

Leuven Brainstorming Event on Collective Redress

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We believe that an EU initiative on collective redress would be an advantage for both sides, for consumers as well as for businesses.

1) Advantages of collective redress instruments for business

Collective actions could reduce the number of individual cases resulting from a specific incident. Especially in an opt-out system a company can settle a large number of consumer claims in one proceeding. It can negotiate with a group representative of all consumers concerned and it can concentrate its resources on one court case rather than on several different cases. Even if a voluntary settlement is not possible and the court has to decide there is more legal certainty if the decision covers all cases related to the same incident or breach of law.

Companies building their business models on long-term customer relationships and trust would benefit if other companies engaging in unfair practices could not calculate on keeping illegal profits anymore as a result of a more effective collective redress system.

A look across the European borders shows, that there is no reason for businesses to fear a European collective redress mechanism or group action:

- In Quebec an average of 30-40 group action claims are registered per year, its detractors were predicting **500!**
- A Canadian study by the Institut de recherche et d'informations socio-économiques (IRIS) states: **no single company** that has been involved into a collective action on redress **ended up in bankruptcy** in Canada.
- The experiences from countries such as Sweden, Canada and Australia show that the **fears of legal blackmail and a resulting floodgate effect on the courts do not seem to have occurred** (Study Leuven, Final Report, p. 267).

2) Advantages of collective redress instruments for consumers:

In the Leuven Study, on page 263 a recent Euro Barometer is quoted in which 67 % of the consumers questioned would be more likely to pursue redress for an injury if they could do

so in conjunction with other consumers. The 2006 Euro Barometer confirmed this: 74 % of those polled in 25 Member States stated that they would be more willing to defend their rights in court if they could join with other consumers. National reporters from all the states that offer collective actions for individual damages note that collective procedures minimize litigation costs for both consumers and defendants. This lower cost enables many consumers to potentially obtain redress for harm, that they never could afford otherwise if pursued individually. One of the key benefits of a collective action for consumers is indeed that it allows the pursuit of redress where each individual consumer's claim may be too small to justify any legal action. For example, if a credit card company overcharges every customer by EUR 2 per month, it would not be worthwhile for any one consumer to litigate because legal fees would far outweigh the potential benefit.

The following cross border case shows that a single European collective redress mechanism would make it easier for consumers to get redress in cases involving consumers from different member states.

We received numerous complaints from consumers from all over Europe about the terms and conditions of the FIFA ticket sales for the 2006 Football World Cup. People could order tickets for teams before they had actually qualified. If they did not qualify in the end, like e.g. Turkey, they still had to pay a service fee of up to 50 EUR per ordered ticket without getting anything in return.

We filed for injunctive relief and the court was inclined to follow our legal opinion that the contract terms used by the FIFA were unfair. Although the courts decision would have been in our favour we finally decided to compromise and settle the case out of court. Why?

The consequences of a stop-now order in Europe are limited. A court decision would not have had the desired effect that FIFA was automatically obliged to pay the service fees back to consumers. This goal could only be reached by an out-of-court settlement containing a contractual obligation for the FIFA to do so.

This case is typical as unfair practice infringements usually lead to small losses for a large number of consumers. Accordingly it is important to prevent infringements and to withdraw financial incentives from companies. Especially in the world of mass production there is a need for collective actions. The use of Terms and Conditions is widespread. For that reason, many consumers enter into the same contract under identical or similar conditions or buy the same faulty product. Aggressive marketing and sales methods and less transparency for the consumer increase the importance of collective actions including redress mechanisms. Well-

known examples for the need for collective actions are the telecommunication sector and financial services.

3) What instruments for collective redress are needed?

a. Automatic redress order in cases of injunctive relief.

If a court decides that a company is in breach of consumer protection law and this breach has led to a calculable damage for a certain number of consumers who can easily be identified by the company the court order should not be limited to injunctive relief but it should also oblige the company to reimburse its customers. This will typically apply in cases of unfair terms and conditions involving illegal payments or fees (e.g. bank fees, ticketing fees or fees for the exchange of faulty products). This could be regulated in the Injunction Directive in the context of the revision of the Consumer Acquis.

b. Possible features of a European Group Action:

- Consumer Organisations should be allowed as claimants as well as consumers themselves
- Opt-in or opt-out should be possible according to a decision by court from case to case
- Optional: opt-out procedure until a specific threshold, e.g. until 500 EUR, from 500 EUR onwards opt-in mechanism (see the French proposal)
- Costs should be no barrier for consumers to file the claim, e.g. no advanced payment of court fees
- Model Case Procedure Element for evidence: Court should have the possibility to select an exemplary case to clear evidence first. The further individual cases are put on hold and will not be continued until the question of evidence was decided in the exemplary case (like in the Capital Markets Model Case Act (KapMuG))
- Model Case Procedure Element for legal questions: Should be possible to skip a court-instance to get a declaratory judgement on legal questions before stepping into the case in detail
- Practical handling by an Internet based Electronic Court claim register like the one for the Capital Markets Model Case Act (KapMuG), so that consumers could register their claim electronically.
- Appeal should be allowed
- Scope: Competition law, unfair practices, unfair terms & conditions i.a.