

## **HAUSFELD & CO LLP**

### **RESPONSE**

#### **EU Commission Green paper on Consumer Collective Redress**

Hausfeld & Co LLP welcomes the Commission's consultation on consumer collective redress options as the next step in the development of a European mechanism which will provide effective access to justice for all consumers. As a claimant only firm, we have extensive experience, both at the policy level and in practice, in acting for groups of claimants both where the value of individual claims is low (as in the air passenger fuel surcharges case), and in higher value more complex anti-trust and collective consumer claims.

In addition to following the EU's procedural reform agenda in this area, we have also contributed to the parallel three year consultation on collective redress undertaken by the Civil Justice Council (CJC) in England and Wales; the CJC is responsible for recommending procedural reform in civil law litigation to the UK government.

Both consultations have included significant analysis of existing civil procedure rules to assess their adequacy and efficacy in meeting current levels of need. We are aware that both the EU and the CJC have considered international experience, and met with judges, practitioners, and academics in jurisdictions around the world where collective actions are routinely conducted. Crucially, the CJC commissioned an 'evidence of need' report from a leading academic in this area which identified;

- that existing UK procedures do not provide sufficient or effective access to justice for a wide range of citizens and,
- there is overwhelming evidence that meritorious claims which could be brought are currently not being pursued.

Both the 'evidence of need' study, and the final recommendations the CJC published in November 2008, can be located at [www.civiljusticecouncil.gov.uk](http://www.civiljusticecouncil.gov.uk). We have no reason to believe that the situation is markedly different in other EU member states – and the situation in some may be significantly less advanced than in the UK.

#### **Q1: What are your views on the role of the EU in relation to consumer collective redress?**

We believe the EU is taking the right approach to encourage collective action reform so as to:

- improve consumer confidence to buy across borders;

- keep the European internal market robust and relevant for consumers;
- stop unscrupulous traders benefiting from illegal and anti-competitive activities; and
- move towards providing greater legal certainty for both business and consumers who currently must deal with fragmented and uncertain consumer collective action procedures.

We believe that, in order to achieve these objectives, the Commission should continue to work towards more effective collective redress mechanisms for consumers who are the victims of unfair and/or anti-competitive behaviour and an unmet demand for more effective collective redress for consumers.

The Eurobarometer surveys clearly demonstrate that consumers would utilize such a procedure should be available and promoted and, as noted above, the CJC 'evidence of need' report showed a substantial gap in civil redress procedures for consumers.

Eurobarometer noted

*67% of European Union citizens would be more willing to defend their rights before a court if they could join with other consumers who were complaining about the same thing.*

Because of the clear gap in many Member States' civil procedures, with no or untested collective redress mechanisms in place in the majority of them, it is our view that any cross border collective redress mechanism will not be effective unless it is binding. There is currently a myriad of industry codes of practice and self regulatory schemes, and little evidence to demonstrate that these are effective in providing a means of redress to harmed consumers. Further, the domestic differences between national civil procedure systems arguably distort the single market, and leave open the possibility of forum shopping challenges by traders, which may have the effect of blocking meritorious consumer claimant cases.

We are routinely approached by individuals and groups from jurisdictions where collective redress procedures do not exist or are so novel or difficult to bring as to make the case unviable.

The implementation of the revised Unfair Commercial Practices Directive presents the opportunity for consumers to seek redress under a harmonized set of rights applying across the EU. But, we suggest, this major advance in consumer rights is likely to fall short of delivering its full potential to empower consumers across the EU if they do not have access to direct and effective enforcement mechanisms. We believe the Commission needs to act to ensure that the 'general duty' to trade fairly with

consumers, now applying across the EU, is matched by a corresponding right for consumers to bring claims, where appropriate on a collective basis, to enforce that duty.

The mediation Directive, as the Green Paper notes, is not in itself an instrument which applies to collective claims: clearly any existing collective redress mechanism is subject to the provisions of the Directive and we believe that any future collective redress procedures (whether adopted voluntarily or following EU legislation) should incorporate appropriate mediation procedures. Mediation is a commonly used and useful tool for resolving collective claims in those (non-EU) states where civil law collective redress mechanisms are more developed than is currently the case in Europe. However, without the encouragement of an effective judicial enforcement procedure available to groups of harmed consumers (who may be in several Member States) we believe it is unlikely that mediation will develop to play a substantial role in collective consumer redress.

A number of relatively recent cases across the EU demonstrate the inadequacy of the existing national systems to deal with business harm to individuals. They include the well known *Parmalat* case where in 2004 the lack of an effective collective action procedure in the EU forced small investors to turn to the US to sue, which led to a \$50million settlement. This resulted in Commissioner Bolkestein calling for improvement of substantive legislation and enforcement in the area of financial services. Other recent consumer cases brought in the UK, Austria and France have shown that the lack of harmonized criteria for collective redress, and the low availability of proper funding and insurance options available to bring them, has meant that claimant groups still face significant hurdles in trying to pursue their claims.

We understand that business groups are also concerned about the lack of legal certainty in collective consumer redress claims, due (among other things) to a fragmentation of national procedures. Yet certainty could be achieved at an early stage by instituting a mechanism which would enable all EU claims arising from a trader's course of conduct to be brought together as one case.

On this basis, clearly there is a strong case for a binding cross border procedure;

- which can deal with a range of consumer related disputes;
- which enables organizations and ad hoc bodies to have standing/or admissibility, to bring actions on behalf of groups of consumers; and
- where costs and funding rules are subject to either harmonization, or at least mutual recognition, in the courts of the Member States, so that all EU citizens have parity of access to both judicial and non judicial collective procedures.

The small claims payment procedure is a significant step forward but does not currently accommodate a collective action procedure, as it only addresses individual claims. The barriers to claiming redress across borders within the EU are still hugely daunting for an individual consumer pursuing a claim which, taken individually, may be too small to warrant substantial expense in enforcement.

**Q2: Which of the four options set out above do you prefer? Is there an option which you would reject?**

We prefer option 4 of those proposed by the Commission. Without a binding judicial collective redress procedure in each Member State, we believe that consumers will continue to be unable properly to vindicate the substantive rights that EU law now gives them. Provided that the mechanism chosen is both effective and at least equivalent to the best available national procedures for bringing claims on an individual basis (and preferably more effective) we suggest that it should be for Member States to choose the best and most appropriate method to achieve this: nevertheless, we believe that certain minimum standards of effectiveness should be laid down in EU law.

We believe that it is important to ensure that

- all consumers can access any compensation awarded easily. This would, in particular, mean that – eg. following a test case – consumers who are within a group having suffered loss should not be required to file separate claims in court (and our additional court fees) but rather be able easily to claim from a compensation fund;
- courts in all Member States should be able to choose between an ‘opt-in’ and an ‘opt-out’ collective consumer redress procedure depending on which is most appropriate in the circumstances of a given case;
- where an unfair trading practice affects consumers in more than one Member State, all consumers affected should be able to benefit from any fund set up – regardless of their place of residence;
- consumer bodies need to be empowered to represent consumers in court or alternative dispute resolution procedures in other Member States and should be able to represent consumer claimants residing elsewhere in their own national courts.

In practice, this means that courts in the EU Member States should have the power, once the liability of a defendant trader to a group of consumers is established, to set up a fund paid for by the defendant to which affected customers from across the EU can easily and speedily apply for compensation.

And we would reject the suggestion that no EU action is required to achieve this. The distorting effect to the single market through uneven enforcement of consumer law, as well as the risks of forum shopping by unscrupulous businesses, demand, in our view, a coordinated (and probably some form of harmonized) approach.

### **Q3: Are there specific elements of the options with which you agree/disagree**

As mentioned above, we believe that the Commission's option 4 is the most effective proposal to bring meaningful collective redress for consumers on a level playing field across the EU. And we also strongly believe that there should be a choice of procedures available to national courts when asked to provide redress to a group of consumers – including 'opt-out' mechanisms.

We note the Commission's concerns about the prevention of 'unmeritorious claims' and the negative perception of so-called 'opt-out' procedures outside the EU. Nevertheless, these are, we believe, overstated and should not be allowed to obscure the central concern which has prompted the Commission's consultation: without effective collective redress, European consumers will continue to be harmed on a massive scale by unfair trading practices.

In any event, we suggest the Commission should not be over influenced by the largely linguistic debate over 'opt-in' and 'opt-out' collective actions. At some point in the process, consumers will have to come forward to claim their compensation: the difference between opt-in and opt-out processes are largely to do with the timing and cost (and other hurdles) to doing this.

We believe that consumers will claim compensation more readily where (i) the liability of the trader is established (ii) the amount available is certain, and (iii) the method of claiming is simple and inexpensive. Hence, for example, a test case followed by the establishment of a fund which pays claimants who come forward on the basis of judicially determined criteria is likely to be an effective means of collective redress: whether it is labeled 'opt-in' (as is likely) or 'opt-out' is, we suggest, irrelevant.

Although we believe that the Commission's suggestion that a network to co-ordinate collective (consumer) actions would be desirable – and may even be essential – we disagree with the (implied) suggestion that the network should only be made up of state or similar bodies enforcement. For any Commission proposal to be effective, we strongly believe that consumers should be able (and indeed encouraged) to bring collective claims as ad hoc groups. However, it is not clear to us how these could form part of an EU network and nor whether their absence from any such network would prevent them from participating in the collective redress processes the Commission proposes. For example, if the CJC proposals for a collective opt out action are enacted in the UK, the network would

need to include some representation from those lawyers working regularly in this area to be effective. Judicial participation in any network would also, we suggest, be desirable.

**Q4. Are there other elements which should form part of your preferred option?**

Although implicit in the Commission's option 4, we believe there should be express provision (preferably binding and at an EC level) allowing collective claims to be effectively settled, with the effect of *res judicata* throughout the EU, as a result of a single action. This is imperative to ensure both that consumers get effective and timely redress but also so that businesses are not faced with a multiplicity of lawsuits (probably over a number of years) on the same case.

And, if mediation and other forms of ADR are to work effectively in this field, a mechanism through which a mediated solution can be effectively enforced if necessary across the EU, is clearly required.

**Q5. In case you prefer a combination of options, which options would you want to combine and what would be its features?**

We believe that option 4 is likely to respond best and produce the most rapid result for European consumers in this field. However, some of the ideas suggested in option 3 could helpfully be included with option 4. We therefore believe (as described above) that any system

- requires action at a European level with at least some elements being binding on Member States;
- should permit a collective claim against a trader to proceed (and be settled in) a single court for all affected consumers in the EU;
- should allow the court seized to choose whether an 'opt-in' or an 'opt-out' procedure is the most effective way of dealing with the collective claim;
- should include a mediation or ADR requirement, provided that this is backed by effective collective redress to ensure that the settlements reached are on the basis of some parity of negotiating position
- should allow representative bodies in one member state to bring claims in another member state if needed to obtain redress for their members, and to bring claims on behalf of non-resident consumers in their own states if appropriate;
- must permit the costs of litigation (if needed) to be shared or otherwise effectively funded for example through a levy on claims or through recovery from the defendant under 'loser pays')

**Q6. In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?**

We believe that a framework where the principal elements are binding on member states will be required to ensure that the EU offers a level playing field both to consumers and to the large majority of businesses who do treat consumers fairly. The binding elements should in our view include

- an obligation on member states to provide an effective means of collective redress for consumers;
- a requirement that member states allow judicial discretion as to whether the collective action should be 'opt-in' or 'opt-out' depending on the circumstances: an indication at a European level of what those circumstances are would be useful;
- a mechanism to allow all claims related to a single traders' unfair practices to be heard in a single court and then be recognized throughout the EU as needed;
- mutual recognition of the rights of consumer organizations and groups to bring claims in the courts of countries other than their own (and to represent non-resident consumers in their own courts)
- appropriate use of mediation and other ADR techniques provided that these do not impair the effectiveness of consumer redress through excessive delay nor operate in a different way for collective claims than for equivalent individual claims.

Softer legislation and guidance would also be useful , for example in spreading best practice among consumer organizations and the judiciary. An additional education campaign to ensure that consumers themselves are aware of their new rights and how to exercise them would also , we suggest, be of considerable benefit..

**Q7. Do you consider that there could be other means of addressing the problem?**

The only other method, which we believe would be effective in ensuring that consumer harm caused by unfair trading is cured, would be for the member states to create a fund – financed by a levy on businesses dealing with consumers – to make payments to consumers who have suffered harm due to unfair trading practices. But not only would this be unfair to the large majority of fair businesses, who would be forced to pay for the sins of their few unscrupulous brethren, we also doubt that the political will would exist to create what would, in effect be a new European tax.

In conclusion, the Commission's continued focus on civil procedure for collective consumer claims is very welcome. We nevertheless believe that the Commission should propose binding measures with a selection of available procedures available to national courts, if its policy objectives are to be fully realised.

March 2009