

Is Europe Ready for Class Actions?

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Several recent developments suggest that the European Union (EU) and some of its individual Member States are preparing to embrace the idea of collective redress mechanisms for consumer claims. Although an effective European collective redress mechanism has yet to materialize, the process toward crafting one is certainly underway.

At the European Level: The European Commission

Last year, the European Commission ordered a study to evaluate the existing collective redress mechanisms throughout Europe, and concluded that there are many obstacles to consumer collective redress in terms of access, effectiveness and affordability. See “Study on the Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union,” Civic Consulting and Oxford Economics, Final Report (Aug. 2008).

Judicial collective redress mechanisms currently exist in approximately half of the EU Member States (13 of the 27 States), and several other States are actively pursuing implementation of pertinent legislation. The primary means of collective redress in the EU are group actions, representative actions and test cases. However, there is little uniformity across Member States’ procedures. Moreover, in many jurisdictions, these mechanisms are not widely used because consumers are not familiar with, or even aware of, these alternatives to individual lawsuits. Another key obstacle is funding, which is quite limited for collective actions, with contingency fees not allowed in most of the States. In addition, collective redress procedures tend to be

complex and lengthy. The study’s finding that the existing collective redress mechanisms are underutilized thus comes as no surprise. For example, according to the study, Germany faced the fewest number of consumer collective claims, with on average only four out of ten million people every year participating in these types of actions.

The European Commission recognises the exigent need for a solution. According to EU Commissioner for Consumer Affairs Meglena Kuneva:

Consumers who are victims of illegal activities, such as overcharging, misleading advertising or outright scams, have a right to compensation. Currently, particularly where there are small scattered claims, this right 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 [sic] leaving consumers with nowhere to go. The present situation is clearly unsatisfactory. We must find a way to make the basic right to consumer redress a reality for more people.

See EU Consumer Affairs’ Press Release, IP/08/1800, Brussels (Nov. 27, 2008).

The Green Paper

With the aim of tackling this problem, the Commission published its Green Paper in November 2008. See Green Paper on Consumer Collective Redress, COM (2008) 794 final, Brussels (Nov. 27, 2008). The Green Paper focuses on proposals for facilitating consumer redress in situations where a large number of people have been harmed by a single trader’s practice that is in breach of consumer law. The Green Paper presents four different options, each of which can be implemented individually or in combination with one or more of the others, as follows:

1. No EU action: Refrain from any immediate action and instead continue monitoring the

impact of the current national and EU systems until more information is available on the combined efficacy of existing measures and measures soon to be implemented.

2. Cooperation among Member States: Develop a two-tier cooperation scheme among the Member States that would (a) allow consumers throughout the EU to use the collective redress mechanisms that are available in different Member States; and (b) encourage the creation of collective redress mechanisms in Member States where they are non-existent or inadequate.
3. Mix of policy tools: Establish an array of mechanisms that combine, among other things, collective mediation or arbitration, measures to facilitate small-claims procedures and efforts to raise consumer awareness of the various means of redress.
4. Judicial collective redress procedure: Implement a system (binding or non-binding) to ensure that judicial collective redress is available in all Member States, thus guaranteeing that every consumer throughout the EU would be able to obtain redress in mass cases through a representative action, group action or a test case. U.S.-style attributes such as punitive damages, contingency fees and similar features that may encourage frivolous litigation would be prohibited.

The Commission stated that it remains “open-minded” about how to facilitate access to redress, and invited interested parties (“stakeholders”) to submit comments to its Green Paper. Consumer groups, industry representatives, public authorities, legal practitioners, academics and other stakeholders sent more than 180 responses to the Commission. Interestingly, the business sector submitted approximately half of the responses. All of the responses were analyzed and summarized in a report published by the Commission in May 2009. See “Assessment of the Economic and Social Impact of the Policy Options to Empower Consumers to Obtain Adequate Redress,” DG Health and Consumer Protection (May 6, 2009). Among the key issues raised by stakeholders include whether the Green Paper provides sufficient evidence of an actual need for collective redress mechanisms, the competence of the EU to act in these matters

(particularly with respect to a judicial collective redress procedure), and the appropriate degree of EU involvement, if any. The report concluded that none of the four options for facilitating access to collective redress, as defined in the Green Paper, was fully satisfactory. The common trend emerging from the consultation was that a combination of several instruments would be the most appropriate way forward.

Follow-up Consultation

Also in May 2009, the Commission launched a follow-up consultation during which stakeholders had the opportunity to provide further information, including concrete examples to support their comments. See “Follow up to the Green Paper on Consumer Collective Redress,” DG Sanco (May 2009). The resulting paper presents a multi-criteria analysis of the impact of the different options with regard to their costs and benefits. The multi-criteria analysis includes considerations such as increasing the availability of collective redress mechanisms, improving the efficient handling of mass claims, ensuring adequate compensation for consumers, avoiding unmeritorious claims, leveling the playing field for defendants, and litigation and implementation costs. The paper analyzes each of the four options presented in the Green Paper in a pragmatic effort to facilitate the consultation, but does not reach any final conclusions.

Although the outcome of this review remains to be seen, the Commission has made clear that it is not considering a U.S.-style class action system, and that any option that is finally implemented will reflect EU legal traditions, including existing safeguards such as the rule that the “loser pays” the prevailing party’s costs. The ideal mechanism would allow consumers affected by illegal practices to be compensated for their losses while simultaneously deterring companies from engaging in illegal activities (such as hidden charges and misleading advertising) that could give them an unfair advantage over their law-abiding competitors. The Commission is quick to point out that while it is trying to encourage business competition by creating more legal certainty in the market and deterring unfair practices, it wants to avoid, at all costs, the creation of a “litigation culture.”

At the National Level: The United Kingdom

In December 2008, the Civil Justice Council (CJC), an advisory group to the UK Minister of Justice, published its final recommendations on the issue of collective redress in the UK. See “Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report,” A Series of Recommendations to the Lord Chancellor, Civil Justice Council (Nov. 2008). The CJC observed that an effective collective-action mechanism not only benefits defendants in resolving disputes in a more economical and efficient manner, but also promotes competition and market efficiency by deterring unfair practices, thus serving societal interests as a whole.

Currently, the UK legal system incorporates several different procedures to deal with multi-party litigation: the Group Litigation Order (GLO) — which provides for the case management of claims that give rise to common or related issues of fact or law — representative actions, consolidation of multiple actions for proceeding in a single trial, and the test case. *Id.* at 25.

The CJC found that the existing procedures do not provide sufficient or effective access to justice for many citizens and could be improved greatly. For instance, the CJC determined that meritorious claims that could be brought collectively either are not being pursued or are being brought as individual claims. The CJC, therefore, recommends the introduction of a “generic collective action” that will allow a wide range of parties, such as individual representative claimants or defendants, or designated or ad hoc bodies, to request class certification. In the CJC’s opinion, the collective action should apply to all types of civil claims that affect multiple claimants, without precluding further reforms in specialized areas. For example, the CJC recommends that a generic collective action should not exclude the development of specific no-fault schemes in certain product liability areas, as has occurred in some jurisdictions.

The CJC views the court as the appropriate body to act both as a “gate keeper” and a case manager in order to ensure that the procedure is fairly balanced between the parties. See Mulheron, R. “Reform of Collective Redress in England and Wales: A Perspective of Need,” A Research Paper for the Submission to the Civil Justice Council of England

and Wales (Feb. 8, 2008). As such, the court should subject any collective claim to a strict certification procedure before the claim is allowed to proceed. Furthermore, it is up to the court to decide which mechanism (opt-in or opt-out) is the most appropriate for any particular claim, taking into account all of the relevant circumstances. For instance, a significant number of small claims arising out of a common contractual dispute, or product liability claims in which it is difficult to identify at the outset of the claim each member of the class, may be better suited to resolution via an opt-out collective action. However, a case with a smaller class involving relatively high-value individual claims, such as when a trade association sues on behalf of its members, may lend itself to an opt-in collective proceeding.

While evaluating which mechanism is the most appropriate, the court should ensure that the choice of procedure does not undermine either claimants’ or defendants’ substantive rights. The court should base its decision on the new rules, practice directions and guidelines that will be implemented to regulate the collective redress mechanism.

The CJC also recommends, among other things, that collective claims be subject to an enhanced form of case management by specialist judges, and that any settlement agreed to by the parties be approved by the court during a “fairness hearing.”

In Part 10 of its Report, the CJC helpfully sets out a draft Collective Proceedings Act and draft Rules of Court as foundational guidelines should its recommendations be implemented. The paper concludes that although the majority of the proposed reforms could be introduced by the Civil Procedural Rules Committee (which is empowered to make rules of practice and procedure, but which cannot amend the substantive law), primary legislation should be considered.

These recommendations were submitted to the Lord Chancellor (one of the most senior officers in the British government, tasked with, among other things, responsibility for the proper functioning of the UK courts) and the Secretary of State for comment.

Formal Response

In July 2009, the British government, through the Ministry of Justice, published its formal response to the CJC's report. See "The Government's Response to the Civil Justice Council's Report: Improving Access to Justice through Collective Actions," Ministry of Justice (July 2009). In brief, the Ministry does not agree with the introduction of a generic right of collective action, and favors regulatory solutions when possible over court-based options. Moreover, the Ministry encourages access to collective redress on the basis of specific "sectors," defined as "discrete area[s] of economic or social activity, within which particular issues, including specific types of legal claim, may arise" (e.g., intellectual property, competition law, etc.). The Ministry argues that a sector-based approach is likely to produce better results and to be more attainable for consumers. The main reasons given by the Ministry in favor of this type of approach are twofold: 1) the existence of diverse regulatory frameworks and appropriate representative bodies among the sectors, which will require different considerations (e.g., the financial sector has a more formal regulatory framework in place than other sectors); and 2) the difficulty in assessing the impact of a global reform across the full spectrum of sectors. A useful global impact assessment would be nearly impossible to achieve as any such review inevitably would overlook considerations specific to individual sectors and may over-generalize, thus rendering potential conclusions inaccurate.

The Ministry agrees with the CJC that any right of representative action must be created by primary legislation and cannot be accomplished through a reform of the Procedural Code. According to the Ministry, details such as standing to sue, opt-in versus opt-out models, the type of recoverable damages and the proper distribution of damages must be considered on a sector by sector basis. The Ministry favors maintaining the "loser pays" principle for costs in order to avoid unmeritorious litigation.

In terms of next steps, the Ministry plans to develop a framework document itemizing the issues for consideration when introducing a right to collective actions. Responsibility for the necessary primary legislation will fall to the government department tasked with overseeing each specific

sector. In addition, the Ministry will work with the CJC to develop procedural rules to be proposed to the Civil Procedure Rule Committee. The objective is for the rules to be sufficiently flexible to deal with the diverse models of collective action and to include provisions for mandatory use of alternative dispute resolution regimes, a procedure for court certification of the collective action, security for costs, and case management and fairness hearings, as appropriate within each sector.

Is an Effective Means of Collective Redress in Sight?

Recent efforts demonstrate that the EU and its Member States recognize that existing consumer redress mechanisms are inadequate to address the current challenges posed by mass consumption and a globalized economy. It remains to be seen whether these efforts at improvement will achieve the hard-sought, balanced solution for sufficiently protecting the interests of all of the parties involved.

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