

ZENTRALER KREDITAUSSCHUSS

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Comments on the European Commission White Paper on Damages actions for breach of the EC antitrust rules

Berlin, 14 July 2008

The Zentraler Kreditausschuss (ZKA) is grateful for the opportunity to comment as follows on the European Commission White Paper on damages actions for breach of the EC antitrust rules (COM [2008] 165 final):

I. General observations

The Commission's White Paper – like the Green Paper presented by the Commission in 2005 – raises the question of whether and, if so, how the law on damages for breach of the EC antitrust rules actually needs to be harmonised.

In this connection, we wish to stress one again that the law on damages should not be instrumentalised to enforce market regulatory policy interests. Such interests should be enforced solely by the means available under market regulatory law. EC Regulation 1/2003 and the resulting amendment of competition law in Germany by way of the 7th amendment of the Act on Restraints of Competition (GWB¹) in 2005, with, among other things, the right to skim off benefits, have thus already introduced much tighter rules of both a preventative and limitative nature. The function of the law on damages can only be to provide compensation for any injury suffered.

As already evident in the Green Paper, the starting point for the Commission's reflections remains the assumption that enforcement of damages claims for antitrust infringements in Member States is ineffective. This assumption cannot be upheld for Germany, where legislators have once again considerably expanded the conditions for effective enforcement of

¹ GWB = *Gesetz gegen Wettbewerbsbeschränkungen*

damages claims and the skimming off of benefits by means of the aforementioned 7th GWB amendment. Not least because of this amendment, the number of antitrust damages actions rose sharply in Germany between 2004 and 2007 – from 38 in 2004 to around 120 in 2007 (see in this connection Weidenbach/Saller, BB 2008, 1020, 1021). Before proceeding on the assumption that the mechanisms in place in this area in the Member States are ineffective, the results of the studies launched by the Commission in this connection should therefore first be awaited (for further details, see our remarks in section II.1.).

Furthermore, the measures proposed in the White Paper constitute direct interference in national civil law and civil procedure law, which differ under Member States' legal systems. The creation of special damages rules and special procedural rules for the area of competition law – which is the thrust of the White Paper – is, however, unnecessary in our view. The questions associated with damages actions for breach of the EC antitrust rules do not differ significantly from those in other areas of law. We are therefore firmly in favour of leaving civil liability and procedural rules in the field of antitrust damages actions to general national law. This is the only way to avoid breaks in the system with regard to general tort law and damages law, as well as procedural law.

In addition, it is questionable whether the Commission has regulatory competence for the issues addressed in the White Paper. Moreover, strict compliance with the subsidiarity principle is also required in this area. In its resolution of 20 May 2008 on EU consumer policy strategy 2007-2013, the European Parliament rightly pointed out that safeguarding effective enforcement of rights originating from Community legislation is principally an obligation of Member States; they are responsible for adapting their national procedural law in such a way that these rights are readily enforceable, to the benefit of consumers and economic operators (see resolution, paragraph 34).

II. Individual comments on the measures proposed by the European Commission

1. Standing: indirect purchasers and collective redress

a) Indirect purchasers

We welcome it that the Commission does not question the indirect purchaser's legal standing to bring an action, including the so-called passing-on defence. Whether an indirect purchaser has suffered harm caused by an antitrust infringement depends, however, on the circumstances of a specific case.

b) Collective redress

aa) According to the Commission Staff Working Paper accompanying the White Paper, the Commission's ideas on collective redress outlined in its White Paper are part of a comprehensive Commission strategy in this area. The results of the studies launched by the Commission particularly on the problems and efficiency of existing collective redress mechanisms are still outstanding. We therefore believe it is premature for the Commission to suggest the introduction of representative actions or opt-in collective actions at the present stage.

Irrespective of this, we wish to point out that, in view of the collective redress systems already in place in most Member States, we see no need to introduce additional collective redress mechanisms at European level either for the area of competition law or for other areas of law. We also have fundamental reservations about the introduction of collective action along US lines, as called for in some cases by, for example, consumer associations. Because it is at odds with the principle of party control over an action (*Dispositions-maxime*) and the right to a fair hearing under the law, application of the legal force of a judgment to all the members of a defined group constitutes a break with the system under civil procedure law. Thus, we welcome the explicit reference in the White Paper to the fact that the envisaged measures are rooted in European legal cultures and traditions and that a situation such as that in the United States is to be avoided. Whether this will be the case depends, however, largely on the concrete form of any legislative measures, although these are not yet clear enough because the proposals in the White Paper are worded too vaguely. However, a number of proposals made by the Commission already suggest that the

envisaged measures will not ensure a balance of interests between the parties to an action for damages, but will instead unfairly put the claimant in a better position.

The Commission does not, in particular, pay enough attention to the negative effects emanating from the “claims industry” that the introduction of general collective redress mechanisms threatens to create, as the situation in the US clearly shows. We wish to point out that, for example, whole sectors may be paralysed, risks may no longer be insurable and that the extra costs generated by a claims industry will ultimately have to be borne, in economic terms, by consumers.

In addition, arrangements would have to be made to prevent actions being brought by claimants that are designed primarily to induce the defendant to buy off the so-called “nuisance value”, i.e. to agree to a financial settlement that is no proportion to the actual amount in dispute. As the experience with collective actions in the US shows, such actions rarely lead to a verdict based on the facts. Particularly in the case of alleged mass harm, a collective action may be extremely dangerous for the defendant. Consequently, even defendants who are in a very good legal position still run the risk of suffering a potentially ruinous defeat. This makes them much more willing to agree to a financial settlement even if such a settlement is not justified by the facts.

For our fundamental reservations about the introduction of collective redress mechanisms at European level, please see in addition our comments on the “Benchmarks for effective and efficient consumer collective redress systems” already presented by the Commission’s Health and Consumer Protection Directorate (**Enclosure**).

- bb) The representative actions by qualified entities proposed in the White Paper are unsuited in our view to enforcing individual damages claims of several victims. Whilst the representative actions provided for so far under the GWB are concerned with protecting supra-individual collective interests, the enforcement of damages claims proposed in the White Paper is more about individual rights of individual victims. Such rights depend on the circumstances of an individual case, which cannot be determined in a joint action without the participation of the victims. In particular, the right of each individual victim to a fair legal hearing could not be maintained in representative actions. After all, questions concerning the causality between the anti-competitive conduct and the harm specifically suffered cannot be settled for all victims jointly, but only individually for each single victim.

Another argument against the introduction of representative actions in the area of enforcement of damages claims is that calculation of the amount of damages and distribution of damages payments may raise considerable problems. In accordance with the compensatory spirit of damages law, damages payments would have to be distributed to the individual victims. This presupposes – like the enforcement of a quantifiable damages claim – that the harm suffered by every single victim can be determined precisely. Moreover, the individual victims would have to be given the means to contest at law the decision on the distribution of damages taken by the qualified entities.

We also have fundamental reservations about the ideas expressed – but not concretised – by the Commission in the Staff Working Paper, according to which representative actions are to be possible not only for a group but also for identifiable individuals. This form of representative action would ultimately amount to collective action similar to the US opt-out model. As already explained in section II. b) aa), such a form of opt-out representative action would not, however, be compatible with the principles of constitutional law and procedural law, which are geared to providing individual legal protection.

Where the Commission Staff Working Paper proposes leaving the damages payments awarded with, for example, the representative entity (paragraph 56), this would increase the potential for abuse even further. There is the danger that the prospect of not inconsiderable damages payments will create (false) over-incentives for actions by consumer associations. What is more, this proposal is at odds with the idea of compensation. As explained in our introductory remarks, the purpose of the law on damages, aside from possible market regulatory measures, can only be to provide compensation for harm suffered. Purely market regulatory policy interests must, on the other hand, be enforced with the means available under market regulatory law.

For the same reason, and contrary to the Commission's proposal, qualified entities should not include state bodies. It is not the job of the state to enforce civil damages claims of individuals, let alone assume the cost risk associated with such legal proceedings.

- cc) Should European legislators consider that collective redress mechanisms actually need to be introduced, the introduction of opt-in collective actions proposed by the Commission would be a more acceptable approach in our opinion. This is the only way to preserve the victims' power of control over the damages claims to which they are individually entitled

and to avoid actions driven by third-party monetary interests.

dd) We welcome it in principle that, in addition to representative actions and opt-in collective actions, individual actions are also to be allowed to enforce damages claims in future. We also welcome it that the White Paper aims to prevent multiple compensation. The remarks on this in the Commission Staff Working Paper (paragraph 56) unfortunately fail to make clear, however, how the Commission intends to prevent multiple compensation in practice. The Commission's proposals on collective redress are not yet detailed enough on this point either.

2. Access to evidence: disclosure inter partes

We welcome it in principle that the Commission no longer refers to the pre-trial discovery system provided for under US law and still proposed as an option in the Green Paper.

The question of the burden of proof in the area of competition law does not, in our opinion, display any special features that would justify creating special rules for this area on the basis of the proposal made in the White Paper. General rules on consideration of the burden of proof are already in place at Member State level, e.g. in Germany in the form of Section 427 of the Code of Civil Procedure (ZPO)². Special rules at European level could lead to contradictions and breaks with the system in national legal regimes.

As regards the procedure for the disclosure of evidence proposed in the White Paper, which is based on prior substantiation of the claimant's claim, we wish to point out that the proposed requirement for the claimant or third parties to disclose precise "categories of relevant evidence" goes too far in our opinion. The term "categories of relevant evidence" is too vague to determine sufficiently precisely which documents are to be disclosed. It is therefore not enough to simply specify categories of certain documents. Instead, every document that is required to be disclosed should have to be specified as concretely as possible. Any other requirement would be incompatible with the *nemo tenetur* principle and the prohibition of

² Section 427 *Zivilprozessordnung* (ZPO) (Consequences of non-presentation by opposing party) reads: "If the opposing party fails to comply with the order to present the document or if the court finds in the case of Section 426 that it has not conducted a careful search to determine the whereabouts of the document, a copy of the document provided by the party producing evidence may be regarded as correct. If a copy of the document is not provided, the assertions made by the party producing evidence about the nature and contents of the document may be accepted as proven." (unofficial translation)

discovery, but also with the existing burden of proof requirement in civil procedure law and in Article 2 of Regulation 1/2003.

Furthermore, we do not see any need for EU-wide rules on the disclosure of evidence if – as also proposed in the White Paper and already provided for today in German law (Section 33 (4) GWB) – the claimant can in future refer in his damages action to a final decision by a cartel authority or a court of law in another Member State finding that an antitrust infringement has occurred. This would already help to improve the claimant's position significantly.

3. Binding effect of NCA decisions

The binding effect of final national cartel authority (NCA) decisions finding an infringement of Article 81 or 82 of the EC Treaty, as proposed by the Commission and already provided for in Germany by way of the 7th GWB amendment, is fundamentally appropriate in our view. It must be ensured in this connection that such binding effect relates solely to the finding of an antitrust infringement. All other questions associated with a damages claim for breach of antitrust rules, particularly concerning causality with regard to claims and quantification of damages, must continue to be handled by national courts considering the evidence freely at their discretion. This takes account of the principle that determining the material facts of the case and their consideration in civil proceedings are the job of the competent court.

4. Fault requirement

It should in principle be up to individual Member State tort law whether and, if so, in what form a requirement of fault exists for damages actions for breach of antitrust rules.

Though the Commission sees no policy grounds against the approach adopted in some Member States of dispensing with a fault requirement if a breach of antitrust rules has been proven, this approach would lead to absolute liability. However, in competition law fault-based liability is required. The switch from the former exemption system to a legal exception system has already created legal uncertainty among companies. If they were to additionally face an obligation to pay damages in future irrespective of fault, numerous economically sensible ventures that ultimately have no implications under antitrust law would likely be abandoned because of the considerable economic risks involved. In the end, this would unreasonably restrict companies' economic freedom – also to the detriment of the other side of the market.

5. Damages

The calculation of damages should also be left to the national legal regimes, which already have rules in this respect. Any special rules at European level would mean unnecessarily interfering with national legal systems.

We welcome it that in the White Paper the Commission has dropped its initial idea to introduce a punitive damages regime and now embraces the principle of compensation for harm instead. As already pointed out by the *Bundesrat*³ (upper house of the German parliament) in its comments on the Green Paper, the proposed issuance of guidelines for calculating damages by the Commission harbours the danger that the fundamental separation between legislative, executive and judicial powers will be impaired by such a soft law issued by the Commission which, on the one hand, does not have the force of legislation but, on the other hand, is to have more of a binding effect than a mere statement of a legal opinion. Moreover, we see no reason why one particular method of calculation should be preferred over another. Use of a specific method depends instead on the circumstances of an individual case. In Germany, for example, a court is authorised to estimate the amount of damages at its discretion and after considering all the circumstances or to officially order an assessment of the facts of the case by an expert (Section 33 (3), sentence 3 GWB in conjunction with Section 287 ZPO). Such an arrangement is appropriate, but also adequate for the claimant, to overcome the difficulties with regard to the provision of evidence that typically exist in an action for damages.

6. Passing on overcharges

We welcome it in principle that, particularly with the compensatory function of damages confirmed by the European Court of Justice in mind, the Commission does not intend to deny the infringer the right to invoke the passing-on defence.

At the same time, we have fundamental reservations about the Commission's aim to lighten the burden of proof by suggesting that indirect purchasers should be able to rely on the rebuttable presumption that the overcharge was passed on to them in its entirety. No special rules should be created for this aspect either, with Member States' general tort law continuing to apply instead. Under German law, for example, an adjustment of profit is only justified under strict conditions; under the general burden of proof rules the infringer carries the burden of producing evidence and the burden of proof. We therefore see no need for further regulation.

³ The *Bundesrat* is the upper house of the German parliament.

In addition, we do not think it is right that a presumption that overcharges have been passed on in their entirety is to apply in favour of the indirect purchaser, but not in favour of the infringer as well. This creates the danger of the infringer being doubly burdened if the indirectly victim can invoke the passing-on of overcharges to substantiate his claim, whereas in order to rebut a claim by the direct customer the infringer would have to – but may not be able to – prove the passing-on of the overcharges.

7. Limitation periods

Civil damages claims in the area of competition law should also be covered by the general rules on limitation in force in the individual Member States. It is also appropriate for this area that the limitation period should only commence once the claim has arisen and the creditor has gained knowledge of the circumstances substantiating the claim and the identity of the debtor or should have gained knowledge thereof without being grossly negligent.

Instead of the Commission's proposed "new limitation period" of at least two years commencing once an infringement decision has become final, the arrangement under German antitrust law, whereby the limitation period is suspended for the duration of the frequently lengthy cartel authority proceedings (Section 33 (5) GWB), is more appropriate in our opinion. Without establishing special rules deviating from the general law on limitation periods, this ensures that creditors retain their claims for the period in question and actions are allowed after effective completion of cartel authority proceedings.

Should the Commission stick to the idea to introduce a special limitation regime for the area of competition law, it should ensure legal peace by also providing for a uniform, EU-wide period for exclusion of claims for breach of EC antitrust rules. Moreover, the subjective element proposed by the Commission for the commencement of the limitation period ("*before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him*") is – contrary to the Commission's objective – likely to make determining when the limitation period starts to run even more difficult. In the interests of all stakeholders, rules allowing the date on which the limitation period commences to be determined clearly would be welcome.

8. Costs of damages actions

As the Commission rightly points out in the White Paper, cost rules influence access to courts of law. They are a suitable regulative instrument to, on the one hand, prevent actions without any prospects of success in the public interest of a functioning legal system and, on the other hand, to also allow parties who do not have extensive financial resources to conduct litigation.

The regulative character of cost rules would, however, be diluted if – as suggested in the White Paper – the losing party did not have to carry the costs of the winning party in certain “justified cases”. Exactly which cases the Commission would like to see fall under such a rule is something the Staff Working Paper also fails to make clear (paragraph 255ff.). It confines itself to outlining the cost rules in force in some Member States, under which in Italy, for example, the court may make a different decision on the parties’ costs in the event that the legal issues are complex and unusual.

Such a different cost rule could prove to be a “gateway” for potential claimants to conduct litigation at the expense of the winning defendant. This is unreasonable particularly under the new legal exception regime and increases the risk of abuse considerably. If no proof of an antitrust infringement can be submitted and the defendant’s own assessment of the situation was thus correct, the defendant should not have to bear the costs of the proceedings.

Against this backdrop, we see no need for any change to the “loser pays” principle in legal proceedings, particularly also given the existing possibility to obtain legal aid.

9. Interaction between leniency programmes and actions for damages

The Commission is adopting the right approach in stating that, in order to ensure the functioning and effectiveness of leniency programmes, rules which do not put the leniency applicant in a less favourable situation than the co-infringers are needed. The proposed protection for companies which have applied for leniency should not be confined only to corporate statements, but cover all documents made available by the immunity applicant.

We have fundamental reservations about the Commission's idea to limit the civil liability of immunity applicants who have been fined. Such a limitation would be at odds with the principle of compensation for injury.

Enclosure

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Comments on the benchmarks for effective and efficient consumer collective redress systems published by the European Commission's DG Health and Consumer Protection

Berlin, 3 March 2008

The European Commission's DG Health and Consumer Protection has published on its website a set of benchmarks for effective and efficient consumer collective redress systems, along with a number of questions, for public consultation. The Zentraler Kreditausschuss (ZKA) welcomes the opportunity to comment on the benchmarks as follows.

I. General remarks

First of all, it is surprising that the DG has presented for consultation at this point in time a set of benchmarks for effective and efficient consumer collective redress systems without any further explanation, although the results of the study commissioned by it on the problems and the effectiveness and efficiency of existing collective redress systems have still to be presented. Such an approach is likely to be incompatible with better regulation principles. Instead, the basic or preliminary question of whether and, if so, for which cases a European collective redress mechanism is needed in addition to the collective redress systems already in place at national level should first be addressed.

Whilst not wishing to anticipate the general policy debate that has still to be held, may we make clear at this point that, given the collective redress systems in place in most EU member countries, the ZKA sees no need to introduce an additional collective redress mechanism for consumers at European level. What is more, the introduction of collective action along US lines – as called for by, for example, consumer organisations in some cases – meets with general reservations. Because it is at odds with the principle of party control over the initiation, scope and termination of an action, application of the legal force of a judgment to all the members of a defined group constitutes a break with the system under the law on civil proceedings. Also, as experience made in the US clearly shows, there is the danger that the initiative for bringing an action may not come from consumers themselves but from other interested parties for completely different reasons. Besides these disincentives, attention should be drawn to the extremely high costs associated with this mechanism. Against this

backdrop, it is no surprise that the class action system has been repeatedly reformed in the US to counter undesirable developments in this field.

II. Specific remarks

Question 1: *Do you agree with these benchmarks?*

No. We wish to comment as follows on the benchmarks listed by DG Health and Consumer Protection:

- *Benchmark 1:* The broadly worded description of the conditions for a collective action in cases “*which they (consumers) could not otherwise adequately pursue on an individual basis*” must be rejected as too vague. Legal certainty in particular requires a carefully worded description of the specific cases in which a collective action is to be possible or in which deviation from the principle of individual proceedings is to be justified. This means – as already mentioned in section I above – first awaiting the findings of the study on the problems and the effectiveness and efficiency of existing collective redress systems. Only then can it be assessed whether or to what extent the introduction of collective redress systems for consumers is actually called for in the first place.
- *Benchmark 2:* Where thought is being given to allowing consumers to be represented by a third party in collective actions, the following should be borne in mind: It should first be ensured that any third party authorised to bring a collective action is apt and able to do so solely in the interest of consumers. In particular, third-party monetary interests must not be allowed to be the actual driving factor behind proceedings, as is sometimes the case in US class actions for example. It should also be ensured that basic legal principles of civil proceedings, such as the principle of party control over the initiation, scope and termination of an action and the right to a legal hearing, remain intact where consumers are represented by a third party.
- *Benchmark 3:* How the risk relating to legal costs is handled is a central problem in collective redress systems. We thus agree with the DG that if collective redress for consumers is introduced the legal costs of both parties should not be artificially and unreasonably increased so as to avoid creating too much of a deterrent for consumers. At the same time, it should not be overlooked that the amount of legal costs can also help to prevent fraudulent and rapacious actions. Therefore, also under

collective redress systems the impact in financial terms of an action for compensation on both parties (i.e. what legal costs they will face) should be made clear to consumers.

If the wording of Benchmark 3 is intended to mean that the GD is in favour of abandoning the “loser-pays” principle for collective actions, this must be firmly rejected. Any party who causes legal costs (i.e. costs of the proceedings and lawyers’ fees) by bringing an ultimately unsuccessful action must reimburse the costs incurred to the other party. It would be unfair if a defendant, after winning a collective action, were to have to carry the costs incurred as a result of the action. In Germany, for example, the legal aid system in place ensures that access to the courts in justified cases is not precluded by financial considerations. The risk relating to legal costs could also be covered by taking out legal costs insurance, involving a company funding legal costs or by setting up a consumer organisation legal costs pool. The so-called “American rule”, meaning that each party carries its own legal costs itself irrespective of the outcome of the proceedings, cannot be taken as a model. As lawyers in the US usually only receive a fee if they win the case, there is no cost risk whatsoever for the plaintiff, whereas the danger of abuse increases since it is generally lawyers who have more of an interest in bringing a collective action.

- *Benchmark 4:* We agree with the DG that any compensation to be provided to the plaintiffs should not be excessive and not take the form of punitive damages in any way. Punitive damages would be inconsistent with the European understanding of a separation between civil compensation and state-imposed penalties. For example, in Germany the Federal Court of Justice rejected the declared enforceability of a US court verdict because the punitive damages awarded were incompatible with basic principles of German law (BGH NJW 1992, p. 3103 f.). It found that damages in excess of the harm caused were not only at odds with the compensatory function of the law on damages but that the introduction of multiple damages also involved an objective danger of abuse by giving the plaintiff a “bigger stick” to force the defendant to accept a financial settlement – even prior to the initiation of an action.
- *Benchmark 5:* The idea to introduce a right to skim off the profit gained from the incriminated conduct should be dropped in general. As with punitive damages, it is questionable whether private individuals can be given a right that would ultimately have a predominantly punitive character. Punishment is the state’s duty alone. In

addition, in many areas the conduct of enterprises is already controlled by separate public-sector obligations which, if breached, carry penalties of their own.

- *Benchmark 6:* The GD's proposal that unmeritorious claims should be discouraged is expressly welcomed. It should, however, be explicitly reflected in the requirements set for collective actions. Otherwise there will inevitably be a contradiction. If the GD's benchmarks are implemented as proposed, unmeritorious claims will not in fact be discouraged after all.
- *Benchmark 7:* This benchmark states that there should be sufficient opportunity for adequate out-of-court settlement. Such opportunity is already available today in the form of the dispute-settlement schemes that have been established throughout the EU. These have proved successful and are widely known.

However, arrangements should also be made to prevent actions being brought that are designed primarily to have the defendant buy the so-called "nuisance value" from the plaintiff, i.e. to agree to a financial settlement that is disproportionate to the amount in dispute. As the experience with class actions in the US shows, such actions rarely lead to a verdict based on the facts. Particularly in the case of alleged mass harm, a class action may be extremely dangerous for the defendant. Consequently, even defendants who are in a very good legal position still run the risk of suffering a potentially ruinous defeat. This makes them much more willing to agree to a financial settlement even if such a settlement is not justified by the facts. The consequence is that only 15% of all class actions are decided in court.

- *Benchmark 8:* If the introduction of an official information-network is considered necessary to allow "bundling" of individual actions and to prepare and manage possible collective redress actions, it should be ensured that the views expressed in such a network are moderated. It must at any rate be ensured that potential violations of the personal rights of any adversaries or of their employees are avoided.
- *Benchmark 9:* The proposal that the length of the proceedings should be reasonable for all the parties is welcomed in principle. At the same time, this must not mean that the basic rights of the parties with regard to the proceedings are curtailed in any way. It must not, in particular, lead to any shortening of due process of law through the prescribed channels.

- *Benchmark 10*: The proposal that collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related parties cannot be supported. It fails to take sufficient account of the fact that in many EU member states contingency fees are either not allowed at all – as is currently the case in Germany – or only to a limited extent. If, in addition, punitive damages are rejected (see Benchmark 4) and the compensation that is to be obtained under a collective redress system is thus limited to recompense for harm which has actually occurred, only the plaintiffs or the claimants participating in the collective action are entitled to the proceeds of the action. How the costs incurred by the parties’ representatives in the proceedings are to be reimbursed is something that must to be handled independently of the question of who is entitled to the compensation.

Generally speaking, the use of the term “*proceeds*” in Benchmark 10 suggests an over-commercialisation of the enforcement of rights under collective redress systems. Damages are designed as compensation, not as a form of enrichment. Moreover, too little attention is paid to the negative effects that emanate from an imminent “claims industry” through the introduction of general collective redress mechanisms, as the situation in the US clearly shows. It must be pointed out that, for example, whole sectors may be paralysed, risks may no longer be insurable and that the extra costs a claims industry threatens to create will ultimately have to be borne, economically, by consumers.

Overall, the benchmarks fail to display the required awareness of the many different problems associated with the introduction of collective redress systems. The experience made with class actions in the US clearly shows the considerable potential for abuse that goes hand in hand with a collective redress mechanism. Besides the basic question of whether a European collective redress system is needed in addition to the systems already in place at national level, the following questions in particular need to be discussed in more depth:

- How should the risk relating to legal costs be shared?
- Should the plaintiffs be required to provide security for the legal costs incurred or to advance these?
- Should lawyers actually be allowed to agree contingency fees for collective actions? See in this connection our remarks on Benchmark 10.

- How is it ensured that there is “legal peace” once a collective action has been brought to a conclusion?
- In this context, the scope of the material legal force of a judgment or financial settlement is a question that needs addressing.
- Should bringing an action have the effect of interrupting or suspending prescription, with the result that companies have to make allowance for the possible assertion of large claims for compensation in their balance sheets for several more years?
- Should bringing a collective action be subject to examination by a judge in each case? If so, which criteria should be applied for admission of a collective action?
- How should evidence be submitted in collective proceedings?
- How is it ensured that collective actions are handled uniformly throughout the EU?

Question 2: *Do you consider other benchmarks to be important?*

Question 3: *Do you consider that more benchmarks or fewer benchmarks are necessary?*

See in this connection our reply to Question 1.

Question 4: *Do you have experiences with existing mechanisms of collective redress, especially in relation to specific sectors and/or in relation to cross-border disputes?*

The analysis and evaluation of collective national redress systems for consumers conducted by the University of Leuven on behalf of the European Commission, plus the country reports accompanying it, already give an overview of the national redress systems in place in this field. May we add to this overview by pointing out that German law already provides for various ways of “bundling” collective interests:

- Joinder of parties where common questions of law or fact are involved. Under this procedure, the injured consumers act together jointly as plaintiffs (§§ 59, 60 Code of Civil Procedure).
- Bundling of individual claims by way of consolidation of actions (§ 147 Code of Civil Procedure). The different plaintiffs also become joint litigants. This allows bundling of proceedings with collective taking of evidence and a collective decision.
- To obtain redress for consumers, consumer organisations can collectively assert in their own name payment claims assigned to them by consumers if this is – as legislators put it – “in the interest of consumer protection” (Art. 1 § 3 No. 8 Act governing Legal Advice). This is deemed to be the case, for example, if there is no

incentive for the consumer to bring an individual action because the amount in dispute is small. Following the reform of legal advice in the Act on Legal Services, which enters into force on 1 July 2008, there will no longer be a requirement in future for collective assertion of claims to be expressly in the interest of consumer protection.

- The Investor Model Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz*), which entered into force on 1 January 2005, allows investors to have model questions of law or fact that are raised in different proceedings dealt with uniformly, with broad binding effect, by way of a model decision issued by a higher regional court. This model decision is binding for all proceedings registered in relation to these model proceedings. The model proceedings can be used particularly for actions by investors wishing to assert claims for compensation due to false, misleading or withheld public capital market information.

The ZKA shares the German government's view that collective redress mechanisms have been expanded significantly under German law in recent years (see Bundestag Printed Paper 16/7666, p.8). As far as can be seen, consumers and consumer organisations are making increasing use of these mechanisms. The ZKA is unable to say whether these collective redress mechanisms have also been used in a cross-border context.
