FRESHFIELDS BRUCKHAUS DERINGER

BRIEFING

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Consumer class actions in the EU

THE STATUS OF THE DEBATE WITHIN THE CONSUMER PRODUCTS AND RETAIL SECTOR

The European Commission has been consulting on proposals for a form of consumer collective redress. This briefing summarises the options being considered, the opinions put forward by stakeholder organisations and how these possible reforms may affect businesses in Europe.

Battle lines have been drawn between consumer organisations and regulators, on the one hand, and industry organisations, on the other, in the ongoing debate about the introduction of new EU rules to ensure effective 'consumer collective redress'. At the same time, EU legal reforms are creating new rights that could be enforced by means of any new procedure that is introduced.

The EU's work on consumer collective redress

'The Commission… will consider action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU antitrust rules': EU Consumer Policy strategy 2007-2013 (COM (2007) 99 final).

Improving consumer collective redress – the ability of large groups of consumers affected by a business's behaviour to bring claims for compensation – is an important part of the European Commission's consumer policy. A number of studies produced for the Commission have led it to conclude that consumers lack confidence in their ability to obtain redress if things go wrong when purchasing goods or services from a member state other than their own. This, in the Commission's view, means that the internal market's functioning is being hindered and that action is required.

The Commission has been keen to stress that US-style class actions will not be imported into Europe. However, it is actively pursuing two initiatives in relation to consumer collective redress. First, it has proposed a specific procedure to deal with breaches of EU competition law: a White Paper on damages actions for breach of EU antitrust rules was published in April 2008. Second, in November 2008 it published its much-anticipated Green Paper on consumer collective redress in non-competition cases. The Green Paper sought views from industry, consumer associations and other stakeholders on what action the EU should take in this field. The consultation period closed on 1 March 2009.

The Green Paper suggested four possible options for future reform, with increasing levels of co-operative action across EU member states:

- option one: wait and see how current EU initiatives to facilitate access to justice and improve consumer rights play out before deciding whether further action is required;
- option two: co-operation between member states to make it easier for European consumers to use the various collective redress procedures available in different member states. In parallel, a Recommendation could lay down a set of minimum standards that all member states' systems should satisfy;
- option three: a mix of policy instruments that, together, would enhance consumer redress by circumventing the existing barriers to claims (such as high litigation costs, complexity and length of proceedings, and consumers' lack of information on the available means of redress); and

- option four: the introduction of a harmonised, cross-EU judicial collective redress procedure. This was clearly the most radical and controversial option. If adopted, it would in effect create a pan-European 'class action' procedure.

In relation to option four, the main issues to be discussed were:
- who should have the right to bring claims under any new procedure? (All consumers or just designated consumer protection groups?)
- how should unmeritorious claims be prevented?
- whether any procedure should work on an 'opt-in' basis or on a more pro-consumer 'opt-out' basis [1];
- how financing should operate, to ensure that consumers have adequate access to justice; and
- whether any new procedure should be limited to cross-border claims.

The EU proposals mirror a plethora of initiatives that are taking place at the member state level. In the UK, for example, the Civil Justice Council – an advisory group to the Ministry of Justice – has recently proposed the adoption of a new generic collective action mechanism, with claims to be brought on an opt-out basis where this would be in the best interests of justice. (For further details of this and other member state initiatives, please see www.freshfields.com/practices/dispute/publications/.)

The responses to the Green Paper

By mid-March 2008, the Commission had received around 160 responses to the Green Paper. Our understanding is that the responses are broadly polarised between:
- those submitted by industry organisations, which tended to favour a 'wait and see' approach and/or less formal structures; and
- those of consumer organisations and regulators, many of whom favour more radical solutions, such as option four's adoption of a new, binding class action mechanism across the EU.

By way of example of the 'industry' viewpoint, the submission by EuroCommerce, a trade association for the retail, wholesale and international trade sectors in Europe, questioned whether the Commission had in fact established that there was a need for reform at all and stated its preference for option one combined with some elements of option three (such as strengthened means of alternative dispute resolution and efficient cross-border co-operation between national administrations). Emota, the European E-commerce and Mail Order Trade Association, made similar arguments in its response. Other industry respondents challenged the EU's legislative competence in this field and, in their discussion of option four, came out firmly against opt-out mechanisms and in favour of safeguards against potential abuse (such as the 'loser pays' principle, whereby the losing party in any litigation has to bear the winner's, as well as its own, legal costs; and strong 'gatekeeping' mechanisms, whereby a court would permit only meritorious claims to be heard).

Consumer organisations have taken a rather different approach. In a closely reasoned response, BEUC, the European Consumers' Organisation, gave its full support to the creation of a new, judicial group action procedure under option four (in possible combination with elements of options three). It argued that this should permit claims on an opt-out basis, have as wide a scope as possible, be 'open and creative' when it comes to compensating consumers, apply to both domestic and cross-border litigation and be accompanied by efficient funding mechanisms. However, BEUC did recognise the need to give courts discretion over the admissibility of any particular claim – ie a gatekeeping function of the sort already described.

This pro-reform position has also been articulated by regulators such as the Office of Fair Trading (OFT), the UK's consumer and competition authority. In its response, the OFT rejected options one to three and instead stated its support for a 'binding, effective system that delivers redress to consumers… a Europe-wide legal process accessible by consumers and consumer groups'. It suggested that such a procedure should permit some claims (those brought by designated representative groups) to be brought on an opt-out basis. It should be possible for consumers to claim against multiple defendants at a time, but the mechanism should be

[1] Opt-in arrangements, which are the most common among the EU member states at present, require individual consumers actively to volunteer to join any claim. This typically leads to smaller classes of claimants being involved. In an opt-out claim, on the other hand, a claim is brought on behalf of a class of unidentified individuals (eg 'all purchasers of product X between date Y and date Z') and liability and damages will be assessed in respect of all, except for those who expressly choose to withdraw from the claim. This system, which is common in the USA, typically leads to larger classes of claimants being involved and thus more viable claims.

limited to cross-border disputes for an initial period. The OFT also suggested limiting defendants' ability to recover their legal costs if they won, to 'prevent vulnerable and other consumers being deterred by… the fear of having a defendant's legal costs imposed on them', while representative bodies should be able to recover their costs in full on any successful claim.

What types of claim would a new EU class action procedure cover?

In its response to the Green Paper, BEUC argued that its proposed new group action mechanism 'should not be limited to the typical consumer contracts. Group actions should be available in a wide range of situations where consumers' interests protected by law can be infringed, such as price-fixing agreements, defective/harmful products, unfair financial products, sickness due to food poisoning, data protection or privacy infringements.'

There is indeed a wide range of possible uses for a new, EU-wide class action procedure. The most likely types of claim that would be brought are not claims relating to personal injuries caused by defective or unsafe products – because these frequently involve complex issues of causation that are hard to resolve on a group basis – but rather economic damage claims relating to allegations of consumer fraud or misleading, or to other conduct that breaches EU consumer protection legislation.

The Commission has been actively overhauling such legislation over the past five years. Key pieces of recent and proposed legislation, which, if infringed, could give rise to substantive rights to claim against industry include the following.

- The Unfair Commercial Practices Directive, which member states were required to implement by 12 December 2007. It bans 'unfair' commercial practices towards consumers. These include practices that are contrary to the requirements of professional diligence, materially distort the economic behaviour of the average consumer or are either positively misleading or omit material information. Annex I to the Directive sets out a list of misleading and aggressive commercial practices that will in all circumstances be considered unfair (such as claiming to be a signatory of a code of conduct where this is not the case; describing a product as 'free' in circumstances where the consumer in fact has to pay postage costs; advertising directly to children to buy products or to exercise 'pester power' etc). A ruling from a national regulator or court that a company had breached these rules may expose that company to civil claims from consumers who had suffered harm as a result.
- The Injunctions Directive, which confers rights on nominated consumer rights bodies to bring proceedings in their home country and other member states to prevent (among other things) misleading advertising, unfair commercial practices, the use of unfair contract terms and breaches of EU rules on consumer credit, package travel, medicinal products for human use, distance selling and e-commerce. Although consumers may not recover damages in the course of any such claim, a successful injunction application may expose the trader in question to civil claims from individual consumers as above.
- The draft Consumer Rights Directive, which, if adopted, will harmonise EU consumer contract law by bringing together the existing Directives on Doorstep Selling, Unfair Contract Terms, Distance Selling and the Sale of Goods and Associated Guarantees. Again, a successful prosecution for breaches of these rules may give rise to consumer claims, which could be brought by way of group action if new collective redress procedures are indeed put in place as a result of the current consultation.

The future

In some ways, the option four-type proposals, if adopted, may prove to be a positive development for those businesses that respect the law, in that they will help eliminate unfair competition from those that do not. However, reforms in the field of consumer protection usually increase the regulatory burden on industry and the adoption of the type of class action mechanism advocated by many consumer groups and regulators would probably increase litigation risk for businesses that deal with, or provide products and services for, consumers.

The Commission intends to publish the results of the consultation by the summer and a White Paper setting out concrete proposals for reform is likely to

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follow before the end of 2009 (although European Parliamentary and Commission elections this year may have an impact on the timetable). Given the polarisation of views, it is hard to predict which way it will jump, but consumer products and retail companies should watch the debate closely.

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Useful web pages

- EU Commission's page on consumer collective redress: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.
- EuroCommerce submission: www.eurocommerce.be/content.aspx?PageId=41457.
- BEUC submission ('Group action: The missing tool – Green paper on Consumer Collective Redress – BEUC Answer'): http://www.beuc.eu/Content/Default.asp?PageID=606&LanguageCode=EN.
- OFT submission: http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1063.pdf.