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## **Is the European Commission's Consultation on Collective Redress Trying to Fix an Antitrust Litigation Landscape That is Not Broken?**

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# Is the European Commission's Consultation on Collective Redress Trying to Fix an Antitrust Litigation Landscape That is Not Broken?

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## I. INTRODUCTION

In February 2011 the European Commission launched a public consultation on whether new EU-wide forms of collective redress should be introduced in order to strengthen the enforcement of European law. The consultation paper, entitled *Towards a Coherent European Approach to Collective Redress* (the "Consultation Paper"), is the result of recent collaboration between the Directorate-Generals for Competition ("DG COMP"), Health and Consumer Affairs ("DG SANCO"), and Justice ("DG Justice"). Rather than pushing through an unpopular measure without consultation, the public consultation represents the Commission's latest attempt to gauge and garner support for this type of potentially wide-ranging reform. However, little indication is given as to whether the Commission has a particular model of collective redress in mind and the consultation itself is very open-ended. Given that both DG COMP and DG SANCO have contributed to the Consultation Paper, having previously put forward their own very different plans for a collective redress mechanism, it is likely that any proposals developed by the Commission will have relevance to both consumers and business.

The Consultation Paper has raised significant interest with stakeholders including claimant law firms, consumer groups, and businesses that may be subject to competition investigations and possible follow-on competition damages claims before national courts in Europe. This is because EU-wide reform to collective redress could have a big impact on the kind and value of private antitrust damages claims brought in Europe. However, the very different stances advocated by the relevant stakeholders—both supporters and opponents of collective redress—whose interests diverge significantly, make it unclear whether such a consultation will really assist the Commission in coming to a conclusion.

## II. THE CASE FOR COHERENT EU-WIDE REFORM

Over the past decade, there has been increased debate within Europe on the relative merits and the best mechanisms for redressing competition law infringements on a collective basis. The concern is both that individual lawsuits are not an effective way to obtain compensation for the harm caused to large groups of people and, further, they do not deter future unlawful conduct. Moreover, individuals are often reluctant to initiate private lawsuits as the loss is small in comparison to the costs of litigation, particularly where the claim is likely to be

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against a well-financed opponent. To date, however, the introduction of collective redress mechanisms (whether for competition damages claims or otherwise) has occurred at national levels and the Commission is clearly worried about what it regards as the "patchwork quilt" of collective redress mechanisms which have emerged as a result. It is concerned by the lack of a consistent EU-wide approach to collective redress and believes that both supporters and opponents of collective redress reform are united in warning against the inconsistency of approaches currently adopted in different Member States.

The Commission's central proposal is that, when a breach of EU law occurs, there ought to be a uniform system for collective redress in Europe, whether that is the bundling together of individual claims or, alternatively, for claims to be brought by a representative body acting in the public interest. This, it is thought, could allow justice to be achieved at a reduced cost and encourage potential claimants to bring claims, such as follow-on damages claims against those found to have infringed European competition law.

Introducing some form of EU-wide collective redress mechanism is not something that is universally supported by all stakeholders who would be affected by such a mechanism. The issue of greatest concern to potential defendants is the need to guard against unmeritorious, abusive, and vexatious claims. The Commission is reportedly sensitive to concerns that an EU-wide collective redress mechanism could result in the abuses associated with U.S. class actions. U.S. claimant law firms have already started to establish themselves in Europe, and they presumably would be happy with a more U.S.-style collective redress system in Europe. Claimant law firms have long advocated the importance of an effective and efficient means of redress and increased availability of appropriate financing mechanisms to allow individual citizens and small-to-medium sized businesses to bring damages claims in the first place. The DG Competition's previous proposals in 2009 highlighted the fear that such a policy might create an economic incentive to bring abusive claims.

Whatever the rights and wrongs of these issues, a more fundamental question seems to be overlooked. All the questions posed by the Consultation Paper are based on the assumption that some form of EU-wide collective redress mechanism should be introduced, but is one either necessary or desirable?

### **III. IS A HARMONIZED COLLECTIVE REDRESS MECHANISM NECESSARY?**

The Consultation Paper is wide-ranging and seeks views on most things concerning a potential collective redress system, but it does assume that one is necessary. This assumption should be challenged. It is not clear why there is a need for harmonization to occur in relation to collective redress. Member States have already been introducing collective redress mechanisms that have been developed to deal with the needs of their particular economic, cultural, and legal systems. Although at first glance a uniform system, particularly in a typically multi-jurisdictional area such as damages claims for European competition law infringements, seems sensible. It should be recalled that the Commission's previous attempt to introduce an EU-wide approach to competition damages claims failed in part because of the political difficulty of bringing harmony to the very different approaches to civil claims that can be found in Europe. An approach that is flexible and meets individual national legal systems may well have some advantages.

The Commission has not put forward any convincing evidence which demonstrates either that EU citizens' rights are currently unprotected, or that a particular individual Member State's collective redress mechanisms are ineffective, so that the only way to resolve the issue is by action

at Commission level. Civic Consulting and Oxford Economics prepared a study for the Commission that evaluates the effectiveness and efficiency of existing collective redress mechanisms in the EU (the "Evaluation Survey"<sup>2</sup>). The Evaluation Survey identified collective redress mechanisms operating in 13 Member States, and indicated that there was a clear expectation that further Member States would introduce collective redress mechanisms in the near future. Although the Evaluation Survey concluded that collective redress mechanisms can only fulfill the objectives set by the individual Member States, and that these objectives vary greatly, it did conclude that over the EU as a whole, collective redress mechanisms have added value to consumers' access to justice in all Member States where they exist.

The Evaluation Survey also concluded that the collective pursuit of claims has actually led to a decrease in costs (for both sides), and that none of the mechanisms available in Europe have had an impact on businesses that was disproportionate to the harm caused. The evidence seems to suggest that the existing mechanisms work effectively. There is no evidence that the creation of a uniform EU-wide approach to collective redress would be an improvement. Therefore, perhaps the focus of any change should be on improving the current individual systems, if necessary, rather than pursuing radical reform.

#### **IV. A COMPENSATORY OR DETERRENT APPROACH?**

The Consultation Paper itself is not clear on whether the objective of a collective redress mechanism would only be to provide compensation, or whether it should also be designed to act as a deterrent. Much of the earlier debate, as to whether there should be a EU-wide collective redress mechanism for competition damages claims and, if so, what form it should take, have revolved around this issue. Although prior Commission proposals for collective redress in relation to competition damages claims were presented principally as consumer protection measures, a very clear motivation was the Commission's desire to see competition damages claims acting as a deterrent to future infringements, and thereby supplementing the Commission's public enforcement policies. There is, however, often a tension between these two objectives and a temptation to tilt the balance in favor of claimants to ensure any deterrent objective is achieved.

The Consultation Paper makes the assertion that "continued illegal practices cause significant aggregate loss to European citizens and businesses" which suggests that collective redress should have a compensatory function. However, there are also elements of the Consultation Paper that appear to suggest that a collective redress system could serve as an instrument of enforcement, like the collective redress system in the United States. This dual aim seems to be suggesting that the Commission has as its end goal a mechanism that would be both compensatory and enforcement in nature: "Collective Redress' is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices."

Even if deterrence was a sensible objective for a collective redress system, in Europe it is doubtful that it would be a very effective enforcement tool in the field of competition law. This is because in Europe nearly all competition damages claims are "follow-on" claims, being claims for damages that rely on an earlier decision of the Commission or a national competition

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<sup>2</sup> Civic Consulting (Lead) & Oxford Economics, *European Commission—DG SANCO Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*, (August 26, 2008).

authority that there has been an infringement of European competition law. Such claims are entirely dependent on the enforcement activity of public authorities and, by definition, cannot relieve that enforcement burden. Moreover, given the level of fines that are regularly imposed by authorities for competition law infringements, it is unlikely that the threat of additional substantial liabilities would be sufficient to deter any would be infringers prepared to risk being fined.

#### **V. A COSTS BENEFIT ANALYSIS?**

If deterrence is not an objective, questions must be asked as to whether achieving compensation for individual consumers is a policy to be achieved at any cost. At least in the field of competition law infringements, the ultimate loss suffered by individual consumers can be very small, perhaps only a few tens of Euros. This is why, in the absence of a collective redress mechanism, many such claims would never be made. A good example is the claims made in the U.K. Competition Appeal Tribunal by the consumer group Which? for losses suffered by purchasers of replica football clothing which had been subject to price-fixing. In this case, the loss suffered by each consumer was in the region of EUR 15. With such trivial individual losses, there may be public policy arguments for discouraging litigation, rather than developing special EU-wide collective redress mechanisms to facilitate such claims.

Many commentators are now looking at the idea of collective redress and are questioning the cost and administrative burden of developing and implementing an EU-wide collective redress mechanism. It is not clear whether the costs of setting up and maintaining such a mechanism would be outweighed by real financial benefits to those who have suffered loss.

#### **VI. SHOULD COMPETITION POLICY BE CENTRAL TO THIS DEBATE?**

To date, competition damages claims have always played a prominent role in the debate about introducing an EU-wide collective redress mechanism. They have been pushed to the fore because of the Commission's desire to encourage damages claims in an attempt to supplement its public enforcement effort. However, given some of the particular characteristics of competition damages claims highlighted above, it is not clear that the inclusion of competition damages claims within this consultation is helpful when determining an overall EU-wide collective redress mechanism. In particular, it is significant that nearly all European competition damages claims are "follow-on" claims, which effectively rely on an earlier decision by the Commission or a national competition authority to establish liability and so are principally concerned with establishing what, if any, loss has been suffered. As a result, such claims are unusual in their characteristics, which means that competition damages claims are not necessarily a helpful starting point for determining an overall collective redress mechanism.

#### **VII. CONCLUSION**

It is not surprising that many stakeholders have found the Commission's approach to collective redress frustrating. The Consultation Paper poses thirty-four open-ended questions, grouped in categories mirroring the common principles it has highlighted, and fails to provide any concrete proposals for reform, despite four years of consideration by DG COMP and DG SANCO. This reflects the difficulty of resolving the competing concerns underlying the collective redress debate and the differences in opinion among DG COMP, DG SANCO and DG Justice, which only recently began to work together. While the Commission seems to be intent on introducing an EU-wide collective redress mechanism, it would be wrong to assume it has already decided on the form it will take. What is not clear, however, is whether competition

policy should be central to this debate or if harmonization needs to occur in order to assist the process of bringing private damages claims.