Collective Redress in Europe: EJF Position Paper

Introduction

European Justice Forum (EJF)[1] is a coalition of international companies and organisations that support fair and balanced civil justice systems. EJF supports accessible and rapid resolution of claims that have merit, but at the same time it calls for an equally rapid and effective dismissal of claims that do not have merit. EJF seeks to avoid Europe experiencing the damage created by class actions in the United States.

European legislators are pursuing two policy goals:

- to ensure that – where it is merited -compensation is paid to more individuals and businesses more frequently, especially where there are multiple small claims; and
- to rectify wrongful market activity, through equalising imbalances, deterring wrongdoing and otherwise affecting behaviour, so as to encourage maximum competition and innovative, vibrant markets.

Until recently, the mechanism principally used by the authorities to achieve these ends was to adopt the US class action model. But now a new model is emerging among policy makers. This model is based on;

- Encouragement of voluntary settlement - ADR;
- Assistance by public authorities in encouraging restitution for consumers;
- Oversight by the court to ensure due process and to ensure that once a matter is resolved, no further proceedings are started;
- Relegation of collective litigation to the last resort.

This new model offers a more flexible and effective way of achieving consumer redress and avoiding the risks presented by class actions. The new model needs to be further developed so as to include safeguards to avoid unintended consequences.

The principal safeguards that EJF is calling for are:

- maintenance of the traditional European approach that enforcement of rights should be for the public authorities, thus minimising the need for any private litigation to enforce those rights;
- recognition of the fact that there are some types of actions that *must not* be

[1] *For further information please see our website: http://www.europeanjusticeforum.org or contact the EJF Secretariat at info@europeanjusticeforum.org*

submitted to any collective process, because the individual claims and characteristics of individual plaintiffs need to be assessed - product liability claims being a prime example;

- preservation of a defendant's right to establish its legal rights and obligations in court in every case where the defendant wishes to do so;
- recognition that, if a claim has merit and a company wants to resolve the matter voluntarily, such resolution is beneficial to all parties and can have the advantage of avoiding litigation and minimising potential reputational damage. In those circumstances, plaintiffs must show reason why the claim cannot be settled before they are entitled to start a class action;
- public authorities playing a neutral role both in filtering out meritless claims and, in other claims, in encouraging voluntary restitution where the parties are pursuing that course;
- at the same time, preventing public authorities from dictating the terms of any settlement or the amount of any compensation or exerting coercive pressure;
- ensuring that the courts provide oversight and endorsement of voluntary agreements so that no one else can make new claims based on a matter that has been settled;
- reserving any class action procedure to the last resort and, if collective litigation is to be employed, ensuring that the necessary safeguards and controls are in place; and
- in cases involving both the imposition of financial penalties by a regulatory authority *and* the award of damages for any consequent loss suffered by third parties, ensuring that the combined economic impact is taken into account so as to prevent organisations being unjustly burdened.

With these safeguards, it should be possible to promote resolution of disputes more quickly and cheaply than with litigation; to minimise the risk of frivolous or unmerited litigation; to ensure that rights to defend and due process are upheld and that the costs of dispute resolution processes are kept reasonable.

EJF's Approach is Research based

EJF was founded to promote the reform of European civil justice systems and to promote a new approach to collective redress that would minimise the risks of collective litigation.

In order to do so, EJF's priority has been to help provide financial support for an independent legal research to generate new thinking on collective redress and civil justice systems. The research programme is run at the Centre for Socio-Legal Studies in the Law Faculty of Oxford University. It is led by Dr. Christopher Hodges, an acknowledged expert in the field, who also benefits from previous experience as a practicing lawyer in defending class actions in the UK.

The Oxford research group has an international reputation, and the output of its research is contributing to the development of the new model for European collective redress. In addition to an impressive volume of publications in leading law journals,

Dr. Hodges has published in late 2008 *"The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe"*[2]*, which* provides an up to date account of the way that civil justice systems are evolving in Europe and how the EU Member States are currently dealing with consumer redress. The book also explores the new model for collective redress that is emerging in Europe.

The output of the Oxford research programme provides the intellectual basis of EJF's positions. .

Development of a new Model for Collective Redress in Europe.

The new model for collective redress that is emerging in Europe has the following elements.

1. ADR: The basis for the model is the well established practice of voluntary resolution of legitimate complaints supported by the extensive network of alternative dispute resolution systems to be found throughout Europe. Where it is appropriate, complaints can be resolved without the glare of publicity and the cost of litigation.

The extent of ADR mechanisms is illustrated by the more than 100 dispute resolution bodies that exist in the UK and by the EU Commission's Directive establishing ADR in all Member States for the resolution of cross border disputes. In Holland, the government passed a "Financial Settlement Law" in 2005 to encourage settlement of disputes where the parties were willing to adopt this route[3]. In the Nordic countries, the consumer ombudsmen help achieve resolution of complaints. In Portugal and Poland, a Consumer Affairs office of the government performs a similar task.

In many cases, voluntary resolution is attractive to all parties as a means of resolving complaints. However, these mechanisms do not force a company to settle litigation if it does not wish to do so. A company remains entitled to establish its rights and obligations in court, and it is important that this remains the case.

2. The Role of the Public Authorities: The second element of the new model is the role played by the public authorities. Such authorities do not have the power to impose restitution or to dictate the terms of any settlement, and to do so would be an

[2] Hart Publishing Ltd, 16C Worcester Place, Oxford, OX1 2JW, UK. Tel No: 01865 517530; E-mail: mail@hartpub.co.uk

[3] In Holland, collective litigation is available to seek remedies such as injunctions or court orders. However, it cannot be used as a means of recovering damages for economic loss. The Dutch government takes the view that such economic loss can only properly be assessed in individual litigation which permits a proper assessment of such issues as contributory negligence or a particular plaintiff's susceptibility to the damage alleged to have been caused. For this reason, the Dutch Class Action (Financial Settlement) Law was enacted to provide a framework for voluntary agreement on financial compensation. The law has successfully been used to resolve major claims for damages in the fields of financial services (Dexia); product liability (the DES pharmaceutical case); and shareholder actions (the Royal Dutch Shell case, in which shareholders were suing the company for being mislead as to the value of its oil reserves).

abuse of their position. But they can and do act as a neutral public official to encourage voluntary resolution where this is appropriate. They are also able to defuse a large number of complaints and lead the complainant to realise that he has no case in law, thus avoiding meritless claims and wasted litigation.

For example, each of the Nordic countries has collective litigation laws, but they are seldom used. Instead, consumer disputes are normally settled after discussion with the consumer ombudsman. The Danish consumer ombudsman has found that on the one hand some 40% of complaints are withdrawn when the complainants realise after discussion with the ombudsman that they do not have a legal right to compensation. On the other hand, the remaining 60% of cases are almost all resolved voluntarily when the ombudsman sees merit in the claim.

The experience of the Financial Services Ombudsman in London is similar.

Over the past 5 years, UK government has moved away from litigation as a means of dealing with disputes to a policy of restorative justice, whereby voluntary resolution is encouraged. The courts have long required parties to show that they are unable to settle a complaint before it is brought to court. Since 2008, there has been a statutory duty upon regulators and public authorities to encourage voluntary resolution where it is appropriate to do so[4].

For example, in the UK, it was found that some television phone-in competitions were being continued after the winner had been decided, with money being wasted by competitors on expensive phone calls that profited both the television and phone companies. As a result of action by OFCOM (the regulatory body for broadcasting organisations) the TV companies made management changes; improved internal controls; and, using their computer records to identify the victims, reimbursed those who had been cheated. All this happened within weeks and without the need for litigation. More to the point, the companies involved wanted to resolve matters voluntarily and to avoid litigation.

In Portugal, overcharging by mobile phone companies was resolved by those companies giving subscribers free calls at weekends.

3. Assessing the overall Economic Effect of Sanctions and Compensation: In the case of a demonstrated breach of regulations that would otherwise give rise to sanctions, the responsible authority should use its discretion to suspend or significantly mitigate sanctions as a means of encouraging voluntary restitution of legitimate third party losses.
The principle aim of government should be to achieve restorative justice – i.e. to compensate legitimate claims – rather than to impose penalties. In looking to a fair result, the cost of restitution and the willingness to make it need to be taken into account when considering any penalties for breach of regulations. There is no point in imposing massive fines as well as forcing compensation of third party loss if the

[4] The Regulatory Enforcement and Sanctions Act, 2008.

overall result is to jeopardise the future of a viable business. The overall effect of sanctions and compensation must be considered and a sensible balance reached.

This cooperative approach is to the benefit of all parties. But the role of the public official cannot be taken lightly, and it should be free from all conflicts of interest and undue influence from any interested parties. This is one of the reasons that the court must have an oversight role in voluntary resolution of disputes.

4. The Court to Endorse Voluntary Agreements and achieve Finality: The Court has a role in the implementation of voluntary resolution of legitimate collective grievances, by providing oversight and endorsement of agreements.

Any party to a dispute should be able to request the court to ensure that due process is followed in negotiations; that no one involved (including any public authority) has abused his position or used unfair influence; and that the terms of the agreement are reasonable. Subject to those conditions, the court should endorse the settlement in order both to make it legally enforceable. More important, endorsement of the agreement must preclude any other person raising any further complaint relating to the matter that has been settled.

A precedent for this combination of oversight and closure of the dispute is to be found in the Dutch Financial Settlement Law (see above).

5. Complaints that require the individual determination of legal rights: There are cases where individual issues predominate and a just outcome is dependent upon individual adjudication of legal liability. This will, for example, normally apply to product liability actions, where issues of causation and the individual characteristics of the plaintiffs need to be assessed in Court.

In such cases, a collective process (whether of litigation or dispute resolution) will not achieve justice. Consideration of all the different circumstances applying to individual litigants can only properly be assessed individual basis – see for example note 3 above with regard to the Dutch approach to the assessment of financial loss. Moreover, in the absence of such an assessment of legal rights and obligations, it would be unjust to oblige a defendant directly or indirectly to accept liability and to compromise his rights by entering into a settlement of claims.

The right of a defendant to have his case heard in court established across Europe, and nothing in the new model of redress denies the defendant that right.

Development of this new approach is occurring at two levels: within the national systems of the Member States, and at EU level. At national level, the new model is to be found in differing forms, for example, in the Nordic countries; in Poland; in Portugal; in Holland; and in the UK. At EU level, there has been no support for this new approach in DG Competition, but in DG Consumer Affairs, there has been a

considerable shift in position. Whereas originally, DG Consumer Affairs based its thinking on collective litigation as the only available remedy, their most recent papers show that voluntary dispute resolution has a major role to play and that collective litigation should be a last resort[5].

Nevertheless, collective litigation remains one of the options open to governments and it is important to ensure that it is contained and controlled by safeguards designed to avoid unintended consequences.

Collective Litigation

All European national systems already have collective court procedures whereby groups of people can obtain *injunctions* and *court orders* in the field of consumer law. In addition, 13 of the 27 EU Member States already have collective laws that permit *damages* claims. Those countries are in the process of extending their laws, and other countries - including Belgium, Italy and Poland - are in the course of bringing in similar procedures.

At EU level, there is heated debate over (currently) two separate proposals to introduce collective procedures for damages claims that would be binding in all EU Member States. The first of these proposals comes from the Directorate General for Competition (DG Comp) and is concerned with the recovery by individuals and companies of any damages suffered as a result of breach of EU competition rules. The second proposal is being developed by the Directorate General for Consumer Affairs (DG Sanco) as a general consumer protection measure to facilitate recovery of damages[6]. The rules proposed for collective litigation in sectoral (competition) measure proposed by DG Comp and in the horizontal (consumer protection) measure proposed by DG Sanco differ substantially from one another, and this inconsistency is likely in itself to present problems when it comes to implementation at national level.

EJF is concerned to ensure that both the EU and national authorities are aware that the US model can bring serious adverse consequences, and that in developing a new approach in Europe it is essential to include the safeguards that will prevent similar unintentional consequences in Europe. Governments have assumed that that the disadvantages of the US class action model will not enter Europe because Europe does not have jury trials in tort cases, punitive damages, or contingency fees, and because Europe does have a loser pays rule. But those differences are not enough. There have to be effective safeguards. The main point is unless the funding is available collective litigation cannot be afforded, but if the funding is available collective litigation is likely to be used to lead to adverse consequences.

[5] In April 2009, DG Consumer Affairs published a discussion paper setting out five options for redress of which only the last involved litigation. The paper positioned the other options (based on ADR) as the preferred approach.

[6] See however above for the positioning of litigation as the last option in DG Consumer Affairs' proposal for consumer redress.

The main safeguards that must be established are that:

- bad claims should be prevented from the outset;
- the merits of claims should be made clear as early as possible;
- there should be court certification of any class of collective claimants;
- that each claimant must be individually identified from the start – there should be so called no opt-out actions where cases are brought on behalf of a group of claimants without their having given individual consent or being individually identified;
- claimants should be obliged to use negotiation and public oversight procedures wherever appropriate before they are entitled to go to court, especially for mass claims;
- but that defendants need to remain to be entitled to establish their legal rights and obligations in court whenever they need to do so; and
- where – as a last resort – collective litigation is employed, there should be the safeguards that will prevent unintended consequences.

(a) Preventing bad claims; Before any claim is filed, the claimant should be required to submit expert reports and certifications adequately demonstrating the merits of the case. Similarly, the defendant must have the right to seek dismissal or summary judgement of the action by asking the court to examine the merits of the claimant's case. It will often be apparent to experienced judges that a case is too weak to justify trial. A great deal of expense – both to the parties and to the Court – can be avoided by such an assessment.[7]

There should also be effective gatekeeper mechanisms to help claims that lack merit being brought to Court. Experience in a number of jurisdictions has shown that the public authorities can play a significant role in this respect see above.

(b) Certification of Class*;* There must be a careful review of the members of any group bringing a case on a collective basis to ensure that there is sufficient similarity between the individuals comprising the group on order fairly to consider the case on a collective basis. Each individual must have suffered loss from the same or essentially similar events, and there must be no material differences in the claimants' backgrounds or characteristics that would result in the event having a significantly different effect on one compared to another. For these reasons, personal injury cases will not be appropriate for any collective process because of the need to assess liability and the quantum of any damages due on an individual basis.

(c) Individual Identification of Claimants; Collective litigation should only be on the basis of opt-in actions where each of the claimants is individually identified and positively elects to take part in the action. The Court should not accept any opt-out action, in which a case is brought on behalf of a class of claimants that are not individually identified but are described only by a general description.

[7] Note that in certain jurisdictions, plaintiff law firms file formulaic class actions based – for example – simply on a newspaper report, hoping thus to be the first firm to file a potentially lucrative case in court.

Unless claimants are identified, the Court cannot certify that they are an appropriate class in respect of which the case can be fairly tried. In a number of UK group legal actions in the 1980s and 1990s the initial class of plaintiffs was dramatically reduced by eliminating those individuals who could not even show that they had been exposed to the event that had allegedly caused them harm[8]. Had each of the claimants not been individually identified, it would not have been possible to establish this.

There are also serious ethical issues in allowing opt-out actions. A defendant has a right to know who is accusing him. Perhaps more important, it is not acceptable that an individual can find another person conducting a matter as important as litigation in his name without his consent. In some countries – for example Germany - it is contrary to constitutional law to do so.

In addition, there is the practical point that unless individual plaintiffs are identified, it is impossible either fairly to assess the overall amount of compensation that should be paid to a class of claimants or to distribute it to the individuals. Research has shown that in the United States, those who are not motivated to identify themselves in a class action do not generally identify themselves even when it comes to claiming part of any award made by the Court. The result is that the overall size of claim is greatly exaggerated (with consequent benefit to the plaintiffs' lawyers) and significant sums are not distributed to plaintiffs[9].

(d) No litigation to be brought by claimants if voluntary procedures will work: There needs to be a requirement for claimants to demonstrate that *where appropriate* they have made good faith efforts to settle their dispute through voluntary dispute resolution processes before they are allowed to bring a collective suit in court. Clearly, this requirement will not apply to claims for which any collective procedure is inappropriate, such as product liability claims. Equally, where a defendant makes clear that he needs to establish his rights in court, there can be no compulsion to use voluntary procedures, since this would simply be a waste of time and money to both sides.

(e) The Loser Pays Rule: In contrast to the USA, the loser-pays principle applies to civil litigation in Europe. The party that loses its case is obliged to reimburse the other party's reasonable expenses[10].

"Reasonable expense" is interpreted differently from country to country. In the UK it means that usually 50 – 60% of the winning party's costs are reimbursed. In other jurisdictions the proportion is higher. In Germany, the figure is typically 100%, if the case is 100% won. Overall in Europe, the average recovery is around 65%.

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[8] See "Multi Party Actions" by Dr Christopher Hodges, Oxford University Press, 2001

[9] See "The Reform of Class and Representative Actions in the European Legal System: A New Framework for Collective Redress" by Dr. Christopher Hodges, Hart Publishing Ltd: mail@hartpub.co.uk

[10] The exceptions to this rule tend to be particular types of litigation. For example, in the UK it does not apply to small claims procedures or labour or housing cases. But the rule is well established for serious civil litigation.

It is essential to maintain the loser pays rule.

(f) The control of litigation funding: In contrast to the United States, contingency fees are banned almost throughout Europe. It is therefore politically realistic to support the status quo and to seek to ensure that such fees are not allowed.

There are a variety of success fees that are allowed in one form or another in most European countries. Broadly speaking, these allow the plaintiff's lawyer to receive an uplift in their normal fee rate if they win a case. But arrangements whereby the lawyer takes part of any award of damages are not allowed in Europe.

Again in contrast to the United States, third party process funding for collective litigation is established in countries that account for some 60% of the whole EU economy. There are other countries or regions of Europe where it is unlikely that a buoyant market for such funding will emerge. For example, in the Nordic countries collective litigation is less likely to emerge, since the use of collective litigation is so limited. To that extent, there is the opportunity to limit or prevent the expansion of third party funding. However, in EJF's view it is politically unrealistic to expect the governments in those countries where such funding is established to introduce legislation banning such arrangements.

Instead, what is important is to argue for strict controls on such funding and court supervision to ensure that it does not create conflicts of interest[11]. EJF has, for example, made such submissions in the UK to Lord Justice Jackson, whose report on the costs and funding of litigation in England and Wales will include consideration of third party funding.

Summary

There is emerging in Europe a new model for collective redress that positions collective litigation as the last and not the first resort and that contains many features that EJF supports as part of a balanced civil justice system.

The new model is in the process of being developed, and EJF is seeking to ensure that it incorporates the necessary safeguards.

Since collective litigation is already established in Europe, it is essential that governments understand the risks and incorporate safeguards that will minimize those risks.

[11] The impact of the loser pays rule in Europe acts as a brake on such funding. Any investor in litigation needs to assess the chances of failure that will expose him not just to absorption of his own costs but also to payment of the costs of the successful litigant. The evidence is that third party funders are looking for a more than 60% chance of success, and that their assessment of risk is sophisticated and far more rigorous than the almost non-existent assessment that used to obtain in the UK in awarding government legal aid to plaintiffs in the days when such aid was available.

In summary, EJF supports a tiered approach to collective redress based on::

- voluntary dispute resolution rather than litigation in cases where settlement is appropriate;
- a balanced and neutral role for pubic authorities in encouraging fair resolution of disputes where that is appropriate;
- oversight by the court to ensure due process and to ensure that once a matter is settled it cannot be reopened by any person;
- the right of companies to defend their position in court if they wish to do so
- preventing cases being submitted to any collective process where – as in product liability – such a process is inappropriate; and
- ensuring that where collective litigation is used, the necessary safeguards and gatekeeper mechanisms are in place.
