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COMMISSION STAFF WORKING DOCUMENT PUBLIC CONSULTATION: Towards a Coherent European Approach to Collective Redress

2. POTENTIAL ADDED VALUE OF COLLECTIVE REDRESS FOR IMPROVING THE ENFORCEMENT OF EU LAW

Q 1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

We are extremely supportive of the introduction of collective redress schemes and their potential for efficient and accessible redress mechanisms, particularly in situations where the individual sums concerned may be relatively small but the collective consumer detriment may be substantial. It is particularly important in a time of economic downturn that consumers are given the type of protection that collective redress would offer. Collective redress thus plays a valuable role in policing the market and helping to ensure fair competition. Competition and confidence suffer when ill-intentioned businesses can defraud a high volume of consumers with impunity. Collective redress schemes are increasingly important in to deal with the wide impacts of an era of instant communications, greater targeting and audience reach, distance and online purchasing, and cross-border transactions.

Since 2000, England and Wales has enjoyed a 'Group Litigation Order' (GLO) procedure on an 'opt-in' basis. From 2000 to 2008 there were 62 actions, and research has confirmed a number of procedural problems with the GLO procedure, which is considerably less effective for consumers than the procedures available in Australia and Ontario[1] , which themselves have been limited in impact. Other parts of the United Kingdom, for example Scotland, have no collective redress procedure at all. Accordingly, EU rules on the minimum requirements for member states to adopt on collective redress

[1] 'Reform of Collective Redress in England and Wales: a perspective of need', Professor Mulheron, Queen Mary's University of London, http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf

would have the benefit of ensuring consistency across the EU, while providing an opportunity to improve accessibility, take-up and the procedural robustness of collective redress procedures.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

Private collective redress should be supplementary to both enforcement by public bodies and access to forms of alternative dispute resolution. Public enforcement powers may be limited and consumer remedies may either not be available or not be the priority of action taken. The use of public enforcement powers may not establish precedents. There may also be resource limitations in identifying and representing those affected.

On the other hand parties are unlikely to commence litigation in matters where small amounts are involved or where the remedies are not necessarily quantifiable, such as changes to a company's practices, training or incentives and so the role of public enforcement accompanied by powers of remedy is crucial.

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?

Because of the resource implications (and procedural difficulties) for consumers in mounting individual or collective actions, and a lack of awareness of the different types of enforcement and redress tools available, national public bodies and representative organisations play an important role in identifying practices and products that cause widespread detriment and in prosecuting these. Powers of redress should be available alongside enforcement powers and standing for public authorities and private organisations such as consumer groups, should be a feature of an effective collective redress system.

Q 4 What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

A collective action at EU level would be particularly valuable for cross border issues or issues where small numbers are affected outside the originating jurisdiction allowing cost effective access to justice for consumers in addition to defined liability for businesses and procedural and resource efficiency for Member States. There would need to be consistency in terms of approach, including costs, processes and representation to ensure fairness and deter

forum shopping. An ability to transfer jurisdiction on defined grounds would go some way to dealing with subsidiarity concerns. Effectiveness would require ease of access, binding resolutions, and publication of actions to ensure all who are entitled to can join and to deter bad practices.

Q 5 Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?

As mentioned above consumers are unlikely to pursue actions where they are of small value, and in some instances, where products, services or contracts are complicated or technical, and consumers may not be aware of the detriment suffered. Injunctive relief may assist future consumers but will not assist those who have already suffered. A broad range of remedies and actions should be available in collective actions and these should be consistent across all areas.

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

We believe that binding rather than non-binding tools should be used to ensure consistent standards for consumers across Member States, otherwise consumers will not be encouraged to participate actively in the single market for financial services.

3. GENERAL PRINCIPLES TO GUIDE POSSIBLE FUTURE EU INITIATIVES ON COLLECTIVE REDRESS

Q 7 Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

We particularly support the principles below to guide the framework for collective redress

(1) The need for access to effective and efficient processes for redress
(2) The importance of information, advice and of the role of representative bodies
(3) The option of collective consensual resolution as a means of alternative dispute resolution
(4) The need for safeguards to avoid abusive litigation
(5) Availability of appropriate financing mechanisms
(6) The importance of effective enforcement across the EU

In relation to (5) from our consumer protection perspective there are two particular principles we would highlight. First, there must be robust, fair and

transparent rules on the amount of fees and charges which consumers can be required to pay for being part of a collective redress court action. Such rules would require to be regulated to ensure compliance. There are examples in the UK of multiple actions and claims being pursued with consumers being financially exploited by those acting on their behalf.

Secondly, the biggest deterrent in any litigation against a multinational opponent is the threat of legal expenses in the event of failure or mixed success. One way to deal with this is to incorporate a 'protective costs order' mechanism into any system whereby the cost of legal expenses would always be fair and proportional to the value of the claims at stake. This would help prevent consumers from being denied access to justice through the ability of wealthy opponents to use the legal process and legal expenses and outlays as a deterrent or as a means to force an unfair extra-judicial settlement.

Q 9 Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?

There should be free or limited cost access to a collective alternative dispute resolution mechanism, appropriate resourcing of representative organisations and public authorities to initiate actions, and public funding through, for example, the availability of legal aid. It will be important to include a programme of training and information for local advice agencies on the scheme to ensure access is as broadly based as possible. This should be reinforced by an on-going contact point of expertise for advisers. The means of enforcement and payment distribution will need to be considered.

Q 10 Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

Whilst not a collective redress scheme the existing European networks such as the ECC-Net or FIN – Net , which already help individual consumers to access an alternative dispute resolution in another country, could also help consumers with similar claims to access the appropriate collective alterative dispute resolution schemes in another member State.

Current provisions in the Financial Services and Markets Act (s404) give the regulator power to make rules requiring each relevant firm that has carried on an activity to establish and operate a consumer redress scheme. The redress scheme shifts the onus to the firms to investigate and determine the redress to be awarded if any, which also shifts the resource burden in the initial stages. However, if the firm is not mindful to punish itself there is a limited power for the Financial Services Authority (FSA) to impose a scheme, subject

to a full public consultation and a cost benefit analysis in most cases. If consumers are not satisfied, they have recourse to the Upper Tribunal of the FSA, in limited cases and on an individual basis, or to the Ombudsman, but only on an individual basis. The provisions provide a convoluted and long winded process in order to make restitution for a widespread breach and would not necessarily satisfy the principles of proportionality and efficiency.

3.1 The need for effective and efficient redress

Q 11 In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

We favour an opt-out procedure as opt-in could present significant practical difficulties for consumers and consumer organisations, as identified in the Commission's previous Green Paper.

Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?

There should be greater powers for regulators to investigate, require information and provide incentives for co-operative settlement. The use of ADR as a preliminary or optional step is likely to be cost effective and accessible whilst narrowing the issues in dispute. Consideration should be given to accepting undisputed facts, evidence received in the course of an investigation or as part of an administrative review, and an investigator or regulator's report as evidence in judicial proceedings.

3.2 The importance of information and of the role of representative bodies

Q 13 How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

The e-privacy directive and US data protection law puts the onus on organisations who have failed to secure data to notify the individuals and organisations affected. A similar obligation should be applied to organisations where sector regulators, or competition or consumer protection bodies, identify an infringement or establish a case to answer. Pre trial discovery powers to regulators and ADR bodies will also be useful tools in attempting to identify those who have been harmed. Where the information is not available to the infringing organisation then targeted publicity will need to be used and its success will often require tailoring to the specific circumstances of the issue concerned.

3.3 The need to take account of collective consensual resolution as alternative dispute resolution

Q 16 Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

It should not be a mandatory step but an optional step and time allocated for the exploration of resolution at an appropriate stage of the preliminary proceedings and at any time after this at the request of the parties. The issue of costs in relation to a settlement prior to a decision is a significant issue and needs to be clarified.

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

Dispute resolution, where conducted by way of arbitration, needs to have legislative procedures and safeguards supporting this role. Dispute resolution by way of mediated or conciliated agreement, should be undertaken only by registered and accredited practitioners, subject to codes of conduct. A court should have a significant role in approving a settlement where an action has been lodged to ensure the interests of the class members are protected and that a settlement can be enforced.

3.4 Strong safeguards against abusive litigation

Q 21 Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

There is a balance to be struck between a loser pays principle, which may involve risks that deter the use of class actions[2] and a system which would encourage entrepreneurial litigation. The Court should always have the discretion to waive the principle in the appropriate circumstances. If a loser pays principle is to apply then funding either needs to be provided by the State for these actions and/or a regulated system of contingency fees should exist. See also our response to question 7.

Q. 22 Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

Standing should be given to a broad range of bodies as mounting a collective action is difficult and resource intensive and goals would not be served by unduly limiting standing. Bodies should be registered for these purposes, maybe in a way similar to the application for the right to lodge a super-complaint that exists under the UK Enterprise Act. Such registration should

[2] See particularly the Australian experience where despite 20 years of class actions these are underutilised as a mechanism to achieve access to justice.

allow for self-help groups around a particular issue to form for the purpose subject to fitness, integrity, expertise and funding. This standing should be recognised at the ADR stage and if there is no ADR stage for the purposes of judicial proceedings.

4. SCOPE OF A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

Q 34 Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

A general scope would allow for areas that cross policy or regulatory boundaries and to ensure a consistency of treatment.

Yours sincerely,

Kay Blair
Vice Chair