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Collective redress – public consultation 2017

I. Introduction

- On 11 June 2013, the European Commission adopted a Communication "Towards a European Horizontal Framework for Collective Redress" and a Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.
- The Commission is now collecting information on stakeholders' practical experiences with collective actions, both injunctive and compensatory as well as on situations, where collective action could have been appropriate, but was not sought.
- BusinessEurope has been working together with EU institutions and other stakeholders for many years to find solutions towards better enforcement in the Single Market as well as effective and easily accessible redress mechanisms for consumers.
- BusinessEurope has throughout the years adopted several position papers expressing its views on:
 - Horizontal EU Judicial Collective Redress consultations ([1999](#) and [2011](#));
 - [European Small Claims Regulation revision](#) (2013);
 - [Entry into force of the EU Alternative Dispute Resolution Directive and entry in operation of the Online Dispute Resolution Platform Regulation \(2015-16\)](#);
 - [Revision of EU framework on cooperation between national consumer protection authorities](#) (2016-17);
 - [New enforcement approach to Competition Law \(2017\)](#);
 - [Single Market Compliance Package \(2017\)](#).
- BusinessEurope takes this opportunity to offer its reply to the ongoing consultation on collective redress. This paper is divided into three parts: (1) general messages on collective redress; (2) useful facts on collective redress; (3) specific remarks on the Commission's evidence gathering exercise.



II. General messages on Collective Redress

- BusinessEurope fully supports the objective of ensuring **better enforcement of EU law** whilst also working **towards effective and easy access to redress mechanisms**.
- It is in the interest of companies and markets that reparation is awarded if a damage is caused to consumers. **The question is not whether reparation is provided but how it can be provided more effectively.**
- Throughout the years **BusinessEurope's goal has been to identify those means of redress which are the quickest, less costly and effective for both parties involved**, and consequently to raise overall awareness around them.
- However, it is equally in the interest of companies and markets that **there are enough safeguards against the development of an abusive litigation culture which leads to undesirable societal and economic costs**. This is why BusinessEurope supported the 2013 Collective Redress Recommendation which precisely addressed the root causes of potential abuses in existing or future national collective redress systems.
- The **EU has recently adopted several measures which objectively increased the accessibility to redress for consumers**, also in a cross-border context:
 - The **EU Alternative Dispute Resolution Directive (ADRs)** aimed at extending the coverage of these means to more sectors as well as to improve the functioning (and transparency) of the existing ADR systems. It is our understanding that the offer of available ADR bodies keeps growing as well as their use.
 - The **EU Online Dispute Resolution Platform** links consumers and traders engaged in cross-border transaction to the best solution to settle their disputes. It has been in operation since a year with BusinessEurope continuously encouraging its awareness and uptake among companies.
 - The **revised EU Small Claims Procedure** has made these tools simpler and more accessible to consumers.
- The above measures (strongly supported by BusinessEurope) equipped European consumers with **cost effective means of redress** even in situations of compensatory claims of a low value which would normally deter consumers from going to courts.
- As regards an **EU-wide collective litigation measure**, BusinessEurope has consistently argued **against its introduction**. Doubts over Treaty powers, the concerns over subsidiarity and proportionality, and over the evidence of need



count as the main arguments. Some of these have also been highlighted in the [European Parliament Resolution on Collective Redress¹](#).

- The **impact** of the possible introduction of an **EU judicial collective instrument** on important aspects of Member States' **procedural and tort law should not be underestimated**. 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.
- The **US experience with class actions** is a constant reminder of the economic costs imposed on society by a judicial system which fosters mass litigation. Considering that a European legislative approach to collective redress will avoid certain excesses is not sufficient. **Only a few elements of US class action system are required for the risk of abusive litigation to materialise**. Take the example of **third party funding** or of **contingency fees** widely developed in the US and, with some nuances, also admissible in some EU Member States. The first introduces a profit-motivated stranger into the traditional attorney-client relationship which can lead to opportunistic litigation as well as to unreasonably prolonging judicial proceedings (e.g. if the settlement is not profitable enough, a third-party funder might forbid the plaintiff to accept 'any' compensation). The second (contingency fees) works as an incentive for plaintiff lawyers to push for as many legal claims as possible to work in their benefit.
- **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 (e.g. lawyers or third-party funders). 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.
- We take the view that **legislation on this issue will not be able to achieve harmonisation and will risk causing forum shopping (backed by international plaintiff firms and litigation funds), opportunistic litigation and abuse** across the different Member States.

¹ European Parliament Resolution 'Towards a coherent European approach to collective redress', 2011 - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>



- European companies agree on the need for a level playing field in terms of legislation and efficiency of enforcement. But when it comes to 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 in a way suitable to the local legal system**.
- 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.
- At most, the Commission could work towards updating the 2013 Recommendation in the light of the results of the ongoing evaluation, with a particular focus on the safeguards against an abusive litigation culture.
- Resources and efforts of EU policymakers should also 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.
- The **objective of achieving greater deterrence** is – in contrast to the full compensation of damage incurred – a socio-political objective and should therefore **be left to the public authorities of the state**. Rather than amending the legal system by passing on large sections of public law enforcement to private parties because the competent authorities do not have sufficient resources, these resources should be increased.
- BusinessEurope supports the **current revision of the Consumer Protection Cooperation Regulation**, now in the final stages of trilogue. This a welcomed step towards achieving better public enforcement within the Single Market.

III. Some useful facts on collective redress²

- Empirical data (collected on a multiannual basis between 2009 and 2013) from the US class action system shows that:
 - **Not one of the class actions ended in a final judgment on the merits** for the plaintiffs;
 - **1/3 of class actions that have been resolved were dismissed** by a court on the merits— again, meaning that class members received nothing;

² Source: Survey the Growth of Collective Redress in the EU, U.S. Chamber Institute for Legal Reform (ILR), March 2017. This study was presented in a joint BusinessEurope, Amcham EU and ILR event on collective redress which took place on 21 March 2017. The Member States chosen in the study (10) account for roughly 79% of the population and 82% of the GDP of the EU.



- Approximately **14% of all class action cases remained pending four years** with class members still to receive benefits (very unlikely that this will happen);
- Over **one-third of the class actions that had been resolved were dismissed voluntarily by the plaintiffs**, some ending up settling individually whilst class members received no benefits;
- In many cases, compensation is not delivered because the amounts in question are so negligible, **compensation is under coupons form**, or the terms so onerous, that class members do not come forward.
- One-third (33%) of resolved cases were settled on a class basis. In 3 of these cases the percentage of benefits allocated to the class were almost *Lilliputian* (**miniscule percentages for the class of 0.000006%, 0.33%, 1.5%**);
- The **majority of EU Member States already foresee some form of collective redress** which can differ in nature, scope or procedural requirements.
- There are some **alarming signs** in Europe showing that there is a risk of US style litigation culture on the verge of settling in. Some examples:
 - Litigation **funding industry is growing** in different Member States;
 - We see more and more **multiple billion EUR claims being filed** (e.g. a claim by the foundation 'East West Debt' in the Air Cargo litigation exceeding €500 million; a multibillion EUR claim brought in the Court of Rotterdam by Stichting Petrobras Compensation Foundation on behalf of - mainly - US based investors);
 - **New forms of unregulated and unvetted web-based claim platforms** are being developed which take up a share of the proceeds (e.g. in France ActionCivile or Weclaim are now helping advertising group actions on their websites demanding up to one third of the rewards).

IV. Remarks on the European Commission evidence gathering

- BusinessEurope considers the European Commission **evidence gathering exercise very timely and useful**.
- It is important not only to check the uptake by Member States of the 2013 Recommendation but also to get feedback on the development of collective redress cases at national level.
- However, the **Commission's questionnaire fails to address fundamental questions** related to the effectiveness of redress systems in the EU. Besides asking



which system exists in a specific Member State, it is **equally important to understand which are the relevant safeguards against meritless litigation** and how **are these safeguards performing**.

- Business organisations and **companies are not being asked important questions**, for example: What is their perception (mostly as defendants) on the safeguards of national systems (e.g. representative certification, loser pays principle, role of judges)? What is their experience with the phenomena of third-party funding?
- Although the Commission in its **2013 Recommendation rightly stressed** that the **goal should always be redress and restitution for victims**, and that **punitive actions should be prohibited**, the Call for Evidence includes no examination of this important issue, or whether Member States are seeking to expand litigation possibilities in this regard.
- The Commission's **evidence gathering should also include an examination of the compensation paid to representatives, lawyers and funders**, as opposed to (exclusively) the one paid to alleged victims.
- The **questionnaire seems to oversimplify the characterization of third party funding** by referring to it as a "*loan*". Such financing is closer to a contingency fee arrangement, entered into with an unregulated party with powerful incentives to initiate and control litigation. Practices such as an "after the event insurance" (ATE) should also fall under this concept. This insurance policy covers all or a part of the costs in case of an unsuccessful claim, such as the costs of the counterparty and the costs of the claim vehicle itself. Evidence is therefore needed on how this powerful unregulated industry is developing in Europe and whether further transparency is needed (in accordance with the 2013 Collective Redress Recommendation).
