Position Paper

UEAPME[1] answer to the consultation "Towards a Coherent European Approach on Collective Redress"

Introduction

UEAPME confirms the statements made in its previous position papers of February and July 2009, in which we stressed our opposition to the creation of a collective redress system. In our opinion, the need for creating a redress mechanism on European level has still not been established.

As stated in Commission´s consultation SEC (2011) 173 final, the existing national mechanisms in relation to compensatory redress vary widely throughout the EU. Legislation in this area is mostly relatively recent and fragmented: there are no two national systems alike. There has not been any evidence of the efficiency of these systems nor has it been considered whether they might be transferable to other legal orders. In our view, the advantages and disadvantages of each system should first be thoroughly scrutinised and then it should be calculated whether there is a need for European regulation on the subject. Furthermore, the benefits for businesses and consumers from such a uniform collective redress system at European level need to be thoroughly assessed, keeping in mind the "Think Small First" principle.

Member States that do not have a system of collective redress should not be forced to introduce one. The European Commission has to take into consideration that the introduction of a collective redress system could be more than dangerous for SMEs. SMEs live on the reputation they have with their clients: being subjected to collective redress could mean the end for small businesses. SMEs are often in the same position as consumers and are facing the same difficulties. A fight against a group of consumers would put them in a weaker position, not to mention the fact that an SME would never have the kind of financial and legal support which a group of consumers could bring up in the case of collective redress.

We see a risk that a collective redress system could lead to misuse of the system and accelerate litigation. Such a development would not benefit SMEs.

Scope of a collective redress system at European level

However, if it was decided to introduce a collective redress system, the following points must be taken into account.

1. This mechanism should be used under rather strict conditions only. The hearing of the case as a class action should be expedient in view of – for example – the size of the class, the subject matter of the claims presented in it and the proof offered in it.
2. There is no categorical need for the collective redress-mechanism to be always and automatically free of charge for those who take part in it. The system should be based on the "loser pays" principle. Process-driven models must be avoided.
3. An appropriate mechanism to prevent abuse must be established.
4. The system should not only provide rights to collective redress to affected consumers, but also affected businesses. Otherwise, there is a risk that the economical stronger party may abuse the collective

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redress system by systematically excluding it for the weaker party.

5. The system should be based on an opt-in solution, where those who want to participate must register their interest for participating. An opt-out solution must be avoided. Opt-in gives the defendant the possibility to estimate the extent of a claim.
6. The rights of defence must be upheld in the whole procedure. This includes the right for appeal.
7. The representative of the defendant must have legal personality, an undisputed character and a power of attorney. Informal or 'pseudo' groups must not be allowed to represent either party.
8. The system needs to be efficient and also in practice be able to work cross border.
9. Financial support for consumers and information campaigns about potential violations of a business to attract more claimants violates the principle of party equality. It also needs to be kept in mind that at this point in time it is not proven yet that the business has actually committed a violation; therefore broadcasting such violation would already prejudge the conduct of such business in the public media. Even if the company would later be able to proof that no such violation had occurred, the general public would still remember the previous media campaign and the reputation of the business would be damaged regardless of the actual outcome of the case.
10. Financial support should be granted to the party who is in financial need AND who has a serious claim. It should not automatically be granted to specific groups e.g. consumers or SMEs without assessing the merits of the respective claim.
11. It might be possible to include a mandatory amiable procedure before starting with the procedure of collective redress.

Conclusion

Generally, UEAPME prefers the development of alternative dispute resolution instruments, such as mediation, because such schemes might be in many cases a simpler and not expensive instrument to settle disputes. Due to their voluntary nature, based on a flexible and informal mechanism, those instruments are difficult to organise for collective disputes and should therefore be reserved to individual disputes. Hence many of the goals of collective redress -consultation could also be reached by improving the existing ADR schemes.

It also needs to be kept in mind that "Brussels I" currently does not allow the execution of titles that were obtained in a collective redress system from another Member State. It is questionable whether this principle should really be softened or even abolished.

In COM(2011) 78 final (Review of the "Small Business Act" for Europe) it is stated that the Commission will carry out an in depth analysis of the unfair commercial practices and contractual clauses in the business to business environment in the Single Market and table a legislative proposal if needed in order to protect businesses against unfair contractual terms. Thus, if a mechanism of collective redress is to be further evolved, the Commission should bear in mind the goals set in the SBA and the SMEs need for protection against unfair commercial practices.

In conclusion, we would like to point out that in COM(2008) 394 final (A "Small Business Act" for Europe) it is stressed that one of the goals of the EU´s policy is to make the EU a world-class environment for SMEs. In our view, introducing a collective redress system at European level could have serious disadvantages for SMEs.

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