BUSINESSEUROPE

SPEECH

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TOWARDS EUROPEAN COLLECTIVE REDRESS FOR CONSUMERS?

THE POSITION OF BUSINESSEUROPE BY JOËLLE SIMON

As a representative of BUSINESSEUROPE, which represents more than 20 million companies – large and SMEs – in 33 countries in Europe, we are happy to be part of this key debate, which like any debate, shall be contradictory.

From our point of view, to discuss about the economics of collective redress, it is important to be clear about the nature of this debate. To this end it is necessary to recall some key facts.

1. Companies fully take their responsibilities

We fully agree that companies have to compensate any prejudice they have caused. If they have infringed the law, they need to be punished for that.

It is even more important when it comes to infringements to competition law, for example, which distort competition at the expense of companies that comply with the law.

2. It is essential to put the question of collective redress into perspective

If you listen to the supporters of class actions, you have the feeling that consumer law is inefficient, because each Member State offers different mechanisms of collective redress.

The picture is quite different in practice. I do not have time to elaborate on the situation in every Member State.

But let us remind you, because we are talking about figures, that more than 90 per cent of litigation between consumers and professionals are solved directly by them and that most of these cases concern only one person.

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Regarding the 10 per cent left, most are settled through alternative means of resolution and only few go to the court. And among those cases that go to court, only a small proportion involve numerous plaintiffs.

Moreover, part of mass litigation we are aware of, take place in emerging markets which are booming thanks to a strong demand. Solutions should be found to these very specific problems. But that does not necessarily imply an EU action on collective redress.

3. What do consumers expect?

What consumers do expect is to obtain satisfaction quickly and at no or minor expenses.

According to the 2006 Commission Eurobarometer, only 17% of European consumers believe that the right to take sellers or providers to court is the best measure to protect their interests.

42% of European citizens consider that it is better to assert their claims through alternative means of dispute resolution such as arbitration, mediation or conciliation.

And only 13% consider that collective actions would be the best way to defend their interests.

Those consumers should be aware that class actions are not the panacea, they are complex, lengthly and costly proceedings that do not facilitate the Administration of Justice.

Funding is one of the main problems of the collective redress system. Among the possible solutions to this problem, we want to warn the Commission against contingency fees which lead to abuses which won't benefit neither consumers, nor the EU economy.

4. Not to be mistaken on the objective:

It is clear that some supporters of these procedures see class actions not only as a way to facilitate the administration of justice, but also to foster punitive persecution.

We do not think that consumers expect to become private attorneys general.

We consider that government authorities, whether at national or EU level, must fully play their role in the event of a violation of law and especially of competition law, and damages must be granted in accordance to each Member State's law.

Moreover the very high fines recently pronounced by the national and European competition authorities already take into account the damage caused to the economy and to the consumers.

No association even if it represents collective interests can substitute to public authorities to achieve a public policy objective.

This is completely in line with our liberal conception of the market economy: companies do business, public bodies monitor the market economy and eventually sanction infringements to the rules.

Therefore there is no objective reason to move towards private enforcement which would add another layer of control and would mean extra costs for business.

5. Is there a need for action at European level?

Besides private enforcement, is there a need for action at European level on collective judicial instruments?

The data I already mentioned clearly show a lack of evidence.

In addition, the potential economic impact of such an initiative explains our reluctance to move in that direction.

It is true that the notion of collective redress covers different realities, as it will be showed later on this afternoon.

But it is also true that the oldest and until recently the unique reference for class actions legislation is the North American model.

I know that the Commission has already pointed out on several occasions that it is not planning to adopt the American system, partly because of the existing differences between the EU and US legal systems. But the US system was not created in one day. It was created step by step. There is a real risk that by importing bits of it Europe will ultimately end up with a similar system and similar consequences: I mean discovery, punitive damages, contingency fees.

It is obvious that the US or Canadian system inspire most of the proposals initiated on that field.

I was in Washington two weeks ago, and I can tell you that US plaintiff lawyers already look at the European market as a new business opportunity.

Does the European Union really want to import a litigation culture into Europe, that has cost 2.1 of GDP in the US? We hope not!

A litigation society and especially a “headline justice” would not benefit to consumers, to companies nor to the European economy in general.

As the European Parliament has perfectly stressed in its report on the Green Paper on Private enforcement, any reform should promote competition rather than litigation.

Before embarking in such a reform, we consider essential to:

- identify any existing problem,
- provide sufficient evidence,
- find out the causes,
- evaluate whether an EU initiative is needed, and which type of action would be the most appropriate,
- assess the impact of such an action on economic growth, jobs and competition in the Internal Market.

We are ready to participate in the two studies launched by the Commission on the effectiveness and efficiency of existing collective redress, and the potential distortions of competition resulting from different approaches.

Those studies will have to take into account various factors such as the organisation and effectiveness of the ordinary judicial proceedings, the public administrative system ….

Any initiative in this field like in any other area should be assessed following three main criteria:

- the better regulation approach: bearing in mind that excessive regulatory actions may hinder companies development,
- the Lisbon agenda,
- the subsidiarity rule.

6. Room for improvement

And I repeat, it is not obvious from our point of view that a European initiative is needed on that particular issue.

That does not mean that we do not consider that there is no room for improvement. Companies and consumers have a common objective which is confidence in the single market.

It is obvious that adequate enforcement of existing legislations should be a priority.

Numerous initiatives have already been taken in this field (the injunction directive, the regulation on small claims and soon the directive on civil mediation …). It is proved that efficient small claims proceedings contribute to reduce potential mass litigation.

We consider that according to the consumers' expectations, disputes should be settled wherever possible, via out-of-court-procedures, in the interest of both: consumers and business.

Non-judicial means of redress make it possible to reach a solution acceptable to both parties more rapidly, at a lower cost and help to mitigate tensions between parties.

They are numerous forms of ADR's and successful experiences in the Member States.

Conclusion

Facilitating multi-party litigation through consolidation or developing alternative means of resolution: we say "*yes*".

Fostering anonymous action intended to destabilise and pressure companies in order to extort money from them: we say "*no*".

BUSINESSEUROPE is ready to talk about practical problems, not to embark in a hazardous venture.

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