EFFECTIVE LEGAL REDRESS
THE CONSUMER PROTECTION INSTRUMENTS OF ACTIONS
FOR INJUNCTION AND GROUP DAMAGES ACTION

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Mr. Minister,
Mr. Commissioner,
Ladies and Gentlemen,

As a preliminary remark, I would like to extend my warmest thanks and appreciation to the organisers of this event, for offering to UNICE, which represents enterprises in Europe, the opportunity of stating its views during this meeting.

The issue at the heart of our debate today is very significant, as it involves the effectiveness of law and, more specifically, consumer law.

There are three possible ways of making law effective:

- prevention,
- remedies,
- sanctions.

This conference is focused on prevention and remedies, even though some of us would like to link remedies with sanctions. I shall come back to this essential issue in a few minutes.

☞ **First, prevention** is the objective pursued by injunction procedures, since they are aimed at obtaining from a professional the discontinuation of conduct contrary to provisions of law.

In fact, the effectiveness of this provision may not be assessed merely on the basis of the number of decisions entered in pursuance of the implementing provision. Indeed, we may not disregard the deterrent effect of legislation.

This is shown by the information that UNICE has been able to collect at this stage on this topic.

It will therefore be particularly interesting to read the results of the Directive's evaluation report.

In addition, it is likely that the coming into force of the European regulation on co-operation between relevant national authorities, as regards consumer protection, should contribute to strengthening the Directive's effectiveness, as it should make it possible to enjoin cross-border practices that are unlawful under EU Directives.

In our view, it is therefore premature to consider revising the Directive. It is, in any event, disputable to intend to move from prevention to remedies, as was suggested by the European Economic and Social Committee in an opinion of February 2005. The EESC recommends extending the Directive's scope, as regards injunctions, in order to allow for genuine class actions intended to promote the making whole of damages.

☞ Remedies:

Before asking the European Union to embark on a new action, let us stop for a moment in order to consider consumers' expectations.

What exactly is sought by a consumer who is coping with a defective good or with a service that is not what it was purported to be?

The consumer first seeks to obtain satisfaction promptly and at the lowest cost.

According to a survey conducted in 2004 by the European Commission[1], more than 90% of consumer-related disputes are settled amicably with the professional concerned.

UNICE therefore considers that it is essential to develop alternative dispute resolution modes – arbitration, mediation, conciliation – making it possible to better satisfy these expectations, as recommended also by the European Commission.

Also, it would probably be necessary to better familiarise consumers with the simplified complaint form developed by the European Commission, in order to help them in their relationship with professionals, as this procedure is still too little known by consumers.

As regards the small number of disputes that cannot be settled by using these procedures, there are, in Member States, streamlined, prompt and economical settlement procedures for small claims related to consumer issues. Here also, an information effort might be made.

[1] European Union Citizens and Access to Justice, European Commission, October 2004.

Incidentally, the Commission submitted a proposal for a regulation instituting a European small claims procedure. But I shall not pursue this issue further, as this matter is not on our agenda.

On the contrary, I would like to make a few comments on class actions, which shall be the core subject of our debate this afternoon.

As a preliminary remark, it is necessary to indicate that the notion of "class or group action" or group covers very different types of procedures.

The common feature of these procedures is their purpose: to settle, in one single litigation, identical or similar disputes having the same cause and involving numerous individuals.

The main variants hinge on the identity of the persons authorised to file an action on behalf of the group and the possible existence of a power of attorney (opt in / opt out).

Such actions exist in the United States or in certain Member States.

It seems, at first, appealing to extend such actions to EU level. Let us avoid however presenting this to consumers as a miracle solution, as their hopes might well be dashed.

It seems important to recall that class actions became extensively used in the United States in order to compensate for Government's relative weakness and lack of intervention. Things are totally different within the European Union.

This has shed a lot of light on why, in a rather brief time, class actions have stopped serving the aim of curing damage sustained by consumers or other individuals and are used as a sanction punishing the conduct of certain professionals by applying to them a private penalty.

Advocates of these procedures support a doctrine under which class actions are not only seeking remedies facilitating the administration of justice, but are also a means of fostering punitive prosecution in order to have enterprises disgorge profits unduly made. This is the ideological plaintiff or private attorney general theory.

To a certain extent, this idea underlies some of the proposals contained in the Green Paper on damages for actions for breach of the EC antitrust rules.

UNICE does not endorse such an approach.

Indeed, we consider that Government authorities, whether at national or EU level, must fully play their role in the event of a violation and that damages must be indemnified in accordance with each Member State's tort law.

☞ **Limited merits for consumers:**

In general, class actions are complex and lengthy procedures that do not facilitate the administration of justice and are rarely beneficial to consumers.

We note that consumers are conspicuously absent from these procedures that are often "hijacked" by law firms or various interest groups.

It suffices to note here just how enthusiastically most French attorneys are welcoming the possible introduction of such a mechanism in France !

In the case where anti-competitive behaviour has caused minor damage to a large number of consumers, class action advocates generally consider that such damages are too immaterial to be awarded to consumers and must be retained by the group's representative or be paid to a fund serving to institute further actions.

☞ … **but adverse impact on business**

Enterprises are often exposed to "settlement blackmail" or to destabilisation attempts. Such types of conduct are unavoidably induced by class actions and are not attributable to the US legal system's sole features. More specifically, such procedures create *per se* the risk of media pressure, and journalists rely on a judicial procedure even before a decision has been entered.

In order to put an end to destructive counter-advertising that severely impairs their business and image, enterprises, whether or not they are liable, are pressured into accepting highly expensive settlements in the countries concerned. The proceeds do not accrue to consumers, but enrich intermediaries instead.

Finally, as shown by cases in the US and, more particularly, in Quebec, any "safeguards" intended to prevent excesses prove to be a mere illusion.

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While it might be advisable, in certain cases, to support the consolidation of legal actions, the principle of class actions instituted by any representative claiming to act on behalf of **an anonymous group of individuals** may in no event be endorsed, as such procedures aim at capitalising on consumers, in the guise of making whole their losses, in order to serve other purposes and in particular punitive purposes.

The study conducted by the Commission, and to which I have referred earlier, indicates that, in the event of a class action, a majority of consumers would be against an opt-out system depriving them of control of the suit.

Also, an opt-out system is contrary to the Constitution of certain Member States and to the European Convention on Human Rights.

As we shall see this afternoon, there are various forms of class actions. However, what strikes me, in legislation enacted recently, is that most of these procedures require minimum involvement from the consumer or investor, through an agency agreement.

Facilitating legal action through consolidation: yes. Fostering anonymous actions intended to destabilise and pressure enterprises in order to extort money from them: no.

A move towards a society where the judicial function is overly emphasised would not serve the interests of consumers or enterprises.

UNICE considers that the debate at EU level should focus on the assessment and where applicable the revision of existing instruments before embarking on any new conceptual effort.

Thank you very much for your attention.