



23 June 2009

### **BUSINESSEUROPE COMMENTS ON THE COMMISSION'S FOLLOW-UP TO THE GREEN PAPER ON CONSUMER COLLECTIVE REDRESS**

Further to the 29 May Commission hearing and in response to the discussion paper<sup>1</sup> prepared by DG SANCO, we would like to reiterate our comments on its key points, which BUSINESSEUROPE had the opportunity to express at the hearing. Our comments will focus in particular on the definition of the problem at issue and the evaluation of the options presented in the Commission consultation paper.

For a more comprehensive analysis of BUSINESSEUROPE position and concerns, we refer to our response to the Green Paper<sup>2</sup> (at annex).

#### **DEFINITION OF THE PROBLEM**

A correct definition of the problem is key in order to discuss the possible solutions efficiently.

The first criterion to be considered is the European dimension and the existence of a cross-border element justifying EU action.

BUSINESSEUROPE fully supports the Commission's objective of boosting consumer confidence in the Single Market, especially regarding cross-border shopping. We consider that effective and easy access to redress mechanisms for consumers is important to attain that objective.

The two existing Commission studies<sup>3</sup> have evidenced a small number of mass claims problems with a very low portion of cross-border cases. Figures for actual cases put the situation into perspective. The Commission discussion paper refers to 326 cases in 8 Member States collected over 10 years. On average, this corresponds to less than 33 cases per year. Only 10% of these have a cross-border element, which means an average of 0.4 cases with a cross-border element per country per year.

Looking at the data produced so far, the cross-border dimension is therefore not sufficiently relevant to justify action at EU level. This shows that cross-border mass claims are not the main problem that calls for EU action. We question the ground for EU action on judicial mass claims, since to date there is not enough evidence of the existence of a cross-border element to justify it.

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<sup>1</sup> [DG SANCO discussion paper presenting a first working analysis of the impact of policy options designed in the light of the replies to the Green Paper, May 2009.](#)

<sup>2</sup> BUSINESSEUROPE response to the Green Paper on consumer collective redress, 2 March 2009.

<sup>3</sup> [Evaluation and Problem studies.](#)



In the light of the data produced, we identify the real problem as being how to deal with claims that are too small for an individual consumer to use traditional instruments, mainly judicial mechanisms that are too costly, lengthy and complex.

The core of the issue is providing consumers with redress tools that allow them an efficient, affordable and rapid solution particularly for small claims.

BUSINESSEUROPE would like to reiterate once more the unexploited potential of alternative dispute resolution mechanisms (ADRs) like mediation and arbitration, the need to improve existing enforcement instruments and information to consumers before we create new judicial mechanisms.

In those countries where the option between judicial (collective or not) redress and ADRs exist, reality shows that consumers prefer ADRs, because they are faster and more efficient. Sweden provides interesting data in this regard.

By their own nature, court actions are and will remain complex and will not be the best way to respond to the problems of cost and slowness to obtain redress.

The DG SANCO discussion paper defines as a problem that “businesses throughout the EU currently are not able to benefit from a more level playing field and are confronted with the uncertainty created by the current difference between national legal system in case of mass claim”. European companies agree on the need for a level playing field in terms of legislation and efficiency of enforcement. But in terms of redress instruments, what matters is that any instrument in place meets the criteria of efficiency, rapidity and reasonable cost. We believe this can best be dealt with at Member-State level.

The general objective of the Commission should not be to try to harmonise national judicial procedures by imposing mass claim procedures but to work on means to increase availability, efficiency, awareness and low cost of means of redress mainly for small claims.

BUSINESSEUROPE does not consider the diversity of instruments to be a problem. We do not support a one-size-fits-all approach, but are in favour of flexibility, pragmatism and efficiency. National legal traditions and specificities have to be respected.

With regard to the DG SANCO discussion paper, we regret that it does not help sufficiently to further define the problem. Only a few figures are presented, deriving mostly from national cases and with no attempt to better understand the underlying reasons for these data. As an example, paragraph 47 of the document states that out of 80 million consumer complaints 20 million are abandoned after first contact. The document does not analyse this figure further, not specifying to which type of complaints it refers to and the reasons for its abandonment (problems related to cost, language, complexity of procedure, etc.). This might even mean that the consumer has received a satisfactory response, or that there is not a ground for action, etc.



We invite the Commission to better analyse what is behind these data in order to better assess the problems that need to be addressed.

We consider that the options discussed must provide consumers who have suffered harm with quick, efficient redress and at a reasonable cost, in order to attain the objective of boosting consumer confidence in the Single Market, especially regarding cross-border shopping.

When analysing the existing redress instruments, what matters is that whatever instrument in place, it meets the criteria of efficiency, rapidity and reasonable cost. This is something to be dealt with best at Member State level.

### **OPTIONS PROPOSED BY THE COMMISSION**

Civic Consulting's assessment<sup>4</sup> of the outcome of the Green Paper's public consultation recognises extremely divergent positions, in particular regarding EU involvement in this matter.

BUSINESSEUROPE stresses the need for a pragmatic approach, improving availability and access to means of redress.

In the first instance, this means improve the functioning of the instruments that already exist. We note that the only consensus that emerges from the replies to the Green Paper rests on the need to evaluate the functioning of the measures already in place. However, this dimension of the problem is almost totally disregarded in DG SANCO's discussion paper.

We believe that the newly introduced instruments still deserve a thorough assessment of their functioning, before new measures are proposed:

- the small claims procedure is providing consumers with simpler, faster and cheaper procedure for cross-border small claims;
- the mediation directive;
- the enforcement network on consumer protection cooperation.

We believe that the above instruments, if properly enforced, will deal satisfactorily with most national and cross-border complaints. They already significantly improve conditions for redress and more time is needed for their evaluation. The following aspects should be looked at more closely:

- How to further improve the enforcement and efficiency of existing instruments;

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<sup>4</sup> ["Assessment of the economic and social impact of the policy options to empower consumers to obtain adequate redress"](#), 6 May 2009.



- How companies can improve the way they deal with consumer claims and how they offer redress to harmed consumers;
- How to improve information and assistance to consumers.

With specific regard to the options, we refer to our response to the Green Paper.

The role that collective redress can play as a driver for cross-border trade should not be overestimated. Confidence in cross-border transactions grows with availability of speedy, straightforward, inexpensive and effective redress systems. This may be achieved by other means than the use of a collective redress instrument.

For the above reasons, BUSINESSEUROPE supports option 1. As already mentioned, however, we believe that the EU has an important role to play regarding the improvement of redress for consumers. Therefore, we consider more appropriate to refer to this option as “no EU legislative action” rather than “no EU action”.

As regards option 2, we have always been supportive of self-regulation. Depending on the content, European companies could be interested in discussing this option further. We believe individual sectors might have a greater role to play in the context of self-regulation.

The other options are more difficult to assess, as their content is not clearly defined. Nevertheless, we oppose the introduction of any EU legislation imposing the establishment of judicial collective redress system to Member States. In this context, we strongly oppose the new options 4 and 5.

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2 March 2009

## **BUSINESSEUROPE RESPONSE TO THE COMMISSION GREEN PAPER ON CONSUMER COLLECTIVE REDRESS**

### **EXECUTIVE SUMMARY**

BUSINESSEUROPE fully supports the Commission's objective of boosting consumer confidence in the Single Market, especially regarding cross-border shopping. We consider that effective and easy access to redress mechanisms for consumers is important to attain that objective.

However, the role that collective redress can play as a driver for cross-border trade should not be overestimated. Confidence in cross-border transactions grows with availability of speedy, straightforward, inexpensive and effective redress systems. This may be achieved by other means than the use of a collective redress instrument.

This is why among the different options presented by the Green Paper we favour option 1. We indeed believe that by improving adequate and public effective enforcement of existing or recently adopted legislation, the EU would provide consumers with effective means of redress to address the problems identified by the Green Paper. Furthermore, any EU action should focus on adequate consumer education and information, and on the promotion of Alternative Dispute Resolution mechanisms (ADRs).

We believe that both the studies and the Green Paper fail to provide justification for any kind of EU legislative action. This is why we oppose option 4 that would oblige Member States to adopt a judicial collective redress mechanism.

If any further action is to be envisaged, it should be carefully assessed in the light of the principle of subsidiarity and on the need to solve a cross-border problem. Only under these conditions, BUSINESSEUROPE believes that the Commission should further assess:

- How to better use the potential offered by ADRs to address mass claims;
- How to improve the functioning of the existing sectoral out-of-court dispute resolution mechanisms (FIN-net);
- How to further promote implementation by individual companies of complaint-handling schemes, e.g. the ICC best practices for customer redress in online business and other sectoral best practices;
- How to improve consumer education and information.



# BUSINESSEUROPE RESPONSE TO THE COMMISSION GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

## INTRODUCTION

BUSINESSEUROPE fully supports the Commission's objective of boosting consumer confidence in the Single Market, especially regarding cross-border shopping.

We consider that effective and easy access to redress mechanisms for consumers is important to attain that objective. This is why we welcome the extensive public consultation and discussion carried out by DG Sanco since the inception of this debate in 2007.

We welcome in particular the fact that the Green Paper does not focus exclusively on collective judicial actions. It also addresses the need for correct enforcement of legislation, adequate consumer education and information, and the promotion of Alternative Dispute Resolution mechanisms (ADRs).

BUSINESSEUROPE is concerned about the different approaches followed by DG Sanco and DG Competition in this area. Whereas DG Sanco is still consulting on an array of options, DG Competition's White Paper<sup>5</sup> has already drawn conclusions on collective and representative actions as a means of improving redress. The argument that these measures apply specifically to those concerned by infringements of EC antitrust law is not convincing.

For the sake of consistency in EU policy, we urge DG Competition to refrain from any action until the outcome of the consultation on the Green Paper is known. BUSINESSEUROPE also calls for the involvement of DG Justice, Freedom and Security in this debate to ensure a holistic approach on this key issue.

Regardless of the outcome and conclusions of this consultation, any possible future action must always comply with the principle of subsidiarity and must be sufficiently justified. This is particularly important in this debate since the public authorities in EU Member States have traditionally been responsible for the enforcement of legislation.

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<sup>5</sup> [White Paper on damages actions for breach of the EC antitrust rules](#)



## **BUSINESSEUROPE RESPONSE TO THE COMMISSION GREEN PAPER ON CONSUMER COLLECTIVE REDRESS**

BUSINESSEUROPE welcomes the objective of the Green Paper: to assess the current state of redress mechanisms in particular in cases where many consumers are likely to be affected by the same infringement.

We have previously advocated<sup>6</sup> that before EU action is taken on this subject it is essential to:

1. Identify any problems and provide sufficient evidence;
2. Pinpoint their causes;
3. Assess whether an EU action is needed and justified and, if this is the case, assess what is the most appropriate type of action;
4. Assess the impact of this action on growth/jobs and competitiveness in the Single Market; and
5. Consult and discuss with representative stakeholders throughout the entire process providing enough time for elaboration of input.

We consider that the studies<sup>7</sup> used as a basis for the Green Paper present a number of important flaws namely:

- Lack of assessment of consumer knowledge and experience of litigation and of dispute resolution mechanisms;
- Lack of evidence on the cross-border dimension;
- No consideration of out-of-court tools (ADRs).

### **Lack of assessment of consumer knowledge and experience of litigation and of dispute resolution mechanisms**

We would like to point out that the level of consumer awareness of existing judicial and non-judicial redress mechanisms, and consumer experience of their use, should be assessed and measured before certain figures are used as absolute indicators<sup>8</sup>. If consumers are not aware of the existing redress mechanisms at their disposal, or have never needed/used them, the figures presented can only be assessed in relative terms.

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<sup>6</sup> See BUSINESSEUROPE position on collective actions, 4 October 2007.

<sup>7</sup> [Evaluation and Problem studies](#).

<sup>8</sup> E.g. "only 30% of consumers think it is easy to get redress through courts"; "Only 39% of European consumers believe that resolving disputes with trades through ADR mechanisms is easy".



### **Lack of evidence on the cross-border dimension**

BUSINESSEUROPE emphasises that a cross-border dimension and the respect of the principle of subsidiarity are necessary conditions for any action at EU level. Therefore, the ongoing EU debate should only develop further if there is indeed strong evidence of a cross-border problem affecting consumer rights in the Single Market and that this identified problem can be better solved by the intervention of the Community as opposed to action at Member State level.

The majority of mass claim cases assessed by the studies are national cases. This is confirmed by the statement that only 10% of cases have a cross-border effect<sup>9</sup>.

BUSINESSEUROPE stresses that the role that collective redress can play as a driver for cross-border trade should not be overestimated. Confidence in cross-border transactions grows with increased availability of speedy, straightforward, inexpensive and effective redress systems. This may be achieved by other means than the introduction of a collective redress instrument, avoiding all the drawbacks linked to a substantial increase in litigation and risk of abusive claims.

In the light of the data provided by the reports, we are of the opinion that there is not sufficient evidence on the cross-border dimension to justify action on collective redress at EU level. Decisions on whether or not to adopt any action in this regard should be taken at the level of the Member States.

### **Lack of consideration of out-of-court tools (ADRs)**

BUSINESSEUROPE considers that, whenever possible, disputes should be settled via out-of-court procedures. Consumers and business should have mechanisms that make it possible to reach a solution acceptable to both parties more rapidly, at a lesser cost, and help to maintain a less confrontational atmosphere between the parties.

The studies analyse mainly judicial means of redress. BUSINESSEUROPE considers that without a detailed assessment of the existing ADR mechanisms at national level and on their effective functioning it is not possible to have a full picture of the situation on consumer redress throughout the EU. In this context we strongly call for a specific study focusing on the existence, awareness and efficiency of ADRs before any decision is taken.

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<sup>9</sup> See Green Paper pt 15, page 6.





***Q1: What are your views on the role of the EU in relation to consumer collective redress?***

BUSINESSEUROPE considers that EU action, whilst respecting the principle of subsidiarity, should primarily focus on:

- Ensuring adequate and effective enforcement of existing or recently adopted legislation, in particular:
  - Raising awareness of the possibility of applying the injunctions directive procedure to cross-border infringements;
  - Ensuring correct implementation of the small claims regulation and the recently adopted mediation directive which are intended to help solve cross-border disputes;
  - Promoting the use and effectiveness of the Consumer Enforcement Network.
  
- Liaising with Member States in order to:
  - Promote consumer education and information regarding rights and responsibilities;
  - Promote consumer information on available means of redress;
  - Promote use of Alternative Dispute Resolution mechanisms and call on Member States which have not yet adopted them to do so;
  - Improve functioning of ECC-Net and FIN-net to assist consumers in the resolution of cross-border complaints and disputes.

***Q2: Which of the four options set out above do you prefer? Is there an option which you would reject?***

***Q3: Are there specific elements of the options with which you agree/disagree?***

***Q4: Are there other elements which should form part of your preferred option?***

**Option 1: No EU action**

BUSINESSEUROPE believes that the EU has a role to play regarding the improvement of redress for consumers as mentioned above. Therefore we do not consider it appropriate to refer to this option as “no EU action” but rather as “no EU legislative action”.



BUSINESSEUROPE fully supports this option of “no EU legislative action”, in line with what it has previously advocated<sup>10</sup>. We do not believe that EU legislative action in this field is needed or justified.

Only after improving the functioning of existing mechanisms and correctly assessing their effectiveness, allowing a reasonable period of time for recently adopted mechanisms, can the Commission state that this option would possibly not provide satisfactory redress for a number of EU consumers.

### **Option 2: Cooperation between Member States**

BUSINESSEUROPE may support the overall objective of option 2 with some caveats. We consider that some of the features presented would interfere with national systems whilst another should be carefully assessed in order to prevent forum-shopping.

- **Features that would interfere with national systems:**
  - **Ensuring that Member States without a collective redress systems establish one**

BUSINESSEUROPE stresses that it should be left to the discretion of Member States which do not have a collective redress system to decide whether to adopt one and what features would suit national needs and judicial traditions. National collective redress mechanisms in force in several Member States depend on various factors such as the organisation and effectiveness of national ordinary judicial proceedings, the effectiveness of market surveillance, public administration system and the historical, political and socio-economic contexts. BUSINESSEUROPE opposes harmonisation of aspects of collective actions.

- **Opening up of national collective redress mechanisms through a cooperation network bringing together entities that have the power to bring a collective action**

For BUSINESSEUROPE it is crucial that entities authorised to represent consumers are defined nationally, following clear and strict criteria (e.g. legitimacy, representativeness and independence, democratic decision-making procedures, etc.). An entity which has standing in one Member State should not be automatically granted standing in another Member State. This would lead to a risk of increased forum-shopping since for the time being there is no harmonisation of the above criteria for consumer associations.

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<sup>10</sup> See BUSINESSEUROPE position on collective actions, 4 October 2007.



- **Feature that should be carefully assessed in order to prevent forum-shopping:**
  - **Improving redress through cooperation of members of the ECC-Net and European Judicial Network**

An extension of the activities of the European Consumers Centres Network (ECC-Net) to advise and support consumers who are engaged in mass claims could be helpful. The European Judicial Network in civil and commercial matters which aims at improving effective judicial cooperation between the Member States and effective access to justice for persons engaging in cross-border litigation could be improved.

Although the above could help Member States having a collective redress system to open their systems to nationals of other Member States in cases when a trader in one Member State has committed an infringement of consumer protection legislation that affects nationals of other Member States, BUSINESSEUROPE underlines that such an option should be carefully assessed in order to prevent forum-shopping. This would increase negative effects of collective redress across Europe.

### **Option 3: Mix of non-binding or binding policy instruments**

Option 3 represents a melting pot of options whose features are not clearly defined. Some of these features would contribute substantially to better consumer redress whilst others may have a damaging effect for national systems.

- **Features that would contribute substantially to better consumer redress:**
  - **Focus on ADR schemes**

As stated above, disputes should be settled via out-of-court procedures whenever possible. We believe that the Commission should reflect on how to better use the potential offered by ADRs to provide consumer redress including in cases of mass claims. This is also supported by the OECD<sup>11</sup>: “Consumers and business should first attempt to resolve their disputes directly before seeking recourse through third-party mechanisms”.

- **Improving complaint handling schemes and dialogue between business and consumers**

BUSINESSEUROPE has always promoted more and better dialogue between consumers and companies. Businesses should continue to improve complaint handling schemes to help consumers to obtain rapid and effective redress. Practice shows that companies’ and sectors’ complaint handling schemes in place in some Member States are efficient. Exchange of best practices could be envisaged between Member States since these will help consumers to find a solution for their problems. Indeed 90% of disputes are already sorted out between consumers and business. Development of

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<sup>11</sup> OECD Recommendation on consumer dispute resolution and redress, 2007.



self-regulatory codes, in particular for those sectors where more mass claims are reported, could be envisaged.

- **Better information and best practices**

As mentioned above, consumers should be informed about existing redress mechanisms and their functioning. Public entities should stress the role that consumer centres and associations have to play in informing and educating consumers, including about existing mechanisms of redress and their functioning. The EU and Member States have an important information role to play. If consumers are not fully informed about the mechanisms for enforcement and redress at their disposal and the best suited to their needs, redress will not be sought.

We support improvement of the ECC-net to make consumers aware of the existing ADRs, and advise and support them when they engage in individual or collective claims.

We welcome in particular the efforts to improve the functioning of FIN-net for financial services.

- **Features that may have a damaging effect for national systems:**

We do not agree with extension of the scope of national small claims procedures to mass claims. Such extension could in particular damage the national litigation systems. The reason these procedures have been put in place is to facilitate access to justice in a more effective and faster procedure. Expanding its scope to mass claims would lead to a blockage of these specialised courts' work.

On the proposal to amend the consumer protection cooperation regulation to allow a competent authority to require the trader to compensate consumers that have been harmed by an intra-Community infringement, BUSINESSEUROPE considers that more time is needed to assess the effective effects of the regulation before considering its amendment. Regarding the attribution of powers to the consumer protection cooperation regulation to skim off the profit from traders who have committed and infringement, BUSINESSEUROPE stresses that the objective of civil law is compensation. Collective actions should only cover damages and should not have a punitive character. Any damages awarded as a result of a collective action ruling must be compensatory and distributed to the victims.



#### **Option 4: Judicial collective redress procedure**

BUSINESSEUROPE opposes EU legislative action which would impose on Member States the obligation to adopt a judicial collective redress mechanism. This choice should be left to Member States to ensure that it fits with the national judicial systems and culture.

Therefore, before envisaging this option, national governments should pursue an in-depth analysis of any existing problems regarding the enforcement of consumers' rights, and if any, whether the mechanisms already in force need to be improved.

As also previously advocated<sup>12</sup>, although we agree with the objective of reducing length of court proceedings and reducing court workloads, we do not believe it will be achieved by the use of judicial collective actions, as mentioned in the Green Paper<sup>13</sup>.

We would like to stress that collective actions give the illusion that concentrating identical or similar disputes having the same cause and involving numerous individuals in one single legal case would reduce costs and prove more efficient. Experience has often shown that court cases with numerous claimants are more difficult to handle than individual actions. Collective judicial actions systems often lead judges to carry out extensive factual investigations regarding whether the individual complainants have standing based on the merits of the case, hence putting at risk the supposed benefits.

In our view, the length of proceedings can be more effectively shortened by improved case management, such as early clarification of the issues, the trial of preliminary issues and limiting pleadings or better use of ICT technologies. It may be that best practice could be shared between Member States.

The Green Paper also refers to the inadmissibility of contingency fees as an obstacle for all judicial means of redress. We consider that adoption of contingency fees, no or low litigation fees for consumers, among other features could facilitate unmeritorious claims and a boost in litigation culture in the EU.

BUSINESSEUROPE is particularly concerned about the reference to media coverage that should be done to mass claim cases so they become more efficient and effective. Based on US experience, it has been observed that companies, whether liable or not, have been pressured to accept highly expensive settlements in order to put an end to harmful negative advertising that damages their business and image.

Therefore, the decision to adopt judicial collective redress systems and their features should be left to each Member State. The EU, respecting the principle of subsidiarity, should not interfere in this area otherwise it risks interfering with national litigation balances and judicial culture.

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<sup>12</sup> BUSINESSEUROPE's response to the Commission consultation on consumer collective redress benchmarks, 12 March 2007.

<sup>13</sup> See Green Paper, page 5.



**Q5: In case you prefer a combination of options, which options would you want to combine and what would be its features?**

**Q6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?**

**Q7: Do you consider that there could be other means of addressing the problem?**

In addition to the above-mentioned comments, BUSINESSEUROPE believes that the Commission should further assess:

- The benefits of ADR schemes and how to better use the potential they offer to address mass claims;
- How to improve the functioning of the existing sectoral out-of-court dispute resolution mechanisms (FIN-net);
- How to further promote implementation by individual companies of complaint-handling schemes, e.g. the ICC best practices for customer redress in online business and other sectoral best practices<sup>14</sup>.

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<sup>14</sup> [ICC Tools for e-business, « Putting it right », Best practices for customer redress in online business, 2003.](#)