BUNDESRECHTSANWALTSKAMMER

Position of the Bundesrechtsanwaltskammer (The German Federal Bar)

Consultation on the follow up to the Green Paper on consumer collective redress

drafted by the Bundesrechtsanwaltskammer's ZPO/GVG Committee and European Affairs Committee

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The German Federal Bar is the statutory umbrella organisation of the 27 regional Bars and the Bar at the Federal Court of Justice. The Bars represent a total of currently approximately 151,000 lawyers admitted to the profession in the Federal Republic of Germany. The German Federal Bar represents the economic and legal interests of the German legal profession.

On the basis of the responses to the Green Paper on consumer collective redress, the Commission has presented an analytical report on the possible EU-wide options to ensure consumer collective redress. In the following, the German Federal Bar presents its views on this report and makes further reference to its position on the Green Paper[1].

1. Problem definition

As The German Federal Bar already pointed out in its position on the Green Paper, there seems to be a lack of knowledge about consumer advantages offered by existing International Private Law and the Brussels I Regulation with respect to the enforcement of claims in the consumer's home country. Therefore, any measures designed to counteract this ignorance would surely be useful. Furthermore, it should be recalled that in the meantime the market has found its own solutions to bundle the enforcement of claims in mass proceedings. These are, however, not specifically tailored to international cases. Lawyers representing consumers and investors are increasingly successful at stimulating larger numbers of clients for their claims, undoubtedly making intensive use of the possibilities offered by the Internet.

With regard to the country report on the situation in Germany, The German Federal Bar would like to point out that this report is incomplete insofar as in relation to the Capital Market Model Claims Act (KapMuG), it fails to mention the fact that all plaintiffs can participate in the proceedings by way of third-party summons to interested parties (*Beiladung*). In practice this is achieved by the Ministry of Justice of the Land Hessen by accepting written statements in model claims only if they are submitted electronically and by giving access to these submissions via an internet forum. Furthermore, the country report fails to mention that the costs for the collection of evidence – which in the proceedings against e.g. Deutsche Telekom, were quite substantial since expert opinions had to be gathered and witnesses had to be heard abroad - are paid up front by the State. This could be a suitable compromise to, on the one hand, facilitate the introduction of claims and to maintain, on the other hand, the risk of facing a negative court order as to costs if the claim is unfounded.

[1] BRAK Position no. 06/2009

2. Policy objectives

The German Federal Bar believes that it is in the interest of everyone involved to find an effective procedure to obtain judicial settlement for mass damages. To refuse new types of procedure in general would be short-sighted. A well-functioning procedure ensures a quick, or at least a quicker settlement of founded as well as unfounded claims and thus also serves the legal certainty for businesses.

3. Regarding the options

In the framework of the proposed options, the Commission dedicates a lot of space to the term “Alternative Dispute Resolution” without clearly explaining what this exactly means. Mediation and arbitration require communication with all participants. In mass procedures, this can be ruled out. Thus, the only possibilities that could be considered are arbitration bodies or ombudsmen. However, these would only bring genuine simplification in straightforward cases. In cases that are legally and factually complicated, the necessary clarification prior to proposing a settlement causes considerable expenditure. The only possible way to make savings in comparison with court proceedings would probably be to abandon the protection of judicial guarantees. The German Federal Bar rejects this idea, unless submission to the proceedings is voluntary. In cases presenting an unclear factual or legal situation and/or where intentional offences are concerned, this cannot be expected to be the case. In addition, the question arises as to who will bear the costs of such proceedings.

The German Federal Bar stresses once again that there is no reason to create distinct types of procedure for consumer protection claims which are not also applied in other legal areas. This issue was also addressed by the European Parliament in its resolution on the White Paper on claims for damages in EU competition law. Also, such types of procedure must not discriminate against a country’s own nationals; they must thus apply indiscriminately to national as well as foreign parties concerned.

The model procedure proposed in **Option V** bears the same problem as the German KapMuG, which is that the preconditions for every individual claim as well as their damage value have to be assessed separately in every single procedure. The required effort could perhaps be reduced by postponing the examination - unlike under the KapMuG - until after the model procedure. This would speed up the model procedure itself. A solution to the individual problem, however, would only be achieved if the claims proved unfounded or if the damaging party were willing to compromise after the conclusion of the model procedure. This

would constitute considerable progress. But whether this alone suffices to create a genuinely effective procedure is, in our opinion, doubtful. Third-party summons (*Beiladung*) in model proceedings alone requires considerable time and expenditure as the case against Deutsche Telekom has shown. When creating special types of procedure with a view to judicial clarification of mass damages, the ultimate objective is to achieve synergies by bundling the various procedures and thus to simplify the conduct of proceedings as opposed to having a multitude of individual proceedings, but without violating requirements imposed by the rule of law. There is thus a conflict of interest between, on the one hand, the desire to simplify and accelerate, and the protection of the procedural rights of all parties concerned (in particular the procedural rights of the third parties that have suffered damage) on the other. The fact that this is indeed a problem area was also clearly shown by the International Bar Association's (IBA) Guidelines on the recognition class action judgments[2]. Against this background, the Commission's proposal to conduct model procedures without the participation of individuals or consumer organisations seems unacceptable.

The German Federal Bar prefers a group action model since effective procedural management can most likely be expected from a private group claimant. This, however, requires careful selection and supervision of the group claimant. One could, for example, imagine an obligation to keep accounts which would be inspected by an auditor. But even in connection with such safety measures, the setbacks with regard to the protection of judicial rights of the other damaged parties are only acceptable under the condition that the parties concerned have voluntarily agreed to such a procedure. Thus, an opt-in model is the only option to be considered.

In addition, The German Federal Bar's view is that an efficient settlement of small claims requires a model for representative action. In this respect we would like to refer to the BRAK's position on the Green Paper.

The German Federal Bar currently prefers **Option I** of the Commission report. As mentioned by many participants attending the Commission hearing on 29.05.2009, we have not yet gained enough experience with the various types of procedure introduced in different EU Member States. In this respect, the Commission should first proceed to an evaluation before it commits to a particular procedure that would apply everywhere and to all kinds of damage. A legislative quick-fire solution does not look very promising, considering the many problems related with the creation of an effective procedure to settle mass damage claims.

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[2] http://www.ibanet.org