"*DISCLAIMER - The European Consumer Consultative Group (ECCG) is a consultative group set up by the Commission, entrusted to represent the interests of consumers at the Commission and to give opinions on issues relating to the conception and implementation of policy and action on the subject of protection and information of consumers. The opinion of the ECCG does not reflect the opinion of the Commission or one of its Services".*

Context

- *The ECCG discussed the Commission Green Paper on consumer collective redress at its meeting of 9 December 2008 with the Commission lead services responsible for this issue.*
- *An ECCG sub-group was created in order to prepare an ECCG Opinion on the Green Paper and met for this purpose on 11 February 2009.*
- *Following these discussions, the members of the ECCG have adopted the Opinion stated below.*
- *The Commission chairs the meetings of the ECCG. However, the Commission does not interfere with the drafting or adoption of ECCG Opinions.*
- *The Commission lead services will take into account the ECCG Opinion when preparing their feedback statement on the Green Paper.*

ECCG Opinion on the Commission Green Paper on consumer collective redress – 27/02/2009

The European Consumer Consultative Group (ECCG) is the Commission's main forum to consult national and European consumer organisations.

The ECCG welcomes the analysis undertaken by the Commission in the area of collective consumer redress (CCR) as for many years now, CCR has been identified as a useful tool to respond to major shortcomings in the area of consumer access to justice. The Green Paper constitutes a welcome analysis of all the issues at stake and identifies a number of possible solutions to achieve effective collective consumer redress.

Q1: What are your views on the role of the EU in relation to consumer collective redress?

The ECCG considers that there is a genuine need for EU intervention in the area of CCR. By the creation of an EU-wide market without borders, and a progressively harmonised regulatory framework, the process of EU market integration has to be complemented by a set of minimum common rules in the area of consumer redress to limit differences in national legislation.

Consumer confidence in markets being a major challenge in current times, it is essential to provide consumers with signals that indicate that if they face problems with suppliers, they have accessible means to obtain redress. Therefore, from the consumer perspective, the absence of collective redress mechanisms in some Member States (MS) constitutes a major loophole in protection. For those Member States where such mechanisms exist, they are not always extended to consumers who reside abroad, nor can they easily be applied against undertakings that are not located in the Member State concerned. So, a more harmonised approach towards consumer collective redress as it is presently defined in the Member States (ranging from inexistence of such a system to judicial collective redress), along with other measures concerning consumer redress (for example penalties for breaches and statutory limits) and other consumer empowerment tools (enhanced consumer rights,

information, education) would help improve consumer confidence to shop across border and therefore contribute to a better functioning internal market. Also, policy makers should take advantage of this reflection in order to learn from the various national experiences and to improve the existing systems to make them more effective and efficient.

Finally, the ECCG considers that the principles and mechanisms underpinning the Small Claims Regulation (861/2007/EC) may be a worthwhile example to learn from. It shows the EU is able to adopt common rules which allow swifter and less costly justice as well as direct enforceability of court decisions in member-states.

Q2: Which of the four options set out above do you prefer? Is there an option which you would reject?

The ECCG expresses a strong preference for the implementation of a binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States (option 4). Such a mechanism should comply with several minimum standards in order to constitute an effective tool of efficient consumer access to justice.

This mechanism constitutes the only possible solution in those circumstances where undertakings are not willing to compensate victims on a voluntary basis. Such an approach also closes a gap with regard to enforcement by public authorities that, at present, may impose fines, but are not enabled to order compensation for victims. Also, public authorities do not necessarily have the powers, means or the will to pursue all the cases of collective damages that arise.

The ECCG rejects option 1, because of the reasons set out in the answer to Q1.

Option 2 alone is not acceptable, because it does not solve the problem of inefficiency of existing systems. Furthermore it encourages forum shopping and overloading of courts. Studies show some collective redress systems have clearly failed to achieve much in the area of consumer protection. To some extent, option 2 looks similar to option 4, as it provides for a collective redress mechanism through co-operation between Member States, by reference to the thirteen MS that have introduced a collective redress system. According to the Green Paper, MS that do not have a collective redress mechanism should establish one. However when it comes to option 2, the Green Paper does not refer to whether these systems are judicial or not, which ECCG believes is very important. Therefore this option is not acceptable unless it is combined with effective and efficient judicial collective redress mechanisms in every MS (option 4). Also, option 2, while initially referring to the fact that MS that do not yet have a judicial collective redress system should put such a system in place, only develops the cross-border aspects linked to such systems.

Option 3 is also not acceptable, if it is not combined with option 4. Access to the court must be(come) possible. ADRs are dependant on the willingness of the business to cooperate and are of no use in cases of rogue traders. Furthermore the use of ADR in Europe is diverse and closely linked to cultural traditions. Most current ADR mechanisms concentrate on individual disputes and are not adequate for collective handling of complaints. Also they can be inefficient and can lack independence. Existing ADR mechanisms are set up with the intention to solve relatively simple individual matters in a less formal and quick manner. Finally ADR is not an alternative if there is no access to judicial collective redress. Experience has shown that if judicial resource is not possible, there is a lack of incentive to handle cases through ADR. .Therefore the ECCG has serious doubts of their suitability to deal with collective redress cases, given their complexity and high financial stakes.

Q3: Are there specific elements of the options with which you agree/disagree?

Overall, the ECCG believes that many of the features described under the various options also apply, maybe with nuances, to the other options. This is the case, namely, for the following: questions linked to jurisdiction and applicable law, funding, opt-in/opt-out, prevention of unmeritorious claims. In particular, the difficulties linked to cross-border litigation, as described most extensively under option 2, will also apply under option 4. Therefore, it could be misleading to present these features as being linked to a specific option.

The problems linked to the impossibility of defining individual damages or to too small individual damages to be effectively paid to consumer, are presented in the Green Paper under option 3, but they also apply to procedures under option 2 and 4. Similarly, the proposal made by the Commission to consider skimming off profits which could then be used to fund collective actions or other projects benefiting consumers mentioned in option 3, should be equally applicable under option 4. These skimmed-off profits could be transferred into an independent fund (at EU or MS level) that could be used to finance, according to certain rules, the preparation of collective consumer actions and other projects benefiting consumers. Examples of such funds are found in Portugal (promoting consumer rights with money from unfair commercial practices by utilities), Italy (money from sanctions in the area of competition made available for initiatives that benefit consumers) and Greece (collective compensation awarded by courts in injunction cases in general consumer interest is split between consumer organisations that filed the case, umbrella organisations and a public fund).

The ECCG particularly welcomes the proposal in the Green Paper related to the role of the judge by deciding whether a claim is unmeritorious or admissible. European judges, unlike judges in those non-EU jurisdictions the Green Paper refers to, have a cautious approach towards admissibility of mass claims and could therefore act as efficient and independent gatekeepers against abuses.

The proposal in point 57 of the Green Paper is a first step towards a creative solution in the context of the very lively debates devoted to opt-in and opt-out : it proposes to allow consumers to join a mass action after judgement in a test case has been delivered. However, the notion of test case can include a lot of different practical situations, and it is important that such a system complies with minimum standards of efficiency and effectiveness. Also, in this context, the question of whether each consumer should have to follow a specific judicial procedure in order to benefit from the judgement, or whether more flexible solutions could be identified, is crucial. Such an approach would prevent many of the shortcomings of an opt-in procedure, while avoiding disadvantages of the opt-out procedure. The discussion will then have to lie with the type of procedure that could be cost-effective for an individual consumer to undertake to obtain compensation: would this be a formality or would the consumer have to prove his individual damage and according to which rules? The merit of this approach will largely depend on the ease of the follow-up procedure.

The Green Paper proposes, in cases of mass claims where consumers come from different MS, to envisage the possibility of imposing one single law, by derogation to the principles contained in the Rome I Regulation which would call for the application by the judge of as many national rules as there are consumers residing in different MS. This law could be the law of the trader, or that of the most affected MS or that of establishment of the representative entity. From the point of view of consumer protection, such a derogation to international private contract law is unacceptable: this is totally against legal certainty, as the law applicable to a given claim could

depend *a posteriori* on the facts of the case. Thus the ECCG considers it vital that the provisions of the Rome I Regulation should be applied fully.

Q4: Are there other elements which should form part of your preferred option?

According to the ECCG, an EU instrument defining a judicial mechanism for collective consumer redress should at least provide the following:

- A ***broad scope*** for the mechanism : it should apply to all type of consumer complaints, be they contractual or non-contractual.
- A **set of minimum common rules** on collective redress
- Application to ***both domestic and cross-border*** litigation, as long as it is not detrimental to existing collective redress structures.
- ***Accompanying measures linked to information*** to be given to consumers as to the introduction of a collective claim and/or the issuing of a decision making it possible for other victims of the same behaviour to claim compensation
- Provisions linked to the modalities of distribution of damages.

Q5: In case you prefer a combination of options, which options would you want to combine and what would be its features?

The ECCG believes that options 4 and 2 may ultimately be combined, as an effective implementation of a EU wide collective redress mechanism will call for cross-border cooperation and will rely, in practice, on the policy, advice and enforcement networks that already exist. The ECCG would not favour the creation of a new network, given the costs involved in such a creation, as well as the confusion for consumers in the presence of the various networks with similar, but not identical attributions.

Option 4 can also be combined to some extent with the proposals contained in option 3, in particular the proposals for improving alternative dispute resolution mechanism could be elaborated upon. The ECCG asks for such an alternative procedure not to be considered as a mandatory first step in a litigation scheme, as experience has shown that where the professional party lacks will to co-operate, such a procedure constitutes a mere means of delaying redress. Also, the ECCG proposes to consider the relevance of judicial approval of settlements obtained within such alternative procedures.

The extension of the Small Claims Regulation to collective damages could also be envisaged, but only as a complementary action. ECCG does not believe in this solution alone. As it stands it does not cover national cases but only applies to cross-border cases and for cases where the value at stake is not higher than 2000 euros. The necessity of identifying each individual consumer is also a problem. The ECCG believes that it could not be an adequate substitute to a general collective judicial redress mechanism.

The proposal contained in the Green Paper to provide public authorities with power to require traders to compensate consumers is hard to accept from a legal point of view. We have seen that the Commission itself has not been able to compensate consumers, even in cases where it has uncovered consumer harm such as the recent sweeps carried out against airline companies. It would require the granting of extra-territorial powers to national public authorities and a significant change in legal systems which consider that compensation can only be imposed by the judiciary, etc. From the point of view of victims of unlawful behaviour, there is no guarantee that public authorities will decide – or will have sufficient resources - to take up a case against a trader: that is why public enforcement has to be complemented, in terms of

compensation, by private enforcement of consumer rights, through the traditional judicial system.

The Green Paper also refers to internal complaints handling systems of undertakings, and in particular in those sectors where more mass problems are reported. The ECCG can only welcome a more customer friendly approach within undertakings and business sectors. However, we urge the Commission to concentrate on collective redress mechanisms that provide guarantees of independence and prospects of due compensation for all victims of unlawful behaviour.

The proposal, finally, to organise awareness-raising actions constitutes a useful and even necessary tool to increase consumer information on the instruments at their disposal to obtain compensation.

Q6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?

The measures proposed at EU level should be binding because it is crucial that all European consumers have equal access to redress. First and foremost because the access to justice is a basic right for consumers which needs to become a reality. This can only be guaranteed if each MS is compelled to introduce a set of common rules. Experience shows that non-binding EU instruments have not worked effectively and lead to fragmented rights for consumers. Secondly because it necessary to make the internal market work fully in consumers´ interest. Lack of redress has been shown to be one of the significant causes of low trust in consumers shopping cross-border.

Q7: Do you consider that there could be other means of addressing the problem?

No, see responses to Q1 to Q6.

Rogier Klimbie (Netherlands), rapporteur, ECCG opinion on the Commission Green Paper on collective consumer redress

27th February 2009