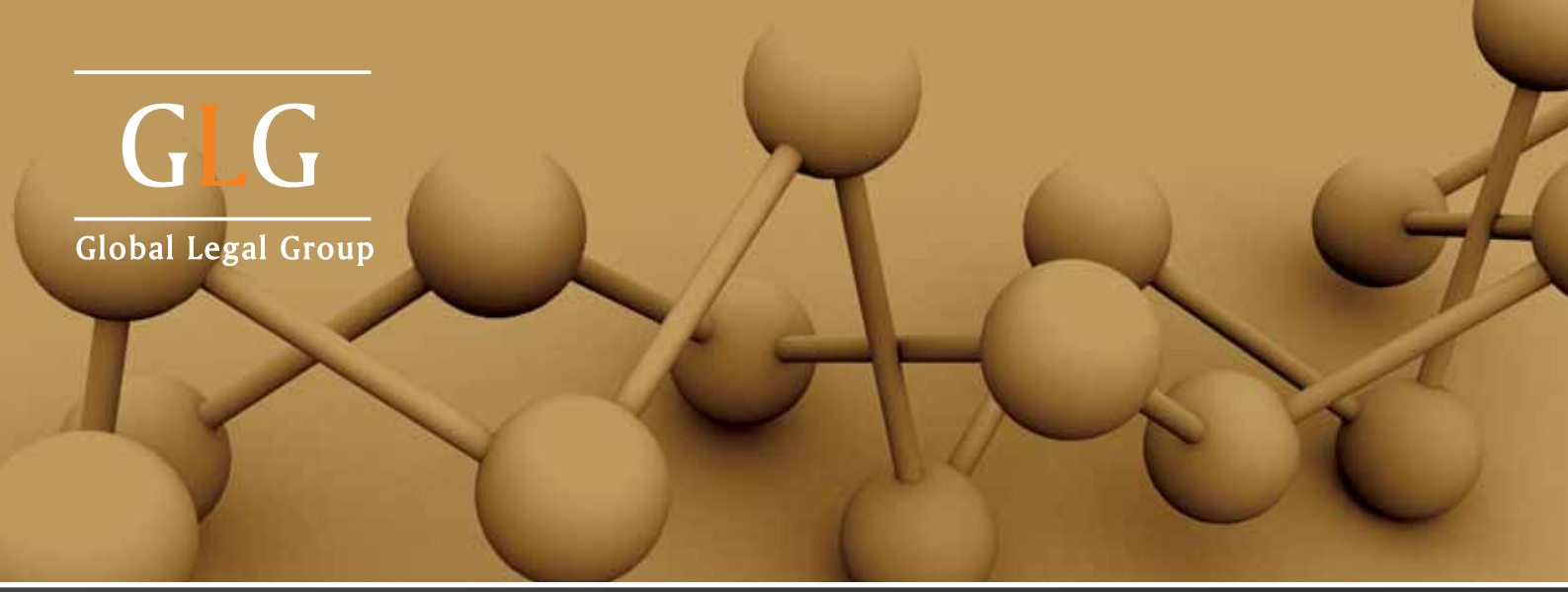

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Global Legal Group

The International Comparative Legal Guide to:
Class & Group Actions 2011

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

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EU Developments in Relation to Cross-border Actions for Collective Redress

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Introduction

The last few years have seen significant developments in Europe in the field of collective consumer redress. At European level, a number of policy reviews have been commenced by the European Commission in the consumer and competition fields looking at whether there is a need to introduce some form of pan-European collective redress mechanism in relation to cross-border disputes. At the same time, many EU countries have introduced their own collective redress procedures through domestic legislation.

There is no common collective action for damages in Europe. A 2007 study produced by the Centre for Consumer Law at the University of Leuven, Belgium, found that more than half of European Member States had no collective action for damages at all. Where a collective action procedure exists, the mechanisms used in different Member States vary widely. While in some countries, such as the UK, group claims can be commenced by individual consumers, in other jurisdictions, such as France, representation is provided by accredited bodies, such as consumer associations or government bodies. Some countries, such as the UK have adopted "opt-in" mechanisms where claims can only be brought by, or on behalf of, consumers who have positively indicated that they wish to participate in the action; while other countries, such as Portugal, have adopted "opt-out" systems where proceedings can be brought on behalf of a class of individuals unless the consumer opts-out of that process.

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. The initiative has been progressed in tandem by the Commission's Competition Directorate, which is considering 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 is looking more broadly at whether a general collective redress mechanism should be introduced. That initiative culminated in the publication of a Green Paper on Consumer Collective Redress in November 2008.

Collective Consumer Redress

The adequacy of the mechanisms permitting collective consumer redress has been under review for several years. In 2005 Leuven University were commissioned to research the existence of alternative means of consumer redress across the EU, other than conventional litigation proceedings, and the conclusion of their report, which was published in January 2007, has been summarised briefly above. They found that there was no common form of collective action for damages in Europe, that many Member States had no mechanism for collective redress and that the systems operated by those countries that had a mechanism varied widely. Following on from this report, in its consumer policy strategy for 2007-2013, published in March 2007, the European Commission indicated that one of its key priorities was to take action to improve access to justice by creating measures which simplify and help access to the courts, particularly in cross-border cases. In order to decide whether, and if so to what extent, to carry out an initiative at EU level, a series of studies have been undertaken to gather further information about the current position. The so-called 'Evaluation Study' looked at the effectiveness and efficiency of existing collective redress mechanisms throughout the EU. It concluded that the mechanisms varied widely between the 13 Member States which have such procedures (France, Germany, Finland, Sweden, Denmark, Bulgaria, Greece, the Netherlands, Italy, Spain, Portugal, Austria and the UK). All of the mechanisms had strengths and weaknesses but their effectiveness could be improved. While some schemes had only recently been implemented and experience with them was therefore limited, overall the mechanisms were used in relatively few cases.

The study found that the average benefit to consumers ranged from €32 in Portugal to €332 in Spain. The Commission has concluded that this patchwork of different laws and procedures creates a "justice gap" where consumers and businesses have different rights depending on where they are located, which is particularly acute in the case of cross-border claims. It raises the possibility that businesses could seek to establish themselves in a Member State where there is a lower risk of claims being made and pursued.

A separate 'Problem Study' looked at the problems faced by consumers who wanted to pursue a claim. They found that consumers 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. A qualitative study looking at consumers' experiences, perceptions and choices was also carried out in August 2009. 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 most recent 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.

Consumer Collective Redress Benchmarks

The Commission has also drawn up a series of benchmarks against which to assess the adequacy of the existing legislative systems in different Member States in terms of the availability of collective redress. These benchmarks are:

1. The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.
2. It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs of bringing an action should not be disproportionate to the amount in dispute.
3. The defendant's costs in defending proceedings should not be disproportionate to the amount in dispute. Consumers should not be deterred from bringing an action due to the "loser-pays" principle.
4. The compensation should be at least equal to the harm caused by the incriminated conduct, but should not be excessive, or amount to punitive damages.
5. A preventative effect for potential future wrongful conduct by traders or service providers concerned is desirable.
6. The pursuit of unmeritorious claims should be discouraged.
7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.
8. The information networking, preparing and managing of possible collective redress actions should allow for effective "bundling" of individual actions.
9. The proceedings should be of a reasonable length.
10. The proceeds of the action should be distributed in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

The Commission's public consultation on the benchmarks has closed. Whilst there is broad agreement over certain benchmarks, for example that the length of the proceedings should be reasonable, other benchmarks have attracted considerable criticism. For example, industry are strongly opposed to Benchmark 5 on the basis that any collective redress mechanism should focus on compensating consumers for the damages they have suffered, rather than adopting a punitive approach. Similarly, industry strongly disagree with Benchmark 10 which suggests that compensation awarded as a result of a collective redress action could be distributed to legal professionals or third parties. They point out that only direct losses should be compensated and only victims should receive compensation.

As expected, the views of consumer organisations and business groups differ on many of the key issues. Whilst the majority of consumer organisations considered the Commission's initiative to be constructive and useful, industry representatives criticised the proposed benchmarks since they appeared to them to fail to balance the interests of consumers in having better access to justice with the interests of the economy and the judiciary in ensuring that adequate safeguards are in place to prevent unmeritorious claims. Broadly, industry's view was that collective redress mechanisms should be a matter of last resort when consumers cannot adequately enforce their rights through individual judicial action or out-of-court mechanisms.

While the outcome of the Commission's consultation on the collective redress benchmarks has not yet been published, it appears that the benchmarks have informed the proposals currently under discussion in the light of the Commission's Green Paper (see below).

Green Paper on Consumer Collective Redress

Following on from these different initiatives, the Commission published a Green Paper in November 2008 (COM (2008) 794 final), which concluded that all of the current redress systems operated in different Member States have their own strengths and weaknesses but that no single mechanism is ideal for all types of claims and that "there is no easy answer to the problem" of providing consumers with adequate redress. The Green Paper explored four possible options for reform (or a combination of elements from the different proposals):

- Option 1 - No EC action: taking no immediate action while continuing to monitor the impact of the national and EU systems which are already in place, such as the European Small Claims Regulation (EC) No. 861/2007 and the Mediation Directive 2008/52/EC.
- Option 2 - Co-operation between Member States: setting up a co-operation scheme between Member States which would extend the protection of existing national collective redress systems to consumers from other EU countries and recommend that Member States which do not have a collective redress system should establish one.
- Option 3 - Mix of policy instruments: putting in place a mix of non-binding or binding policy tools combining:
  - promoting collective mediation or arbitration;
  - recommending to Member States that they allow consumers to bring small mass claims under their small claims procedure;
  - enabling public authorities to impose compensation orders (requiring traders to compensate consumers) or permitting them to skim off the profit made by traders carrying out harmful trading practices (this would involve amendments to the Consumer Protection Co-operation (CPC) Regulation); and
  - encouraging business to improve complaints handling schemes and raising consumers' awareness of existing means of redress.
- Option 4 - Judicial collective redress procedure: a non-binding or binding EU measure to ensure that a judicial collective redress procedure exists in all Member States. This would mean that every consumer throughout the EU would be able to obtain adequate redress in the case of mass claims. The Green Paper recognises that a number of issues would need to be considered in relation to this option including:
  - how the procedure would be financed;
  - the conditions under which consumer organisations or public authorities could bring a mass claim to court;
  - how unfounded claims could be prevented; and

- whether an "opt-in" procedure (consumers have to take action to join a court action) or an "opt-out" procedure (consumers are covered by a court action unless they actively decide to opt out) is chosen.

Whilst a number of options remain under consideration, it is clear that the Commission has rejected a "US style class action". In its 'Questions and Answers' on the Green Paper, it rejected the so-called "toxic cocktail" of the combination of contingency fees, punitive damages, pre-trial discovery procedures and an "opt-out" mechanism. It suggests that the options outlined in the Green Paper reflect EU legal traditions and contain effective safeguards to prevent such 'excesses' including the loser pays principle in respect of costs, the judge's discretion to exclude unmeritorious claims and the procedure whereby only accredited associations are authorised to bring claims on behalf of consumers.

Commission Discussion Paper

The consultation period on the Green Paper has now closed and an analysis of the responses was published by the Consumer Policy Evaluation Consortium in May 2009. A discussion paper taking account of those responses was also published in May 2009. Whilst the paper is caveated and is said to be published to 'facilitate the debate', it does give an indication of how the Commission's thinking is evolving. The paper sets out explicitly the Commission's policy objective in drawing up the Green Paper, which is to ensure access to effective means of redress for consumer mass claims across the EU. Its specific aims include increasing consumer confidence in cross border shopping and reducing the detriment to consumers as a result of their failure to pursue claims. In assessing the merits of the different policy options the Commission say that they will take account of a series of operational objectives:

- To increase the availability of means of redress for consumer mass claims.
- To improve the efficient and cost-effective handling of mass claims.
- To ensure adequate compensation of consumers.
- To ensure that EU consumers can join a mass claim in any Member State.
- To avoid unmeritorious claims.
- To ensure a level playing field, so that businesses that are at fault do not obtain a competitive advantage.

The discussion paper presents a refined set of options for future legislative development which aim to provide accessible, affordable and effective redress "providing compensation for legitimate claims, preventing unmeritorious claims and taking into account the legal traditions in Member States":

- Option 1 - No EC action
- Option 2 - Self regulation: this option envisages the introduction of two non-legislative measures, a standard model of collective alternative dispute resolution (ADR), together with a code of conduct for EU businesses, which would include a complaints handling system for managing mass claims.
- Option 3 - Non-binding ADR and judicial redress schemes together with additional regulatory enforcement powers: non-binding instruments would encourage Member States to set up a collective ADR system where such systems do not exist or to adapt existing schemes so that they deal with all claims and are available to consumers from all Member States. Such ADR schemes could be used to promote early settlement before the commencement of proceedings, or during a case, or to determine the compensation awarded. While ADR would remain voluntary, it would be backed by a judicial collective redress scheme which would encompass certain benchmarks including:
  - safeguards to avoid abuses;
  - claimants should have access to redress schemes in other Member States, and national consumer organisations should be able to represent consumers in other countries;
  - appropriate means of financing should be available, either through State funding or by awarding a share of the compensation to the representative body bringing the claim, so that they can recover their expenses;
  - punitive damages should not be awarded; and
  - cases should be managed efficiently.

  Finally, the powers of public authorities under the CPC Regulation would be strengthened by giving authorities or the courts power to impose compensation orders or to order the skimming-off of profits.
- Option 4 - Binding ADR and judicial redress schemes together with additional regulatory powers: this is the same as Option 3, save that Member States would be bound to set up collective ADR and judicial collective redress schemes.
- Option 5 - EU-wide judicial collective redress mechanism including collective ADR: this would impose a binding obligation to set up an ADR regime and a judicial collective redress mechanism with harmonised features. It appears that the Commission proposes that a test case should be decided, which would result in certain legal findings that would then be applied by affected consumers in separate follow on actions. Although an outline of the proposed procedure has been provided, much detail remains to be decided for example, whether the Commission favours an "opt-in" or "opt-out" approach. Features of the procedure include:
  - Financing: court and legal fees should be recoverable. A test case procedure would limit the costs incurred, making proceedings less costly for follow-up cases. There should be a low threshold (e.g. 10) for the number of claimants able to launch the collective procedure.
  - Standing: consumers, approved consumers organisations and regulatory bodies (such as an ombudsman) should have standing to bring claims.
  - Avoiding unmeritorious claims: the court should act as a 'gatekeeper' in deciding whether a case is suitable for such a procedure, for example, through a certification type procedure.
  - Effect of the judgment: this would be extended to all EU consumers harmed by the same practice who 'identified themselves after the judgment'.
  - Distribution of compensation: businesses should be ordered to advertise or otherwise inform those affected by the decision in the test case about the process for determining and distributing compensation.
  - Competent court: for the test case this would be the court of the Member State where the defendant is domiciled or where the market is most affected by the illegal practice and for the follow-up cases the court of the Member State where the consumer is domiciled.
  - Applicable law: for the test case this would be the law of the Member State where the market is most affected, and for the follow up procedure the law of the Member State where consumers have their habitual residence.

    There would be significant legal implications to such a proposal, including a need to amend existing laws relating to jurisdiction (the Brussels I Regulation) and choice of law.

The discussion document was considered at a stakeholders' meeting in May 2009. While there was general support for the overall objective of the proposal, a wide range of views were expressed with some industry representatives questioning the need for EU action in relation to collective consumer redress, arguing that most examples of inequities related to national and not cross-border cases. Of the five options proposed, industry favoured options 1 and 2, which involve no action or the introduction of limited self regulation, whereas consumer organisations and legal experts supported options 4 and 5 and the establishment of a judicial collective redress mechanism, as this would provide an alternative and complementary mechanism in cases where ADR did not work and would 'encourage' businesses to engage in ADR. No consensus was reached on whether such a judicial procedure should be "opt-in" or "opt-out". While there was some support for the test case approach, some stakeholders considered that it would be very difficult to obtain uniform results in follow-on cases as these would be handled in the courts of different Member States, applying different laws. All stakeholders agreed that the various options needed to be developed further, as they were not presently detailed enough to allow assessment of their cost and impact on individual Member States.

Looking at the various options it appears that any future proposal is likely to include some element of ADR. However, it remains unclear whether harmonising legislation introducing an EU-wide collective redress mechanism will be introduced. The Economic and Social Committee (EESC) has published a series of Opinions on this issue, most recently in May 2010. In addition to the use of ADR, it supports the introduction of a Directive providing a collective redress mechanism, so as to ensure a minimal level of harmonisation throughout the EU, together with safeguards to seek to prevent the development of a 'litigation culture'. The Committee appears to favour a flexible 'group action' based approach. Its position on whether such actions should be "opt-in" or "opt-out" is unclear. It appears to envisage that the group action could encompass both of these approaches, depending on the type of claim being advanced. However, in general EESC appears to favour an "opt-in" approach, in order to mitigate the impact of the introduction of a new collective action regime in those Member States which do not currently have such legislation. It also considers that the courts should have a supervisory role and assess the suitability of the collective action procedure in each case (for example, through some form of certification procedure) in order to prevent unmeritorious claims.

In its various Opinions, EESC recognises some of the challenges of introducing such legislation, including the tension between an "opt-out" mechanism and the constitutional principles in some Member States and the principles of the European Convention on Human Rights (ECHR). In particular, any legislation will need to be framed in a way which safeguards the freedom to take legal proceedings. There is tension between this and an opt-out procedure which deems claimants to be part of a collective action without each claimant's express agreement. Such concerns could be accommodated by giving members of the group a right to opt out at any stage and to pursue individual actions should they wish to do so. Similarly, under Article 6 of the ECHR, which enshrines the right to a fair trial, a defendant must have equality in relation to its defence rights and must, therefore, be able to invoke individual means of defence against any one of the claimants who is included in the collective action. This is unlikely to be a problem in many cases, where the claims in the collective action arise from a single event or contract and, therefore, raise the same legal and factual issues. However, other cases, such as some product liability claims (for example, cases involving defective medicines which may raise issues of individual causation related to the particular claimant's medical condition or personal circumstances) may not be suitable for management under an opt-out procedure.

With regard to the practical implementation of any new collective redress measure, in its May 2008 Opinion EESC suggested two possible legal bases for legislation:

- Articles 95 and 153 of the EC Treaty - which are concerned with ensuring the free movement of goods and the protection of consumers and could form the basis for the implementation of a collective action limited to the area of consumer law; and
- Articles 65 and 67 of the Treaty - which are concerned with developing judicial cooperation in civil matters which have cross-border implications and could be used as the legal basis for a more general measure.

Arguably, both legal bases may only permit the introduction of legislation affecting cross-border claims, not domestic claims.

Damages Actions for Breach of EU Anti-trust Rules

In April 2008, the European Commission published for public consultation a White Paper on damages actions for breach of EU anti-trust rules. This contained a set of proposals for the introduction of a range of new measures to make it easier for the victims of infringements of competition law to obtain compensation for any damage they have suffered.

The Commission found that existing means for obtaining redress were inadequate as potential claimants' losses were often limited and claims were spread over a wide area. Potential claimants were not always aware that there had been an infringement of competition law and found it difficult to obtain information about the extent of the losses they had suffered due to the infringement. Overall, individual consumers and small businesses were often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. In some cases it was simply not cost effective to pursue the matter through litigation. The result was that many consumers and businesses were not compensated for infringements that had occurred.

As a result, the Commission concluded that competition law was an area where collective redress mechanisms can significantly enhance consumers' ability to obtain compensation and thus access to justice. It proposed that EU legislation should be introduced to implement two complementary mechanisms of collective redress allowing the aggregation of individual claims of victims of anti-trust infringements: an "opt-in" collective action; and representative actions, which could be brought by qualified entities such as consumer associations, state bodies or trade associations on behalf of identified or, in some cases, identifiable victims. Such entities would either be approved in advance by their Member State or designated on an *ad hoc* basis to deal with the particular anti-trust infringement and would automatically be granted standing in other Member States so that they could pursue damages claims in countries other than the one where they are located. It envisaged that such legislation would provide a minimum level of harmonisation, ensuring that businesses and consumers are afforded the same basic level of protection throughout the EU in respect of claims for breach of anti-trust laws. The Commission also proposed that Member States should design procedural rules to encourage settlements, set court fees in an appropriate manner so that they are not disproportionate to the amount of damages claimed and, in appropriate cases, give national courts the possibility of derogating from the normal cost rules.

Work on a proposal for a Directive implementing these proposals reached an advanced stage, but was put on hold at the end of 2009 after concerns were raised over whether a more flexible approach to the implementation of the aims of the White Paper might be more appropriate. In light of these differences, it is unclear whether this proposal will be progressed.

Conclusion

The last few years have seen rapid developments in the area of collective redress in Europe. Many European countries have introduced national laws providing, for the first time, a collective action for damages. At the same time, a number of policy initiatives have been developed by the European Commission looking at whether there is a need for a European-wide collective redress mechanism for cross-border claims. The proposal for a damages action for breach of anti-trust laws is, perhaps, the best developed. In contrast, the proposals in respect of consumer collective redress remain in early development and firm legislative proposals have not yet been made.

Whilst there appears to be a consensus that the different legislative regimes in different European countries (and the lack of any collective redress mechanism in some States) leads to inequalities and injustices, the nature of any proposed new collective redress regime remains unclear. The Competition Directorate favoured the complementary mechanisms of a representative action and an "opt-in" collective action. In contrast, EESC favours the introduction of a generic collective action. What seems clear is that Member States' very different judicial systems and procedural laws will make it difficult to formulate a new European wide mechanism, save in the most general terms. While it is difficult to predict the outcome of the current initiative relating to collective consumer redress, it appears that any future proposal is likely to include some element of ADR.

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