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

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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. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

On 4th February 2008, the Commission launched a consultation in relation to a list of benchmarks that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers.

The Commission would like to know from stakeholders whether they:
- agree with these benchmarks;
- consider other benchmarks to be important;
- consider that more benchmarks or fewer benchmarks are necessary;
- have experiences with existing mechanisms of collective redress, especially in relation to specific sectors and/or in relation to cross-border disputes.

The CCBE is grateful for this opportunity to contribute to the current reflection on the important topic of collective redress proceedings.

The CCBE would like to point out that it does not take a stance on the question whether an EU instrument is needed or desirable in this field. However, if a community instrument were to be envisaged, a number of aspects should be taken into consideration, as explained below in the CCBE comments on the Commission's proposed benchmarks.

Moreover, the CCBE would also like to point out that a possible future instrument on collective redress should be restricted to cross-border cases only, as provided by Article 65 EC[1] which limits the competence of the European Union to measures in the field of judicial cooperation in civil matters having cross-border implications.

II. CCBE comments on the Commission suggested Benchmarks

The nine benchmarks identified by the Commission are listed below in bold (the numbering was inserted by the CCBE for clarity). The CCBE comments appear under each benchmark.

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

The CCBE considers that the mechanism should, of course, enable consumers to obtain satisfactory redress. However, consumers should not obtain redress in any case, regardless of whether the pursuit of their claims might be reasonable or not.

The reasons why consumers could not otherwise adequately obtain satisfactory redress should, therefore, be identified and specified in detail. This should be done in order to avoid unreasonable, unmeritorious, or mischievous pursuit without any substantial chance for a successful pursuit. In order to discourage the introduction of unmeritorious claims - since allowing the pursuit of such claims would not be in compliance with the goal aimed for i.e. to ensure satisfactory as well as adequate redress for

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

consumers - the "loser pays" principle is considered as one of the key measures being appropriate to avoid abuse of the mechanism.

Since collective redress is always based on individual claims, the "opt-in" principle is the only way to respect appropriately and guarantee 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 consumer should have to say "yes" to opt-in to collective redress, and should not be forced to do anything just to get out of a collective redress mechanism he/she does not agree with.

The opt-out system would lead to consumer decisions which are not self-governed but under pressure of a collective: in other words, to stay within the process of a perhaps unmeritorious or excessive claim just because a consumer is under the collective pressure of a group, and not having been decided in a free and self-determined way, would lead every single consumer to be deprived of legal capacity, i.e. of the right to self determination.

(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.**

With regard to the financing of actions, the CCBE considers it important to separate the financing strictly 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, which should, without question, not be the outcome of the EU mechanism.

As for the question on whether consumers can be effectively represented by a third party, the CCBE is of the opinion that this possible representation should be limited to legal persons having the same interest in a claim. It should not be possible for a "third party" to act without having its own or the same interest in the claim.

The CCBE considers that the costs for bringing an action should be proportionate to the total amount in dispute. Accordingly, the CCBE recommends that the expression "the amount in dispute" should be replaced by "the total amount in dispute" in the last sentence.

(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 CCBE agrees with this benchmark but considers that some clarification is needed (for example what is covered by "costs of proceedings"?).

As also mentioned in the comments under benchmark 2, the expression "the amount in dispute" should be replaced by "the total amount in dispute" in the first sentence of the benchmark.

The CCBE would like to underline that it considers the "loser pays" principle as a principle of utmost importance in order to avoid unreasonable, artificial and vexatious actions. The "loser-pays" principle is to be followed in order to avoid abuse of the mechanism, as in the American class action system.

(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.

The CCBE agrees with this benchmark, i.e. that the compensation to be provided by traders/service providers (against whom actions have been successfully brought) should be **equal** to the harm caused by the incriminated conduct and should not amount to punitive damages.

The core principles of responsibility (fault – cause – harm) should be respected subject only to the exceptional cases under (5) below.

The CCBE would like to underline that it is of crucial importance to separate strictly the adjudication of civil damages from punishment of criminal or regulatory nature.

The aim of a collective redress procedure should remain civil and should not lead to the allowance of punitive damages.

(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.

The CCBE believes that the introduction of collective redress itself will have a preventative effect. However, the CCBE does not agree with the introduction of this benchmark, for the following reasons:

- European civil law systems are designed to compensate claimants for damages suffered by wrongful conduct. The punitive nature of the proposed measures, solely based upon potential future wrongful conduct, does not fit into that concept. 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. Other kinds of damages beyond pure recompense for harm (such as skimming off the profit gained from the incriminated conduct), should be truly exceptional and limited to existing schemes (for example in the competition area).

- It is unclear whether it is meant that claimants would directly benefit from these measures. Again, that would not fit within a civil law framework.

- Collective redress does not require the introduction of punitive damages, a concept that is also not considered desirable in benchmark (4) above.

(6) The introduction of unmeritorious claims should be discouraged.

The CCBE agrees that the introduction of unmeritorious claims should be discouraged, as mentioned under benchmark (1).

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

The CCBE agrees that sufficient opportunity for adequate out-of-court settlement should be foreseen.

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

In all the current systems of collective redress, the legislator always provides for the possibility of both collective redress actions and individual actions.

The aim is to preserve the right of an individual litigant to initiate an action if they would not like to be part of collective redress actions.

Even in the opt-out system in the United States, someone can decide not to take part in collective redress actions and bring an individual action.

It is a fundamental right for the prejudiced consumer or the litigant.

Therefore, any publicity that would be undertaken either to launch a collective redress or to inform the public of a decision declaring the collective redress admissible and calling those "prejudiced" to join the collective redress actions, shall mention that the "prejudiced consumer" is not obliged to join the collective redress actions and that he/she can bring an individual action himself/herself.

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

The CCBE agrees with this benchmark. In any proceedings, the parties should be able to expect a solution within a reasonable period of time. Nevertheless, sufficient time should be allowed for careful consideration of the case, in order to lead to fair solutions and results.

III. Conclusion

The CCBE agrees with benchmarks 6, 7, 8, 9.
The CCBE agrees with benchmarks 1, 3 and 4 in so far as the CCBE comments are integrated into the benchmark.
The CCBE does not agree with benchmarks 2 and 5.

Moreover, the CCBE considers that two additional benchmarks would be needed:

(1) **the "loser-pays" principle,** in order to avoid abuse of the collective redress mechanism;

(2) **"the opt-in" principle, in order to guarantee the freedom of every single consumer to decide individually whether to pursue his/her claim or not in a self-determined and active way.**

The CCBE will carry on working on the issue of collective redress and may address additional comments on this topic to the Commission.