Class Actions on the horizon in Europe

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Class actions on the horizon in Europe

- **Class action: the French experience**
- **The Europeanization of the question of collective redress**: increasing pressure by consumers' associations and law firms

Class actions on the horizon in Europe

- **Education vs demagogy:**

- The companies own up to their responsibilities.
- **Yes** to proceedings facilitating access to justice but definitely **no** to those which advocate for punitive prosecution.
- In Europe, the right balance between public and private enforcement.

Class actions on the horizon in Europe

- **<u>Education vs demagogy</u>:**

- **What do consumers expect?**
  To quickly obtain satisfaction at no or minor costs.

- **What are class actions?**
  Lengthy, complex and costly and often inefficient proceedings.

Class actions on the horizon in Europe

- **Common wrong statements about class actions:**

- **1st wrong statement**: inefficiency of consumer and competition law: consumers would have no access to justice

  → **wrong**:

  - *numerous ways to enforce rights: extrajudicial, judicial means,*
  - *90 per cent of litigation between professionals and consumers are settled directly between them,*
  - *collective cases are the exception.*

Class actions on the horizon in Europe

- **Common wrong statements about class actions:**

- **2nd wrong statement**: the Europe system would be US "*abuses proof*",

  → **wrong**:

  - *class action mechanism is a vicious circle in itself,*
  - *perspectives in some Member States are worrisome : contingency fees, discovery, punitive damages…*
  - *significant gap between the official positions and the different proposals on the table in some Member States and at EU level.*

Class actions on the horizon in Europe

- **<u>The White Paper proposals</u>:**
  - apparently less excessive than those of the Green Paper, but similarly dangerous, in particular by what they do not explicitly mention,
  - vicious combination between the two types of collective action (representative actions based on opt out?),
  - a first step towards discovery,
  - an indirect relaxation of "*the loser pays*" rule.

Class actions on the horizon in Europe

- **<u>In conclusion</u>**:

  Our recommendation: let us not be foolish, let us be pragmatic:

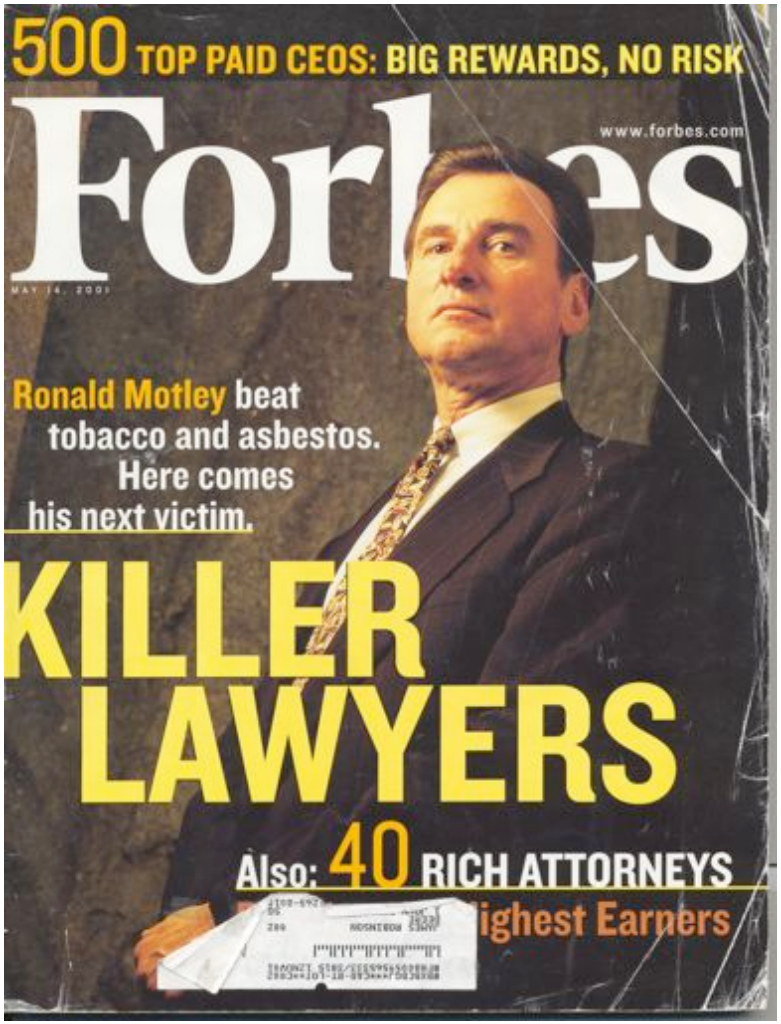
  – margin for progress exists,

  – the judicial way should be the last recourse,

  – ADR development and promotion.

The Death by 1,000 Cuts:

Class Actions in the United States



U.S. Class Actions … When?

1. *plaintiffs are numerous,*
2. *common questions of law or fact exist,*
3. *claims of representative plaintiffs are typical of the class,*
4. *representative parties will adequately protect interests of the class,*
5. *common questions predominate, and*
6. *class action is superior method for fair and efficient adjudication of the controversy*

U.S. Class Actions … How?

1. *a named plaintiff files a complaint asserting claims and seeking relief on behalf of a described class of others similarly aggrieved*
2. *discovery*
3. *the court rules on satisfaction of the class action requirements ("certification")*
4. *discovery*
5. *the parties litigate merits of the dispute*
6. *if successful, counsel for the plaintiff petitions the court for an award of fees*

U.S. Class Actions … What Happened?

1. *magnet jurisdictions*

U.S. Class Actions … What Happened?

1. *magnet jurisdictions*
2. *predatory federalism*

"We have here a Minnesota state court, applying a New Jersey consumer fraud statute to a nationwide class of plaintiffs, with few of those plaintiffs residing in New Jersey."

U.S. Class Actions … What Happened?

1. *magnet jurisdictions*
2. *predatory federalism*
3. *lead lawyer races*

"[T]he lawyers who bring the lawsuits effectively control the litigation; their clients – the injured class members – typically are not consulted about what they wish to achieve in the litigation and how they wish it to proceed. In short, the clients are marginally relevant at best."

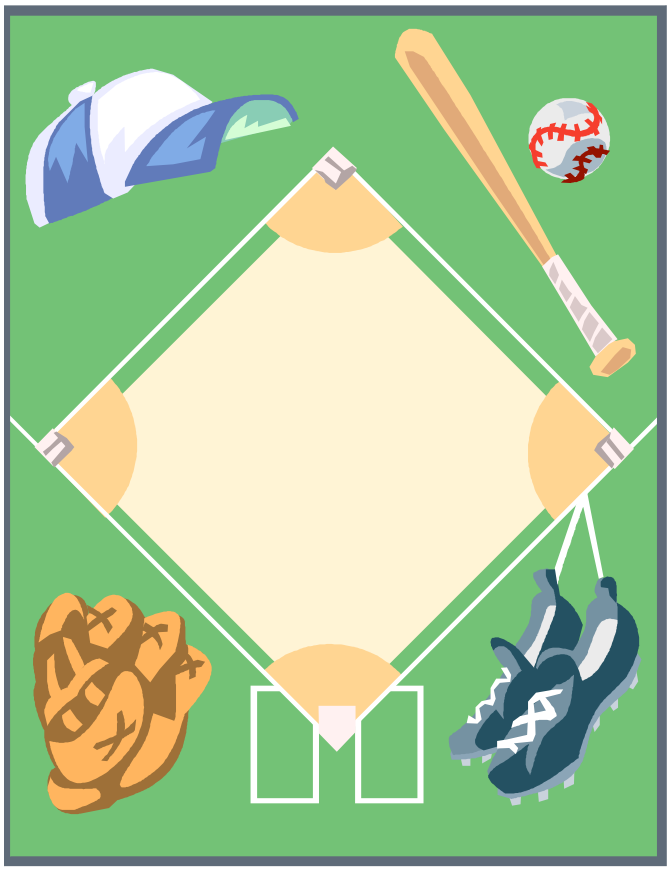
U.S. Class Actions … What Happened?

1. *magnet jurisdictions*
2. *predatory federalism*
3. *lead lawyer races*
4. *copy-cat filings*
5. *professional plaintiffs*
6. *net loss settlements*
7. *consumer coupon cases*

"[I]n state court consumer class action settlements not involving personal injuries, class counsel typically walk off with more money than all of the class members combined."

U.S. Class Actions … What Happened?

1. *magnet jurisdictions*
2. *predatory federalism*
3. *lead lawyer races*
4. *copy-cat filings*
5. *professional plaintiffs*
6. *net loss settlements*
7. *consumer coupon cases*
8. *unholy alliances*
9. *"suicide squeeze" defenses*



U.S. Class Actions … A Postscript

1. *1995 federal legislation curbed class "find-a-fraud" securities suits*
2. *The 2005 Class Action Fairness Act addressed many notorious abuses*
3. *three prominent U.S. class action attorneys have pleaded guilty to criminal charges*
4. *one professional plaintiff has pleaded guilty to criminal charges*
5. *a federal appeals court has approved the largest class ever certified in the U.S. (1.6M)*

- Allied Capital Corp. ALD
- BearingPoint, Inc. BE
- Buca, Inc. BUCA
- Canadian Imperial Bank of Commerce CM
- Chicago Bridge and Iron Co., N.V. CBI
- Converium Holding AG
- Corn Products CPO
- CP Ships
- Datatec
- Deutsche Bank AG DB
- Dura Pharmaceuticals
- ECtel ECT X
- Fannie Mae FNM
- Gilat GILT
- Harman International Industries, Inc HAR
- Inphonic, Inc.
- Isilon Systems, Inc.
- LeapFrog LF
- LDK Solar Co., Ltd.
- Lipper
- Mamma.com
- Merrill Lynch MER
- Pall Corporation PLL
- Parmalat
- Pozen, Inc. POZN
- ProQuest
- Pzena Investme nt Management, Inc. PZN
- Sears
- SeraCare SRLS
- Societe Generale
- SourceCorp, Inc.
- Staples SPLS
- Sunrise Senior Living SRZ
- UICI
- VeriSign, Inc. VRSN
- Xybernaut
- AIMCO Properties
- Archstone Trust/ Fair Housing
- BASF Age Discrimination
- BellSouth
- Geico (Wa ge and Hour)
- Geico Race Discrimination
- Keepseagle Race Discrimination
- Kroger Corporation Race Discrimination
- Pilgrim's Pride
- Sterling Jewelers, Inc.
- Tulsa Race Riot Reparations
- Tyson Foods
- Wal-Mart Sex Discrimination
- Willis Group Holdings
- Brother Printers
- Dex-Cool (General Motors)
- Honda Element SUV
- Hurricane Isabel
- Light Cigarettes - RICO
- Philips Electronics
- Vonage
- Aon Corporation 401k Plan
- BellSouth Telephone Concession Plan
- Citigroup
- Delphi 401k Plan
- FFIC
- Goodyear Tire and Rubber 401k Plan
- International Ladies' Garment Workers' Union Death Benefit
- Marsh & McLennan 401k Plan
- Merck and/or Medco Retirement 401k Plans
- Merrill Lynch
- SBC Pension Benefit Plan
- SBC Telephone Concession
- Tharaldson Employee Stock Ownership Plan
- ChoiceDek
- Hormone Replacement Therapy (HRT)
- Milwaukee Lead Paint Litigation
- Medtronic Heart Implant Device
- Ortho Evra Birth Control Patch
- Silzone Heart Valve MDL
- Thimerosal (Mercury) Vaccines
- Vioxx
- Welding Rods

My Class Action Lawsuit . Com - Personal Injury Law Suit Complaint System

U.S. Class Actions … Lessons Learned

- *tailor the tool to the perceived need*
- *ensure the plaintiff has a real stake*
- *avoid rewarding the first to file*
- *preserve "loser pays"*
- *limit early discovery*
- *require certification of the class*
- *allow consideration of the merits*
- *allow immediate certification appeals*
- *address choice of law and geographic reach*

Recommended Reading:

http://www.cmht.com/

Cohen, Milstein, Hausfeld & Toll website

http://www.abanet.org/litigation/committees/classactions/docs/cafa_history.pdf

U.S. Senate Judiciary Committee report on the Class Action Fairness Act

http://classactionworld.com/

compilation of U.S. class action settlements & recent filings

http://classaction.findlaw.com

click-through links to information on 66 class drug suits & attorneys

http://rand.org/pubs/monograph_reports/MR969.1/MR969.1.pdf

RAND Institute for Civil Justice study of class action litigation

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MEDEF's position on Class actions (summary)

Class action procedures are supposed to improve the effectiveness of law for large multi-party cases, which is a valuable objective.

Such actions already exist in some Member States and a few Member States have recently started a debate about introducing them. In France, we have had this debate for 24 years.

The European Commission also raised that question at a European level, first with the consultation on the Green Paper on damages actions for breach of the EC Treaty anti-trust rules and secondly on consumer issues.

☞ **As a preliminary remark**, it is necessary to indicate that the notion of "class or group action" 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 which have the same cause and involve numerous individuals.

The main variants hinge on the scope of the procedure (consumer law, competition law …) on people's identity authorised to file an action on behalf of the group (individuals, associations, lawyers …) and the possible existence of a power of attorney (opt in / opt out).

Such actions already exist in the United States, in Canada and some Member States: Sweden and Portugal for example.

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

As a business organisation, we are quite reluctant to move in that direction for several reasons.

☞ **First of all**, we should keep in mind 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.

In a rather brief time, class actions have stopped serving the aim of compensating for damage sustained by consumers or other individuals and are used as a sanction punishing the conduct of certain professionals by applying a private penalty to them.

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 actions for breach of the EC Treaty anti-trust rules.

MEDEF 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 of law and especially of competition law and that damages must be indemnified in accordance with each Member State's tort law.

☞ **Limited merits for individuals:**

What consumers expect :

She or he is entitled to obtain satisfaction quickly and at no or minor expenses.

But in general, class actions are complex and lengthy procedures that do not facilitate the administration of Justice and are rarely beneficial to individuals: consumers, shareholders ...

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

It is quite interesting 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.

We could not accept that.

Moreover, in the United States, millions of dollars are waiting for plaintiffs who do not even take the necessary steps to claim the money they are entitled to.

... 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**.

In France, we are told that we would be able to avoid those side effects, but we are not convinced at all that it would be possible.

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 made.

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 or shareholders, but enrich intermediaries instead.

We really think that it is quite impossible to neutralize the negative effects of class actions procedures for several reasons:

- it would be very difficult to limit their scope to some matters like consumer law for example/ or to dedicate the right to introduce actions to specific registered organisations, like consumer associations,
- as shown by cases in the US and in Québec, any safeguards intented to prevent excesses proved to be mere illusion,
- moreover, the advocates of class actions consider that to be really efficient, it is necessary to adopt an **opt out** system.

In no event, MEDEF can endorse the principle of class actions instituted by any representative claiming **to act on behalf of an anonymous group of individuals.**

This is contrary to the rights of defence and **de facto** to the Constitution of some Member States and to the European Convention on Human Rights.

The advocates of class actions generally justify this violation of the rights of defence by an unbalanced situation between the plaintiff and the defendant.

This is not acceptable.

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

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The study conducted in 2004 on European Union Citizens and Access to Justice by the Commission, 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.

Facilitating multi-party litigation through consolidation: we say yes.

Fostering anonymous actions intended to destabilise and pressure enterprises in order to extort money from them: we say no.

To take legal action is important, it should not become commonplace.

A move towards a society where the judicial function is overly emphasised would not serve the interests of individuals or enterprises. Moreover, the US judicial system has an important economic cost : 2 points of the US GDP.

MEDEF 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. Moreover it is essential to develop alternative means of disputes' resolution: arbitration, mediation, conciliation.

To illustrate that necessity, more than 90% of consumer – related disputes are settled amicably with the professional concerned.

BUSINESSEUROPE

COMMENTS

13 November 2007

"INTRODUCING EU COLLECTIVE REDRESS - THE SLIPPERY SLOPE TOWARDS US-STYLE CLASS ACTION"

Over the last few years, there have been moves at the level of both the EU and the Member States towards adoption of "collective redress" mechanisms in what appear to be efforts to embrace procedures similar to the US class actions system. The issue is on the EU's agenda in the realm of competition law, where private enforcement is being considered, and consumer law, as a means of facilitating consumer "access to justice".

It is interesting to note that these developments are taking place in Europe precisely at a time when US policy-makers are taking steps to move away from a regime that fosters litigation abuse.

There is a general recognition in the US that the class action system has imposed an unwarranted financial burden on industry and can dissuade foreign companies from investing in the US. The main beneficiaries of the system are the US plaintiff class action lawyers who have received huge financial rewards for their efforts.

Having been so successful in the US, US class action law firms are now setting up shop in Europe to exploit what they see as a new business opportunity as a result of the possible introduction of class actions in this part of the world.

The prospects of collective redress mechanisms in Europe should be of concern not only to business but also to European governments, which will not be immune to class action suits. The European model of regulation means that government agencies play a much greater role than in the US in determining the standards of goods and services provided to consumers. They too are therefore likely to find themselves on the wrong end of class action lawsuits.

- The US class action system is often hailed by its supporters as a quick, inexpensive and effective mechanism for compensating groups of consumers or others who claim to have suffered at the hands of big corporations. The truth is rather different.

- That the US class action system regularly delivers large payouts from US companies cannot be denied. However, these payouts are primarily made because the stakes in class action suits are so high. Whatever the legal merits of a case, corporate defendants often prefer to settle rather than face the prospects of a drawn-out and immensely disruptive legal battle (for which they cannot recover their legal costs), which may end in damages awards well in excess of any losses that may have been suffered by the alleged victims.

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- The so-called success of US class actions in extracting these payouts depends on several features of US litigation which operate alongside the class action procedures but have nothing to do with them. These features include:

  - the "no costs" rule: lawyers can pursue speculative and groundless claims without any fear that if they are unsuccessful, they or their clients will have to contribute to the defendant's costs of defending the proceedings, which in large class actions can be considerable;
  - contingency fees: lawyers are given a financial incentive to bring class actions and pursue them vigorously;
  - sweeping discovery rules: these are very liberal and enable US attorneys (through documentary discovery and depositions) to “fish for evidence” and "harass" senior management, thus imposing huge costs on defendants in terms of cost and wasted management time;
  - punitive damages: the prospects of significant damages over and above what would be needed to compensate the plaintiffs is an added incentive for lawyers to bring class actions.

- These features of the US litigation system are generally absent from the litigation systems that operate in Europe. Lawyers would not have the same financial incentive to pursue class actions and their clients would be reluctant to lend their names to speculative or groundless cases if this meant taking on the risk of having to contribute to the corporate defendant's costs. Similarly, corporate defendants would be more inclined to defend class actions on their merits rather than pay out large settlement awards to extricate themselves from the litigation as they do in the US.

- Absent the lucrative rewards that accrue to US plaintiff attorneys, and in an environment where claims which lack merit carry financial risks for the plaintiff, there would inevitably be pressure to adopt those other features of the US litigation system that operate alongside US class action procedures. This might ultimately lead to the introduction of a "no costs" rule, contingency fees or some other form of "no win no fee" arrangement, liberal discovery procedures and possibly punitive or multiple damages.

- The experience of other common law countries where class actions have been introduced bears this out. For example, in Canada and Australia, where a "loser pays" costs rule is the norm in litigation, the "no costs" rule has effectively been adopted for class actions by a procedural device which means that all members of the class are relieved of any liability for the defendant's costs, other than the "class representative" who is usually a "man of straw".

- Similarly, various means have been adopted in these other jurisdictions to provide financial incentives to plaintiffs' lawyers and others to fund class actions. For example, a special change in the law has been made in the Province of Ontario, Canada, to exempt class actions from the general prohibition on contingency fees in civil proceedings. In other Canadian provinces, contingency fees are also generally available for class actions. In Australia, a new breed of entrepreneurs

who fund class actions under contingency fee arrangements has been allowed to operate with the approval of the courts. These third-party funders effectively fill the shoes in Australia of the plaintiffs' lawyers in funding class actions in the US.

- The discovery rules in these countries, albeit different from the US, are far more liberal than those generally found in Europe and are seen as a key part of the armoury of class action lawyers. We have already seen calls for the liberalisation of discovery rules in Europe in the context of class actions. Indeed, when the idea of European class actions was first mooted by the European Commission with the publication of its 1999 Green Paper on product liability for defective products, it was proposed alongside the idea that discovery should be liberalised. Similarly, the Commission's 2005 Green Paper on private damages actions for breach of anti-trust rules suggests the opening up of discovery procedures as an integral part of procedures for private damages claims.

- Thus, the introduction into Europe of US style class actions is likely to lead to other forms of the US litigation system being adopted in Europe, including the "no costs" rule and liberal discovery procedures. In addition, contingency fees or other funding incentives which have already started being introduced in European countries such as Italy risk being adopted by other European countries and even by the EU, thus increasing the financial incentives for plaintiff attorneys to litigate. The US class action procedures require these other features if they are to deliver the perceived benefits to plaintiffs that they do in the US. The experience in Australia and Canada has shown that once class actions are introduced, these other features are likely to follow in one form or another. This would result in some of the worst features of US litigation making their way into Europe, with considerable adverse effects on the EU economy.

- We suggest that what is needed to address any problem of collective redress for consumers are solutions that correspond more to European traditions. There is a desire to avoid litigation wherever possible and many Member States have set up various means, for example ADRs and Ombudsman schemes to provide redress. Instead of going down a slippery slope creating new instruments for more litigation, we believe the future lies in another direction: the debate should consider the various options and take due account of the specificities and legal traditions of the country where it will be applied.

UNICE
THE VOICE OF BUSINESS IN EUROPE

COMMENTS

21 April 2006

GREEN PAPER "DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES"

1. INTRODUCTION

The Commission is consulting on the need for changes to national procedural and substantive law to facilitate damages claims before national courts for breaches of EU competition law. In this context, it has published a Green Paper in which a wide variety of issues relevant for damages actions are addressed. The Green Paper puts forward, for debate and possible action, various options designed to make it easier to exercise the Community right to claim damages for breach of EU competition law. More concretely, the Green Paper deals with whether there should be special rules on access to evidence in civil proceedings; whether there should be a fault requirement for antitrust-related damages actions; whether there should be special rules on the definition and calculation of damages; whether there should be special rules regarding the admissibility and operation of defences; whether there should be special procedures for bringing collective actions and protecting consumer interest; but also whether there should be special rules on the costs of actions and issues relating to jurisdiction and applicable law, limitation periods and the appointment of experts.

UNICE[1] is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. Antitrust law is crucial and UNICE recognises that its public and private enforcement is fundamental for creating and sustaining a competitive economy just as the public and private enforcement of other Community rules, such as those related to the free movement of goods, is fundamental for the good functioning of the internal market.

The protection of Community rights is a cornerstone of the Community legal order and depends on national procedural and substantive law which must allow for the effective protection of the Community right and apply similar conditions as are applicable for the protection of comparable national rights. Now the Commission is launching a debate as to whether this system should be changed for damages claims for breach of Community competition rules.

[1] In January 2007, UNICE, the *Union des Industries de la Communauté européenne*, changed its name into BUSINESSEUROPE, The Confederation of European Business.

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Apart from the fact that UNICE considers it inappropriate to use EU competition law to harmonise important aspects of Member States' procedural and tort law, UNICE does not agree that competition law issues should be treated differently than other Community law issues. Competition law is a relatively complex area of law which involves a lot of economics. Encouraging more and more litigation would undoubtedly increase chances of divergent decision-making with obvious negative implications for the integrity of the internal market and the ability of companies to compete on merit. Apart from this, there are other disadvantages to increased litigation. Significant transaction costs serve no public interest objective and the uncertainty and burdens brought about by more and more court actions, harmful in themselves, could also lead to companies avoiding new forms of innovative and pro-competitive behaviour to the detriment of their competitiveness.

Having said this, UNICE welcomes taking part in discussions on what policy to follow in this area and its views and recommendations are set out below.

2. GREEN PAPER

Private enforcement

As set out in the Green Paper, damages actions for breach of Community antitrust rules are part of the private enforcement of these rules. Private enforcement is a well established feature of EU competition law which has enabled interested private parties not only to bring actions for damages but also to claim the nullity of anti-competitive agreements or to stop anti-competitive behaviour ever since the direct effect of the prohibitions of Articles 81 and 82 was firmly established. The possibility for private parties to rely on the Community antitrust rules has been significantly enhanced by the entry into force of the new modernised directly applicable exception system which decentralised application of the exemption possibility as laid down in para 3 of Article 81 to national courts and competition authorities. As a consequence, numerous tribunals throughout the EU also have to perform the complex economic assessment of balancing both anti- and pro-competitive aspects of agreements.

As the Green Paper rightly explains, enforcement of Community antitrust rules is a key element of the "Lisbon strategy". Correct enforcement of competition law is in fact absolutely crucial for maintaining the ability of companies to compete effectively and efficiently. Over the years, UNICE has always supported a more economic approach for assessing anti-competitive effects of business behaviour as opposed to a strict legalistic interpretation and a clause-based approach that would unnecessarily impose constraints on undertakings and cause them to avoid innovative and potentially pro-competitive behaviour. UNICE is therefore very pleased that the Commission has recently moved away from such a legalistic, clause-based approach for assessing agreements.

It is now of course equally important that the many national judges, who have to apply Community competition rules in their entirety, follow this move towards a more economic approach and do not revert to imposing outdated legalistic

requirements in the context of a damages action for infringement of Community antitrust rules. This would be a step back and seriously undermine companies' ability to compete on merit.

Although the Green Paper states that private enforcement of Community competition law is to be distinguished from substantive competition law, it also acknowledges that the rules regarding the remedies and procedures governing damage actions can make a big difference because they can influence the likelihood of a finding of liability in the first place. If numerous tribunals across the EU will have to perform the complex economic assessment of both anti- and pro-competitive aspects in the context of actions for damages, chances of conflicting and erroneous decision-making augment significantly. Because national courts usually have to base their decisions solely on the facts as presented by the parties, the risk that decisions are taken that do not relate to factual market conditions is heightened. The Commission will be unable to compel national courts to adopt its thinking if they are unwilling so to do and it is not mandatory on the court to receive it. There could thus be significant problems with respect to divergent decision-making when there will be more damages actions and this could seriously harm the ability of companies to compete effectively. Instead of simply stating that clarity as to substance already exists, the Commission should take a more realistic stance with respect to this risk and the impact on competitiveness of encouraging more and more litigation.

In addition, and as a preliminary remark to discussing the different issues relevant for damages actions below, UNICE considers it inappropriate to use EU competition law to harmonise important aspects of Member States' law of tort and procedural law. National rules related to issues such as fact-finding, unlawfulness, burden of proof, causation and defences have evolved gradually in the different Member States' legal systems and perform their function within the context of these systems. Harmonisation of such traditional national law concepts should not be undertaken on the basis of the Commission's legislative competence in the field of competition.

Access to evidence

The Green Paper inquires whether there should be special rules on the disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 and, if so, what form such disclosure should take. In addition, the Green Paper is asking whether special rules regarding access to documents held by a competition authority would be helpful for antitrust damages claims and, if so, how such access could be organised. Lastly, it is asked whether the claimant's burden of proving the antitrust infringement in damages actions should be alleviated, and, if so, how.

As explained in the annex to the Green Paper, the difficulty for a claimant to obtain evidence of an alleged antitrust infringement is a particular problem for cases where there is no prior decision from a competition authority finding an infringement. It is clarified that in these 'stand-alone' actions a lot depends on the possibility for the claimant to oblige the defendant or a third party to disclose

documents in its possession which may constitute evidence of the alleged infringement.

Apart from the fact that, as set out above, UNICE believes that there should be no harmonisation of national law in this context, the risk of divergent decision-making, as identified above, is especially serious when actions for damages would relate to 'stand-alone' cases considering that in such instances the judge would have to also rule on the substance of the case. It is thus of vital importance that the Commission does not devise special rules to encourage damages actions for such cases, which are unlikely to occur frequently anyway. There should thus be no special rules on disclosure of documentary evidence in civil proceedings.

With respect to the issue of a national court asking a national competition authority or the Commission for access to documents regarding an infringement, there is no need for more flexible rules either. On the contrary, business secrets and confidential information should be better protected and information which has been voluntarily submitted by a leniency applicant should not be transmitted. The ordering in civil damages proceedings of corporate statements made to a competition authority in the context of a leniency programme undermines the effectiveness of the programme and access to this information should therefore be refused. In this context, UNICE favours stronger safeguards in existing rules and procedures which aim to uphold these principles and obligations. Changes to the Commission's leniency notice to provide for a special procedure for the protection of corporate statements made to the Commission in the context of its leniency programme are thus highly welcome.

The Green Paper also suggests that shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant could make up for non-existent or weak disclosure rules. As set out above, weak disclosure rules are particularly relevant for 'stand-alone' actions and the issue of alleviating the burden of proof is thus mainly of interest for facilitating such actions. Similarly, suggestions to deal with unjustified refusal by a party to disclose evidence are mainly of interest for facilitating 'stand-alone' actions. Considering that UNICE believes that the Commission should refrain from encouraging such actions, there should thus be no alleviation of the burden of proving an antitrust infringement in case of information asymmetry. Similarly, there should be no evidentiary consequences of a refusal to disclose evidence.

With respect to the issue of whether there should be an alleviation of the claimant's burden of proving an infringement which has already been established, UNICE refers to Article 16 of Regulation 1/2003 according to which a claimant should be able to rely on the Commission's infringement decision in relation to the same behaviour as proof of the infringement in a subsequent proceeding before a national court. UNICE has always supported this provision considering that national courts and national competition authorities should avoid conflicting decisions. UNICE would like to stress that this principle should also apply to so-called negative decisions.

Lastly, UNICE would like to take the opportunity to urge the Commission and the Member States to grant qualified in-house counsel legal privilege. When in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

Fault requirement

The Green Paper raises the issue of whether there should be a fault requirement for antitrust-related damages actions. Although, as set out above, UNICE does not believe that EU competition law should be used to harmonise national tort law, UNICE, as a matter of principle, firmly believes that a fault requirement is very important. It should be clear that Community competition law was infringed. In many instances, the law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements and practices. Often positions are not clear-cut and businesses need to know that their ventures are not going to give rise to harmful claims for damages. Existing block exemption regulations do not provide a safe harbour for agreements that fall outside them and understanding the accompanying guidelines can sometimes be difficult. Damages actions for infringements that are not clear-cut would only lead to companies avoiding innovative and potentially pro-competitive behaviour to the detriment of their competitiveness. It would also undermine Commission efforts to apply a more economic competition-based approach and get away from imposing straitjackets.

Damages

The Green Paper asks how damages should be defined. In principle, UNICE believes that damages should be rewarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant. Definitions of damages which go beyond compensation would unjustly enrich plaintiffs and could reduce incentives to apply for leniency. It would also introduce punitive elements in a system that should be about compensation. Unlike the US, where public enforcement is less developed than in the EU, punishing breaches of Community law in the EU should be a matter for the public authorities. The investigation powers of the Commission and its power to impose fines have been extended significantly following modernisation and UNICE believes that rather than extending opportunities for punishing companies even further, focus should be on better safeguards to counterbalance application of already far-reaching powers, such as better protection of the right of the defence. Maximum levels of penalties which can be imposed are excessive and allow for very high fines so there is no need for more deterrence. UNICE also notes that both the initial and modified Rome II proposals question whether non-compensatory damages are compatible with Community public policy.

The passing-on defence and indirect purchaser standing

The Green Paper wonders whether there should be rules on the admissibility and operation of the passing-on defence, and, if so, what form such rules should take. Although, again, rejecting the need for harmonisation, given that in UNICE's view actions for damages in principle should be about compensation, the passing-on defence should thus also be allowed. Similarly, in principle, both direct and indirect purchasers should be able to sue the infringer, allowing each of them to be compensated for their damage.

Collective actions

The Green Paper raises the important issue of whether there should be special procedures for bringing collective actions and protecting consumer interests. As a preliminary point, UNICE notes that collective or class actions often have limited merits for consumers. In general, they are complex and lengthy procedures that do not facilitate the administration of justice and are rarely beneficial to consumers. Harmed consumers are often absent from these procedures which are hijacked by law firms or various interest groups who are not using the procedure to obtain compensation for injured consumers but to punish companies. As set out above, liability law should be about compensation; it should not be abused to punish companies. Collective or class actions for protecting harmed consumers are unsuitable for obtaining compensation, especially for antitrust infringements. As set out in the Green Paper, consumer damage is often too immaterial in case of antitrust infringements resulting in damages not being awarded to harmed consumers but enriching intermediaries. There should thus not be special procedures for bringing collective damages actions.

Cost of actions

The Green Paper also explores whether there should be a rule that unsuccessful claimants will have to pay costs for court fees only if they acted in a manifestly unreasonable manner by bringing the case. UNICE appreciates the Commission trying to make provision for avoiding unmeritorious and frivolous cases but believes that such a special cost rule would unduly interfere with the cost traditions of Member States and create uncertainty as to who will have to pay instead of the complainant. To avoid frivolous cases, the Commission should simply refrain from using cost rules as incentives for damages actions. Existing cost rules of the courts of the Member States are sufficiently reasonable to provide for a fair recovery and they do not pose any real obstacles for bringing an action for damages if a plaintiff has a strong case.

Coordination of public and private enforcement

The Green Paper also gives consideration to the important issue of the impact of damages claims on the operation of leniency programmes so as to preserve the effectiveness of the programmes. UNICE would be very worried if the effectiveness of leniency programmes were to be undermined and exposure to excessive claims (going beyond compensation) would clearly reduce any advantage of applying for immunity for fines. It is thus important that damages are not defined too broadly and do not go beyond compensation, especially because

UNICE does not consider it opportune to remove the joint liability from the leniency applicant considering that this would unduly penalise the other infringers. It is also important, as set out above, that the confidentiality of submissions made to a competition authority as part of a leniency application is protected.

Jurisdiction and applicable law

The Green Paper also addresses the issue of which substantive law should be applicable to antitrust damages claims. UNICE does not believe that there should be a special rule for competition cases which would give the claimant the choice to determine the law applicable to the dispute.

Other issues

The Green Paper also addresses issues such as whether an expert should always be appointed by the court, whether limitation periods should be suspended, and whether clarification of the legal requirement of causation is necessary.

With respect to the issue of experts, UNICE does not believe that single parties should be deprived of the possibility to appoint an expert if they can do so under national law. This issue is especially important in the absence of specialist courts or specialist panels for competition cases. With respect to the suspension of limitation periods, UNICE would like to stress that suspension would prolong a situation of legal uncertainty which is always harmful for companies. Lastly, with respect to causation, UNICE believes, as stated before, that there should be no harmonisation in this context. It thus agrees that there is no need for further action in this field.

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BUSINESSEUROPE

POSITION PAPER

4 October 2007

BUSINESSEUROPE POSITION ON COLLECTIVE ACTIONS

SUMMARY

Over recent years, the debate on collective actions has increased at EU level, based on the European Commission's claim that consumers lack confidence in cross-border shopping at EU level due to their concerns about the effectiveness of redress mechanisms.

BUSINESSEUROPE strongly supports effective and easy access to justice for EU consumers, which is key to underpin European stakeholders' confidence in the Internal Market and to ensure fair competition. It is in the interest of companies, that adequate redress mechanisms exist and function well. This is why we consider it of primary importance that a balance is struck between the interests of the various players and that the legal and economic consequences of any proposal are taken into consideration.

The debate launched by the Commission is particularly necessary to answer to some questions - not yet clarified in our view - regarding whether further action is needed on this subject.

The principles of better regulation and subsidiarity as well as the goals of the Lisbon Agenda must be at the heart of this debate. Before any action is taken at EU level, we believe it essential to:

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

BUSINESSEUROPE also stresses that enforcement of current legislation is of paramount importance as it plays a central role in the perception of citizens and companies about Europe and their confidence in the single market. Promotion should also be given to consumer education and information before further action is envisaged.

Moreover, we consider that disputes should be settled via out-of-court procedures whenever possible and that the existence and functioning of these mechanisms should be taken into consideration before further action is envisaged.

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1. INTRODUCTION

The debate on different redress mechanisms and the means to ensure proper access to justice for consumers or shareholders has been under way for several years. Particular attention has been given to collective actions which are judicial mechanisms designed to allow various individuals with the same interest to pursue a defendant before a court as a group. This paper sets out BUSINESSEUROPE's views on this important subject.

One of the starting points for this debate was the Commission claim that consumers lack confidence in cross-border shopping at EU level due to their concerns about the effectiveness of redress mechanisms. Discussions are taking place predominantly in two areas: competition and consumer policy.

In the field of competition, in December 2005 the Commission published a Green Paper on damages actions for breach of EC Treaty anti-trust rules in which it raises the issue of whether collective actions should be introduced. A follow-up White Paper, which may contain proposals for special procedures for bringing collective damages actions, is expected by the end of the year.

In the area of consumer policy, the new Consumer Strategy 2007-2013 provides that the Commission "will also consider action on collective redress mechanisms for consumers for infringements of consumer protection rules and breaches of the EC anti-trust rules […]". In addition, in February 2007 a Green Paper on the review of the consumer *acquis* was published launching a debate on what is needed to improve the legislative framework protecting consumers, including redress.

BUSINESSEUROPE strongly supports effective and easy access to justice for EU consumers, which it considers crucial to underpin European stakeholders' confidence in the Internal Market and to ensure fair competition. It is in the interest of companies that adequate redress mechanisms exist and function well. We therefore welcome the debate launched by the Commission's Consumer Affairs Directorate [1], in particular the "reflection period". In this debate, it is essential that stakeholders are properly consulted and that evidence and facts are gathered about the current situation in Member States and the problems that consumers and companies face when using the redress tools available.

We believe that a number of questions must be answered before further action is decided.

[1] For further information see http://ec.europa.eu/consumers/redress/index_en.htm

2. IS THERE A NEED FOR ACTION ON COLLECTIVE JUDICIAL INSTRUMENTS?

Before any action is taken at EU level, the first step should be a comprehensive assessment of the alleged problems (if any) as well as a clear identification of their causes.

Currently such evidence is insufficient. The 2006 Commission Eurobarometer[2] finds that:

- only 17% of European consumers believe that the right to take sellers or providers to court is the best measure to protect their interests;
- only 13% consider that collective actions would be the best system; and
- 42% of European citizens consider it better to assert their claims through alternative means of dispute resolution such as arbitration, mediation or conciliation. Indeed, more than 90% of consumer-related disputes are settled out of court between the parties involved[3].

Moreover, the Commission acknowledges in its reports on product liability that the majority of disputes between consumers and producers/companies are solved via out-of-court procedures (e.g. negotiation). Indeed, experience shows that most disputes are settled following a direct complaint by consumers to the company in question. Most companies now have a customer relations department whose task is to deal with such complaints.

Therefore, BUSINESSEUROPE believes that the available data:

- do not demonstrate that existing national civil justice systems, including out-of-court mechanisms, fail to provide adequate access to justice for consumers; and
- do not show that collective actions are the best solution to improve the current situation. On the contrary, the above Eurobarometer figures clearly spell out that consumers are not interested in engaging in litigation as long as there are other out-of-court means providing adequate solutions.

➢ LIMITED MERITS FOR CONSUMERS BUT ADVERSE IMPACT ON BUSINESS

The emerging interest in the instrument of collective actions often looks at existing models such as the class action in countries such as US or Canada which are based in substantially different legal systems and principles and respond to diverse societal values.

BUSINESSEUROPE strongly believes that collective actions are not the appropriate solution to improve consumer redress and enforcement of consumer rights in the EU.

Public authorities in EU Member States have traditionally been the primary enforcement mechanism. Adoption of a harmonised litigation system similar to the one

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[2] Eurobarometer Special Report 252 "Consumer Protection in the Internal Market", European Commission, 2006, available at http://ec.europa.eu/consumers/topics/facts_en.htm.

[3] Eurobarometer survey: European Union citizens and access to justice, October 2004, available at http://ec.europa.eu/consumers/topics/facts_en.htm.

existing in the US, even if adapted to the EU reality, may lead to an excessive litigation culture with the consequent increase in costs imposed on the EU economy as can be observed from the US experience. We also note that consumers are sometimes conspicuously absent from these procedures, which are often "hijacked" by law firms or various interest groups, as proved by experience with the US system of class actions. This means that the proceeds which are supported by societies as a whole (including consumers) in most cases do not accrue to consumers, but enrich intermediaries instead.

In addition, it has been observed in the US that companies, whether or not liable, can be pressured into accepting highly expensive settlements, in order to put an end to harmful negative advertising that can damage their business and image.

Although the Commission has already on several occasions pointed out that it is not planning to adopt the American system, in part due to differences between the EU and US legal systems, there is a risk that many of the economic incentives and drivers featuring in the US will be introduced nonetheless, up-front or step by step.

Moreover, collective actions give the illusion that concentrating in one single litigation identical or similar disputes having the same cause and involving numerous individuals, would reduce costs and prove more efficient. In addition, these 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.

We would therefore like to stress that it is of primordial importance to strike a balance between the interests of the various players.

- **BASIC PRINCIPLES FOR A SOUND DEBATE: BETTER REGULATION, LISBON AGENDA AND SUBSIDIARITY**

As previously mentioned, BUSINESSEUROPE has been actively following the debate on judicial and out-of-court mechanisms that allow consumers to assert their rights better and to benefit fully from the Internal Market. It is in this context that we consider key that the above-mentioned principles are taken into consideration when further action regarding mechanisms of redress is being considered.

Better regulation is a central element of the Commission's policy for strengthening competitiveness and supporting sustainable growth and employment. We fully support the better regulation policy, bearing in mind that excessive regulatory actions may hinder companies' development, to the detriment of efforts to implement the Lisbon agenda.

Rules should create workable and affordable solutions for clearly identified problems which do not harm European competitiveness. This is why we have always advocated that any regulatory actions should be backed up by impact assessments based on a competitiveness test. This is what better regulation is about.

Therefore, as explained above, before any action is to be taken at EU level, we consider it essential to:

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

The way in which the most effective means of redress can be made available to consumers across the EU depends on various factors such as the organisation and effectiveness of its ordinary judicial proceedings, the way business is structured and consumers organised, the effectiveness of market surveillance, public administration system, and the historical, political and socio-economic contexts. For example, contingency fees can have different effects depending on whether or not insurance cover for legal expenses is widespread. The legal aid system needs to be organised differently depending on the degree to which lawyers fees are regulated. The role of burden of proof depends on the powers courts have when exploring the facts of a case.

Adoption of a uniform collective redress system at EU level could undermine the above-mentioned aspects of national litigation system and could ultimately affect the functioning of the internal market. Moreover, as collective actions have only been very recently adopted in some Member States, more time is needed to verify whether this system proves effective. It is too premature to draw conclusions about "best" mechanisms at national level.

Hence, we believe that EU action which is not strongly justified may lead to serious risks with a strong impact at national level and in the Internal Market.

3. ROOM FOR IMPROVEMENT

BUSINESSEUROPE agrees that redress can be improved and believes that action should focus on better enforcement at national level, better consumer information and education regarding their rights and responsibilities in the Internal Market, and on the promotion of non-legislative tools that allow proper access to justice.

➢ ENFORCEMENT IN THE INTERNAL MARKET

Adequate enforcement of existing legislation should be the priority. Enforcement of legislation on the Internal Market is of paramount importance and plays a central role in the perception of citizens and companies about Europe and their confidence in the single market. Member States should play a decisive role for efficient enforcement.

The effectiveness of EU legislation already adopted should be analysed and its enforcement improved before further proposals are put forward. Special reference should be made to the injunctions directive[4], which aims at obtaining from a

[4] Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumer interests

professional the discontinuation of conduct contrary to provisions of law: evidence to date shows that the cross-border procedure is not being utilised[5]. Also, the recently adopted regulation on small claims that will allow the enforcement of cross-border claims up to EUR 2,000 and will apply from 1 January 2009[6]. Moreover, the regulation on consumer protection cooperation[7] should strengthen the consumer protection directives' effectiveness.

European mechanisms for problem resolution such as SOLVIT, the free-of-charge online problem-solving network that helps citizens and businesses to enforce their rights when there is a misapplication of EU rules by national authorities, should be made better known by citizens and enterprises and adequately resourced, especially at national level.

➢ OUT-OF –COURT REDRESS

BUSINESSEUROPE considers that whenever possible, disputes should be settled via out-of-court procedures, in the interest of both consumers and business, and therefore highlights that more emphasis should be placed on promotion and reinforcement of ADRs. Member States have implemented various forms of ADRs which are fine-tuned to their specific situation. It is therefore particularly at Member-State level that the discussion on ADRs should take place.

Non-judicial means of redress make it possible to reach a solution acceptable to both parties more rapidly, at a lesser cost and helping to maintain a less confrontational atmosphere between parties. Therefore, these should also be taken into consideration before further action is taken on collective means of redress.

There are different levels of out-of-court procedure including: direct negotiation, mediation, arbitration and, in some countries, an ombudsman designated on the basis of specific legislation. These mechanisms which offer the possibility of providing case-by-case solutions and are better suited to the particular circumstances of each situation may be further improved where necessary as also recommend by the Commission[8].

➢ EDUCATION AND INFORMATION

BUSINESSEUROPE has always promoted more and better dialogue between consumers and companies and has recommended that in addition to initiatives by professionals and consumer organisations, public authorities should invest more in consumer education from school onwards using modern technology in order to help consumers to know their rights and responsibilities better. BUSINESSEUROPE has always stressed that well-informed consumers are good news for companies.

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[5] "EU Consumer Law Compendium-a comparative analysis", April 2007, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm

[6] Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (OJ n. L 199, p. 1 ff.).

[7] Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) which apply as from 29 December 2005.

[8] Further information about Commission actions in respect of ADRs at http://ec.europa.eu/consumers/redress/out_of_court/index_en.htm

4. CONCLUSION

Finally, and based on the above-mentioned reasoning, BUSINESSEUROPE considers that the debate at EU level should develop further before any action is taken at EU level, and that any action envisaged should primarily focus on assessment and, where applicable, revision of existing national instruments, including ADR schemes, before any new avenues are explored.

A move towards a society where the judicial function is unduly emphasised would not serve the interests of consumers or enterprises. Moreover, we consider that adding a further, mandatory EU mechanism would confuse operators and consumers, and upset complex national internal balances.

BUSINESSEUROPE also believes that non-judicial modes of redress are a more effective way to deal with consumer complaints. As also recognised by the 2007 OECD Recommendation on consumer resolution and redress, "consumer disputes can often be resolved directly by the relevant business and [that] consumers and business should first attempt to resolve their disputes directly before seeking recourse through third-party mechanisms".

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