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Andrew Jeffries
Allen & Overy LLP

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I. INTRODUCTION

This article examines the EU consultation on proposals for a collective redress regime across the EU, with particular reference to the antitrust sector. We look at the issues that arise, and how these might play out.

II. THE PROCESS SO FAR

The European Commission launched in February 2011 another consultation on proposals for collective redress. This is open to April 30, 2011, and takes the form of 34 open-ended questions.

This is the latest in a long-running and tortuous attempt by the Commission to develop European collective redress, in particular in the fields of consumer protection and competition law, which has so far produced nothing concrete. Is the whole process simply lost in consultation? We consider this below. The EU uses the term "collective redress" to cover court-based procedural mechanisms which enable mass litigants to band together—usually claimants—to bring one case where there are common themes and issues. This is otherwise more commonly known as a class action.

The EC adopted a Green Paper on antitrust damages action in 2005, followed by a White Paper in 2008. These were both aimed at effective enforcement in antitrust cases, especially for consumers, by collective redress mechanisms. The White Paper became a draft directive, which got within a few days of becoming law in 2009.This directive attracted controversy; for example, it would have given decisions of national competition authorities binding effect on the national courts of other Member States. This, and internal divisions within the EU, led to the directive being pulled. Little real progress has been made since.

III. THE COMMISSION'S MISSION

The Commission's policy was (and remains) driven by its view that it continues to be difficult for consumers, particularly with relatively small claims, to pursue effective redress through the courts, especially when faced with anticompetitive behavior that may cross EU boundaries. The situation is, in the Commission's view, made worse by the lack of a coherent collective redress mechanism across the EU, with half the EU Member States having little or no collective redress mechanism, including England and Wales. The mechanisms that were by then (and still are) available in 13 of the EU states varied hugely in both the scope and procedure. This

[1]Andrew Jeffries is a Litigation Partner with Allen & Overy LLP based in London, and leads the class actions practice there.

led the Commissioners for competition, justice, and health and consumer policy to meet in October 2010 and jointly launch the new consultation.

An EU study in 2008 found that 50 percent of those consulted would not bring a claim for less than EUR 200. About 20 percent of those consulted would not bring a claim for less than EUR 1,000. Seventy-six percent of those consulted would be more likely to bring a case if a collective redress mechanism was available. The costs and complexity of litigation were cited as the main obstacles. The Commission believes that this is a significant barrier to effective enforcement of consumer and antitrust rights. It is the Commission's ambition to bring in to place an EU-wide collective redress mechanism, which would enable consumers (and others) to band together to bring a case in a cost- and procedurally efficient manner, wherever in the EU they are based, and wherever in the EU the defendant is based and the anticompetitive behavior occurred. Perhaps recognizing the practical and political difficulties of legislation to this effect, the EU is considering a range of responses between, at the one end, a general encouragement to Members to adopt effective collective redress mechanisms and, at the other end, compulsion by legislation.

A significant part of the discussion focuses on the high costs of litigation across EU Member States. The Commission is looking at funding alternatives, as well as modifications to the "loser pays" principle. Nevertheless, the Commission does recognize that in bringing such proposals, there is a risk of encouraging nuisance and hopeless litigation. Preventing that harm is part of the objective but, of course, is in conflict with the objective of encouraging cost-effective collective redress.

The Commission is also concerned at the lack of consistency of approach in civil consumer remedies. Its ambitions to introduce a pan-European system of collective redress have behind them the same philosophy as the equally ambitious proposals for a single pan-European contract law. In its collective redress consultation, the Commission has in mind, in part, encouraging consumers to shop, online or otherwise, freely around the EU without concern that they will not be able to enforce their rights if they make a purchase based in another Member State.

IV. THE CURRENT SITUATION

Current EU collective redress or class action mechanisms, where they exist, do adopt very different approaches, which illustrate differences of procedural history, public policy, and Government priorities. Some countries, for example France, have an objection to opt out regimes on public policy grounds. Others, for example the Netherlands, have no problem with opt out, but its regime only covers class action settlements. Italy and Poland introduced class action systems last year, and they are proving popular, especially in Italy. Belgian proposals for a full American-style class action system are now apparently stalled at the legislative stage. England and Wales have some mechanisms for test cases, or consolidation of cases, but no true class action system. Forum shopping is becoming more common, to take advantage of relative court speed or sloth and of differing rules on issues such as disclosure of documents. The EU would prefer to eliminate such differences.

Unsurprisingly, consumer groups are all in favor, while businesses are generally against. A recent EU Parliament debate on the issue heard a full day's submissions from interested parties. For consumer groups there were complaints that nothing had happened after so long. For business groups there was a deep felt concern that the proposals would lead to a whole industry

of frivolous or nuisance claims, which would cost millions to deal with and EU-based businesses would lose competitive edge in the global market place.

V. SOME ISSUES

A. Going Trans-Atlantic

The American system of class actions is well-known, and seen as the foundation of all the class action systems around the world today. One of the few things on which everyone seems to agree is that this should not simply be copied. However, what there seems to be agreement not to adopt are items that have mostly nothing to do with class actions *per se*: juries in civil claims, punitive damages, lawyers on contingency fees, and no "loser pays" deterrent to nuisance cases.

B. Opt in and Opt out

Class actions can be either on an opt in or opt out basis, or both—with the court deciding which route to follow. Opt in is generally accepted in all jurisdictions with a class action system. Here claimants must come forward and elect to join "the club." They then obtain the procedural and cost advantages of being in a class, but take the net collective payout of damages. Those who want to pursue their own claim (usually because they have suffered much greater damage than the class action is likely to pay out) can do so. Those not interested never come forward.

Opt out is far more controversial. Here a class is defined, often on a global basis, and all potential claimants are included, unless they specifically opt out. Accordingly, the rights of parties who are not involved in the litigation, and may never even be aware of the case, are decided in their absence. This is offensive to many countries on grounds of public policy, notably France. If the EU is intent on introducing an EU wide class action system, this policy issue alone may mean that it is doomed to failure.

Furthermore, businesses, in opt out cases, may have only one case to deal with, but in some systems must pay damages based on the whole defined class. That may be many times the damages due to those claimants who actually come forward. So what happens to the surplus? Sometimes it is eventually returned to the defendant, leaving at least a substantial cashflow problem and funding cost. Proposals in the UK Finance Bill 2010 (dropped in the run up to the general election) for class actions in financial services cases would have had the surplus given to a suitable charity. This prompted understandable angry reaction from businesses that redress for consumers is not about funding charities. Opt out class actions often also allow claims that would otherwise be time-barred. This is again seen as objectionable.

There is then the issue of costs. If a claim is won, claim costs are usually deducted from the damages award before payout, but this can be controversial, and the whole system relies on lawyers being prepared to act on a conditional/contingency fee or even on a pro bono basis, or third party funding. However, if the case is lost, who pays the claim costs and, possibly, the defense costs? Naturally, those members of the class who did not actively participate will not pay, and so some form of insurance, or consumer group or fighting fund may be necessary. An opt in class claim is simpler—if you opt in, you opt in to a share of the costs.

The Dutch system of class action settlements is growing in popularity, and widely seen as a success. This operates with opt out claims, so how are these obstacles overcome? The answer probably lies in the fact that it applies only to settlement of cases, where parties have agreed to submit to the process, and this element of consensus makes it manageable. There is not a similar system for class action litigation. The system may not overcome all the opt out issues and, in particular, whether such a Dutch court settlement is enforceable elsewhere is strictly untested.

Public policy objections could be raised. So far, in practice, such judgments are being enforced voluntarily, or because no one has taken the point.

C. Funding, Checks, and Balances

The collective redress consultation recognizes the legitimate business concern against encouraging nuisance claims, and this is closely linked to proposals for litigation funding. The English system of loser pays is widely seen as an effective mechanism against such nuisance litigation—a losing claimant will usually have to pay most of the costs of the successful defendant, including the fees of lawyers and experts. This can be expensive. However, such a loser pays system is alien to most of Europe, where fees paid to the winner, if any, are nominal. It was clear during the parliamentary debate on the EU consultation that bringing English-style loser pays to Europe is a non-starter, both politically and on jurisdiction grounds (see below).That leaves a void to be filled, with no obvious answer beyond rigorous judicial monitoring. Views are very mixed on whether that can be truly effective.

There is also widespread business concern of double jeopardy, especially in antitrust cases, where consumer class action damages may follow on from substantial fines at an EU or national authority level.

The issue of litigation funding is less relevant in continental Europe, where a claimant does not have to cover the risk of paying the defendant's costs if the case is lost. Nevertheless, claim costs must still be met, and here there is no perfect solution for litigants who cannot afford to pay; insurance, third party or consumer group funding, pro bono schemes, and state aid have all been tried with mixed success. There is, again, a strong business group objection to any form of "sponsorship" by the state or consumer groups of litigation, especially where there is no reimbursement of defense costs if the case is lost, and where there is no effective check on nuisance cases.

D. Jurisdiction

A short but complex point is whether the Commission has jurisdiction to achieve its highest objectives. The answer may well be no. There is significant doubt whether the Treaty gives the EU power to impose civil procedure upon Member States through a pan-European class action system. Some in the Commission are of the view that this could be pushed through under a free markets umbrella, but the more widespread view is that a one-class action system is unachievable, quite possibly on jurisdictional grounds, but certainly politically. It is just not realistic to try to achieve this level of harmonization, where the base line from which each Member State starts is so different, and the procedural culture is so disparate. Some Member States have a strong history of judicial control while others do not; some have a comprehensive class action system already while others have nothing. The differences between adversarial and inquisitorial systems are well-known and well entrenched. Public policy differences have been referred to above.

VI. CONCLUSION

My first conclusion is that many of the Commission's ideals are likely to be unachievable for jurisdictional or political reasons, or because opposition to elements such as opt out are too fervent to overcome. The three Commissioners do not appear to be united in one approach, and are not driving this with the same vigor as, for example, the EU contract law proposal. We may end up with just a set of principles that Member States will be encouraged to adopt to assist—in

the Commission's view—effective collective redress. That is a weak conclusion to a long process, but may be all that can be achieved at the EU level.

The parliamentary debate mentioned above concluded with the question: What's next? The reply was that there would be some sort of response to the consultation by the end of the year. That is a long time for a first reaction, and suggests that implemented legislation is years away, if at all. This leads to my second conclusion—whatever will happen is likely still a long way off. At the EU level, we can expect to be in consultation—"lost" or not—for some time. If the outcome is the issuance of encouraging principles, then action is even further away, since the debate then shifts back to the national level as to what notice, if any, should be taken of such principles.

Putting all the EU debate to one side, class action systems are developing across Europe: Italy, Poland, and the Netherlands in recent years, Belgium, France and Germany underway, although at different stages. About half the Member States have some sort of class action system now, even if (as in Denmark) it is little used. The Scottish Parliament has recently put class actions on the agenda that, if it comes in, will put significant pressure on the English and Welsh governments to do something similar. Therefore, my final conclusion is that—like it or loath it—in reality class actions are here to stay, and for those jurisdictions where the system is in its infancy, the time to voice your concerns as to the form it should take, especially at the national level, is now.