



FEDERATION OF EUROPEAN RISK MANAGEMENT ASSOCIATIONS
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European Commission
Consultation on collective redress
Avenue de Bourget 1-3
B-1140 Brussels (Evere)
Belgium

Brussels, 28th April 2011

By e-mail only

Dear Sirs,

Re: FERMA response to the consultation document Towards a Coherent European Approach to Collective Redress

The Federation of European Risk Management Associations (“FERMA”) welcomes the opportunity to comment on the European Commission’s staff working document, “Towards a coherent European Approach to Collective Redress”. FERMA has taken part in the European debate on consumer collective redress (“CCR”) and commented on the last consultation paper. We reiterate our points of concern from 2009 with this note.

FERMA brings together the national risk management associations from 17 European countries, including 14 EU Member States. FERMA’s 4,000 individual members represent major industrial and commercial companies as well as public authorities in their respective countries. These members manage complex risks and insurance matters on a daily basis in their companies. Members’ dual perspectives influence FERMA’s views on EU CCR: as large corporate insurance buyers and as potential defendants.

Much of the focus during the consultation period has been on how best to set up a legal framework for CCR in the EU, rather than revisiting all four of the options outlined in the Green Paper. FERMA members would urge the Commission to keep open all options and to reflect in particular, key European principles such as proportionality and subsidiarity, so that the least restrictive action is pursued.

FERMA members’ primary concern is to reduce risks for their companies. This involves dialogue with consumers and consumer groups on ways to continually improve products and services. This is why FERMA believes that it is in both consumers and industry’s interest that practical and workable solutions are found in cases where solutions are currently lacking. EU and national attention should focus on ways to improve out-of-

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court settlement as this is the best means to provide access to quick and relatively low-cost means of resolving disputes.

The EU should continue to encourage Member States to work with industry to improve the range of Alternative Dispute Resolution schemes (“ADR”) on offer. There is a clear need to increase consumer awareness of what is already available, so that ADR mechanisms become the preferred option to resolve disputes. This need not be achieved under threat of CCR, but a more conciliatory and constructive approach whereby both consumer groups and industry come together with the Member States to design effective solutions. Once suitable ADR schemes are available across the EU, FERMA could envisage the Commission adopting guiding principles for EU Member States which would encourage industry and consumers to use ADR as a necessary first step in resolving disputes before court action. This would require a more robust system to be in place so that mediated settlements in one Member State are recognised across the EU.

A number of EU measures are already in place to assist consumers to enforce their rights, including measures on cross-border enforcement and cooperation between Member States. It is not clear to FERMA that the value of these measures has been fully appraised, nor the cumulative impact of compliance. This is a necessary first step, not least as some of these initiatives have been introduced relatively recently. FERMA believes the existing framework of legislation and soft-law initiatives should be fully utilised, a view that is shared by the insurance industry.

FERMA shares the concerns expressed by the insurance industry that to proceed with proposals to introduce an EU CCR legal system would have a major adverse effect on the professional liability insurance market. Risk management in industrial and commercial companies across the EU would thus be rendered more complex and costly. Claims would become more frequent and the risk would ultimately fall on insurers. In time, insurers would be forced to increase premiums for coverage. Risk managers would either have to increase spending on insurance or seek alternative solutions. It is likely any additional costs would have to be passed onto the consumer.

FERMA would reiterate that there remains scope to fully utilise and expand on the redress mechanisms already available to consumers. FERMA respectfully requests that the Commission conduct a thorough economic assessment, including careful consideration of the possible impact on the professional and product liability insurance market, before taking any further steps towards EU CCR.

There are many questions set out in the Commission staff working document. FERMA has not sought to respond to each question, but rather has set out what we believe are the critical points from a risk manager’s perspective.

1. What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

FERMA does not believe there is sufficient evidence to support the need for an EU CCR system to protect consumers in the single market. Consumer laws are not yet fully harmonised, and their enforcement depends on national procedural rules. As mentioned above, recently introduced EU initiatives have not yet been fully reviewed and so the introduction of a new system appears to us, at best, premature. FERMA does not share the view that an EU CCR system is a necessary deterrent, whatever the cost, particularly as other solutions are available. FERMA does not believe that an adversarial approach is necessarily wanted or needed.

5. Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory address at EU level?

FERMA believes that US-style CCR would not be an appropriate approach for the EU. This view is shared by many other stakeholders. Much time was spent at the recent Commission public hearing discussing safeguards to avoid the risk of abusive litigation: such as an opt-in rule, the loser pays principle, and bans on contingency fees and punitive damages¹. FERMA is not convinced that even if such safeguards were built into any EU system, that they would have the desired effect. The system would have to be so intricate to avoid potential abuse that the resulting provisions may prove difficult, if not impossible, to apply in practice.

12. How can effective redress be obtained, while avoiding lengthy and costly litigation?

FERMA would prefer to see limited EU resources being placed on encouraging all Member States and industry to work together to put in place effective and efficient ADR mechanisms, and welcomes the Commission's on-going work in this regard.

FERMA supports the Commission's efforts to continually improve the single market and restore consumer confidence in this difficult economic cycle. FERMA believes that the best option to achieve these goals is dialogue and cooperation between the stakeholders. The Commission should, for instance, encourage Member States to exchange good ADR practice. It would also be appropriate for the Commission to facilitate cooperation between Member States, with a view to Member States coming to an understanding of certain "good common features" of national CCR, which could, in turn, be incorporated into on-going national initiatives to reform legal systems in the Member States.

¹ FERMA strongly urges the Commission to refrain from introducing punitive damages to the EU legal system, either directly or indirectly through any EU CCR regime.

34. Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

Given the number of outstanding and interrelated issues that need to be resolved before anti-trust and consumer collective redress is a viable option at EU level, it would not be appropriate for the Commission to move ahead on one initiative in a specific policy field and risk settling on solutions which are wholly inappropriate for another policy field. Furthermore, the potential unintended effects of introducing an EU CCR regime to business, in terms of reputational risk and the cost of finance and insurance, are as yet not fully known. The dialogue on CCR must continue on a precautionary basis, with a clear focus on delivering benefits to consumers with minimum disruption of the business environment.

FERMA would be concerned if any new EU developments would expose companies to the risk of ‘double jeopardy’: a fine imposed for a breach of anti-trust law and a claim for compensation for the same breach.

Yours faithfully,



Peter den Dekker
President