CCBE RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION *"TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS"*

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CCBE Response to the European Commission's consultation: *"Towards a Coherent European Approach to Collective Redress"*

1. Introduction

On February 4th, 2011, the European Commission has launched a public consultation aimed at achieving a coherent approach towards collective redress in the European Union.

The Council of Bars and Law Societies of Europe (CCBE) hereby submits its answers to the issues raised by the European Commission.

2. POTENTIAL ADDED VALUE OF COLLECTIVE REDRESS FOR IMPROVING THE ENFORCEMENT OF EU LAW

Q 1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

The CCBE welcomes the Commission's collective redress initiative. The CCBE believes that such mechanisms could significantly improve the effectiveness of citizens' rights in Europe. The creation of a real compensatory action could help to ensure the consumer's access to Courts and the equality of their rights.[1]

Moreover, the setting-up of collective redress mechanisms could constitute a quicker and more efficient way to ensure legal certainty for European citizens than the current situation in which procedures are split up, insofar as they exist. Finally, the CCBE considers that in the context of a constantly growing intra-Community trade, it could be useful to set up an instrument at EU level.

It is of paramount importance to the CCBE that – whatever the specific mechanism might look like – due process is respected.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

Private collective redress will usually be compensatory in nature. It is conceivable that private collective redress could be injunctive, even for the relation between the opposing party and third parties (rather than just between the alleged victim and the opposing party). That is the case with the US-American class actions, with their punitive damages posing a threat that has an injunctive effect. However, the CCBE concurs with the notion that the US-American system is not one to be copied in Europe.

With private collective redress usually being compensatory, it needs to be independent and distinct from public redress. A claimant's right to seek compensatory redress should not depend on the

1 The Austrian, Dutch and United Kingdom delegations express their concern regarding a legal basis for the proposals, stress the significance of the principle of subsidiarity and accordingly request that new mechanisms at EU level should be restricted to cases with cross border implications. Moreover, the United Kingdom delegation, on the basis of the principles of subsidiarity and legal certainty, requests that the Commission does not try to adopt a "one size fits all" mechanism for collective redress, and that it first considers a facilitative approach (such as guidelines coupled with mutual recognition).
Links to the UK delegation position:
Law Society of England and Wales:
http://ec.europa.eu/competition/consultations/2011_collective_redress/law_society_of_england_and_wales_en.pdf
Bar Council of England and Wales:
http://www.europarl.europa.eu/document/activities/cont/201107/20110714ATT24020/20110714ATT24020EN.pdf
Links to the Austrian delegation position:
http://www.rechtsanwaelte.at/downloads/21_11_19_collective-redress.pdf

conduct of public bodies. Otherwise, public authorities could essentially deny citizens' access to justice. This would be intolerable, even if such denial was accidental. In reverse, it is not the purpose of collective redress to punish certain behaviours or to impose sanctions. This is only up to public enforcement.

Coordination between private and public redress is not required. Coordination between private and public redress may be necessary where those two do overlap. For example, a national public authority may have the power to skim off profits made by unlawful conduct. This power might overlap with a consumer's right to seek redress if such right existed. However, such overlaps can be avoided if collective redress is strictly limited to compensation and the potential sanctioning remains with the public authority: In such cases, it is sufficient that the public authority assumes the debt towards the consumers in lieu of the opposing party.

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?

Enforcement of law (as opposed to enforcement of *rights*) should only be undertaken by public authorities[2]. If, for example, EU law prohibits a certain defective product design, it must remain the public authorities' duty to ensure that such products do not appear on the market. At the same time, it is up to the consumers to claim compensation if they suffered a damage from a defective product.

Uncertainty about the legal situation is a major obstacle against effective consumer redress. Therefore, lawyers play a crucial role in supporting consumers in obtaining their rights, *inter alia* by representing them in court.

All EU member states have strict and high criteria as to the qualification of lawyers. Similarly, all EU member states have strict codes of conduct which their lawyers must adhere to. There are few if any fields of profession with similar demands regarding quality and integrity. The CCBE recommends that the Commission appreciates and relies on the quality and integrity of the European advocacy.

In addition, representative entities (e.g. consumer associations) can assist consumers in their redress proceedings. By nature though, consumer associations do and cannot have the same legal expertise as lawyers whose mission is to represent clients in court. Therefore, while representative entities can "represent" consumer interests by providing organisation and support, in order to provide plaintiffs and defendants with maximum support in court, actual representation in court needs to be done by lawyers.

Q 4 What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

The CCBE considers that, in accordance with the subsidiarity, proportionality and efficiency principles, the future instrument should define the basic rules and principles for collective claims.

Q 5 Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?

Q 5 and Q 6 are the first questions to target the procedural options the EU has at its disposal. An example for injunctive relief is the rights granted by the Directive 98/27/EC. They allow cease and desist injunctions against infringements of consumer Directives.

Injunctive relief is not an adequate substitution for compensatory redress. From a merely economical point of view, it may have similar results in the long run (i.e. discouraging market participants from unlawful conduct, thus lowering costs and improving market performance).

2 See already Comments on the Commission's Consultation Paper on Consumer Collective Redress, p. 3.

Moreover, if collective compensation mechanisms are set-up within the Union, the CCBE considers that they must comply with the fundamental principles of the Member States, and with the European rules determining the court having jurisdiction, and the law applicable, provided by the regulations 44/2001/EC called "Brussels I" and 593/2008/EC called "Rome I".

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

Any mechanism – be it binding or non-binding – needs to make sure that due process is being guaranteed.

3. GENERAL PRINCIPLES TO GUIDE POSSIBLE FUTURE EU INITIATIVES ON COLLECTIVE REDRESS

Q 7 Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

This question is the central one concerning safeguards of future EU initiatives.

The CCBE agrees that any possible EU initiative on collective redress should comply with a set of common principles established at EU level. First and foremost, this is the "fair trial" principle according to Article 6 of the European Human Rights Convention, which must also apply in civil proceedings[3].

The Commission has already laid out some groundwork with the introduction of the Consumer Collective Redress Benchmarks[4]. The CCBE largely agrees with most of them[5].

Furthermore, the Commission has worked out several principles in its work concerning ADR[6]. These are the principles of independence and of transparency, the adversarial principle, as well as the principles of effectiveness, of legality, of liberty, and of representation. At a minimum, these principles need to apply to any collective redress mechanism as well.

Moreover, there are four principles which must be heeded in particular (together with the "loser pays"-principle which is addressed under Q 21):

Equality of Arms

Equality of arms must be a cornerstone of procedural law in the EU, be it at the national or at the European level. An economic advantage of one party must not be countered with procedural inequality. Equality of arms is, first of all, a formal matter: All parties to a proceeding must have the same procedural rights. Equality of arms also implies that the balance between the parties must not be shifted in non-formal ways, e.g. by allowing only one party to recover its administrative costs.

Open Proceedings

Closely related to this is the principle that all proceedings must have an open outcome. The terminology employed by the Commission sometimes gives rise to the concern that the odds may be stacked in favour of consumers, irrespective of the facts of the case at issue.

Examples include:

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3 See e.g. European Court of Justice, judgment of 21.05.1980, 125/79, Denilauler v. S. M. C. Couchet Fréres.
4 Available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.
5 See Response to the Commission's Consultation on the Consumer Collective Redress Benchmarks for details.
6 Recommendation 98/257/EC, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF. See also Recommendation 2001/310/EC, available at http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf.

- Using the phrase "*injured party*" for a person who merely brings a claim *alleging* to be injured[7];
- Using the term "*victims*" rather than "*claimants*" when referring to participants in a collective redress litigation (as in Q 13).

Consumer Redress is Compensatory

Redress must be compensatory in nature, not punitive. It must be aimed only at compensation, e.g. the damages suffered by a specific conduct. It is not up to the consumers to punish the defendant for his law infringements. This is the role of the state, which can hand out administrative fines or initiate penal investigations.

Freedom of Contract implies Freedom of Enforcement

Whether and how a creditor (e.g. of a damage claim) enforces his rights must be left in his discretion, just as it is in his discretion whether or not he concludes a contract. As consumer redress does not have punitive character, there is no reason to push consumers one way or the other.

In the individual pursuit of claims

Each citizen must remain free to pursue his or her rights, either individually or through an association.

The CCBE considers that consumers should be able to choose to join an association; otherwise there would be a breach of the citizen's right to access justice. The obligation to be part of an association initiated by a consumers' organisation is an infringement to the freedom of association, which comprises the freedom not to join an organisation.

Q 8 As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?

The experience gained so far by the Member States can indeed contribute to formulating a European set of principles.

The EU has gathered no less than 13 country reports on the current situation of collective redress in the Member States[8]. This informative collection reveals several similarities which back up the CCBE's choice of principles as outlined in Q 7.

For example, under both the Italian and the Portuguese mechanism, representative entities must duly represent the consumer's interests[9]. This is closely related to the CCBE's notion that consumers must have the power to pursue their own rights and be free to choose whether to pursue them or not.

In a similar vein, the French mechanism allows consumer associations to sue, but not for the actual damage the alleged victims suffered – that is up to them to enforce[10].

As another example, the Swedish mechanism (a group action) demands that the group of claimants is well-defined in terms of the value of the claims[11]. This stipulation is closely related to the principle of equality of arms: Unless the total value of the claims is known to the defendant, he cannot calculate his risk related to the proceeding, and is therefore at a disadvantage when bargaining with the claimants.

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7 As in Art. 2 No. 3 of the Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty.

8 Available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm. Unfortunately, the Commission did not consider all existing collective redress schemes, e.g. the Austrian one.

9 http://ec.europa.eu/consumers/redress_cons/it-country-report-final.pdf at p. 2 for Italy; http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf at p. 4 for Portugal.

10 http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf at p. 4.

11 http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf at p. 5.

Q 9 Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?

A prime example of an EU initiative that

- is necessary to ensure effective access to justice,
- takes due account of the EU legal tradition and
- takes due account of the legal orders of the 27 Member States

would be an initiative to improve consumer information on collective redress, including the information that a specific lawsuit is pending, and consumer's rights to join or not to join it[12]. The Commission has noted that lack of information equals lack of consumer protection[13]. Ultimately, access to justice is only as effective as far as consumers' knowledge about it goes. As we have mentioned earlier, public authorities can play an important role in this context.

The CCBE would approve of an EU initiative that compels member states to publish information on the available redress mechanisms, and on the available representative entities. We will address this issue further (see **Q 13, 22**)

Q 10 Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

There are indeed such practices. While any list is necessarily non-exhaustive, the CCBE would like to name the following practices which it considers valuable:

In certain areas, a statutory bundling of claims can be beneficial. For example, under German law, claims from damages which the alleged victim was insured against automatically pass to the insurance once it grants coverage to the victim (*cessio legis*). Therefore, if a single conduct gives rise to a multitude of claims, those claims might be essentially bundled, i.e. at insurance companies.

Conversely, merely creating a new collective redress mechanism would not be sufficient, as the example of Portugal demonstrates. While Portugal does have a collective redress mechanism (a group action), it is rarely used. Among other factors, the Portuguese country report blames this on the lack of predictability as well as the lack of knowledge among lawyers and judges[14].

The criticism of the lack of predictability underlines the need to protect the rule of law.

3.1 The need for effective and efficient redress

Q 11 In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

With the questions Q 11 to Q 14, the Commission goes into detail concerning the procedural options for improving consumer redress. This issue is necessarily related to the role of the lawyers and representative entities (Q 13 and Q 14).

If the EU was to implement a collective redress mechanism, it would be efficient and effective if it offered

- access to justice to all EU citizens who wish it,
- within an appropriate time and at appropriate cost, the latter in view of the amount claimed,

12 See Response to the Commission's Consultation on the Consumer Collective Redress Benchmarks, p. 5, on why the latter part is of equal importance.
13 Consultation Paper, p. 3.
14 http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf at p. 3.

- respecting the core principles put forth in Q 7,
- involving professionals of law such as lawyers.

If the collective redress mechanism was open for everybody, no specific features would need to be set up for SMEs.

Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?

As a general rule, it can be assumed that all Member States strive for keeping their national redress mechanisms as time- and cost-effective as reasonably possible. At the same time, there always tends to be a tension between finding justice and moving cases as smoothly as possible. Different legal cultures have developed different approaches to ensuring this goal.

Generally speaking, the proceedings are the more likely to be treated diligently and efficiently, if those who are running the process are qualified legal professionals. Accordingly, if consumers in a collective redress proceeding are represented by qualified lawyers who can build and join their cases in a stream-lined manner, consumers will benefit. European lawyers have the necessary experience in e.g. exploring facts and gathering evidence in preparation of the trial. At the same time, following the principle of equality of arms and open proceedings, the rights of defendants also need to be preserved by due process.

It is indispensable to the CCBE that due process be respected at every single stage of the proceedings, including:

- admissibility
- liability
- compensation
- control of the distribution

3.2 The importance of information and of the role of representative bodies

Q 13 How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

The first issue is how citizens should be informed in general about their means for redress, i.e. the existence of a collective redress mechanism. As the Commission notes[15], uncertainty and perceived difficulty to access redress are major obstacles. This is not restricted to collective redress.

This issue is usually solved by citizens either getting legal advice, or getting information from other sources. The internet can be the medium of choice for such information. In fact, several law firms already give out free information as to the available legal recourses, and provide forums for pooling claims and information.

They could be complemented by official EU databases such as the CLAB (on unfair terms in consumer contracts, now discontinued). The Commission could provide incentives for publication on its website.

The second issue is how the potential plaintiff could be informed. In general, information sources like online or print media are appropriate here. Conversely, contacting the potential plaintiffs personally is only possible if they are known personally, and the associated costs will often be unreasonable compared to the possible gain.

As to who should be responsible for the information, the answer depends on whether the law infringement has already been ascertained by a court. If the law infringement has been ascertained, responsibility might lie with the liable person or entity. This may be the Respondent in an action.

15 Consultation Paper, p. 3.

If the alleged law infringement has not been ascertained, the matter is less clear-cut. The defendant must not be held responsible as it has not yet been established that he acted unlawful. Burdening him with information duty (and costs) would

- give the claimants unreasonable bargaining power, as the defendant would try to get a settlement in order to avoid costs, and
- be detrimental to the internal market, as every business would distribute the potential costs among its customers.

The CCBE underlines that any information regarding the existence of the collective redress procedure needs to be provided neutrally and correctly. It may not be misleading and if necessary must be subject to judicial review.

Q 14 How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

The core factors for ensuring efficient representation are competence and integrity of the representing persons.

I. The parties' right of free choice

The CCBE insists on the parties' right to freely select the way they want to be represented in line with national law. Standing to sue should be granted to individuals and not be reserved solely to representative entities. The CCBE also emphasises the parties' freedom of association principle, which comprises the freedom not to join any organisation.

II. Safeguards attached to the representation by a lawyer

The representation and the defence of a citizen's interests is the essence of the mission of lawyers. The major characteristics of the lawyer profession constitute unquestionable safeguards in the frame of the implementation of a collective redress procedure at EU level.

- The lawyer is subject to a **strict deontology** in all Member States. Moreover, these rules of ethics are completed by sanctions that can range from disciplinary to criminal sanctions in case of a serious breach of the rules governing the profession.
  - The objective of the setting-up of a collective instrument at EU level is the effective access to justice for citizens; the representation and the assistance of an independent and qualified lawyer is a way to reach this goal. Yet, one of the essential principles under which the lawyer is submitted is **independence**. Within the legal framework of collective redress, the independence that governs the lawyers' work and that must exist at a political, economic and intellectual level in that type of actions will permit to ensure the quality of the advice provided by the lawyer. The independence principle implies that under any circumstances, the lawyer accomplishes his mission remaining free from any influence; particularly from state authorities and economic operators. The defence of the client's interests (consumer in the present case) only, in the respect of the law, governs the work of the lawyer.
  - Moreover, the principle of **professional secrecy** instituted in the exclusive interest of the lawyers' clients, permits to the persons subject to trial to act besides their lawyers in full confidence. The respect of professional secrecy by lawyers will apply along the whole proceedings of collective redress and will contribute to a fair administration of justice by preventing disclosure of information during the procedure
- The fact that lawyers have the obligation to contract **professional liability insurance** is an additional safeguard.

- As legal practitioners, lawyers are the best positioned professionals to legally advise the consumers about this new procedure.

  Their **competence** is ensured through educational training dealing with substantive as well as with procedural law. They are assigned to a mandatory life-long training that guarantees their adaptation to the evolution of law and its practice. Experience has shown that lawyers are quick to respond to new procedural mechanisms, and will actually boost the application of those mechanisms if those are thought-through. For example, in Germany, several law firms have specialised in the new test case procedure (*Kapitalanlegerverfahren*) very quickly after the respective law was implemented, and they now coordinate consumer's efforts i.e. by the means of websites.

- **Expertise**: The lawyer's mission, based on the defence of parties' interests, which he represents, involves a daily practice of dialogue with the judges and the citizen. As direct point-of contact of the citizens, the lawyer is able to legally "translate" the demands expressed by a client.

  Regarding the second question, the CCBE considers that the cross-border challenge will not provide any problems for the advocacy. There are countless law firms already operating cross-border (e.g. in several Member States), cooperating with each other smoothly wherever it is necessary. In particular, a plaintiffs' bar is developing in Europe, setting up cross-border alliances and building networks in order to assist potential plaintiffs on a European scale. Moreover, for an effective administration of these procedures, and more generally of justice, a study will have to be made about the designation of a "lead lawyer" who would be the lead counsel in the procedure. The "head lawyer" would coordinate the work and the management of the different claimants and the other lawyers working on the action.

3.3 The need to take account of collective consensual resolution as alternative dispute resolution

Questions Q 15 to Q 19 address how ADR can supplement judicial redress in order to facilitate consumer protection. The CCBE recognizes the merits of ADR. As the CCBE has stated before, ADR is by no means unsuitable for high value claims, e.g. mass claims. Therefore, ADR can be a supplementary means of resolution in collective disputes as well. For example, mediation could be successful in labour disputes.

Q 15 Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

The CCBE holds that the parties will take recourse to ADR out of their own initiative whenever it suits their interests. As a general rule, the parties may know best what suits their interests. The inherent advantages of ADR may provide sufficient incentive.

The EU has made an important step with the Directive 2008/52/EG. In particular, the CCBE approves of Art. 6 I of this Directive, which demands that settlements by mediation must be enforceable. As the quality of mediation is guaranteed by EU-wide quality control, mediation may become a powerful tool to further consumer's interests.

Q 16 Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

An attempt to resolve a dispute via collective consensual dispute resolution should not be a mandatory step in connection with a collective redress action for compensation.

Regarding individual redress, some Member States have gathered experience with a mandatory consensual resolution stage for small claims, e.g. Germany.

However, the situation is different in collective redress, where the amount claimed in total will be typically large. A mandatory consensual resolution stage would simply be another opportunity to leverage bargaining power, and thus potentially abuse the proceeding. Furthermore, we refer to Q 19.

Conversely, the court should be open for settlements during the entire course of the proceeding. Experience shows that parties are often willing to renegotiate after the taking of evidence. Again, lawyers can be of help here, since they will be more able than laymen to assess how the evidence impacts the legal situation.

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

In order to have this question answered, the Commission would have to state what it considers to be a fair outcome. There is no blanket answer to the question what is "fair".

The CCBE advises against mandatory court control over the results of consensual dispute resolution. For such control, the respective court would have to consider the entire case, since what is "fair" cannot be determined without looking at the particularities. This would nullify one advantage of consensual dispute resolution, i.e. relieving courts from lawsuits.

Again, the best protection for a party against being disadvantaged out of inexperience is legal counsel.

Q 18 Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

According to Article 6. I of this Directive, a settlement by mediation is enforceable if the parties agree to it. In principle, the CCBE sees no reason to deviate from this principle in collective dispute resolution. However, it is conceivable that the parties agree that the settlement should be enforceable before the mediation commences.

The CCBE strongly advises against giving one party the right to unilaterally have the settlement made enforceable. Such a right would severely jeopardise the principle of equality of arms, as outlined under Q 7.

Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

The CCBE would like to caution the Commission against setting obstacles in the form of mandatory ADR. Such obstacles could put efficient consumer redress at risk.

Similarly, ADR-clauses have to be monitored, especially if they are included in general terms and conditions and bar the parties from resorting to judicial redress (as it is the case with arbitration). Such ADR-clauses could be abused by businesses to avoid collective judicial redress (and, consequently, lead to confusion about whether collective ADR can be initiated instead[16]).

3.4 Strong safeguards against abusive litigation

Q 20 How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

With Q 20 to Q 24, the Commission seizes again the crucial issue of safeguards and of the principles that must govern collective redress.

The CCBE considers the following safeguards to be indispensable:

16 Exemplified by the US Supreme Court judgment of April 27th 2010, Stolt-Nielsen S.A. et al. v. Animalfeeds International Corp, available at http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf.

- The principle of equality of arms must apply (see Q 5). One party being favoured over the other by procedural law is practically an open invitation to abusive litigation.
- It must be economically irrational to pursue unmerited claims. An important aspect of this is the "loser pays"-principle (see Q 21).
- Any proceeding must be binding only to parties who have actively agreed to do so ("opt in", not "opt out"). This effectively limits the amount a single party can obtain in a proceeding, and thus removes incentive to claim amounts in the billions where the individual damage is much smaller.
- Court costs must scale up with the sum claimed, in order to have a threshold against very high unmerited claims.
- If consumer associations were allowed to bring collective redress actions, their independence would have to be ensured. To the extent that representative bodies were permitted to act, they also would need to be fully transparent as regards their funding and funding of claims as well as their decision making process.

The judge should be able to control the admissibility of the claims at the commencement of proceedings.

Q 21 Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

The CCBE considers that the 'loser pays' principle should apply to all collective redress proceedings, for two reasons[17]:

- If the "loser pays" principle does not apply, it can be economically rational to bring claims which the claimant knows to be unmeritorious, because the claimant does not stand to lose anything. This is especially the case if his lawyer fees are insurance-covered, or if they can be tied to the claim's success.
- If the "loser pays" principle does not apply, the defendant in any collective redress lawsuit will always bear his own lawyer costs, even where the claim is manifestly unmeritorious. This creates an incentive to pre-trial settlement, as long as the associated costs do not surpass those lawyer costs, even where the claim is manifestly unmeritorious.

The CCBE sees no reason for exceptions to this rule.

Furthermore, it should be noted that according to a widely (though not unanimously) held notion, pre-procedural attorney fees can be recovered under Art. 74 CISG. The CISG has been contracted for in the majority of the EU member states[18]. There is no reason why the recovery of procedural attorney fees should be different.

Q 22 Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

This question is not only about the right to bring a claim but also about representation in legal proceedings.

The introduction of a new redress mechanism alone will not improve consumer's legal knowledge. A bridge between consumers and the legal world is required. The European Court of Justice ruled that the right to be represented by a lawyer is indispensable for a fair civil proceeding according to Art. 6 of

17 See also Comments on the Commission's Consultation Paper on Consumer Collective Redress, p. 4; Response to the Commission's Consultation on the Consumer Collective Redress Benchmarks, p. 5.

18 Overview at http://www.cisg.law.pace.edu/cisg/cisgintro.html.

the European Human Rights Convention.[19] Therefore, the right to be represented by lawyers must not be limited.

In addition, representation by a lawyer is necessary in order to ensure equality of arms and to prevent needless lawsuits. Without legal counsel by lawyers, there is an increased risk of consumers refraining from legal action out of lack of information or legal knowledge.

Similarly, the European advocacy is an integral part of the rule of law. Lawyers can provide independent advice. Without such advice, there is a significant risk of consumers filing needless lawsuits since they may not realize their claim is unmeritorious. Consequently, consumers may be exploited by interest groups, by being pushed to file claims which are actually politically motivated.

Therefore, the right to represent one or more customers / victims or a representative entity in legal proceedings should be limited to lawyers, in line with national law.

Q 23 What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?

Judges should play their usual role in preventing abusive claims. Where representative entities are entitled to bring a claim, the entitlement of these entities should be recognised on a case-by-case assessment by the Court. It is indispensable to the CCBE that due process be respected at every single stage of the proceedings, including:

- admissibility
- liability
- compensation
- control of the distribution

Q 24 Which other safeguards should be incorporated in any possible European initiative on collective redress?

If the role of counsel is being respected and the procedural safeguards under the Rule of Law are implemented, this should be sufficient.

3.5 Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs

Q 25 How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

The question of funding is relevant since consumers cannot be expected to pursue economically irrational lawsuits, as meritorious as they may be.

Funding can be achieved via the “loser pays” principle. In addition to the use of public funds, litigation financing may be a way to obtain funds in order to professionally pursue a case and to make sure that quality standards will continue to be respected.

The CCBE advises against allowing *quota litis* in collective redress proceedings, i.e. the right of representative entities or lawyers to receive a share of what was obtained in the proceedings[20]. Such a remuneration scheme might give incentives to abusive litigation, as the developments in the USA have shown.

19 ECJ, C-305/05, judgement of 26.06.2007, at 31
20 Response to the Commission’s Green Paper on Consumer Collective Redress, p. 6.

Furthermore, the CCBE advises against exempting consumer collective actions from court fees. Such an exception would make it economically rational to bring even the most far-fetched claim that has only a minuscule chance at succeeding.

Q 26 Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

Funding can be provided by businesses specialised in procedural funding. Legal insurance companies adopted such a business model. The same is true for other financing companies[21].

Legal cost insurance is a suitable way to improve access to justice for the insurant. At the same time, it can discourage abuse of procedure. Insurance companies can restrict the insurance coverage to potentially successful claims, thus serving as a filter against abusive claims. Similarly, any individual who files claims for a living will have to pay for it with vastly increased insurance premiums.

Concerning third party funding, the EU should neither discourage nor prohibit it. What consumers do with the payment acquired in a proceeding is up to them. If, for example, consumers decide to pledge a part of the potential gain to a third party in exchange for the third party funding the proceeding, there is no reason for the EU to intervene.

Q 27 Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

Q 28 Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

Apart from the issues discussed in the preceding questions, we can see none.

3.6 Effective enforcement in the EU

Q 29 Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?

The enforcement of claims, considered by the EU in Q 29 to Q 32, is as indispensable as the others: Whatever the procedural options, efficient redress will not be achieved if there is no efficient enforcement.

Jurisdiction, recognition and enforcement of judgements are all addressed in the Brussels I regulation which has been extensively analysed elsewhere[22].

Q 30 Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

Regarding jurisdiction, recognition, enforcement of judgments and applicable law, collective redress – in principle – faces the same issues as individual redress. In recent years, there has been a steady improvement in the EU in clarifying these matters. For example, the aforementioned Brussels I regulation provides consumer protection when it comes to jurisdiction, whereas the Rome I regulation (593/2008) provides the same when it comes to the applicable law.

It has been noted that exequatur proceedings under this regulation operate efficiently[23]. Still, a claimant seeking to enforce a judgement abroad may incur costs, deriving from the cost of the

21 One example from Germany can be found under http://www.das-prozessfinanzierung.de.
22 See Hess/Pfeiffer/Schlosser, Report on the Application of Regulation Brussels I in the Member States

translation of the judgement or of the cost of an attorney's services if the defendant challenges the exequatur according to Art. 43 of the Brussels I regulation. Therefore, abolishing the exequatur proceeding entirely while maintaining a substantial and procedural public policy filter could help consumers to save costs where they have acquired a beneficial judgement.

Q 31 Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

3.7 Possible additional principles

Q 32 Are there any other common principles which should be added by the EU?

We refer to our answers to Q 7 and Q 20.

4. SCOPE OF A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

Q 33 Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

The CCBE could imagine that a collective redress mechanism could apply to other areas of EU law.

Q 34 Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

If the EU decided to take action concerning collective redress, the CCBE sees no reason to restrict it to consumer redress.

23 See Hess/Pfeiffer/Schlosser, Report on the Application of Regulation Brussels I in the Member States, p. 226