Translation

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BDI

Law and Insurance Policy

Position Paper

On the Discussion Paper of DG Consumer Protection (SANCO) referring to their Survey on the Green Paper on Collective Redress for Consumers

The Federation of German Industries (BDI) represents over 100.000 industrial enterprises with around 7.5 million employees. 98 % of the enterprises are small and medium-sized businesses.

A. General observations

The BDI welcomes the fact that the Directorate-General Consumer Protection (SANCO) is conducting an open discussion on collective redress in consumer affairs and is making known the results of its investigations and surveys. In the process it has emerged that in the EU Member States the extent of individual legal protection is well developed and is backed up by a range of complementary regulations and directives from Europe. The BDI therefore continues to endorse Option 1, which recommends no measures for collective redress.

The papers published by the Commission confirm that there is no need for additional collective redress measures in the EU and that all the models outlined merely complicate procedural law, and possibly even undermine it, and have the effect of leading to increased costs without any real additional benefits for the consumers affected. It has become clear that it is not possible to eliminate the negative example set by non-European class actions and the abuses resulting from them.

Of the 27 Member States of the EU, it is claimed that only 13 have collective redress procedures. To the extent that Germany is included in this list, we can confirm at best that in Germany for some special areas there are some instruments which have elements of collective procedures. A uniform collective procedure for mass harm, such as the Directorate-General SANCO apparently has in mind, does not exist in our country. Neither can there be said to be any legal loophole in this field since the study submitted by the Commission is based on 326 cases extending over a period of ten years. These cases are supposed to have acquired relevance in eight Member States with 10% of them allegedly having cross-border reference. This ultimately boils down to an arithmetic average of four cases - just under 0,4 cases cross border - annually in the Member States investigated.

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In addition, it cannot be seen clearly what kind of damages is involved. The cases partly stem from insolvencies which are subject to a special procedure everywhere. In part they derive from the financial sector. Some of them could have been dealt with by simple – including individual – actions for an injunction. In part the harm involved is as yet only asserted. In Germany one major investor test case has not yet been brought to a conclusion, so there can be no talk of the extent of damage being clear-cut.

It is also not clear why serious consideration is not given to experience with the application for an injunction which applies across Europe. Similar arguments also apply to the new instruments on collection procedures, mediation, the enforcement of small claims and also the regulation on court of jurisdiction and enforcement and to EU provisions on applicable law. These European measures gave substantial reinforcement to consumer rights as against the justified interests of enterprises. So far very inadequate attention has been paid to the impact of these legal acts. The domicile or place of residence of the consumer for the court of jurisdiction and applicable law are not practicable, especially in the case of cross-border collective redress actions. Under existing EU consumer law, consumers from several EU Member States do not have the same court of jurisdiction and are subject to various legal systems.

We would like to emphasize once again that it is also not easy for business enterprises, especially not for small and medium-sized enterprises, to apply foreign law, and even less so in foreign courts. A foreign language constitutes another specific obstacle. It can hardly be supposed that this problem will be solved by laws on collective procedures, and even less so when such laws are to apply in 27 Member States.

In the case of mass actions, there is also the factor that the material basis for a claim ought also to have a certain foundation in the other EU Member States. Otherwise, the country with the most favourable basis would become the most popular venue for taking action. In our opinion this makes clear that the attempt to institute national rules on collective actions for disseminated harm by means of cross-border case models is neither objectively warranted nor politically defensible. In addition, it has frequently been demonstrated that there is no suitable legal foundation for this in the EU and the Commission should take heed of this fact.

Regarding the assumption that, for justice to be done, minor damages sustained by several consumers (disseminated harm) should at all costs be gathered together and be sued for by a third (mostly private) body, we would like to comment that, for example, failings by the authorities responsible such as the business inspectorate, foodstuffs inspectorate etc do not have to be dealt with by private lawsuits. On the contrary, the authorities have to carry out their tasks of regulation and supervision in an effective manner. The individual is not impeded in asserting claims for compensation. This is also demonstrated by court statistics in Germany. In just under 20 % of the civil cases decided by local courts in Germany in 2007, the amount at issue was less than 300 Euros. For amounts up to 600 Euros there is a special simplified procedure. Of the nearly 7 million

enforcement procedures annually the majority is resolved without a subsequent civil case. This makes clear that in traditional individual procedures small claims can be lodged in the courts and enforced without an incalculable cost risk being incurred. If the costs of the case have to be borne by the party which loses the case, then the claimant also has to inform himself about the realistic chances of his claim. This helps to exclude unmeritorious claims. Apart from this, the cost of litigation can be avoided by insurance for legal expenses.

Taken as a whole, the proposals in the discussion paper point towards largely adopting class actions such as in the USA and to establishing collective dispute resolution out of court. We do not see the deficiencies of US law as having been eliminated. The lack of need and the lack of the competence of EU to enact law in this area also argue against further action by the Commission. In addition, we also refer to our observations in our position papers of 13th February 2009 and of 3rd March 2008.

B. The individual options

Option 1: No action

The BDI is of the view that the need for collective redress measures has not been proved by the Commission's investigation. Neither the number of cases nor their content is convincing. From a legal point of view there is no legal basis for measures by European institutions. All the other options put forward accept either deliberately or unknowingly that abuses of non-European cases such as class actions will find their way into our legal system and conduct of cases. The Commission should therefore completely dispense with this project. After all, it has also given up previous attempts to introduce the class action because the disadvantages clearly predominated. There are now several new European rules on individual law enforcement. These must first be tested and the experience evaluated. Independently of this, there are appropriate national and cross-border procedures for enforcing the rights of consumers in the Member States of the EU.

Option 2: Developing self-regulation

Many business enterprises have already adopted measures of self-regulation for dealing with disputes. There is therefore no urgent need for a standard model for resolving disputes. Such a model always has the weakness that it cannot do justice to the special features of products, services and enterprise structures of all kinds. In several respects the Commission's texts to date go too much into detail so that ADR standard rules are frequently difficult to handle in dispute resolutions. Precisely in the case of mediation it is vital that it should not be dominated by bureaucratic regulations.

Codes of conduct and certifications are in principle appropriate instruments for setting minimum standards. However, they are not suitable in

all sectors or areas. We therefore consider the best approach to urge enterprises to continue to expand their complaint management.

Options 3 and 4: Setting up of binding or non-binding collective ADR schemes and benchmarks for judicial collective redress schemes in combination with additional powers under the Consumer Protection Cooperation Regulation

The BDI rejects both proposals. In our view it is only a preparatory step towards binding collective dispute resolution and judicial collective redress schemes as under option 4, when under option 3 such procedures are proposed as non-binding. As previously explained, pan-European ADR mechanisms are not necessary since on account of existing individual legal protection there is no deficit in legal redress.

It is true that out-of-court dispute resolution is a sensible means of avoiding litigation. As mentioned in our comments on option 2, it is frequently practised. However, the disparate nature of branches, general circumstances and legal systems in the Member States do not permit a uniform system to be imposed without more ado. What is more, the EU rules on courts of jurisdiction and enforcement and on applicable law for cases with consumer claims from several countries are not practicable. It does not lead to simplification if a court has to apply several legal systems in a mass action. The intended lumping together in collective actions in material and procedural respects cannot fulfil the expectations of the consumer. Subjecting those engaged in business to this blanket procedure is equally unreasonable and ultimately forces them to pay large amounts of money for a court action which is obscure.

We consider totally inappropriate the goal linked to options 3 and 4 of entrusting the authorities of the Member States explicitly named in the CPC regulation for cooperation and information in the EU with the distribution of the profits skimmed off and of compensation. On the one hand, the possibilities of skimming off profits have so far been very limited. Extending these possibilities contained in competitive law to all compensation cases in the consumer area is just as questionable as the uniform introduction of collective redress. The legal preconditions for measures to skim off profits are limited to a few concrete individual cases of deliberate infringements. It is quite inexplicable why the method of skimming off profits is intended to be applied in the area of civil law. It must also be considered that even in certain cases of breaches of fair practices the profit skimmed off does not go to the plaintiff (consumer organisations). These are absolutely special cases which are completely inappropriate as a model for every compensation claim under civil law.

On the other hand, it has traditionally been the case in Germany that there is no enforcement by authorities of private compensation claims. From our point of view it is therefore mistaken to extend the CPC regulation contrary to its original intention and to enforce private claims with official means. Incidentally, with this proposal the costs of the litigant associations seem to have taken centre stage at the expense of a balanced

solution for settling claims. What is more, if the authorities mentioned in the CPC regulation should be involved, option 3 can hardly be classified as non-binding. Consequently, in our view options 3 and 4 are not suitable approaches and must therefore be rejected.

Option 5: An EU-wide judicial collective redress mechanism including collective ADR

This option also contains the proposal for a binding instrument obliging the Member States to establish a voluntary collective dispute resolution scheme (ADR) and to make available a judicial collective redress system in line with the EU specifications. It is intended as a model procedure that is to apply in all comparable cases. Consumers, consumer organisations and competent authorities such as the ombudsman are to be entitled to institute proceedings. Consumer organisations are to be given mutual recognition throughout the EU. The claims are then to be announced in a follow-up procedure. The courts of jurisdiction and applicable law differ. The defendant has to inform consumers affected about their claims and organise the distribution of compensation.

For all sectors of industry this procedure does not contribute to transparency and cost limitation so that we reject it. It is true that in the German capital investor test case law - temporarily in force until 2010 -, which is not congruent with this proposal, a general ruling is obtained with an effect for many individual cases which were filed previously. However, this concerns a relatively straightforward area of claims in connection with public capital market information. Yet even here it is not always a simple matter to arrive at the right decision.

In contrast, given the diversity of consumer claims, especially in the product and services sectors, it will be no simple matter to uniformly determine questions of law and fact. Since even if the cases here were all comparable, for example with the same deficiency or the same product defect, there would still be the need for every single harm to be set out and proved individually. In this respect, in every follow-up case it would have to be proved that the nonconformity, deficiency or defect was actually present in the actual individual case and led to the harm for which compensation is being claimed. It would be essential to have an extensive hearing of evidence regarding the concrete causes and course of the harm. Differing courses of harm and extent of harm are not suitable for test cases and it is precisely this which makes class actions questionable. A simplification of the procedure, reduction in costs and an increase in the efficiency of judicial redress can therefore not be achieved in this manner.

Added to the above is the fact that the material bases for claims are not uniform in the EU. If the competent court and applicable law for the planned test case and follow-up procedure are also to be determined in a non-uniform manner (no. 62, p.19 of the discussion paper) so that courts of various Member States make judgements based on foreign law, the whole procedure becomes cumbersome, impenetrable, costly and time-

consuming. It is conceivable that there would be very different results on account of different laws and interpretations. It is accordingly not obvious what the benefit of the proposed procedure could be.

It is also not clear how far the test case is to apply. The DG SANCO does not seem to want to commit itself on the obligation of those affected to declare their participation in the procedure (opt-in). However, neither will there be a clear rejection of the USA model of the opt-out. The casual handling of the reach of legal force gives cause for concern. The right to a court hearing and the principle of party disposition anchored in procedural law are ignored. This is also likely to appear problematic from the point of view of consumers. According to this proposal, if the claim were to be rejected, a consumer not actively participating in the lawsuit would have no chance of taking legal action on his own behalf.

In conclusion, the fixing of the competent court and applicable law in accordance with where the market is most affected is too vague since these can vary at various stages of the procedure. Since no clear limitation of costs and no effective instrument against improper procedures are put forward, option 5 with the model procedure meets with no approval from industry.