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European Commission
Consultation on Collective Redress
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Consultation Paper on Collective Redress: Towards a Coherent European Approach to Collective Redress

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 5,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

APIL has previously responded to the European Commission on collective redress. Our most recent response was in March 2009¹ and we welcome the opportunity to provide further input and assistance on behalf of injured people, where appropriate, during the development of this work.

We have reviewed the consultation paper at length and at this stage we feel unable to provide further detailed comment over and above that already stated by this organisation. We remain committed to being involved in future discussion and would

¹ APIL Response to the Commission of the European Communities Green Paper on Consumer Collective Redress, 9 March 2009, <http://files.apil.org.uk/pdf/ConsultationDocuments/1515.pdf>

wish to bring our members' experience and ideas to any further debate. On this occasion, therefore, we restate our earlier views.

Our members believe that the level of damages outside of the UK are too low and do not adequately reflect the level of injury. The introduction of new mechanisms for collective redress would offer added value to injured people in the UK if the UK standard of damages were to be used as a benchmark. We do, however, appreciate that it is difficult to fairly harmonise the level of damages between the member states due to widely different government welfare benefits, and private insurance arrangements which exist.

We believe that collective redress should exist, and that the EU should act in a facilitative role to encourage all member states to implement a judicial collective redress procedure. However, there is still an overwhelming need for a complete overhaul of the procedure for dealing with collective actions as access to justice issues have not been served well by the current legal processes, either in the UK or Europe.

As stated previously, we believe the EU should ensure that each member state's procedure contains similar provisions, such as:

Representative actions

It should be possible for collective claims to be brought by a wide range of representative parties, individual representative claimants or defendants, designated bodies and *ad hoc* bodies.

Opt in- opt out

A procedure which allows the flexibility of an opt-in or opt-out procedure, based upon the court's assessment of the particular issues of the case.

Certification procedures

No collective redress action should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure, properly managed by the courts. The certification procedure should ensure that an adequate degree of control is being exercised upon representative parties and that any potential for conflict in the context of the interests of those who are within the group is avoided. Further information on certification procedures is available in our response to the European Commission's 2009 consultation paper on collective redress.

Funding and costs

During the certification process, the court should examine the fairness of any funding arrangement between the parties and should also be obliged to look at whether the parties can afford to take part in the process. At this stage, the court should be considering how to deal with costs in the particular case: is full costs shifting appropriate, or should there be *Corner House*² type procedures when considering protective costs or cost capping orders? This consideration has to be given at this early stage otherwise the issue of costs will reflect in the future conduct of the action.

Defined appeals procedure

Appeals from either positive certification or a refusal to certify a claim should be subject to the defined rules on permission to appeal. Equally, all other appeals brought within collective action proceedings should be subject to the defined rules of appeal.

Power to aggregate damages

Where a case is brought on an opt-out basis, the court should have the power to aggregate damages in an appropriate case. Under opt-out regimes in other

² *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. See also the recent Court of Appeal decision in *R (on the application of Buglife - The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd (Interested Party)* [2008] EWCA Civ 1209 which reiterates the procedures as set out in *Corner House*.

jurisdictions, the power to make an aggregate award of damages is generally endorsed as a means of avoiding costly, time-consuming and inefficient individual damages determinations. This should be a required element of any collective redress procedure. There also needs to be a mechanism in the rules to enable the court to assess the individual entitlements of the class members.

Court approval of settlements – representative actions

To protect the interests of the represented class of claimants any settlement agreed by a representative claimant and the defendant(s) must be approved by the court before it can bind the represented class of claimants. In approving a settlement or giving a judgement on a collective redress action, the court should take account of a number of issues in order to ensure that the represented class are given accurate opportunity to claim their share of the settlement or judgement.

We would welcome the opportunity to provide further detail on our recommendations above, or any specific proposals that the European Commission may consult on in future.

We would also add that there are frustrations with each individual member states' system of collective redress and, in order to provide the injured person with the best result, we recommend that any specific proposals made in the future should look to rectify the imbalance that has been created between the claimant and defendant positions.

We hope that our comments prove helpful to the committee and look forward to engaging with you further in the future.

Yours sincerely

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