

**Collective redress
mechanisms – typology and
selected mechanisms**

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State of the art

- On-going political debates at national and EU level
- Various types of mechanisms in at least 16 EU Member States (in some MS several mechanisms; latest in France and Belgium 2014)
- EU level: Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights
- EU law background: Obligation of Member States to ensure effective enforcement of consumer law which does not work with individual mechanisms alone

Why collective mechanisms?

- Consumer perspective – Access to justice
- Business perspective
- Efficiency perspective
- Enforcement perspective

Outline

- The principle of effectiveness
- Typical situations in which individual remedies are insufficient
- Types of collective mechanisms
- Crucial factors for the effectiveness of mechanisms
- Which instrument for which situation?

EU minimum standard: Effectiveness

The principle of effectiveness

- Is concerned with the (procedural and substantive) legal environment of national law that is derived from EU law
- Has a negative and a **positive** side

The positive formula

Member States shall provide for *appropriate sanctions* in the event of the supplier's failure to comply with national provisions adopted pursuant to this Directive. These penalties must be *effective, proportional and dissuasive* (Art. 11 of Directive 2002/65/EC on the distance marketing of financial services)

The fields of law concerned

- Private law: individual remedies and collective remedies
- Public law: fines and other sanctions, e.g. withdrawal of licence
- Criminal law
- ECJ (*Berlusconi and others*): A particular sanction or combination of sanctions must be effective, dissuasive and proportionate

Gaps in individual enforcement

- Sometimes no remedies available (unfair competition law)
- Practical impediments (cartel law)
- Reasonable apathy (small claims)
- Risk aversion (e.g. capital market law)
- Psychological barriers (to confess to have been cheated)
- Disincentives in the judicial system
- Poverty

Limited usefulness of injunction procedures

- Injunctions are an established instrument in EU consumer law
- Injunctions only take effect for the future
- Traders can use the court system to delay the effect
- Injunctions procedures do not normally include the obligation to return what was received unlawfully
- Injunctions often only apply *inter partes*, thus consumers have to litigate from the start

Types of collective mechanisms

- Group actions
 - Where individual actions are grouped
 - Brought by groups
 - Brought by (normally institutional) representatives
- Representative actions
 - Aiming at individual redress
 - Protecting the 'collective interest of consumers'
- Test cases
- Skimming-off procedures

Group action 1 – UK

- Group Litigation Order
 - Requires a number of law-suits with common features
 - Case management tool in the hand of the court
 - Gatekeeper procedure in which the court decides on the suitability of a GLO
 - 2nd gatekeeper procedure in which the decision of the court to make a GLO must be approved by the Chief Lord Justice
- Used in package holiday and personal injury cases
- Loser-pays principle, no relaxation of litigation costs (potential economies of scale)
- Similar: the German Capital Market Model Claims Act

Group action 2 - Spain

- Group action can be brought by a number of consumers
- Other consumers can sign up
- Used in large-scale consumer litigation
- Court decision can individualise the consumers to be compensated, or state conditions that consumers must meet in order to be compensated
- Loser-pays principle; contingency fees are prohibited but said to be tolerated
- Similar: Denmark, Portugal, Poland

Group action 3 - France

- Group action can (only) be brought by a consumer organisation that is active in the whole of France
- Applicable only for sale of goods and services and unfair commercial practices (experimental phase)
- Limited to material damage (not immaterial or physical)
- First stage: the court decides on the liability of the trader and defines the group of consumers that can claim damages
- Second stage: consumers can sign up within a period set by the court (2 to 6 months)

Group action 4 - Belgium

- Group action can (only) be brought by a consumer organisation
- Wide scope of application
- First stage: Gatekeeper procedure
 - Here the court decides whether an opt-in or opt-out procedure applies
 - In the case of an opt-in procedure, the court determines an opt-in period of no less than 30 days and no more than 3 months
 - For physical and immaterial damage, only the opt-in procedure is available
 - Consumers who do not have their domicile in Belgium can opt in.
- Second stage: Negotiation of a settlement that must be confirmed by the court

Group action 4 – Belgium (cont.)

- Third stage: If no settlement can be reached, the court will decide
 - Decision of the court has binding effect on all that joined (opt-in) or that did not opt out.
 - Exception: those who can show that they could not reasonably be aware of the group action
- Fourth stage: Execution procedure where an executor is appointed and the list of the members of the group is finalised that can claim reparation.

Group action 5 - Portugal

- Group action can be brought by a consumer organisation but the decision can be enforced by all consumers concerned
- Opt-out procedure (the law-suit and the possibility to opt-out shall be advertised in the media)
- Slow start due to legal uncertainty and conservative courts
- No costs for consumers; litigation risk lies with the intermediary
 - Therefore dependant on the resources of the intermediary
- Lengthy court procedures

- Similar: Bulgaria, Italy, Denmark, Finland, Sweden, France (usually opt-in procedures that grant easy access)
- Netherlands: confirmation of a settlement with opt-out procedure

Representative action 1 - Germany

- Consumer organisations can bring claims on behalf of consumers
- Only the intermediary participates in the law-suit and bears the litigation risk
 - Therefore dependant on the resources of the intermediary
 - Fees for aggregate claims are lower than the added fees for individual claims
- Only the intermediary can enforce the decision
- No legal effect on consumers who are not represented
 - Risk of prescription!
- Slow start due to legal uncertainty and conservative courts
 - Admissible where 'necessary for the protection of consumers'
- Used in mid-size cases (up to 100 claimants; up to 1,000 euros each)
 - Air travel; gas price increases
 - Limited through management capacities
- Similar: Austria

Representative action 2 - France

- Aiming to protect the 'collective interest of consumers'
- Can be brought by consumer organisations
- No need to individualise victims of an unlawful practice
- Damages to be determined by the court and awarded to the consumer organisation
 - In practice often equivalent to the lawyers fees
- Deterrent effect through publication of decisions and media coverage
- Similar: Belgium, Bulgaria, Greece (with higher or even punitive damage awards)

Test case procedure - Austria

- Test case to be brought by a consumer organisation (VKI)
- Legally binding only *inter partes*
- Facilitation of access to the highest civil court whose judgments are *de facto* binding
 - No minimum value of the claim
 - Good media coverage
- Frequent use due to third-party litigation financing
- Follow-on individual litigation necessary if the trader does not pay out even after the supreme court decision
- Danger of prescription of individual claims

- Similar mechanisms: Germany (*Quelle* case); Greek declaratory action

Skimming-off procedure - Germany

- § 10(1) UWG:
- Whoever, while acting with intent, uses an illegal commercial practice (...), thereby making a profit to the detriment of numerous purchasers, can be sued for surrender of such profit to the Federal budget by those entitled (...) to assert a cessation and desistance claim.
- Extended to cartel law (§ 34a GWB) in 2013

Skimming-off procedure - Germany

- Available in unfair commercial practices law
- Can be brought by consumer associations
- Aims at skimming off unlawful profit rather than compensating victims (who do not normally have claims anyway under unfair commercial practices law)
- Skimmed off profits go to the public purse whilst the loser-pays principle applies
 - Little incentive to litigate
- Serious restriction: requires intentional breach

Crucial factors for the effectiveness of collective mechanisms 1

- Great reluctance at the political level and, of course, massive resistance of industry – ‘we do not want class actions in Europe’
- Figures: Very few cases in most Member States
 - Exceptions: Spain, Poland (group actions), Austria (test case procedure)
- Reasons: Manifold, most of them intended – no litigation industry, no ‘abuse’

Crucial factors for the effectiveness of collective mechanisms 2

- Actors:
 - In many countries only institutional actors, i.e. consumer ombudsmen and registered consumer associations
 - Limited resources
 - Particular agendas that may not include the problem at stake, be it for political reasons or because of a clash of interest with the members
 - Principle-agent problem once litigation is initiated
 - Only Portugal, Spain, Denmark, Sweden and Poland allow 'real' group actions (that may be organised by lawyers)

Crucial factors for the effectiveness of collective mechanisms 3

- Types of claims
 - Experimental character of some procedures
 - Sunset clauses, e.g. French group action
 - May lead to frictions with related claims that cannot be brought under the same procedure
 - Recent amendment of the German Capital Market Model Claims Act in order to include claims against advisors
- Substantive law
 - Claims that could be grouped are highly risky
 - Product liability cases, in particular pharmaceuticals
 - Capital market law cases
 - Still advantages because the 'common costs' are shared but discouragement once several actions have failed
 - Cheaper option test case
 - Restrictive requirements for collective mechanisms
 - German skimming-off procedure requires (proof of) intentional breach of unfair competition law

Crucial factors for the effectiveness of collective mechanisms 4

- Procedural law
 - Litigation risk
 - Loser-pays principle everywhere but Spain, even where intermediaries act in the 'collective interest of consumers'
 - Consumer participation in the costs (Danish model)? Chilling effect yet unclear
 - Court fees and lawyers' fees
 - Court fees are sometimes relaxed (e.g. 2% of the value of the claims in Poland) but insignificant as compared to lawyers' fees anyway
 - Lawyers' fees are sometimes regulated (D, S) – but then the action is not attractive for lawyers (slight improvement now in the German Capital Market Model Claims Act)

Crucial factors for the effectiveness of collective mechanisms 5

- Financing
 - Third party financing is only available in high profile cases
 - Conditional fees and contingency fees are prohibited in most Member States (exception: Austria – usually 30%)
 - Development in this area
 - Germany (O₂ case)
 - Sweden ('risk agreement')
 - Poland (cap 20%)
 - Potential principal-agent problem

Crucial factors for the effectiveness of collective mechanisms 5

- Management capacities
 - Institutional intermediaries: factually limited to a few high-profile cases per year
- Gatekeeper procedures
 - In particular where groups can take action (but also French and Belgian group action – not Poland!)
 - Looking at efficiency criteria
 - May create high up-front costs for the gatekeeper procedure (UK Group Litigation Order)
 - Court discretion creates legal uncertainty

Crucial factors for the effectiveness of collective mechanisms 6

- Lack of incentives for intermediaries
 - Skimmed-off profits (Germany) go to public purse
 - Damages for the breach of the 'collective interest of consumers' are low in France (higher in Greece)
 - Lawyers' fees are kept low (Sweden, Germany, France), although the workload is much higher
- Legal uncertainty
 - 'Necessary' for the protection of consumers; associations who have a 'justified interest' etc.
 - Easy for conservative courts to dismiss claims
 - Clarification of the law, or amendment, may take years (e.g. Portugal, Germany)

Which instrument for which situation?

- No 'one size that fits all'
- Individual claims are impossible or nearly impossible → skimming-off procedure or damages in the collective interest, or public law
- Otherwise, group actions and representative actions aiming at individual redress are preferable but have limitations
- Actors: limited financial and personal resources
- Required activities of victims: barriers lowered but still present
- Even opt-out group actions require some activity of victims at the end of the procedure.

Conclusions

- No litigation industry in Europe
- Most collective mechanisms are in the hands of underfinanced and understaffed organisations
- Intentional disincentives for lawyers to engage in the field
- In some cases, the aim is restricted to help enforcing the law against rogue traders
- Long way to go – whether the EU can change the attitude of the Member States remains to be seen.

Literature

- Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, 2008,
http://ec.europa.eu/consumers/redress_consumers/finalreportevaluationstudypart1-final2008-11-26.pdf