

Position paper:
European collective redress?
- a consultation in search of a problem



Position paper of Platform Detailhandel Nederland (Dutch Retail Association) on the green paper on Consumer Collective Redress, as presented by European commissioner for consumer affairs Meglena Kuneva in November 2008 – COM(2008) 794.

Summary

European Commissioner for consumer affairs, Meglena Kuneva, has presented a consultation on consumer collective redress. She offers four possible scenarios, varying from 'no European Commission action' to 'a binding EU measure to ensure that a collective redress mechanism exists in all Member States'. Although a consultation suggests that everything is still open, Kuneva has already several times publicly stated that in her view EU action is necessary.

Platform Detailhandel Nederland (PDN) is in favour of good consumer protection. We believe that this strengthens consumer confidence. This is clearly in the interest of shopkeepers.

However, we believe that the proposal of the European Commission does not contain compelling evidence that there really is a need for action at the European level with regard to consumer collective redress. We also fear that class action mechanisms could provoke an excessive claim culture. For this reason we would prefer that the European Commission refrains from action.

Position paper

The European Commission is currently consulting on the need for a European system for consumer collective redress. According to European commissioner for consumer affairs, Meglena Kuneva, there seems to be no doubt about the need for such a system.

'Consumers who are victims of illegal activities, such as overcharging, misleading advertising or outright scams, have a right to compensation. Currently, particularly when there are small scattered claims, this is often theoretical because of the obstacles to exercising it in practice. There is a justice gap, a welfare gap and there are black holes in our redress system that is leaving consumers with nowhere to go', said Ms Kuneva at the presentation of her consultation document on the 27th of November 2008.

To put Kuneva's words in perspective it is worth recalling that the European project was badly damaged in 2005 when French and Dutch voters said no against the European



Meglena Kuneva (European commissioner for consumer affairs)

constitution. This setback was aggravated when last year the Irish voters said no against the Lisbon Treaty, the remaking of the European constitution.

As a reaction to these setbacks, the European Commission developed a so-called Citizens agenda. Core idea is to prove via tangible results that European cooperation is of a real advantage for ordinary people.

The Citizens agenda places the consumer centre stage. It focuses for example strongly on consumer protection. The consumer must be better protected against rogue traders, against misleading advertising, against cartels and abuse of a dominant position and so on.

Platform Detailhandel Nederland (PDN) is in favour of good consumer protection. We believe that this strengthens consumer confidence. This is clearly in the interest of shopkeepers.

However, PDN also believes that action from the European level should be based on convincing evidence. Ideology and rhetoric are not enough. Facts are needed.

We are therefore pleased that since a number of years the European Commission has been committed to undertaking an evidence-based impact assessment of all major legislative proposals, covering the potential economic, social and environmental benefits and costs of the proposed policy both inside and outside the European Union. These assessments are the backbone of the drive for better regulation.

Better regulation is about laws and regulations that ensure a

fair and competitive market place, the effective protection of public health and the environment and the welfare of European citizens in ways that maximize public policy benefits whilst minimizing the costs regulation may impose on our economy (see: http://ec.europa.eu/governance/better_regulation/br_what_en.htm).

To put it in another way: rules and mechanisms for consumer protection should be balanced against the costs they impose for businesses. According to Platform Detailhandel Nederland it should in any circumstance be avoided that the chosen remedy is worse than the problem it seeks to solve. And we believe that a remedy like 'a European system for consumer collective redress' is worse than the problem it seeks to solve. Especially, because there is no tangible evidence that there really is a problem that needs to be solved.

Number of cross border collective redress cases very limited

Does the European Commission provide any evidence that would justify intervention from the European level with regard to collective redress?

The services of the Commission have commissioned a study by external experts, covering roughly the last decade, in which, according to the experts, a total of 326 consumer relevant collective redress cases could be documented for the 13 Member States that so far have introduced collective redress mechanisms. The highest numbers of cases are reported from France, Spain, Germany and Austria. The main economic sectors in which collective redress mechanisms so far have been used are the financial services and the telecommunications sectors. Cases brought vary significantly concerning the value of the claim, with most of the cases having a total amount of the claim of between euro 10,000 and euro 99,000. Collective redress cases brought under current mechanisms involve at least some cross-border aspects in close to 10 percent of the documented cases for which relevant information was available.

So, more than 90% of the documented cases only have a national dimension. The number of cases with some cross-border aspects is very limited. It should also be underlined that not all documented cases are clear examples of collective damages and that several cases do not concern (alleged) breaches of consumer protection law but of competition law.

(For full study see: http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf; The 13 Member States that have introduced collective redress mechanisms are: Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.)



On the basis of this study the question comes up: is there really a problem with consumer collective redress with a cross-border dimension? A problem that would justify action from the European level?

Given the very low number of reported cases, around 30 with some cross-border aspects over a period of a decade, the only reasonable answer in our view is that we speak about a very minor issue. An issue which at this stage certainly does not justify far reaching binding EU measures to ensure that a collective redress mechanism exists in all Member States.

Use of collective redress too limited to draw conclusions

Such a measure would also be premature given the newness of collective redress mechanisms in several Member States. As the legal service of the European Parliament correctly stresses in an opinion on the possible legal basis for a possible Community instrument for collective redress dated 23 January 2009: 'Judicial mechanisms for collective redress are at present available in the legal orders of thirteen Member

States. In a number of cases, these mechanisms have only been introduced comparatively recently, and the number of occasions on which such mechanisms have been used is generally too small to permit generalizations as to their utility.'

It would make sense to first gain more insight at the national level into the effectiveness of the mechanism and its possible side effects, either intended or unintended, and either positive or negative. Special attention should be paid to what we expect to be an unintended negative side effect of these mechanisms: that they could be the cause of an excessive claim culture.

Already many consumer protection mechanisms in place

Apart from the fact that the European Commission hardly offers examples of businesses harming consumers with practices of a cross-border dimension, we are of the opinion that there are already several mechanisms in place which could protect consumers from such practices.

We would like to mention the injunctions directive. This directive provides a procedure to stop trans-border practices that could harm the interests of consumers in another Member State. This procedure is scarcely used. Only two cross-border cases have been brought since the injunctions directive entered into force in 1998.

Another mechanism is the cooperation between national authorities responsible for the enforcement of consumer protection. Since two years a network of authorities has been monitoring the application of legislation to better fight intra-Community infringements of consumer protection legislation. There is not yet an evaluation of this European regulation available.

The last mechanism we would like to refer to is the European regulation on Small Claims. This regulation, into force since January 2009, seeks to simplify and reduce the costs of litigation concerning small claims by establishing a European Small Claims Procedure. For consumers with a claim of low value this Regulation provides a solution to avoid high litigation costs and lengthy court procedures.

Against the background of all these measures and the fact that most of them are relatively new and still unproven, we believe that the best way forward is to closely monitor whether the low number of cases where consumers base their

claims on alleged illegal business activities with a cross-border dimension, could be properly dealt with the measures currently available. If this would prove not to be the case, then we would recommend to first revise the current mechanisms, before proposing new measures.

Harmonization consumer rights could further strengthen protection

Platform Detailhandel Nederland would like to add that the European Commission last October presented a proposal for the EU-wide harmonization of consumer rights. This proposal aims to strengthen consumer protection against late delivery and non delivery, as well as setting out tough consumer rights on issues from cooling off periods, returns, refunds, repairs and guarantees and unfair contract terms. If this proposal would be endorsed by the European Parliament and the Member States without too many amendments, this would amount to a huge step forward in terms of consumer protection in the European Union. All consumers could clearly and easily know their most important rights and obligations when buying a product, be it nationally or abroad. Also for retailers this would be a step forward, for it would allow to sell goods under one uniform set of consumer protection rules across the European Union.

We moreover would like to stress that at the national level there are already many, often well functioning, organisations which aim to protect the consumer. For the Netherlands we think of the Consumer Authority, which supervises compliance with consumer law. But also organisations like the Netherlands Competition Authority (Nederlandse Mededingingsautoriteit, NMa), the Independent Post and Telecommunications Authority (Onafhankelijke Post- en Telecommunicatieautoriteit, OPTA), the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, AFM), the Dutch Advertising Code Commission (Stichting Reclamecode) and a great number of easily accessible Dispute Resolution Boards (Stichting Geschillencommissies).

So, although we do understand that the European Commission wants to win the hearths and minds of euro-sceptic citizens, we think that with regard to consumer protection both at the European and national level there are already sufficient measures being taken. Instead of adding new measures, we rather prefer to start thinking about streamlining the current ones.

The threat of an excessive claim culture

To strike a more positive note, Platform Detailhandel Nederland welcomes that commissioner Kuneva for consumer affairs is clearly aware that businesses in Europe fear that binding EU measures to ensure that a collective redress mechanisms exists in all Member States could bring Europe closer to the United States with its harsh litigation culture. 'This consultation', underlined Kuneva last November, 'is not in any way a blueprint for an American style system of class actions for damages'. To back this up she pointed out that she is not in favour of contingency fees and punitive damages, core elements of the American class action system.

Although there is no proof of a need for a European system for consumer collective redress, we find it encouraging that the European Commission at least tries to avoid copying a system that has proven to lead to an excessive claim culture and has made America a lawyers' paradise. Class action law suits are often extremely costly for businesses. Payments have to be made to the plaintiffs, either on the basis of a final trial decision or a settlement. Substantial fees have to be paid to lawyers. Directors and in-house counsel have to pay much of their valuable time to the law suit. The reputation of a corporation is often severely damaged, because the press will eagerly report on collective redress suits.

Especially the often abundant media coverage of collective redress suits worry retailers. The European Commission argues in the Green paper on Consumer collective redress (page 5, point 13) that 'elements which contribute to the effectiveness and efficiency of collective redress mechanisms include high media coverage (which can act as an incentive for traders to settle and can also help in finding financing companies; in general it can have a deterrent effect on wrongdoers)'.

Retailers especially vulnerable for blackmail claims

However, we believe that this element of high media coverage is also one of the main reasons to be careful with stimulating collective redress mechanisms. Retailers operate in consumer markets. Especially large retailers with a well known brand or corporate name are prone to loss of corporate reputation and loss of consumer loyalty due to negative publicity. For this reason these retailers will be tempted to settle claims for damages as quickly as possible, even if these

claims are without merit. But also small and medium sized retailers are in a vulnerable position. They will often lack the financial means and specialized legal staff to fight an unmeritorious claim.

This risk of unmeritorious or so called blackmail claims, is higher with regard to collective redress in case of infringements of consumer rights, than in case of infringements of competition law. An important reason for this increased risk is that whether a business for example breached the unfair commercial practices directive – which prohibit misleading advertising and aggressive sales tactics – is often not clear cut.

In cases of infringements of competition law there is less margin for interpretation, because there are not so many grey areas. One can for instance in cases of competition law not simply sue a company and start an aggressive media offensive. In general there has first to be a decision taken by a competition authority.

We therefore have even more reservations about the collective redress plans of consumer affairs commissioner Kuneva, than about the plans of competition commissioner Neelie Kroes for damages actions for breach of antitrust rules, as presented last April.

(For further information see: A European-wide system of class action is premature; Position paper of Platform Detailhandel Nederland; http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/dutchretail_en.pdf).

Protect consumers from tendentious statements

Finally, we would urge the European Commission to be more cautious in the way it communicates about collective redress. Statements like 'consumers who are victims of illegal activities, such as overcharging, misleading advertising or outright scams, have a right to compensation', seems to suggest that many retailers breach the law. There is no evidence whatsoever that this is the case.

Given the hard economic times we are going through, it is of paramount importance that consumer confidence is not further weakened with tendentious statements. This is also a matter of consumer protection.



PLATFORMDETAILHANDEL
NEDERLAND

Address Dutch office

P.O. Box 262
2260 AG Leidschendam
T 0031-(0)70 320 23 45
E info@platformdetailhandel.nl
www.platformdetailhandel.nl

Address Brussels office

Nerviërslaan 9-31
1040 Brussels (Belgium)
T 0032-2 736 5830
E info@platformdetailhandel.nl
www.platformdetailhandel.nl

Platform Detailhandel Nederland is a joint agreement between the National Retail Council of MKB-Nederland, the Dutch federation of SME's, and the Raad Nederlandse Detailhandel, the Dutch association of large retailers. The Platform represents all retailers in the Netherlands. There are 110.000 retail companies with a combined annual turnover of approximately euro 85 billion. Dutch retailers employ 770.000 people, making retail trade the largest industry in the Netherlands. Platform Detailhandel Nederland is member of EuroCommerce, the European umbrella organisation for the retail industry, wholesale and international trade.