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EU Developments in Relation to Collective Redress



Arnold & Porter (UK) LLP

Alison Brown

Introduction

This year has seen significant developments in Europe in the field of collective consumer redress, with the publication in June 2013 of a Commission Recommendation and a Commission Communication setting out common principles for collective redress mechanisms to be applied in EU Member States. This represents the culmination of a series of policy reviews carried out by the European Commission in the consumer and competition fields since 2005. This chapter discusses the Recommendation and its implications.

Previous European Initiatives

The European Union has already enacted a number of measures in the consumer protection field aimed at defending consumers' collective rights in specified circumstances. To date, these have been focussed on injunctive relief rather than monetary claims. For example, the Injunctions Directive 98/27/EC permits certain qualified bodies in one Member State to apply to the courts or authorities in another Member State for a cross-border injunction aimed at protecting the collective interests of consumers under certain consumer protection Directives, including the Directives on misleading advertising, distance sales contracts, consumer credit, television broadcasting, package travel, advertising of medicines, unfair terms in consumer contracts and property timeshare contracts.

In recent years the Commission has turned its attention to the question of whether European consumers have available to them an adequate mechanism for seeking damages in circumstances where the growth of the internet and the expansion of consumer markets creates greater potential for mass claims. Separate initiatives have been progressed in tandem by the Commission's Competition Directorate, which looked at whether there is a need for a collective mechanism to assist victims of anti-trust infringements to seek damages, and by the Health and Consumer Affairs Directorate, which considered more broadly whether a general collective redress mechanism should be introduced. Those initiatives have resulted in a series of publications, including a White Paper on damages actions for breach of EU anti-trust rules published in April 2008, and a Green Paper on Consumer Collective Redress published in November 2008. However, concerns that these various initiatives were inconsistent and were advanced on a piecemeal basis led to a further consultation in February 2011, "Towards a Coherent Approach to Collective Redress". The Recommendation has been introduced in the light of the responses received during that consultation, including the European Parliament's resolution of 2 February 2012 commenting on consultation.

Collective Consumer Redress - Background

The adequacy of the mechanisms permitting collective consumer redress has been under review for many years. A series of studies have been commissioned looking at the collective redress schemes in place in Member States, and seeking to evaluate the difficulties faced by consumers in pursuing mass claims. In its most recent consultation the Commission noted that, while many Member States had introduced a collective redress procedure in respect of compensatory relief, this was not universal, and every national system was unique. Differences identified included:

- *Scope* - some procedures are sector-specific, e.g. Germany has a scheme relating to capital investment losses, whereas other measures (such as in Spain) apply generally.
- *Standing* - in some Member States only certain approved public authorities can bring proceedings (e.g. the Ombudsman in Finland), whereas others grant standing to private organisations such as consumer associations (e.g. Bulgaria) or to individuals acting on behalf of a group (e.g. Portugal), or have a combination of such rules.
- *Claimants* - although most schemes provide for compensation of consumers, a few also permit others, such as small businesses to seek relief.
- *"Opt-in" versus "Opt-out" schemes* - while most countries have "opt-in" collective redress schemes, some, such as Portugal, Denmark and the Netherlands have opt-out measures.

In its so-called Evaluation Study published in August 2008 the Commission concluded that this patchwork of different laws and procedures created a "justice gap" where consumers and businesses have different rights depending on where they are located, which was particularly acute in the case of cross-border claims. A separate 'Problem Study' looked at the problems faced by consumers who wanted to pursue a claim and found that they faced barriers in terms of access to justice, effectiveness and affordability, particularly in pursuing small claims. Litigation costs were high and judicial procedures were complex and lengthy. Half of consumers said that they would not bring court proceedings where the amount claimed was less than €200. In the light of these reports, the Commission concluded that a significant proportion of EU consumers who have suffered damage do not obtain redress. It estimated in its 2009 discussion document that about 40 million EU consumers who have problems with a trader and make a complaint do not pursue the matter and apparently do not, therefore, obtain redress.

Commission Recommendation 2103/396/EU on Common Principles for Collective Redress Mechanisms

The Commission Recommendation sets out a number of common principles to be applied by Member States in their national collective redress systems. The principles are intended to apply horizontally in all areas where collective claims are made, but in its accompanying Communication the Commission singles out, in particular, the areas of consumer protection, competition, environment protection, protection of personal data, financial services and investor protection.

Member States are asked to implement the principles set out in the Recommendation by 26 July 2015. However, the Recommendation is not binding and it therefore remains to be seen whether any changes to existing national laws will be made. Within two years following implementation, by 26 July 2017, the Commission will assess the practical impact of the Recommendation and will determine whether further measures should be proposed to consolidate and strengthen EU laws on collective redress. One area that will remain under review is whether there is a need for specific rules on jurisdiction and choice of law in collective redress actions: the Commission rejected this proposal in its Communication, but said that it will review experience of these issues in cross-border cases. As matters currently stand, there is considerable uncertainty as to whether any strengthened measures will be introduced in future. According to the Commission's Communication, Member States that responded to the consultation expressed divergent views on whether binding rules on collective redress should be introduced, ranging from support to "strong scepticism". Some Member States supported the idea of binding rules only in certain legal areas such as competition law (Sweden and the UK) or for cross-border claims only (Denmark).

The overall aim of the Recommendation is to facilitate access to justice by ensuring that collective redress mechanisms are available to assist in the resolution of large numbers of similar claims, while at the same time ensuring that appropriate procedural safeguards are put in place to avoid abusive litigation. The Commission Communication rejects 'US style' class actions which it describes as vulnerable to abusive litigation and highlights the fact that such class action procedures, and in particular the availability of punitive damages, funding of cases by means of contingency fees, extensive discovery of documents and 'opt-out' class action procedures, have encouraged defendants to settle claims that may not be well founded. The Recommendation seeks to balance these different considerations, proposing that all Member States should have collective redress mechanisms in place, while at the same time introducing safeguards in terms of the format of that procedure. The few Member States which do not presently have any collective redress mechanisms are therefore encouraged to introduce these. To balance this, the Commission propose a range of safeguards including recommending that Member States' collective redress procedures are 'opt-in', no punitive damages should be available and there should be restrictions on the availability of funding by means of contingency fees and through third party funders.

The Common Principles

The Recommendation contains a set of principles which would apply to all collective redress mechanisms, whether their purpose is to provide injunctive relief to stop illegal practices, or to provide compensation to injured parties in mass harm situations. These are:

1. *Standing to bring a Representative Action* - Member States should designate representative entities to bring

representative actions on the basis of defined conditions of eligibility. In particular, the Commission suggests that the representative entity should be non-profit making, have a direct relationship with, or interest in, the subject matter of the collective proceedings and act in the best interests of the group represented. Alternatively, Member States should be permitted to empower public authorities to bring representative actions on behalf of claimants seeking compensation.

2. *Admissibility* - The Recommendation appears to support a process of approval or certification of all collective actions by the courts. It states that there should be a process of verification at the earliest possible stage to ensure that manifestly unfounded cases and cases which do not comply with the rules for collective actions are not pursued.
3. *Provision of Information* - The representative body must be able to publicise the proposed proceedings.
4. *Costs* - The Commission proposes that the "loser pays" principle should apply and that the party that loses a collective redress action should reimburse the legal costs of the winning party. The Communication indicates that all stakeholders in the public consultation supported this proposal and the Commission's recommendation is expressed emphatically: "the Commission has no doubt that the 'loser pays' principle should form part of the European approach to collective redress".
5. *Funding* - Claimants should be required to provide details of their source of funding for the litigation at the outset of the case. Although the Recommendation supports the funding of collective proceedings by third party funders, this would only be permitted in restricted circumstances. In particular, rules should prohibit the third party funder from charging excessive interest, prevent conflicts of interest and stop the funder from seeking to influence the conduct of the litigation by the claimant, including in relation to settlement of the proceedings. The Recommendation also proposes that the courts should have the power to stay proceedings if either the third party funder or the claimant has insufficient resources to fund the litigation and any adverse costs ruling.
6. *Cross-Border Cases* - Member States should ensure the claims can be brought in their jurisdiction by foreign groups of claimants or representative entities from other countries. In particular, any representative entity that has been officially designated by another Member State as having standing to bring proceedings in that country should be permitted to bring a claim in another Member State which has jurisdiction to hear the collective proceedings. This recommendation could potentially have a significant impact if, for example, the Dutch special purpose vehicle (SPV) model is used to bring claims in common law jurisdictions like the UK, which don't generally recognise representative entities as having a right to bring such claims.

The Regulation also lays down the number of specific principles relating to injunctive collective redress. These are very generally worded and suggest that Member States must provide expedient procedures so that any injunctive orders can be made promptly to prevent any continuing harm, and should provide for sanctions, such as daily fixed-fee penalty payments, to ensure that any injunctive orders are complied with.

With regard to compensatory collective redress, the Commission makes detailed recommendations governing the basis of the proceedings. These include:

1. *"Opt-in" Collective Redress Mechanism* - The Commission considers that claims should generally be pursued on an "opt-in" basis because this respects the right of individuals to decide whether they want to litigate. In addition, it notes that 'opt-out' systems may not be consistent with the central aim of providing compensation, since the class of persons

affected are not individually identified and they may therefore never receive the compensation awarded. However, the Recommendation suggests that exceptions to this principle may be permitted if they are justified by reason of “sound administration of justice”. Member States such as the Netherlands, Portugal, Bulgaria and Denmark which already have “opt-out” collective redress mechanisms may therefore be able to justify their continued operation on grounds of national administration of justice. A similar justification could be made by the UK Government, which has recently proposed a new collective redress procedure for competition damages actions that can be pursued on either an “opt-out” or an “opt-in” basis.

2. *ADR and Settlement* - Parties to any collective proceeding should be encouraged to settle the dispute both pre-trial and during the proceedings. In order to encourage this, the Commission proposes that any limitation period applicable to the claim should be suspended while ADR procedures are followed. Where a collective settlement is agreed, the Commission also proposes that this should be approved or verified by the courts to ensure the appropriate protection of interests and rights for all parties involved.
3. *Contingency Fees* - In general, Member States should not permit contingency fees as these risk creating an incentive to conduct litigation which might result in spurious claims being brought. However, Member States can exceptionally allow for contingency fees provided these are appropriately regulated, taking into account the right to full compensation of the individual Claimants.
4. *Punitive Damages* - These should not be permitted. In its Communication, the Commission makes clear that the aim of collective redress procedures should be to facilitate compensation: it considers that imposing sanctions on infringers as a punishment and deterrence is a matter for public enforcement.
5. *Collective Follow-on Actions* - The Commission generally favours so-called “follow-on” actions. Where the claim for compensatory damages relates to an area of law, such as competition law, where public authorities are empowered to adopt decisions finding that there has been a violation of EU legislation, it considers that proceedings should generally only be brought after the regulatory action has been concluded, so as to avoid the risk of conflicting decisions. The courts should also have the power to stay any claim for compensatory relief until the regulatory proceedings have been concluded.

Conclusion

After years of investigation and debate, the Commission has finally published formal proposals on collective redress. The Recommendation seeks to influence Member States’ national procedural rules, encouraging a more coherent approach to collective redress through the publication of common principles that it recommends should apply to such collective redress procedures. In doing so, it has sought to reconcile the different positions held within the Commission by its Competition Directorate which has long supported ‘opt-out’ class actions for anti-trust damages claims and the Health and Consumer Affairs Directorate, which considered more broadly whether a general collective redress mechanism should be introduced. It is notable that the proposed EU Directive on Antitrust Damages which was published at the same time as the Recommendation side steps the issue of collective redress and the accompanying press release suggests that the Recommendation should guide the form of national collective redress procedures in the competition field.

Overall, the impact of the Recommendation remains uncertain. It remains to be seen whether Member States will, in fact, make legislative changes to their procedural rules to implement or amend existing collective redress procedures given that the Recommendation is not binding and Member States have divergent views on the need for EU-wide measures in this area.

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