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Class Representation: Opt-in, Opt-out, or Representative Action?

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Class Representation: Opt-in, Opt-out, or Representative Action?

Alberto Martinazzi[1]

I. INTRODUCTION

This paper aims to discuss one of the key themes underlying the recent European Commission's public consultation on collective redress, i.e. which of the alternative class action models—opt-out, opt-in, and representative actions—would be best suited to pursue collective redress of EU law in national courts, and to what extent an EU legislative initiative is needed to ensure the efficacy of a would-be European class action and its co-existence with the laws of the Member States on collective redress already in force.

Preliminary to discussing the advantages and disadvantages of the different class action models, consensus should be established on what kind of damage claims collective redress should be addressed to, and whether or not there are cases where collective actions would do more harm than good, or simply be a useless addition to the existing litigation avenues.

The issue is not irrelevant with respect to private antitrust enforcement, a domain where the interests at stake for victims often differ sensibly; depending, for example, on victims being final consumers or undertakings.

II. WHAT TYPE OF MASS DAMAGES SHOULD COLLECTIVE REDRESS BE ADDRESSED TO?

As portrayed in some academic literature,[2] when it comes to the types of mass damages that can be addressed through forms of collective redress, an important distinction should be made between petty damages, or "scattered loss," and damages of more significant value.

Scattered loss-type damages are damages of serial nature that are of trivial value for the individual victim but of considerable aggregate value for a class of victims taken altogether. For example, these damages normally result from violations of consumer protection laws (e.g. "sham packages"). Conversely, a more significant individual harm to a multitude of victims may result from torts, as is the case with product defects or malfunctions causing personal damage to several users. While scattered loss damages are hardly ever pursued by the individual victims because their small value makes it unprofitable to seek redress in court (the so called "rational inertia" phenomenon), victims of damages resulting from mass torts are more inclined to take an active stance and seek compensation because of the normally higher value of the damages at stake. Although affecting several victims at the same time, mass torts result in damages that are often individualized, so that damage quantification might require a case-by-case assessment. This

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[2] *See* G. Wagner, *Collective redress – categories of loss and legislative options*, (55) L. QUAR. REV. (2011).

means that individual litigation might often be better suited than collective redress in addressing damages arising out of mass torts.

For consumers, violations of antitrust laws—even serious ones—normally result in scattered loss-type damages. For example, the damage stemming from price-fixing cartels may take the form of an (otherwise absent) mark-up on the price of products or services, which, although not necessarily insignificant for the individual consumer, is not substantial enough to justify the costs of pursuing individual redress. Conversely, for undertakings, antitrust infringements may result in damages that—especially where the volume of goods or services that the victims might have traded with the cartelist(s) is substantial—could be high enough to prompt compensation claims.

It is indeed in the domain of private antitrust enforcement that new models of collective litigation have gained ground. These include, for example, the damage actions launched on the basis of multiple claim assignments by specialized private litigation companies (often through special purpose vehicles) on behalf of undertakings directly harmed by anticompetitive infringements sanctioned by antitrust agencies in Europe and worldwide. This model of litigation has become increasingly popular in Member States such as the United Kingdom, Germany, and the Netherlands, where group actions based on claim assignments are recognized by the courts as lawful. They've been employed, so far, to pursue follow-on damage actions with respect to some high-profile Article 101 EC Treaty decisions adopted by the European Commission, such as those in the *Air Cargo* and *Cement* cases.[3]

Conversely, where the damage at stake for consumers amounts to scattered loss, alternative redress models like claim assignment seem ill-equipped because of the high cost of soliciting and collecting damage evidence from thousands (if not million) of victims, a cost which the normally low value of the damage awards makes unlikely for the promoter to recover.

For scattered loss-type damages, class actions seem the best tool to ensure redress, as they make it possible to group together a multitude of identical rights and thus share the costs of otherwise economically unfeasible individual claims. In areas like antitrust enforcement, class actions might also exert an important deterrence effect in those cases where wrongdoers would be reliant on consumers' inertia in pursuing stand-alone redress. From this perspective the threat of potentially disruptive collective actions would further increase the undertakings' incentives towards full compliance.

III. THE LIMITS OF OPT-IN AND OPT-OUT CLASS ACTIONS

While, in principle, class actions are probably the most suitable procedural tool for collective redress in cases where damages amount to scattered loss, like in antitrust and consumer protection law infringements, in practice both the opt-out and opt-in class action models have shown to present a number of shortcomings.

On the one hand, the U.S.-style opt-out class action offers a potential for litigation abuses as it comes with certain procedural rules incentivizing plaintiffs' litigation, such as contingency fees, and the prospect of treble damages. On top of that, this type of class action might paradoxically fail to deliver real benefits to victims. This is ultimately because often only a

[3] *See* on this topic the recent contribution by M. Slotboom, J.Polet, & B. Haan, *Settling mass claims – a recent case will boost the Netherlands' jurisdictional importance*, COMPETITION L. INSIGHT (March 2011).

minority share of the class action proceeds actually goes into the pockets of the class members entitled to receive them; instead, litigation promoters reap the main economic returns from the class judgment or settlement. The U.S. experience is ripe with examples on this regard.[4]

Leaving aside the risk of U.S.-style excesses—which in the EU appear quite remote, considering that certain imbalances like contingency fees and treble damages are not part of the European litigation culture—opt-out class actions could in theory work well, as they bypass consumers' inertia to pursue scattered loss-type damages and, at the same time, effectively play a role in terms of deterrence vis-à-vis wrongdoers. However, it is debatable whether a European version of the U.S. private practice-led opt-out class action could be successful, without substantial incentives for class action promoters to bear upfront the financial risks and organizational costs that come with this type of litigation.

On the other hand, opt-in actions, as those introduced in some continental law systems such as Italy and France, also present shortcomings when it comes to scattered loss-type damages. Key issues here are not only the lack of incentives for the individual consumer to join the action, due to the small value of the potential return, but also the administrative burdens imposed on class members to be able to do so. For example, Italian law requires consumers interested in opting in to provide full evidence of their entitlement (e.g. proof of purchase of the affected good or service) within a deadline set by the court at the very beginning of the proceedings, immediately after the court declares the class action admissible.

A telling example of the practical difficulties of getting consumers involved in opt-in class actions is offered by the collective litigation that followed the French *Cartelmobile* case, a long-standing cartel among mobile operators which had affected some 20 million mobile phone users in France. Notwithstanding the significant financial and organizational efforts by consumers' association *Que Choisir* to advertise its class action amongst the public, only some 12.500 consumers opted in, that is to say less than 0.1 percent of all entitled victims.

IV. COULD AN EU REPRESENTATIVE ACTION BE THE WAY FORWARD?

A third option, which the Commission already considered favorably in the 2008 White Paper on damages actions, consists in the representative action. In essence representative actions are opt-out class actions that can be brought only by legally entitled entities or bodies on behalf of an identified (or identifiable) class of victims. Representative actions are already in force in a number of EU Member States, such as the Scandinavian countries (where class representation is entrusted to an independent civil servant, the Ombudsman), and the United Kingdom (where certified consumer associations, like *Which?*, are empowered to bring class actions in given areas of the law, such as consumer protection and antitrust).

Representative actions seem best suited for consumers' collective redress in the field of consumer protection and antitrust law. Indeed, because there is no requirement for class members to opt in the representative action, the potential returns for the victims, in terms of damage compensation, would come at no financial or organizational cost. Thus representative actions present the same advantage as opt-out actions when it comes both to making redress genuinely available to the largest possible number of victims and to contributing to deterrence

[4] *See* the illustrative examples by J.T. Rosch, *Striking a Balance? Some Reflections on Private Enforcement in Europe and the United States*, paper presented to the ICC 2008 Annual Meeting, *available at*: http://www.ftc.gov/speeches/rosch/080924strikingbalance.pdf .

vis-à-vis wrongdoers, while at the same time the presence of certain safeguards—in particular the independency of the representative bodies and the existence of a transparent funding system—means that risks of U.S.-style litigation abuses can be avoided.

Building an EU legal framework for a successful representative action system presents, nonetheless, a number of challenges.

First, there is a need to define *ex ante* the criteria according to which representative status should be granted to certain bodies or entities; these criteria should ensure that the selected body is both independent and apt to pursue general interests of the whole class, rather than just those of some of its members. The issue of conflicts of interest exists in particular with respect to collective representation of small and medium enterprises ("SMEs"), a proposal discussed in the Commission Consultation Paper. Concerns might arise where, for example, trade associations were to be granted a certified status, the issue being especially for those larger trade associations representing diverse types of undertakings, from SMEs to large multinationals, under a single umbrella. In these cases, it might be difficult to consider the trade association adequately impartial or independent vis-à-vis the different classes coexisting within the same association, among which there could possibly be both wrongdoers and victims.

In the wake of the successful model employed in the Scandinavian countries, some have suggested that public bodies, such as the Ombudsman, or even governmental and regulatory agencies, could be entrusted with the representative role in collective damage actions.[5] As appealing a solution as this may seem, it poses nonetheless two key issues. On the one hand, there is a risk that, in moving the collective redress policy from the private to the public initiative sphere, the balance of collective redress would shift from compensatory to regulatory and victims would become dependent on public agencies' willingness to take action which, in turn, would be influenced by the extent to which these agencies are provided with specific public funds and resources. On the other hand, in areas of the law such as consumer protection and antitrust, the distinction between public and private enforcement would become blurred, with significant risks in terms of legal certainty and due process for all parties involved in administrative (as opposed to judicial) proceedings.

The second challenge concerns the guidance that should be provided at the EC level on common funding rules in order to ensure that representative bodies—specifically when these are consumer associations—have sufficient means to bear the litigation costs; yet, funding mechanisms do not incentivize forms of abusive litigation. In this respect, sound enforcement by judges of the "loser pays" rule—a principle rooted in the European legal system—would help to ensure that class actions are only brought when claims are objectively grounded.

In a different, yet related vein, adequate funding of representative bodies appears instrumental to make it possible that, in areas like antitrust, collective private enforcement does not merely rely on public enforcement in discovering and tackling anticompetitive practices , limiting its initiatives to the pursuit of follow-on damage actions. Rather, it should contribute through its own litigation initiatives to unveiling previously unknown anticompetitive practices, at least to the extent possible in the EU taking into account the procedural limits of most continental law systems (above all, the absence of discovery).

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[5] *See* C. Hodges, *Collective redress in Europe: the new model*, CIVIL JUSTICE QUAR., 370 (2010).

Other challenging issues concern the *quantum* that the representative body should be entitled to claim and receive on behalf of the class, and the way the distribution of the collected proceeds among the final beneficiaries should take place.

It has been argued[6] that the bringing of damage actions on behalf of an initially unidentified number of victims—which is the case with both opt-out class actions and representative actions based on the opt-out mechanism—could raise constitutional concerns in certain Member States to the extent that it might clash with the principle of full compensation, which postulates that damage claims should be based purely on the loss *actually* suffered by *identified* victims. However, it is easy to see how confining representative actions to circumstances where each claimant can be identified prior to initiation of the proceedings would defy the very purpose of representative actions, as it would be unrealistic to expect each claimant to express his/her consent in writing prior to the launch of the representative action. To ensure the efficacy of the remedy there should be scope for a representative body to initiate proceedings on behalf of identifiable, but not necessarily identified, individuals.

In order to bypass possible concerns, a solution could be that the outcome of the proceedings is not an award of damages to the representative body itself, but constitutes instead a legal basis for claims to recover damages by individuals within the class, provided that they come forward with their claims to enforce the judgment within a short period from determination of the representative action. There may be a need for some publication of the outcome of the proceedings for this to be made a meaningful possibility, and representative bodies should be able to act as intermediaries of claimants in managing, in the most efficient and inexpensive manner, the filing of the compensation claims.

This system would also bypass a further issue that arises when a representative body is awarded compensation in its own name, that is to say the distribution of the proceeds among the victims. Identifying and soliciting each entitled individual would indeed be a burden likely to impact significantly on the representative bodies' administrative costs, the saving of which constitutes the main rationale of the representative's action in the first place.

If representative actions were to be shaped in this way, then the outcome of the representative proceedings—be it a judgment by courts or arbitrators' panels, or a settlement—should also be binding on all those within the relevant class, not merely those who have been identified prior to the outcome of the proceedings or who have come forward with claims to enforce the judgment after determination of the representative claims, (save of course those who expressed their wish to opt out the action (or the settlement)). This would reduce the level of legal uncertainty faced by defendants in collective damage actions, as they would be able to roughly estimate *ex ante* the likely impact of the financial claims on their finances and, at the same time, act as an incentive for them to reach settlements with representative bodies, given the binding effects of such settlement on the whole class.

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[6] *See* the Independent Impact Study accompanying the Commission 2008 White Paper on damage actions, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf, pp. 306 and 314, and, *contra*, R.Gaudet, *Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience*, EUR. COMPETITION L. REV., n. 3 (2009).

V. CONCLUSION: THE SCOPE OF EU HARMONIZATION INITIATIVES IN THE FIELD OF COLLECTIVE REDRESS

In conclusion, if representative actions are to become the chosen mechanism for EU collective redress, then the next question should be to what extent EU harmonization is required, and how should an EU legislative initiative fit with the class action mechanisms already existing in several Member States.

It is indeed a fact that in certain jurisdictions where class actions are structured around both the opt-out and the opt-in mechanism, a certain degree of representativeness is normally recognized to certain constituencies, like consumers' associations. This is the case in Italy where the class action legislation (article 140-*bis* of the Consumer Act) clearly states that class members are entitled to bring the collective action also through "associations or committees." However, because Italian law does not envisage any form of *ex-ante* certification or designation conferring formal representative status to consumers associations, the latter can only act on behalf of those victims who are members of the association or expressly conferred them a power of representation.

Some common rules on certification and designation of representative bodies would then be necessary to harmonize the existing collective redress systems of the Member States and ensure their convergence towards EU-wide class representation standards.

The second necessary step would be to introduce common principles on cross-border class representation. The lack of cross-border representation mechanisms would seriously undermine the possibility for all victims, irrespective of their Member State of residence, to have access to collective redress throughout the EU. This is particularly important in those domains where damages arising out of an unlawful conduct result in multiple offenses in different jurisdictions, as with antitrust law infringements spanning over the territory of more than one Member State, or that are genuinely EU-wide in scope. Accordingly, mechanisms for mutual recognition of certified entities should be put in place so that representatives authorized in one Member State have legal standing to bring collective claims in multiple Member States.

In any case, any EU initiative on collective redress should not encroach upon alternative types of collective litigation procedures better suited for those complex and fact-finding intensive cases where collective harm does not amount to "scattered loss" for final consumers, but rather entail significant individual damages to clearly defined categories of victims. From this point of view, the already mentioned collective claim assignment model—which is proving to work well throughout Europe for group enforcement of antitrust damages—should be favorably considered.