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

- **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

• 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

• 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