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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. 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 July 2011 European Parliament Briefing Note "Overview of Existing Collective Redress Schemes in EU Member States" found that 16 Member States (Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and the UK (England and Wales)) had collective redress schemes, while a number of other Member States (Belgium, Malta and the UK (Scotland)) were considering introducing such schemes. However, it remains the case that more than a third of Member States have no collective action procedure 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 England and Wales, 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 England and Wales 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. 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 antitrust 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:

- April 2008 - White Paper on damages actions for breach of EU antitrust rules; and
- November 2008 - Green Paper on Consumer Collective Redress (COM (2008) 794 final).

However, concerns that these various initiatives were inconsistent and were advanced on a piecemeal basis have led to the publication of a further consultation in February 2011, "Towards a Coherent Approach to Collective Redress", which seeks to establish common legal principles on collective redress which will guide any future EU initiatives in this area. That consultation and recent developments in the field of collective redress are discussed in this article.

Collective Consumer Redress - Background

The adequacy of the mechanisms permitting collective consumer redress has been under review for several years. In 2005, Leuven University was commissioned to research the existence of alternative means of consumer redress across the EU, other than conventional litigation proceedings. It 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 were 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 found that the mechanisms varied widely between the Member States

which, at that time, had such procedures and concluded that this patchwork of different laws and procedures created a "justice gap" where consumers and businesses had different rights depending on where they were 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. It 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 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.

The European Parliament Briefing Note referred to above, which was published in July 2011, reached similar conclusions. It reviewed the different collective redress procedures in operation in the 16 Member States which have such procedures and concluded that differences in the scope and availability of these procedures meant that consumers seeking redress were faced with a complex legal patchwork of solutions, which were applied by some, but not all Member States. It broadly found that 4 types of collective redress mechanism were used:

- Group actions - where the group members have individual rights to enforce any judgment obtained. Defined in this broad way, which includes group actions brought by an ombudsman or consumer organisation on behalf of group members, as well as groups of individual claims, such actions were the most common form of collective redress mechanism and were available in Bulgaria, Denmark, Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the UK (England and Wales).
- Representative actions - where a representative acting on behalf of others obtains a judgment which he can enforce. This mechanism includes both claims where any damages are distributed to consumers damaged by the act complained of, and actions where any damages are retained by the representative organisation. Such actions were available in Austria, Bulgaria, France, Germany, Greece, Lithuania and the UK (England and Wales).
- Test case procedures - where judgment is given on the facts of a model or test case, were available in Germany, Austria and Greece.
- Procedures for skimming off profits - Germany has introduced a special procedure in the competition law field for skimming off profits gained from unlawful conduct. Damages are not compensatory, but seek to re-establish fairness by recovering illegally earned profits from wrongdoers.

The Briefing Note concluded that there were differences in the scope of such national laws - whether they applied generally, or were only applicable to particular sectors - and in their application, for example, there were differences in the rules governing legal standing to bring an action, whether the procedure is "opt-in" or "opt-out", the remedies available, and responsibility for legal costs.

The Briefing Note also considered whether existing collective redress mechanisms provide an adequate remedy in cases involving cross-border claims. It noted that around 10% of collective redress cases involve cross-border litigation, and that such claims raised complex issues of choice of forum, procedure and law. There was some evidence that the availability of different procedures led to forum shopping both within Europe and internationally (particularly in the USA), and the report suggested that some of the difficulties which appeared to limit cross-border litigation might be addressed by providing for adjudication of these disputes at European level (through the Court of Justice or the General Court).

Consultation: "Towards a Coherent Approach to Collective Redress"

The recent consultation on collective redress, published in February 2011, draws on these various studies and concludes that, while many Member States have now introduced a collective redress procedure in respect of compensatory relief, every national system is unique and that the introduction of an EU-wide measure would potentially impact on all Member States, depending on how it was formulated. Differences identified include:

- 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 and the Netherlands have opt-out measures.

The consultation is broadly based and seeks views horizontally, across a range of industry sectors, with the aim of developing a coherent approach to legislation relating to collective redress. It seeks to address criticism that previous sector-specific initiatives in the competition and consumer fields were inconsistent and piecemeal by developing a set of common principles that will guide future developments. The consultation seeks views on whether any changes should be made to existing laws, whether new mechanisms of collective redress would add value, how they would work and whether they should be introduced generally or in specific sectors, such as competition law and consumer law.

The report suggests that previous consultations have identified a set of core principles which could guide any possible future initiatives on collective redress and seeks views on those suggested principles and whether any further principles should be proposed. The core principles are:

1. the need for effectiveness and efficiency of redress - the system must be capable of delivering legally certain and fair outcomes within a reasonable time frame;
2. the importance of information and of the role of representative bodies - the consultation highlights the difficulties of communication, in ensuring that citizens and businesses are aware that they are victims of the same illegal practices and have the opportunity to join a collective procedure, particularly where such practices affect victims in several Member States. It also seeks views on the role of representative bodies in protecting victims' interests;
3. the need to take account of collective consensual resolution as a means of alternative dispute resolution;
4. the need for strong safeguards to avoid abusive litigation;
5. availability of appropriate financing mechanisms; and

6. the importance of effective enforcement across the EU - in particular, whether any concerns arise in relation to jurisdiction and applicable law, and the need to avoid so-called "abusive litigation" such as forum shopping.

In common with previous initiatives, the European Commission has stressed that any new laws would have to include safeguards to avoid the risk of "abusive litigation". It does not support the combination of factors present in so-called "US style" class actions, including the availability of punitive damages, the absence of limitations regarding standing, the availability of contingency fees and the wide-ranging discovery procedures for documentary evidence, which it considers potentially provide economic incentives to litigate unfounded claims. It seeks views on safeguards which could be introduced to prevent such "abusive litigation" including the introduction of the "loser pays" principle (which means that the losing party pays the court and lawyers' fees of both parties) and restrictions on when proceedings can be commenced (for example, the need for court approval prior to the commencement of proceedings).

While the principal aim of the consultation is to ensure that adequate mechanisms are in place so that citizens and businesses are able to seek redress on a collective basis, the consultation document acknowledges that improved mechanisms for collective redress could also assist consumers and businesses in initiating private actions against unlawful practices, thereby supporting regulatory agencies by indirectly policing breaches of EU law - whilst the role of private law actions in law enforcement is widely recognised in the US, it has not generally been acknowledged by the EU authorities as a factor influencing legislative initiatives.

The consultation has now closed and the Commission is considering the responses received.

In July 2011, Viviane Reding, the Vice-President of the Commission and the EU Justice Commissioner, while recognising the importance of ensuring access to justice for consumers and companies, indicated that collective redress was a complex issue and that there were divergent views as to whether and how the European Union should address this. The consultation acknowledges this divergence of opinion, noting that most consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many industry bodies are opposed to such schemes, fearing the risks of abusive litigation. The Commissioner indicated that 3 main options were being considered: first, taking no further action on the basis that the evidence in favour of further EU measures is not compelling; secondly, issuing a Recommendation that would seek to "steer" developments in the EU; and thirdly, a legislative initiative, either by means of a sectoral initiative or a horizontal instrument.

It appears likely that the Commission will publish the outcome of its consultation during 2012, as its work programme for the year lists an "EU framework for collective redress" for the fourth quarter of 2012.

European Parliament

In February 2012, the European Parliament adopted a resolution which welcomed the Commission's consultation, stressing the need to ensure that victims of unlawful practices are able to recover compensation for any damage suffered, while at the same time continuing its opposition to the introduction of US style class actions. The resolution calls on the Commission to demonstrate in its impact assessment that there is a need for action or legislation on collective redress at EU level, and notes that the Commission's 2008 Evaluation Study did not indicate that EU collective redress mechanisms had generated disproportionate economic consequences. While this falls short of an endorsement of the need for EU collective redress measures, it does represent a softening of the views expressed by the Legal Affairs Committee in its draft report of July 2011, which stated that the Commission had not put forward convincing evidence justifying the need for an EU measure on collective redress.

The resolution suggests that if such a measure is considered appropriate, it takes the form of a horizontal instrument providing a uniform set of rules, so as to avoid fragmentation of national and procedural laws applying to different sectors and areas of law. It proposes that such a framework might deliver most benefit in cases with a cross-border dimension, but does not repeat the Legal Affairs Committee's proposal that such a measure should only apply to cross-border actions (between a defendant and claimant domiciled in different Member States) relating to an infringement of EU (as opposed to national) laws. The resolution does, however, reiterate that if a horizontal measure is adopted it must contain safeguards to avoid unmeritorious claims and suggests a number of measures, including:

- proceedings should be "opt-in" rather than "opt-out" - the resolution rejects an "opt-out" mechanism, stating that any measure must ensure that the group of claimants are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so. It also notes the need to respect existing national systems in accordance with the subsidiarity principle, perhaps recognising that the introduction of an opt-out procedure would be contrary to many Member States' constitutions;
- there should be a preliminary procedure carried out by a judge or other similar body ensuring that the action is fit to proceed;
- Member States should designate organisations qualified to bring representative actions, applying criteria laid down at EU level;
- damages should be compensatory and punitive damages should not be permitted;
- the resolution appears to recognise the difficulties of introducing a new general collective redress measure that remains consistent with Member States' very different judicial systems and procedural laws. It rejects the possibility that discovery or disclosure of documents (which forms part of court procedure in most common law jurisdictions, but does not apply in the civil law jurisdictions prevalent in much of Europe) should be introduced as part of any horizontal measure;
- it supports the "loser pays" principle as a means of avoiding the proliferation of unmeritorious claims, stating that although the detailed rules on costs are a matter for Member States, the unsuccessful party in any litigation should bear the costs of the successful party;
- national rules should apply to the funding of claims;
- it supports the use of so-called "follow-on" actions, where a claim for compensation is made after an infringement decision by the Commission or by national competition authorities;
- it suggests that measures should be put in place to prevent forum shopping;
- it proposes that the Commission should identify specific pieces of EU legislation where there is a need for collective compensatory redress in order to strengthen existing measures to protect consumers; and
- it encourages the use of ADR as an alternative to litigation and suggest that judges considering whether to grant permission for a collective action to proceed should have power to require the parties to submit to some form of ADR before commencing court proceedings.

Consumer Collective Redress Benchmarks

Previously, 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. The Commission's public consultation on the benchmarks closed some time ago, and no further progress has been made in producing a final set of principles. It is therefore unclear whether these benchmarks continue to reflect the Commission's thinking. However, they identify certain issues which are likely to be informative in any assessment of the adequacy of collective redress mechanisms in different Member States. The 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 defendants' 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.

Whilst the consultation indicated that there was broad agreement over certain benchmarks, for example that the length of the proceedings should be reasonable, other benchmarks attracted considerable criticism. For example, industry were 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 disagreed 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 differed 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.

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 Europe-wide collective redress mechanism for cross-border claims. This is a controversial issue, and whilst the legislative regimes in various European countries are different, there are divergent views on whether any action is necessary to address this situation. With a Communication from the Commission expected later this year, further developments appear likely, although their direction remains uncertain. What seems clear is that Member States' very different judicial systems and procedural laws will make it difficult to formulate a new Europe-wide collective redress mechanism, save in the most general terms.

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