

E-ALERT | Dispute Resolution

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COLLECTIVE REDRESS - EU-STYLE CLASS ACTIONS ONE STEP CLOSER?

Introduction

The European Commission has launched a 12-week public consultation to explore proposals for facilitating collective claims by EU citizens. The consultation poses 34 questions and represents the latest attempt by the Commission to make it easier for citizens to obtain redress for breaches of their rights under EU law. If the EU eventually adopts legislation on collective redress, this could lead to a dramatic change in the Dispute Resolution landscape for corporations.

Background

There is currently no EU-wide judicial framework for consumers to bring collective claims against EU companies in the Member States. At the national level, only certain Member States offer consumers redress, with varying degrees of effectiveness. In addition, there may be practical or legal barriers to consumers in other Member States taking advantage of these national laws. The Commission has been considering legislation to implement an EU-wide framework for several years, with the focus initially on claims for damages against companies infringing competition law. The present consultation goes far beyond that narrow competition law scope.

Initially, under the leadership of former Commissioner for Competition Neelie Kroes, DG Competition produced a draft Directive on damages for competition claims in 2009. This draft was never officially tabled following opposition from other Commissioners and Member states, and criticism from the European Parliament. There was concern that legislation was being implemented too hastily and without the proper involvement of the Parliament. It was considered inappropriate for a single directorate to implement rules which could have a wide-ranging impact on the relationship between consumers and industries across the EU.

The present consultation approaches collective redress in more general terms. It could have very wide implications for many businesses, for example increasing claims for defective consumer and financial products. While DG Competition remains a strong influence, it has been joined by DG Justice and DG SANCO, responsible for consumer policy, in formulating the proposals. The three directorates issued an [Information Note](#) in October 2010 in which they set out their broad intentions for the present consultation. The Note outlined the importance of a coherent policy on collective redress, but importantly highlighted the need to implement safeguards against abusive collective claims, and firmly opposed the introduction of US-style class actions within the EU.

Policy positions within the Commission

Although apparently presenting a unified front, significant differences of opinion exist within the Commission on the topic of collective redress.

DG Competition, in particular, remains committed to collective redress and Competition Commissioner Joaquín Almunia, is seeking to implement a system which allows consumers to pursue private claims in damages against organisations which breach competition rules. He has emphasised the importance of the enforceability of collective judgments throughout the EU as part of this system.

DG SANCO is also committed to implementing collective redress mechanisms as part of its general remit to protect consumers, but has indicated a preference for collective Alternative Dispute Resolution (ADR), with binding judicial measures only being used as a last resort. To this end, the directorate has launched a [separate consultation](#) which explores proposals for setting up a cross-border ADR mechanism, which will be available to resolve disputes in a variety of industry sectors throughout the EU.

DG Justice has adopted the most conservative approach. This is significant, because the directorate has the lead role in the consultation exercise. Whilst the directorate is open to suggestions on collective redress, it has argued against increasing cross-border enforceability of judgments, preferring to keep in place the existing legal regime, whereby Member States must actively authorise the enforcement of foreign judgments.

It is important to understand these differences within the Commission, as they colour the approach to the Consultation and provide the framework for influencing the debate.

Substantive questions posed by the Consultation include:

- How extensive will the proposals be
- Which sectors will be covered
- Who will be permitted to bring claims
- How will cross-border claimants be represented
- Will claims be opt-in or opt-out
- Will the procedure be legally binding or simply guidance
- Will they include injunctive and/or compensatory action
- How can abusive claims be prevented
- How to effect cross-border recognition and enforcement of Judgments

Potential implications for companies in the EU include:

- Facilitating general consumer claims
- Facilitating competition claims by individuals or groups of individuals
- Improving mechanisms for enforcing damages awards against unsuccessful defendants; and
- Ensuring that potential abuses of collective redress mechanisms are minimised.

Immediate Action Points

This consultation merits active interest by corporations and other organisations, including trade associations, who should consider the wider implications of any collective redress proposals on their businesses and industry sectors. Companies and industry associations must ensure that their interests are adequately represented and that their voices are heard. In particular, companies will wish to lobby for increasing the safeguards against abuse of any collective redress mechanism, and for considering the use of collective ADR. They will want to review how widely any proposals are drawn and the impact of opt-in or opt-out on their businesses, as well as how EU-wide procedures would affect numbers of potential claims and the scope of competition issues faced by the company.

While any proposal for legislation on collective redress would have to be approved by the European Parliament and the Member States, the outcome of the Commission consultation will be very influential as it is likely to shape the proposal that the Commission will table. Consumer organizations and plaintiff lawyers, including US plaintiff law firms which have recently entered the litigation market in Europe, are

likely to actively participate and lobby hard for a binding legal instrument with as wide a scope as possible, in order to support **DG Competition** and **DG SANCO**.

The consultation questionnaire is available at

http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm .

The written submissions on the consultation must be made by **30 April 2011** to EC-collective-redress@ec.europa.eu. The Commission will then hold a Hearing and publish a Communication.

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