EUROPEAN Justice Forum

Institute for Legal Reform, BusinessEurope & AmChamEU Launch event

The State of Collective Redress in the EU

Summary of presentations

21 March 2017

The context in which the presentations were given was planted by the AmCham EU representative **Roger Coelho,** Acting Policy Director. He talked about the need for stability to drive US companies' investment decisions for the single market. Collective redress can dissuade US companies from investing in Europe. It frequently encourages frivolous litigation. Nobody benefits from a litigation culture except lawyers. Accountability can be achieved by ADR and ODR. A stable and trustable climate is required, not opportunistic litigation.

Lisa Rickard gave an outline of some of ILR's successes over the last few years in moderating the excesses of the class action system in the US. In 2005 the Class Action Fairness Act ("CAFA") improved the class action system by forcing many such cases to be commenced via the MDL procedure, but it did not do much to affect an extremely entrepreneurial set of trial lawyers. A new piece of federal legislation promoted by ILR is the Fairness in Class Action Act ("FCAA") which has introduced some novel concepts such as: claimants get paid before the lawyers(!), a mechanism to compensate, disclosure of TPF will be required. Over-inclusive opt-out is still to be reformed.

US plaintiff lawyers are spreading into Europe with litigation funders - who are crafting and financing these cases. Burfield Capital $30m into Hausfeld LLP to open office in Berlin focused on competition cases. £40m to Quinn Emmanuel to finance £14bn opt-out class action against MasterCard in London. Bentham Europe, owned by Hedge fund, funded case against truck maker for cartel €100bn. And now there is the Petrobras investor action filed in the Rotterdam District Court by investors outside the US under the auspices of Stichting Petrobras Compensationvbbb Foundation[1].

Not all of the features of the US system are required to replicate the abuses. Financial incentives that lower risk and incentivise the lawyers are already enough. Research confirms this. EU Commission's review of 2013 Recommendation presented the opportunity for the ILR study, the object of tonight's event. The state of play in 10 Member States was analysed, covering 16 collective redress mechanisms, and discussed across 6 key areas of interest: who may file a claim, compensation of representatives, loser pays principle, opt in/opt out, admissibility and certification standards and forum shopping.

Ken Daly summarised the ILR study's methodology and conclusions, which are contained in the document (link). Collective redress is a growing business. The Commission does not need to worry about an access to justice deficit. The study shows a wide range of collective redress mechanisms existing in 21 out of 28 Member States. Particular attention became focused on financial incentives and safeguards against abuse. None of the domestic class action mechanisms in the 10 countries studied adopt all the Recommendation guidelines and in particular adoption of safeguards is piecemeal, bespoke, and in some cases minimal. There are clear signs of a TPF market not just

[1] The coalition represents investors who purchased Petrobras securities on the BM&FBOVESPA exchange in Brazil and other securities purchased via transactions outside of, and not covered by, litigation in the United States.

emerging in some MS, but being encouraged. This leads ILR to conclude that the Commission needs to legislate for safeguards of the sort identified as desirable in the Recommendation, but tightened up. The study proposes a separate range of safeguards for collective redress procedures and for TPF.

Renate Nikolay, Head of Cabinet, Commissioner Jourova

The Commission is listening to the need for safeguards including the avoidance of financial incentives.

Would a hard law solution have been better for embedding safeguards consistently across the Member States?

We are undertaking a thorough review of the consumer law acquis. Central to this is whether the Injunctions Directive can be bolstered by inclusion of a collective damages mechanism. Is this the solution to the dilemma about whether to legislate or not?

The Injunctions Directive take up in MS is not good. Such an amendment could make it more relevant.

From the point of view of consumers Dieselgate is a very different problem from what it may look like to business. (Mary Terzino explained at the end of the panel discussion that the US Volkswagen settlement of $10,000 per driver was reached as a result of pressure from the EPA and DOJ. Plaintiffs' lawyers were allowed into the settlement discussions and class actions followed on from this).

We are looking at the issue of what to do in a multi-faceted way and have not made up our minds. The Commission will take seriously the safeguards and research. "We do not want to change the European justice culture".

Panel Debate

Jeroan Kortman, Stibbe Amsterdam

The key issue is what do we mean by access to justice? Is it "sue at any price" or is it to get full compensation to the consumers harmed? The Volkswagen case may present a credible compensation story but we are all aware of many cases that are not credible, i.e. sue at any price, which are clearly a lawyers' game. He then went on to describe a number of developments in the Netherlands which demonstrated a "race to the bottom". The Dutch courts are not worried about potential for abuse– the tenuous jurisdictional link needed for a stitching with which to commence the WACM process. Coupled with the move to opt-out, and see the CDC cartel case thrown out in Germany but accepted in NL or the case against BA by Chinese claimants thrown out in the UK but allowed in NL. The NL has ignored the Recommendation.

Heiko Willems BDI

The problem we saw in US cases about extra-territoriality, which has now disappeared as a result of Supreme Court decisions, has now moved across to Europe. In Germany the phenomenon has arisen in human rights and securities actions.

In Germany, the mechanisms are many and various but there is no horizontal form of class actions yet. However, in environmental cases BDI's members have noticed it's not about access to justice, it's about reputational threats.

We don't have an access to justice deficit – he cited the World Justice Project Rule of Law Index. Shows that the top 5 jurisdictions for access are Germany, Norway, Denmark, Singapore and Netherlands. We don't need any more access to justice in those jurisdictions.

Stephan Werninke DIHK

What is talked about as access to justice is really business models for US law firms. The law should not be an investment.

We are seeing the legal market across the EU being carved up into those jurisdictions that seize market share by being more competitive in providing standing for non-domicile plaintiffs, entry for claimants by facilitating third party funding, and innovative procedures. Even Germany does not want to lose out on this business.

We reject the possibility that the Commission is able to legislate, and we say it cannot help either in moderating the excesses of domestic programmes for the same reason: it is not in a position to avoid the dangers because it has not the power to legislate on safeguards. The result is a race to the bottom where individual jurisdictions are developing claimant friendly procedures to attract business. This is particularly acute for our thousands of SME members where it is the risk of reputational damage that is the principal concern.

Ken Daly

It is worth taking a careful look at whether class actions work for their class members. A very interesting prior study by ILR a few years ago, analysed actual pay-out in a sample set of consumer and employee federal class actions started in one year, 2009. Four years later the report concluded: in 14% of cases there was no solution at all; 31% of cases were dismissed by courts; 35% were withdrawn voluntarily by lawyers - who were paid, but there was nothing for the class; in the remaining 33% of resolved cases consumers may have got something but publicly available data exist in only 6 of those cases. Of these 5 delivered some returns but to small percentages of the class and in some cases so small as to be negligible: 12% of the class, 9%; 1.5%, 0.33% and 0.00006% of the class obtained something. The notion that collective redress delivers is wrong. Objective compensation must be achieved differently.

As to the Commission's powers, he has a more open mind. Civil justice rules in various sectoral legislations can and should be justified in the Treaty. The possibility exists that focusing on safeguards at EU level is justified. A minimum platform is required to avoid forum shopping, which the Study shows is being encouraged by developments in some Member State. MS have already enough class actions, we don't need the EU to give more, but safeguards are required.