

Client Alert.

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Are Consumer Class Actions Coming to the European Union?

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In a potential move towards U.S.-style class actions, the **European Commission** (“EC” or “the Commission”) recently launched an initiative seeking public comments about potential options for collective redress in the European Union (“EU”).¹ This initiative arises from substantial concerns about the lack of options available to consumers in the EU to redress unfair competition claims against businesses, as well as the lack of a collective redress mechanism generally.

The EC is seeking public comments on a series of questions such as whether collective actions should be publically funded and whether collective compensatory redress should be extended beyond consumer protection to other areas like financial services and environmental law. Notably, the Commission does not set forth its own procedural or substantive suggestions, and appears to be wiping the slate clean and withdrawing from the EC Director General of Health and Consumer Policy’s Green Paper of 2008, which promoted forms of collective redress closely aligned to U.S.-style class actions.

Currently, there is a very limited collective redress mechanism under EU law, and EU member states have adopted a wide variety of approaches to fill in the gaps. Existing EU law and international agreements require member states to have procedures in place for individuals to seek injunctive relief in the areas of consumer protection and environmental law, but there is no EU-wide law governing compensatory relief, and certainly nothing approaching the types of class actions so prevalent in the U.S.

The procedures allowing for collective redress in the twenty seven individual member states vary greatly. No two national systems are alike. Among the major distinctions are (1) whether the relief is available for all types of legal harms in all sectors; (2) whether an individual has standing to bring suit (Portugal), or only a public authority (Finland), or certain private organizations (Bulgaria); and (3) whether the mechanism is “opt-in” or “opt-out.” Due to these differences, the Commission is keen to explore further the possibility of introducing common principles enabling decentralized but consistent collective redress against infringers of EU law. It is hoped that the introduction of a coherent EU approach to enforcement will overcome the problems faced by EU citizens who are forced to bring individual proceedings, the costs of which can often far outweigh the loss suffered. The unlikelihood that individuals will bring individual proceedings under those circumstances is seen by many, especially in the U.S., as the primary appeal of making class actions available for consumers.

¹ European Commission, Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 (2011), available at http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf (hereinafter “Public Consultation”).

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But is a move toward U.S.-style class actions the right way to address these concerns? The proliferation of class actions in the U.S. — often involving claims in which consumers have suffered no real injury — and the resulting pressures on businesses to settle even meritless claims in order to avoid the significant costs associated with litigation is notorious. To illustrate this, in California, with a population of close to 37 million, there were close to 1200 class actions filed in federal and state courts in 2005 alone.² Compare this to England and Wales, with a population of over 50 million, where six “group litigation orders,” in which multiple claims giving rise to common or related issues of facts and law are litigated jointly, were issued during the same period.³

Several factors account for this difference. For example, contributing to the small number of cases in England is the fact that England has an “opt-in” system, in which the plaintiffs must individually join the group. Attempts to use “representative actions” in England have been rejected by the courts due to the lack of legislation on the issue. Conversely, throughout the United States there is an “opt-out” mechanism for class actions. In the United States, nearly any individual may sue on behalf of similarly “injured” individuals, unless the class members expressly object. Another factor contributing to the disparity, which is particularly problematic in California, is the body of law which provides for attorneys’ fees for successful suits brought by plaintiffs, with little or no corresponding risk for unsuccessful suits.

The Commission appears well aware of the abuses seen in U.S. class actions, and identifies, in the recent Public Consultation, the features of the U.S. system which “taken together increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition,” including “the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence.”⁴ Note, however, that the Commission continues to seek input on whether to have an “opt-in” or “opt-out” mechanism, as well as whether to institute a “loser pays” principle.

Although the lessons from the U.S. may be on the Commission’s radar, it remains possible that these or other features will become part of the final system, leading to the same or worse abuses. For example, on the one hand the Commission points out the perils of contingency fees for attorneys, while on the other it seeks input on possible methods of financing collective redress. Only a carefully conceived mechanism could “allow for the funding of meritorious claims but avoid any incentives for pursuing unmeritorious claims.”⁵

Given the importance of these issues to businesses operating in the European Union, we urge those undertaking significant business in the EU to consider submitting a comment by the deadline of April 30, 2011 by e-mailing public submissions to EC-collective-redress@ec.europa.eu.

² Federal Judicial Center, Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts 5 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CAFAProgressReport-Final.pdf>.

³ Her Majesty’s Court Services, Group Litigation Orders, <http://www.hmcourts-service.gov.uk/cms/150.htm> (last visited February 11, 2011).

⁴ Public Consultation, at 9.

⁵ *Id.* at 11.

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