

BEUC Conference

‘Group action : Taking Europe forward’

BUSINESSEUROPE’s views on collective actions

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I. Starting point of the debate :

1. EU Commission

- Lack of confidence of consumers in cross-border shopping
- Concerns about effectiveness of redress mechanisms

2. Discussions mainly in 2 areas

- **Competition** : Green paper (december 2005) on damage actions for breach of EC Treaty anti-trust rules
- **Consumer policy**
 - New consumer strategy 2007-2013
 - Green paper (february 2007) on review of consumer acquis

II. BUSINESSEUROPE

- Strongly supports effective and easy access to justice for consumers
- Welcomes the debate (reflection period) launched by Commissioner Kuneva
- A number of questions must be answered **before** further action is decided.

1. Is there a need for action on collective judicial instruments?

a. First step :

- A comprehensive assessment of the alleged problems (if any)
- A clear identification of their causes

b. Evidence currently insufficient

(Cfr. 2006 Commission Eurobarometer)

- Only 17% of European Consumers believe that taking sellers or providers to court is the best measure to protect their interests
- Only 13% consider that collective actions would be the best system
- 42% of European citizens consider it better to assert their claims through ADR (ex. arbitration, mediation or conciliation)
- More than 90% of consumer-related disputes settled out of court (Eurobarometer survey, October 2004)
- Majority of products liability disputes solved via out-of-court procedures (direct complaint to the company)
(Cfr. Commission reports on the 1985 directive)

Available data do not demonstrate that :

- existing national civil justice systems, including ADR, fail to provide adequate access to justice;
- Collective actions are the best solution to improve the current situation.

c. Collective Actions : Limited merits for consumers but adverse impact on businesses

Experience USA Class action :

- **annual cost** of U.S. tort system (only this area) estimated at more than \$ 300 billion U.S. (1)

(1) Tilling – Towers Perrin U.S. Tort cost, Trends and findings on the costs of the U.S. tort system, february 2003

- **Huge disproportion** between lawyers' fees in class actions and compensation allowed to consumers.

Ex. In a class action lawsuit filed in CA more than 50 well-known computer manufacturers and distributors were accused of misrepresenting the screen size of their computer monitors. The nationwide class of an estimated 40 million consumers received \$ 13 rebate on new computers and monitors or 6 \$ in cash. Lawyers received almost \$ 6 million in legal fees ! (1)

- Media pressure forces companies – whether or not liable – to accept highly expensive settlements to stop negative impact on image and business
(blackmail settlements)

(1) Source : US Chamber of Commerce; another ex. Premier Cruise Line settlement, Mealey's Litigation report : Class actions, July 17, 2003 (Class members received coupons for \$ 40 discounts on another cruise line; their lawyer : \$ 887,000 in fees!)

- **‘Lawyer driven’** procedures :
 - Consumers ‘hijacked’ by law firms or interest groups (ex. ambulance chasers, advertising campaigns, websites of law firms)
 - Mostly those proceeds do not accrue to consumers, but enrich intermediaries instead
 - Inability of consumers to control claims brought in their names
- Compensation culture => excessive **litigious society**
- Collective actions do not **reduce costs** and do not prove to be more **efficient**
- US Government various attempts to reduce worst excesses (**Class action Fairness act 2005**, unfortunately limited in scope)

- **EU-Commission** already pointed out she is not planning to adopt American system (i.a. due to differences between U.S. & EU legal systems)

However : Serious risk that many of the economic incentives and drivers featuring in the U.S. will be introduced, up-front or step by step

- **BUSINESSEUROPE** : of paramount importance to strike a **balance between interests of various players**

2. Basic principles for a sound debate

- Better regulation

- Key element of Lisbon strategy for growth and jobs
- BUSINESSEUROPE fully supports Better regulation policy
Excessive regulation hinders companies' development (contra **Lisbon agenda**)
- Rules to create workable and affordable solutions which do not harm European competitiveness

- **Before taking action at EU Level, it is essential to**

- Identify problems and provide sufficient evidence;
- pinpoint their causes;
- assess whether any EU action is needed and justified and if it is the case : assess what is the most appropriate type of action;
- assess the impact of the action on the basis of a competitiveness test;
- dialogue with representative stakeholders
(provide enough time for input)

- **A uniform collective redress system at EU level could :**
 - undermine various aspects of national litigation system (ex. powers courts regarding the role of burden of proof, different effects of contingency system whether or not insurance cover for legal expenses is widespread, ...)
 - affect functioning internal market
- Collective actions very **recently** adopted in some member states (too premature to draw conclusions as to effectiveness)

3. How to improve redress?

a. Priority : Enforcement of legislation in the internal market

- Member states to play a decisive role for efficient enforcement
- Enforcement of existing legislation : essential for confidence of citizens and companies in the internal market
- Need to analyse effectiveness of current EU legislation and its enforcement before putting forward new proposals

Examples :

- Injunctions directive : cross border procedure is not being used (Cfr. EU consumer Law compendium – a comparative analysis, april 2007)
- Regulation 11 july 2007 establishing a European small claims procedure (allows enforcement of cross-border claims up to 2000 €)
- Regulation 27 october 2004 on consumer protection cooperation to strengthen consumer protection directives' effectiveness
- SOLVIT (European free-of-charge online problem-solving network) helps citizens and businesses to enforce their rights in case of misapplication of EU rules by national authorities (should be made better known and adequately resourced, especially at national level)

b. Out-of-court redress

- Whenever possible, disputes should be settled via ADR (interest of both consumers and business)
- Different levels of out-of-court procedure (direct negotiation, mediation, arbitration, ombudsman)
- Advantages of non-judicial means :
 - make it possible to reach a solution acceptable for both parties more rapidly
 - at a lesser cost
 - help to maintain a less confrontational atmosphere
 - provide case by case solutions; better suited to specific circumstances of each situation
- More emphasis needed on promotion and reinforcement of ADR's (various forms of ADR's in member states; discussions at that level)
- ADR's to take into consideration before action taken on collective redress
- Non-judicial modes of redress = more effective (Cfr. OECD 2007 Recommendation on consumer resolution & redress)

c. Education and Information

- more and better dialogue needed between consumers and enterprises.
- Public authorities should invest more in consumer education, in addition to initiatives between professional and consumer organisations

Conclusions

- Debate should develop further before action is taken at EU Level.
- Any action envisaged should primarily focus on assessment and – where applicable – revision of existing national instruments, including ADR's, before any new avenues are explored.