BUSINESSEUROPE

POSITION PAPER

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BUSINESSEUROPE VIEWS ON COLLECTIVE REDRESS

1. INTRODUCTION

1. BUSINESSEUROPE welcomes the opportunity to submit its views on the public consultation on collective redress launched by the European Commission on 4 February 2011 with a working document entitled "Towards a European approach to collective redress".

2. We appreciate the joint efforts of the European Commission in launching this public consultation with the involvement of DG JUST, DG SANCO and DG COMP with the aim to ensure a holistic approach on this key issue.

3. This consultation builds upon a number of previous studies, consultations, green and white papers that the Commission has published in the past years on the subject. However, a number of novel, fundamental concepts that substantially modify the terms of the debate are now introduced. This is the case in particular for a proposed definition of collective redress upon which BUSINESSEUROPE does not agree (see point 8 below).

4. Unfortunately, the consultation paper gives the impression that a decision to go forward with a judicial collective redress system at EU level has already been taken. In addition, some of the questions appear unrelated to the topic of improving redress. This is the case for example with **question 3** on whether and how the EU should strengthen the role of national public bodies in the enforcement of EU law.

5. In the present paper, we will address the fundamental questions that need to be addressed to decide *whether* and, if so, *how* the system for protecting the rights derived from EU law should be changed for addressing mass claims.

2. GENERAL COMMENTS

6. BUSINESSEUROPE strongly supports effective and easy access to justice for those harmed by breaches of EU rules. This is key to boost consumers' confidence in the single market. It is in the interest of companies that adequate redress mechanisms exist and function well.

7. It is of primary importance that a balance is struck between the interests of the various players. The economic costs imposed on society by a judicial system of collective redress and the increase in litigation it entails should be evaluated. The US experience should also be taken into account to avoid going down a similar route. **Declaring that a European approach to collective redress will avoid certain excesses is not enough.** There are too many concerns that have not been answered yet.

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8. As mentioned above, the consultation introduces new concepts that change substantially the terms of the debate. In particular, BUSINESSEUROPE does not agree with the new proposed definition of collective redress as any mechanism to address "the cessation or prevention of unlawful business practices" affecting multiple claimants, as well as the compensation for the harm caused. The term "redress" - and therefore the present debate - should only refer to instruments to provide economic compensation for damage suffered as a consequence of a breach of law.

9. Actively seeking to increase litigation is both wrong and counter to the public policy of many Member States, which is currently to minimise litigation. BUSINESSEUROPE supports effective redress for those concerned by breaches of EU law but does not believe that this can only be achieved through more litigation. Other, non judicial, redress mechanisms are available and should be taken into consideration very seriously.

10. In this context, we welcome the fact that the consultation paper does not focus exclusively on collective judicial actions. It also addresses the need to take account of Alternative Dispute Resolution mechanisms (ADRs). We also appreciate the parallel debate on ADRs launched by DG SANCO in January 2011 with the consultation paper on the use of ADRs as a means to resolve disputes related to commercial transactions and practices in the EU.

BUSINESSEUROPE will address these and other aspects in the comments below.

3. SPECIFIC COMMENTS

3.1 Should the EU pursue a policy of private enforcement of EU law?

11. **Question 1** of the consultation asks what added value the introduction of collective redress would have for EU law enforcement. We strongly disagree with the focus on private enforcement of the consultation paper. Resources and efforts of EU policy-makers should concentrate on maintaining and improving public enforcement in Europe, and not shifting towards a private enforcement system. If there is a need to address problems with public enforcement, these should be addressed separately, but certainly the Commission and Member States should not abdicate from their responsibilities and transfer it to private parties.

12. In previous consultations (e.g. the 2008 white paper on damages actions for antitrust breaches), the Commission correctly recognised the different objectives pursued by public enforcement and private actions: the former being concerned with deterrence and compliance, the latter aiming at compensation. **The objective to create a system of private enforcement through damages actions would be fundamentally incorrect**, as the objective of private actions for damages cannot and should not be the enforcement of law: as mentioned, the objective of these actions should be to provide a remedy for compensation. In addition, the European legal systems present a clear separation between general public enforcement of legislation on the one hand, and private enforcement of rights in specific cases on the other hand.

13. The consultation paper describes private collective redress as an instrument to enforce the rights stemming from EU law (**chapter 1.1**). The main reason provided as to "whether future mechanisms of private enforcement should be added" is the fact that the number of cases has increased substantially "with the enlargement of the European

Union". First of all, this does not take into account that the enlargement has also brought new capacity and resources (creation of new national agencies and enforcement bodies) which should have counterbalanced any increase in caseload. Secondly, an increase in workload of public authorities is not in any case an acceptable justification for a shift towards private enforcement in Europe.

14. The proposed approach focusing on enforcement would inevitably require the system to include strong drivers to incentivise private entities to litigate. Even if this might not happen up-front, this trend would probably develop gradually at national level and end up in including measures that have a high potential to foster not only litigation, but also abusive litigation.

    In order to become a significant enforcement agent, private actions would have to generate a high and sustained increase in litigation. Such a system would need to incorporate strong financial incentives to make court actions sufficiently attractive. It would also likely require procedural features that facilitate litigation and alleviate the position of claimants. Therefore, **the objective to promote private enforcement by means of judicial collective redress would further enhance the risk of developing towards an abusive system**. Also, more litigation would inevitably lead to the clearly undesirable result of putting more pressure on the already strained resources of national courts.

15. As mentioned, the Commission paper for the first time defines collective redress as a tool not only to provide economic compensation (*compensatory relief*), but also to stop or prevent a breach of EU law (*injunctive relief*). While it is true that collective procedures for injunctive relief already exist in certain areas, this angle has never been the subject of the previous consultation documents and debates on collective redress (this aspect has to be underlined, as the consultation paper often refers to previous studies to provide justification for action at EU level).

16. As regards **question 2**, BUSINESSEUROPE believes that the Commission should concentrate on strengthening public enforcement, ensuring that it operates in a way that is complementary to tort law and facilitates private claimants in obtaining appropriate redress. Public authorities are the sole entities that represent and defend the public interest. Law enforcement must therefore remain strongly in their hands in order to guarantee fairness and balance to citizens and society in general, and to avoid encouraging litigation spurring primarily from the commercial interest of intermediaries.

17. With specific regard to competition cases, the current EU enforcement policy is based mostly on sanctions, with a low number of processed cases and the imposition of fines by public authorities having a deterrent effect. Here again, effective enforcement by public authorities competent for antitrust violations must not be compromised, and no shift towards private enforcement should take place.

3.2 What would be the justification for action at EU level?

18. BUSINESSEUROPE believes that the current consultation paper and the documents provided in previous consultations fail to provide justification for EU legislative action.

19. By linking directly the possible introduction of a judicial collective action with the objective of enforcing rights stemming from EU law, the consultation paper seems to uncouple the initiative from the need to provide compensation in cross-border cases – i.e. infringements affecting the single market – which was one of the main reasons for

action stated by the previous consultations. This impression is reinforced by the formulation of **question 31**, which specifically refers to « special rules » for cross-border situations, making a particular case for them.

20. If any further action is to be envisaged, it should be carefully assessed in the light of the principle of subsidiarity (**question 4**) and on the need to solve a cross-border problem. In this context, looking at the data produced in previous studies[1], the cross-border dimension is 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 (**question 14**).

21. 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 party 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**.

22. In addition, in **par. 10** the paper argues that a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights and it gives rise to uneven enforcement of those rights. However, neither this consultation paper nor previous Commission documents provide analysis or support for stating that the lack of a common EU approach to collective redress is the cause of uneven enforcement of rights in the EU.

23. BUSINESSEUROPE considers that the Commission is underestimating the impact for the possible introduction of a EU judicial collective instrument on important aspects of Member States' procedural and tort law. Rules related to central aspects of procedural law such as fact-finding, unlawfulness, burden of proof, causation and defences have been evolving gradually and performing their function within the context of the different Member States' legal systems. External intervention on such delicate aspects risks upsetting national legal systems with unforeseeable effects on their inner balance. **Any proposed model would not prevent the risk that more far-reaching and dangerous measures are introduced at national level** (like "loser does not pay" or "punitive damages" rules), together with all the dangerous collateral effects which the Commission itself correctly highlighted in its previous consultation papers. These vast legal implications do not seem to have been considered by the present consultation.

24. We recognise the need to meet the standards laid down by the Court of Justice. However, this is already the case in many Member States. Where needed, reform would be better carried out nationally, introducing measures suitable to each legal system.

25. 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.

26. 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,

[1] "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union", European Commission study submitted by Civic Consulting, 2008-2009.

pragmatism and efficiency. National legal traditions and specificities have to be respected.

27. Finally, **par. 10** assumes that a European framework drawing on the different national traditions "could facilitate strengthening collective redress": BUSINESSEUROPE firmly rejects the strengthening of collective redress as an *objective* for EU action. At the very most, collective redress should be regarded as one of the various possible instruments to achieve the objective of providing compensation for mass claims.

3.3 Should the EU introduce a judicial collective redress system or not?

28. **The consultation does not ask the most fundamental question on *whether* the EU should introduce a judicial collective redress system or not.** A large number of questions already refer to the features that the possible future system should have. This preconceived approach does not reflect the outcome of the previous consultations, where a very large number and variety of stakeholders expressed a strong opposition and raised serious concerns about the possible introduction of a judicial collective redress system at EU level.

    These concerns have not yet been replied to.

29. The role that judicial collective actions can play should not be overestimated. When a problem arises, consumers need to have access to speedy, straightforward, inexpensive and effective redress systems. This will increase consumer confidence more than the existence of a judicial collective redress instrument.

30. **Judicial collective actions usually have limited merits for the plaintiffs.** They are with no exception costly, complex and lengthy: as a consequence compensation is not fully awarded to those damaged, as a big part of it ends up in enriching intermediaries. In addition to being rarely beneficial to consumers, they do not even facilitate the administration of justice: the inadequacy and inefficiency stemming from systemic problems and structural flaws of certain national courts and procedures are not going to be resolved by the introduction of judicial collective actions. On the contrary, similar initiatives would only encourage litigation on cases that could otherwise be better dealt with out of court mechanisms.

31. Previous discussion papers[2] defined 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.

3.4 Should Alternative Dispute Resolution (ADR) mechanisms be the main focus of action at EU level?

32. With regard to **question 12**, BUSINESSEUROPE would like to reiterate once more the underexploited potential of alternative dispute resolution mechanisms (ADRs) like mediation and arbitration, the need to improve existing enforcement instruments and information to consumers before creating new judicial mechanisms.

[2] DG SANCO discussion paper for the public hearing of 29 May 2009 on collective redress.

33. The consultation paper recognises that alternative/consensual dispute resolution "can often provide parties with a faster and cheaper resolution of their claims" (**par. 19**) and "can often lead to a fair outcome for all parties involved" (**par. 20**). However, the consultation paper suggests that the effectiveness of ADRs rests significantly on effective judicial actions as a strong incentive for parties to join an out-of-court procedure.

34. BUSINESSEUROPE does not agree with the above Commission approach. In this context, we note that **question 15** of the consultation paper is ill-formulated: paradoxically, a judicial collective mechanism works as an incentive to use ADRs only if the court-based mechanism is less effective and efficient for the parties.

35. This is indeed true, and confirmed by the fact that 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, more efficient and present a number of additional advantages for all parties (**see questions 8, 9 and 10**).

36. With a view to provide redress, even for small and mass cases, BUSINESSEUROPE therefore strongly believes that ADRs should be the *main focus of action* at EU level. We regret that the consultation does not take account of the possible extended use of existing tools such as ECC-NET and FIN-NET to address collective claims. We refer to BUSINESSEUROPE response to the ADR consultation for further details on our position on this matter.

3.5 Are there appropriate mechanisms for facilitating and financing collective court actions without incentivising frivolous claims?

37. In par. 21 of the consultation paper the Commission states that the features of the US class action system "taken together increase the risk of abusive litigation". It has to be stressed that US class actions are not only dangerous because of the combination of all the different elements (such as punitive damages, contingency fees, opt-out etc...): even taken one by one, these elements could lead to a possible misuse of the system to the detriment not only of the parties involved, but of society in general.

38. The consultation paper addresses the difficult issue of funding. The Commission's starting point is that adequate funding must be ensured to grant access to justice. The paper then considers that any funding mechanism should avoid incentives to unmeritorious litigation (see in particular **questions 25 and 26**).

39. One of the disadvantages of judicial collective actions is their high cost. This is mostly related to their complexity and the fact that these mechanisms involve a lot of intermediaries, each of them having costs to sustain and profits to seek.

40. The importance of ensuring access to justice/compensation for those harmed by a breach of law is key and is not under discussion. However, we do not share the Commission's choice to use judicial collective actions to achieve this objective.

41. Providing effective abidance and application of law is the role of public authorities. When a breach takes place, policy-makers should look for instruments for compensation that are the most effective and efficient and have less negative repercussions as possible. On the contrary, the consultation seems to be focusing on the introduction of an instrument that – as a large part of stakeholders stressed in

previous consultations – has several shortcomings including high costs, and asks for ways to fund it without encouraging abusive litigation (**question 25**).

42. BUSINESSEUROPE strongly opposes any hypothetical solution involving the creation of economic incentives to litigation. In particular **third-party funding is extremely dangerous** as it provides profit opportunities to entities unconnected with the case. The same applies to **trading of would-be claims.** This refers to purchase of claims by third-party entities from would-be claimants in order to bring an action to obtain redress. These companies are merely guided by profit and would fight for obtaining a return on their purchase no matter how unmeritorious the claim may be. This will also derail any settlement that does not produce a proper return, regardless of whether such settlement would provide proper compensation for the damage caused.

    The best option to avoid abuses is to **keep the funding of any future system under the control of public entities**, as is the case for example for Ombudsmen in some Member States.

    With regard to **question 21**, it is worth stressing that in no way public authorities should think of modifying cost rules and introducing a "loser does not pay" rule. The **"loser pays" principle is an absolutely essential bulwark** against abusive litigation of any kind.

43. In conclusion, BUSINESSEUROPE believes that there is a clear contradiction in trying to reconcile all the safeguards that would be needed to make a system abuse-proof, with the idea of making it more appealing to claimants.

4. ADDITIONAL ISSUES: LACK OF CONSIDERATION OF ASPECTS RELATED TO RIGHTS OF DEFENCE

44. In addition to the key aspects discussed above, we would like to stress that in the debate on collective redress, there is often not sufficient clarity about the fact that a majority of claims would be lodged in cases where the violation claimed still has to be demonstrated. This perspective is crucial if one wants to keep into account the rights of defendants (**question 20**).

45. In light of the above, we note that the consultation paper fails to address the important aspects linked to the possible negative repercussions of collective actions on the reputation of companies that may be unjustly brought to court.

46. The consultation paper (**par. 17**) rightly stresses the importance of information. To function well, a collective redress system should ensure that potential claimants are aware that they might have been victims of the same breach. By asking how potential claimants can be informed about the possibility of joining a judicial collective action, **question 13** pinpoints a very delicate aspect. We do not believe there are good ways of informing the public about such actions without inevitably harming the reputation of the defendant company. It is sufficient to look at the US system to see how the simple threat of reputational damage is sufficient to push the defendant to settle the claim without even looking at the merits of the case. We do not believe this is the kind of system the EU should aim for.

5. CONCLUSION: THE WAY FORWARD

47. **Objectives for action need to be better clarified.** BUSINESSEUROPE strongly disagrees with the focus on private enforcement of the consultation. Resources and efforts of EU policy-makers should concentrate on improving public enforcement, and not shifting towards private enforcement. If improving enforcement is indeed one of the objectives of the Commission, this would deserve a separate discussion, where judicial private actions do not have a useful role to play.

48. Once the objectives are clarified, **the EU will need to evaluate appropriate solutions that are compatible with national legal traditions**. The Commission should conduct a thorough assessment of any envisaged measure and its impact on citizens and society at large. The subsidiarity principle is paramount when deciding about the need for EU action. Evidence for the need to address cross-border cases has not been found yet.

49. The most important principle in our view is that **litigation must not be seen as the primary form of redress for mass claims**. Consumers and other claimants should first seek redress through ADRs. This may take the form of sectoral schemes or action through a public authority or Ombudsman. BUSINESSEUROPE is open to discuss how these schemes could be developed.

50. Only as a possible third stage should there be recourse to court proceedings where other instruments were either not sufficiently available or have been tried and failed within a reasonable time. EU action, if any, should be aimed at **developing a set of good practices guidance** (see **question 7**) on how to deal with cross-border small and mass claims out of court, to ensure the respect of common effective safeguards in the event Member States have already in place, or decide to introduce, a collective redress mechanism.

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