

COLLECTIVE REDRESS WITHOUT COLLECTIVE ACTION LITIGATION: THE CHALLENGE FOR EUROPE

by

Malcolm Carlisle

This LEGAL BACKGROUNDER will briefly summarise the main initiatives being proposed for collective action litigation in Europe and will set out an alternative approach for settling disputes without resort to litigation.

It should be stressed that the legislators advocating collective litigation neither want nor believe that they will create American-style class actions. They believe that Europe's legal systems and traditions are sufficiently different to protect Europe from such a result. However, the question is whether they underestimate the risk they face and whether the underlying drivers of class action litigation in the U.S will not apply also to Europe.

Just as class actions were introduced in the U.S. with the best of intentions, the same may happen in Europe unless the risk is fully acknowledged and better alternatives are identified. The law of unintended consequences is powerful and operates on both sides of the Atlantic.

The Present Situation at National Level. The concept of collective or representative litigation is not new to Europe. Thirteen EU Member States already have some form of it. Moreover, courts need to have a means of managing actions which involve large numbers of plaintiffs. Where such mechanisms do not exist, they often have to be invented. In the UK, the courts developed the Group Legal Order in the 1990s in response to a number of actions brought on behalf of large numbers of plaintiffs, mainly in the field of pharmaceutical or tobacco product liability. In Germany, the legislature introduced the Investor Protection Law for the Courts to manage a suit involving thousands of plaintiffs and Deutsch Telecom.

In addition to the existing regimes, a number of countries are considering introducing collective litigation into their law or amending current liability laws. France has been debating class action laws for 25 years. It has a strong tradition of consumer associations taking actions on behalf of their members. Late in 2008, the French Government proposed a new Class Action law which the Parliament is debating. In Italy, a Class Action law was introduced in December 2007 as part of the Budget Bill. The law is not yet formally in effect, but the Italian Parliament is debating three alternative proposals, with a fourth Government proposal in the development stage. Over the past three years, Poland has developed a Class Action Law and presented it to the Council of Ministers in mid 2008. On 19th January, the Legislative Council of the Polish Prime Minister delivered a legal opinion on the draft law, which allowed the draft to advance in the legislative process. The draft calls for an opt-in only mechanism, and includes strict certification criteria, a significant level of court supervision, and the mandatory supervision of the higher courts. In Sweden the existing Class Action Law is under review with discussion on whether contingency fees and an opt-out mechanism should be allowed.

Malcolm Carlisle is Chief Executive Officer of the European Justice Forum, a coalition of businesses, organisations and individuals that wish to promote a fair and balanced system of civil justice in Europe.

Current Proposals at the EU Level. The Commission is now developing two separate proposals. The first originates with the Directorate General Competition and concerns recovery of losses suffered as a result of breach of Competition (Anti-Trust) Law. The DG Consumer Affairs is developing the second, which concerns general measures for consumer protection.

DG Competition sees enforcement of anti-trust laws as essential to the competitiveness of Europe. DG Competition possesses significant powers and can fine companies up to 10% of their turn-over for breach of European competition law. Since 2004, this Directorate has developed policies to enable consumers to recover losses suffered as a result of breaches of competition law – for example, redress for overpricing due to cartel behaviour. In early 2008, the Directorate published a White (policy) Paper in which it proposed that consumers should be able to use collective litigation to enforce their rights. This litigation could either be in the form of an opt-in action in which each plaintiff is identified, or a representative action taken on behalf of an “identifiable” group of plaintiffs. This latter form of action would effectively work as opt-out litigation.

The DG Competition proposal has met with strong reactions in the European Parliament. A significant number of Members of the European Parliament (MEPs) support collective litigation and wish to see the White Paper move forward to legislative proposals. However, there are also a large number of MEPs who challenge a policy that is based solely on litigation and question the EU’s legislative power to interfere in the national systems of the Member States in this way.

In parallel with DG Competition, the newly created Directorate General for Consumer Affairs has started a consultation exercise on how to improve consumer rights in general and in particular how to better enable redress when they suffer loss or damage. At the start of their exercise, DG Consumer Affairs focused almost entirely on judicial measures – i.e. collective actions. The phrase “collective redress” became nearly synonymous with “collective action”, i.e., litigation.

However, in a Green (discussion) Paper published in late November 2008, DG Consumer Affairs proposed four different options, only one of which was litigation. Significantly, one of the options would focus on improving methods of settling disputes. The Green Paper will be developed into a policy document by 2010.

In relation to both the DG Competition White Paper and the DG Consumer Affairs Green Paper, European Justice Forum (EJF) has been active with Commission, Parliament, their advisers, and the Permanent Representation Offices of the Member States in Brussels. EJF does not seek to forestall measures meant to improve consumer redress. Rather, it is making the case that far better ways of achieving this objective exist other than collective or class action litigation. We have pursued the same arguments at the national level with positive results. Indeed, DG Consumer Affairs’ change from a litigation model to a discussion of different options was arguably a response to EJF’s advocacy. Similarly, in its report on the DG Competition White Paper, the EU Parliament adopted a number of amendments that were influenced by the European Justice Forum’s submissions.

Advocacy Based on Independent Legal Research. EJF has based its advocacy on independent academic research. EJF provides financial assistance for Oxford University’s establishment and continued work of a research centre in its Law Faculty focussed on civil justice systems and collective redress. This research unit has achieved international standing, and is the co-leader with Stanford University of a project to study the global development of class actions. In December 2007, Oxford and Stanford jointly organised a major seminar on the subject held in Oxford. As a spin-off from this seminar, Oxford and Stanford are organising programmes in America, Europe, and Australia/New Zealand.

The Oxford project is researching how much class action litigation actually benefits individuals or society, or whether alternative approaches to compensating consumers would be preferable. Because the research is independent, it has credibility with Governments. EJF has chosen to base its own advocacy on that research, and the resulting recommendations are summarised below.

EJF’s Recommendations for a New System of Collective Redress. Consumer redress should be based on rapid and effective settlement procedures. European business operates increasingly in an environment where organisations must make voluntary restitution when they err. Recalcitrant or fraudulent organizations and

behaviour should be strongly punished. The great majority of organisations, however, are well intentioned, and when they make mistakes it is in their own interest to put matters right. Corporate governance occupies increasing amounts of senior management's time. Reputation is the most important stock in trade of corporations, and they cannot afford the reputational damage major disputes impose.

Added to this culture is the European tradition of public enforcement of private rights. There is a widespread network of regulators and public authorities that cover almost all areas of commerce, be it in travel, medical products, food, advertising, motor vehicles, competition, telecommunications or financial services. These public authorities identify and take action against abuse. The reality is that in many cases, such authorities have long tended to place pressure on wrong-doers to make amends when their actions have damaged third parties. In EJF's opinion, this tendency should be a statutory duty, and in this way considerable leverage would be created to resolve disputes long before litigation is necessary.

EJF is not suggesting that public authorities should be judge and jury and impose settlements on either party. On the contrary, it is important that the authorities act impartially, and simply encourage parties to settle disputes where it is likely that damage has occurred.

A number of European countries have already adopted this policy of public or regulatory oversight. In the Nordic countries, the use of consumer ombudsmen is common. They have proven to be very successful in encouraging parties to settle complaints. Each of these countries has a form of collective litigation, although in Denmark and Finland, actions can only be brought through or with the consent of the ombudsman. More importantly, they are normally able to settle disputes without resorting to litigation. Denmark, for example, introduced a form of collective litigation in 2007. However, while the Danish ombudsman welcomes the existence of such a "big stick", he rarely needs to use it. A large proportion of the disputes brought before him are withdrawn after he has consulted with both sides. The rate is said to be as high as 40%. Once the plaintiffs have had a hearing with an independent regulator and have a better understanding of their position, they chose not to pursue their complaint.

Another example of regulatory oversight in operation arose in the UK in connection with television phone-in competitions. Evidence emerged recently that in a number of cases such competitions had continued long after the winner had been chosen. Consequently, competitors continued to phone-in (paying call tariffs that were deliberately high to compensate both the telephone and the television companies) without any chance of winning. When this behaviour emerged, the UK regulator, OFCOM, persuaded the TV companies concerned to improve their internal controls and reimburse those contestants who had been deceived. Since computer records of the phone calls were available, compensation was not difficult.

The UK Government has now made this policy a statutory duty. The Regulatory Enforcement and Sanctions Act of 2008 requires public bodies to obtain redress where it is clear that third parties have suffered as a result of a breach of regulations.

The third element of EJF's recommendations is that court should be used not as a forum for litigation, but as a means of overseeing and endorsing settlement proceedings. The Dutch Financial Settlement Law of 2005 offers a model for this approach. This law allows opposing parties to apply to the Amsterdam Court of Appeal, which can declare the agreement binding once they have reached a settlement. A court will review the settlement to ensure that it was both fair and reasonable. It will then declare the agreement to be binding and final. If appropriate, the Court will allow a short period for those who were not a party to the settlement, but who have suffered loss from the same circumstances, to announce themselves. Those persons will be entitled to share in the settlement proceeds. In this way, the settlement becomes final and no further proceedings are allowed on the same matter.

This tripartite approach provides a valid and effective means of delivering compensation – without the time, uncertainty, cost, and distress of litigation. There are few that would argue against settlement being a more desirable means of resolving disputes than litigation. The public authorities' influence provides leverage that may be required to push the larger party into bona fide discussions. The involvement of courts ensures that no party abuses its position, that the public authorities behave properly, and that once settlement is reached, finality is given to the dispute.

The success of this approach is evidenced in the Nordic countries, in the UK, and in Holland. It is EJF's hope that these experiences will influence the EU to adopt a more nuanced approach, in which the focus of policy is on settlement. Only if this approach does not work and where either the plaintiffs or the defendants are adopting an unreasonable approach, should litigation be necessary.

The Safeguards Required for Litigation. Much as EJF believes that collective redress can be achieved without litigation, it is important to recognise that collective actions may arise and to take measures to prevent their becoming the subject of abuse.

There is a tendency in Europe to refer to the U.S. class action system as being a “toxic cocktail of ingredients.” As long as those ingredients are not wholly replicated in Europe, the argument goes, the disadvantages of the U.S. experience will be avoided. According to this line of reasoning, certain aspects of U.S. court procedure, such as civil jury trials and punitive damages, do not exist in Europe. Similarly, Europe has the general rule that the losing party to any litigation pays the reasonable costs of the winning party, and this serves as a deterrent to any ill-founded litigation.

But this argument only goes so far. First, there are key aspects of the American system that either already exist in Europe or legislators are already considering. These include contingency fees and opt-out actions, both of which are powerful drivers of class actions in America. Second, there is no guarantee that national legislators will not introduce other aspects of the U.S. system. There are 25 countries in the European Union, and each of these has sovereign powers to manage its own civil justice system. While Brussels has the power by means of a Directive or Regulation to require the Member States to introduce a form of collective litigation, Brussels does not have the power to dictate the details of those national systems. Accordingly, the EU can advance the concept of collective litigation, but it cannot impose the safeguards that might guard against abuse.

The main weakness of the “toxic cocktail” argument is that it misses the central point about litigation funding. The force of the U.S. class action system depends crucially on the liberal funding provided by contingency fees. This funding is typically supplied by plaintiff law firms who then have a strong financial motive in maximizing their returns through a high value settlement or damages. It is this capture of the system by intermediaries that is the prime cause of abuse.

Collective litigation is expensive, and Government funding in Europe cannot be expected. To date, contingency fees are only available on a limited basis. The relatively low level of funding that is available is one of the main reasons why the use of collective litigation in Europe has been limited. And herein lies a paradox. Without sufficiently liberal funding, collective litigation is unlikely to be widely used. However, with liberal funding, the risk of collective litigation being abused is considerable. If Europe allows liberal funding – whether from plaintiff law firms or process funding companies – it runs the real risk of repeating America's class action experience.

That is why it is so important to persuade policymakers that litigation is not a good solution for consumers, and that there are far better ways of achieving collective redress.