CCBE RESPONSE TO THE COMMISSION'S GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

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I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE welcomes this new opportunity to participate in the current reflection on the important topic of collective redress proceedings, following the Commission's consultation on possible Benchmarks and the meetings between the Commission and the main stakeholders that took place in 2008.

II. CCBE response to the questions raised in the Green Paper

QUESTION 1: What are your views on the role of the EU in relation to consumer collective redress?

The CCBE does not take a stance on the question whether an EU instrument is needed or desirable in the field of collective redress. However, if a Community instrument were to be envisaged, it should be based on the benchmarks and principles described below under the response to questions 2 and 3.

QUESTION 2: Which of the four options set out above do you prefer? Is there an option which you would reject?

Although the CCBE is pleased that the Green Paper offers various options to be used to address this issue, we regret that none of the options identified by the Commission meets the benchmarks which the CCBE itself has considered as necessary for an effective Collective Redress System, as outlined in our Response to the Commission's Consultation on the Consumer Collective Redress benchmarks of March 14, 2008. The benchmarks outlined by the CCBE are as follows:

Any possible future instrument on collective redress should follow Article 65 EC[1] which limits the competence of the European Union to measures in the field of traditional cooperation in civil matters having cross border implications.

Any possible future instrument on collective redress should, of course, enable consumers to obtain satisfactory redress; however, unreasonable, unmeritorious or mischievous pursuit without any substantial chance for a successful outcome should be avoided. Hence, the CCBE considers the loser-pays-principle should be the starting point to avoid abuse of any possible future instrument on collective redress, though it should be applied with sufficient flexibility so as not to discourage, for example, interim applications or the speedy resolution of cases

[1] Article 65 as modified by the Lisbon Treaty also refers to judicial cooperation in civil matters "having cross-border implications".

The opt-in principle is the only way to respect appropriately, and protect, the freedom of every single consumer to decide individually whether to pursue his/her claims or not in a self determined and active way. The single consumer should not be deprived of legal capacity, i.e. of the right to self determination and to pursue his/her claims individually. A good communication network will have to be set up, allowing advertising for the beginning of a procedure so as to allow potential plaintiffs to join the action and make sure they can actually join. That said, we would encourage a system which permits courts to consolidate actions and join parties etc, thus avoiding unnecessary duplication of costs and time, as well as the risk of inconsistent findings of fact or law.

The CCBE considers it as being of utmost importance to keep the financing strictly separate from the claims in dispute. Otherwise (in cases of quota litis) the disadvantages and disproportions of the American class action system would be implemented in the EU mechanism.

As for the grouping of consumers by a third party, leadership of the group should generally be limited to legal persons having the same or similar interest in a claim. Genuinely representative consumer associations, with existing rights under national law to act as claimants, should be able to bring a claim.

The costs for bringing an action should be proportionate to the total amount in dispute.

Any compensation to be provided should be equal to the harm caused and should in no respect amount to punitive damages, because it is of crucial importance to separate strictly the adjudication of civil damages from punishment of a criminal or regulatory nature. Only public authorities, acting in a public law framework, are capable and entitled to take measures to protect consumers' interests that are not directly based upon any damages suffered.

The availability of other kinds of damages, beyond pure recompense for harm, should be determined by Member States according to their own legal system.

Given these proposed benchmarks, should the Commission propose an EU-level instrument, the CCBE prefers an option not yet identified by the Commission, i.e. an instrument on collective redress which would meet the CCBE's benchmarks as summarized above.

QUESTION 3: Are there specific elements of the options with which you agree/disagree?

In the light of our answer to Question 2 above, the CCBE agrees with those specific elements of the options which are in compliance with the CCBE's preferred benchmarks and disagrees with those that do not accord with them.

The specific elements of the options set out in the Green Paper with which the CCBE agrees/disagrees are the following:

- Option 1:

The mediation Directive: the CCBE believes more information is needed before answering the question of whether the Mediation Directive can be made applicable to mass claims. This is because it is not yet known what impact the Directive will have in practice. The Directive route involves a risk of a delay in implementation and disparities between Member States. A doubt exists concerning the powers of the mediator set in the Directive (in two respects: first and in particular concerning the dissuasive effect against activities which are illegal or contrary to the consumers' interest, and second in respect of court files). What would be the consequences of a failure in the mediation mission?

The European Small Claims Regulation: similarly, the CCBE considers that the impact of the European Small Claims Regulation is not known yet and that more time is needed to evaluate the practical effects of the regulation before considering extending it to other areas. In addition, since the European Small Claims Regulation raises objections as to whether the principles of a fair trial as specified under Article 6 of the Human Rights Convention (HRC) are complied with, the CCBE considers that the Regulation may not be appropriate to be adopted for mass claims (further reasons given below within the Comments to Option 3).

Therefore, in general, the CCBE agrees with that aspect of Option 1 which says that more information is needed in this area.

- Option 2:

The CCBE agrees that developing cooperation between the Member States in order to ensure that consumers throughout the EU are able to use the collective redress mechanisms that are available in different Member States, provided that there is a link between their claim and the Member State in question, would be a positive development. The existence of an EU cross-border collective redress system, or of national mechanisms in other Member States, may encourage those that do not have a domestic collective redress mechanism to establish one. However, we reiterate the CCBE view that any future EU measure should be cross-border only.

The CCBE does wonder whether the opening suggested under Option 2 will result in such an opening in practice. It is unlikely that Member States will grant resources to their entities for bringing collective redress actions on behalf of or assisting consumers from other Member States before their courts, when entities in Member States without collective redress mechanism do not have such an obligation. This option would lead to a risk of forum-shopping by collective redress plaintiffs (difference between plaintiffs living/residing in States with collective action and those living/residing in States without one). Another issue will be the appointment of geographically competent lawyers (lawyers of the place of the damage or lawyers of the place where the action is brought?).

As for the grouping of consumers by a third party, as mentioned earlier, the CCBE considers that the leadership of the group should generally be limited to legal persons having the same or similar interest in a claim. Genuinely representative consumer associations, with existing rights under national law to act as claimants, should be able to bring a claim.

- Option 3:

The CCBE disagrees with policy tools such as extending the scope of national small claims procedures to mass claims, extending the scope of consumer protection cooperation regulation and focussing on alternative dispute resolution mechanisms on only consumers' mass claims for the following reasons:

The CCBE questions why an EU wide collective redress instrument should be restricted to consumer mass claims only, excluding eg mass claims by small enterprises. The CCBE has not yet been able to identify any reason for granting collective redress instruments to consumers only and excluding eg small enterprises from such an instrument. Furthermore, a risk of difference in treatment of consumers from one State to another and from one sector to another exists.

It must be emphasised that supervisory authorities for infringements in consumer matters already exist (DGCCRF in France) but their investigatory powers come up against the financial issue. These supervisory authorities are also clogged up with many solicitations by private individuals and thus act as a filter. The financing of these authorities is also an issue; investigation costs can be very high, so

who would finance them? Would the chosen mode ensure enough independence for these authorities?

Regarding the distribution of punitive damages granted by courts, the preliminary identification of the potential plaintiffs remains an issue.

The CCBE disagrees with the Commission's assertions that alternative dispute resolution schemes "*may be less suitable for high value claims*" and that higher value claims "*often involve complex facts and evidence gathering*". Both arguments are not supported by the facts.

Low value claims often involve complex facts and evidence gathering as well, so there is no justification for high value claims being granted better legal protection than low value claims.

The CCBE disagrees with the aspect of Option 3 which recommends amending the Consumer Protection Cooperation Regulation[2] to include a power whereby a competent authority could require the trader to compensate consumers that have been harmed. The CCBE considers the compensation of consumers, as well as the compensation of any other person who has suffered damage, as being within the competence of the Member States themselves. To transfer this power to other authorities would result in a shift of competence not foreseen by the Treaty as falling within the competence of the European institutions. Public authorities could examine the ways in which traders could be encouraged to compensate consumers in such circumstances.

The CCBE considers that a possible future instrument on collective redress should not be based on EU-wide or national instruments provided for small claims procedures, because the often restricted legal protection available for low consumers' claims does not consistently comply with the purpose of the Commission's initiative to provide for adequate redress and efficient enforcement for consumers' claims in collective redress matters.

- Option 4:

The CCBE considers that Member States should be encouraged to develop national instruments in the field of collective redress.

The CCBE however questions the competence of the EU to ensure that judicial collective redress mechanisms exist in all Member States. However, as stated under our answer to Question 2, any forthcoming collective redress mechanism should meet the benchmarks outlined there.

The CCBE disagrees with EU rules on cutting down the costs by exempting consumer collective actions from court fees or capping legal fees. The work of the courts to be performed when dealing with collective actions is intense and needs court fees to finance this work. Furthermore the jurisdictions in the Member States finance their activities by court fees, so that there is no justification for exempting consumer collective actions from court fees. Moreover and in any event, there is no competence on the part of the Commission to limit court fees or litigation costs in regard to consumer collective redress.

Another risk that has to be underlined is the difference in court fees from one State to another. And there is an issue concerning the public financing of this kind of collective proceedings. Do the court fees fall to the taxpayer if the claim is dismissed?

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[2] Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

The CCBE does not agree, either, with allocating a share of the compensation to an intervening consumers' organisation to cover its costs. Allocating a share of the compensation to the consumer organisation to cover its costs would mingle the financing of collective redress with the claims in dispute. These organisations must be prevented from taking over collective redress, which might deprive citizens of an effective right of access to the judge.

The CCBE supports any measure discouraging a litigation industry, no matter by whom this litigation industry is initiated, whether by consumer organisations, companies specialising in financing litigation, or lawyers or any third party. The CCBE considers the loser-pays-principle (as described above) to be a key benchmark in order to prevent unmeritorious claims.

As previously stated, the CCBE favours the opt-in procedure over opt-out solutions. That said, the fact that a claimant does *not* opt in should not preclude that claimant from pursuing its own right of action (though there should be serious (costs) penalties if it could have achieved the same outcome by participating in a consumer collective redress action, and has run up substantial extra costs by reason of not doing so).

Another issue is whether the payment of the court fees and legal fees is assured. As the costs of proceedings may be high, there is a risk of a payment difficulty by organisations, either private or public.

Concerning the truthfulness of the action and the necessity to bring such action by a collective action: Is it necessary to resort to the certification procedure (intervention by the judge to validate the class action, as in the USA)? This perspective may be relevant as it would prevent any obstruction of courts limited to this issue only, as claims may concern a great number of potential plaintiffs. Or must the defendant have the opportunity to refer to the judge at any time during the proceedings so as to obtain the end of the action in a collective form (as in Australia)? The risk of a boom of unmeritorious law suits must indeed be avoided.

Even though the opt-in option may seem burdensome regarding the publicity means needed to inform any potential plaintiff, it seems safer for all plaintiffs considering the opt-out risk (plaintiffs who do not exclude themselves would be bound by the decision) as well as the communication and information media in Europe. Likewise, and this accords with the issue concerning the allocation of compensation, plaintiffs are known – since they make their presence known – and the distribution of compensation is much easier than within the so-called opt-out procedure.

The issue of the applicable procedure also needs to be solved: in case of a cross-border claim, the question of legal competence will be crucial and could govern large parts of the proceedings (rules of evidence among others). Damage is by definition multiple in such proceedings, then how can the following issues be settled: place of commencement of proceedings (which suggests judicial co-operation) and, again, which lawyers?

The CCBE wishes to specify its conception of the role of the lawyer within collective redress. A lawyer absolutely must be the guarantor that the proceedings go as smoothly as possible (lawyers are bound by a strict code of conduct). Resorting to a lawyer and not to an organisation will allow each plaintiff to have access to a judge and obtain compensation for their rights without having to convince an organisation to accept to take over their case. For sound administration of these proceedings and more generally of justice, it will be necessary to think about the nomination of a “leading” lawyer, who would be the sole contact for the procedure, and particularly for the judge and the prosecuted company. The “leading” lawyer would coordinate work as well as the different plaintiffs with the other lawyers working on the case. Lawyers will be encouraged to attend specific training courses in order to streamline the proper management of these heavy cases which bring together a large number of claims.

QUESTION 4: Are there other elements which should form part of your preferred option?

Yes, please see the response to question 2 where the CCBE describes the option it supports.

QUESTION 5: In case you prefer a combination of options, which options would you want to combine and what would be its features?

Please see the response to question 2 where the CCBE describes the option it supports.

QUESTION 6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?

Since the CCBE does not support any of the options in the form they are presented in the Green Paper, it cannot respond to this specific question.

QUESTION 7: Do you consider that there could be other means of addressing the problem?

No, at this stage the CCBE considers that the best way to address the issue of collective redress is the one described in the response to questions 2 and 3.