FRESHFIELDS BRUCKHAUS DERINGER

Developments in class actions and third party funding of litigation

Maturing themes across Europe?

Autumn 2009

Contents

Introduction	1
European developments	3
Austria	7
England & Wales	9
France	25
Germany	30
Italy	34
The Netherlands	39
Spain	44

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Introduction

Class actions and third party funding have continued to be very topical over the last year, both at national and European levels. We therefore thought it would be helpful to provide clients with an update to our June 2007 and February 2008 publications on these subjects[1].

For some countries the collective redress proposals look radical on paper. However, the political process is not complete and the end product may look quite different. For example, new legislation in Austria that had been due to come into force in 2008, has been delayed and is subject to ongoing amendments; in France, although there has been continued debate as to change, concrete proposals are yet to emerge. But there have also been some significant substantive movements including the government response to significant proposals in England and approval by the Italian Parliament of new laws.

The European Commission is pushing for changes for consumers: a survey it carried out found that 76 per cent of European citizens would be more willing to defend their rights in court if they could join with other consumers with similar complaints. The Commission has also been active in the competition sphere.

In the current economic climate securities class actions in the US rose significantly in 2008 compared to 2007. The majority of the filings were related to the financial crisis, with defendants in the financial sector being the target of the suits. But recent findings by Stanford Law School show that federal securities class action activity then declined in the first half of 2009, although lawsuits against issuers with non-US headquarters (foreign firms) continue to rise. This is in accordance with a wider trend of increased filings against foreign firms over the last decade. The key question for claimants is whether they fall under the jurisdiction of the US courts in such cases.

However, the US courts have taken a cautious approach to the scope of their jurisdiction; two recent judgments by the New York federal courts involving mainly foreign shareholders bringing securities class actions against AstraZeneca and GlaxoSmithKline, raised the issue of lack of subject matter jurisdiction. In the AstraZeneca case the court took the view that Congress had not intended that the reach of US securities laws should extend to include disputes relating to the purchase by foreign investors of shares on foreign exchanges. It seems that the US courts are not prepared to be used in cases where claims should be brought in the claimants' home courts.

Of significance in Europe has been the progress of the settlement of the Shell reserves mis-statement case under the Dutch settlement mechanism.

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[1] Copies of these publications are available at http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf and http://www.freshfields.com/publications/pdfs/2008/feb20/21722.pdf

At the end of May the Dutch court upheld the settlement between Royal Dutch Shell and a group of more than 150 institutional investors from 17 European countries, Canada and Australia, making it binding on all those who do not opt out of the settlement arrangement. This marks the first time that the innovative Dutch settlement system has been used in an international dispute with the majority of injured parties residing outside of the Netherlands. There may be scope in the future for foreign firms at risk of jurisdiction in the US to settle collective claims outside of the US using this mechanism.

A considerable portion of this update is concerned with developments in England & Wales reflecting the very considerable amount of activity that there has been in this jurisdiction over the past 18 months.

We hope you find this update interesting and useful. As always please do not hesitate to contact us should you have any questions.

European developments

European Commission Green Paper on consumer collective redress[2]

'Class action is about revenge; our policy is about redress', according to a senior EC official.

On 27 November 2008 the European Commission published its anticipated Green Paper on consumer collective redress (the Green Paper), launching a public consultation on the options for a collective redress system for victims of illegal commercial practices across Europe, both in national and cross-border contexts. Responses were requested by 1 March 2009.

This work-stream is separate from the Commission's specialist work in relation to damages actions for breaches of EC antitrust rules (including the proposal in the cartel damages White Paper for a collective redress mechanism – see below). However, the two Commissioners are working closely together and agree that compatibility between the proposals is essential, even though the initiatives focus on distinct areas. For example the Green Paper only covers redress for consumers, whereas the White Paper in the competition sphere contains proposals designed to benefit both consumers and businesses.

In its Green Paper the Commission expressed concerns that EU consumers face material barriers to claiming redress in terms of access to justice, effectiveness and affordability and the fact that collective redress mechanisms currently vary between Member States resulting in diverse results. However, the Commission has only floated possibilities in its Green Paper and this does not advance the debate substantively.

- Option 1 – No EC action at all.
- Option 2 – Cooperation between Member States to make it easier for European consumers to use the various different collective redress mechanisms available in different Member States, either via a Recommendation and/or a Directive. In parallel, a Recommendation could lay down a set of minimum standards for all Member States' systems to satisfy.
- Option 3 – Mix of policy instruments that together would enhance consumer redress by circumventing the existing barriers to claims, for example high litigation costs, complexity and length of proceedings, and consumers' lack of information on the available means of redress.
- Option 4 – A Europe-wide judicial collective redress procedure; this is clearly the most controversial and radical option, being a centralised solution effectively creating a pan-European 'class action'.

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[2] For further information, please see our client briefing entitled Consumer class actions in the EU dated April 2009 which is available at http://www.freshfields.com/publications/pdfs/2009/apr09/25640.pdf

The Commission highlights several factors for consultation under Option 4 (many of which are already 'in play' at a national level), including funding issues, the need to prevent unmeritorious claims, standing for cross-border issues and the issue of opt-in or opt-out. The Commission wants to avoid elements that might encourage a 'litigation culture', such as punitive damages and contingency fees.

If, and this is a very significant 'if', Option 4 were to be adopted, Member States, many of whom have just completed or are in the process of introducing reforms of their own collective redress mechanisms, would have to revisit their position to ensure that the national and European mechanisms would work together.

In May 2009 the Commission published the responses it received to its Green Paper[3]. A large number of the responses came from the business sector but feedback was also received from public authorities, consumer organisations, legal practitioners and academics. A feedback statement[4] produced by external consultants provided detailed analysis of the contributors' opinions on the various policy options put forward in the Green Paper for promoting access to consumer collective redress and identified additional issues raised by the contributors. The feedback statement concluded, not surprisingly, that there is considerable difference and in some cases antagonism between the views of the various stakeholders.

The Commission has now published a Consultation Paper[5] presenting a first working analysis of the impact of the proposed policy options in light of the replies to the Green Paper. The consultation seeks to gather further information regarding the impact of the policy options on each national redress system. The Consultation Paper sets out:

- the scale of the problem and the reasons for deficiencies in existing redress systems;
- the policy objectives of the Commission in relation to consumer collective redress;
- the five policy options proposed ((i) no action; (ii) developing self-regulation; (iii) non-binding collective ADR schemes and judicial collective redress schemes in combination with additional powers under the Consumer Protection Cooperation Regulation; (iv) binding collective ADR schemes and judicial collective redress schemes in combination

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3 Copies of the responses are available at http://ec.europa.eu/consumers/redress_cons/response_GP_collective_redress_en.htm

4 A copy of this is available at http://ec.europa.eu/consumers/redress_cons/docs/feedback_statement.pdf

5 A copy of this is available at http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf

with additional powers under the Consumer Protection Cooperation Regulation; and (v) an EU-wide judicial collective redress mechanism including collective ADR);

- the criteria used for analysing the impact of the policy options; and
- an analysis of the benefits, costs and other impacts of each policy option.

Responses to the consultation were required by 3 July 2009 but have not yet been published. It seems that the Commission is still in favour of promoting an EU-wide solution to the perceived problems in the area of consumer collective redress with ADR being a significant element. A White Paper is expected later this year, although European Parliamentary and Commission elections this year may have an impact on the timetable.

White Paper on damages for breaches of antitrust rules

On 2 April 2008 the European Commission published its White Paper on damages actions for breach of EC Treaty antitrust rules. This recommended a broad range of measures aimed at ensuring that all victims of anti-competitive behaviour are able to obtain full compensation for harm suffered.

Although the White Paper was relatively cautious – for example it rejected the more radical proposals in the preceding Green Paper for double damages and/or forms of award that compensate more than real value in favour of a model compensatory damages (plus interest), a number of its proposals did advance a collective action approach. The Commission was particularly concerned that the disparate small claims of many victims of anti-competitive behaviour go uncompensated. It proposed allowing representative actions to be brought by designated bodies (such as recognised consumer groups or trade associations) on behalf of a group of identified, or in limited circumstances, identifiable victims. In addition it recommended that groups of claimants should be permitted to bring a collective action on an 'opt-in' basis.

The consultation closed on 15 July 2008. On 26 March 2009 the EU Parliament adopted a resolution supporting the White Paper and made recommendations to the Commission on establishing a redress mechanism that would accompany and not replace existing alternative forms of protection in some Member States.

Neelie Kroes, the Commissioner for Competition, has said publicly that she is in favour of introducing only an opt-in mechanism and again stressed that the Commission is not proposing anything like the US system, recognising that the legitimate interests of defendants must be fully protected and that procedural rights of all parties must be well balanced. In particular, she has said that the Commission will ensure that representative actions cannot be brought by uncontrolled litigation vehicles pursuing their own financial interests instead of the interests of the injured parties, because businesses should not be at risk of speculative litigation.

Once again, European Parliamentary and Commission elections this year may have an impact on the timetable, although it is anticipated that a draft

directive will be published before the end of this Commission's mandate. The unofficial draft circulating, and which will evolve before publication, appears to leave open the possibility of harmonised systems of group and representative actions, perhaps even on an opt-out basis.

Austria

Discussions about the implementation of a group litigation mechanism have continued in Austria. In the summer of 2007 the Austrian Government submitted a draft amendment to the Austrian Code of Civil Procedure (*Zivilprozessordnung*) providing for group litigation in a formal sense to the Austrian Parliament. The Government had planned for the amendment to come into force on 1 January 2008. However, criticism of the draft has delayed that process.

The new Austrian Government (formed in November 2008) once again included formal group litigation proceedings in Austria in its program. The previous Government's draft amendment to the Code of Civil Procedure will serve as a basis for further governmental negotiations. However, two particular modifications to the draft amendment are included in the new Government's program:

- the group litigation mechanism would only be available for a minimum of 100 plaintiffs (50 plaintiffs were sufficient under the terms of the previous draft); and
- the amount in dispute has to be a minimum of €20,000.

The main purpose of the proposed system is to group together similar claims of multiple parties and to ensure faster and more efficient proceedings. Therefore only claims requiring a decision based on similar questions of fact or law can be brought together.

In general terms the draft amendment provides the following as detailed below.

- In order to initiate group litigation proceedings before an Austrian court, the complaint will have to include an explicit application for conducting group litigation. In that document, the plaintiff must assert and furnish prima facie evidence that several parties have claims with a similar legal or factual background against the same person. If the plaintiff is able to provide such prima facie evidence, the court will issue an official note on its public internet page thus informing the public that a complaint, together with an application for group litigation proceedings, has been filed. The note must also include details of the contents of the complaint.
- After a period of 90 days the court will decide the following questions:
  - whether group litigation proceedings are admissible in connection with the respective complaint; and
  - the parties who will participate in the proceedings. This decision will depend on the number of parties who have joined the proceedings as further plaintiffs within this period. It is only if 100 plaintiffs have joined the proceedings and all have similar claims that the court will

continue the group proceedings. Therefore this process is expressly an opt-in arrangement.

- After the court has approved the admissibility of group litigation proceedings other parties may join these proceedings within six months. They must do this by filing a brief with the court which includes the contents of a complaint and an application for the approval of their joining the proceedings. This brief will therefore have the effect of a complaint (eg suspension of the limitation period for the claim) and the joiner becomes a party to the proceedings as 'group plaintiff' (*Gruppenkläger*).
- The group plaintiffs are entitled to opt out of the proceedings at any time (and file an individual complaint), but must bear their share of the costs incurred in the group proceedings on a pro-rata basis.
- The draft amendment also provides for the nomination of a group representative (*Gruppenvertreter*) who will represent all plaintiffs joining the group litigation. The group representative must observe the procedural rights and obligations of all plaintiffs and take the necessary procedural steps on their behalf.
- Finally the group litigation proceedings will only deal with the facts and legal questions that are common to all plaintiffs and the court will only render a declaratory judgment on such mutual questions of fact and law. The court will not decide on the individual claims of the group plaintiffs. For this purpose they would have to file an individual complaint within three months after the declaratory judgment has become finally binding. Those that have not joined the proceedings would not be bound by the result.

As this draft amendment will be subject to further governmental negotiations it cannot be ruled out that the new Government will modify this draft and present a new version to the Austrian Parliament. Therefore it still remains unclear exactly what form any new system for formal group proceedings will take in Austria or when it will come into force.

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England & Wales

Introduction

2008 was a busy year in the areas of collective redress and third party funding and that activity continued into 2009. Two major initiatives have been underway since the publication of our last update in February 2008.

On the collective actions side the Civil Justice Council (CJC), an advisory group to the Minister of Justice, published interim and final recommendations to the Government for the reform of collective redress procedures,[6] to which the Government has just responded[7]. The CJC's most controversial recommendation was the introduction of a new generic right of collective (ie 'class') action, that at the judge's discretion could have been on an opt-out basis. However, as had been widely anticipated the Government rejected that central recommendation. Instead it has proposed change on a sector-by-sector basis, which means that development of this area will be piecemeal, not always consistent and at a speed reflecting the need and the assessment of the relevant sponsoring government department. As a result, change is likely to be granular and slow particularly in those sectors that are low priority or more complex. However, there may be faster progress in areas such as financial services and competition law, where thinking is already more developed and pressures for change are more acute.

In taking this stance the Government has indicated a preference for enhancing the powers of regulators to award compensation between private parties. However, it remains to be seen how willing regulators will be to take on this role, given that it is an area in which they may have limited resources and experience. Moreover, defendants may not relish being subjected to processes that may not be applying the rule of law (an ombudsman can act on general fairness criteria), that may reflect regulators' wider policy objectives and that may not be challengeable.

On the funding side it was announced in December 2008 that a costs review would be undertaken by Lord Justice Jackson to review the rules and principles governing the costs of civil litigation. Jackson LJ's brief is to make recommendations to promote access to justice at proportionate cost. A preliminary report of his findings was published earlier this year in May, with the final report expected in December. The ambit of Jackson LJ's

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6 Please see our briefings from August and December 2008, which are available at http://www.freshfields.com/publications/pdfs/2008/aug06/23650.pdf and http://www.freshfields.com/publications/pdfs/2008/dec08/24906.pdf

A copy of the Final Recommendations is available at http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

7 A copy of the Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions' dated July 2009 is available at http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf

review is wide, covering the whole of the litigation process and includes the 'loser pays' rule, third party funding and CFAs/contingency fees in relation to litigation funding. It is clear that the potential impact of Jackson LJ's work is very significant and its results are eagerly awaited.

Collective actions

Government response on the CJC's Recommendations on collective redress

In August 2008 the CJC published its draft recommendations to the Lord Chancellor for a more efficient and effective procedure for collective actions including some very significant proposals. In particular, a new generic collective action including a possible 'opt-out' methodology was put forward, to be piloted by sector and by specific reform (for example in the competition law area). The final recommendations followed in December in a similar format, but included draft procedural rules and a draft practice direction.

On 20 July 2009 the Government provided its response. Although it agrees with some of the CJC's recommendations, it has rejected the introduction of a new generic right of collective action, favouring instead a piecemeal approach on a sector-by-sector basis (eg consumer protection, financial services, employment rights and competition law). The sectoral approach echoes the approach proposed earlier in July in the Consumer White Paper and the Treasury White Paper for consumer and financial services claims respectively (for further information on these proposals please see below) and was not surprising in the light of these earlier signals.

The key assumptions behind the CJC's proposed reforms had been that ombudsman or regulatory systems are not well suited to the resolution of the wide range of possible detriment that can give rise to the need for large scale remedial action; private enforcement is to be preferred to state funded regulatory intervention; and the current system does not provide sufficient or effective access to justice for consumers, small businesses or employees wishing to bring multi-party claims; given the overwhelming evidence that meritorious claims that could be brought are currently not being pursued.

The Government was not convinced by the evidence presented in favour of a need for extensive reform. Whilst acknowledging the findings that a larger number and range of collective actions have been brought overseas compared with the use of the Group Litigation Orders in England & Wales, the Government's view is that without consideration of the wider economic, social and legal contexts, such comparisons do not constitute direct evidence of need in this jurisdiction. It also feels that there was little consideration or evidence of the wider economic impacts of the overseas systems and whether these have been negative, positive or neutral or of whether there were viable alternatives to the creation of opt-out collective actions. The Government specifically states that it views litigation as the dispute resolution system of last resort. So before proceeding to look at court-based solutions it considers it important to consider alternatives and,

in the context of problems affecting a large number of people, to examine in particular whether there are viable regulatory alternatives.

The main points made by the Government are summarised below.

- Change should be introduced only where there is evidence of need following an assessment of economic and other impacts and consideration of alternative approaches. The approach may vary between sectors according to their respective economic and regulatory circumstances, including as to the authorisation of representative bodies and the allocation of damages. For that reason primary legislation, which will be necessary in the case of significant change, will be sector-specific and introduced by the government department concerned. Given the pressure on the legislative timetable this itself is likely to cause delay in many areas.
- Regulatory options should be considered before introducing court-based options. For example in some sectors it might be appropriate to give regulators power to order the payment of compensation in addition to, or instead of a financial penalty. While regulatory aims and objectives are usually strategic and not specifically focussed on compensatory objectives this does not preclude their adaptation for this purpose. The Government seemingly believes that certain regulators may have the capacity to deal with matters in a holistic and relatively inexpensive and timely way, depending on the resources available to them.
- The Government is open to expanding the use of representative bodies to conduct group actions using existing processes in appropriate circumstances. The CJC had proposed broadening the nature of representative bodies that can bring claims to include single representative claimants, and ad hoc bodies as well as authorised bodies such as consumer watchdogs. In line with the Government's view that collective actions should be introduced on a sector-by-sector basis, it does not believe that there should be a single approach or set of approaches to the issue of authorisation. It could rely on ministerial designation of one or more bodies or categories of body or ad hoc court authorisation against generic or sector-specific criteria or a combination of both as determined by the relevant government department.
- The distinction between opt-in and opt-out models for collective actions is not necessarily clear-cut since the Government considers they are, to some extent, part of a continuum. The key point is the stage in the process at which claimants have to come forward and/or admission to the class action is closed (ie (i) before the claim is issued (pure opt-in model); (ii) before the common issues of liability are decided (a hybrid model); (iii) after the decision on liability but before the quantification of damages (a further hybrid model); and (iv) after the quantification of damages where the surplus damages would be returned to the defendant or distributed on a cy-pres or other prescribed basis eg to fund other collective litigation or surrendered to the Treasury (fully-fledged opt-out

model)). The appropriate model or models for representative actions will need to be considered on a sector-by-sector basis, but, in most cases, a hybrid opt-in model will be preferable to an opt-out model.

- Compensatory damages is the basis of the English system. However, disgorgement of profits might be introduced in appropriate sectors (particularly for enforcement and sanction purposes) by the legislation creating the specific representative action. This would require a change of substantive law, and would be applicable in all claims of the type concerned, not just class actions, and so would need to be assessed on its own substantive merits rather than as a mechanism to facilitate a procedural solution.
- There should be strong case management by the court, including the use of a strict certification procedure, as proposed by the CJC. Issues likely to form part of a court certification procedure include:
  - whether the claim has legal merit;
  - whether the likely benefits justify the likely cost;
  - whether the claim could be achieved more cost-effectively by a non-court mechanism (such as regulatory action or via an ombudsman);
  - if litigation is appropriate, whether a collective action is the most appropriate route (rather than individual claims, a GLO or a test case);
  - whether the representative body or party is likely to be able to meet the defendant's costs if unsuccessful, whether from insurance, its own resources or otherwise and whether to order the payment of security for costs; and
  - depending on the statutory provisions in the particular sector, authorisation or approval as suitable of the proposed representative body or party.
- The existence of effective ADR mechanisms in any collective action procedure will be crucial and encouraged as an alternative to litigation.
- The CJC had recommended that settlements be approved by the court in a 'fairness hearing' with echoes of US practice. The Government considers that such a regime could bring potential benefits in terms of ensuring that collective actions operate fairly and in the interests of all represented parties. However, it will also impose additional costs and increasing the costs of settlement could be a potential disincentive for parties to settle. Therefore the Government considers that it will be necessary to weigh the benefit of such a requirement against the costs and to determine whether this is something to apply generally or whether it should be on a case by case basis at the court's discretion.
- The 'loser pays' principle for costs should be maintained to help deter unmeritorious litigation, as proposed by the CJC. The Government recognises that the absence of the loser pays rule has led to cases with little merit being brought before the courts and also so-called 'blackmail

litigation' whereby unmeritorious claims are made with the intention of forcing the defendant to settle on an objectively unreasonable basis. In particular the system of 'notice pleading' available in the US (where the alleged wrong need only be described in general terms) has encouraged this tendency. In this area the Government is sending an early indication of its thinking in relation to a number of issues relating to qualifying the loser pays principle that have been floated in Lord Justice Jackson's review (for further information on this, please see below).

- The Government proposes to develop a framework document in the second half of 2009, setting out the issues to be addressed when introducing a right of collective action, with options and where appropriate a preferred approach, to assist policy makers and legislators. It will cover specifically:
  - regulatory and other alternative options;
  - options and criteria for designating or authorising representative bodies;
  - funding options;
  - issues surrounding opt-in, opt-out and hybrid models and the associated issues around damages and limitation periods; and
  - enforcement and in particular cross border issues.
- In addition, the Ministry of Justice will work with the CJC and Civil Procedure Rule Committee to develop flexible generic procedural rules within which any collective action scheme can operate.

The CJC had included in its detailed rules a number of 'brakes' to control abuse. The sentiment behind a number of these has been taken on board by the Government in framing its response. The potential scope of any brakes in the sector-specific regimes will be clearer once the framework document is published but will depend on the specific primary legislation drafted for each particular sector. As is often the case with procedural reforms, the devil will be in the detail, made more complicated in this context given the potential for inconsistent approaches across different sectors. Even after any legislation comes into force much may depend on the practice of English judges as to how dramatic the actual shift in the litigation paradigms will be. This is because much emphasis is put on the role of the judiciary as gatekeeper by the Government and by the CJC.

So depending on the priority that the Government gives to this issue (against the background of an election timetable) there may be support for more collective actions in certain sectors in England & Wales. There could also be a move in favour of disgorgement or profit stripping (rather than the traditional compensation) – this would be a significant shift from the current position.

It is far from clear that a complaint to a regulator who will award damages will be a better scenario for a prospective defendant than a collective action in court appropriately controlled. Regulators may lack the resources and

skills required to award inter-party compensation on the basis of legal merits (a wholly new role for them); it is not clear that these processes will apply law (they might be given some general power to do what is 'fair') nor that they will be sufficiently independent or free from policy drivers or indeed that the decision will be binding on all parties. Finally it is unclear whether these processes will generally be subject to judicial scrutiny (except in extreme cases meriting judicial review). What businesses might be left with (as discussed below) would essentially be an opt-out class action structure before an ombudsman (which some might regard as the perfect storm). On current experience so far non-court based systems have been shown to be ill-equipped to deal with high volumes of cases, leading to arbitrary results and making it more difficult to achieve a binding settlement. A lot will obviously depend on precisely what powers are given to the regulators and how they use them. Some indication of what will emerge in the consumer and financial services sectors can be gleaned from the recent White Papers in these areas, referred to below.

This diverse sectoral approach with a mixture of regulatory action and enhanced group action, to the extent that it results in genuine change, will make life a lot more complicated for companies.

The European Commission's Green Paper on Consumer Collective Redress

For further discussion of the Green Paper at a European level see above in the section entitled 'European developments'.

- **UK Government Response to the Green Paper**

  Not surprisingly the UK Government favoured a mixed approach combining public enforcement with private rights of redress. Option 3 was therefore the preferred option as it offers a mix of binding and non-binding instruments but does require Member States to provide access to compensation whilst allowing them to develop solutions that best suit their existing legal framework.

  In relation to Option 3 the Government suggests that whilst it is supportive of consumer organisations that pursue private litigation on behalf of a group of consumers, there are problems in devising a proportionate mechanism to allow consumers to obtain collective compensation. The Government suggests that public enforcement may have a role to play to resolve this issue using available civil sanctions to fund collective redress via a 'public-interest' test. In the Government's view, if applied to groups of consumers, this could mitigate potential abuse and reduce the costs of collective litigation.

  Option 1 was rejected on the grounds that the EU needs to take positive action to create access to redress across the EU. Similarly Option 2 was seen as insufficiently harmonising as the diversity of actions available under the legal systems of each member state would make a truly European solution difficult. The Government's response acknowledges that with appropriate implementation, a judicial collective redress mechanism as suggested under Option 4 could avoid the feared US-style

of class action. However, it highlights the potential difficulties in terms of funding, the necessary safeguards to avoid unmeritorious claims and problems arising out of the distribution of compensation.

On the opt-in/opt-out point the Government feels that opt-in cases can be time-consuming, but that opt-out cases remain open to the possibility of abuse and suggests that the decision on this should be left to each Member State individually. Additionally the Government indicates that no approach should be based solely around a judicial procedure without emphasis on alternative measures such as ADR.

- **The OFT Response to the Green Paper**

  The OFT took an independent position from the Government, with a more aggressive stance in favour of consumer redress in the competition area. It was in favour of a binding, effective system that delivers redress to consumers (with appropriate safeguards) and therefore supported Option 4 (ie a consistent judicial collective redress procedure in all Member States). It believed this to be the best way to avoid the inconsistencies and complex problems of differing legal systems and regimes. The OFT's preferred solution would be to set up a court process that could be used in all jurisdictions and open to both competent bodies and consumers. This was recommended as the most flexible approach, even though it is potentially the most complex one. The OFT also suggested that such a mechanism could be limited to cross-border cases only 'at least initially'.

  In terms of opt-in or opt-out, the OFT prefers a hybrid so that certain specific designated representative groups (ie only those groups with sufficient expertise and resources, who are more likely to have regard for the potential reputational effects of bringing spurious claims) could bring opt-out claims, with other groups bringing only opt-in claims. Moreover, it suggests a minimum value threshold for claims that would trigger the opt-in system.

  The OFT rejected Option 1 on the basis that relying on existing systems will be insufficient in view of low consumer confidence in cross-border transactions. It also rejected Option 2 on the basis that bilateral agreements between Member States may lead to inequalities and inconsistencies for businesses and consumers alike. Option 3 is rejected on the basis that none of the various options outlined (improved ADR etc) would provide a short or medium-term solution to the problems facing consumers, although the OFT acknowledged that these are important parts of an effective system and need to be discussed further.

- **Reactions from the business sector and from consumer organisations**

  Unsurprisingly the majority of the industry representative bodies who submitted a response to the Green Paper strongly reject Option 4. Consumer organisations evidently have a different approach though and see the merits of a court-based EU-wide collective redress system on an opt-out basis, with such measures being brought into place by binding

instruments. They also consider the ability of consumer representative groups to pursue a claim on behalf of consumers to be an important part of access to collective redress.

There have been a number of other recent developments in Engand & Wales.

- Irrespective of any policy discussions relating to class actions, the Court of Appeal decision in *Devenish Nutrition Limited v Sanofi-Aventis SA (France) & Ors*[8] confirmed that restitutionary remedies are not available in cartel damages actions and that compensation is the appropriate measure of redress.

- In April 2009 in the case of *Emerald Supplies Limited & Anr. v British Airways Plc*[9] the High Court denied representative action status in respect of a claim for damages coming out of international investigations into price fixing in the airfreight industry.

  The claimants had claimed damages on their own behalf as well as all other direct and indirect purchasers of airfreight services claiming they all had the 'same interest' and would merit representative action status. The court held that the representative action failed in this case as the members of the class would only be identifiable (if at all) if the action were successful rather than at the time when the action was brought. In addition, the class members did not have the same interest because proof of damages depended on whether the inflated prices were absorbed or passed onto customers. This shows that the courts will not allow opt-out actions to be introduced into England via the backdoor. The claimants have requested permission to appeal.

- On 2 July 2009 the Secretary of State for Business, Innovation and Skills published a Consumer White Paper entitled 'A Better Deal for Consumers: Delivering Real Help Now and Change for the Future'[10]. The proposals include the appointment of a Consumer Advocate who will 'be a champion for groups of consumers who have suffered a loss at the hands of a business'.

  The Consumer Advocate's role will amongst other things be to monitor cases where a large number of consumers have been affected in a similar way and to liaise with relevant enforcers and seek to help businesses propose a satisfactory compensation package on a voluntary basis. Where a business is not prepared to provide compensation voluntarily the Government is considering equipping the Consumer Advocate with the power to bring a collective action to obtain compensation on behalf

8 [2008] EWCA Civ 1086

9 [2008] EWHC 741 (Ch)

10 A copy of the White Paper is available at http://www.berr.gov.uk/files/file52072.pdf

of a group of consumers. The proposal in the paper is for an action on an opt-in basis that will proceed once a significant number of named consumers have agreed to join the action. There would, however, be a possibility for other consumers to join the action at a later stage after liability had been established but before the final compensation awards had been made.

The Government's proposals come after research in 2008 suggested that there is a gap between successful enforcement action and adequate consumer compensation and that representative actions by an independent publicly-funded figure could be a way to bridge this gap, alongside attempts to deliver compensation through public enforcement. This model of a publicly-funded figure to negotiate compensation on behalf of groups of consumers is one that has been used in Finland, Sweden and Denmark.

The intention is that the Consumer Advocate will be appointed in 2010. The Government will, however, consult formally on how the new powers should be framed by the end of 2009.

Relevant developments in the Financial Services Sector

Mass claims have been a recurrent theme in the retail financial services sector, with redress largely being achieved through regulatory action, remediation schemes and the Financial Ombudsman Service (FOS). A great deal of political and media pressure has accompanied this. The Government seems now to believe that the system is in need of reform and that this sector is being prioritised for legislative change along the lines suggested in the Government's response to the CJC's collective action proposals.

- The well-publicised bank charges litigation in relation to charges imposed by the banks and building societies for unarranged overdraft facilities continues. A House of Lords hearing has recently taken place on a key preliminary issue. All of the county court claims which had been brought (together with customer complaints and Financial Ombudsman proceedings) have essentially been stayed since July 2007, when the test case was brought between the OFT and seven high street banks and a building society.

  This litigation has been cited as an example of why an opt-out collective action may be a more efficient way of proceeding for defendants who would otherwise face multiple separate actions, with a risk of inconsistent approaches in different courts.

- In May 2009 the Financial Ombudsman Service (FOS) published its annual review for the financial year 2008/2009. The review states that the present system for dealing with large areas of un-remedied consumer detriment is in need of reform as consumers are being denied millions of pounds in compensation for mis-selling from high street banks and the

FSA has not acted to help them. It identifies a number of objectives that any reform should achieve including the following:

- resolve the issue generically for all affected consumers not just for those who make a complaint and pursue this as far as the ombudsman (this is effectively a form of opt-out system);
- draw a line under the liability of financial businesses;
- provide incentives for consumers to accept fair redress rather than pursuing individual claims in court; and
- lead to solutions that provide sufficient economic drivers to deter future behaviour that could be detrimental to consumers.

- On 8 July 2009 the Treasury published its White Paper 'Reforming financial markets'[11]. This includes proposals for dealing with widespread complaints, including reforming the FOS, giving the FSA new powers to impose settlements and enabling a representative body to bring a collective action on behalf of a group of consumers to enforce their rights. Responses to this consultation are requested by 30 September 2009 during which time the Government will also engage directly with relevant stakeholders.

  The report highlights various instances in recent years in which a large group of consumers has suffered detriment at the hands of regulated firms. For example, the mis-selling of endowment policies, personal pensions, split capital investment trusts, precipice bonds and payment protection insurance, noting that there has been relatively limited use of existing procedures for collective redress. The FSA's powers to secure restitution have also not been much used.

  'The regulator must balance consumer protection with other factors. Its resources are limited and it must take its own costs into account. This may lead it to conclude that consumers should seek redress through the FOS or private proceedings'.

  The report also notes that the FOS is not primarily a vehicle for collective redress because it is designed to deal with complaints by deciding what is fair and reasonable in all the circumstances of each individual case. It cannot decide a case in the absence of a complaint, even though many people may have been affected by the alleged conduct. In addition its decisions are not binding on an individual consumer or group of consumers.

  The White Paper states that the Government believes the emphasis should remain on ensuring that firms compensate the consumer voluntarily. When that is not possible, and many consumers are affected in a similar way, there should be routes to collective redress that can deal with claims

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[11] A copy of the White Paper is available at http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

more efficiently, reduce the time that claimants may have to wait and reduce the volume of individual cases dealt with by the courts or FOS.

The Government therefore announced that there would be a review of the FOS 'wider implications process', through which the relevant regulators (FSA and OFT) and the FOS seek to find ways of handling issues that concern a large number of consumers or firms. The aim will be to make that process more transparent, consultative and streamlined.

In addition the Government invites views on the case for legislating to:

- update regulators' existing backstop powers to deliver collective redress:
  - the power of the Treasury to initiate a collective redress scheme on a wider basis is set out in section 404 of Financial Services and Markets Act 2000 (FSMA). The Government believes there should be new powers for the FSA to impose schemes requiring a firm or firms to make redress either on an industry-wide or firm-by-firm basis as appropriate;
  - any scheme of redress would be likely to require firms to ascertain their liability to individual persons, calculate loss and pay compensation to such persons following parameters set by the compensation scheme; and
  - this might apply generally or on an opt-out or opt-in basis.
- introduce some form of collective action through which consumers can enforce their rights to redress (acknowledging that any solution will require primary legislation):
  - the Government suggests that such actions should be subject to the approval of a gatekeeper, which might be the FSA. As a consequence the Government suggests there would be little risk that firms might be forced to settle to avoid expensive litigation, or a risk that action might be counter to the general good;
  - the Government believes there is a case for a new collective redress mechanism in the financial services sector. It proposes giving the FSA a new power to appoint a nominated, qualified representative body or person to pursue a representative action through the courts where the FSA believes there is evidence of a breach of its rules. It is considering whether it is desirable for the power to extend beyond breaches of rules. The court would establish liability and order compensation to be paid to consumers as directed by it; and
  - the Government expects that a representative action would be available to an FSA-nominated person in exceptional cases where the FSA, taking account of FOS decisions as appropriate, took the view that FOS or restorative justice using FSA powers were inappropriate or unavailable. There would need to be a sufficient number of potential claimants and reasonably uniform claims. The case would need to be supervised and approved by the court, who may need to decide whether it should be based on

automatic inclusion of eligible claimants with the possibility of opting out (ie an opt-out system). A representative body would not receive public funding and might be required to provide security for legal costs.

Litigation funding

As we reported in our February 2008 update, a number of major players have emerged in the third party funding market, together with a number of brokers who advise a party seeking funding on its various options. Typically funders will be looking to take 25 per cent to 50 per cent of any recoveries or a multiple of the funding provided. Funding products for 'outcome hedging' are also available for defendants. The sentiment emerging seems to be that even if companies can afford to fund their own litigation, there are cash flow advantages to not doing so or they may simply want to set off part of the risk.

As third party funding has developed so has After the Event (ATE) insurance, which typically covers liability to pay the other side's costs and disbursements under the 'loser pays' rule. More and more sophisticated packages are emerging and insurers are frequently prepared to defer the payment of any premium until the conclusion of the case. An ATE premium may also be contingent on success, which means that if the case is lost the premium is not charged. Another advantage of ATE insurance is that the premium is currently recoverable on success from the losing party. However the entire litigation costs landscape, including these areas, may be about to change in the light of Jackson LJ's review.

Jackson LJ's Preliminary Report

In May Jackson LJ published his preliminary report following the first phase of his review of civil litigation costs. The conclusions drawn are only interim conclusions and the consultation period closed at the end of July. In summary this preliminary report looks at the position in relation to contingency fees, third party funding and the recoverability of ATE insurance premiums from the losing party.

The key points/proposals to note are:

- the existing costs shifting regime is not sacred but cannot simply be abolished in its entirety. There may be certain specific regimes where the principle should be abolished or where one way cost-shifting may be appropriate (ie where if the defendant loses he pays the claimant's costs but when the claimant loses each side bears its own costs);
- in relation to contingency fees, Jackson LJ's provisional view is that following the reduction in legal aid some form of fee by result (whether in the form of conditional fee arrangements (CFAs), contingency fees, third party funding or other system) must exist in order to facilitate access to justice;

- the Report considers the abolition of the recoverability of success fees under CFAs and of ATE premiums, provided access to justice for individual claimants could be otherwise preserved; and
- in the group action context, which is also considered by the interim report, Jackson LJ considers whether there should be no costs shifting subject to two qualifications: (a) cost shifting for frivolous or improper litigation tactics; (b) implementation of the common fund doctrine whereby a successful group or class' legal fees is a first charge on the damages payable by the defendant. Alternatively there might be cost shifting for only part of the collective proceedings, for example, no cost shifting up to certification but if the group or class wins certification the cost shifting rule applies after that.

Jackson LJ has emphasised that he will only make up his mind on all of the issues at the end of the consultation period. The final report is expected in December 2009.

There have been a number of other recent highlights in this area.

- The dismissal of the claim against Moore Stephens over its auditing work for collapsed trading company Stone & Rolls. This was a very high profile case brought with the aid of litigation funding in England and has been hailed by some as a cautionary tale for litigation funders. The claim was struck out on public policy grounds by the Court of Appeal, highlighting the inherent risks in taking on litigation as an investment and it is said that the funders will have to pay very significant costs for both sides. On 30 July the House of Lords on its last day before becoming the Supreme Court upheld that decision.
- It has been reported that litigation funder Juridica has raised a further £35m to meet the increase in demand for litigation funding particularly in the US. Susan Dunn of Harbour Litigation Funding is also reported to have said there has been a huge increase in demand for litigation funding as a result of the economic slump.
- It has also been reported that a new joint venture partnership, Independent Litigation Funding, is expected to raise up to eight new funds this year, which will focus on investing in mid-sized corporate litigation cases. A new litigation funding venture, Therium, is being established with a view to funding court cases in the UK and international arbitration cases with a focus solely on commercial disputes. Therium will reportedly be looking to invest between £100,000 and £5m per case and expecting 250 per cent return on its outlay.
- Concerns have been raised that litigation funders should not exploit claimants or promote vexatious litigation. To this end, the Third Party Litigation Funders Association (comprised of various funders) has been working with the CJC to develop a voluntary self-regulating code of good practice for its members. This has recently been submitted to Jackson LJ

to consider.[12] The code aims to set minimum standards for a litigation funding agreement and to promote greater acceptance and wider use of third party litigation funders. Of particular interest to those concerned about the financial capacity of funders are the provisions about capital adequacy requirements to be met by funders. In relation to decisions on settlement, the code recognises that only the funded party can decide to settle the claim but the funder may ask the funded party to obtain counsel's opinion on any settlement offer (which the funder will pay for). The opinion will be binding on the funded party and the funder. It will be interesting to see what Jackson LJ decides on this issue of regulation.

- A £50m action has reportedly been brought on behalf of 555 investors in complex investment schemes against a London law firm. The claim has been brought on the back of a groundbreaking finance package that includes a discounted CFA by the solicitors, litigation funding from Allianz ProzessFinanz and ATE insurance (reportedly for around £10m and apparently one of the largest to date in the London insurance market).

- In November 2008 the CJC published another report entitled 'Improving Access to Justice', Contingency Fees[13]. This report was a study of the operation of contingency fees in the US. In summary the report supported damages-based contingency fees in England should the current system of Conditional Fee Agreements (CFAs), supported by ATE insurance, fail. The CJC Report concluded that properly regulated contingency fees in England and Wales would not lead to perceived US style 'excesses' and may be beneficial in terms of access to justice (particularly for multi-party and higher value cases). However their impact on access to justice may be too unpredictable to recommend their immediate implementation.

  Some of the highlights of the CJC's findings are as follows:
  - contingency fees in the US are generally not extravagant tending to gravitate around 33 per cent and rarely exceeding 50 per cent;
  - there is no strong evidence that contingency fees provide improper disincentives to settle;
  - damages are reported to be much higher in the US than in England but the claim that damages claims in the US have been inflated to reflect the contingency fee is not supported by clear evidence; and

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12 A copy of the submission, including the draft code which is included at Annex D, is available at http://www.civiljusticecouncil.gov.uk/files/Submission_to_the_Review_of_Civil_litigation_Costs.pdf

13 A copy of the Report is available at http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf

- a contingency fee system does not appear to lead to high rates of litigation, frivolous claims, or a litigation culture. Evidence suggests that although Americans are more likely to consider bringing a claim, they are not more likely to seek legal assistance in making a claim. Headline levels of damages and jury awards in particular provide the strongest explanation for concerns about the system in the US, not contingency fees.

- On 25 June 2009 the Department for Business, Innovation and Skills (BIS) published its research into tribunal claimants' perspectives on funding, including on contingency fees. This may have an impact on Lord Justice Jackson's review on civil litigation costs. In summary the research found that clients who paid privately were more positive about the service they received than those on contingency fee arrangements. In terms of settlement arrangements privately-funded lawyers generally gave neutral advice whereas others were inclined to advise that offers were the best the client would get.

- On 1 July 2009 the Ministry of Justice published a consultation paper on 'Regulating Damages Based Agreements' (DBAs)[14] seeking responses by 25 September 2009. Such agreements are essentially contingency fees whereby the claimant's legal representative receives a percentage of the overall damages recovered by its client. These are currently permitted in employment tribunals (though unregulated) but prohibited in civil court proceedings. There is a concern at Government level to prevent lawyers from exploiting vulnerable clients by using unreasonable lock-in clauses and taking an excessive percentage of damages.

  The consultation paper does not seek any views on extending the use of DBAs, but concentrates on how their existing use can be strengthened to protect the public. The Jackson's Review covers the issue of whether contingency fees should be permitted more widely in civil litigation. The Ministry of Justice recognises in the paper that extending DBAs to litigation would be a major step raising a number of issues, not least costs shifting and the apportionment of costs between parties. It states that it has no current plans to extend the use of DBAs more widely. Any decision to extend the use of DBAs to litigation generally – or, perhaps more likely, to specific classes of litigation – would be preceded by full consultation and discussion, requiring the approval of both Houses of Parliament before it could be implemented.

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[14] A copy of the Consultation paper is available at http://www.justice.gov.uk/about/docs/regulating-damages-based-agreements.pdf

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France

There have been many announcements, recommendations and a draft bill in France but still no group actions to date or material progress in terms of legislation.

- Despite many recommendations and announcements made over the past year in favour of the introduction of group actions in France, no such action exists yet.
- The final report of the Commission for the Improvement of Growth in France (*Commission pour la Libération de la Croissance Française*) dated 23 January 2008 had recommended that group actions be introduced in France. However, such actions were not implemented by the Act on Modernisation of the Economy dated 4 August 2008 due to the fact that the numerous amendments to the bill introducing a group action were systematically rejected by members of Parliament.
- On 6 June 2008 a draft bill on the decriminalisation of business law (*avant-projet de loi*) was presented to the different Ministries for discussion. The draft bill was issued on the basis of the report of the Commission for the decriminalisation of business law dated 20 February 2008 (*Commission sur la dépénalisation du droit des affaires*). This report is said to echo the recommendations of the final report of the Commission pour la Libération de la Croissance Française that indicated:
  - only consumer groups with joint authorisation from the Minister for Economy, Finance and Employment and the Minister of Justice would be able to launch a group action;
  - courts would have jurisdiction to rule on the admissibility of the claim brought by such groups;
  - courts that would have jurisdiction to hear actions brought by such groups would be listed;
  - only those consumers who had opted-in would be able to take part in the proceedings;
  - a judge would make a ruling regarding the liability of the company and would fix a time-period during which consumers would be able to bring a claim for damages;
  - in cases of a refusal to indemnify or of an absence of response from the company, consumers would be able to revert to the courts to obtain damages and the courts would be able to order a periodic delay penalty (*astreinte*);
  - claimants who launch abusive proceedings would have to pay damages for the loss suffered by the defendants;
  - settlement agreements would have to be approved by the court with jurisdiction to hear the claim; and

- no criminal action would be brought before the end of the civil proceedings unless the criminal action were to be brought by the public prosecutor's office.

The draft bill of 6 June 2008 that might have introduced group actions in France has not progressed and is no longer on the legislative agenda. It is likely that both political and economic reasons are behind this given the current economic crisis. In a general climate of suspicion towards financial institutions and corporate behaviour a bill that would decriminalise business law would most likely give rise to heavy criticism of the French Government. In any event should this draft bill be enacted it would have a limited scope as it would only concern consumer issues and actions filed by consumer groups.

- In an official ministerial response to a question posed by the Parliament on 11 September 2008 regarding the introduction of group actions in France, the Minister of Justice explained that President Sarkozy and his Prime Minister wished to introduce class actions in France. She therefore had set a goal to have a draft bill introducing group actions ready by the end of 2008. The Minister of Justice also indicated that she considered that the discussions regarding the introduction of group actions had to be carried out within the framework of the ongoing discussions regarding corporate liability in France. Despite this announcement group actions have not yet been introduced.
- On 3 February 2009 in an official ministerial response to a question posed by the Parliament, the Minister of Justice confirmed the Government's willingness to introduce group actions in the framework of the future bill on decriminalisation of business law, which is however suspended for now (see above).
- In a letter dated 10 February 2009 Luc Chatel, the French Secretary of State in charge of Industry and Consumption and also the Government Spokesman, entrusted Dominique Laurent, a Member of the *Conseil d'Etat*, with the task of finding solutions to improve efficiency and representativeness of the consumer movement in France. Dominique Laurent handed down a 38 page report on 7 May 2009. The introduction of group actions is briefly mentioned in one paragraph, which is less than a page long. The report mentions that consumer groups are looking forward to the passing of a bill introducing group actions in France. However, Dominique Laurent considers that the current 17 authorised associations do not offer sufficient guarantees to represent consumers in collective actions. In her opinion these authorised associations do not have the required expertise, skilled professionals or the necessary territorial network. The report therefore recommends reflecting both on the need for a modification of the current system and the means to achieve this successfully.

- On 15 July 2009 on the basis of the working group report for the reform of the rules relating to civil liabilities under French law, the law commission of the French Senate made 28 recommendations including two relevant major initiatives: (i) the introduction of collective redress mechanisms in situations where individual damages of a small amount were caused to several persons but where the disputed breach was lucrative for the person responsible, ie where it was still able to make profits regardless of the compensation it paid to the victims (Recommendation n° 23); and (ii) the introduction of punitive damages in specific contexts where the breach was lucrative for the person responsible (Recommendation n° 24).

Are French courts beginning to show the way forward?

A decision of the French Supreme Court of 18 September 2008 seems to adopt a friendly stance towards actions brought by a group in the collective interests of individuals. A group defending persons with muscular dystrophy brought an action for damages against the liquidator and the former managing director of an institution, which provided accommodation for persons suffering from muscular dystrophy, on the grounds that the former managing director had mismanaged the institution. By bringing this action for damages the group did not act in the interests of or on behalf of its members, but rather on behalf of the collective interest of persons with muscular dystrophy.

The French Supreme Court nonetheless held that the group's action was admissible as it was closely linked to the group's purpose, namely the defence of persons suffering from muscular dystrophy. The French Supreme Court thus overruled former case law holding that groups intending to bring legal actions before the French courts to represent collective interests do not need to be legally authorised to do so. In the past groups were only entitled to act on their own behalf or on behalf of their members who had expressly given their consent to such action. In light of this decision it seems that a group wishing to bring a legal action to represent collective interests no longer needs legal authorisation to do so but must merely demonstrate that the collective interests it intends to defend fall within the ambit of the group's purpose.

On 31 October 2008 the Paris Court of Appeal partially upheld the decision of the Paris First Instance Court in the Sidel case. On 12 September 2006 the Paris First Instance Court had ruled that a collective action against Sidel relating to losses suffered by shareholders who were unable to buy, sell or keep the shares because they were given misleading information was admissible. The Paris Court of Appeal upheld the decision of the Paris First Instance Court to award a lump sum of damages of €10 per share to each of the 700 individual plaintiffs who were represented by two shareholders' defence groups. The Paris Court of Appeal ruled that this claim was admissible, whilst holding that this legal action was not a collective action but merely the result of simultaneous claims brought by individual plaintiffs who had each suffered a personal loss.

The European Commission's Green Paper on Consumer Collective Redress

The key contributions in response to the European Commission's Green Paper on Consumer Collective Redress were filed by bodies representing companies and employers and those representing consumers. The former are generally opposed to the introduction of court-based collective redress mechanism at an EU level and prefer the further development and implementation of existing alternative dispute resolution and other out of court strategies. The bodies representing consumers on the other hand are in favour of adopting a court-based collective redress mechanism.

Reactions from Industry Bodies

Bodies representing companies such as the Paris Chamber of Commerce and Industry (*the Chambre de Commerce et d'Industrie de Paris or CCIP*), the French Stock Market Regulator (*the Autorité des Marchés Financiers or AMF*) and the French Banking Federation (FBF) would tolerate Option 3, to the extent that any reform is thought to be necessary, on the grounds that it is based on a non-binding instrument that will improve the resolution of small claims and encourage businesses to handle claims brought against them more efficiently.

The Mouvement des Entreprises de France (MEDEF) and l'Association Française des enterprises privées (AFEP) prefer a combination of Options 1 and 3 on the basis that a mix of binding and non-binding rules encouraging self-regulation would improve the situation for consumers and minimise the negative impacts associated with collective redress. MEDEF suggests that the first step in revolving consumer disputes should involve discussions between the consumer and the professional. If this is not successful, alternative dispute resolution should be undertaken. AFEP suggest that the Commission should launch campaigns to inform consumers of their existing rights. AFEP rejects Option 2 on the basis that it would encourage forum shopping.

The Confédération Générale de Petites et Moyennes Entreprises (CGPME) prefers Option 1 since, in its opinion, the introduction of collective redress is likely to create tension within small and medium sized companies. It feels that Option 2 is too difficult and costly to implement and criticises Option 3 on the basis that dispute resolution mechanisms are more suited to solve individual as opposed to group claims.

None of the industry bodies support Option 4, with MEDEF and AFEP suggesting that such a solution could only be envisaged if it were narrowly monitored and only on an opt-in basis.

Reactions from consumers' associations

UFC-Que Choisir has expressed its satisfaction to the acknowledgment by the European Commission of the need to introduce collective redress for European consumers. However, it considers that only Option 4 is likely to create a real and efficient collective action. UFC-Que Choisir suggests that the class action system available in Québec should be used as a source of inspiration. There should be five different stages to the proceedings: firstly

the Court would decide whether the action is admissible; secondly the potential members of the group would be informed of the existence of the proceedings; the proceedings on the merits would then commence, but it would still be possible to settle the dispute; as a fourth stage the members of the group would be informed of the decision on the merits; and finally a third party (for example an insurer, a consumer group or an accountant) would be in charge of distributing the amounts amongst the members of the group. UFC-Que Choisir considers that an opt-out system should be preferred and is not in favour of a 'test case' mechanism.

In UFC-Que Choisir's view the scope of collective redress should be wide enough to encompass national as well as transnational proceedings. Furthermore, it should not be limited to contractual claims but should also comprise non-contractual claims. It also suggests that an efficient system of advertising needs to be set up. According to UFC-Que Choisir a fund should be created and Member States should cap legal costs. It also suggests that Courts should have wide discretionary powers to decide that legal fees should not always be borne by the losing party and a Court order should be made at an early stage in the proceedings to decide on the apportionment of legal costs, so as to enable consumers to have a clear idea of the financial risks involved.

Many other consumer groups (including *Organisation Générale des Consommateurs, Consommation Logement et Cadre de Vie* and *Familles de France, Confédération Syndicale des Familles*) have also indicated that they are in favour of Option 4 and the use of binding rules.

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Germany

Although there are still no class actions in a formal sense, Germany is in the process of considering new procedural routes to increase the efficiency of court proceedings and to handle disputes that concern a large number of plaintiffs. In the last year new claims have been lodged and new decisions have been rendered under the Act on Lead Cases of Private Investors and the new Act on Legal Services has extended the possibility to bring group actions. Contingency fees are also now permitted in exceptional circumstances and discussions with respect to the European Commission's Green Paper on Consumer Collective Redress suggest that the German litigation culture regarding class actions might be changing.

Lead case treatment in securities litigation

As we have previously reported the Act on Lead Cases of Private Investors (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*) came into force on 1 November 2005. The KapMuG aims to protect investors by allowing a lead case procedure relating to specific public information on capital markets. The procedure has now been used on a number of occasions.

- The most prominent case is one in which approximately 17,000 shareholders of Deutsche Telekom AG filed claims based on the allegation that Deutsche Telekom overstated the value of its real estate in its listing prospectus. The lead case has now been pending before the Higher Regional Court in Frankfurt for over two and a half years. The Court is still in the process of hearing witnesses. While these proceedings have proved to be time-consuming it would probably have been even more time-consuming to hear and adjudicate each case separately.
- The claims of sixty shareholders against DaimlerChrysler led to the first lead case decision in Germany. The Higher Regional Court in Stuttgart held on 15 February 2007 that it did not support the shareholders' view that the company had failed to inform them immediately about the resignation of its former chairman. On appeal the German Federal Court (*Bundesgerichtshof*) lifted this decision and remanded the case to the Higher Regional Court in Stuttgart for a further hearing. This ruling does not, however, affect the lead case approach generally and does not suggest that future cases using this technique will be unsuccessful.
- In July 2008 the German Federal Court decided that incorrect, misleading or omitted capital market information relating to products of the grey market can also be subject to a claim under the Act on Lead Cases of Private Investors. This decision has significantly widened the scope of application of the Act.

All proceedings, current and terminated, can be checked at www.ebundesanzeiger.de (see *Gerichtlicher Teil – Klageregister*). The KapMuG will expire on 1 November 2010 unless the legislator decides to extend it. In January 2009 the legislator commissioned four professors from

Frankfurt am Main, Bern and Bremen to evaluate the effects of this procedural tool to inform the legislator's decision in 2010.

Collective actions arising from the assignment of consumer claims

In 2002 the legislator allowed consumer protection associations to enforce consumer claims that have been assigned to them, provided they relate to the issue of consumer protection. The German Act on Legal Services (*Rechtsdienstleistungsgesetz*) that came into force on 1 July 2008 eased the requirements for such a claim and now enables consumer protection associations to bring claims without having to prove consumer protection.

The European Commission's Green Paper on Consumer Collective Redress

The Green Paper (see also the 'European developments' section above) has contributed to an already lively discussion about facilitating access to the courts for plaintiffs with small claims and about handling disputes that typically concern a large number of such plaintiffs. The reactions to the Green Paper in Germany are diverse and show the huge variety of different positions.

- While the German Federal Bar (*Bundesrechtsanwaltskammer*) appreciates the European Commission's aim to strengthen the consumer's access to court, it has pointed out that the legal structures of each member state need to be maintained. It therefore recommends a thorough examination of the need to create a system for collective redress. If it turns out that there is a necessity for further measures in this area, the German Federal Bar prefers a European judicial collective redress procedure with an opt-in mechanism. In exceptional cases (ie a multitude of cases with a very low amount in dispute per case) the German Federal Bar believes that an opt-out mechanism would be the most efficient. In the opinion of the German Federal Bar such a collective redress procedure should apply to all proceedings and not only to consumer-related ones.
- In a position paper issued in February 2009 the German Bar Association (*Deutscher Anwaltverein*) stated its preference for a combination of developing further cooperation among member states in this regard and encouraging a mixture of different measures, among them alternative dispute resolution for solving consumer/trader disputes, an extension of the scope of small claims procedures to mass claims and the initiation of a complaint-handling system for all businesses.
- The Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag e.V.*) have formulated a frame of reference for the collective enforcement of damages claims comprising ten requirements:
  - actions may be brought only for actual, demonstrable damages;
  - damages awards must actually go to victims;
  - defendants should not be required to pay disproportionately high procedural costs;

- litigation must not be a means of extorting settlements based on abusive demands;
- victims must join the collective action knowingly and willingly (ie an opt-in solution);
- a level playing filed must be ensured;
- collective actions must not diminish the protection of data and privacy rights or lead to the disclosure of business and trade secrets;
- collective actions must not lead to 'forum shopping' in Europe;
- only international cases should be addressed at EU level; and
- the EU should not create collective legal instruments unless the associated risks can be eliminated.

- The association of German exchange-listed stock corporations and other companies and institutions engaged in the capital markets development (*Deutsches Aktieninstitut e.V.*) is sceptical about an expansion of collective redress measures. It therefore sees no need for an EC action at all.

- The German Alliance of Judges (*Deutscher Richterbund*) has pointed out that based on the experience of the German judges a consumer collective redress mechanism does not present a particularly pressing or grave problem. In particular, transnational cases are still isolated instances. The German Alliance of Judges therefore rejects creating new regulations in this respect. It strongly rejects most of the options suggested in the Green Paper and only accepts the encouragement of alternative dispute resolution for solving consumer/trader disputes. The German Alliance of Judges has further pointed out that there have been bad experiences with certain organisations that have filed representative actions (*Verbandsklagen*) for damages only to enrich themselves. A better experience has resulted from the German Act on Actions for Injunctions (*Unterlassungsklagengesetz, UKlaG*), which permits certain qualified representative organisations to file actions for injunctions aimed at stopping violations of consumer rights.

- The Federal Government and the Federal Cartel Office have stated that an opt-out damages action brought by associations would not fit into Germany's claim system, and that 'opt-in' damages actions were already possible by way of assignment.

In summary the majority of German legal practitioners are reluctant to introduce mass tort litigation in Germany but are open to discuss new means to enhance the efficiency of court proceedings and handle disputes that concern large groups of individuals.

Funding issues

Since 1 July 2008 contingency fees have been permitted in exceptional cases where such fees are necessary to give clients the means to raise a claim. Such fee arrangements are heavily regulated. In a recent study 20 per cent of the

attorneys indicated that they at least once acted on a contingency fee basis in the past year.

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Italy

There has been a lot of discussion about the incompatibility of certain features of class actions with Italian constitutional principles and several draft bills on collective redress have been submitted to the Italian Parliament over the last few years. At the end of December 2007, the Italian Parliament finally introduced a specific statutory provision (article 140 *bis*) in to the Consumer Code allowing a sort of 'class action' on an opt-in basis.

Article 140 *bis* had a specific sphere of application. A collective action could be brought only in relation to (i) '*legal relationships connected to agreements stipulated in accordance with*' article 1342 of the Italian Civil Code (ie standard or mass contracts), or as a result of (ii) torts, (iii) unlawful commercial practices or (iv) anti-competitive behaviour. The standing to sue '*for protecting the consumers' interests*' was limited to (i) consumer associations with nationwide presence as listed on a registry maintained at the Ministry of Productive Activities; and (ii) any other consumer, investor group or association sufficiently representative of the collective interests as assessed by the relevant judge. At the end of the proceedings the Court could issue a declaratory judgement defining the criteria to be used to calculate, at a later stage, the amount to be awarded in favour of the consumers.

A lot of debate followed the introduction of these rules because they provided for a hybrid regulation that was not considered to be entirely suitable to protect the interests of all parties.

Therefore, the Italian Parliament has postponed the entry into force of article 140 *bis* more than once and in the meantime began to look at ways to modify it.

On 9 July 2009 the Italian Parliament approved definitive amendments to the original version of article 140 *bis* of the Consumer Code, providing new Italian rules on class actions, the content of which is summarised below. Although there are differences between the Italian rules and the US rules, the content of the recently approved article 140 *bis* represents an attempt to bring the Italian rules closer to the US regime.

- Both systems have the same rationale however the manner in which interests and rights are protected is different. In particular the Italian procedures focus on facilitating mass actions rather than creating opt-out classes. However, these do represent a very considerable degree of change in the Italian market.
- Under Italian law, in addition to every member of the class having standing to bring collective actions, the consumer associations and councils also have standing to bring such claims.
- Moreover, article 140 *bis* contemplates a collective action for damages arising from specific circumstances, such as liability arising from: (a)

contractual breaches including infringement of contracts closed under articles 1341 and 1342 of the Italian Civil Code; (b) defective products (the producer's liability is also now provided in a case where no direct contractual relationship between consumers and producers exists); and (c) unfair commercial practices or anti-competitive activities.

- Not every Court is competent to determine class actions; only the Court in the capital of the Region where the defendant has its head office will have jurisdiction.
- The purpose of these rules is to allow consumers and end-users to obtain compensation for damages or a refund of unduly paid sums. The Court has different options; it could issue a declaratory judgment stating the consumers' right to obtain such compensation or refund and define the criteria for such calculation or award compensation damages.

Article 140 *bis* of the Consumer Code currently envisages two phases for the collective actions procedure:

- during the first phase the judge, who acts as a jurisdictional filter, will decide whether the action is admissible by evaluating: whether the claim is *prima facie* groundless; whether there is a common interest that needs adequate protection; if there are conflicts of interest among the plaintiffs; or if the claimant is able to adequately protect the interests of the class members. The statement of claim shall also be served on the Public Prosecutor who will be able to participate to a limited extent in the admissibility proceedings; and
- if the action is considered admissible the second phase will commence and the plaintiff must inform all of the class members of the collective action. This will enable them to opt-in to the action and take part in the proceedings using the methods and within the time limit provided for in the order that will declare the admissibility of the action. Advertisement of a class action is required in order to advance the claims. If individual consumers or end-users do not want to take part in the collective action, they are free to bring an alternative individual claim. Participation in a class action automatically involves a waiver of the individual action founded on the same cause of action. The decision issued at the end of the proceedings will not affect the rights of class members who did not participate in the collective proceedings. It will not be possible to propose other class actions on the basis of the same cause of action against the same defendant after the expiry of the time limit set by the Court. The class actions brought before the time limit shall be joined *ex officio* if they are pending before the same Court.

  In the order admitting the class action, the court will: (i) define the nature of the individual claims subject to the proceedings, specifying the criteria on the basis of which the parties that have asked to participate in the action have been included in the class or have to be excluded from the action; (ii) set a peremptory time limit within which a subscription

certificate shall be filed in the court clerk's office; and (iii) prescribe the procedural rules to be respected during the hearing.

At the end of this phase the Court may order, according to article 1226 of the Italian Civil Code (which provides for an evaluation of damages on the basis of an equitable criterion), the payment of compensatory damages or a refund of unduly paid sums. Alternatively the Court may also seek a substantive declaration of liability and the criteria for calculating damages or loss will begin.

This process will apply to the illicit conduct that took place after the date on which the law establishing these rules comes into force.

These rules have been approved by the Italian Parliament and should become effective on 1 January 2010.

The European Commission's Green Paper on Consumer Collective Redress

Following the publication of the Green Paper on Consumer Collective redress Italian interested parties responded in a variety of ways to the public consultation opened by the European Commission. We summarise below the content of some of these responses.

The responses of consumers' representatives

Consumers' representatives declared their preference for Option 4 to increase consumers' confidence in the judicial system, to obtain a more efficient end to the illegal commercial practices and to give better protection of traders' promoters. Their common interest is to provide and put into force specific rules to ensure the ability of any consumer to protect their own rights and bring injunction proceedings or actions for compensatory damages. They were against:

- Option 1 which suggests out-of-date solutions and could increase the lack of homogeneity of consumer protection provided for by the Member States as well as the substantial differences in the treatment of consumers in the different Member States; and
- Option 2 because it may cause further delay in the interpretation and provision of a valid mechanism of collective protection for consumers. The cooperation of the Member States is evaluated as a precondition for more appropriate consumer protection.

In relation to Option 3, the consumers' representatives consider that ADR is useful for the purposes of increasing consumers' rights but prefer to combine such a system with judicial mechanisms of protection. Considering the Italian ADR experience they point out that the ADR mechanisms have been concentrated on individual disputes to solve them in a less formal and expeditious manner and may not be adequate for the collective handling of complaints. They suggest, inter alia: (i) a system of automatic compensation with respect to specific claims; (ii) a maximum limit for legal costs; and (iii) the opportunity to optimise the European Consumer Centres Network

(ECC-Net) that should work closely with the consumers' associations and final users of the different Member States.

In light of the above considerations consumers' representatives propose a possible combination of the mechanisms mentioned in Options 3 and 4. They suggest amongst other things introducing calculation criteria to determine the amount of damages awarded as compensation. These would take into account the additional profit achieved by the companies' illegal activities, as well as a complementary public enforcement.

The responses of the Confindustria

Even though Confindustria (the main organisation representing Italian manufacturing and services companies) recognises the significant role of the EU in the legal harmonization of certain sectors, it believes that Option 4 is dangerous and not necessary for the purposes of increasing consumers' protection. It stated that it prefers the first three options suggested by the Green Paper allowing a more intensive and appropriate use of consumer protection mechanisms provided for by the EU and different Member States. Confindustria is worried that detailed European regulation could infringe certain important Italian procedural principles (for example the absence of punitive damages and *res judicata* for third parties such as consumers who decide not to participate in the collective proceedings) and so reduce their defensive rights as a consequence of their increasing involvement in lawsuits exploited by consumers' associations. For this reason Confindustria prefers a proposal that combines different elements such as information, promotion of the use of new means of consumer protection, self-regulatory activities and activities of cooperation between different Member States, but it rejects any legislative solution to regulate consumer collective redress.

They would support the first three options suggesting a possible combination of them on the basis of the following reasons:

- Option 1 because it takes into consideration the methods of consumer protection;
- Option 2 because they consider that cooperation between Member States is essential in order to achieve the most efficient operation of the present means of consumer protection; and
- Option 3 because it improves the current ADR systems, the scope of the national small claims procedures for mass claims, the scope of the Consumer Protection Cooperation Regulation and internal companies' complaints handling schemes, as well as informative and promotional activities.

Confindustria also suggests avoiding any legislative provisions that could increase the number of collective actions being brought. For example public funding for consumers to bring collective actions or changes to the general 'loser pays' rule under Article 91 of the Italian Civil Procedural Code. These instruments could cause consumers to avoid their responsibilities and encourage them to bring judicial actions without taking into account a

costs-benefits analysis. Confindustria also suggests providing: (i) in favour of companies, the standing to sue for bringing collective actions; (ii) a preliminary compulsory attempt of conciliation; (iii) a preliminary judicial valuation of the admissibility of any collective action (ie certification) and an opt-in system to operate within specific deadlines before any decision regarding the merits of a collective action is issued; (iv) the exclusion of the ability to bring new collective actions against the same company with respect to the same unlawful act or fact. Proposals (iii) and (iv) were included in the new rules approved by the Italian Parliament on 9 July 2009.

Confindustria has also recognised, for the time being, the futility of suggesting further instruments in addition to those included in the four options set out in the Green Paper, suggesting only the implementation of ADR procedures.

The examination of the opinions expressed by the Italian interested parties showed the existence of a clear-cut division between the consumer associations and the Confindustria with respect to the evaluation of the options suggested in the Green Paper. Nevertheless all the parties expressed a general consensus on the importance of the EU's role for the harmonisation and coordination of the collective consumer redress rules. Regarding a role for the EU in relation to consumer collective redress a common theme emerged as to the importance of this institution, particularly in relation to (i) providing and applying the different means of consumer protection and (ii) assuring the real and effective use of the present mechanisms of protection through advertising campaigns and a system of protection for both consumers and companies.

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The Netherlands

We referred to Dexia's court-approved collective settlement regarding financial lease products in our previous client guides. Briefly this is the second Dutch-style 'class action' under the Collective Settlement of Mass Damages Act (CSMDA). The settlement appeared to have survived its opt-out period successfully. However, in a case initiated by an individual litigant whose spouse had not co-signed the lease agreement with Dexia and who had 'opted out', the Supreme Court ordered Dexia to compensate the individual to a substantially greater extent than the settlement had provided. This may limit the popularity of the system for claimants since by opting-out they may secure a better deal for themselves, although clearly each case is fact-specific.

However, in two recent judgments the Amsterdam Court of Appeals confirmed the reasonableness in principle of the settlement arrangements for other individual litigants. The Supreme Court has also rendered three judgments regarding financial lease products including a Dexia product. In its judgment the Supreme Court confirmed its earlier decision that an individual who had 'opted out' of the Dexia settlement was still entitled to claim and, under certain circumstances, to obtain a more substantial compensation than provided by the settlement.

Following the Dexia settlement three other settlements have been concluded under which the parties filed a request for court approval under the CSMDA. Two settlements have recently been approved by the Amsterdam Court of Appeals.

- The first is the Royal Dutch Shell settlement which we referred to in our update of February 2008. The settlement agreement between Shell and its non-US shareholders provides relief in the amount of US$352.6m. The Amsterdam Court of Appeals held a hearing on 20 November 2008. By a decision dated 29 May 2009 the Court declared the settlement binding. This decision is of particular interest because it is the first time the Dutch settlement system has been used in an international dispute with the majority of injured parties residing outside of the Netherlands. With respect to non-resident shareholders the Court based its jurisdiction on the fact that the majority of applicants were established in the Netherlands.[15] The Court also provided useful guidelines on how to

[15] Article 3 of the Dutch Code of Civil Procedure provides that the Court has jurisdiction in request proceedings if one or more of the requesting parties is domiciled in the Netherlands. In the present case, five of the six requesting parties were domiciled in the Netherlands, so the Court had jurisdiction. In addition, the Court considered the Brussels I Regulation, the Brussels Convention and the Lugano Convention (together, the Instruments), all of which were applicable. From these Instruments, the Court deduced the following:

inform the shareholders of the settlement, the decision of the Court and the shareholders' right to opt-out. The opt-out period determined by the Court is at least three months after the announcement that the decision of the Court has become irrevocable and has been published in a list of newspapers determined by the Court (the decision became irrevocable at the end of August 2009).

- The second is the Vie d'Or settlement relating to damage suffered by 11,000 policyholders due to the bankruptcy of their life insurer Vie d'Or in 1995. The settlement has been declared binding by a decision dated 29 April 2009. The opt-out period in this case expired on 1 September 2009.
- The third is the Vedior settlement with Dutch Investors' Association (VEB) relating to compensation for shareholders who sold Vedior shares on the Friday morning of 30 November 2007 hours before the publication of a press release regarding the discussions between Vedior and Randstad. The request for court approval was filed on 6 October 2008 and a settlement hearing took place on 20 May 2009. By its decision dated 15 July 2009 the Amsterdam Court of Appeals declared the settlement binding. Despite the fact that this settlement concerns a large number of foreign shareholders, the Amsterdam Court of Appeals did not specifically explain the grounds for its jurisdiction. The opt-out period in this case will expire on 1 December 2009.

- the Court had jurisdiction over the Dutch shareholders under Article 2 of the Brussels I Regulation;
- the Court has jurisdiction over the shareholders domiciled in a Member State to the Regulation under Article 6 of the Brussels I Regulation;
- the Court had jurisdiction over the shareholders domiciled in a Member State of the Brussels Convention under Article 6 of the Brussels Convention;
- the Court had jurisdiction over the shareholders domiciled in a Member State of the Lugano Convention under Article 6 of the Lugano Convention; and
- for all shareholders domiciled outside the EU and the Lugano countries, the Court had jurisdiction on the basis of Article 3 Dutch Code of Civil Procedure.

The possibility that the damages claim of foreign shareholders against the English Shell company may be submitted under another law to the law applicable to the claims of the shareholders of the Dutch company did not in itself lead to the conclusion that the claims were not closely connected. The court held that the English and the Dutch companies had close ties and it did not matter which company made which declarations with respect to the reserves. The importance of Article 6 of the Instruments in the context of a good administration of justice cannot be set aside by the factual circumstances in the present case (ie that the English shareholders would not expect to be bound by a Dutch settlement and that unless they opt-out, they can no longer go to an English judge).

Several insurers, eg Nationale Nederlanden (a subsidiary of ING) and Fortis ASR concluded settlement agreements with private clients in relation to usurious policies. The insurers agreed to draft a settlement agreement in accordance with the requirements of the CSMDA. However the insurers agreed not to file a request for court approval but to first inform their clients of the settlement arrangements and to invite them to agree with the settlement. The announcement by one of the associations representing the class that it will aim for more compensation, through judicial means or otherwise, may have resulted in the decision not to request court approval. According to financial analysts, this affair may cost the financial sector €6bn (about $8.5bn).

The Ministry of Justice has announced that it is preparing several amendments to the CSMDA and also to the rules on collective actions.

- Even though it has not so far been seen in practice, a considerable disadvantage of the Dutch system is that it is difficult to force the party causing the damage to enter into settlement negotiations. Of particular interest are situations in which the parties disagree on certain legal issues. In such situations it can take a Supreme Court judgment before settlement negotiations begin.

  In order to resolve this issue, the Ministry of Justice announced last year that a 'pre procedural personal appearance' by the party causing the damage and the organisations representing the class, together with preliminary rulings by the Supreme Court, are being considered. Both instruments are envisaged to force unwilling parties to negotiate a settlement. A preliminary ruling by the Supreme Court would be particularly helpful in cases where legal issues remain outstanding between the parties – especially when case law from the lower courts is ambivalent. On 3 June 2009 the Ministry of Justice published a draft proposal for a new act providing the ability to request a preliminary ruling from the Supreme Court in mass claim matters. By way of an internet consultation, the Ministry has invited all interested parties to the procedure to comment upon the draft proposal before 15 September 2009. On the basis of the comments received the Ministry of Justice will consider whether the draft proposal should be amended before being submitted to the Council of State (*Raad van State*).

- Article 1015 of the Dutch Code of Civil Procedure (CCP) provides that proceedings in which individuals claim compensation for damages from the party causing the damage should be suspended until the Amsterdam Court of Appeals has rendered its decision under the CSMDA. It has been seen in the Dexia case that several individual claims were initiated by Dexia (in lieu of the individual as prescribed by the CCP) and could therefore not be suspended. This resulted in (conflicting) case law from lower courts during the period when the request for court approval was still pending and during the opt-out period. The risk of conflicting case law is that it may confuse individuals who are deciding whether or not to

opt out of the settlement. To resolve this issue, the Ministry of Justice considers it preferable to broaden the suspension rule so that the party causing the damage should always be able to request the suspension of individual proceedings or even suspension ex iure and that the suspension period will end after the opt-out period rather than after judgment.

- The DES and Dexia court approved settlements not only covered compensation in terms of damages but also issues about the validity and voidability of contracts. Currently the text of the CSMDA does not reflect its broad application and it will therefore be amended accordingly.
- The most important limitation of collective actions in the Netherlands is the inability to claim compensation for damages. The reasoning behind this is that the relationship in terms of causation between the act and the damage cannot be determined for a group; it should be dealt with on an individual basis. The Ministry of Justice is considering lifting this limitation by allowing injured parties to claim damages to be determined in follow-up proceedings. It is unclear yet how this would affect the current practice. However, the current prohibition on claiming damages in a collective action will probably be relaxed.

The European Commission's Green Paper on Consumer Collective Redress

The Ministry of Economic Affairs submitted a draft Government response to the European Commission's Green Paper to the Houses of the States General (the Parliament and Senate) in April 2009. The response of the Dutch Government to the European Commission's Green Paper was sent to the Commission in June 2009. Considering its own experience with the CSMDA the Netherlands is in favour of a collective settlement approach which gives Member States the ability to develop national initiatives. At the same time, the Netherlands believes that the Commission should play an important role in European activities related to the field of collective settlement. In particular the Commission could monitor the various national initiatives and facilitate the national systems as much as possible via measures related to the jurisdiction, the recognition and the enforcement of decisions by national courts. It could also play a role in the areas of cooperation, providing information, raising consumer awareness and opening up procedures for foreign victims.

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Spain

Recent Cases on Consumer Collective Redress

Santander Consumer – a subsidiary of Banco Santander – was found liable on 9 June 2009 by the First Instance Court of Madrid to pay €2.07m in damages for the cancellation of a facility agreement with a car sale-and-leasing company (OTAYSA) that went bankrupt because of such cancellation. As a result of this decision more than 1,200 affected consumers will be entitled to claim damages from Santander Consumer before Spanish Courts. However, consumer associations have not yet taken any action to bring those affected consumers together.

Consumer associations are embarking on publicity campaigns to gather support for and subsequently commence collective claims representing consumers affected by the insolvency of Lehman Brothers. These claims would affect not only Lehman Brothers but also other credit entities that have sold their products in the Spanish market particularly the Spanish banks Banif and Bankinter and foreign institutions such as Citibank and Fibanc. Well-known lawyers, together with a banking industry consumer association (*Asociación de Usuarios de Bancos, Cajas y Seguros, ADICAE*), have announced mandates received from groups of affected consumers requesting a defence of their case. This association states on its webpage that preliminary investigations have taken place prior to bringing both individual and collective actions (against Banif, Citibank and Fibanc).

In a parallel matter those in Spain affected by the Madoff case are evaluating whether to initiate collective claims against the Spanish banks Banco Santander, Banco Bilbao Vizcaya Argentaria and Banesto. With regard to the Madoff case Spanish lawyers representing a significant portion of all the claimants in Spain agreed to a non-contentious settlement with Banco Santander. To the best of our knowledge court proceedings involving the remaining claimants related to this case have not yet been initiated.

Another significant event was the non-admission in April 2008 of the quasi-class action filed on 30 July 2007 by a consumer association (*Organización de Consumidores y Usuarios, OCU*) against the companies FECSA-Endesa and Red Eléctrica Española, for compensation for damage caused to an unidentified group of consumers by a blackout in Barcelona on 23 to 24 July 2007. The First Instance Court of Barcelona dismissed the claim on the basis that consumers affected by the blackout (more than 300,000) could be identified and therefore a collective action, and not a quasi-class action, should have been filed. This precedent is important as it has helped to enlighten when a group of consumers will be considered '*easily identifiable*' or not.

Recent Legislative Reforms on Consumer Collective Redress

On 1 September 2007 a new Spanish Competition Law came into force introducing new measures designed to ease litigation in competition matters. However, there are still no precedents regarding group actions on

behalf of groups of consumers, identified or not, that have been harmed by an infringement of competition law although in theory these are possible on an opt-in basis.

No substantial legislative amendments have been made over the past year and no changes in the law have been proposed so far for this year.

The European Commission's Green Paper on Consumer Collective Redress

The Spanish responses to the European Commission's Green Paper on Consumer Collective Redress were largely regional.

- The Catalan Consumer Agency of the Government of Catalonia (*Agència Catalana del Consum de la Generalitat de Catalunya*) calls for collective redress to have a European scope of application so that all claims by European consumers affected by the same facts or companies can be jointly resolved. It also states that all measures should be adopted as binding instruments. In this context this Agency favours Option 3 (a combination of instruments) and considers that the Administration should have the ability not only to impose sanctions on companies breaching Consumer Law but also to claim damages suffered by consumers because of that breach. The Agency also considers that Option 2 (cooperation between Member States) and Option 4 (judicial collective redress procedure) should be implemented as well. In addition alternative dispute resolution mechanisms should be considered. Finally the Agency proposes that a website be created for the purposes of informing consumers about collective redress, together with specific training in this field for consumer protection authorities' civil servants and working groups among the competent European authorities.
- The Town Council of Irún, Councillor for Consumer Affairs (*Ayuntamiento de Irún, Concejalía de Consumo*) holds European measures on collective redress to be key to the development of transnational markets within the Union. Furthermore it states that all measures should be adopted as binding instruments. For these purposes Option 4 (judicial collective redress procedure) should be implemented. In addition Option 2 (cooperation between Member States) should also be implemented because of its importance for the effective implementation of Option 4 (and for subsequent effects as well). More specifically the Councillor proposes a European arbitral tribunal for consumer redress, free of charge, to be first implemented as a pilot scheme in towns on European borders.
- The Office of the Public Prosecutor in Córdoba (*Fiscalía de Córdoba*) explains the disadvantages of consumer redress deriving from inconsistencies within the procedural law and illustrates this with a case they currently have under way regarding this matter (*Córdoba Prosecutor vs. Gas Natural Andalucía, S.A.* – Public Prosecutors can bring actions on consumer collective redress in Spain). In this context they propose the following actions: to increase the powers of the Public Prosecutor in

consumer collective redress; to create special courts for consumer law with national competence; to specifically allow the compensation of credits in agreements with perpetual succession (*contratos de tracto sucesivo*); and a set of adjustments to procedural law on consumer redress proceedings. With regard to the last recommendation, the Office proposes introducing provisions on declaration, preparation of enforcement and enforcement, co-active measures to stimulate enforcement and restriction on cassation. The Office also calls for the provisions on evidence to be modified so as to ensure greater collaboration by the companies to be sued or to suffer enforcement while relaxing the burden of proof on consumers.

- The Catalan Socialists' Party (*Partit dels Socialistes de Catalunya)* considers that Option 3 (combination of instruments) and Option 4 (judicial collective redress procedure) should be implemented. In addition these measures should be supported by the implementation of Option 2 (cooperation between Member States). Furthermore the Party advocates the implementation of alternative dispute resolution mechanisms (mediation and arbitration) because of their benefits in terms of costs, time and effectiveness. Finally consumer associations should be granted more powers for consumer redress. They also propose encouraging the use of IT for procedural matters and for providing information to consumers.

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