BUSINESSEUROPE

POSITION PAPER

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BUSINESSEUROPE'S RESPONSE TO THE COMMISSION CONSULTATION ON CONSUMER COLLECTIVE REDRESS BENCHMARKS

SUMMARY

BUSINESSEUROPE strongly supports effective and easy access to justice for EU consumers. It welcomes the current consultation on the benchmarks identified by the Commission, although with the following important caveats:

- The proposed benchmarks should take into account the specific features of national judicial systems, as well as social and economic circumstances;
- Collective judicial actions should only be envisaged as a last resort and when consumers cannot otherwise enforce their rights and achieve satisfaction through an individual action. Moreover, court cases with numerous claimants are more difficult to handle than individual actions;
- National features such as the "loser pays" rule, the absence of contingency fees in the majority of EU Member States' legal traditions as well as the absence of discovery procedures, are key to discourage speculative litigation and unmeritorious claims;
- Civil regimes function to provide compensation and elements of deterrence and punishment should most definitely be avoided;
- Regarding participation in collective actions procedures, an opt-out system would go against constitutional principles in some Member States and article 6 of the European Convention on Human Rights;
- More emphasis should be given to Alternative Dispute Resolution mechanisms (ADRs) which are quicker and less costly. Member States have implemented various forms of ADRs which are fine-tuned to their specific situation.

Before any judicial collective action is envisaged, it is key to:

- Identify any problems and provide sufficient evidence;
- Pinpoint their causes;
- Assess whether judicial 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 the national judicial system, society and economy;
- Consult and discuss with representative stakeholders throughout the entire process providing enough time for elaboration of input.

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INTRODUCTION

BUSINESSEUROPE has been actively following and contributing to the debate currently being held at EU level on collective redress.

As previously advocated[1], 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.

Judicial collective redress systems in force in several Member States have been designed to reflect the national judicial systems and culture. Its adequacy takes into consideration various factors such as the organisation and effectiveness of national ordinary judicial proceedings, the effectiveness of market surveillance, public administration system, and the historical, political and socio-economic contexts.

Moreover, and taking into account these characteristics, Member States should regard adoption of judicial collective actions as a last resort. Before envisaging this option, national governments should pursue an in-depth analysis of any existing problems regarding the enforcement of consumers' rights, and if any, whether the mechanisms already in force need to be improved. Alternative Dispute Resolution mechanisms should be the first option available to consumers and their correct enforcement should be the priority of Member States.

In this context, BUSINESSEUROPE welcomes the current consultation on the benchmarks identified by the Commission that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers. However there are important caveats that should be taken into account in this debate.

As we consider that the case for EU legislative action in this field has not been made, we would like to reiterate that the discussion of these benchmarks should be held exclusively in regard to the systems in force at national level and take into account the above-mentioned features. We also consider that more emphasis should be given to Alternative Dispute Resolution mechanisms (ADRs).

[1] BUSINESSEUROPE position on collective actions, 4 October 2007

BUSINESSEUROPE COMMENTS ON COMMISSION PROPOSED BENCHMARKS:

1. **The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.**

   We agree that collective redress should only be used where consumers cannot otherwise enforce their rights and achieve satisfaction through an individual action, be it judicial or extra-judicial. We consider that "satisfactory" should be viewed as an objective test as in practice collective redress claims should be subject to time limits and financial cut-offs. It is unlikely to make economic sense to permit a large number of consumer claims where the individual loss amounts to only a few euros.

   Also, settlements may realistically be set at various levels whereby consumers with high-value claims may proportionately receive less than the average consumer. The degree of consumer satisfaction will vary according to the actual compensation received.

   Moreover, experience has often shown that court cases with numerous claimants are more difficult to handle than individual actions. Collective judicial actions 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 benefits often advocated in favour of these systems.

2. **It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.**

   We believe that the normal costs rules which operate in the courts of the Member States should continue to apply to collective actions. The "loser pays" rule in EU Member States' legal traditions is very important to discourage speculative litigation and should be upheld.

   Accordingly, the question of whether the claimants' costs are disproportionate, or not, is fundamental. If they are likely to be disproportionate then the answer is that the case should not be brought. If the case is nevertheless brought, and deemed to be admissible, BUSINESSEUROPE considers it of fundamental importance that the successful defendant is awarded full compensation for all actual and justifiable litigation costs.

3. **The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.**

   The same principles as above apply and the normal costs rules should operate. Court procedures should permit the defendant to apply for surety for costs or other costs orders to protect itself against unrealistic and uneconomic claims. The meaning of "defendants should not for instance artificially and unreasonably increase their legal costs" in this benchmark should be further clarified or the reference deleted. In any event, in systems where the loser-pays rule applies, there are existing safeguards in place to ensure proper control over the level of costs paid by the "loser" in a claim, irrespective of the level of costs actually incurred by the "winner" party.

4. **The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.**

   We propose that this benchmark should be reformulated to take account of the normal measure of damages.

   In the case of tort, damages essentially seek to bring about restitution but may be reduced for example by contributory negligence so the eventual award may not be equal to the harm caused.

   In the case of breach of contract, damages will be for the loss of bargain but again may be reduced by a failure to mitigate.

   We agree that damages should not be punitive as the essential function of the civil regime is to provide compensation. Punishment should be a matter for the public authorities.

5. **One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.**

   BUSINESSEUROPE does not support this benchmark as it introduces elements of deterrence and punishment. The civil regime functions to provide compensation. Moreover, although reduction of future harm is a good ideal, it is not the primary purpose of collective redress.

6. The introduction of unmeritorious claims should be discouraged.

BUSINESSEUROPE fully supports this benchmark. Court procedures should permit a defendant to apply for unmeritorious claims to be struck out at an early stage with the claimants penalised by having to pay costs. The criteria for striking out unmeritorious claims should be sufficiently robust and properly applied by the courts to ensure this is an adequate protection.

We also support strong case management by the courts so that, for example, there can be an early trial of a preliminary issue which would have the effect of shortening the overall proceedings and reducing the costs of the litigation.

We would also like to stress that experience shows that the "loser pays rule" and the prohibition on contingency fees are the best deterrents for unmeritorious claims. In this regard, discovery procedures should also definitely be avoided.

Furthermore, and regarding participation in collective actions procedures, it should be noted that an opt-out system would go against constitutional principles in some Member States and article 6 of the European Convention on Human Rights.

7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.

As previously mentioned [2] Alternative Dispute Resolution mechanisms (ADRs) should be taken into consideration during the whole debate and more emphasis should be placed on promotion and reinforcement of ADRs. Whenever possible, disputes should be settled via out-of-court procedures, in the interest of both consumers and business.

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. They have proved efficient in several situations. 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 ADRs should be discussed.

This benchmark is absolutely essential and should be given greater prominence in the listing. We would like it to be rephrased as we believe the word "adequate" is redundant. Since a settlement is by its nature voluntary, whether or not it is adequate will be a matter for the parties to agree.

[2] BUSINESSEUROPE position on collective actions, 4 October 2007, page 6.

8. **The information networking preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions.**

Although steps to improve preparation of cases through appropriate dissemination of information in order to group individual suits are welcome, we believe that this benchmark needs further clarification. We also refer to benchmark 1 where it is mentioned that experience has often shown that court cases with numerous claimants are more difficult to handle than individual actions, and that these action should be envisaged exclusively when consumers cannot otherwise enforce their rights and achieve satisfaction through an individual action.

9. **The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.**

We agree that this is a worthy objective but whether it will be achieved in practice will be down to the national court procedures. The length of proceedings can be shortened by good case management, such as early clarification of the issues, the trial of preliminary issues and limiting pleadings. It may be that best practice could be shared between Member States but it is questionable how far the Commission wishes to proceed down this route.

Moreover, it should be stressed that ADRs are often a far quicker route for reaching a solution acceptable to both parties.

Also, the possibility to appeal against a decision should be taken into account as this is a vital feature of most Member States civil litigation systems.

10. **Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.**

We consider that this question needs further clarification: what is understood by “an appropriate manner”? Does it refer to the contractual arrangements between the claimants and the lawyers representing them?

Special attention should be given regarding the introduction of contingency fees and to the fact that proceedings from civil litigation only belong to plaintiff(s) and not to their “representatives”. Such arrangements in the US with class action law firms may result in lawyers recovering as much as 50% of the proceeds.

Also, what is understood by "Possibly other related entities"? If “other entities” have an interest in a particular claim, they should join the plaintiffs (and thus either receive part of the proceedings or bear the costs if the claim is unsuccessful).

RESPONSE TO THE COMMISSION CONSULTATION

1. Does BUSINESSEUROPE agree with the Commission proposed benchmarks?

We believe that the Commission's proposed benchmarks should be reformulated. We refer to the specific comments above regarding each benchmark proposed.

As mentioned above, it should also be borne in mind that national judicial systems of collective redress have been designed to reflect national judicial culture. Many Member States have in their general procedural rules specific tools aimed at handling multiple claims, e.g. test cases, bundling of identical or similar cases, etc, which they consider best serve their legal tradition. The application of these benchmarks should respect the various systems of collective redress in force in the framework of the national contexts.

Moreover, the proposed benchmarks focus mainly on judicial collective means of redress. This is a very narrow approach and emphasis should also be placed on Alternative Dispute Resolution mechanisms (ADRs) such as arbitration and mediation which have proven efficient is a number of circumstances[3]. The current consultation does not in our view put enough stress on ADRs, which should be the first option consumers have at their disposal for enforcing their rights.

2. Does BUSINESSEUROPE consider other benchmarks to be important?

Other benchmarks which we consider to be important and which we highly recommend are:

- defendants should be encouraged to make an early offer of redress to affected consumers in settlement of disputes;
- The role of the courts should be to act as a gatekeeper for collective actions and their approval should be required to bring such actions;

3. Does BUSINESSEUROPE consider that more benchmarks or fewer benchmarks are necessary?

The list of benchmarks should not be so detailed and prescriptive in order to allow adequate room for Member States to deal with the fundamental objectives flexibly in the broader context of their own national judicial systems and cultures.

[3] E.g. Cirio and Parmalat cases in which the main banking groups involved decided to undertake conciliation procedures.

We refer to question 2 where we have made specific suggestions for important benchmarks that should be included in the list.

4. Does BUSINESSEUROPE have experiences with existing mechanisms of collective redress, especially in relation to specific sectors and/or in relation to cross-border disputes?

BUSINESSEUROPE would like to refer in particular to three particular cases mainly focusing on ADRs.

In Italy, as mentioned above, in the wake of the Cirio and Parmalat cases the main banking groups undertook conciliation procedures in agreement with the main consumer associations. The result was a success since the remaining number of claims after conciliation was 1%: approximately 150 cases for 14,000 examined.

In the Netherlands the umbrella ADR system operates in 36 sectors of the economy and receives over 12,000 consumer complaints yearly. It is operated by both business and consumer organisations, and is partly co-financed by the Dutch government. In addition, there is a legal collective action mechanism in force, but before starting that procedure the representative consumer organisation has to attempt to resolve the dispute out of court. The recently adopted Class Action (Financial Settlement) Act opens the possibility for two parties that have agreed on the settlement for a mass damages claim to go to court and ask for a declaration to make the agreement binding on the entire group of victims.

Also, statistics from the "Deutsche Kraftfahrzeuggewerbe" (German Federation for motor trade and repair) show that their 130 arbitration boards handled 11,550 cases, 9,951 of which were settled in preliminary proceedings. Only 1,600 cases had to be handled by the board itself, again about 50% of those cases were settled without a ruling by the arbitration board[4]. These figures show that arbitration proceedings are an easy and economical way for consumers to settle complaints satisfactorily.

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[4] See http://www.kfzschiedsstellen.de/presse/presseinfos/index_20070913144300.html.