Bundesrat **Printed paper 951/08 (Resolution)**

13.02.09

Resolution
of the *Bundesrat*

Green Paper from the Commission of the European Communities on Consumer Collective Redress

COM(2008) 794 final; Council document 16658/08

At its 854th sitting on 13 February 2009 the *Bundesrat* adopted the following position pursuant to sections 3 and 5 *EUZBLG* (Act on cooperation between the Federal State and the *Länder* in matters relating to the European Union):

Re question 1:

1. The *Bundesrat* welcomes the Commission's plan, set out in its Green Paper, to help consumers obtain cross-border redress, especially in cases of 'dispersed damages' (*Streuschäden*) and small claims. This is in line with the ongoing completion of the European internal market in a globalised economy and strengthens citizens' confidence in that internal market. The *Bundesrat* makes the point that care should be taken to ensure an appropriate balance between the interests of both consumers and businesses.

2. It sees the effective enforcement of consumer rights in Europe as an important contribution towards improving the functioning of the internal market from the consumer's point of view. In its opinion, this also includes the effective enforcement of consumers' justified claims for compensation.

3. Consumers must, in case of need, be able to rely on appropriate legal redress to enforce their rights. Effective redress in all Member States supplements material consumer protection and contributes (also across borders) to ensuring fair competition between businesses and in relations with consumers.

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ISSN 0720-2946

4. However, the *Bundesrat* sees no need for Europe-wide standardised regulation of matters which are exclusively a national concern. Measures which the Green Paper puts forward for discussion concern national civil law and civil procedural law, which are regulated very differently in the legal systems of the Member States. Community legislative measures in this area constitute a significant intrusion into the fabric of national procedural law and thus into a core area of the national legal order. In drafting any legal acts at Community level covering cross-border redress, it is essential, for reasons of subsidiarity and proportionality, for the national legislator to retain sufficient transposition leeway so as to be able to ensure system equity with national law.

5. The *Bundesrat* is of the opinion that the introduction of cross-border collective redress mechanisms should be considered, if at all, only where less intrusive measures, such as optimisation or supplementing of existing legal systems, do not succeed in enforcing consumer protection rights.

6. The *Bundesrat* reiterates the fact that collective redress can be considered, also in cross-border cases, only where it is practicable and fulfils judicial guarantees. In particular, the information and participation rights of potential claimants must be safeguarded.

7. It must also be ensured that effective mechanisms are available to prevent abuse of collective redress mechanisms. For example, proven principles such as ‘loser pays’ should be retained for this reason. Furthermore, the Green Paper incorrectly states that ‘class actions’ based on the US model cannot be a solution.

8. The testing of collective forms of redress in the Member States is still at an early stage. Further assessments are essential before new measures are taken.

9. The *Bundesrat* is therefore of the opinion that it is necessary, before introducing new legal action systems, particularly collective redress mechanisms, first of all to analyse carefully the procedures which already exist in 13 Member States and establish whether and which specific national deficits actually exist. The next step should then be to look at how such deficits can be rectified and the well-established redress systems of the Member States developed or optimised with the aim of ensuring comparable levels of protection. In this connection it is

especially important also to promote and improve the effectiveness of alternative dispute settlement procedures.

10. The various national experiences will be able to provide important pointers towards possible material areas of application and procedural law concepts for possible European measures for cross-border cases.

11. The German redress system already provides sufficient scope for legal action in the event of infringement of individual rights and also contains collective redress instruments for consumers in the form of the possibility of representative actions, especially in the field of consumer protection and general standard terms and conditions of business (*Recht der Allgemeinen Geschäftsbedingungen*).

12. Thus, in addition to the right to take representative action under the Injunctions Act (*Unterlassungsklagengesetz*) and the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*), so-called 'recovery proceedings' were introduced into German law in 2002 (section 8(1) No 4 of the Legal Services Act *RDG*, section 79(2) sentence 2 No 3 of the Civil Procedure Ordinance *ZPO*), giving consumer associations the right to take independent legal action on behalf of third parties. In 2005 the Investor Test Case Act (*Kapitalanleger-Musterverfahrensgesetz - KapMuG*) was adopted in order to improve legal protection for investors (see BGBl. I 2005, 2437).

Re questions 2-7:

13. As things stand, the *Bundesrat* considers it appropriate to give the Member States sufficient time to develop and test collective forms of redress, and to undertake a detailed analysis in accordance with Option 1 of how the different approaches to collective redress in the Member States' national legal orders work in practice. It doubts whether the 'Consumer Markets Scoreboard' referred to in the Green Paper (footnote 33) as evidence of the functioning of the different redress systems will suffice as the sole means of evaluation. It recommends the systematic consideration also of court and legal representation practices in the Member States, insofar as this does not already take place through the consultation launched by the Green Paper. The aim should be to identify a Europe-wide 'best practice' for specific collective redress case

groups.

14. The Green Paper focuses its considerations concerning mass consumer claims for damages caused by unfair business practices on ‘dispersed damages’ (see paragraphs 6–9 of the Green Paper), where the damage suffered by individual consumers is usually so trivial that they would not take individual legal action because of the cost. The Green Paper’s intention here is to use collective redress arrangements to strengthen individual legal protection and at the same time perform the market management function of civil justice (determent of unfair business practices). However, the question of whether collective forms of legal action are suitable specifically for dealing with ‘dispersed damages’ cases is not considered by the Green Paper. The statement that ‘76% of consumers would be more willing to defend their rights in court if they could join together with other consumers’ (paragraph 18 of the Green Paper) in any event seems questionable in such cases. Germany’s experience to date with relevant legal instruments, e.g. the recovery proceedings mentioned in paragraph 12 above, speaks against it. These instruments are not used in ‘dispersed damages’ cases because collective legal action for small claims also involves administrative and financial costs which neither consumers nor associations can meet. In 2005 this conclusion caused the German legislator, with a view to safeguarding fair competition, to introduce an objective management instrument consisting of ‘skimming off’ infringers’ profits (see section 10 of the Unfair Competition Act *UWG* and section 34a of the Anticompetitive Restraints Act *GWB*).

    Against this background the suitability of collective legal action in the case of ‘dispersed damages’ cases seems questionable. In the *Bundesrat*’s opinion, the Green Paper’s general assumption that consumers would be significantly more willing to take legal action if they could join together with other plaintiffs does not yet constitute a sound basis for further thoughts on how to deal with ‘dispersed damages’. In order to safeguard fair competition, it would be preferable also to investigate in detail the suitability of objective instruments (in particular skimming off profits, representative injunctions), which the Green Paper so far only mentions in passing.

15. Furthermore, the *Bundesrat* is generally in favour of increased cooperation between the Member States. Insofar as Option 2 envisages the establishing of a cooperation network based on a corresponding directive, the associated

administrative burden gives rise to doubts about the cost-benefit ratio. It might be more effective to support national consumer associations, so that they are in a position to assume the additional tasks resulting from increased cooperation. Cooperation between national consumer protection associations should also lead to easier access for consumers to information on the redress possibilities in other EU Member States.

16. The *Bundesrat* advocates non-regulatory action by the EU, such as ensuring closer cooperation between Member States by strengthening existing networks (see Option 2) or the introduction of voluntary out-of-court dispute settlement procedures (see Option 3).

17. Better cooperation between Member States should therefore be achieved by exploiting and where necessary improving existing structures. In this way the benefits of judicial cooperation in civil matters could, for example, be used more for consumer disputes.

18. The *Bundesrat* is also of the opinion, particularly in the context of consumer redress and personal contractual relations between businesses and consumers, that voluntary measures would be more easily accepted. Another possibility might also be measures such as the creation of specific 'ombudsman' arrangements, which have proved successful in Germany in the insurance sector, an area of economic importance for consumers and businesses alike.

19. The *Bundesrat* is also in favour of comprehensive information for European consumers, especially on the redress options available in the individual Member States, the associated costs, and any possibilities of State aid for the less well-off.

20. Beyond this, the *Bundesrat* is of the opinion that only a thorough analysis and assessment of national redress systems can identify other potential solutions.

21. As regards Option 3, the *Bundesrat* particularly welcomes the development and promotion of alternative dispute resolution schemes. However, combining different instruments should not lead to a situation in which the consumer no longer has an overview of the possibilities available.

Increased use should also be made of alternative dispute resolution schemes in the EU (Option 3). All Member States should be required to introduce such schemes and, in so doing, should ensure that they are also accessible to consumers in other Member States. A standard model for a collective alternative dispute resolution scheme could ensure that the scheme is easy for consumers to use and is also suitable for cross-border cases. The European Consumer Centres Network could provide valuable support for consumers wishing to use out-of-court settlement procedures in cross-border cases.

The *Bundesrat* advocates a review of the Regulation on cooperation in the field of consumer protection, since cooperation between competent authorities as envisaged in the Regulation does not yet function ideally. However, the *Bundesrat* is against the EU imposing a binding requirement on the Member States to provide for public enforcement of consumer claims, which is discussed in Option 3 in the context of the amending of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364 of 9 December 2004, p. 1).

Public enforcement of private claims (paragraph 44 of the Green Paper) would contradict the legal tradition of independent private redress which has proved successful in Germany and according to which private claims must in general be brought by the damaged party.

The ‘skimming off’ of profits (paragraph 45 of the Green Paper), on the other hand, seems fundamentally suitable with a view to safeguarding fair competition, also in the interests of consumers. However, this task should be delegated to appropriate associations (e.g. consumer associations) rather than a State authority.

22. Attention is drawn to the following:

As regards the introduction and procedural form of a judicial collective redress procedure at European level (Option 4), and against the background of the Commission’s parallel considerations concerning the introduction of claims for damages on account of infringement of EC competition law, the *Bundesrat* also sees a danger of fragmentation of procedural law. It therefore considers it absolutely essential, in the interests of a ‘better legislation’ policy, to coordinate the views of the different DGs and as far as possible develop proposals that are

'from the same mould'. A horizontal approach should be considered here.

23. Subject to a further evaluation, the only procedure the *Bundesrat* feels might be worth considering under Option 4 is the opt-in procedure, i.e. where several damaged parties actively join together to take collective action. As already mentioned in its opinion of 4 July 2008 (*Bundesrat* printed paper 248/08, Resolution) on the Commission's White Paper on damages actions for breach of EC anti-trust rules (COM(2008) 165 final), it rejects the opt-out procedure. The reason is that consumers could be included in legal action without their knowledge and then be bound by the outcome. This runs counter to the system which predominates in Germany and most other Member States, i.e. individual legal action, where every individual claim for damages must be presented and proven separately. This is hardly possible in the case of a representative claim, as the association is not normally familiar with individual claims. An opt-out procedure could thus not ensure the actual and legal consideration of individual claims and, in 'dispersed damages' cases, would in the final analysis be equivalent to 'skimming off profits' for the benefit of private individuals under the guise of safeguarding third-party interests. In addition to constitutional and procedural reservations, this model is also likely to be the least advantageous for individual consumers.

24. Such a procedure should be applied only if damaged consumers explicitly opt in. Careful consideration should be given to whether such an instrument should apply in cross-border cases only, or also in purely national legal disputes. Under no circumstances should this type of action envisage punitive damages or success fees. When due damages are paid out, it must be ensured that they really reach the plaintiffs and are not swallowed up by solicitors' costs.

25. As regards the potential cost of legal action, *Bundesrat* makes the point that the principle of 'loser pays' is certainly an effective means of preventing abusive claims. It rejects the possibility mentioned in paragraph 50 of the Green Paper which involves exempting collective actions from court fees or capping legal fees. In Germany collective legal action already reduces the costs incurred by the individual participants. There are no objective reasons for further cost-cutting, as this would encourage abusive claims on a massive scale, which in turn would hinder the smooth functioning of the judicial system.

26. In view of the above remarks, the *Bundesrat* is primarily in favour of non-binding instruments, which are likely to be much more efficient and acceptable to consumers and businesses in individual cases than inflexible redress procedures.

27. The *Bundesrat* feels that it is too early to reply to question 7. Specifically with regard to the test case mechanism recently introduced at national level in the field of capital market information, the mechanism must first prove itself to be effective. The newly introduced formal and material consumer protection requirements (e.g. formal rules, rights of objection, etc.) first have to prove themselves in legal practice. Only then will conclusions be possible as to the effectiveness of the existing redress procedures. The over-hasty binding imposition of specific redress procedures 'from the same mould' would be an impediment to balanced solutions.

Questions of competence:

28. The *Bundesrat* also has serious reservations from the point of view of legal competence about the introduction of a Community-wide binding collective redress system in the form of group action by consumers. There would also be a risk that phenomena which are familiar from non-European legal circles and which in the Commission's view certainly need to be avoided — excessive (punitive) damages), success fees, choosing the court location for manipulative reasons, etc. — would become more prevalent in the Community too.

29. The *Bundesrat* has doubts about the EU's legislative competence for the introduction of collective redress systems applicable throughout Europe. The introduction of such redress systems at European level would to a significant extent touch upon Member States' national civil procedural law, which of course comes under the jurisdiction of the individual Member States.

    The role and understanding of the EU should therefore be limited to clarifying measures aimed at Member States and consumers, recommendations and other non-regulatory instruments.

    If the EU nevertheless claims regulatory jurisdiction for itself, the legal framework of collective redress systems would have to be carefully coordinated with existing national procedural systems, in order to prevent abuse and

excesses which are detrimental to the economy.

30. The *Bundesrat* makes the point that Article 95 ECT can constitute the legal basis for measures resulting from the Green Paper only if the focus is on completion of the internal market (Article 153(3)(a) ECT). Measures must genuinely be intended to improve the conditions for the establishing and functioning of the internal market or to remove perceptible distortions of competition. The mere existence of different national procedural law systems does not justify measures under Article 95 ECT.

31. If the Commission is aiming at a consumer protection policy that is independent of the internal market, it is limited to 'measures which support, supplement and monitor the policy pursued by the Member States' (Article 153)(3)(b) ECT). The ECT does not provide any justification for an independent autonomous EU consumer protection policy. The Community is in fact limited to 'contributing to improved consumer protection'. It may concern itself with consumer protection as a main objective only in connection with measures to support, supplement and monitor Member States' policies, which means that a consumer policy which is independent of the internal market is subordinate to Member States' policies.

32. With regard to the competence standard in Article 65(c) ECT, the *Bundesrat* makes the point that a cross-border factor is vital. From this, and from the limitation to harmonisation of existing national provisions, it also follows that empowerment is not a competence basis for the creation of standardised European civil procedural law. Possible harmonisation is therefore restricted to approximation and does not permit the creation of new civil procedural instruments.

33. From the point of view of complying with the subsidiarity principle, future measures must be examined in terms of their expected efficiency and likely added value. The questions to be posed here form the negative and positive boundaries for the admissibility of Community legislative measures. The question to be asked in the context of efficiency is whether the subject area has transnational aspects and whether the goals of a measure can be achieved properly, or at all, at Member State level. For future legal acts, from the point of view of added value, it must also be asked whether action at Community level,

given its scope or effect, will bring a clear advantage compared with action at Member State level. A measured comparison is necessary between additional gain in terms of integration and loss of jurisdiction by the Member States. Accordingly, the Community's powers should not be fully exercised where the additional gain in terms of integration is minimal but the encroachment upon the Member States' areas of jurisdiction is considerable.

34. The *Bundesrat* is sending this position directly to the Commission.