

Group Action: A Necessity for Consumers

Brussels, 15 November 2010

(Conference organized by BEUC¹ and Test-Achats² –
Conference in the framework of the current Belgian Presidency
of the Council of the European Union)

1. All information is available on the Conference Website:
<http://www.groupaction4consumers.eu/index.html>.

I especially refer to the Documents.

2. The Conference took off with a Keynote Speech by John Dalli, EU Commissioner for Consumer Policy.

Commissioner Dalli, Vice-President Reding³ and Vice-President Almunia⁴ drafted a Joint Information Note: *Towards a Coherent European Approach to Collective Redress: Next Steps* (5 October 2010) (the Note can be found on the Conference Website).

The idea is to organize (once again!⁵), amongst the Member States and all stakeholders, a public consultation on a European approach to collective redress in order to identify which forms of collective redress could fit into the EU legal system and into the legal orders of the 27 EU Member States.

Eddy De Smijter (DG COMP) explained the set-up and the difference with previous consultations.

The idea is to look for the ideal collective redress instrument in different fields of law – consumer rights, competition, passenger rights, environment, rights of data protection, etc. –

¹ Bureau Européen des Unions de Consommateurs / European Consumers' Organisation (<http://www.beuc.org/Content/Default.asp?PageID=591&LanguageCode=EN>).

² Belgian Consumers' Organisation (<http://www.test-achats.be/>).

³ Commissioner for Justice, Fundamental Rights and Citizenship.

⁴ Commissioner for Competition.

⁵ See http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Consultation.

and to detect the common principles binding these ideal instruments. The three Commissioners already listed some of these principles in their Note⁶. The central questions in the public consultation are: do you agree with the principles? do you think there are other principles?

Once the common principles are listed, the question arises what to do with them? There are two extreme alternatives. On the hand, the creation of a real “European class action” (created on the basis of those common principles), that can be used for cross-border cases and that Member States can copy (completely or partially) into their own legal system. On the other hand, just listing the common principles (in soft law – in a Directive?) and ordering the Member States to respect them in their own (national) collective redress instruments. In between those alternatives other solutions are possible. Commissioner Almunia, for example, already said he wants to create sectoral legislative instruments based on those common principles.

In the meanwhile, Commissioner Dalli aims of widening the toolbox for consumers by making the (internal) complaint handling procedures of companies more effective and by making the current ADR schemes more efficient. With respect to the latter, he wants to make a proposal next year.

3. The first session was on National Systems in Practice: Efficiency and Limits.

A classical overview was given of some countries: Portugal, France, Belgium, the Netherlands and Austria. The presentations were biased, because they were exclusively given by people of consumer organizations.

This observation is a general remark. The main problem I had with the conference was that everybody assumed we need representative collective (or group) actions in Europe. This was the basic, and non debatable⁷, assumption. In that sense, the Conference was (partially) a well organized promotion for representative collective (or group) actions in Europe. There was no focus on the broader picture: do we deal with mass cases publicly or privately (public vs.

⁶ Effective compensation, strong safeguards against abusive litigation, agreements or systems in addition to court proceedings to resolve disputes, collective judgements should be enforceable throughout the EU and adequate financing.

⁷ There was one (“weak”) representative of FEB (Federation of Enterprises in Belgium).

private enforcement)? Are there other adequate (public, private, penal, sectoral) tools? The exercise of taking a step back and first looking at the broader picture was done by others. I especially refer to the book of Chris⁸.

The (symptomatic) question was asked if there are many group proceedings in those countries that have collective (or group) actions. The overall answer was no (in Portugal 10-15 cases in 15 years, in the Netherlands 6-7 cases in 5 years, in Spain 40 cases, ...). One of the attendees asked if, on the basis of this limited statistical information, we need group proceedings at all. The consumer organisations countered this argument by stating that the problem is not the efficiency of the tool as such, but only financing group proceedings. I think this is a very short-sighted view.

I am not giving a description of the instruments in the aforementioned countries, just some stray remarks that may be interesting.

The audience liked the cost aspect of the Portuguese tool⁹, in particular the exemption of litigation costs for the plaintiff (exemption, except if the plaintiff totally loses the law suit, in that case the judge can condemn the plaintiff to pay between 1/2 and 1/12 of the normal regular litigation costs).

The chairman of UFC (a French consumer organization) (Alain Bazot) talked about the absence of an adequate representative collective (or group) action in France. On the other hand, he referred to (ad hoc and sometimes creative) initiatives consumer organizations take when a mass disaster occurs. For example, after the volcano eruption in Iceland and the disruption of European air traffic, UFC provided practical and legal information on their website for duped passengers.

In the Netherlands there is the Collective Settlement of Mass Claims Act of 2005. Currently, there are some proposals to modify the act. There is a proposal on a pre-trial hearing and the possibility for courts of asking pre-judicial questions to the Dutch Supreme Court. Finally, reference was made to a study on trifling damages in October 2010 (with disappointing results).

⁸ CH. HODGES, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2008, 324 p.

⁹ The representative of DECO (Luis Silveira Rodrigues) talked about three interesting cases (DECO vs Portugal Telecom, DECO vs Prosecutor and DECO vs Open English).

In 2009, the Austrian VKI¹⁰ published an extensive report.

4. The second session was on Group Action: How to Make it Work? This was interesting.

Jacqueline Riffaut-Silk (judge at the French Cour de Cassation) listed some failed French proposals of introducing a group action. Today, the focus in France is on mediation. According to the judge, the following aspects should be taken into consideration when creating an adequate group action: full compensation for the victims and full closure for the wrongdoers, maintaining the basic principles of European civil procedure, foreseeing a filter to wipe out vexatious and frivolous claims, specialized courts and judges and maximum flexibility for the group action judge.

A representative of FORIS¹¹ (a German commercial litigation funder) talked about their practices in Germany, Austria and Switzerland:

- Is there an adequate legal regulation in those countries? no (only: accumulation of objective actions / assignment of all claims to one plaintiff).
- How can we organise a group action? Who can we give standing?
 - merger of victims in association or partnership?
 - law firms?
 - consumer groups (the problem is that many groups do not want to sue the damages of other applicants)?
- What about the financial risk? FORIS is a commercial litigation funder; they provide a well established instrument for risk-free litigation; the company takes FULL financial risk; when the case is won, FORIS receives a bonus of maximum 30%; as expected, the representative of FORIS favoured an opt in system.

Ben Knüppe (the former CEO of Dexia Nederland) emphasized the necessity of group actions for the industry. He talked about the Dexia case, where he was involved as a trustee. The Dexia settlement (the so-called Duisenberg settlement) was approved by the Amsterdam court

¹⁰ Verein für Konsumenteninformation.

¹¹ <http://www.foris.de/av/anwaltsverzeichnis.html>.

under the Collective Settlement of Mass Claims Act of 2005. Knüppe talked about the extensive negative media campaign after the decision of the court was published. As a result of that campaign, 23.000 group members (!) opted out. At the end, Dexia was involved in 2.400 individual law suits.

Deborah Prince (of Which?, a consumer organization in the UK) focused on three “group action problems”: the long duration, the fact that most compensation schemes are not comprehensive and the funding issue. She formulated two possible solutions: ADR (according to Prince you can develop (enhance) this only when you have an adequate group action) and an opt out class action that allows cy-près distribution.

5. The afternoon started with a Keynote Speech by Paul Magnette, the Belgian Minister for Consumer Affairs. He briefly talked about the recent Belgian proposal on group proceedings.

His speech announced the third session: Focus on the Belgian Draft Bill which provides a complete set of rules to facilitate consumer group litigation (the Draft Bill can be found on the Conference Website (only in Dutch and French)).

For those who are interested in the Belgian proposal, I have written a text in English. I also have slides in English.

The core of the proposal is a double pathway: a partially out of court settlement track and a court-based litigation track. The proposal aspires to be the best of two worlds: the Dutch Collective Settlement of Mass Claims Act of 2005 and the articles 999-1051 of the Code of Civil Procedure in Québec.

The proposal was presented by its two co-authors: Hakim Boularbah and Andrée Puttemans (of the Université Libre de Bruxelles).

After the presentation, there was a panel discussion, with two (“weak”) Belgian politicians, somebody from Test-Achats and a Brussels lawyer. This was not interesting.

6. The last session was on Coherence between EU Initiatives?

The panel was chaired by Jorge Pegado Liz (a Portuguese ECOSOC member), who dominated the debate ... (he did more talking than chairing).

A French member of the European Parliament (Robert Rochefort) observed the two main obstacles in France that hinder a representative collective (or group) action: the recent financial crisis and the presence of a very powerful employer's patronage and powerful trade unions. This is very important, also in Belgium. Trade unions have a lot of power. They fear that collective (or group) actions can jeopardize their power.

Denmark uses an opt in model. In some cases an opt out model can be imposed by the judge, but only when the group representative is a public body (i.e. the Danish Ombudsman). The Danish Ombudsman (Henrik Øe) told the conference that he uses the opt out model exclusively to settle cases. This seems to work. He made two other remarks. On the one hand, he emphasized the acute need for a tool to deal with cross border cases (especially in Europe with the single market). There is still too many discrimination between European citizens. On the other hand, he warned legislators not to put all their eggs in the ADR basket. They also have to create adequate (representative) court proceedings.

With respect to the latter, the Director of BEUC (Monique Goyens) referred to the new practice of ODR: online dispute resolution¹².

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¹² http://en.wikipedia.org/wiki/Online_dispute_resolution.