barents krans advocaten notarissen

POSITION PAPER

ON THE EUROPEAN COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

BY

THE LITIGATION DEPARTMENT

OF

BARENTSKRANS N.V.
THE HAGUE
THE NETHERLANDS

1. BarentsKrans has developed over the last 30+ years a highly-recognized financial-services litigation practice with a particular emphasis on obtaining collective redress through class actions. Notable class action cases are Co-op, ObliDAF, Volendam / Fortis, Via.Claim / Fortis and Euronext (re IPO of Via.Networks), Leaseverlies / Dexia (shareleasing products) and Verliespolis / several insurance companies (unit linked and universal life insurance policies)

2. Based on its considerable experience, BarentsKrans believes it is well-placed to offer a number of observations on the White Papers noticeable silence on the funding of class actions (albeit the White Paper's companion Staff Working Paper does broach the issue very briefly).

3. In BarentsKrans' view, funding of class actions is the single most critical aspect of success: translating the well-known adage of late medieval and early-Renaissance war fare "Pas d'argent, pas de Suisses" into "No money, no class actions", the day-to-day organization of getting an action for collective redress started entails simple book building. In other terms, someone has to take the initiative to develop on his own behalf or on behalf of others a case worthwhile to be pursuit. Book building means in essence finding victims with an interest to participate sooner or later, at the front end or at the back end of a case, in the project. Book building is – in a loose sense, an opt-in system. At least here in The Netherlands in view of the prevailing class action system (for description references made to a report made for the 2006 AIJA prepared by two members of the BarentsKrans Litigation Department) – it is important to ensure representativity of the class by obtaining the endorsement of a relevant number of victims and/or one or more relevant consumer organizations and/or trade groups. In BarentsKrans' view there is a direct link between representativity on the one hand and subsequent credibility in negotiations on the other. As said, all this is important to the building of a case. Building a case requires up-front investment, including not only the time required to develop a new project, but also money for a variety of outside assistance (e.g. building a website, maintaining contacts with members of the class, developing an injury theory with the help of experts, fact-finding).

4. The elementary question is who is prepared to fund such project. In BarentsKrans' experience, neither consumer organizations nor trade and industry groups are in a position to fund cases. They may be willing though to contribute by way of formal endorsements, publicity and (limited) manpower, but they are by their very nature (existing on the basis of incidental donations and/or regular contributions) very significantly restricted in their ability to fund cases, in particular to pay legal teams and experts.

5. Law firms may be prepared to invest time in the development of a project, but that ability is restricted by their ability to cross-subsidize projects which do not materialize with those that will go through successfully (in terms of obtaining of instructions and being paid on a basis in accordance with prevailing bar rules).

6. Although in The Netherlands legal aid is available for individuals, who are not able to provide for sufficient funds to pay their legal fees, similar aid is not available to class action entities. In view of the free rider problem and the increase of legal efficiency resulting from the use of the class action mechanism, this topic (and the desirability of the then needed change in the law on legal aid) is debated at this moment. However, the Dutch Government is very reluctant to stimulate class action litigation out of fear for "American situations".

7. Commercial insurance companies – at least to date – do not provide for appropriate coverage. Their policies are limited to commonly accepted risks in the area of consumer protection (housing, consumer purchases, and employment) and in business areas. Class action litigation coverage does not seem to be available. And even if it should be available, it does not seem likely that a significant member of a putative class of plaintiffs would have purchased appropriate coverage.

8. The last possible group of potential funders are so-called litigation funders. These have existed since ever. Litigation funders typically acquire title to a claim by paying a discounted price, upon which they will assume the full risk of success or failure in pursuing that claim. A very common form of this is found in commercial factoring of accounts receivable (much practised in industries with very large volumes of accounts receivable, e.g. utilities, insurance). It is also widely known in banking where debt owned by banks may be sold to third parties at a discount who assume the risk of collection. BarentsKrans is aware of the existence of a limited number of litigation funders actively attempting to develop a commercial antitrust damages class action business, but so far not much, if anything, has happened. This is in its view very much caused by the fact that even though the class action mechanism in The Netherlands to date is an opt-out system, there is – without special arrangements with individuals who are willing to actively opt in – no money flow through the class action entity. Funders therefore, are only interested in funding a class action, if sufficient individuals are willing to actively sell or assign their claims. Another aspect may well be that there are too few litigation funders active at this moment and that they may not have enough finances themselves and enough staff to develop a larger number of projects.

9. BarentsKrans sees one way ahead to remedy the systematic failure of lack of sufficient risk takers to develop class actions and that is to allow members of the legal profession to assume the full risk of a case. In other words, BarentsKrans suggests abolishing the generally prevailing ban on contingency arrangements in Europe. This would allow developing a meaningful class action practice, at least in the area of cartel damages, and help to promote the policy objectives of the White Paper.

10. BarentsKrans submits there are good legal reasons for doing so on the principle of access to justice of the European Convention on Human Rights and the right to compensation of cartel damages in conjunction with the right to effective remedy under Treaty of the European Community (reference is made to an article of one of the members of BarentsKrans' Litigation department annexed to this Position Paper).

Pierre V. F. Bos and William M. Schonewille

***