Position of Detailhandel Nederland

Consultation of European Commission on a coherent European approach towards collective redress

Detailhandel Nederland, further referred to as Dutch Retail Association, represents the Dutch council for SME-retailers (MKB-Nederland) and of large retailers (Raad Nederlandse Detailhandel).

Registered as interest representative: nr 22232504133-92

---

1. Collective redress and the enforcement of EU law

The retail market in the Netherlands is well functioning and known for the fierce competition among its players.[1] However, occasionally retailers fall victim to anti-competitive behavior by other players in the market. In general, parties sentenced for a breach of antitrust rules only pay a fine to a national or European competition authority. This fine flows into the public pocket. The victims - citizens and businesses - of such a breach of anti-competitive behavior (think for example of a cartel or abuse of dominant) are not compensated, unless they individually go to court and win their case.

Overall, the Dutch Retail Association holds the view that the introduction of EU-wide mechanisms for collective redress pose more risks than benefits. From a retail perspective it could be argued that certain forms of compensatory collective redress applying solely in the field of competition law, could carry with some benefit for the enforcement of EU law. The associated lower costs for litigation of collective action, and the relatively higher gains per plaintiff would provide notably smaller retailers with an incentive to seek redress.

[1] Netherlands Competition Authority (NMa), Price Forming in de Agri-Food Sector, December 2009

When discussing collective redress we consider it important to make a clear difference between competition law and consumer law. Infringements of competition law are usually established after a thorough enquiry by national and/or European competition authorities.

In the area of consumer-rights such thorough enquiries are in general not the case. Moreover, it is usually harder to point out what was right and wrong. Consumer right law has more grey areas.

Against this background, collective redress can have a more adverse effect, as it carries with it a huge risk for reputational damage for both large and small retail firms, in case they were to be targeted by a collective redress claim. This is predominantly caused by the media attention surrounding a collective claim for damages. The mere threat of a group of consumers going to court poses a huge threat to the public image of a company. As a consequence, for an accused retailer there is a strong incentive to settle at an early stage, even if from a legal perspective there is no need to do so as the company perfectly stands in its right. This incentive to settle could easily have a perverse effect. It could lead to many unmeritorious claims, which would only be beneficial to lawyers and their clients.

This is why, if the European Commission, based on sound and ample evidence of positive effects on consumer and business, chooses to take European wide action in the field of collective redress, we advocate a two-tier approach where it only applies to competition law.

2. EU collective redress and the principles of EU law

According to the Lisbon Treaty, under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Here the question arises whether EU action in the field of collective redress would have such an effect that EU-wide action is justified. According to information currently available, this does not seem to be the case. Given the

very low number of reported cases with some cross-border aspects (30 over a period of a decade), the only reasonable answer in our view is that we speak about a very minor issue that does not justify far reaching binding EU measures to ensure that a collective redress mechanism exists in all Member States. On a national level, member states are free to introduce mechanisms that suit their needs, the Commission could even play an advisory role in this and disperse best practices. However, one system of collective redress for 27 different member states is not desirable.

2.1. Extending the scope of the existing EU rules

According to the Directive on Injunctions (98/27/EC), Member States may extend the scope of actions for injunctions beyond misleading advertising, consumer credit, package travel, unfair contractual terms. Member States may also extend the possibility of bringing action for injunctions to any other person concerned. Given the wide range of options now at hand at Member State level to extend the scope, extending this at EU level seems to run counter to the principles of subsidiarity and of proportionality.

3. Common principles

Even though the added value of any possible EU initiative on collective redress remains questionable, it should in any way incorporate core principles that prevent abusive litigation. Fortunately, the Commission seems well aware of this risk and identifies a number of them which the Dutch Retail Association supports. An important threat pointed out by the Commission is the possibility of contingency fees for attorneys which would provide lawyers with a strong financial incentive to engage in class-action-like cases. Other risks pointed out are the wide-ranging discovery procedure for procuring evidence, the availability of punitive damages and the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties).

Whatever the form any initiative on collective redress might take, a system in which presumed victims should opt-in to a collective settlement would be

preferred above an opt-out system. The reason for this is that with an opt-out system, there is a risk that much of the proceedings from a court case, destined for victims, is left in the pockets of for instance consumer-organizations who brought the case to court at their behalf. When victims are ignorant of their rights for compensation, there is a clear risk that proceedings from court cases do not find their way to the victim.

4. Effectiveness and efficiency

For SMEs in retail, the introduction of representative actions could be helpful to more effectively claim damages in case of antitrust infringements. Small businesses are often reticent to take companies to court, in particular if they are one of their suppliers or customers. An important reason is that they fear that by doing so, they would damage a business relation beyond repair. Joining a representative action, for example brought by a trade association, could moderate or even fully remove this fear.

4.1. Avoiding lengthy and costly litigation

Alternative Dispute Resolution would be an evident step for victims to obtain effective redress, while avoiding lengthy and costly litigation.

4.2. Informing the victims

Regarding informing consumers on the existence of collective redress claims in a particular country, consumer cooperation networks could play a role providing information; single point of contact centralizing the information could therefore be of added value. European Consumer Centres (ECC) or any other national contact point could play an important role by providing assistance and the necessary information to the consumer. For cross-border disputes, such national points can act as intermediaries between the various national schemes.

5. Promoting ADR

The starting point should be the voluntary take-up, not the top-down imposing of ADR. The reason for this is that voluntary take-up carries with it a higher level of support within and with a company, than anything imposed from above.

The principles of the two existing EU Recommendations on ADR, although not drafted with the resolution of collective consumer claims in mind, can also be applied to collective ADR schemes. ADR is less harmful than the forced introduction of alien judicial proceedings into existing national legal systems.

However, ADR should not mean that parties get total freedom regarding the result. Whatever the outcome is, it should be based on the law of the respective Member State and reflect a fair system for both the consumer and the business involved in the procedure. Currently, in some cases, companies are not treated equally. Their economic position is abused as they are seen as the stronger party. It should be ensured that both parties are protected equally.

If the recommendations made from the ADR scheme are arbitrary, the scheme will not survive, since the market will not adhere to the recommendations. The whole existence of ADR schemes depends on market confidence; therefore it is necessary to maintain the voluntary character of ADR. This is also the only way to ensure that ADR schemes remain easy, fast and cheap. Moreover, guidelines helping to ensure that ADR schemes are balanced and independent do make sense; such guidelines already exist in Recommendation 98/257/EC.

6. Abusive litigation

The Dutch Retail Association is, as mentioned above, against an EU wide Collective Redress mechanism for consumer rights. When unjustifiably sued, these types of collective redress can have a long term negative effect on a company. Therefore, a collective redress system should provide the necessary safeguards in order to prevent unmeritorious claims. These should include a screening process in front of a judge; a ban on contingency fees; an opting in procedure at the EU level; and a requirement that no case should proceed unless and until a trader has been convicted of an offence in a court or through such other processes as may be formally adopted in a Member State and all appeal

procedures have been completed. Also measures should be put in place to prevent forum shopping.

Redress (of whatever type) and punishment should be separated. Redress should be redress for the damage caused to the consumer. Anything more is likely to lead eventually to punitive damages of some sort and potentially double punishment. The principle of compensation-based damages must be maintained. Non-compensatory damages must be excluded as well as contingency fees (or other kinds of 'success fees') for litigation lawyers.

Moreover, the loser pays principle should apply to EU cases to prevent unmeritorious claims across the EU; this principle is essential since it discourages speculative litigation and it should be upheld. This is separate from any view on the loser pays principle for national purposes where it may be relevant to ensure overall coherence. The normal costs rules which operate in the courts of the Member States should continue to apply to collective redress.

Court procedures should permit the defendant to apply for security for costs or other costs orders to protect itself against unrealistic and uneconomic claims.

Third party representation should be limited to representative consumer bodies (which could be the same as those recognised under the Injunctions Directive for bringing cases) to avoid legal firms touting for business.

Furthermore, due to the lack of a harmonised EU consumer protection law the Dutch Retail Association does not see how an EU wide collective redress mechanism could properly function. The application of an EU wide mechanism would not be achievable with 27 different consumer protection laws. On the basis of the ongoing negotiations between the European Parliament and the Council it is for example clear that there will be no full harmonisation in important areas as guarantees and rules on conformity. Furthermore, the Brussels I Regulation raises also questions of the applicability of an EU wide collective redress mechanism.

There will be more legal uncertainty for consumers if they have different judicial rights under the different fields of legislation. The Commission must also take into account that the introduction of a judicial system will require substantial modifications to the national systems of the Member States. The exact impact on the national systems can only be assessed if there is a proposal

with clear decisions taken. Every system needs to be assessed separately; Member States have different judicial systems and proceedings for court cases.

In its consultation document, the Commission already points several items that should be resolved in order to avoid abusive litigation. One of them is the possibility of contingency fees for attorneys providing lawyers with a strong financial incentive to engage in class-action-like cases. Other risks pointed out are the availability of punitive damages and the absence of limitations as regards standing.

7. Should the 'loser' pay?

Moreover, the loser pays principle should apply to EU cases to prevent unmeritorious claims across the EU; this principle is essential since it discourages speculative litigation and it should be upheld. This is separate from any view on the loser pays principle for national purposes where it may be relevant to ensure overall coherence. The normal costs rules which operate in the courts of the Member States should continue to apply to collective redress.

Court procedures should permit the defendant to apply for security for costs or other costs orders to protect itself against unrealistic and uneconomic claims.

8. Who should be allowed to bring a collective redress action

Third party representation should be limited to representative consumer bodies (which could be the same as those recognized under the Injunctions Directive for bringing cases) to avoid legal firms touting for business. Monitoring and auditing mechanisms should be put in place in case of third party representation.

9. Scope

European wide systems for consumer collective redress require a European-wide set of consumer rights. As these are currently absent, a system for collective redress with a general scope, touching both upon the field of competition law and consumer rights does not make sense. If the Commission with hard facts,

can demonstrate the need for an EU initiative for collective redress, this should be targeted at policy fields where European legislation is harmonized. Even though currently the usefulness of collective redress in the field of competition law in cross-border cases seems very limited, given the small number of cases, we are not necessarily against EU wide collective redress mechanisms in the field of competition law. Hence we propose a two-tier system that focuses solely on competition law and leaves out an EU-wide system for consumer law.

In case of any remarks and/or questions you may contact the Brussels office of the Dutch Retail Association, call 032-2-7365830 or send a mail to hendrikjan.vanoostrum@dedetailhandel.nl

Brussels, 29 April 2011