Position paper:
A European-wide system of class action is premature

Position paper of Platform Detailhandel Nederland (Dutch Retail Association) on the White paper on Damages actions for breach of antitrust rules, as presented by European commissioner for competition, Neelie Kroes, in April 2008 – COM(2008) 165.

Summary

European commissioner for competition, Neelie Kroes, has presented a blueprint for the introduction of a European-wide system of collective redress on the basis of minimum harmonization. Given the clear risk that class actions mechanisms could serve as the inciting cause of an excessive claim culture, Platform Detailhandel Nederland is not in favor of this idea. We prefer that the European Commission is going to study carefully for a couple of years what the effects will be of the different class action mechanisms that a number of Member States recently have introduced themselves. If the outcome of this study is that there are no excesses, we would be happy to consider the question as to whether any further action from Brussels to harmonize collective redress in the European Union would be necessary.

Position paper

Platform Detailhandel Nederland (PD) agrees with the European Commission (EC) that any citizen or business who has suffered harm from a breach of the antitrust rules of the European Union – cartels and abuse of dominant position, respectively art 81 and 82 of the EC Treaty – should be able to claim compensation from the party who caused this damage. Infringements of antitrust rules run counter to fair competition. Infringements can therefore not be tolerated in the interest of those companies that compete lawfully and, more generally, in the interest of all parties which are victims of companies which rig prices or breach competition rules in other ways.

It is clear that currently most parties who are sentenced for a breach of antitrust rules only pay a fine to a national or European competition authority respectively. These fines generally flow into the public coffer. As a consequence, the victims of such a breach – citizens and businesses – are not compensated. Although it could be argued that they gain from these fines, at least indirectly, for the reason that the money is spent on public goods or could be used to lower taxes.

Over the last few years the European Commission has investigated hundreds of companies for violation of the competition law. More than 100 companies have been fined for antitrust violations. But as a comparative report on the competition laws in the EU and its Member States published in 2004 reveals, in only 28 individual cases damages were awarded to a private plaintiff. Out of these 28 cases only 12 concerned a breach of EU competition law, as opposed to national competition law.

Neelie Kroes (European commissioner for competition)

In the White paper commissioner Kroes underlines that the primary objective and guiding principle of creating an effective system for collective redress is to grant citizens and businesses full compensation. She considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. According to Kroes, individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damages, are often deterred from bringing an individual action for damages because of the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently remain uncompensated.

Commissioner Kroes envisages two mechanisms to reverse this trend. To stimulate individuals to claim damages she wants to introduce representative actions, which are brought by qualified entities such as consumer associations or trade associations on behalf of individuals. Moreover, she wants to introduce a so-called opt-in system for collective action, in which only individuals who expressly decide to bundle their claims would take part.

In April at the presentation of the White book, commissioner Kroes stated that we have moved beyond the question of whether we should have a more effective system of antitrust damages action to the question of how such a damages action system should operate.

PD considers that there are a number of positive elements in the White paper, but that there are also considerable risks if this blueprint for collective redress would be implemented in the European Union.

Especially for small retailers 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.

Nevertheless there are also risks with regard to Kroes' blueprint for collective redress in the European Union. Collective action may fit well into the Citizens' agenda of the European Commission, which was developed in reaction to the no-vote in France and the Netherlands against the European constitution in the summer of 2005. A more effective system to claim damages could count as a tangible result of action at European level. This in turn may stem citizens less skeptical about European integration.

But there is also an older European agenda, the so-called Lisbon agenda, set by the heads of state and governments in 2000. The aim of this agenda is to make the European Union the most dynamic and competitive knowledge-based economy in the world. The key to do this is to make the European Union more friendly to businesses. So, for example less administrative burdens as well as the removal of other obstacles which obstruct entrepreneurs in their drive to start and grow businesses.

An important background to the Lisbon agenda is the gap in productivity between the EU and the US. The EU wants to close this gap. In this respect it is striking that the European system of damages actions for breach of antitrust rules that the European Commission envisages, resembles to a significant extent the American system of class actions. A system that is widely discredited for creating an excessive claim culture. This is also the reason why there has recently been an important class action reform in the United States. In 2005, after years of lobbying the US Chamber of Commerce and other business associations convinced the Congress to pass the Class Action Fairness Act. This act ends the practice that lawyers can bring class action suits in states with the most sympathetic laws and juries to their clients. As of 2005 cases with plaintiffs in multiple states must be brought before federal courts, where large damage awards are considered less common.

A pivotal question is whether the new system of damages actions for breach of antitrust rules as envisaged by the European Commission, would also create an excessive claim culture in the European Union or has other unintended consequences.

Commissioner Kroes believes that the White paper offers a middle way between the hurdles to compensation that currently exist in most EU Member States and the over-incentives that could lead to excessive litigation, as has been seen in jurisdictions like the United States. To guard against excessive abuses she introduces the aforementioned opt-in approach (compared to the opt-out approach in the US) and the aforementioned system of representative actions. This means actions which may only be brought by entities that are designated to do so by Member States. She also recommends single damages which only compensate for the loss suffered, while in the US there is a system of multiple or punitive damages.

On the basis of these changes compared to the American class action system commissioner Kroes claimed on 3rd April that 'a vast majority of businesses stand to gain from this White paper – it is only those who break the rules that are at any risk'.

PD has serious doubts whether this optimism is justified. Anticipating the plans of commissioner Kroes, a plaintiffs class action law firm based in Washington, Cohen, Milstein, Hausfeld & Toll, has recently opened a branch in London. Managing partner of the London office, Rob Murray, gave on the 25th April a prediction of the future growth of claims in the European Union. He pictured collective redress 'as the biggest potential for jackpot justice'.

In the US a great majority of private antitrust suits are resolved through settlements rather than final decisions from a trail (see the report the European Commission commissioned on Making antitrust damages actions more effective in the EU: welfare impact and potentialscenarios, published 21 December 2007). The reason for this stark preference for settlement is obvious. Class action law suits are often enormously costly for businesses. Not only because of the payments to the plaintiffs, either on the basis of a final trail decision or a settlement. But also because of the substantial fees to be paid to lawyers. Then there is the cost of time of directors and in-house counsel paid to the law suit. And there is, the more difficult to estimate, cost of loss of corporate reputation, because the press will eagerly report on collective redress suits that can drag on for years.

The knowledge that businesses have a stark preference for settlement entails the risk that the collective redress plan of commissioner Kroes will stimulate unmeritorious claims for damages. Especially businesses that operate in consumer markets run this risk. These businesses, think of retailers with a well known brand or corporate name, will be prone to loss of corporate reputation and loss of consumer loyalty due to negative publicity. For this reason they will be tempted to settle claims for damages, even if these claims are not well founded.

Against this background PD is quite concerned about the collective redress plans of commissioner Kroes. We are even more concerned knowing that another European commissioner, Meglena Kuneva, has announced that she will present a blueprint for collective redress in the field of consumer protection at the end of this year. This would broaden the scope of the plans of the European Commission from competition law to consumer protection law in general. This latter field encompasses a broad range of European directives on the sale of consumer goods and guarantees.

PD notes that there are already several European Member States that have introduced class actions. The UK introduced a mechanism of group litigation orders in 1998, more recently followed by the Netherlands and Portugal, Spain, Sweden, Italy and Germany (albeit in Germany limited to securities law). In Austria, France and Belgium moves are afoot to introduce class action procedures as well.

Given the clear risk that collective redress systems could serve as the inciting cause of an excessive claim culture, PD is not in favor of the route as laid out in the White paper. The European Commission aims to create minimum harmonization of collective redress mechanisms across the European Union. We consider it more appropriate to study carefully for a couple of years what the effects will be of the different class action mechanisms that individual Member States have recently introduced. If the outcome of this study is that there are no excesses, we would be happy to consider the question as to whether any further action from Brussels to harmonize collective redress in the European Union would be necessary.

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