

## THE CHEMICAL INDUSTRY RESPONSE TO THE COMMISSION GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

26 February 2009

*Cefic is the Brussels based organisation representing 27,000 companies located in Europe and their respective national federations in all Member States and other European countries accounting for 30% of the world production of chemicals.*

*Cefic also represents about 100 sectoral organisations addressing issues relative to more than 120 chemical products families. The European chemical industry is one of the European Union's largest business sectors which has as its core the commercialisation of new technologies, products and processes, that enhance the wellbeing and the lifestyle of consumers and to meet the new challenges that society faces such as climate change.*

### **A. GENERAL COMMENTS**

Cefic and the companies it represents are in favour of the principle of consumers having the possibility to be able to get their redress for damages based on fair and balanced systems in the Member States.

We welcome that the Green Paper does not only focus on collective judicial procedures but, also on the need to implement and enforce EU pieces of legislation adopted recently, as well as the need to make awareness and education activities toward consumers, and Alternative Dispute Resolution mechanisms (ADR).

Regarding Collective Redress, the Green Paper is aimed at assessing the current state of redress mechanisms in particular in cases where many consumers are likely to be affected by the same legal infringement. We consider that even if both the problem and evaluation studies used as a basis for the Green Paper provide some information, clarification on a number of aspects pointed out in the Green Paper is still needed and a number of flaws can be identified as indicated below.

The majority of mass claim cases assessed by the studies are national cases. This is indeed confirmed by the statement that only 10% of cases have a cross-border effect. Although we fully agree that redress is needed for these 10% of cases, further information is needed on the "significant proportion of consumers who have suffered damage and do not obtain redress" in cross-border cases<sup>1</sup>.

It is not clear whether the instruments as proposed in the Green Paper will apply exclusively to cross-border cases. Cefic considers that this discussion should be limited to cross-border cases. Any EU action should not exceed the competence of the Commission with respect for the principle of subsidiarity.

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<sup>1</sup> See Green Paper pt 15, page 5.



It is obvious that we neither favour the import of a US like litigation culture<sup>2</sup> into Europe, in particular for Collective Redress, nor do we favour any intervention into Member States' litigation systems which would not fit together with these national systems and traditions. Therefore whatever course of action is chosen, the following fundamental principles should be respected: - no class action in particular based on an opt out system; no punitive, double or treble damages but compensation for actual losses; -- the passing-on-defence must remain admissible to prevent unjustified enrichment of plaintiffs who did not suffer damages; --- no discovery of evidence (normal evidence in accordance with each national system should prevail); ---- loser pays the winner's legal costs (to prevent unmeritorious claims).

It is important to note that contrary to what is often advocated, mass claims give the illusion that concentrating in one single litigation identical or similar disputes having the same cause and involving numerous individuals, would reduce costs and prove more efficient. In fact, these systems often lead judges to carry out extensive factual investigations regarding whether the individual complainants have standing based on the merits of the case, hence putting at risk the supposed benefits. The reference to media coverage is also of concern as based in the US experience, it has been observed that companies, whether liable or not, were pressured to accept highly expensive settlements in order to put an end to harmful negative advertising that damages their business and image.

We also would like to point out the lack of analysis on the costs an EU Collective Redress mechanism would represent for industry in the Green Paper. Without an in-depth assessment of the impact it can have in the overall EU economy no EU action should be envisaged. A detailed cost-benefit analysis is needed.

Finally Cefic is also preoccupied by the fact that both DG Competition and DG Sanco have consulted on Collective Redress and damage claims but at different time; while this consultation is still open and looking into an array of options, it seems that DG Competition White Paper had already drawn some conclusions, which may prejudice the outcome of this consultation. In addition, we do not share the Commission views to have separate legal provisions for antitrust damages and for consumers claims. Therefore, we call upon the Commission to develop a more uniform approach towards dealing with damage claims and Collective Redress.

## **B. ANSWER TO THE QUESTIONS INCLUDED IN THE GREEN PAPER**

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

In addition to the above comments already made, Cefic is of the opinion that the Commission has a key role to play to improve consumer confidence, welfare and further integration of the Single Market. Effective and easy access to justice for consumers is part of this.

We feel important to reiterate that subsidiarity is crucial in this field, and any proposal of the Commission into Member States litigation systems should be based on principles that fit together with national tort laws, litigation systems and traditions. Therefore, any action of the EU should not exceed the competence of the Commission and respect the principle of subsidiarity.

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<sup>2</sup> Overall the US system has created a strong, and unfair, unbalance between the position of the plaintiff and of the defendant. Because of the special features of this system, a defendant is not in the position to fight and to have the dispute decided by a court on the merits. In most of the cases, the only way out for a defendant is to settle, even in case he has sound legal arguments against the claim.

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

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

**Option 1: No EC action**

Cefic proposes to rename Option 1 as “NO EC legislative action”, as we believe that the Commission has a role to play in helping the consumer to get redress, but, not to propose legislation at this stage. As a consequence, we strongly support this Option as renamed.

Indeed, before further legislative action is made, focus should be given on the implementation of adopted EU legislation (such as the Mediation Directive that should help to solve cross-border disputes, the Small Claims Regulation, and the Injunction Directive regarding cross-border procedures), and existing mechanisms at national level. In some of the Member States these mechanisms may be rather new as in Germany for example and there has not been yet enough time to gather sound experience, thus, conclusions may not yet be drawn from these national experiences.

The Commission comment that *“this option would possibly not provide satisfactory redress to a number of consumers concerned or remedy to obstacles to the Single Market”*. Cefic does not see how this conclusion may be reached before any sound development of the above and having enough time to gather effective feed back from the use of these national/EU systems.

**Option 2: Cooperation between Member States**

Cooperation between national institutions is possible already today and the networks for this are already in place. Therefore, there is no requirement for new structure.

In any case, it should be left to the Member States which measure they would like to adopt. Existing national Collective Redress systems depend in each Member State of nationally lead factors, including judicial proceedings traditions, public administration, and the socio-economic context. For Member States which do not have a Collective Redress system it should also be left to their discretion to decide whether to adopt one, and what features would suit the national needs and judicial traditions. In addition, cooperation between Member States should not end up into harmonisation of aspects of national Collective Redress systems.

**Option 3: Mix of non-binding or binding policy instruments**

This Option is a melting pot. Therefore, we prefer to comment on specific items and would encourage the Commission to specify in more details each of its proposal.

As already mentioned in the Response to Q 1 full implementation should be given to EU legislation on Mediation the Small Claims, and Injunction before even envisaging new/complementary systems.

We consider that whenever possible, disputes should be settled via out-of-court procedures, in the interest of both consumers and business.

ADR makes it possible to reach a solution acceptable to both parties more rapidly, at a lesser cost and help to maintain a less confrontational atmosphere between the parties. The studies analyse mainly judicial means of redress. However, Cefic considers that without additional assessment of the existing ADR mechanisms at national level and on their effective functioning it is not possible to have a full picture of the situation throughout the EU. In this context we strongly call for a specific study focusing on the efficiency of national ADR.

**Option 4: Judicial collective redress procedure**

Cefic is not in favour of this last Option. Firstly it is quite drastic, but, secondly because the competence of the Commission to act in this field is questionable as the implementation of such proposals would of necessity lead to incisive interventions in the legal systems of the Member States, notably in their codes of civil procedure but also in substantive law governing damages. The Commission does not have the legislative power for such interventions in the civil procedure rules of the Member States. Tellingly, the Green Paper does not contain any statements on the basis for the Commission's powers. Given the absence of authority rules the Commission should not go for any legislative activity altogether, whether in the form of directives or regulations.

Besides, as already commented before introducing new mechanisms, the already existing regimes must be promoted in a first step, then, possible shortcomings in respect of consumers' knowledge of these options must be removed.

In addition, the Commission should consider in all the measures it takes, that even the best-intentioned entrepreneurs often will not always be able to satisfy all legal requirements given the complexity of legal norms especially in cross-border trade with 27 Member States and their legal peculiarities.

In any case, for any contemplated measure by the Commission, whether recommendations or binding legislative measures, the interests of consumers in a strengthening of Collective Redress instruments must be carefully weighed up against the resulting burdens on companies as well as consumers themselves, which does not appear to have been made in the Green Paper.

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

***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?***

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

We refer to our previous comments.

Contact :

*Nicole L. Maréchal*

*Cefic Senior Legal Counsellor & Governance Officer*

*nma@cefic.be*

*tel : ++ 32 2 676 72 18*