

CEA contribution to the consultation on the consumer collective redress benchmarks

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Summary

The CEA, the European insurance and reinsurance federation, welcomes the opportunity to contribute to the consultation launched by the European Commission (EC) on the identified benchmarks that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers.

The CEA believes that consumers should be able to obtain satisfactory redress when their rights have been violated. Any new EU initiative should be based on evidence that it will address a clearly identified consumer detriment and must be a proportionate response to the problem identified. The CEA strongly supports the use of alternative dispute resolution systems and out-of-court mechanisms to resolving disputes between insurers and customers.

The insurance industry also has interest in this issue as provider of product, public and professional liability insurance and thus dealing with claims.

The CEA supports the rights of affected consumers to bring an action for redress against a named defendant. An appropriate balance needs to be struck, however, between the right of consumers to bring a claim for compensation and the potential for unmeritorious and vexatious litigation to result. It is vital that any collective redress schemes that are developed, supported by the Commission's benchmarks, do not result in a disincentive for business to use insurance as a mechanism to protect their interests.

Benchmark 1

The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.

The CEA believes that consumers should be in a position to obtain satisfactory redress when their consumer rights have been violated. In most Member States, alternative dispute resolution systems and out-of-court settlement systems operate and it is important that plaintiffs and defendants use these systems before making the decision to engage in litigation. If litigation is necessary, it is important for the legal systems of Member States to make appropriate provision for plaintiffs (or defendants) to take collective action to obtain redress for any breach of their rights. The Commission's benchmarks may provide useful guidance to Member States in this regard.

Collective redress should be restricted to those areas where the judicial enforcement of claims is not sufficiently ensured otherwise. Any collectivisation of claims makes sense only if the substantive liability rules of the area concerned are based on constituent facts which may be generalised and allow homogeneous decisions on facts and legal issues.

Benchmark 2

It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.

The CEA agrees with the EC that the costs for plaintiffs for bringing an action should not be disproportionate to the amount in dispute. The CEA is of the opinion that plaintiffs should not be given the opportunity to file an action for free, as this would encourage a litigation culture and possibly lead to unmeritorious claims against industry sectors. Any legitimate claimant should have access to justice. If the action is being brought by a third party on behalf of affected consumers, it is important that the third party must be a reputable, designated body whose principal activities are consumer advocacy and /or consumer advice. The third party should also be a not-for profit institution to provide an incentive to the organisation only to pursue genuine cases and it should also be required to demonstrate that it has sufficient financial resources to meet any liabilities that they may incur as a result of bringing the representative action.

Benchmark 3

The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.

In CEA's opinion the costs of proceedings should be reasonable for both the defendant and the plaintiff. In this context, the CEA notes the danger that contingency fees may lead to the development of a US-style class action legal system in the EU. Therefore the CEA is against any kind of contingency fee system. The enforcement of individual legal rights should not be abused by third parties.

Benchmark 4

The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.

The levels of compensation available to consumers do not have any relationship with whether consumers are able to access any form of collective redress scheme. For this reason, we do not support the inclusion of benchmark 4 at all.

Benchmark 5

One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.

The CEA does not support this benchmark as it introduces elements of deterrence and punishment.

In CEA's opinion compensation should be limited to the restoration of the victim's original condition (restitutio in integrum).

Benchmark 6

The introduction of unmeritorious claims should be discouraged.

The CEA agrees with the EC that the introduction of unmeritorious claims should be discouraged. Every claim needs to have a legal foundation. Unjustified claims should not be accepted by the judge who is in charge of declaring the admissibility of the claim. For the insurance sector it is of primary importance to know the number of claimants beforehand. In fact insurers need to calculate the amount of provisions they have to set aside. This is true not only for legal expenses insurers, who cover the legal expenses of their clients, but also for liability insurers of the defendants and insurance companies, which may get involved in collective actions themselves.

The CEA is strongly against an “opt-out” system. In this context an “opt-in” system would allow all parties to know the number of claimants beforehand. This would ensure that the decision of the court compensates only those who expressly come out in favour of a collective redress action. Otherwise potential plaintiffs may join a legal proceeding at a later stage only when the outcome seems promising, which would ultimately lead to an unpredictable adverse leverage effect.

The CEA believes that consumers should face some cost in order to pursue an action as this will act as a disincentive for consumers to bring unmeritorious or vexatious claims. It is also important that any collective redress scheme employs appropriate mechanisms to identify and dispose of unmeritorious or vexatious claims at the earliest opportunity.

Benchmark 7

Sufficient opportunity for adequate out-of-court settlement should be foreseen.

The CEA fully supports the use of alternative dispute resolution mechanisms and out-of-court settlements rather than judicial proceedings, as these generally provide faster resolutions to disputes for both plaintiffs and defendants and assist in keeping legal expenses to a minimum.

Benchmark 8

The information networking preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions.

The CEA believes that the adjudicator should always be responsible for the appropriate management of a collective action. This ensures that the admissibility, representation and notification criteria are appropriately complied with.

Benchmark 9

The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.

The CEA agrees with the EC on this benchmark. The CEA is convinced that out-of-court settlements are on average shorter than judicial proceedings.

Benchmark 10

Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

As already mentioned, plaintiffs should only be compensated for the loss that they have suffered. Therefore the use of the term "proceeds" in benchmark ten is inappropriate and the CEA would prefer to see the term "compensation" used. This would assist in making benchmark ten consistent with the remaining benchmarks.

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