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Towards a Uniform European Approach to Collective Redress?[†]

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The story of European class actions has been unfolding for many years and the ending is still to be written. In the last year, two important plot points have emerged that may preview the next chapter: the European Commission's Recommendation on collective redress and the Directive on Antitrust Damages Actions. These instruments suggest that a standard class action model is perhaps inevitable across the European Member States. However, as so many Member States have already established the characteristics they prefer in their domestic rules for civil procedures, what will the Commission's case be for further action in this area?

This article examines the steps taken by the European Commission to develop its Recommendation on collective redress and where the key features already exist in current national laws. The number of these examples suggests that a critical mass of Member States already has some or all of the recommended features. The debate to come is whether the Commission will agree that sufficient progress has been made or, instead, that anything short of complete uniformity will justify stronger measures to bring all Member States in line.

THE EU BACKSTORY

The European Commission has been considering the issue of collective redress for many years, but as the term 'collective redress' can be confusing, it is useful to start with what the Commission understands this term to mean. 'Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action.'[1] In other words, while the Commission has correctly prioritised alternative dispute mechanisms, for the purposes of this discussion, we will focus only on aggregated actions in civil court.

[†] This article first appeared in the *Newsletter of the Consumer Litigation Committee*, International Bar Association Legal Practice Division (May 2015).

[1] European Commission, 'Towards a European Horizontal Framework for Collective Redress', COM (2013) 401, 11 June 2013.

With that definition in mind, perhaps the best place to start is the 2008 Green Paper on Consumer Collective Redress[2], produced by the Directorate General for Health and Consumer Affairs ('DG SANCO'). The Green Paper presented DG SANCO's findings and recommendations after public consultation earlier that year. It outlined four possible options to improve collective redress for consumers in the Member States:

- take no action at all and instead allow Member States to continue their respective efforts to expand collective redress within the framework of their own legal culture;
- establish a collective redress network to encourage cooperation among Member States;
- adopt a mixture of nonbinding and binding instruments, short of a collective action model, that would improve alternative dispute mechanisms and small claims procedures; and
- introduce an EU model for judicial collective redress through representative actions, group actions or test cases.

Meanwhile, the Directorate General for Competition ('DG COMP') had proceeded separately, focusing on collective redress solutions for antitrust violations. DG COMP released its Green paper in 2005,[3] followed by a White Paper in 2008.[4] After the EU elections in 2009, a new joint consultation process between the two Directorates was initiated with the help of the Directorate General for Justice, Fundamental Rights, and Citizenship ('DG JUST') to work towards a more coordinated policy on collective redress across sectors.[5]

The Commission's 2011 working document, 'Towards a Coherent European Approach to Collective Redress', reflected its shift to a more 'horizontal approach' across multiple sectors.[6] A public consultation on this document was conducted between February and April 2011, during

[2] European Commission, 'Green Paper on Consumer Collective Redress', COM (2008) 794, 27 November 2008.

[3] European Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules', COM (2005) 672, 19 December 2005.

[4] European Commission, 'White Paper on Damages Actions for Breach of the EC antitrust rules', COM (2008) 165, 2 April 2008.

[5] European Commission, 'Commission Work Programme 2010: A Time to Act', COM (2010) 135, 31 March 2010.

[6] European Commission, 'Public Consultation: Towards a Coherent European Approach to Collective Redress', SEC (2011) 173, 4 February 2011).

which the Commission received thousands of submissions from Member States, consumer associations, corporations, law firms and citizens.[7]

In June 2013, DG SANCO released its final Recommendation on collective redress, which encourages, but does not require, Member States to adopt collective redress within two years 'equally and horizontally' in the areas of competition claims, consumer protection, environmental protection and data privacy.[8] The Commission will then spend another two years reviewing the Member States' progress and determine whether stronger steps are warranted.[9]

THE COMMISSION'S RECOMMENDATIONS

The common principles outlined in the Recommendation include an opt-in model in which representative entities and public authorities would have standing[10] to bring representative actions for injunctive and compensatory relief.[11] It suggests additional safeguards to prevent abuse, such as by requiring the determination of admissibility at the earliest possible opportunity,[12] preserving the loser-pay rule,[13] and banning punitive damages.[14] However, the Recommendation leaves open the possibility of opt-out, if justified by the just administration of the claim,[15] and the use of contingency fees, subject to national legislation and appropriate regulation.[16] Third-party funding also appears to be supported, provided it does not allow the funder to exert influence over the litigation, including decisions on settlement.[17]

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[7] The replies to the consultation are available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replies_collective_redress_consultation_en.htm (last visited 22 April 2015).

[8] European Commission, 'Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law', (2013/396/EU).

[9] *Ibid.* at para. 41 ('The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest.')

[10] Rec. nos. 4-7.

[11] Rec. no. 2.

[12] Rec. no. 8.

[13] Rec. no. 13.

[14] Rec. no. 31.

[15] Rec. no. 21.

[16] Rec. no. 30.

[17] Rec. nos. 14-16, 32.

As the two-year implementation period ends this summer, I will now consider how a few of the key recommendations are reflected in the models currently in place among the Member States.

Collective redress that is 'horizontal and equal' across all relevant sectors and includes a determination of admissibility at the earliest opportunity

The Recommendation does not propose a limit on the type of claim that can be heard on a collective basis and instead recommends making collective redress available across all sectors. Notwithstanding, there is enough data from class action schemes around the world to know that not all cases are appropriate for collective treatment. It would be prudent for Member States to state this explicitly from the outset in any collective redress rule, in order to avoid unnecessary experimentation in the courts. In the absence of any such restriction, however, it becomes even more important for the court to have clear guidelines on whether to admit the claim as a collective or class action and for the court to determine admissibility before allowing it to proceed to the merits. The countries most closely fulfilling the Recommendation in these areas include Bulgaria,[18] Denmark,[19] Lithuania,[20] Malta,[21] Poland[22] and Sweden.[23]

Italy[24] is an example of a country that includes both limitations on the scope and the consideration of admissibility at the beginning of the case. The Italian class action law only covers injuries based on standard form contract disputes, or caused by a tort, unfair trade practice or anti-competitive behaviour. Moreover, Italian courts have interpreted the law to exclude claims for personal injuries because of the predominant individual issues those types of claims present.[25]

Belgium's new class action law is also limited to claims based on consumer protection, competition and contractual disputes and, like Italy's, includes an assessment of admissibility at the beginning.[26] However, unlike the Italian law, the Belgian law specifically permits claims for

[18] Arts 379(1) and 380, ch 33 of the Civil Procedure Code (2008).

[19] S 254 of the Administration of Justice Act (2007).

[20] Art 441 of the Civil Procedure Code (2014).

[21] Collective Proceedings Act, Act No. VI (2012).

[22] Act on Pursuing Claims in Group Proceedings (Journal of Laws from 2010, No. 7, item 44).

[23] Group Proceedings Act (2002:599).

[24] Art 140-*bis* of the Italian Consumer Code (2010, 2012).

[25] *See* Civil Court of Rome, decision no. 11 (25 Mar. 2011) and Court of Appeal of Rome, decision no. 2758 (27 January 2012).

[26] Belgian Code of Economic Law, Art XVII. 42. (2014).

personal injury. Malta's Act is similarly constructed.[27] It does not specifically address the availability of personal injury claims, but it does exclude the possibility that the presence of individual issues would defeat admissibility, as the Italian courts have concluded.[28]

The scope of the collective redress model in France's new Consumer Law is limited to consumers who have sustained similar injuries, excluding personal injuries, as a result of the same professional's breach of contractual obligations or competition law.[29] A consumer association files a claim based on several exemplary individual cases. There is no separate admissibility phase and, instead, the civil court decides the defendant's general liability towards the class, based on these exemplary cases. In the same ruling, the civil court orders that a class be certified, defines the class and the means of notifying absent class members, and determines the compensation to be paid to the class members. Class members then join after this ruling in order to liquidate their damages.[30]

Availability of compensatory and injunctive relief in collective redress

All of the models discussed in the previous section also permit both compensatory and injunctive relief. This is not yet the case in all Member States, such as the Czech Republic, Estonia, Greece, Hungary, Ireland, Latvia and the Slovak Republic.

In contrast, the availability of collective injunctive relief has existed among all Member States since 1998 when the Directive on Injunctions for the Protection of Consumers' Interests[31] was adopted. Under this directive, Member States can permit 'qualified organisations', such as consumer associations or public entities, to bring injunctive actions to stop violations of national consumer protection laws. Often, the declaration of a violation in this manner may be used in subsequent individual claims in which damages are recoverable.

An example of this is the Collective Consumer Law in the Netherlands.[32] The follow-on consumer claim, however, has been criticised as being inefficient.[33] The Dutch Ministry of Justice is

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[27] Art 2 of the Collective Proceedings Act.

[28] *Ibid* at Art 10.

[29] Consumer Code §L. 423-1, et seq. (2014).

[30] *See also* Marc Shelley & Emily Fedeles, 'New French Class Action Law Could Span the Gamut', Law360.com, 5 May 2014.

[31] Directive 98/27/EC; Directive 2009/22/EC.

[32] Art 3:305a of the Dutch Civil Code (1994).

[33] *See* Motie Dijksma c.s. van 8 November 2011 (Kamerstuk 33 000 XIII, nr. 14).

currently examining the possibility of extending the power of representative associations with standing under the Collective Consumer Law to recover damages.

Standing for qualified representative associations and/or public authorities to file collective actions

The Commission's concern for the United States system focused on the strong economic incentives for parties to bring a case to court independent of the merits of the claim.[34] One of the key incentives highlighted was the lack of limitation on standing. The belief is that *qualified* representative associations and public authorities will have more expertise and less financial incentive to bring claims without merit.

In France and Spain, standing is given to a limited group of associations. In France, there are only 15 registered associations that are empowered to bring a class action under the new Consumer Law.[35] The Minister of Health has included a similar class action model in her National Health Bill, but with an expanded list of possible representative associations. Spain also permits only a small number of officially registered associations to file such claims.[36]

The broad language in Italy's law gives standing to file class actions not only to registered consumer associations, but also to almost any consumer association.[37] A class action may also be brought by individual class members. The same is true in Bulgaria.[38]

The Danish class gives standing not only to individuals and associations, but also to the consumer ombudsman.[39] In Finland, the consumer ombudsman has the exclusive right to bring a group action.[40]

Collective redress based on the opt-in model, unless opt-out is 'justified by reasons of sound administration of justice'

The concern for opt-out models is due in part to the fact that the opt-out feature is iconic of the US model and its excess,[41] and also because of questions surrounding the constitutionality of an

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[34] *Supra* note 7, at 9.

[35] Consumer Code §L. 411-1.

[36] Spanish Civil Procedure Act, 1/2000.

[37] Art 140-*bis*(1) of the Italian Consumer Code.

[38] Arts 379(2)-(3), ch. 33 of the Bulgarian Civil Procedure Code.

[39] S 254c of the Danish Administration of Justice Act.

[40] Art 4 of the Finnish Group Action Act (444/2007).

opt-out model in Europe. An opt-out approach that allows an individual to be party to a lawsuit without consent – indeed, possibly without even being aware of the lawsuit – would arguably violate Article 6 of the European Convention on Human Rights and the constitutions of many Member States.[42]

The opt-in model has been adopted almost exclusively among national collective redress models. Opt-out models exist in only a few European countries, albeit with certain restrictions that may or may not meet the Commission's vague 'sound administration of justice' exception. For example, Portugal limits the types of claims that may be brought to remedy violations of rights based on either the Constitution or Consumer Protection Law;[43] Denmark permits opt-out classes for claims with low values;[44] Belgium permits opt-out classes of exclusively Belgian claimants for non-personal injury matters;[45] and the Netherlands allows opt-out classes for settlement only.[46]

Preservation of the loser-pay rule; regulated and transparent litigation funding; prohibition of contingency fees

These recommendations generally address the Commission's other concern that the financial incentives of collective redress will encourage frivolous claims.[47] Starting with the loser-pay rule, the models adopted to date have generally preserved it. Two models, Denmark and Lithuania, have even gone a step further by explicitly stating that the individual class members are potentially responsible for costs.

In Denmark, if the class loses, the court can decide whether the individual class members must pay the opposing counsel or indemnify the class representative, who must pay the opposing counsel, but the result appears to be essentially the same.[48] In addition, if the court believes the

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[41] *Supra* note 2, at 8.

[42] European Parliament, Committee on Legal Affairs, Draft Report on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI) (July 15, 2011), at 6.

[43] Art. 1, no. 2 and Art. 19, nb.1, of the Law of Class Action, Law No. 83/95, 31st August.

[44] Sec. 254e(8) of the Danish Administration of Justice Act

[45] Code of Economic Law, Art. XVII. 43, §2(3).

[46] *Wet collectieve afwikkeling massaschade* (WCAM) of 17 April 2005, section 7:907-910 of the Dutch Civil Code and section 1013-1018 of the Dutch Code of Civil Procedure.

[47] *Supra* note 7, at 9.

[48] *See* sect. 254f of the Danish Administration of Justice Act.

cost to defend the class action will be particularly large, or it has questions about the solvency of the class and/or class representative, it can order security for costs at the beginning. The security is then essentially a credit on the cost award at the end and acts as a kind of 'opt-in fee'.

Similarly, the new law in Lithuania states that if the class loses, all members of the class are equally responsible: 'When… the court orders the group to pay the litigation costs incurred by the other party, the afore-mentioned costs shall be paid by the members of the group in equal parts….'[49]

Although not abrogating the loser-pay rule, the new law in Malta reduces the cost-shifting burden for associations.[50] The prevailing defendant may shift the costs to the class representatives but, unlike Denmark and Lithuania, the individual class members are not responsible and registered consumer associations are only responsible for between 10 per cent and 50 per cent of the normal costs assessable.

Contingency fees are prohibited in many Member States and few collective redress models expressly address this issue. In October 2008, the Swedish Ministry of Justice released its evaluation of the Class Actions Act.[51] Among other conclusions and recommendations, the Ministry recommended allowing US-style contingency fees up to 30 per cent of the disputed amount, but the proposal was rejected.

However, the use of litigation funding and contingency fees to facilitate collective claims is increasing in certain Member States. In Austria, the prohibition on the use of contingency fees applies only to attorneys, but not to consumer associations to which the consumers can assign their claims. In the Netherlands, third-party funders have increased in number and the Dutch Bar Association is currently conducting a pilot programme on contingency fees in individual tort claims. In England and Wales, where the debate on class actions is unsettled but the rules on costs and funding were recently amended to permit contingency fees,[52] the importance of transparency and accountability was recently illustrated in a ruling by the London Commercial Court. In a dispute over oil rights in Iraqi Kurdistan, the court ruled that due to their alleged actions in driving the litigation, which had no basis, the litigation funders had to pay indemnity costs up to the total amount they had funded.[53]

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[49] Art 441^{17}(2) of the Lithuanian Civil Procedure Code.

[50] Collective Proceedings Act, Act No. VI of 2012, Arts 23(1), (4).

[51] Swedish Ministry of Justice, Class Action Committee Report, DS2008:74 (2008).

[52] See Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act (2012).

[53] *Excalibur Ventures LLC v Texas Keystone Inc & Ors* (Rev 2) [2014] EWHC 3436 (Comm) (23 October 2014).

HOW TO MAKE SENSE OF THEM ALL AND WHAT COMES NEXT?

Taking all of these examples together, at least 14 of the 28 Member States have a form of class action that conforms to some or all of the Recommendation: Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Italy, Lithuania, Malta, Poland, Portugal, Spain, Sweden, and the Netherlands.[54] Three additional countries permit limited forms of collective redress: Austria has an ad hoc method for forming classes of claimants who have assigned their rights to a representative; Germany has the Capital Markets Model Case Act that permits collective claims for securities litigation; and the United Kingdom has the ability to aggregate claims through Group Litigation Orders and to hear class actions in the Competition Appeal Tribunal.

The Commission has implied that if the Member States' compliance with the Recommendation is inadequate, it might propose stronger measures. It is worth noting that the landscape among the Member States has evolved relatively quickly over the past decade. In 2004, only three European countries had a class action procedure allowing for the recovery of damages.[55] It is remarkable that eleven have been adopted since. Nevertheless, most of these proposals have required several years of legislative debate and public comment, which suggests that the European Commission's two-year timeline is simply unrealistic. The efforts observed in the past ten years make a strong case for allowing this evolution to continue naturally and with an appropriate level of flexibility for Member States to implement the Recommendation in a manner that best fits within the broader context of their respective civil justice culture.

It is also unclear what level of conformity the Commission will demand. Moreover, should it conclude that there is insufficient conformity, it remains unclear whether the Commission has any legal authority to adopt the stronger measures it is threatening.[56] Both the subsidiarity principle and the European Union Treaty suggest that the Commission and Parliament may not interfere with the rules of civil procedure in the Member States.[57]

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[54] *But see* Directorate General for Internal Policies, *Overview of Existing Collective Redress Schemes in EU Member States*, PE464.433 (July 2011). This analysis concluded that, in 2011, there were 16 collective redress schemes. This list included Greece and Hungary, which I have excluded because neither of these permits damages to be awarded to individual class members. Since 2011, three additional countries have adopted collective redress schemes: Belgium, Cyprus, and Malta.

[55] Portugal (1995), Spain (2000), and Sweden (2002).

[56] *See* European Parliament, Resolution on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) (2 February 2012).

[57] *See also* European Parliament, Committee on Legal Affairs, Draft Report on Towards a Coherent European Approach to Collective Redress, 2011/2089(INI) (15 July 2011).

However, the EU may have already crossed this line. In November 2014, the Directive on Antitrust Damages Actions was signed into law.[58] The Directive, which will facilitate private damage claims for antitrust violations, initially included a class action provision, but it was removed in favour of the Commission's Recommendation on collective redress. Notwithstanding, the final text of the Antitrust Directive requires Member States to ensure that national courts can, under certain conditions, order the disclosure of relevant evidence from any litigant or third party, including a competition authority.[59] It is arguably the first time the Commission has interfered with the rules of civil procedure in the Member States and may set a disquieting precedent for future incursions by the Commission in other areas.

Stay tuned for the next chapter.

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[58] Directive PE-CONS 80/14.

[59] *Ibid* at Ch. II, arts 5-6.