RESPONSE TO THE CONSULTATION

Towards a Coherent European Approach to Collective Redress

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'Towards a Coherent European Approach to Collective Redress'

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Introduction: Aims and focus of this response

The European Commission's consultation on Collective Redress seeks to determine whether – and if so, how – collective redress mechanisms can be used to remedy shortcomings in the enforcement of EU law. The aim of the consultation is (inter alia) to identify common legal principles on collective redress.[4]

We support the view that collective redress can have added value for the enforcement of EU law. The term 'collective redress' is defined by the Commission as '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'. This collective type of enforcement can contribute, therefore, to the protection of citizens' rights in those instances where individual action does not suffice to safeguard the rights of individuals affected by harmful or unlawful conduct. Practice shows that such situations occur often in the Member States (e.g. in consumer markets) and arise, for example, where a large number of consumers suffer detriment from an unfair practice but their individual stakes in potential litigation are too low to make them take action.[5]

Collective redress can offer a solution for this kind of problem and a 'Europeanisation' of this area of the law seems timely. In our response to the Commission's consultation we aim to propose some recommendations on the most vital aspects that we believe are necessary for achieving a more 'coherent European approach' to collective redress.

For the sake of clarity, we distinguish two stages of enforcement through collective redress. The first stage concerns the instigation of actions – either in the form of a test case, settlement negotiations, or of a mass claim procedure – by individuals or by representative public bodies. Who can bring an action to

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[4] Please note that currently a PhD research is being conducted at Tilburg University which aims at identifying the principles of collective redress and private international law to ascertain how private international law influences the resolution of a mass claim through a collective redress mechanism.
[5] Compare, for example, the UK consultation on Consumer Redress for Misleading and Aggressive Practices discussed further below.

safeguard substantive rights/who has standing to do so? This phase determines who can bring an action to safeguard collective interests. The laws of the Member States diverge considerably on this point.[6] We will discuss the potential added value of a European approach to collective redress at this stage in part 1. A related point concerns the question how to reach individuals with an interest in the outcome of a collective redress action, which we will discuss separately in part 2 of our response.

The second stage concerns the enforcement of the outcome of collective redress proceedings in the EU. The effectiveness of this stage of enforcement depends on the regulation of private international law in the EU, in particular with regard to jurisdiction, recognition and practical enforcement. Differences in national procedural laws stand in the way of effective enforcement of actions in the Member States. We will discuss it in part 3.

Part 4 summarizes our conclusions and makes some recommendations.

1. Potential added value of new collective redress mechanisms (Q1, Q2)

The added value of new collective redress mechanisms is first of all that they can guarantee that individuals enjoy the same protection of substantive rights throughout the EU. Substantive rights given by EU legislation, of which many examples can be found in consumer law, are thus made more effective.

The first step to achieving this is to ensure greater uniformity with regard to who can bring actions to protect collective interests: individuals, public bodies, and/or private bodies. An example can, and should, in this respect be taken from the Member States' experiences with the Unfair Commercial Practices Directive (UCP Directive) (see part 1.1.). This can help identify which approach works best to safeguard substantive rights of consumers for protection against unfair commercial practices (part. 1.2).

1.1. Unfair Commercial Practices

The closest comparison to collective redress, surprisingly, is not mentioned in the Commission's consultation paper. In its own legislation concerning unfair commercial practices – Directive 2005/29 on unfair business-to-consumer commercial practices (further: UCP Directive) – the European legislator has foreseen a procedure that safeguards the collective interests of consumers who are harmed by misleading or otherwise unfair commercial practices.

Article 11 of the UCP Directive prescribes that Member States are obliged to maintain an enforcement regime that ensures 'adequate and effective means' to combat unfair commercial practices in order to enforce compliance with the Directive in the interest of consumers. This means that the Member States have to maintain or introduce legal provisions that enable not only individuals but also 'organisations regarded under national law as having a legitimate interest in

[6] See the Consultation Paper at p. 4.

combating unfair commercial practices' to bring legal action against such unfair commercial practices. This can include public bodies as well as private organisations (e.g. consumer associations).

Practically, this has been translated in national laws into so-called 'dual regimes':[7]

- individuals and organizations with a 'legitimate interest' are able to initiate legal action on the basis of an infringement of private law rights (e.g. the breach of a duty of care in tort law);
- whereas an administrative law route enables designated government organizations/authorities to confer penalties on traders who violate the rights of consumers deriving from the UCP Directive or to impose an injunction against such practices. In Dutch law, for example, the Consumer Authority (*Consumentenautoriteit*) has been given these competences.

At EU level, therefore, a regime for collective redress – or at least the first stage of it – is already partly in place in the UCP Directive. If the Commission wants to achieve a 'coherent European approach' to collective redress, therefore, the regime of the UCP Directive will have to be included.

In this context, it is important to take into account of the experiences that the Member States have had with the enforcement of the rights laid down in the UCP Directive. In the UK, for example, actions against misleading or aggressive advertising under the Regulations implementing the UCP Directive currently can only be instigated by public bodies. For individual claimants the only available route is the action of misrepresentation. This is a complex and cumbersome action which not many consumers will use in practice. In order to secure effective enforcement of the UCP Directive, therefore, the introduction of individual redress possibilities is being investigated.[8]

With this example in mind, we add some more general comments on the way in which public and private collective redress actions can complement one another to achieve an effective protection of substantive rights of individuals.

1.2 Public or private actions?

Collective redress has a twofold goal, namely awarding damages in an effective and efficient way, and the effective enforcement of norms.[9] The enforcement of certain norms should not be dependent of a possible successful outcome of a private action. Hence a public body should primarily have the task of the enforcement of norms. This set-up should guarantee that consumers or other parties are less confronted with breaches of these norms in the future. Such

[7] See e.g. for the Netherlands Asser/Hijma 5-I *Koop en ruil*, at [93a].

[8] See the Law Commissions' Consultation on Consumer Redress for Misleading and Aggressive Practices; further information available at http://www.justice.gov.uk/lawcommission/areas/misrepresentation-and-unfair-commercial-practices.htm.

[9] Especially in so called "strooischade/Streuschaden" cases. See: Tzankova, *Toegang tot het recht bij massaschade*, diss: Tilburg University, p. 3-4.

public bodies should only be dealing with the enforcement of norms (by e.g. imposing fines).

The claiming of damages should be dealt with by private parties/organizations. Public organisations are not suitable at claiming damages for the individual claimants. Such a task is simply too complex to be taken care of by a public body. Moreover, if public organisations would have the task of claiming money from the plaintiff and compensating the individual victims, they would need financing to perform this task. Looking at the discussion concerning the financing of collective redress it seems highly unlikely that public organisations would be allowed to have the task of awarding or claiming damages for the individual claimants.

To add to the enforcement of norms that should be guaranteed by public organizations, private organizations should therefore be able to claim damages collectively. As a fine always has a certain maximum, a private claim can amount to a much higher financial interest. This could serve as an extra incentive and so as an additional enforcement mechanism.

Moreover, private collective procedures would not only offer an additional ground on which norms could be enforced, a collective action would also offer a way to access to justice. Without a sort of collective action, claimants would have to resort to conventional claims to get compensation. As a consequence, courts would be confronted with an unrealistic number of individual cases and it will take claimants longer before they are compensated. Such a situation does not offer the required access to justice. When the claimants would start individual procedures, the chance of irreconcilable judgments, taking the number of probable procedures in mind, is high. Such irreconcilable judgments can be avoided by use of proper collective redress mechanisms.

At the same time one has to realise that in many European countries there is a strong tradition in reliance on public enforcement which results in tendencies in the current private enforcement discussions to attribute private enforcement powers exclusively to public agencies. This is especially the tendency with regard to the so-called scattered damages. To make sure that public enforcement of private rights does not become an empty shell because of resource or policy restrictions of the concerned public agency one has to make sure that the enforcement of private rights never becomes the exclusive domain of the public agency. This problem could be mitigated by the introduction of a superiority test in which the private entity enforcing private rights should explain why public law enforcement in that particular case is not sufficient.

Questions

Q1: What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

Q2: Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this

coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

Answer to Q1 and Q2: following from the above, it appears that there is added value in the introduction of new mechanisms of collective redress. These would extend the type of protection currently offered to consumers under the UCP regime to other areas of EU law. It is also an example of the way in which public and private enforcement can complement one another. Public enforcement should not be aimed at compensating the various victims in a mass dispute. It should only be used to enforce certain violated norms in a mass dispute. Private enforcement should offer individual victims an autonomous means to claim damages. Such a compensatory claim could complement a public action to enforce the violated norm. This way norms could be enforced both through public and private enforcement. More importantly, individual victims won't be dependent on public organisations to be compensated.

2. Information (Q13)

Taking as an example the Dutch Collective Settlement Act, possible victims should be notified by one of the parties in the settlement. In the current situation they should, however, be notified through an official document. When a conflict contains several thousands of victims, the notification by use of official documents is costly and time-consuming. Modern forms of communications, such as the internet, could serve as a solution to a more effective and efficient way of informing all the potential parties.

Questions

Q13: How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

Answer: With the current state-of-the-art means of communication, the notification of possible parties in an opt-out or opt-in procedure could be done more efficiently and effectively. Before such an actual procedure begins, a notification should be placed in an online EU register for complex cross-border claims. Like in insolvency cases, people and the media can be notified through a register in which the judgment which institutes the procedure is filed.
As suggested at Q29, parties could also inform more victims if they would invest in a professional communication plan, which would outline the strategy by which the individual victims could and should be informed.

3. Effective enforcement in the EU (Q29, Q30)

The effectiveness of collective redress procedures in the EU also, and importantly, depends on the existence of effective measures for the recognition and enforcement of judgments and of collective settlements.

Questions

Q29: Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgments? What consequences did these problems have and what counter-strategies were ultimately found?

Answer: Through use of the Dutch Collective Settlement act, one cross-border case has already been resolved (Shell-case 2009) and a second is still pending (Converium-case 2010/2011). Due to the contractual opt-out nature of this procedure, the Shell-settlement covered in principle all of the individual claimants. Because of the opt-out character, there is, however, a lot of discussion about the grounds of jurisdiction and the actual force of a binding collective settlement. Although the Amsterdam Court of Appeal assumed jurisdiction, some legal scholars and practitioners have cast doubt on the ground on which this jurisdiction is based.[10]
On which ground can one assume jurisdiction for the people that are bound by the settlement, but are at the same time no parties in the actual procedure? Art. 6(1) Brussels Regulation has been used in a creative manner in the Shell and Converium cases and served as a ground for jurisdiction in an opt-out procedure.

Linking this back to Q13, the way in which possible claimants are notified that they could join or opt-out of a collective procedure is an important phase in the enforcement of private collective claims. If interested parties are not informed properly, the judgment that follows from the collective procedure does not have to be recognised or enforced (art. 34 (2) and (1) Brussels Regulation). Modern ways of communication should be used to increase the chance that all of the potential claimants are informed of the procedure. This could be achieved by launching the before mentioned online EU collective redress register.
Rather than investing vast amounts of resources in the individual notification process the notifying parties should invest in identifying the group interested parties and in developing a proper communication plan of reaching out to those parties making use of contemporary communication methods. Those plan and methods could vary depending on the nature and characteristics of the case.

Q30: Are special rules on jurisdiction, recognition, enforcement of judgments and/or applicable law required with regards to collective redress to ensure effective enforcement of EU law across the EU?

Answer: Grounds for jurisdiction should be added, to regulate which court has jurisdiction in a collective redress case (be it an opt-in or opt-out procedure). This would help solve the type of problems identified under Q29. As a solution, we propose that when a dispute covers a large group of possible claimants which would make it impossible for a single court to deal with the claims on an

[10] H. van Lith, *The Dutch Collective Settlements Act and Private International Law (Aspecten van Internationaal Privaatrecht in de WCAM)*, Den Haag: WODC 2010. See also the annotation of prof. J. Kortmann following the Converium judgment of 12 November 2010.

individual basis, jurisdiction should be given to the court that has the legal power/means to deal with the dispute collectively.

The question is which court would be the most appropriate for this type of proceeding. Although the starting point that the place where the defendant is domiciled should remain the primary ground for jurisdiction in the Brussels Regulation, it remains to be seen if that principle will actually be beneficial not only to the defendant but also to the claimants. If there is a jurisdiction in which the defendant could get finality in a certain dispute, while the claimants can get compensated relatively quickly, would this not be the better jurisdiction to resolve the mass dispute? An exception to the main rule, giving jurisdiction to this alternative court, would be appropriate.

Alternatively, when more than one EU court has assumed jurisdiction some coordination is required. The experiences with the US Judicial Panel on Multidistrict Litigation on federal level can be inspiring and useful in the European context.[11] This panel has the authority to decide if a certain action which is pending in two or more states should be transferred to a single court. In the EU, such a panel could decide if it is better to give jurisdiction to the court that has the power to resolve the dispute in a single procedure, or to the court which is nearest to the defendant's domicile

Further research is necessary to determine which possible new grounds for jurisdiction in collective redress cases can be identified. This can result in a new scheme for the allocation of jurisdiction in collective redress procedures, which can be tailored specifically to cross-border procedures in the EU.

4. Conclusions and recommendations

We conclude that a new European approach to collective redress can have added value for the effective enforcement of substantive rights of individuals in the EU. This will, however, require a review of existing regulation regarding legal standing (who can brings claims?), the notification of possible claimants, and the enforcement of judgments and collective settlements. To that end, we make the following recommendations:

1. Enforcement of rights should be secured by enabling the instigation of claims by individuals, private organizations, and public bodies. The dual public/private enforcement regime of the UCP Directive could serve as a model for other areas in which collective interests are at stake. The public and private forms of redress can complement each other in the ways described in part 1.2.

2. Effective information is important to include possible claimants in collective proceedings. We believe that contemporary means of communication, such as the internet and the use of communication plans and strategies, should play a more prominent role in distributing such information. An online EU collective

[11] See: I.N. Tzankova, 'Toegang tot het recht bij Europese massaschade', *NJB* 2007/41, p.2634-2642.

redress mechanism could be used to inform EU citizens of a pending collective action.

3. Effective enforcement can only be achieved if judgments and settlement can be practically enforced in the EU, in particular also in cross-border cases. To this end, existing rules of private international law need to be reviewed in order to design a new model for collective redress procedures. Further research is needed to determine what such a model would look like, for example with regard to an appropriate allocation of jurisdiction.