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Collective Redress—More Consultations at the European Level But are We Getting Closer to Consensus?

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Towards a Coherent European Approach to Collective Redress is the latest consultation by the European Commission (“Commission”) on collective redress and follows a 2005 Green Paper and a 2008 White Paper on antitrust damages actions; in 2008 there was also a Green Paper on consumer collective redress. The earlier consultations provoked much debate and disagreement among stakeholders with many complaints about the lack of coordination within the Commission itself. There was no decisive action taken in 2008 and so, after more than 6 years, we are still in a consultation.

So what is new this time? There are three new aspects to note in the current consultation:

- (i) This is a horizontal public consultation involving three Commission Directorates—Justice, Competition, and Consumer—which addresses, to some extent, past criticisms;
- (ii) There is a focus on the use of private enforcement to achieve public enforcement of EU law. This has been widely criticized as an inappropriate policy direction. The enforcement of EU law should remain the responsibility of EU and national bodies and should never be the role of private legal actions; and
- (iii) Looking at injunctive relief in the context of collective procedures. This already exists in certain areas but has never been mentioned in previous consultations and studies—a point that is relevant to note as the current paper frequently refers to earlier studies as justification for action at EU level.

Perhaps more interesting to note is, What is the same this time? Again, the Commission’s starting point is that the need for judicial collective redress at EU level is a given. There is a clear determination to move forward without first stopping to ask the most vital questions: (i) Is judicial collective redress really the best and most efficient means of redress and compensation for consumers? (ii) Is there a real cross-border issue that would justify EU action? And that would respect the principle of subsidiarity? (iii) Are there better means (including those that already exist at a national level) to offer consumers effective access to redress?

Industry stakeholders have always supported the need for effective and efficient redress for consumers in order to compensate actual harm suffered. In this context the efficiency of collective claims in appropriate cases is recognized. But the real question to be asked is how best to achieve this in a balanced way that respects the rights of all parties, both plaintiffs and defendants. The Commission’s focus on driving judicial collective redress as a panacea for all

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consumer harms arguably is flawed. Litigation is expensive, lengthy, and complex by nature and rarely compensates consumers but, instead, often only enriches intermediaries. Encouraging increased levels of litigation will only place more pressure on already over-burdened national courts, which can only decrease efficiency for consumers seeking redress.

The question of judicial collective redress provokes strong responses from stakeholders. On the one hand, consumer groups typically call for immediate action to introduce judicial collective redress across the EU as the only way to achieve effective consumer redress. Interestingly, at the recent Commission oral hearing on this topic, many stated they believed such a mechanism would not be used in practice but instead would be a “stick” to force companies to settle consumer claims. This somewhat singular focus does not consider other implications—in particular, the financial incentives for third parties to encourage and fund collective actions despite having no or minimal interest in consumer compensation; and the related potential for companies to be pressured into settling even unmeritorious claims to avoid the negative publicity of litigation.

Industry, trade groups, and legal think tanks, on the other hand, broadly advocate a more measured approach. They call for reviews and improvements, if needed, of existing redress mechanisms at national levels including, in particular, alternative dispute resolution (“ADR”) mechanisms and direct consumer complaints procedures. They also call for caution before rushing to litigation, questioning whether this is something that merits EU legislation. But if EU collective redress is to be introduced, they identify the need for clear strong safeguards to prevent abuses and excesses of private litigation.

So what is so wrong with judicial collective redress? The easy answer to this question is to point to the U.S. class action system with its excesses of multi-million dollar awards, rich lawyers, and a distinct absence of real justice. It is clear that no one wants that in Europe, and the Commission repeatedly states this view. However, good intentions alone will not stop the creep of litigation culture and there are many calls for strong safeguards to counter the strong economic interests that would want to broaden and abuse collective redress systems. Such safeguards would include the “loser pays” principle, tight control of third party involvement, no private funding, and no “opt-out” actions.

This has been a long debate with entrenched positions on both sides and a lot of discussion about what is not wanted. However, there is common ground on which all agree; namely, the need to provide efficient and effective consumer redress that provides appropriate compensation in both individual and collective cases. It should also be a common aim to balance the needs and rights of all parties, business and consumers, involved in consumer redress actions. Where consensus is lacking is how compensation can be best achieved, and whether there should be limits to such compensation; for example, claims for very small individual amounts.

What is needed now is a positive way forward that meets the abovementioned common aims and best avoids the risks and pitfalls of litigation abuses. It is clear that there is no one outcome that will satisfy all stakeholders, but it should equally be clear that any policy seeking to introduce “one size fits all” EU legislation on judicial collective redress is flawed. Such an approach underestimates the impact on key aspects of procedure and tort law in Member States where legal systems have evolved over time. More importantly, this drive to introduce EU legislation underestimates the difficulties of preventing or even controlling the worst elements that litigation brings in terms of abuses and excesses. It also ignores the wide array of existing consumer redress mechanisms including, in particular, ADR already available in Member States.

Surely, it would be better to assess, improve, and develop what already exists before creating new judicial mechanisms.

To the extent that any action could be supported at EU level, there has been some support in both consumer and industry camps for a non-binding set of common principles that should be applied to any form of collective redress, judicial or out of court. Such principles could include best practices and a clear set of safeguards to prevent abuses and exploitation. This would allow Member States to assess the need for, and to carry out if necessary, any reforms and developments that are most suitable for their legal systems.

With regard to the focus on private collective redress actions to achieve enforcement of EU law, the Consultation Paper refers to the enlargement of the EU and an increased requirement for enforcement that is undoubtedly true. However, it is respectfully submitted that the Commission should focus resources on improving and strengthening public enforcement rather than creating a system of private enforcement. The rationale for and aims of public enforcement and private actions are different: the former being deterrence and compliance and the latter being compensation. These should not be blurred. Throughout the EU there is a strong culture of public enforcement and to seek to encourage private enforcement to strengthen the enforcement of EU law would not be consistent with European legal culture and practice.

Returning to the question in the title as to whether we are getting closer to consensus, the answer is probably yes and no. All sides appear to agree on the need for effective and efficient consumer redress that provides appropriate compensation for valid individual and collective claims, but there is no clear agreement on the best way to achieve this aim. Perhaps a more simplistic approach would be to see compensation as the key goal and then to look at the full spectrum of potential means of consumer redress as a continuum. The starting point for any consumer complaint should be the consumer complaints department of the business in question. Indeed, this point was recognized by the European Consumers' Organisation (BEUC¹¹) at the recent Commission hearing on this subject. Litigation should be last and final point on the continuum with ADR mechanisms making up the widest range of available means of achieving appropriate compensation.