REINFORCING SANCTIONING REGIMES IN THE FINANCIAL SERVICES SECTOR

Communication from the Commission

BEUC response to consultation

Contact: Anne Fily & Farid Aliyev – Financialservices@beuc.eu
Ref.: X/2011/020 - 22/02/11

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu
EC register for interest representatives: identification number 9505781573-45

Summary

BEUC welcomes the opportunity to comment on the European Commission Communication on "Reinforcing sanctioning regimes in the financial services sector". We welcome the findings and proposals made by the Commission as they aim at achieving better compliance with EU law and protecting EU consumers. Sanctions must be effective, proportionate and dissuasive.

Additional suggestions are made by BEUC in order to reinforce the Commission proposals and to better protect consumers. BEUC proposals are as follows:

- Conflicts of interest between the activities of national financial supervisory authorities (prudential supervision versus conduct-of-business supervision) should be eliminated. Consumer protection must become an official objective of the national supervisors.
- In countries, where the supervisory authorities are not officially in charge of conduct-of-business supervision, consumer protection supervision must be enshrined in national legislation and form part of the tasks performed by the supervisory authorities.
- Power and competences of supervisory authorities must be sufficient to duly perform their supervisory activities.
- A European Group Action mechanism should be put in place to enable European consumers to collectively bring a case before the court to obtain compensation for loss or damage caused by the same financial service provider or intermediary. It would also have a deterrent effect on behaviour of financial institutions.
- In addition, a scheme similar to the OFT Super-complaints in the UK would enable consumer organisations to get in contact with relevant authorities on major issues and allow for a regulated as well as swift reaction.

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

BEUC welcomes the opportunity to comment on the European Commission Communication on 'Reinforcing sanctioning regimes in the financial services sector'.

Because more and more legislation on financial services is decided at EU level, no reason exists for the sanctioning regimes to remain a purely national issue. Furthermore, too much divergence between national sanctioning regimes is not in line with the single market spirit and leaves room for regulatory arbitrage.

BEUC welcomes the findings of the stocktaking reports by the 3 Committees (CEBS, CEIOPS and CESR) and proposals made by the Commission as they aim at achieving better compliance with EU law and protecting EU consumers.

However it is regrettable that the stocktaking exercise was limited to a certain number of EU legislative acts, while some others that directly affect consumers, like the Consumer Credit Directive and the Payment Services Directive, were not covered. It would have been also useful to gather information on sanctions stipulated by national legislations in areas which are expected to be covered by EU legislations soon, like mortgage credit and access to a basic payment account. All these legislative areas must be taken into consideration by the Commission when defining the scope of its future policy actions.

1. The following EC findings are supported by BEUC:

- Some competent authorities do not have at their disposal important types of sanctioning powers for certain violations.
- The levels of pecuniary sanctions (fines) vary widely across Member States and are too low in some Member States.

  For example, the maximum fine that can be imposed on banks by the Italian Antitrust Authority amounts to € 500.000 which can not act as a deterrent against violations of law. In Germany, while §39 WpHG (law concerning trade of investments) allows for fines to a maximum of 1 million Euros depending on different offences, breach of regulation on credit advertisement can only be fined to an amount of only € 20.000 according to §10 Preisangaben-Verordnung and §3 Wirtschaftsstrafgesetz. Furthermore, fines imposed for wrong investment counselling may not exceed € 50.000.
- Some competent authorities cannot address administrative sanctions to both natural and legal persons.
- Competent authorities do not take into account the same criteria in the application of sanctions.
- Divergence exists in the nature (administrative or criminal) of sanctions provided for in national legislation.
- The level of application of sanctions varies across Member States.

Lack of dissuasiveness and ineffective application of sanctions seriously undermine consumer protection and their confidence in the financial sector.

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

2. Proposals to reinforce national sanctioning regimes:

BEUC supports the proposals made by the Commission to approximate and reinforce national sanctioning regimes in the financial services sector:

- Defining appropriate types of administrative sanctions for the violation of **all** provisions so as to allow the competent authorities to impose, in each specific case, a sanction that is likely to be optimal in terms of effectiveness, proportionality, and dissuasiveness.
- Systematically publishing sanctions.
- Defining a sufficiently high level of administrative fines to allow national authorities to impose effective, proportionate, and dissuasive fines.
- Imposing sanctions on both individuals and financial institutions responsible for a violation.
- Taking into account appropriate criteria, including aggravating and mitigating circumstances, when applying sanctions.
- Introducing criminal sanctions for the most serious violations.
- Setting appropriate mechanisms supporting effective application of sanctions so that competent authorities could detect violations and impose appropriate sanctions (powers and investigatory tools, cooperation between competent authorities).

However, it should be also taken into account that in some Member States sanctions imposed by the supervisory and antitrust authorities are often cut down by courts. For example, sanctions imposed by the Italian Antitrust Authority in most cases are rejected by the Regional Administrative Tribunals (TARs) or the Council of State (Consiglio di Stato). This fact may deter the supervisory and antitrust authorities from imposing sanctions on financial institutions and encourage the latter to not comply with legislation.

In order to implement the measures proposed by the Commission, a minimum harmonisation approach should be adopted to ensure a very high level of consumer protection everywhere in the EU, while enabling Member States to keep and/or adopt additional measures in order to take into account national specificities.

3. Need for additional measures:

However above measures are not sufficient because they are only focused on sanctions. It is not because future legislation would better harmonise sanctioning regimes that national authorities in charge of consumer protection will use them or will be able to use them. Other shortcomings need to be addressed and solved.

Conflict of interests (conflict of priorities) exists between the activities of national supervisory authorities, as for example regarding financial sector competitiveness versus strong consumer protection, provider information secrecy versus market information distribution, strong prudential capital adequacy rules versus good credit perspective (responsible lending). BEUC has been asking for several years for

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

consumer protection to become an official objective of the national supervisors[1]. Currently the activity of most national financial supervisors is mainly focused on overseeing compliance with prudential rules by market players (e.g. the capital requirements), while control of conduct-of-business rules is not a priority for many of them even if this role forms part of their duties. A BEUC study on how consumer interests are actually taken into account by national financial supervisors will be available in March 2011. Preliminary findings show that in many cases competent authorities pay very little attention to consumer protection issues. For instance, the Danish Financial Supervisory Authority *(*Finanstilsynet*)* is an integrated supervisor in charge of overseeing all financial services sector. As reported by the Danish Consumer Council, almost all the actual control run by Finanstilsynet is about annual accounts and capital requirements.

Therefore conflicts of interest should be eliminated.

In some other countries ***the supervisory authorities are not officially in charge of conduct-of-business supervision***. For example, in Germany the general Financial Supervisory Authorities BaFin and Bundesbank are not even legally entitled to focus on market behaviour towards consumers, with exception to insurances, leaving a huge lack of adequate control. An example to illustrate the Slovenian situation is the national legislation transposing the Consumer Credit Directive, where the specifications on information and advice are widely disregarded by the providers without any reaction from the national supervisor. In this country, consumer protection supervision is a new issue; the supervisor traditionally seldom focuses on the aspects of laws on financial services that deal with consumer protection.

C*onsumer protection supervision must be enshrined in national legislation and form part of the tasks performed by the supervisory authorities.*

There is also a ***mismatch between the powers conferred to supervisory authorities and the activities of financial institutions***. A specific problem has been reported in Germany where local municipalities are in charge of checking whether interest rates in credit advertisement are representative, i.e. are offered to two thirds of consumers who apply for this credit. But the municipalities do not hold adequate powers and competence to oversee compliance of large banks operating on a national or international scale.
Thus, power and competences of supervisory authorities must be sufficient to duly perform their supervisory activities.

Furthermore ***damages suffered by consumers in case of infringements are not compensated*** because of lack of efficient compensation mechanisms in most Member States.

Non-compliance with legal rules can easily detrimentally affect a large number of consumers. Individual actions are not an appropriate remedy, as the litigation costs involved can be much higher than the compensation the affected consumers are entitled to.

---

[1] BEUC position "Financial supervision in Europe: consumer perspective", July 2009.
BEUC position "Financial supervision at EU and national levels: consumer interests", March 2010: http://www.beuc.eu/Content/Default.asp?PageID=2143

Below are examples of detriment suffered by many consumers as a result of unfair behaviour from a single financial institution:

France
In January 2010, the Crédit Foncier de France was fined € 50 000 for being guilty of misleading commercial practices on the essential qualities of home loans sold between 2005 and 2007.[2] In the absence of group action to bring together all affected consumers to obtain full compensation for the damage, UFC-Que Choisir and Collective Action – a group of customers misled by the Crédit Foncier - had to engage with the bank in lengthy and difficult negotiations, due to the absence of a group action mechanism, to secure the running contracts and obtain compensation for consumers. 150 000 consumers were affected.

Slovenia
A number of Slovene consumers have opted for savings plan contracts with Slovenia's largest bank Nova Ljubljanska banka (NLB) – they entered into annuity savings contracts. The Annuity Savings Plan is a long-term (even up to twenty years) instalment savings product. The contract in question included a covenant that the interest rate would be kept unchanged throughout the savings period; however, the bank took the liberty of changing the interest rate unilaterally. In this particular case the bank decreased the interest rate without informing savers about it. What is more, the contract did not include the right of consumers to withdraw from the contract. Following the involvement of the national consumer association ZPS, the bank started making settlement arrangements with consumers, as part of which it has partly been paying back interest rates it had failed to pay in sufficient amounts in the past. ZPS does however believe that should consumers opt for filing compensation claims in the court, the amounts of money received would be even higher. Unfortunately the option of making collective compensation claims does not exist in Slovenia yet, and consumers do only rarely decide to introduce individual compensation claims.

Belgium
In Belgium, various increases of insurance premium were declared illegal by Court decisions under injunction procedures. Those legal orders stop illegal practices for the future but offer no compensation for damages suffered by up to a million of consumers.

In 1998 Test-Achats filed a complaint against certain provisions in general conditions of contracts offered by Dexia bank. In July 2007 the Court of Appeal of Liège ruled in favour of Test-Achats' claim. Notably, the provision that allows the bank to offset the negative account balance against a positive balance in another account was ruled unfair. Many other banks in Belgium had to review their general conditions to comply with legislation. In the absence of a group action procedure consumers who were harmed by unfair contract terms are unable to get redress.

---

[2] Commercialisation des crédits à taux variable: le crédit Foncier reconnaît devant la justice s'être rendu coupable de tromperie, UFC-Que Choisir press-release, 25 January 2010: http://www.quechoisir.org/argent-assurance/banque-credit/credit/communique-commercialisation-des-credits-a-taux-variable-le-credit-foncier-reconnait-devant-la-justice-s-etre-rendu-coupable-de-tromperie

A European Group Action mechanism would appear to be not only useful, but indeed also an indispensable tool for European consumers**.** It would enable them to collectively bring a case before the court to obtain compensation for loss or damage caused by the same financial service provider or intermediary. It would also have a deterrent effect on behaviour of financial institutions.

However, the discussion on the introduction of consumer collective redress at EU level has been clouded by fears that the EU will open the door to US class actions system and the elements of this system which eventually have led to it abuse. It must be underlined that experience from those Member States (e.g.: Spain and Portugal)[3] that already have collective redress mechanisms in place clearly demonstrates that European legal traditions provide for the necessary safeguards to avoid abuses of the system, which are feared by the business community. On the contrary, group actions will benefit those companies that comply with the law and respect consumer legislation.

Leaving compensation issues to the single consumer to sue individually will not create the adequate impetus given the huge efforts, cost and risk and the specific legal expertise needed for the individual to have any chances to succeed with their legal claims. Compensation in the sense of market regulation surmounts people's individual interest, it is about the functioning of those check and balances that make a market work or not.

In addition, a scheme similar to the OFT Super-complaints in the UK would enable consumer organisations to get in contact with relevant authorities on major issues and allow for a regulated as well as swift reaction. The possibility to set up such a scheme at national or EU level should be further investigated by the Commission.

END

[3] See BEUC Country Survey of Collective Redress Mechanisms: Where does collective redress for individual damages exist (Updated in July 2010): http://docshare.beuc.org/docs/1/KIBAMCNACNNAOBOOBCGKMJDEPDWD9DB1AW9DW3571KM/BEUC/docs/DLS/2010-00538-01-E.pdf

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu