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Collective Redress Proposals for Europe: Seeking a Solution to a Non- existent Problem?

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I. INTRODUCTION

The European Commission's public consultation on collective redress² is the latest in a series of attempts at legislating for class action-style relief in Europe for breaches of EU law. It follows proposals in 2005 and 2008 by the Competition Directorate General ("DG COMP") and the Health and Consumer Policy Directorate General ("DG SANCO"), but it is not clear how the new consultation fits with those earlier proposals. In one sense, it appears to be taking a step backwards, asking for views on whether such a regime is necessary at all, before seeking opinions on how it should work.

Neither DG COMP nor DG SANCO addressed the basis on which the EU could legislate in this area at all. The new consultation is similarly silent on this issue, and provides no evidence that legislation at EU level is necessary, or that it would achieve the objectives of the Treaties.

This article examines the history of the Commission's attempts to put in place a collective redress framework for breaches of EU law and looks at what regimes currently exist in Member States for collective redress. It also considers the concerns of defendants that the perceived disadvantages of U.S. class actions will make their way into Europe through any new legislation.

II. BACKGROUND

Collective redress has been debated at the EU level for some years now, with DG COMP's Green Paper (a type of discussion document) on antitrust damages actions published in 2005 and a White Paper (a paper containing proposals for European Union action) in 2008. A draft Directive (legislation) was expected in 2009 but not published, apparently due to political difficulties. DG SANCO published a Green Paper on consumer collective redress in 2008.

The White Paper on antitrust damages actions suggested a combination of two complementary mechanisms of collective redress, namely:

- representative actions which are brought by qualified entities such as consumer associations, state bodies, or trade associations on behalf of identified (or identifiable) victims; and
- opt-in collective actions, in which victims expressly decide to combine, into one action, their individual claims for harm suffered.

It suggested a minimum level of documentary disclosure for antitrust damages cases. Disclosure, while already part of litigation in England and Wales, is not widely required in other European jurisdictions.

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² *Towards a Coherent European Approach to Collective Redress*, SEC(2011)173 final.

It proposed that a final decision on what are now Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") taken by a national competition authority in the European Competition Network, as well as a final judgment by a review court upholding that decision, should be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases. At present, this is not the case in every Member State.

It suggested that, for Member States where there is a requirement to show fault in order to obtain damages, once the victim has shown a breach of Articles 101 or 102 of the TFEU, the infringer should be liable for damages caused unless he can demonstrate that the infringement was the result of a genuinely excusable error.

There was also a proposal that defendants should be entitled to invoke the passing-on defense against a claim for compensation. This defense is currently excluded in Germany.

On the issue of costs, the White Paper suggested that Member States should: a) design procedural rules fostering settlements as a way to reduce costs; b) set court fees at a level that does not make them a disproportionate disincentive to bringing claims; and c) give national courts the possibility of issuing costs orders derogating, in certain justified cases, from the normal costs rules, thereby guaranteeing that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

No such proposals appear in the more recent consultation document. Rather, it starts by asking whether the introduction of new mechanisms of collective redress would add any value to the enforcement of EU law at all.

It therefore appears that the Commission has decided to start the process anew, and that the proposals put forward in the antitrust damages White Paper will not necessarily form the basis of even a framework for antitrust claims, let alone others.

III. COLLECTIVE REDRESS IN MEMBER STATES

The lack of EU legislation on collective redress does not, of course, mean that it is not available in the Member States themselves, but the types of redress, and the procedures for obtaining redress, vary widely between jurisdictions.

Most larger EU Member States allow representative actions for injunctions across several areas of law. However, representative actions for damages are only available in a few countries and areas of law. Germany, Spain, Italy, and the United Kingdom allow group actions for damages, but none of the EU Member States currently has true U.S.-style class actions.

Any EU framework that has to sit over the top of these Member State laws, for EU law infringements, will therefore have to take into account these many differences.

Developments in Belgium, France, Germany, and Italy demonstrate that the law in this area is already changing. This suggests that Member States are in the best position to legislate for their own citizens and specific circumstances. For example, a new law came into force in Poland in July 2010 which, for the first time in that country, allowed a group of at least ten people jointly to pursue a claim in a class action, albeit not in the sense that the term is understood in the United States. The law applies only to consumer claims, product liability, and tort claims, and requires plaintiffs to opt in to the proceedings rather than using the more familiar U.S. "opt-out" model.

It does seem clear that European jurisdictions and the EU itself are keen not to import a U.S.-style class action system. The perceived disadvantages of such a system stem from the interaction of three features:

- "Opt-out" actions, which can mean large classes of plaintiffs even if many or most of those people have no knowledge of the action and may not be interested in bringing proceedings themselves;
- Contingency fees, which encourage lawyers to seek out potential class actions and encourage plaintiffs to start proceedings; and
- No costs shifting. In the United States, the loser does not usually pay the winner's costs. This encourages speculative claims. In Europe, and particularly in England, the loser usually has to pay at least part of the winner's costs.

Other features of the U.S. system that are seen as undesirable are the use of juries to decide claims (and award inflated damages) and the possibility of punitive damages.

Awareness of the availability of redress is growing in Europe, but there is nothing to suggest that existing or proposed Member State legislation is incapable of dealing with an increase in demand from potential plaintiffs.

IV. THE LATEST CONSULTATION

The European Commission's new consultation paper almost seems to acknowledge that new legislation may not be necessary, stating only that the lack of a consistent approach to collective redress at EU level "may" undermine the enjoyment of rights by citizens, and that a coherent European framework "could" facilitate strengthening collective redress in targeted areas.

It is not clear whether this demonstrates a lack of confidence in the earlier consultations by DG COMP and DG SANCO, or whether perhaps it shows a lack of confidence that the EU has any power to legislate in this area at all. Certainly the new consultation no longer seems to assume that new legislation is necessary. It also notes that "Any new initiative would...have to comply with the principles of subsidiarity and proportionality laid down in Article 5 of the [TFEU]..." but it does not explain how an initiative would do so.

The principle of subsidiarity means that matters ought to be handled by the least centralized competent authority. This means that, if Member States can address these issues themselves, they are the appropriate authorities to do so, and the EU has no role. As many Member States do allow for at least some forms of collective redress, there is an argument that they can bring in more rules themselves if they feel it is necessary to do so, and there is no need for the EU to do it.

The principle of proportionality means that the European Union institutions may only do what is necessary to achieve the objectives of the Treaties.

The consultation paper does not assert that collective redress legislation at EU level would satisfy either of these principles. Rather, it acknowledges that:

Certain mechanisms of injunctive collective redress are already in place in all Member States with regard to consumer matters, while several Member States know other forms of collective redress to varying degrees. It would need to be

considered whether and how action at EU level would be necessary in these circumstances to ensure the effective enforcement of EU law.

In light of the developments already taking place at Member State levels, and discussed above, it is arguable that an EU initiative in this area would not satisfy either principle.

The paper asks readers whether they think new collective redress mechanisms are needed at all, and then to set out what the relevant features of any mechanisms should be. The paper does recognize the need for "strong safeguards against abusive litigation," and mentions the "loser pays" principle as potentially helpful in this respect. Most European jurisdictions require the unsuccessful party to legal proceedings to pay some or all of the costs of the successful party, which is seen as one of the key safeguards against frivolous claims. Even in jurisdictions such as England, where the courts can cap the costs in certain types of cases at the outset, there is a careful examination of the case and the parties before such an order is made.

The paper also asks who should be permitted to bring a collective redress action, and whether the right should be reserved for certain entities. These might include consumer associations, trade associations, or NGOs, and the paper asks whether the entities should be recognized as representative entities by a competent Government body, or left for case-by-case assessment by the courts.

Another issue that is key to collective redress actions is funding, but the paper is vague about funding options, saying only that "[m]echanisms of financing collective redress should allow for the funding of meritorious claims but avoid any incentives for pursuing unmeritorious claims." In most of Europe, contingency fees are not allowed and, while professional litigation funders have begun to enter the European market, it is undoubtedly more difficult to find funding for a collective action than is the case in the United States.

Work by the European Commission on collective redress to date has focused on competition and consumer protection. The paper asks whether the Commission's work should be extended to other areas and, if so, which ones. The paper cites environment and financial services laws as two examples, but says that "[r]egardless of the scope, a coherent EU approach must be ensured. It is difficult to see how an approach could be "coherent" if it did not include more (or arguably all) areas of law. Anything less risks satellite litigation on whether a claim has been correctly classified as belonging to a particular area of law, which would serve only to increase the time taken to resolve it, and the costs of doing so.

There are, therefore, many issues still to be decided, and there is a question mark over whether the EU has the power to involve itself in this area at all. Despite this, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, said in March that the Commission would adopt "a position on the common principles of collective redress by the end of the year" and that, in 2012, he intended to put forward a "legislative initiative for private enforcement consistent with those principles."

V. CONCLUSION

The tentative tone of the consultation paper, particularly compared with earlier attempts by the EU to address this issue, suggests that reform in the area of collective redress may not happen quickly.

Member States are, however, continuing to develop their own laws in this area, and there is greater consumer awareness of compensation opportunities, not least as U.S. class action

lawyers now have a presence in Europe, and European businesses have increasingly been drawn into U.S. class actions.

However, there is a lack of evidence of an unmet need for collective redress opportunities for breaches of EU law, and also uncertainty about whether the EU can legislate in this area at all. These are all issues that the European Commission will have to consider when deciding whether to pursue collective redress further.