

EJF position paper on proposed “producer responsibility” amendment to the Tobacco Products Directive

October 2013

The horizontal approach to mass consumer redress was adopted by the Parliament in the Lehne Report of February 2012¹. The principle was clear that there has to be a coherent framework for collective redress across the EU. Accordingly, mechanisms have to be standardized, there have to be built-in safeguards, and any sector differences would be accommodated subordinately in appendices to a horizontal legislative measure. This approach was recognised by the Commission in its Communication and Recommendation on collective redress of June 2013², though it has adopted a non-legislative route and has not proposed sector specificity for competition law infringements.

In the course of our monitoring of civil justice reforms in the EU institutions we occasionally see efforts to claim sector specificity as the basis for building on this EU-wide approach to collective redress, and for making different substantive rules for different sectors. We are seeing this impulse in the debates about possible EU legislation in the data protection and medical devices sectors, and in the consultation about environmental litigation and the application of the Aarhus convention.

The concept of sector specificity justifying different legal cross-border mechanisms and remedies may seem peripheral to much larger debates about the substance of the underlying legislation. Its implications can easily be overlooked or discounted. But such legal separatism carries risks. It risks losing the coherence and consistency which the Parliament and the Commission have prioritised in creating a common body of workable collective redress principles. It risks introducing unequal remedies for separate products or services areas. It creates the risk of a slippery slope where a precedent-setting change to substantive law ostensibly limited to one sector morphs into other sectors.

This note deals with the most recent case of such ‘legal separatism’: an interesting amendment to Recital 8 of the ENVI Committee Report on the Tobacco Products Directive.

In July 2013, MEP Karl-Heinz Florenz (EPP, Germany) introduced a vague sentence calling for “producer responsibility” of tobacco health care costs in Recital 8 of the Environment, Mental Health and Food Safety (ENVI) Report on the Tobacco Products Directive (TPD):

(8) In accordance with Article 114(3) of the Treaty of the Functioning of the European Union (hereinafter: “Treaty”), a high level of health protection should be taken as a basis, regard being had, in particular, to any new developments based on scientific facts. Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco, health protection should be given high importance, in particular to

¹ See the European Parliament’s 2012 Report: [“Towards a coherent European approach to collective redress”](#).

² See the Commission's initiative on Collective Redress http://ec.europa.eu/consumers/redress_cons/docs/com_2013_401_en.pdf and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013H0396:EN:NOT>

*reduce smoking prevalence among young people. To that end, Member States should promote smoking prevention campaigns, especially in schools and in media. **In accordance with the principle of producer responsibility, manufacturers of tobacco products should be made responsible for all health costs arising as a consequence of tobacco consumption.***

This proposed amendment floats a civil justice reform (which would apply to collective redress as much as to unitary actions) based purely on sector specificity. This has many drawbacks, outlined below. Whilst a Recital in a Report itself has little operative effect, it is symptomatic of the trend we have described, of devising a particular remedy to target a particular industry, without regard to the wider implications. “Producer responsibility”, itself a vague and legally questionable concept, could apply to any producer. The concept needs scrutiny, under which it collapses.

Recital 8 calls for a change in well-established legal doctrine. Under the EU’s Product Liability Directive 85/374/EEC, as well as general legal principles throughout the Union, liability of a product manufacturer is dependent on the existence of a defect in the product or a finding of fault by the manufacturer. Recital 8 appears to eliminate this requirement in the case of manufacturers of tobacco products, calling for “responsibility for all health costs” regardless of the existence of any legal basis for such responsibility.

The proposal is an attempt to unnecessarily overextend EU authority, infringing the judicial powers of Member States. Such a change would supersede the power of courts of the Member States to determine legal responsibility, in accordance with established law.

Furthermore, Recital 8 violates important principles of EU law:

- the principle of *subsidiarity*, in that it threatens to impose measures which, if required at all, could be sufficiently achieved by the Member States;
- *proportionality*, in that the measures cannot be said to be suitable and necessary to attain a Union purpose, and;
- *legal certainty*, by violating reasonable expectations of manufacturers not to be subject to retroactive liability for the sale of a lawful, heavily taxed and regulated product.

While the current focus of Recital 8 is on the tobacco industry, such language would set a dangerous precedent that could lead to efforts to target other industries. Creating a special liability regime that targets a single industry starts down a slippery slope leading to special liability regimes on an industry-by-industry basis.

The end result could be crippling for any of these industries who engage in legal, regulated enterprises providing products and services that consumers choose to use.

Recital 8 presupposes that “producer responsibility” of any industry needs strengthening. The fact is, however, that there is already adequate protection and recourse for consumers who believe that they have been wrongfully harmed by any product. The existing laws of EU Member States, including those based on their transposition of the EU Product Liability Directive, are already sufficient to address issues of manufacturer liability.

The Product Liability Directive already contains a provision that requires the Commission to review regularly the effectiveness of its legal framework for product liability. The most recent report from the Commission, dated September 2011, was drafted after widespread consultation with stakeholders. The Commission concluded that most stakeholders believe the Product Liability Directive “offers the real possibility of filing a claim for appropriate remedy and compensation for damage caused by a defective product.”

It is not appropriate to now attempt to circumvent the review mechanism provided for in the Product Liability Directive by imposing another separate mechanism for establishing liability on manufacturers on a product by product basis.