COMMISSION STAFF WORKING DOCUMENT
PUBLIC CONSULTATION:
Towards a Coherent European Approach to Collective Redress

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The European Commission has launched a public consultation on the Commission staff working document Towards a Coherent European Approach to Collective Redress. Finland Chamber of Commerce submits the following statement.

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

Finland Chamber of Commerce stresses that court proceedings are very seldom a suitable approach for dealing with consumers' claims. According to our experience, out-of-court proceedings should be the primary consumer redress mechanism. We have a wide experience of dealing with consumer claims in the Consumer Disputes Board, an organ set up by the government according to our laws. In 2006, a collective redress mechanism was added to the Board's competence. In the financial sector, alternative dispute resolution mechanisms are provided by the industry. These mechanisms provide consumers with real access to justice due to the simplicity and costlessness of the procedures. Forms to be filled in are provided and consumers don't usually need expert help. As the system provides *de facto* access to justice consumers, there is no need for introducing new mechanisms. Before taking any further steps, the Commission should study if the alleged need for collective redress mechanisms is actually based on the lack of real access to justice in consumer affairs in some Member States.

It is often said that a significant amount of consumer claims remains without compensation due to the lack of collective redress mechanisms. This assumption has been proven wrong by the total lack of collective redress court cases despite their admissibility since 2007 in Finland. If there were a large number of cases requiring collective redress measures, by now at least some of them would have led to court procedures and this has not materialised. Based on this experience we find it important not to take hasty measures that add to the costs of businesses in the Member States as a definite need for such measures has not been established.

An EU legislative action obliging Member States to introduce judicial collective redress mechanisms would infringe on the principle of subsidiarity and could lead potential litigants to file frivolous claims.

Question 2: *Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

The enforcement of the law is mainly the task of the public bodies. If there are problems or negligence in the functioning of public bodies in some Member States, this issue should be addressed separately to support them in fulfilling their tasks.

Question 3: *Should the EU strengthen the role of national public bodies and/or private representive organisations in the enforcement of EU law? If so, how and in which areas should this be done?*

We are satisfied with our current authorities, such as the Consumer Ombudsman and Financial Supervision Authority. There is no need or role for private representative bodies where public bodies exist.

Competent authorities' role should not be disregarded especially on regulated business sectors. On many occasions it has been indicated that there is a need for collective redress procedures against breaches of contract for example in the financial sector. If indeed there are such cases in some Member State, the primary measure to be taken should be to ensure that the national Financial Supervision Authority fulfills its duties. The introduction of a collective redress mechanism should not be based on possible negligence or passivity of some national authority.

Question 4: *What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?*

We find it important that EU action respects existing mechanisms in the Member States where they exist.

Question 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 redress at EU level?*

We do not support EU level collective compensatory redress.

Question 6: *Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?*

We cannot support a binding instrument due to the differing legal systems and existing mechanisms in the different Member States. A binding instrument could not meet the requirements of subsidiarity and proportionality. The answer does not depend on the area in which action is taken. Currently we don't see any need for EU level collective redress instrument but if action is taken, it should be in the form of a recommendation, taking into account the different legal systems and existing mechanisms. Member States with existing mechanisms should not be forced to amend their systems. The instrument should be flexible enough to allow different solutions in the Member States according to their legal tradition and based on their existing mechanisms.

Question 7: *Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?*

We do not support EU action in the field of collective redress as no real need for the instrument has been established.

Question 8: *As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?*

We find it very important that before taking any measures the Commission familiarizes with the different systems and experiences of the Member States. So far the public discussion has mostly concentrated on some parties' lobbying for collective redress system with no concrete evidence of its need.

The Finnish situation has been thoroughly researched in the preparation of the Finnish Act on Class Actions and the legislation on group complaints. The Act on Class Actions was enacted after four different working groups at the Ministry of Justice had conducted preparatory work for legislation during almost fifteen years. In addition, a separate study had been conducted by the Ministry of Justice. This extensive work included studying the cases where multiple consumers could have claims against the same seller/provider.

Working group report 2006:4 of the Finnish Ministry of Justice mentions hypothetical areas where situations for mass claims could arise. During the preparatory work it was essential to look for concrete case examples. Hardly any substantive information about potential concrete cases was found despite intensive work during fifteen years. It should be noted that the consumer authorities and consumer associations as well as environmental associations were represented in this work. Thus, all existing knowledge of problems was available in the preparations with very meager results. The Finnish Act on Class Actions was enacted by a po-

litical decision. So far, no court proceedings have been initiated despite that legislation has been in force for several years.

Furthermore, our experience is that the primary method to strengthen consumers' position is to make sure that public bodies fulfill their duties. If for example, an actor in the financial service sector breaches its duties, it is the duty of the Financial Supervision Authority to take measures. Most importantly, these measures should have preventive effect. When companies are aware that public bodies fulfill their duties, there is less likelihood of breaches of contract or other damage-causing action.

Question 9: *Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?*

Due to the different jurisdictions and legal traditions, it is crucial that any possible EU action is flexible and respects existing mechanisms. EU action cannot be detailed in this field.

Question10: *Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?*

We would like to refer to the Finnish experience of efficient ADR mechanisms. The Consumer Ombudsman has the right to initiate a group complaint at the Consumer Disputes Board. See also the answer to question 11.

Question 11: *In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?*

The defining features of any possible EU initiative should be the protection against abusive and frivolous litigation. Furthermore, in order to respect proportionality, the primary collective instrument should be alternative dispute resolution.

As of March 2007 we have had legislation on group complaints at the Consumer Disputes Board. The Consumer Ombudsman may initiate these group proceedings. The first case has been brought to the Board very recently. The case is very minor and concerns only 11 buyers of an apartment and its maintenance costs.

Due to the fact that there are very seldom cases where collective action is feasible, it is very important to stick to the principle of proportionality and to avoid the risk of increasing litigation at the cost of European companies and consumers.

Question 12: *How can effective redress be obtained, while avoiding lengthy and costly litigation?*

It is very important to avoid court proceedings due to their costs and time-consuming procedures. Instead, alternative dispute resolution should be the primary redress system. We have excellent experiences of ADR systems. See also questions 1, 17 and 26.

Question 13: *How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?*

Such an action may only be the responsibility of a public body. Otherwise there may be a risk of American style litigation industry. For example, in the Finnish system the Consumer Ombudsman may make public announcements to inform the customers of a defendant in a class action case.

Question 14: How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

Representation of customers should only be given to a public governmental body. Otherwise there may be a risk of American style litigation industry. For example, in the Finnish system the Consumer Ombudsman is the body representing customers in class action and group complaint cases.

Question 16: Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

We definitely see a consensual dispute resolution proceeding to be the primary step to be taken. This reduces the risk of frivolous litigation. See also question 1.

Question 17: How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

In Finland we have extensive experience on consensual dispute resolution. It is organized and funded by the private sector but run in cooperation with consumer authorities. This is definitely a sufficient safeguard for the fairness of the outcome.

For example, at the Insurance Complaints Board a solution was found for 847 cases in 2010. Of these cases 143 lapsed before the case was handled by the board. In 132 of the lapsed cases the insurance company paid the demanded compensation and in 11 cases the client

cancelled the proceedings or they were ended for some other reason. So the Board handled and resolved 692 cases (in 12 cases the Board did not issue a recommendation). In 199 cases the recommendation differed from the insurance company's view to the benefit of a client. Insurance companies complied with the recommendations in 98 per cent of the cases. These figures show how well a consensual dispute resolution mechanism can function.

Question 18: Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

We don't find it possible to make the outcome of collective consensual dispute resolutions binding. If this were the case, the mechanism would inevitably have to be organized more heavily than is feasible and the custom today, without adding any material gain to the success of the mechanisms. More heavily built mechanisms are expensive to run and their financing would undoubtedly fail.

Question 19: *Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?*

We have excellent experiences on ADR system set up by the industry. When the industry finances the system, its functioning is organized in an efficient and professional manner and dispute resolution is conducted in cooperation with consumer authorities. These procedures are free of charge to clients. Furthermore, the proceedings are nowhere near so time-consuming as litigation. These features have secured wide respect of the bodies among companies and their clients.

Question 20: *How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?*

The main safeguards against abusive and frivolous actions are as follows: only competent authorities should have the right to initiate proceedings, loser pays principle must be established and the eligibility and suitability of a case should be considered separately before the full court proceeding with the presentation of evidence has been started. Furthermore, the mechanism must be based on opt-in principle. Finally, we stress the importance of not introducing any sort of damage actions with a punitive character. Without these safeguards an American style class action system with considerable risks of abuse will pester the European jurisdictions.

Question 21: *Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left*

to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

The loser pays principle is a core value of fair proceedings. Without this principle, the EU would introduce an American style class action litigation industry to Europe. Finland Chamber of Commerce urges the Commission to adhere to the loser pays principle with no exeptions.

Question 22: *Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).*

Finland Chamber of Commerce opposes a one-size-fits-all solution.

As some Member States have efficient Consumer Ombudsmen while others don't, it would not be acceptable either to require all Member States to establish an Ombudsman system or to ignore the importance and efficiency of these systems where they exist. Accordingly, if a Member State has a Consumer Ombudsman with adequate powers, there is no need to make further requirements or recommendations on EU level concerning who should have the authority to start proceedings.

Finland Chamber of Commerce stresses the importance of a flexible approach, allowing different solutions to consumer redress mechanisms. There is no need to add costs in those Member States where adequate mechanisms for consumer redress are already provided for.

Question 23: *What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?*

Finland Chamber of Commerce opposes a one-size-fits-all solution. In our jurisdiction with Consumer Ombudsman and other competent authorities, giving the right to other organs to start collective proceedings would considerably add the risk of abusive and frivolous litigation. In any case it is important that the right to start collective proceedings is strictly limited. These entities should be recognized by a competent governmental body after careful screening. In a jurisdiction with competent authorities such as Consumer Ombudsman there is no need for further parties to be given a right to start proceedings.

Question 24: *Which other safeguards should be incorporated in any possible European initiative on collective redress?*

The main safeguards are as follows: only competent authorities should have the right to initiate proceedings, loser pays principle must be established and the eligibility and suitability

of a case should be considered separately before the full court proceeding with evidence has been started. Furthermore, the mechanism must be based on opt-in principle. Finally, we stress the importance of not introducing any sort of damage actions with a punitive character. Without these safeguards an American style class action system with considerable risks of abuse will pester the European jurisdictions.

Question 25: *How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?*

In order to avoid abusive or frivolous litigation, the right to initiate collective action should be limited to competent authorities within their own budgets.

Question 26: *Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?*

The only non-public solution of financing that we see conceivable is the establishment of private-sector alternative dispute resolution mechanisms. In Finland we have very successful experiences of these organs. We would especially like to refer to the very popular and efficient self-regulatory bodies funded and organized by the business sector. These organs cooperate with the consumer authorities and provide expert redress mechanisms for consumers. These popular and efficient bodies are the Insurance Complaints Board, the Banking Complaints Board and the Securities Complaints Board. The recommendations given by these boards are complied with by businesses in 98 to 100 per cent of the cases. These alternative mechanisms in addition to the Consumer Disputes Board are the primary ways for consumer redress in Finland. In our opinion, any EU level instrument should concentrate on cost and time-efficient alternative mechanisms instead of focusing on expensive and time-consuming court proceedings.

Question 27: *Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?*

In order to avoid the negative effects of the American style class action, it is necessary to adhere to the loser pays principle. Otherwise frivolous action will be taken especially if proceedings may be commenced by others than competent authorities.

Question 28: Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

In order to avoid frivolous action, the right to initiate collective action should be limited to competent authorities with their own budgets.

Question 29: *Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?*

We are not aware of such examples.

Question 30: *Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?*

We believe that cross-border collective redress may prove to be a very difficult effort due to the questions of applicable law etc. Consequently, we cannot support any rules on cross-border collective litigation. Only ADR mechanisms can prove to be feasible.

Question 31: *Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?*

We suggest that the Commission considers setting up a European pilot project that would establish an ADR body tailored to European cross border collective claim (mediation/arbitration). That pilot project should be developed with support of online dispute resolution technologies.

Question 33: *Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?*

Finland Chamber of Commerce opposes collective redress mechanisms to be extended to any new areas. In many areas there are competent authorities responsible for monitoring and in some regulated sectors special licenses from public authorities are needed for operations. For example, in the areas of labour law or environmental issues there is extensive legislation, monitoring, reporting and licenses required. There is no need for new mechanisms.

Question 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?

If the EU decides to issue a recommendation on collective redress, its scope should be limited to consumer protection.

FINLAND CHAMBER OF COMMERCE

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