

Class Actions: Developments in EU and UK

EU Level

1. The European Commission Directorate General for Competition (DG COMP) published its White Paper on damages for breach of competition law in March 2008.¹ This set out a sequence of proposals, but was notably more restrained than the Green Paper, although innovative. It announced the policy decision that the objective was to deliver compensation, but not to overlap regulatory functions. It included proposals for two types of collective mechanisms: representative claims by trusted bodies (note precedents in the consumer² and IP Regulations³) plus a new opt-in mechanism. Amongst other proposals were extension of discovery rules and a recommendation that Member States should pay particular attention to funding and costs issues, although mandatory measures were not mooted (probably because of restrictions on Community legal competence in this field).
2. The EU Parliament is currently considering the White Paper. As at November 2008, the draft Report by the Parliament's Economic and Monetary Affairs Committee adopts a stance that is not fully supportive of the Commission. The Report asks for clarification of the legal basis for legislation (a difficult area for DG COMP), for a more comprehensive approach given the relevance of collective redress in other areas (which would at least slow DG COMP down if it were to be adopted). It also favours compensation only, no cy pres, no replacement of public enforcement, opt-in only, foreign authority decisions not to be binding, maintenance of passing on defence, and maintenance of the leniency scheme. All of this is conservative in approach.
3. The European Commission Directorate General for Consumer Affairs (DG SANCO) is shortly to publish two large studies on the situation on consumer collective redress. DG SANCO is then aiming to publish a Green Paper on consumer collective redress on 26 November. This will set out a sequence of options for addressing a deficit in cross-border collective redress, and request feedback. The options will include public, self-regulatory and private mechanisms, and combinations thereof. There is then to be consultation during 2009, and any legislative proposal would be unlikely before at least late 2009.
4. It is notable that various Member States that are contemplating possible reforms or introduction of new collective mechanisms are proceeding slowly and cautiously:

¹ White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 2.4.2008. Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, 2.4.2008 ('Staff Working Paper'). Commission Staff Working Document accompanying the White Paper on damages actions for breach of the EC antitrust rules: Impact assessment, SEC(2008) 405, 2.4.2008 ('Impact Assessment Report'). *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, final report submitted to the Commission on 21 December 2007 ('Impact Study')

² Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

³ Directive 2004/48/EC, art. 4.

- Netherlands: proposals on encouraging more settlement, but no swift move to ‘filling the gap’ by introducing a front-end class action procedure.
 - Italy: In July 2008 the new Berlusconi government delayed of introduction of the Class Action Act to January 2009. It is unclear what might happen then. The Act has been criticized by scholars, and it is understood that various changes are being considered.
 - France: the government has delayed introduction of any proposals, which is of some significance given that France currently holds the EU Presidency and has chosen not to lead or push on this issue. The new Sarkozy government seemingly keen to limit impact on business.
 - England: see below.
 - Poland: a draft Act has been developed, that is cautious and opt-in in approach.
 - Germany: it is noteworthy that the largest European national economy has been taking no steps to introduce any reform or new class action procedure. Indeed, the Federal competition authority has strongly opposed implications of the Commission’s White Paper. But the government has introduced a new law permitting contingency fees where no alternative funding exists, albeit with restrictions.
 - Sweden: a government report has been published on 5 years’ experience of their Class Action Act. This proposes to make various amendments to tighten the procedure, and also introduction of contingency fee arrangements in certain circumstances. The government is, however, not that keen on introducing contingency fees.
5. It is interesting to consider whether and what impact the global financial crisis will have on governmental policies. First, the severe restriction of credit by banks is having a similar effect on the willingness of private investors to fund litigation. Secondly, there may be a cooling effect on the willingness of governments to proceed with any radical reforms, in order not to adversely affect businesses and national economies in those states that do not have class mechanisms.

UK

6. The government has enacted innovative powers for many public enforcement authorities⁴ to impose Restoration Requirements (that would include compensation) on infringers, as part of the armoury of enforcement powers: Regulatory Enforcement

⁴ See The Legislative and Regulatory Reform (Regulatory Functions) Order 2007, SI 2007/3544.

and Sanctions Act 2008.⁵ The authorities are required to ensure that their sanctions and penalties, *inter alia*, “aim to eliminate any financial gain or benefit from non-compliance”.⁶ There is also a duty on the specified regulators to exercise their regulatory functions in accordance with five principles of good regulation (the Hampton principles), namely that activities must be carried out in a way that is transparent, accountable, proportionate and consistent.⁷ Regulatory activities should be targeted only at cases in which action is needed.⁸ This regulatory oversight option has been supported by one academic study.⁹

7. The government has continued to delay public consultation on expanding the opt-in regime for representative claims in the Competition Appeal Tribunal, recommended by the Office of Fair Trading in 2007.
8. The Civil Justice Council has published its recommendation of a generic opt-out procedure, dismissing the government policy noted above on regulatory oversight of compensation. The CJC proposal is unlikely to be accepted by the government because of the potential risks to economic competitiveness, and the political risk of being attacked for encouraging a litigation culture. At best, the government prefers to proceed on a sectoral approach (eg in competition claims) that would be heavily ring-fenced. In relation to consumer collective redress, the government is likely to monitor the effects of the public authorities’ Restorative approach referred to above before expanding any court-based systems.
9. The long-running MMR vaccine case (so old that it was funded under the pre-1999 legal aid system) has collapsed. It was a further example of an English pharmaceutical product liability case that was shown to have had no underlying merits: ongoing scientific research vindicated the safety of the triple vaccine, and the Legal Services Commission was criticized for funding speculative litigation and scientific studies to try to prove the hypothesis that the vaccine was dangerous. The case also raises questions of the role of the media and the legal system for fuelling

⁵ Royal Assent on 21 July 2008, at

http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf. Criminal courts possess a general power to order a person convicted of an offence to pay compensation for any personal injury, loss or damage resulting from that offence, or any other offence that is taken into consideration by the court in determining sentence: Powers of Criminal Courts (Sentencing) Act 2000, s. 130, traceable back to the Powers of Criminal Courts Act 1973. The Financial Services Authority has power to seek a compensation order as part of its enforcement powers: Financial Services and Markets Act 2000, ss. 382 and 383.

⁶ *Regulators’ Compliance Code: Statutory Code of Practice for Regulators*, (BERR, 17 December 2007), at <http://www.berr.gov.uk/files/file45019.pdf>, para. 8.3. The Code is made under s. 22 of the Legislative and Regulatory Reform Act 2007. Essentially the same approach is already mandated under ‘Purpose (e)’ of the purposes of sentencing set out in s. 142 of the Criminal Justice Act 2003: “Any court dealing with an offender in respect of an offence must have regard to the following purposes of sentencing ... (e) the making of reparation by offenders to persons affected by their offences.”

⁷ Legislative and Regulatory Reform Act 2007, s. 21.

⁸ *Ibid.*

⁹ C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Approach towards Collective Redress in Europe* (Hart, 2008).

public concern over vaccine safety, which has led to an increase in child morbidity and one death.

10. A lengthy case against the Bank of England for alleged failure to regulate BCCI also collapsed, with considerable recriminations about procedures allowing it to continue for so long (reforms have been implemented).
11. After extensive consumer and media attacks on some bank charges (especially unauthorized overdrafts), in which many individual claims were being settled through the Financial Ombudsman Service, claims spilled into multiple county court cases encouraged by intermediaries and swamped the courts. All individual cases are currently on hold pending a test case by the OFT against the banks. No GLO was invoked. There has been criticism of the civil justice system and its intermediaries.
12. The government has commissioned an academic study of conditional and related fee systems to investigate complaints that the CFA system is not working well: the media in particular have objected that the CFA system imposes blackmail pressures to settle defamation claims, and hence a restriction of reporting and comment, thereby undermining free speech. The judges have also started a review of costs, and the CJC is looking at this area (the duplication of effort by these bodies has drawn criticism).

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