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## **Position Paper of the German Bar Association (Deutscher Anwaltverein)**

**by the legislative Committee “European Contract Law” in collaboration with the  
Committee on “Civil Procedure”**

**on the**

### **Green Paper on Consumer Collective Redress**

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  - DG Competition
- European Parliament
  - IMCO Committee
  - JURI Committee
- Council of the European Union
- Permanent Representation of the Federal Republic of Germany to the EU
- Permanent Representations of the German Bundesländer
- Council of the Bars and Law Societies of Europe (CCBE)
- Representatives of the liberal professions in Brussels

*The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 67,000 German lawyers. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession.*

## **Introduction**

The Commission of the European Union (**EU**) has initiated a debate regarding consumer collective redress. It identified benchmarks that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers<sup>1</sup>. On 27 November 2008, the Commission has published the Green Paper On Consumer Collective Redress<sup>2</sup>. In this Green Paper, the Commission has summarized the status of consumer collective redress in the EU member states. It has suggested four options for dealing with perceived shortcomings.

The Commission has requested interested persons to express their view on consumer collective redress, and has added a list of seven questions to the Green Paper for this purpose. For ease of reference, the German Bar Association first summarizes the options and then expresses its view on the Commission's questions.

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<sup>1</sup> Available at [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm).

<sup>2</sup> Available at [http://ec.europa.eu/consumers/redress\\_cons/greenpaper\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf).

## **Options for Improving Consumer Collective Redress (summary)**

The Commission's four options suggest different degrees of legislative activity on a European level.

### *Option 1: "Wait and See"*

Option 1 does not promote further action at the current stage. Rather, it suggests that the effects of existing or soon-to-be-implemented EU-measures should be monitored and assessed before further action is taken. Those measures are, in particular, the Mediation Directive 2008/52/CE and the Small Claims Regulation 861/2007.

### *Option 2: Further Cooperation*

Option 2 suggests to improve consumer redress by developing cooperation among member states. In particular, member states should allow foreign consumers to join national collective actions. Foreign entities should be allowed to bring actions to national courts. To this end, an equitable mechanism for distributing the costs of proceedings would have to be introduced.

Creating cooperation networks of public bodies and consumer organisation would contribute to consumer redress, as would information campaigns. Cooperation networks could be facilitated by the European Consumer Centres Network.

### *Option 3: Mixture of Measures*

Option 3 consists of a mixture of different measures. One of these measures would be to encourage alternative dispute resolution for solving consumer/trader disputes, and to extend the scope of small claims procedures to mass claims. Another measure would be to widen the scope of the Consumer Protection Cooperation Regulation. Inter alia, this would include granting a "competent authority" the power to require traders to compensate customers, if those customers have been harmed by intra-Community infringements. Finally, Option 3 suggests complaint-handling systems for all businesses.

### *Option 4: Introduction of a Uniform Collective Redress Mechanism*

The central feature of Option 4 is the introduction of a collective redress judicial mechanism in all Member States. Since the Green Paper deems different means of

redress to be disadvantageous<sup>3</sup>, this is apparently supposed to be a *uniform* collective redress mechanism. In order to make financing proceedings easier for the participants, Option 4 suggests exempting collective actions from court fees. Whether the mechanism is an opt-out- or an opt-in-system is left open for debate.

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<sup>3</sup> Green Paper, para 22.

## **Statements on European Options for Consumer Collective Redress Legislation**

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

In relation to consumer redress, the German Bar Association acknowledges that the EU strives for a suitable standard in all member states. A suitable standard in all member states is desirable for two reasons. First, it might facilitate the actual possibility for citizens in EU member states to enforce their rights with the help of the judicial system. Second, as outlined in the Green Paper, the European economy as a whole might benefit from an efficient judicial system which obliges perpetrators to compensate aggrieved parties.

However, the EU should not force member states to adopt uniform measures of collective redress. Compulsory changes to national procedural law should be restricted to the minimum degree. In the EU, there is great diversity in national procedural law. National procedural law is necessarily influenced by national substantive law, and vice versa. Also, national procedural law often has a long history of amendments and fine-tuning in order to achieve a fair and just balance between the participants. In such context, member states have created such different collective redress mechanisms as class actions, group litigation or test cases. This balance might be disturbed if a uniform European legislation was imposed. More importantly, in its ultimate shape as an opt-out-system, such disturbance may jeopardize the principle of equality of arms in certain member states. An exception may apply with respect to mass damages which are very small for each individual customer, but significant as a whole. Under such circumstances, a uniform collective redress mechanism might be suitable. Other than that, the German Bar Association would recommend that the Commission expects member states only to provide for the existence of a collective redress mechanism. The German Bar Association believes that the Commission should, in principle, not provide for a particular collective redress mechanism.

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

The German Bar Association prefers a combination of elements of Option 2 and 3. A uniform collective redress judicial mechanism as suggested by Option 4 is rejected

unless mass claims of a respectively low value are concerned. If the Commission nonetheless was to go ahead with Option 4 for other categories of claims, the German Bar Association recommends an opt-in-System.

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

*Regarding Option 1: Use of Small Claims Regulation and Benefit of Competing Systems*

As suggested in Option 1, issues already subject to EU measures should not be subjected to further regulation until the effects of the existing measures can be determined.

According to the Green Paper, a key problem of collective redress is that consumers refrain from going to court for small claims. One of the already existing measures – the Small Claims Regulation – has potential to improve this situation. Based on the information given by the Green Paper, the scope of application of the Small Claims Regulation also appears to be able to achieve this goal even though it only covers disputes not exceeding € 2000, as it can be estimated that most consumers will bring claims of € 2000 or more to court<sup>4</sup>.

Moreover, different means of redress in various member states are not a disadvantage as long as each member state provides *suitable* means of redress. The Rome I and Rome II Regulations notwithstanding, as a general principle, competition between legal systems contributes to the economic strength of the EU. Member states already started to compare the various existing collective redress mechanisms and to respectively establish the one which they find best suited for their respective legal system.

*Regarding Option 2: Further Development of Collective Redress Systems by Further Cooperation*

The German Bar Association supports the general concept of Option 2 that most of the perceived problems can be solved by better cooperation between the member states. Such approach would also make sense as a collective redress system on a

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<sup>4</sup> Green Paper, para 9.

European level would be limited to cross-border disputes in accordance with Art. 65 EC. However, a minimum standard for consumer redress should be maintained in each Member State, irrespective of the chosen national redress mechanism.

Ensuring that consumers have access to the legal protection offered in a foreign member state may ultimately improve legal protection in their home state as well. As the Green Paper mentions<sup>5</sup>, member states who do not have a collective redress mechanism may establish one. This will also solve the problem of member states being hesitant to finance national consumer associations as envisioned by the Green Paper<sup>6</sup>, since no member state will gain an advantage by not providing for a collective redress mechanism.

The German Bar Association agrees that consumer information should be improved. Primarily, this includes the information that damages have actually occurred, since there are cases where consumers may not notice damages on their own.

#### *Regarding Option 3: Mixture of Measures without undue Proceedings or Burdens*

Whereas the German Bar Association considers a mixture of measures as a good idea, it would like to make two reservations with respect to elements of Option 3. First, the German Bar Association rejects the suggestion that a “competent authority” could require traders to compensate consumers. If the “competent authority” is not a court, such approach could violate the principles of separation of power and due process. Non-judicial institutions may be authorized with investigating possible breaches, as mentioned in the Green Paper<sup>7</sup>. However, there must be a recourse for the final judgement to a court. In order to avoid unnecessary regulation and bureaucracy, the German Bar Association would, however, be pleased if the Commission could refrain from creating just another administrative entity.

Second, if businesses are required to have internal complaint-handling systems, sufficient leeway should be left for the companies, depending on the complexity of such systems. Smaller businesses in particular might otherwise suffer from the necessary costs to employ staff and install and maintain complaint-handling systems. On a larger scale, compulsory complaint-handling systems might put smaller

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<sup>5</sup> Green Paper, para 23.

<sup>6</sup> Green Paper, para 28.

<sup>7</sup> Green Paper, para 43.

businesses at a disadvantage as compared to large businesses. The Green Paper acknowledges that businesses have an interest in ensuring that their customers are content<sup>8</sup>. Therefore, there may be no too strong need for regulatory measures forcing businesses to make their customers content by a compulsory complaint-handling system.

#### *Regarding Option 4: Opt-In*

The German Bar Association prefers a mixture of measures over a uniform collective redress mechanism.

In order to avoid frictions with national law, an imposed collective redress mechanism would need to take many aspects into account. For example, the concept of time limitation of actions would need to be addressed in a way that is satisfactory for various, existing approaches. If the collective redress mechanism was not to address time limitation of actions, the mechanism might clash with legal systems which consider time limitation of actions to be a procedural issue, since claims might then not be subject to time limitation at all. If the collective redress mechanism does address the time limitation of actions, the mechanism might clash with legal systems which consider time limitation of actions to be a substantive issue, since the time limitation of claims might then be governed by different provisions.

Similar issues might arise with regard to burden of proof. Depending on whether the uniform collective redress mechanism does address burden of proof or not, there might be either claims which are governed by different provisions on burden of proof, or claims which are governed by none.

Another example is the right to claim punitive damages, a right not granted by many European legal systems for good reason. A legal system's substantive law may grant an aggrieved party the possibility to demand punitive damages. The same legal system's procedural law may compensate for this possibility by raising the threshold required for proving that damages have occurred. Introducing a uniform redress mechanism with a lower threshold might destroy this balance, causing severe economic damage. Other examples are conceivable. Therefore, a uniform collective redress mechanism should not be implemented in the EU.

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<sup>8</sup> Green Paper, para 46.

If the EU introduces a uniform mechanism of collective redress, the admission of success fees could be a way to provide incentives for lawyers to ensure that claims that otherwise would not be brought could actually be pursued.<sup>9</sup> At the same time, it would be of paramount importance to preserve the "Loser pays" principle in order to avoid unmeritorious claims.

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

Option 2's suggestion of information campaigns might be extended. To improve legal protection, consumers may have access to basic and easy-to-understand information on the available legal remedies via the internet. In particular, consumers should know how the burden of proof benefits or disadvantages them. Depending on the case, a proportional share of the costs for such campaigns might be imposed on the defendant if it is found to be liable.

More importantly, however, as indicated above, the "Loser pays" principle needs to be preserved.

In order to simplify enforcement, a binding standard of diligence and procedural rights should be established for courts in all member states. Accordingly, member states will be less hesitant to enforce a judgment from a foreign court.

In order to be efficient, any mechanism for collective redress has to regulate the proceeding by which potential payments by the perpetrator should be distributed among the injured parties. The most practical solution is a two step approach: First, the perpetrator effects payment to a fiduciary, second, the fiduciary distributes the payment among the injured parties. EU measures should ensure that potential fiduciaries are qualified and easily accessible.

The German Bar Association supports the promotion of alternative means of dispute resolution to the extent that they do not entail settlement pressure or even extortion.

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

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<sup>9</sup> See Case 1 BvR 2576/04 of 12.12.2006 of the German Constitutional Court: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20061212\\_1bvr257604.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20061212_1bvr257604.html) and the related DAV press-release: <http://www.anwaltverein.de/interessenvertretung/schwerpunkte/erfolgshonorar/2007-13>

As stated above, the German Bar Association could imagine a combination of various elements of options 2 and 3.

**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?**

Concerning the cooperation between member states as outlined in Option 2, binding instruments are preferable, as long as a binding standard of diligence and procedural rights for courts is maintained. If such a binding standard is maintained, there is no reason why member states should be exempted from the duty to cooperate with other member states with regard to consumer redress.

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

According to the Green Paper, consumer redress in the EU suffers not from a single challenge, but at least from two problems: First, access to legal protection of consumers may differ depending on the consumer's location, and may therefore be insufficient with regard to procedural aspects. Second, consumers often do not obtain compensation for damages.

The first problem is a legal issue, and Option 2 essentially gives an ample solution. The second problem is a factual issue which may or may not be caused by a lack of legal protection. The statistics referred to in the Green Paper<sup>10</sup> indicate a basic unwillingness of some consumers to enter court proceedings. It is the position of the German Bar Association that this unwillingness is partially due to a lack of knowledge about judicial proceedings. Therefore, reliable information will remedy the problem to a great extent. Whether other means are required will have to be established once the measures suggested above have been implemented and evaluated.

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<sup>10</sup> Green Paper, para 9.