



Brussels, 7 July 2009

RESPONSE TO COMMISSION'S CONSULTATION PAPER ON COLLECTIVE REDRESS

The Federation of European Risk Management Associations (FERMA) brings together the national Risk Management Associations of 16 European countries, including 14 in EU Member States. FERMA has over 4.000 individual members representing the major industrial and commercial companies in their respective countries. FERMA's members play a crucial role within their companies with respect to the management and treatment of complex risks and insurance issues.

FERMA has followed with interest the debate on consumer collective redress and welcomes the opportunity of the second consultation phase to submit its views on the Commission's Consultation Paper on Consumer Collective Redress ("the Consultation Paper"). FERMA recognizes that the introduction of a new instrument throughout the EU will create significant challenges for the European industry and its risk management. FERMA nevertheless shares the view of the Commission that consumer protection legislation must be enforced and compensation awarded for any harm caused.

FERMA takes note of the efforts of the European Commission to address concerns raised by companies following the Green Paper, in particular the importance of Alternative Dispute Resolutions ("ADR") mechanisms and the option to extend the scope of the Regulation on Consumer Protection Cooperation.

In general, FERMA is against the introduction of consumer collective redress. FERMA remains deeply concerned that such redress would simply provoke US-style class actions with all the shortcomings such actions have given rise to.

1. No need for EU legislative action on collective redress

DG SANCO's arguments fail to convince FERMA of the need for collective redress at EU level since few sectors are concerned by mass consumer claims and the vast majority of those claims lack a cross-border element. The legal basis for an EU legislative instrument remains unclear and FERMA is of the opinion that Member States are better placed to address the issue given that consumer laws are not fully harmonised and their enforcement depends on national procedural rules. Some Member States have already adopted a collective redress system; a decision to do so – or to rely on existing measures – should remain a Member State option, in conformity with the principle of subsidiarity.

A number of consumer protection instruments are already in place at the EU level (e.g. the Small Claims Regulation and the Injunctions Directive) and at national level. Since many of these instruments have only recently entered into force, it is first necessary to conduct an impact assessment of those instruments before any further action at EU level is taken.

2. Promotion of self-regulatory measures

FERMA supports the promotion of self-regulatory measures for complaint handling based on a code of conduct and the improvement of existing ADR systems.

The Consultation Paper recognizes that the introduction of collective redress will raise difficult questions of applicable law and competent jurisdiction. Self-regulatory measures are a better means to address those questions. Codes of conduct already exist in various sectors and can be extended to others. FERMA is of the opinion that an efficient complaint handling system based on a fair Code of Conduct is a rapid and efficient way to respond to mass consumer complaints.

ADR systems also have many advantages. They provide flexible solutions, avoid long and costly procedures and the problem of applicable law and competent jurisdiction. Out-of-court settlements are already implemented in certain insurance contracts and could be developed in other sectors. The efficiency of existing ADR systems should first be assessed before the EU takes any decision to require their use in case of consumer collective redress.

Again, FERMA prefers guidance at EU level for a harmonized approach of self-regulatory measures rather than an EU legislative action.

3. Opposition to an EU-wide judicial collective redress procedure

FERMA has serious arguments against the introduction of an EU-wide judicial collective redress. Judicial collective redress is the counterpart of a lightly regulated economic system such as in the United States. The EU context is very different as most of business sectors are effectively regulated either at EU or national level. Thus, FERMA doubts that an EU-wide judicial collective redress would be suitable in the EU economic and legal environment.

An EU-wide judicial collective redress approach would open the flood gates to massive litigation and the introduction of a litigation culture especially if Member States, intermediaries or law firms are allowed to fund such litigation.

Therefore, FERMA is strongly opposed to the suggestion made in the Consultation Paper that “(...) *means of financing should be available (either through State funding or by awarding a share of the compensation to the representative entity to cover expenses necessarily incurred in connection with the relevant action)*”. On the one hand, awarding a share of the compensation would lead to the development of contingency fees which play a key role in the abuses which occur in the United States. Moreover, state funding (directly or via representative entities) may infringe the “loser pays principle” which is necessary to prevent a litigation culture from emerging in the EU. Contingency fees and state funding would result in unmeritorious claims on the docket of already overloaded courts.

FERMA takes note that the Commission still considers the possibility of an “opt-out” collective redress. That option is incompatible with article 6 of the European Convention on Human Rights which entitles a defendant to know the nature and the number of claims it faces. Victims will not be clearly identified and the harm they have suffered impossible to assess accurately. Therefore, it will render the distribution of compensation complex with serious risks of overcompensation. Whether the “opt-in” or “opt out” solution is adopted, the effective transfer of a single case to a multitude of cases with identical factual and legal background will prove very difficult to handle in a cross-border context and will allow unmeritorious claims to be brought.

Thus, FERMA is opposed to EU-wide judicial collective redress which would render risk management unnecessarily complex and would jeopardize the partial transfer of that risk to the insurance market. Undoubtedly, collective redress would have an adverse effect on the availability and scope of coverage and on the price of insurance products.



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The national risk management associations of 16 countries form the Federation of European Risk Management Associations – FERMA. It represents over 4,000 individual members and a wide range of business sectors. Member associations are from the following countries: Belgium (BELRIM), Bulgaria (BRIMA), Czech Republic (ASPAR CZ), Denmark (DARIM), Finland (FinnRiMa), France (AMRAE), Germany (Bfv & DVS), Italy (ANRA), Netherlands (NARIM), Poland (POLRISK) Portugal (APOGERIS), Russia (RusRisk), Spain (AGERS), Sweden (SWERMA), Switzerland (SIRM) and United Kingdom (AIRMIC).

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Mission Statement

FERMA exists to support its members by coordinating and enhancing awareness and effective use of risk management, insurance and risk financing in Europe

Strategic Objectives

- 1. To coordinate, promote and support the development and application of risk management in Europe*
- 2. To be recognized as a significant stakeholder in the decision making process at the European level on Risk Management and Insurance issues*