



CCBE COMMENTS ON THE COMMISSION'S CONSULTATION PAPER ON CONSUMER COLLECTIVE REDRESS

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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.

The CCBE appreciates the Commission's efforts to advance the discussion on establishing an effective legal framework that enables consumers to receive adequate compensation in mass claims. However, three of the five options now presented in the latest Discussion Paper (presented and discussed in the Public Hearing of May 29, 2009) are to be considered as a material step back: we consider that the options suggested in the Green Paper provided a much better legal protection for consumers than is now provided under Options 3¹, 4² and 5³ in the Discussion Paper.

We aim to show this in this paper by giving the kind of information and reports of facts the Commission has invited the stakeholders to provide, i.e. by giving facts and reports referring to the experiences of those Member States where there are already national instruments of collective redress (for consumers).

As mentioned in its response to the Green Paper on consumer collective redress, the CCBE does not take a stance on the question whether an EU instrument is needed or desirable in this field.

1. Collective Redress Instruments not only for Privileged Claims:

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.

In some Member States, eg in Austria, the collective redress instruments, especially the proceedings, are available not only for consumers but as well for anybody, especially for small enterprises, when their rights are violated by a trader and they want to pursue their claims collectively. This indiscriminate opening of collective redress instruments to all is to be reported as functioning well (see Section 227 Austrian Code of Civil Procedures, Section 11 Number 2 Austrian Code of Civil Procedures; Decision of the Austrian Supreme Court 4 Ob 116/05w and the doctrine eg *Scheuba*, AnwBI 2006, 64 FN 4, *Kalss*, ÖBA 2005, 322, 330ff; *Madl*, ÖBA 2003, 722ff).

An EU-wide effective legal framework should, hence, enable not only consumers but any EU-Citizen to obtain adequate compensation in mass claim cases, no matter if such claims are brought by consumers, or small enterprises, or agriculturists, or artists or freelancers.

The options 3-5 given in the Discussion Paper restricting any initiative to consumers' claims will only result in the preferential treatment of claims by consumers. The question of whether an illegal practice of a trader violates the rights of consumers or of small enterprises or of agriculturists or of artists or of a freelancers is irrelevant regarding the experiences already seen:

¹ Option 3: Non-binding setting up of collective ADR schemes and judicial collective redress schemes in combination with additional powers under the Consumer Protection Cooperation Regulation.

² Option 4: Binding setting up of collective ADR schemes and judicial collective redress schemes with benchmarks in combination with additional powers under the Consumer Protection Cooperation Regulation.

³ Option 5: An EU-wide judicial collective redress mechanism including collective ADR.

Illegal bank practices for instance can violate the rights of those who are holding an account. The harm caused is the same, no matter if the account holder is a consumer, a small entrepreneur, an agriculturist, an artist or a freelancer. Even though one person holding an account privately and an entrepreneur holding a similar account might suffer the same harm, they will not be granted the same entitlement to seek adequate compensation in mass claim cases.

Such a discriminating system as suggested under options 3-5 is not what should be the outcome of an initiative of the Commission to establish an effective legal framework to ensure adequate compensation in mass claim cases.

Besides the initiative of DG Sanco, has not yet been harmonized with the initiative of DG Competition, which will - when both initiatives will lead to EU-wide instruments - result into an EU wide legal uncertainty and will leave more legal questions confusingly open than now.

2. Civil Law Claims are to be Strictly Separated from Criminal Law Punishment:

Instruments already existing in several Member States enable consumers (respectively anybody who has suffered harm from a trader's illegal practice) to pursue claims and to obtain adequate compensation collectively. The CCBE is of the view, however, that any forthcoming instrument should entitle the consumer only to compensation – any damages awarded should not be punitive or amount to the skimming-off of profits. None of the options mentioned in the Discussion Paper should lead to such a consequence.

In the Member States where collective redress instruments exist, it remains for the public authorities to take measures to protect consumers' interests and to punish illegal practice. This system of separating compensation for harm suffered from any prosecution, retort and criminal law punishment is to be reported as functioning well⁴

Public authorities prosecuting the illegal practices of traders are a guarantee of objectivity and independence, whereas private consumer organisations - other than public authorities and indeed consumers - are less so.

Prosecution of illegal practices of traders is in the exclusive competence of the public authorities of every Member State and this should not be "sourced out" to private organisations, as consumers private organisations. The options 3-5 suggested in the latest Discussion Paper of the Commission give rise to the concern that the initiative might result into an EU-wide "Consumers' Police Force". There is no legal basis for such a competence of the Commission to be seen.

3. Lack of Transparency - Importance of Independency:

If consumer associations are to become entitled to bring representative actions on behalf of consumers, the CCBE believe that they should be required to meet standards of transparency and independence. This is so whether such organisations are publicly or privately funded. Mass claims should be pursued with the sole purpose of compensating the consumer who has suffered harm.

In some Member States where - inter alia - private consumer organisations are entitled to access collective redress instruments, but there is reportedly a lack of transparency:

Consumers organisations are often funded by public means. When such organisations decide to use a collective redress instrument to obtain compensation for consumers in mass claim cases, or indeed decide not to, their decision is not always transparent. Consumers who have suffered harm have no recourse against the consumer organisation to ensure their claims are pursued.

In some Member States it has been reported that consumer organisations pursued consumers' claims based on illegal practices against certain selected banks or insurance companies, while not pursuing

⁴ For example, in Austria the adjudication of civil damages is strictly separated from punishment of a criminal or regulatory nature and only public authorities are entitled to skim off the profit (Section 20 of the Austrian Criminal Code; *Karollus*, JBI 1988, 280).

the same claim against other banks or insurance companies that had been guilty of the same illegal behaviour. Consumers do not have any guarantees against the arbitrary decisions of consumer organisations.

Following the comments above the CCBE, raises serious concerns about the possible consequences that could arise under benchmarks mentioned in the Discussions Paper (paragraphs 52, 57 and 62).

Consumer associations located in Member State A would be entitled to bring collective actions in Member States B, C and D on behalf of consumers in relation to the same illegal practice of a trader or traders. They could be publicly funded by the Government of Member State A or could recover costs from the compensation awarded. Consumer organisations would be entitled to pursue actions only in countries B and D, however, without giving explanation. We are concerned that consumer associations should not be manipulated to pursue litigation that is politically motivated or that, for reasons that are not made clear, targets traders in certain Member States.

Hence, the (financial) independence of those, who are entitled to assist consumers to obtain adequate compensation in mass claim cases is of utmost importance. Whenever such an independence is not granted, i.e. in cases the persons are funded by public means or are entitled to skim of profits, any legal framework that enables consumers to ensure adequate compensation in mass claim cases can be turned into an instrument of political instability.

4. The role of lawyers in collective redress:

It might not be desirable that collective redress may be brought only by consumer organisations. Indeed, consumers who are not members of an organisation should be able to gather freely and act through the lawyer(s) of their choice; failing which, freedom of access to justice for citizens would be jeopardised.

In relation to test case procedures, the plaintiff should be represented by legal counsel to lead the proceedings (given the exceptional complexity and the number of different issues which tend to arise), if that is not already required by national procedural law. In some countries (for example in Germany), the competence of lawyers has ensured that the vast majority of claimants choose to be represented even where this is not compulsory. The costs resulting from such a requirement should be recoverable by the "loser pays"-principle. Counsel fees will have to take into account the extent and difficulty of the test case.

The CCBE would like to stress that lawyers are subject to strict ethics in every European Union State, and lawyers' work is covered by compulsory insurance. In addition, they are professionals with skills, with the experience of dialogue with judges and citizens, with independence (an essential aspect, in particular in this respect) and with savoir-faire.

Furthermore, resorting to a "leader" lawyer would ease the smooth operation of the proceedings.

5. Test case procedure

The CCBE would like to propose amendments to the test case procedure suggested by the Commission.

First, consumers should not have the option to decide whether they want to be bound by the proceedings' outcome after the award was rendered. Such "cherry picking" on only one side would severely jeopardise the principle of equality of arms.

Second, the procedure would need to provide for some exclusive jurisdiction. Otherwise, a race to different courts in different countries could hardly been prevented. If several test case actions were allowed to be pursued simultaneously, however, there might be different outcomes. This would certainly not support the idea of a unity of European law.

Third, the scope of the test case procedure should be limited to establishing certain facts alone. Applying the substantive law should remain the task of the national courts. Thereby, the procedure would be simplified. The facts being established, consumers would have little difficulties to achieve compensation at a national court.

Fourth, the scope of the test case procedure should be limited to cases where the individual damage makes two-party litigation uneconomic. Where this is not the case, there is no need to restrict private autonomy by imposing a collective redress mechanism. However, parties of a two-party litigation could be granted to join the test case if both consent to it. According to Article 65 of the EC Treaty, the test case procedure would have to be limited to cross-border claims.

Conclusion:

- (1) Any future collective redress proposals should not be restricted to consumers only.**
- (2) Civil law claims should be strictly separated from criminal law punishments.**
- (3) Consumer associations entitled to bring representative actions on behalf of consumers should be required to meet standards of transparency and independence.**
- (4) Consumers who are not members of an organisation should be able to gather freely and act through lawyer(s) of their choice. In relation to test case procedures, the plaintiff should be represented by legal counsel to lead the proceedings.**
- (5) A test case procedure should meet the minimum requirements underlined in part 5.**