regarding whether further action is needed on this subject.

The principles of better regulation and subsidiarity as well as the goals of the Lisbon Agenda must be at the heart of this debate. Before any action is taken at EU level, we believe it essential to:

- Identify any problems and provide sufficient evidence;
- Pinpoint their causes;
- Assess whether any EU action is needed;
- Assess whether an EU action is needed and justified and, if this is the case, assess what is the most appropriate type of action;
- Assess the impact of this action on growth/jobs and competitiveness in the Internal Market; and
- Consult and discuss with representative stakeholders throughout the entire process providing enough time for elaboration of input.

BUSINESSEUROPE also stresses that enforcement of current legislation is of paramount importance as it plays a central role in the perception of citizens and companies about Europe and their confidence in the single market. Promotion should also be given to consumer education and information before further action is envisaged.

Moreover, we consider that disputes should be settled via out-of-court procedures whenever possible and that the existence and functioning of these mechanisms should be taken into consideration before further action is envisaged.



1. INTRODUCTION

The debate on different redress mechanisms and the means to ensure proper access to justice for consumers or shareholders has been under way for several years. Particular attention has been given to collective actions which are judicial mechanisms designed to allow various individuals with the same interest to pursue a defendant before a court as a group. This paper sets out BUSINESSEUROPE's views on this important subject.

One of the starting points for this debate was the Commission claim that consumers lack confidence in cross-border shopping at EU level due to their concerns about the effectiveness of redress mechanisms. Discussions are taking place predominantly in two areas: competition and consumer policy.

In the field of competition, in December 2005 the Commission published a Green Paper on damages actions for breach of EC Treaty anti-trust rules in which it raises the issue of whether collective actions should be introduced. A follow-up White Paper, which may contain proposals for special procedures for bringing collective damages actions, is expected by the end of the year.

In the area of consumer policy, the new Consumer Strategy 2007-2013 provides that the Commission "will also consider action on collective redress mechanisms for consumers for infringements of consumer protection rules and breaches of the EC anti-trust rules [...]". In addition, in February 2007 a Green Paper on the review of the consumer *acquis* was published launching a debate on what is needed to improve the legislative framework protecting consumers, including redress.

BUSINESSEUROPE strongly supports effective and easy access to justice for EU consumers, which it considers crucial to underpin European stakeholders' confidence in the Internal Market and to ensure fair competition. It is in the interest of companies that adequate redress mechanisms exist and function well. We therefore welcome the debate launched by the Commission's Consumer Affairs Directorate¹, in particular the "reflection period". In this debate, it is essential that stakeholders are properly consulted and that evidence and facts are gathered about the current situation in Member States and the problems that consumers and companies face when using the redress tools available.

We believe that a number of questions must be answered before further action is decided.

¹ For further information see http://ec.europa.eu/consumers/redress/index_en.htm



2. IS THERE A NEED FOR ACTION ON COLLECTIVE JUDICIAL INSTRUMENTS?

Before any action is taken at EU level, the first step should be a comprehensive assessment of the alleged problems (if any) as well as a clear identification of their causes.

Currently such evidence is insufficient. The 2006 Commission Eurobarometer² finds that:

- only 17% of European consumers believe that the right to take sellers or providers to court is the best measure to protect their interests;
- only 13% consider that collective actions would be the best system; and
- 42% of European citizens consider it better to assert their claims through alternative means of dispute resolution such as arbitration, mediation or conciliation. Indeed, more than 90% of consumer-related disputes are settled out of court between the parties involved³.

Moreover, the Commission acknowledges in its reports on product liability that the majority of disputes between consumers and producers/companies are solved via out-of-court procedures (e.g. negotiation). Indeed, experience shows that most disputes are settled following a direct complaint by consumers to the company in question. Most companies now have a customer relations department whose task is to deal with such complaints.

Therefore, BUSINESSEUROPE believes that the available data:

- do not demonstrate that existing national civil justice systems, including out-of-court mechanisms, fail to provide adequate access to justice for consumers; and
- do not show that collective actions are the best solution to improve the current situation. On the contrary, the above Eurobarometer figures clearly spell out that consumers are not interested in engaging in litigation as long as there are other out-of-court means providing adequate solutions.

➤ LIMITED MERITS FOR CONSUMERS BUT ADVERSE IMPACT ON BUSINESS

The emerging interest in the instrument of collective actions often looks at existing models such as the class action in countries such as US or Canada which are based in substantially different legal systems and principles and respond to diverse societal values.

BUSINESSEUROPE strongly believes that collective actions are not the appropriate solution to improve consumer redress and enforcement of consumer rights in the EU.

Public authorities in EU Member States have traditionally been the primary enforcement mechanism. Adoption of a harmonised litigation system similar to the one

² Eurobarometer Special Report 252 "Consumer Protection in the Internal Market", European Commission, 2006, available at http://ec.europa.eu/consumers/topics/facts_en.htm.

³ Eurobarometer survey: European Union citizens and access to justice, October 2004, available at http://ec.europa.eu/consumers/topics/facts_en.htm.



existing in the US, even if adapted to the EU reality, may lead to an excessive litigation culture with the consequent increase in costs imposed on the EU economy as can be observed from the US experience. We also note that consumers are sometimes conspicuously absent from these procedures, which are often “hijacked” by law firms or various interest groups, as proved by experience with the US system of class actions. This means that the proceeds which are supported by societies as a whole (including consumers) in most cases do not accrue to consumers, but enrich intermediaries instead.

In addition, it has been observed in the US that companies, whether or not liable, can be pressured into accepting highly expensive settlements, in order to put an end to harmful negative advertising that can damage their business and image.

Although the Commission has already on several occasions pointed out that it is not planning to adopt the American system, in part due to differences between the EU and US legal systems, there is a risk that many of the economic incentives and drivers featuring in the US will be introduced nonetheless, up-front or step by step.

Moreover, collective actions give the illusion that concentrating in one single litigation identical or similar disputes having the same cause and involving numerous individuals, would reduce costs and prove more efficient. In addition, these systems often lead judges to carry out extensive factual investigations regarding whether the individual complainants have standing based on the merits of the case, hence putting at risk the supposed benefits.

We would therefore like to stress that it is of primordial importance to strike a balance between the interests of the various players.

➤ **BASIC PRINCIPLES FOR A SOUND DEBATE: BETTER REGULATION, LISBON AGENDA AND SUBSIDIARITY**

As previously mentioned, BUSINESSEUROPE has been actively following the debate on judicial and out-of-court mechanisms that allow consumers to assert their rights better and to benefit fully from the Internal Market. It is in this context that we consider key that the above-mentioned principles are taken into consideration when further action regarding mechanisms of redress is being considered.

Better regulation is a central element of the Commission’s policy for strengthening competitiveness and supporting sustainable growth and employment. We fully support the better regulation policy, bearing in mind that excessive regulatory actions may hinder companies’ development, to the detriment of efforts to implement the Lisbon agenda.

Rules should create workable and affordable solutions for clearly identified problems which do not harm European competitiveness. This is why we have always advocated that any regulatory actions should be backed up by impact assessments based on a competitiveness test. This is what better regulation is about.

Therefore, as explained above, before any action is to be taken at EU level, we consider it essential to:



- Identify any problems and provide sufficient evidence;
- Pinpoint their causes;
- Assess whether any EU action is needed;
- Assess whether an EU action is needed and justified and, if this is the case, assess what is the most appropriate type of action;
- Assess the impact of this action on growth/jobs and competitiveness in the Internal Market; and
- Consult and discuss with representative stakeholders throughout the entire process providing enough time for elaboration of input.

The way in which the most effective means of redress can be made available to consumers across the EU depends on various factors such as the organisation and effectiveness of its ordinary judicial proceedings, the way business is structured and consumers organised, the effectiveness of market surveillance, public administration system, and the historical, political and socio-economic contexts. For example, contingency fees can have different effects depending on whether or not insurance cover for legal expenses is widespread. The legal aid system needs to be organised differently depending on the degree to which lawyers fees are regulated. The role of burden of proof depends on the powers courts have when exploring the facts of a case.

Adoption of a uniform collective redress system at EU level could undermine the above-mentioned aspects of national litigation system and could ultimately affect the functioning of the internal market. Moreover, as collective actions have only been very recently adopted in some Member States, more time is needed to verify whether this system proves effective. It is too premature to draw conclusions about “best” mechanisms at national level.

Hence, we believe that EU action which is not strongly justified may lead to serious risks with a strong impact at national level and in the Internal Market.

3. ROOM FOR IMPROVEMENT

BUSINESSEUROPE agrees that redress can be improved and believes that action should focus on better enforcement at national level, better consumer information and education regarding their rights and responsibilities in the Internal Market, and on the promotion of non-legislative tools that allow proper access to justice.

➤ ENFORCEMENT IN THE INTERNAL MARKET

Adequate enforcement of existing legislation should be the priority. Enforcement of legislation on the Internal Market is of paramount importance and plays a central role in the perception of citizens and companies about Europe and their confidence in the single market. Member States should play a decisive role for efficient enforcement.

The effectiveness of EU legislation already adopted should be analysed and its enforcement improved before further proposals are put forward. Special reference should be made to the injunctions directive⁴, which aims at obtaining from a

⁴ Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumer interests



professional the discontinuation of conduct contrary to provisions of law: evidence to date shows that the cross-border procedure is not being utilised⁵. Also, the recently adopted regulation on small claims that will allow the enforcement of cross-border claims up to EUR 2,000 and will apply from 1 January 2009⁶. Moreover, the regulation on consumer protection cooperation⁷ should strengthen the consumer protection directives' effectiveness.

European mechanisms for problem resolution such as SOLVIT, the free-of-charge online problem-solving network that helps citizens and businesses to enforce their rights when there is a misapplication of EU rules by national authorities, should be made better known by citizens and enterprises and adequately resourced, especially at national level.

➤ **OUT-OF –COURT REDRESS**

BUSINESSEUROPE considers that whenever possible, disputes should be settled via out-of-court procedures, in the interest of both consumers and business, and therefore highlights that more emphasis should be placed on promotion and reinforcement of ADRs. Member States have implemented various forms of ADRs which are fine-tuned to their specific situation. It is therefore particularly at Member-State level that the discussion on ADRs should take place.

Non-judicial means of redress make it possible to reach a solution acceptable to both parties more rapidly, at a lesser cost and helping to maintain a less confrontational atmosphere between parties. Therefore, these should also be taken into consideration before further action is taken on collective means of redress.

There are different levels of out-of-court procedure including: direct negotiation, mediation, arbitration and, in some countries, an ombudsman designated on the basis of specific legislation. These mechanisms which offer the possibility of providing case-by-case solutions and are better suited to the particular circumstances of each situation may be further improved where necessary as also recommend by the Commission⁸.

➤ **EDUCATION AND INFORMATION**

BUSINESSEUROPE has always promoted more and better dialogue between consumers and companies and has recommended that in addition to initiatives by professionals and consumer organisations, public authorities should invest more in consumer education from school onwards using modern technology in order to help consumers to know their rights and responsibilities better. BUSINESSEUROPE has always stressed that well-informed consumers are good news for companies.

⁵ "EU Consumer Law Compendium-a comparative analysis", April 2007, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm

⁶ Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (OJ n. L 199, p. 1 ff.).

⁷ Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) which apply as from 29 December 2005.

⁸ Further information about Commission actions in respect of ADRs at http://ec.europa.eu/consumers/redress/out_of_court/index_en.htm



4. CONCLUSION

Finally, and based on the above-mentioned reasoning, BUSINESSEUROPE considers that the debate at EU level should develop further before any action is taken at EU level, and that any action envisaged should primarily focus on assessment and, where applicable, revision of existing national instruments, including ADR schemes, before any new avenues are explored.

A move towards a society where the judicial function is unduly emphasised would not serve the interests of consumers or enterprises. Moreover, we consider that adding a further, mandatory EU mechanism would confuse operators and consumers, and upset complex national internal balances.

BUSINESSEUROPE also believes that non-judicial modes of redress are a more effective way to deal with consumer complaints. As also recognised by the 2007 OECD Recommendation on consumer resolution and redress, “consumer disputes can often be resolved directly by the relevant business and [that] consumers and business should first attempt to resolve their disputes directly before seeking recourse through third-party mechanisms”.
