Opinion of the European Economic and Social Committee on the 'Green Paper on Consumer Collective Redress'

COM(2008) 794 final

(2010/C 128/18)

Rapporteur: **Mr CALLEJA**

On 27 November 2008 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green Paper on Consumer Collective Redress

COM(2008) 794 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 9 September 2009.

At its 457th plenary session, held on 4 and 5 November 2009 (meeting of 5 November), the European Economic and Social Committee adopted the following opinion by 123 votes to four with 13 abstentions:

1. Summary of recommendations

1.1. As a matter of principle access to effective judicial protection is a fundamental right that consumers should have regarding collective redress. However, due care needs to be exercised to respect the limitations imposed by the Treaty and the national juridical differences of procedural and constitutional law.

1.2. EU legislative measures on collective redress would enhance the protection of consumers particularly in cross-border transactions.

1.3. Sufficient safeguards need to be built into the system against frivolous claims and abuse mainly driven by financial incentives and profit motivation from parties other than the consumers.

1.4. As a general principle any EU measure adopted must provide appropriate safeguards against the introduction of features that in other jurisdictions have demonstrated to be susceptible to abuse. In particular, any collective redress system introduced ought to include powers vested in the judge considering preliminary submissions on a collective redress case to halt any abuses and to ensure that the claims being made are meritorious.

1.5. The adoption of a collective judicial redress mechanism does not preclude recourse to systems of out-of-court settlement for consumer disputes.

1.6. The EESC recommends to the Commission to take further action to encourage businesses to develop internal complaint handling systems, to develop further existing alternative dispute resolution systems and public oversight. These alternatives means could be used by consumers before they resort to the judicial system.

1.7. The EESC reminds the EU Commission that the question of collective judicial redress has been under discussion since 1985 and that it is time that decisions are taken and schemes implemented to the satisfaction of consumers without further delays.

2. Introduction

2.1. The Commission Consumer Policy Strategy [1] has the objective of promoting the retail internal market by making consumers and retailers as confident shopping across borders as in their home countries by 2013. In its Strategy, the Commission underlined the importance of effective redress mechanisms for consumers and announced its intention to consider action on consumer collective redress.

2.2. The European Parliament, the Council and the European Economic and Social Committee welcomed the Commission's intention to improve consumer redress and in particular to

[1] COM(2007) 99 final.

consider action on collective redress ([2]). There was even an OECD recommendation on consumer dispute resolution and redress ([3]) that encouraged its member countries to provide consumers with access to different means of redress, including collective redress mechanisms.

2.3. The Commission Green Paper on Consumer Collective Redress issued in November 2008 ([4]) has now sought ways in which it can go about facilitating redress in situations where large numbers of consumers have been harmed by a single trader's practice which is in breach of consumer law. Four options are presented in the Green Paper.

2.4. The EU Commission also organised a public hearing on 29 May, 2009 to discuss the Green Paper and subsequently formulated a document that was submitted for public comments where it included a further fifth option to the other four options for action on collective redress that were listed in the Green Paper. This recent Commission suggestion cannot be considered by the EESC at this late stage of its deliberations. Especially so, that there are still impact assessments to be conducted. This especially so, when even at this early stage the EESC is already anticipating that this 5th option will present substantial difficulties in its implementation.

2.5. One cannot negate that access to redress by consumers, when consumer rights are violated by traders, promotes consumer confidence in the markets and improves their performance. This objective, however, can only be achieved if consumers know that if they have a problem, their rights will be enforced and they will receive adequate redress.

2.6. To ensure equity for all stakeholders, a fair balance must be struck between all the interests involved.

3. **Summary of the Green Paper**

3.1. The objective of the Green Paper has been identified as being that 'to assess the current state of redress mechanisms, in particular in cases where many consumers are likely to be affected by the same legal infringement, and to provide options to close any gaps to effective redress identified in such cases' ([5]). The Commission felt it necessary not to distinguish between cross-border mechanisms for mass claims and purely national mechanisms. Another issue which the Green Paper seeks to identify is whether certain instruments could apply only to cross-border or also to national cases.

3.2. The Green Paper focuses on the resolution of mass claim cases and aims at providing effective means of collective redress for citizens across the EU affected by a single trader's practice independently of the location of the transaction. It also identifies the current main obstacles for consumers to obtain effective redress and the elements that contribute to the effectiveness and efficiency of a collective redress mechanism.

3.3. The Commission states that existing European instruments ([6]) are not sufficient and outlines four options which seek to address the issues at hand and to provide consumers with adequate and efficacious means of redress particularly via the tool of collective redress:

— Option 1 – Reliance on existing national and EC measures to achieve adequate redress for consumers.

— Option 2 – Developing cooperation between Member States in order to ensure that consumers throughout the EU are able to use the collective redress mechanisms that are available in different Member States.

— Option 3 – A mix of policy instruments that could be non-binding or binding, that can together enhance consumer redress by addressing the main barriers.

([2]) In their resolutions on the Consumer Policy Strategy, the EP asked the Commission, after careful assessment of the issue of consumer redress in the Member States '… to present, as appropriate, a coherent solution at European level, providing all consumers with access to collective redress mechanisms for the settlement of cross-border complaints' (A6-0155/2008); the Council invited the Commission '… to carefully consider collective redress mechanisms and come forward with the results of on going relevant studies, in view of any possible proposal or action', OJ C 166 of 20.7.2007, p. 1-3.
The EP request was re-iterated in the resolution on the Green Paper on retail financial services (A6-0187/2008). The EP committee of inquiry on Equitable Life also had requested the Commission '… to investigate further the possibility of setting up a legal framework with uniform civil procedural requirements for European cross border collective actions …' (A6-0203/2007). The EESC in its own initiative opinion (OJ C 162 of 25.6.2008, p. 1) put forward proposals in respect of the legal arrangements for CR mechanisms.

([3]) http://www.oecd.org/dataoecd/43/50/38960101.pdf.

([4]) COM(2008) 794 final.

([5]) COM(2008) 794 final, p. 3.

([6]) Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (OJ L 115 of 17.4.1998, p. 31) and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR (OJ L 109 of 19.4.2001, p. 56); Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166 of 11.6.1998, p. 51); 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 9.12.2004, p. 1).

— Option 4 – Judicial collective redress procedures consisting of a binding or non-binding EU measure.

4. General comments

4.1. Over the years the EESC has advocated the need for a definition at Community level of a collective action designed to ensure effective compensation in the event of the infringement of collective rights.

4.2. As far back as 1992, by way of two own-initiative opinions, the EESC drew the Commission's attention to the need to identify opportunities for action in relation to the regulation of cross-border disputes and to recognise the powers of representation of consumer organisations in both national and trans-frontier disputes ([7]). Similarly, in an opinion adopted unanimously at the plenary session of 1 June 1994, the EESC expressly called on the Commission to establish a uniform procedure for collective actions and joint representation, not only to put a stop to illegal practices but also for facilitating actions relating to claims of damages ([8]). This subject was subsequently taken up by the EESC in several of its opinions ([9]). In its opinion of 26 October 2006 ([10]), the EESC clearly supported the concern expressed by the Commission in its Green Paper on actions for damages where there was a breach of the EC antitrust rules and confirmed the importance of having effective means of redress for victims of breaches of anti-trust rules in its opinion of 25 March 2009 ([11]).

4.3. Since the EU makes provision for harmonised substantive rights for consumers, the EESC agrees that it should in the same way ensure that there are appropriate procedures in place for consumers to be able to uphold these rights. So consumers should have a court-based collective redress procedure if justice is to take its course as in other instances concerning commercial transactions. As the EESC has already maintained in previous opinions, consumer redress is a fundamental right that should give judicial protection for collective and individual homogeneous interests. EU action is needed because collective and individual homogeneous rights in the EU are lacking a judicial tool to make them effective and enforceable. Collective redress mechanisms are necessary to give consumers a realistic and efficient possibility to obtain compensation in cases of damages of distinct, numerous and similar nature.

4.4. Furthermore, enhancement of competitiveness is a primary policy of the European Union. On the consumer protection side, the European Union has constructed a corpus of substantive legislation. It now needs to ensure that such laws are applied so that the economic engine can be cranked up through increased cross-border trade, based on confidence that any disputes can be resolved quickly, cheaply and under similar rules and procedures anywhere in the single market. Consumers might be subject to unfair commercial practices on increased scales, and therefore procedures are necessary to prevent and stop such abuses. Enforcement, prevention, rectification and compensation are all important. Amounts of compensation are typically small for individuals but overall they can amount to large sums.

4.5. The EESC is of the opinion that judicial redress has to be available and made effective. However, out-of-court settlements must be complementary to court proceedings and can offer a less formal and less costly procedure. However, this requires both parties involved in a dispute to be genuinely willing to cooperate. These out-of-court measures could make it possible to reach a fair solution and at the same time contribute to keep the backlog of court cases from increasing.

([7]) OJ C 339 of 31.12.1991, p. 16 (see point 5.4.2. and OJ C 19 of 25.1.1993, p. 22 (see point 4.12, and section 4 of the interesting study appended to it, carried out jointly by Eric Balate, Pierre Dejemeppe and Monique Goyens and published by the ESC, pp. 103 et seq).

([8]) OJ C 295 of 22.10.1994, p. 1.

([9]) The most significant of these opinions were the own-initiative opinion on the Single market and consumer protection: opportunities and obstacles(OJ C 39 of 12.2.1996, p. 55), which noted that at that date there had been no follow-up to the suggestions and proposals put forward by the ESC in its previous opinion on the Green Paper; the opinion on the Single Market in 1994 - Report from the Commission to the European Parliament and the Council (COM(1995) 238 final), which pointed to delays in the effective implementation of the internal market, particularly regarding consumer legislation, and in particular for cross-border relations (OJ C 39 of 12.2.1996, p. 70); the opinion on the Communication from the Commission: Priorities for Consumer Policy (1996-1998), in which the Committee, while welcoming the proposal for a directive on actions for injunctions and the action plan presented by the Commission on consumer access to justice, said that it awaited with interest developments in the area, that, in that area, the single market was far from complete and that a 'conscious adherence to consumer rights' was a basic condition for gaining that confidence from the consumer (OJ C 295 of 7.10.1996, p. 64). The same kind of concern was also expressed in the ESC's opinion on the Communication from the Commission to the European Parliament and the Council on the impact and effectiveness of the single market (COM(1996) 520 final of 23 April 1997) (OJ C 206 of 7.7.1997). Reference should be made here to the following EESC opinions: own-initiative opinion on Consumer policy post-enlargement (point 11.6) (OJ C 221 of 8.9.2005); opinion on the Programme of Community action in the field of health and consumer protection 2007-2013, point 3.2.2.2.1.(OJ C 88 of 11.4.2006); Opinion on a Legal framework for consumer policy (OJ C 185 of 8.8.2006).

([10]) OJ C 324 of 30.12.2006. The EESC expressed its support for this Commission initiative and confirmed the need for collective actions where they 'provide a perfect example of some key objectives: i) effective compensation for damages, facilitating claims for damages by organisations on behalf of the consumers affected, thus helping to provide real access to justice; ii) the prevention and deterrence of anti-trust behaviour, given the greater social impact of this type of action'.

([11]) OJ C 228 of 22.9.2009, p. 40.

4.6. Nonetheless, the EESC underlines the importance of establishing appropriate mechanisms in observance of European States' cultural and legal traditions.

4.7. The EESC is also of the opinion that such an EU judicial tool ought to be used mainly for collective rights in instances where there is a breach of consumer laws and competition rules.

5. **Specific observations regarding the Green Paper**

5.1. *Judicial collective redress*

5.1.1. The EESC acknowledges that a European judicial collective redress mechanism in line with what is being proposed in option 4 of the Green Paper should be put in place if justice is to prevail in favour of both consumers and business. The creation of such a mechanism would make it possible to provide access to justice to all consumers, irrespective of their nationality and financial situation and the amount of individual damage which they have suffered. Furthermore, such a mechanism would address the problem acknowledged by the Council of Ministers of the OECD in the Recommendation on Consumer Dispute Resolution and Redress ([12]) that most existing frameworks for consumer dispute resolution and redress in the different Member States were developed for dealing with domestic cases and are not always adequate to provide remedies for consumers from another Member State.

5.1.2. However, the EESC also recognises that the identification of a harmonised collective court-based procedure may have its own difficulties and disadvantages deriving from inherent complexities, costs, duration and other challenges. Minimising the substantial risk of abuse arising from litigation is one such challenge as is the mode of funding such actions. One also needs to decide whether to have the opt-in or opt-out procedure. Both of these options have their own disadvantages as already identified by the EESC ([13]).

5.2. *Salient features of a European collective action*

5.2.1. As the Commission acknowledges in its Green Paper, only thirteen Member States currently have judicial collective redress mechanisms in place. Furthermore, one can identify three different types of mechanisms which can be classified as 'collective' judicial redress in those Member States which currently have such a system in place.

5.2.2. 'Collective redress' is indeed a broad concept, focusing on the outcome rather than the (or a) mechanism. It encompasses any mechanism that may accomplish cessation or prevention of non-conformity and/or delivery of redress in the broadest sense, whether involving rectification or compensation. Given that a proliferation of possible procedures have emerged or are emerging within a number of EU Member States, and that most procedures are innovative and experimental, it is hardly possible to identify any model as being preferable to any other.

5.2.3. Bearing in mind the divergences in legal systems and taking into consideration the various avenues explored and suggestions made in previous Opinions on the subject ([14]), the EESC is in favour of:

— an EU Directive to ensure a basic level of harmonisation and to leave at the same time sufficient leeway for those countries which to date do not have collective judicial redress systems in place. Furthermore, such a directive would follow up the directive on actions for injunction;

— safeguards to make sure that collective actions do not take the form of the class actions employed in the USA. Any EU legal measure adopted should reflect European cultural and legal traditions, have compensation as its only goal and establish a fair balance between parties leading to a system that safeguards the interests of society as a whole. The Committee fully supports the Commission's suggestion that whichever measure is adopted to institute a judicial collective redress mechanism in all Member States 'should avoid elements which are said to encourage a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements';

— a combined system of group actions, which combine the advantages of the two systems of 'opt in' and 'opt out.', depending on the nature of the interests at stake, the determination of the group members or the lack of it, and the extent of individual damage; in the case of an 'opt in', it is up to the parties concerned to combine their individual claims for harm they suffered into one single action; should they decide to 'opt out', actions should be proposed by representative, qualified bodies;

— granting individuals the right to opt-in to aggregate litigation proceedings rather than simply presuming them to be a party to it unless they opt out. The EESC refers to the advantages and disadvantages of these mechanisms described in its opinion of 13 February 2008 ([15]). This option should be preferred in order to mitigate the impact of such a collective action in particular in those Member States which to date do not have such a procedure in place;

([12]) Rec (2007) 74 of 12 July 2007.
([13]) OJ C 162 of 25.6.2008.
([14]) OJ C 162 of 25.6.2008, p. 31, and OJ C 228 of 22.9.2009, p. 40.
([15]) OJ C 162 of 25.6.2008, p. 1.

— the Commission's statement that any EU mechanism ought to prevent unmeritorious claims and that the judge can play an important role in establishing whether a collective claim is unmeritorious or admissible. Indeed, the EESC recalls its recommendations on the important role of the judge in its previous opinions. Powers need to be vested in the judge to enable him to halt early on in the litigation proceedings unmeritorious claims. The courts will conduct inquiries about the merit of a plaintiff's claim and the suitability of the claim at issue to collective resolution. In particular, the judge must ensure that the identity of the group is established, based on a certain number of identical cases and that the damages being claimed have a common origin in that they result from the non-performance or improper performance by the same trader of his contractual obligations;

— granting victims full compensation of the real value of the loss suffered, covering not only the actual loss or material and moral injury, but also loss of profit and encompassing the right to receive interest. In deed, while public enforcement focuses on compliance and deterrence, the objective of damages actions must be to provide full compensation of the damage suffered. This full compensation must therefore include actual loss, loss of profits and interests;

— such a collective judicial mechanism must be guaranteed sustainability in terms of adequate funding;

— the system ought also to cater for a system of appeals.

5.2.4. All other aspects of this judicial mechanism ought to be left to Member States themselves, in accordance with the principle of subsidiarity. Indeed, any collective action introduced at an EU level should, at all events, respect the principles of subsidiarity and proportionality; it should never go beyond what is required to meet the objectives set out in the Treaty, insofar as such objectives cannot be adequately achieved by the Member States and are thus better realised by taking action at Community level. There are different national, juridical and constitutional requirements that can impede or generate opposition for harmonisation of legislation, not least Art. 5 of the EC Treaty.

5.3. *Safeguarding consumer redress by other existing means*

5.3.1. The EESC has already recognised that the adoption of a collective judicial redress mechanism at EU level should in no way precludes recourse to systems of out-of-court settlement of consumer disputes. The latter measures have received the unqualified support of the EESC and their potential should be further explored in detail and further developed ([16]) as proposed in option 3 of the Commission's Green Paper. Indeed, the measures being proposed by the Commission in option 3 are complementary but not substitutes to the adoption of an EU judicial tool as defined above.

5.3.2. Considerable emphasis has been made on non-court mechanisms for dispute resolution. DG SANCO commissioned a study on ADR mechanisms for consumer disputes. There were also recent Directives that have been approved on small claims mechanisms ([17]), mediation ([18]), and extension of the EJ-NET ([19]). Indeed, European legislation on consumer protection enforcement has had to allow for both public and private systems. A policy shift that may have important consequences occurred in 2004, with the requirement that all Member States must have a central public authority for coordinating cross-border enforcement ([20]).

5.3.3. Internal complaint-handling procedures

The Committee believes that effective handling of complaints by traders can be a decisive step towards increasing consumer confidence in the Internal Market. The EESC deems it of the utmost importance that the Commission ought to promote the necessary initiatives, with the sine qua non involvement of civil society and in particular representative business organisations, in order to ensure that there is a coherent legal framework in place which regulates the development of such internal complaint-handling systems by traders which have as their main focus the efficacious handling of consumer complaints.

5.3.4. Public oversight

The EESC agrees with the Commission's proposal to extend and enhance the enforcement powers of the competent authorities, including national ombudsmen, under the Consumer Protection Cooperation Regulation. It strongly recommends that the detailed workings of such a mechanism are however dealt with in a Directive in order to ensure a minimum level of harmonisation across all EU Member States. Any such proposal should limit available remedies to compensatory damages and include strong procedural protection for the entities subject to enforcement proceeding. The EESC reckons that the public oversight approach could be developed into an interoperable working network covering all Member States and might turn out to be a very effective way to identify operator across the EU who might be transgressing consumer rights. Appropriate public relations campaigns to raise consumer awareness and disseminate information could indeed encourage consumers to report breach of their rights.

([16]) OJ C 162 of 25.6.2008, p. 1.

([17]) Regulation 861/2007 (OJ L 199 of 31.7.2007, p. 1).

([18]) Directive 2008/52/EC (OJ L 136 of 24.5.2008, p. 3).

([19]) COM(2008) 380 final – EESC opinion: OJ C 175 of 28.7.2009, p. 84.

([20]) Regulation 2006/2004 (OJ L 364 of 9.12.2004, p. 1).

5.3.5. Alternative dispute resolution mechanisms

The Commission acknowledges that existing consumer alternative dispute resolution schemes vary considerably within and between Member States and that even in jurisdictions where such mechanisms are available, there are significant gaps of a sector specific nature and in geographical coverage. Furthermore, most alternative dispute resolution schemes within the EU deal principally with individual claims. In so far as existing EU instruments are concerned ([21]), the report 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings' commissioned by the European Commission, reveals that the principles on independence and impartiality of third parties involved in mediation/arbitration schemes set out in the said instruments are not even complied with within the EEC-Net database. To this end, the EESC is of the opinion that the existing recommendations in relation to alternative dispute resolution systems ought to become binding legislative tools. Expanding consumer access to ADR and small claims mechanisms can lead to prompt, fair, efficient and relatively low cost resolution of consumer protection issues.

Brussels, 5 November 2009.

The President
of the European Economic and Social Committee
Mario SEPI

([21]) Recommendation 1998/257 and Recommendation 2001/310.