FRESHFIELDS BRUCKHAUS DERINGER

Response to the EU Green Paper on consumer collective redress

1. About this response

1.1 This response is submitted by Freshfields Bruckhaus Deringer LLP[1]. We are a leading international law firm, with offices in 28 countries, including 9 of the EU Member States. We have acted for clients in the defence of mass consumer and shareholder claims in a wide range of jurisdictions, including Austria, Belgium, Bulgaria, Canada (Québec), France, Germany, Israel, Italy, the Netherlands, Spain, the UK. Our work also requires a close familiarity with the legal environment in the USA, in Member States where we do not ourselves have offices, and in other markets.

1.2 We welcome the opportunity to share our views on the important issue of the future of consumer collective redress mechanisms in the EU. We understand this term to mean 'mechanisms by which a large group of consumers affected by a single trader's practice can effectively obtain redress wherever the trader is located in the EU'[2], particularly in 'large scale low value damage cases'[3].

2. Our responses to the questions raised in the Green Paper

Question 1: What are your views on the role of the EU in relation to consumer collective redress?

2.1 The EU's desire to achieve an appropriate standard of consumer collective address across all 27 Member States is laudable. When consumers enforce their legal rights against businesses which do not respect the law, this not only assists consumers who have been wronged, but also protects the interests of the majority of businesses which do comply with the law.

2.2 However, our experience of assisting clients with the defence of mass consumer actions is that such claims are unfortunately not always brought in good faith or in the best interests of the consumers whose rights are supposedly being protected. We therefore believe that any solution that is adopted must effectively deter unmeritorious claims, by means, inter alia, of strong 'gatekeeping' mechanisms and the enforcement of the 'loser pays' principle[4]. The Commission has already recognised the importance of these issues both in the Green Paper and in its draft consumer redress benchmarks.

Question 2: Which of the four options set out [in the Green Paper] do you prefer?

2.3 We consider that there is much merit in waiting for more information on the impact of current initiatives, as advocated in Option 1. The EU has quite properly been extremely active in the consumer sphere in recent years. In addition to the procedural mechanisms put in place by the Mediation Directive (2008/52/EC) and the European Small Claims Regulation (861/2007/EC), the proposed Consumer Rights Directive, if adopted, and the new mechanisms

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[1] We stress that this response is submitted on our firm's behalf, and not on behalf of any of our clients.

[2] Green Paper, at para. 7.

[3] Final Report of the Evaluation Study (Part 1) prepared for the Commission (the 'Evaluation Report'), at p.9. The Evaluation Report is available at: http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf.

[4] See further paragraph 2.6, below.

envisaged by the Commission's White Paper on damages actions for breach of EC anti-trust rules would both create significant new rights for consumers. A wide range of other recent Community legislation aims to prevent consumer rights being infringed from the outset by requiring Member States to sanction improper conduct by businesses[5]. Finally, as identified in the Evaluation Report, a number of national collective redress mechanisms have been introduced since 2000[6] and, in the words of the authors, 'the effectiveness and efficiency [of these measures] cannot be assessed yet'[7]. Before introducing further reform, it would be prudent to establish the impact of these existing changes on improving consumers' rights and their ability to seek redress where those rights are infringed.

2.4 It is also possible to envisage the concerns in the Green Paper being addressed by means of the use of some or all of the policy instruments contemplated in Option 3, combined with cooperation between the Member States of the sort envisaged by Option 2. However, we believe that the proposal under Option 2 for a set of benchmarks to which all Member States' collective redress mechanisms should adhere raises some of the same issues as Option 4, which we discuss below.

2.5 For the reasons already discussed, we do not consider the adoption of the harmonised judicial collective redress procedure across the EU that is envisaged by Option 4 to be necessary at present. The position will remain the same for at least so long as the impact of the recent legislative and procedural reforms described at paragraph 2.3 above, remains unevaluated.

2.6 If Option 4 or the benchmarking Recommendation under Option 2 are nevertheless considered, then we suggest, based on our experience of assisting clients in the defence of mass claims, that the following steps are taken.

(a) Courts should be required proactively to manage cases and to exercise a gatekeeping role at an early stage, particularly at the certification or establishment of any group or class. The central objective of this gatekeeping role should be to permit only claims with good prospects of success to continue to full trial. This serves the interests of consumers (who thereby avoid becoming involved in potentially lengthy and costly legal proceedings which have little real prospect of success), defendants (who are not required to spend time and money defending such claims) and the courts (who thus avoid wasting judicial time and public money). Other features of a gatekeeping mechanism could include a requirement that the claimants and their legal counsel are acting in good faith, that the interests of members of the class will

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5 Among many examples, see the General Product Safety Directive (2001/95/EC), the parallel food safety and traceability regime put in place by the General Food Law Regulation (178/2002/EC) and the Unfair Commercial Practices Directive (2005/29/EC).

6 See Evaluation Report, at pp.17-19. The post-2000 examples cited there are: Austria (Collective redress actions (2000)), Bulgaria (Collective action for damages to collective consumers' interests (2006), collective action for damages suffered by consumers (2006)), Denmark (Group action according to the Administration of Justice (2008)), Finland (Group action for compensation in consumer disputes (2007)), Germany (Recovery of ill-gotten gains (2004), Sammel- or Musterklage (2002), Group actions in the capital market (2005)), Greece (Declaratory action for damages (2007)), Italy (Collective action (2009)), Netherlands (Act on Collective Settlement of Mass Damage (2005)), Spain (Action in defence of rights and interests of consumers (2000)), Sweden (Group proceedings act (2002)) and the UK (Group litigation order (2000)).

7 Idem.

be properly represented and that the use of a collective redress mechanism is the most efficient, just and fair way to resolve the dispute in question.

(b) The costs shifting/loser-pays principle should be accorded a central role in any such mechanism, in order to deter unmeritorious claims and to prevent undue pressure being exerted on a defendant to settle a claim rather than incur defence costs. As noted in the Evaluation Report (at p.5), '[w]here the use of a collective mechanism is unfounded, the loser-pays principle usually protects the business from losses.' Costs that may be awarded should be proportionate to the total amount in dispute, not to the value of any individual claim.

(c) The opt-in procedure should be adopted, in accordance with widespread practice in the Member States at the present time and as a means of preserving consumers' individual rights to choose to participate or not to participate in litigation.

(d) Damages should be purely compensatory, assessed solely by reference to those consumers who have chosen to opt in to the claim.

(e) Appropriate requirements as to standing should be adopted, in order to ensure that only those with a genuine interest in the claim may pursue it. In the case of claims by representative organisations, one alternative to requiring court certification on a case-by-case basis would be to permit only qualified entities within the meaning of the Injunctions Directive to act.

(f) Any mechanism should be limited to claims with a cross-border element (ie cases involving nationals of more than one Member State or cases where the claimants and defendant are located in different Member States), consistent with the EU's competence under Article 65 of the EC Treaty.

2.7 In addition, we consider that further thought needs to be given to how questions of jurisdiction, and res judicata, would be dealt with in the case of the type of cross-border consumer collective redress claims envisaged by Option 4 and the opening-up of national collective redress mechanisms (whether or not supported by a benchmarking Recommendation) envisaged under Option 2. The combined effect of two key features of the Brussels I Regulation[8] raises substantial difficulties when applied to mass, cross-border claims. These are, first, that multiple Member States may potentially have jurisdiction over a consumer claim[9] and, second, that the Member State courts first seized of the claim will have conduct of the claim to trial[10], with no scope to decline jurisdiction in favour of a more convenient forum[11]. We make the following observations in this regard:

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8 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

9 For example, in a case involving consumer contracts, the Regulation permits the claim to be heard in the consumer's or defendant's place of domicile and/or the place of domicile of a relevant branch office. In claims involving tort, delict or quasi-delict, including claims under the strict product liability regime, the claim may be brought in the place where the harmful event occurs or may occur.

10 Art 27 of the Brussels Regulation.

11 Eg on the basis of the doctrine of forum non conveniens that is available to courts in common law jurisdictions such as the UK, the USA and Canada.

(a) This may lead claims to be heard in fora that are not convenient for the majority of the class. Consider, for example, the hypothetical situation where several hundred thousand consumers are alleged to have been injured by a defendant's conduct in (for example) the UK, but where the single consumer who lives in, or who bought the product in Bulgaria legitimately files a claim in that country before any other case is brought. In those circumstances, the claim would have to be heard in Bulgaria, despite the manifest inconvenience (in terms of distance, language and unfamiliarity with substantive and procedural rules) to the majority.

(b) Given the perceived differences between Member States' legal systems in terms of both substantive law and procedural rules (particularly as to funding and costs), the US and Canadian experience suggests that there may be a 'rush to the courts' of supposedly 'claimant-friendly' jurisdictions. This may, as above, not be the most suitable forum for the class, and may also prejudice the rights of the defendant.

(c) Our experience in relation to the US and Canadian litigation suggests that, in any situation of alleged cross-border damage, multiple claims will be filed in multiple Member States concurrently. It would then be for the courts of these Member States to consider their jurisdiction and to decline to hear the case in favour of the court first seized. However, our experience is that such considerations may involve difficult questions of law[12] and may take months or even years to resolve[13]. Defendants may therefore be left fighting costly jurisdiction proceedings in multiple Member States for a long period of time, even before the claim has reached the 'gatekeeping' stage.

(d) Indeed, there is a risk of abuse, in that claimants may file multiple claims in an attempt to place undue pressure on a defendant to settle (rather than face the expense and trouble of defending multiple jurisdiction claims).

(e) Similar issues arise in relation to choice of law, which we do not propose to discuss here for reasons of space.

2.8 Possible solutions to these issues might include permitting courts, as part of their 'gatekeeping' function and by way of exception to the Brussels Regulation, to consider whether they represent the most convenient forum for the dispute to be heard, in the context of deciding the question of the efficiency, justice and fairness of the collective redress procedure (see paragraph 2.6(a), above). Alternatively, as has been done in some countries (eg Israel, in its 2006 class actions legislation), a mandatory register of all collective claims could be set up, with claimants not being permitted to bring a claim where a similar claim has already been commenced elsewhere. It is recognised, however, that both of these suggestions would offer only very partial solutions to what is a very difficult issue.

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12 Eg where the identity of the alleged class is subtly different from one Member State to another, or where the legal basis on which recovery is sought is also different.

13 It has, for example, been suggested in the context of patent litigation that the Italian courts can take several years to determine preliminary issues of this nature. See M. Franzosi, 'World-Wide Patent Litigation and the Italian Torpedo', [1997] 7 EIP Rev. 382 – patent litigation in the EU must move at the speed of the 'slowest ship in the convoy'.

Question 3: Are there specific elements of the options with which you agree/disagree?

2.9 Please see our responses above. In addition, we would like to comment on the suggestion, under Option 3, that national competent authorities should be empowered to order traders to compensate consumers who have been harmed by an intra-Community infringement. As a matter of general principle, we believe that questions of civil compensation should be decided by courts of law, balancing all the evidence and with proper regard to due process, rather than by regulators. However, if competent authorities were empowered this way, then the power to order the payment of compensation should, at a minimum, be counterbalanced by rights for the trader concerned to be notified and consulted before any order is made, to receive a detailed written statement setting out the reasons for the order and the basis for the calculation of compensation, and to appeal to its national courts.

Question 4: Are there other elements which should form part of your preferred option?; Question 5: If you would prefer a combination of options, which options would you want to combine and what would be its features?; Question 6: In the case of options 2, 3 or 4 would you see a need for binding instruments, or would you prefer non-binding instruments?; and Question 7: Do you consider that there could be other means of addressing the problem?

2.10 Please see our responses above.

3. Further discussion

3.1 We would be happy to discuss our response with you further. Please contact Ashmita Garrett of our London office (ashmita.garrett@freshfields.com) if you would like to do so.

27 February 2009

(NPL/AA/AC/EC)

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