

COUNTRY SURVEY OF COLLECTIVE REDRESS MECHANISMS

WHERE DOES COLLECTIVE REDRESS FOR INDIVIDUAL DAMAGES EXIST?

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AUSTRIA



Two mechanisms are currently in operation in Austria under which similar claims of individual consumers against the same professional can be collectivised and assigned to a consumer organisation.

The two mechanisms are a representative test-case action and the 'Collective Redress Action of Austrian type'. This second instrument is not provided for in law, but rather has developed from practice. There were attempts to formalise the situation and adopt a law, but so far no progress has been made.



BELGIUM

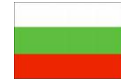


Presently, Belgium does not have any type of collective action for damages.

A project outlining a group action mechanism was drafted in September 2009 by the University of Brussels (ULB). It envisages an opt-out procedure for persons living in Belgium and an opt-in possibility for consumers living outside the country. Under this proposal both out of court settlements and judicial proceedings can be undertaken.



BULGARIA



Bulgaria has a legal system of two representative actions by which consumer organisations can act in court to claim damages for collective interests or act on behalf of consumers for compensation, and a general group action procedure. The first two actions are collective actions for damages. The second mechanism is conditional upon two or more identifiable consumers having suffered damages of the same origin, that the damages have been caused by the same trader and that the association has been authorised in writing by at least two consumers to take court action. The third procedure was adopted in 2008 and allows consumer organisations to represent unspecified person who suffered damage in any sectors of law. Few cases have been brought so far (five between 2004 and 2008). Indeed, Bulgarian consumers are either often unaware of this mechanism or do not have the instinct to use it. Moreover, lawyers and judges are not acquainted with it.



CYPRUS



Presently, Cyprus does not have any type of collective action for damages.



CZECH REPUBLIC



Presently, the Czech Republic does not have any type of collective action for damages.



DENMARK



Denmark has adopted a group action procedure that came into force on 1st January 2008. The Danish law encompasses both opt-in and opt-out options. Opt-in group actions can be brought either by individual claimants, by the private consumer association (The Consumer Council) or any representative organisation, or by the Consumer Ombudsman. If the group action concerns demands which cannot be expected to be taken to court individually because of the small size of the demand, and opt-in is not the appropriate way to do it, the court can decide - on request of the group representative - that the case shall be opt-out. Only a public authority can take opt-out cases to court (in this case the Consumer Ombudsman). So far, only one collective case was brought concerning the domain of the financial services. The case is still ongoing.



ESTONIA



Presently, Estonia does not have any type of collective action for damages.



FINLAND



As of October 2007, Finland has disposed of its opt-in group action procedure. The Finnish Consumer Ombudsman is now the exclusive channel to file a group action seeking redress for consumers or to take the case to the Consumer Complaint Board seeking a recommendation directed at the trader. Under the Finnish system, consumers do not bear the litigation costs. Individual consumers or consumer associations do not have the right to act, even when the Consumer Ombudsman has decided not to bring proceedings.

This instrument has turned out to be very effective, as its mere existence has led companies to accept negotiations and settlements. In 2009, two companies (Wixawin and Be2) which had behaved fraudulently have reimbursed the victims and changed their policy after they had been threatened by the Ombudsman.



FRANCE



Since 2006, several bills on group action have been discussed on how to incorporate a system of collective redress into the French legal system.

The current system of representative action (*'action en représentation conjointe'*) available to consumer organisations requires the association to have been given written authorisation by at least two consumers to take a court action. This procedure has been used 12 times since its introduction in 1992. However, it has proven to be ineffective when dealing with claims that are very important in terms of scope and scale.



GERMANY



Germany has several collective redress procedures:

A representative action (*'Sammelklage'* or *'Musterklage'*) allows state subsidised consumer associations to select one or a certain number of claims and pursue them on behalf of consumers in a test case. The litigation is limited to pecuniary claims and must be necessary for consumer protection in general. The individual claims must be identifiable (opt-in). In addition, if the jurisdictional damages limit does not exceed €5,000 the action must be filed at the local court with the risk of no option to appeal.

In the field of anti-competitive practices, the skimming-off procedure (*'Gewinnabschöpfung'*) allows the consumer association - in the collective interests of consumers - to skim off ill-gotten gains.

Furthermore, a test case proceeding exists. This procedure comes from the Capital Investors' Proceeding Act and is only available for capital investments disputes (*'Kapitalanleger-Musterverfahren'*). It was introduced in 2005. Its aim is to obtain a judgment which will eventually resolve a series of similar cases. The test case judgment is binding for all cases pending at the same time. Once the test judgment has been decided, the other individual lawsuits are continued, while the parties involved shall be bound by the test decision. The law contained a sunset clause which provided for a revision of the system after 5 years. In November 2010, the government decided to extend the procedure till October 2012.

In total, the German Consumer Association (VZBV) has brought 24 cases to date using a collective redress mechanism. However, profits seized are collected by the Federal Treasury. Moreover, because of the complexity of the procedure, it has shown little effect in practice.



GREECE



Since June 2007, new legislation allows consumer organisations to file a collective action asking for the recognition of the right of consumers to be compensated.

The consumer organisation can only obtain a declaratory judgement, but on such a basis individual consumers can then seek compensation directly from the trader. However, the first judgment has to become irrevocable, which may considerably delay compensation of consumers. If the trader does not respond to the demand, then individual consumers may ask, by a simplified written procedure in court, to issue a payment order against the trader.



HUNGARY



Hungary has adopted a representative action procedure that came into force on January 2011. Only the Hungarian Competition Authority is empowered to file an action, and only when a competition supervision proceeding against the infringement in question was already initiated. Thus, this action concerns exclusively infringements of provisions of the competition rules.

There is a time-limit of one year after the commitment of the infringement for bringing an action, the time-limit being suspended for duration of the competition supervision proceeding.

Individual consumers have the possibility to take further action by themselves against the offender under the provisions of the civil law.



ICELAND



Presently, Iceland does not have any type of collective action for damages.



IRELAND



Presently, Ireland does not have any type of collective action for damages.



ITALY



Since December 2007, the Italian Consumer Code contains a provision on collective actions for damages¹.

Previously, consumers' organisations and other adequately representative associations were allowed to bring cases. In January 2010, the new law also granted individual users or consumers standing to sue.

Consumers who intend to adhere to the collective action must communicate it in a written form to the claimant (opt-in) before the closure of the procedure (including appeal). The use of collective action is foreseen for claims related to standard contracts, non-contractual torts (only when concerning product liability and antitrust violations), unfair competition issues and unfair commercial practices.

The court will preliminarily decide whether to admit the claim or not. The claim can be brought by any member of the group, by an association or committee delegated by the group or one in which the members of the group participate. The claim will be declared inadmissible if legally unfounded, if there is a conflict of interest or if the collective interest is not proven. The judge can also postpone the decision on the admissibility of the claim when an independent authority is investigating on the same subject. If the court admits the claim and will determine the liability of the enterprise, the judge can order the claimant to publicise the collective action in order to allow further joining of members. Once the judge has decided on the trader's liability, he will then determine the amount of the compensation or define the criteria for the quantification of damages in a final judgement that can be enforced up to 180 days after its publication.

The new provision also allows contingency fees.



LATVIA



Presently, Latvia does not have any type of collective action for damages.



LITHUANIA



In Lithuania, group action brought by consumers only exists in theory since the Code of Civil Procedure mentions this possibility, but no further legislation has been taken to organise the procedure. Nevertheless, representative actions are theoretically possible to a limited extent. The State Consumer Rights Protection Authority and certain qualifying registered consumer associations may file a claim for protection of public interest of consumers, but so far no case has been brought.

The Ministry of Justice has initiated the discussion on the new law in 2011.

¹ Article 140 was introduced within the legal framework of the Financial Act (Law 244/2007) which introduced a new definition of group actions. This article was further amended in January 2009 by Law 99/09.



LUXEMBOURG



Presently, Luxembourg does not have any type of collective action for damages.



MALTA



Presently, Malta does not have any type of collective action for damages, but the draft law is being considered by the Government.



THE NETHERLANDS



Since 2005, the Netherlands have a procedure for collective settlement of mass damages (Collective Settlements Act). Consumer organisations can negotiate a settlement on behalf of all victims (opt-out basis) with the professional responsible for the damages. Agreement with the professional needs to be reached first before going to court. This renders consumer organisations totally dependant on the willingness of the business to cooperate and reach a settlement. Once a settlement is reached, parties to the agreement can ask the court to declare it binding on all victims. To date, this instrument has been used five times.

In cases where a settlement appears to be unfeasible, it is not possible for representative organisations to start a collective action for damages. This is explicitly excluded in the Dutch civil code. According to Dutch law, they can only ask the courts for injunctive relief and or declarations when a person has committed a tort or breached a contract.

The Collective Settlement Act was evaluated in 2009. The National Parliament has taken the position that the Act fulfils a positive need, but supplementary measures are necessary. The evaluation particularly found that measures are still required in order to increase the willingness of parties to enter into negotiation and actually achieve a collective settlement.



NORWAY



Norway has introduced a new Dispute Act including rules on group action (both opt-in and opt-out, the court can decide when more appropriate that the case will be opt-out). The act entered into force on January 1st, 2008. The Consumer Council, consumers, industry organisations, legal persons, associations and public bodies are eligible to bring a group action.

One of the main purposes of the Dispute Act is to solve and settle disputes as early as possible and to make it possible to accomplish legal proceedings at a reasonable cost. The problem however, is that the Act does not contain provisions on how to finance opt-out group action.



POLAND



In December 2009, the Polish Parliament adopted an Act on the pursuing of claims in Group Proceedings. This act, which came into force in July 2010, provides for the possibility of pursuing damage claims by a group of claimants of at least 10 persons. This mechanism covering both consumer and competition law is not open to consumer associations. It is up to the affected consumers to self organise (the proceedings can be announced in recognised newspapers), to designate a lawyer and to pay for the litigation fees upfront (a system of contingency fees up to 20% is mentioned in the Act).

The role of consumer associations is limited to providing help in the constitution of the group or the designation of the lawyer. Consumer organisations are totally set aside from the proceedings. The fact that victims will have to pay for the proceedings will be a major obstacle for the use of the mechanism in mass claims situations.



PORTUGAL



Since 1995, Portugal has had an effective group action system for the compensation of individual damages. Portuguese consumers, consumer associations and municipal authorities can file such actions. The plaintiff represents all consumers involved in the group, except those who expressly tell the court they do not want to be represented (opt-out). Only in the case that the plaintiff loses the law suit in its entirety, court fees may be due, but even then only between half and 1/10 of the regular rate. The role of the judge, who may collect *ex-officio* the evidence he considers necessary, is also an important factor. These elements ensure that consumers can be represented cost-effectively. DECO, the Portuguese Association for Consumer Protection, has successfully made use of this procedure.



ROMANIA



The Romanian consumer code allows consumer organisations to file a representative action asking for the recognition of the right of consumers to be compensated. Consumers must then file individual claims and prove they have suffered damages in order to receive compensation. Individuals or legal bodies can also act in conjunction where the damage they have suffered derives from the same right or obligation.



SLOVAKIA



Presently, Slovakia does not have any type of collective action for damages.



SLOVENIA



Presently, Slovenia does not have any type of collective action for damages.



SPAIN



Since 2000, Spain has had two procedures of collective redress for damages. An action can be taken by a consumer association or by a group of consumers in cases where the consumers have registered and are identifiable. Each individual will then be compensated. If the group of consumers is not identified but they share the same problem, only certain consumer associations can act before the court. The decision establishes the principles by which compensation will be given to individual consumers.

In 10 years this procedure has been used more than 50 times especially in relation to financial services.

In 2007 after a massive power cut in Barcelona, OCU introduced a case before the Barcelona tribunal on behalf of all the victims (323,337 persons). This case was the first recognition of the right for recognised Spanish consumer organisations to bring an action on behalf of unidentifiable victims (i.e. without actual victims present at the moment of filing the suit). In 2009, a judgment sentenced the electricity companies to compensate the victims.

There is no specific procedure for actions for damages arising from the breach of competition rules.



SWEDEN



Since January 2003, Sweden has implemented an opt-in group action system which also encompasses laws other than those of consumer protection, e.g. environmental laws. Under the Swedish Group Proceedings Act a private individual, an organisation such as consumer associations or a Government-appointed authority can bring a case on behalf of a group of consumers.

In October 2008, the Swedish government edited a report assessing the functioning of the Group Proceedings Act. The overall conclusion was positive even though the opt-in mechanism is considered by some as being too burdensome. In six years, twelve cases had been brought to court and the two objectives of the law, namely access to justice and behaviour modification, had been considered as met.

However, in order to increase the effectiveness of this Act some adjustments were proposed such as the spreading of the plaintiff's responsibility for litigation cost (by allowing contingency fees agreements in certain circumstances and by increasing legal aid).



UNITED KINGDOM



In the UK, laws can be different in England and Wales, Scotland and Northern Ireland. England and Wales have collective claims procedures in both consumer protection and competition fields, although these differ across its three legal jurisdictions. A Group Litigation Order (GLO) allows claims to be brought as part of a group. It has not often been used in consumer cases, but so far claims have involved product liability and holidays. Representative actions of a sort are also available, but these present procedural obstacles and have largely fallen out of use. In the competition field, once a conviction for anticompetitive behaviour has been secured, statutory enforcers in the UK, e.g. Which? can bring a representative action on behalf of individual claimants. Which? recently brought such an action on behalf of football fans after the Office of Fair Trading fined JJB Sports for price fixing agreements which resulted in unlawful overcharging.

Since 2007, the Government is thinking about new mechanisms to improve collective redress. In 2009, it refused a proposal from the CJC to establish a generic collective action (available for any type of civil claims) but favoured sector by sector improvements. It also decided to appoint in 2010 a Consumer Advocate who will be in charge of raising awareness of consumer issues in general and will be able to bring collective claims of national importance to court. The full extent of his missions and powers has not been decided yet.

TABLE: Summary of the country survey (updated July 2010)

Country	Collective redress for individual damage claims					No collective redress available
	Group action			Representative Action	Test Case procedure	
	Proposed	In force	Collective ADR			
Austria	√			√	√	
Belgium	√					√
Bulgaria		√				
Cyprus						√
Czech Republic						√
Denmark		√	√	√		
Estonia						√
Finland		√		√		
France	√			√		
Germany		√*		√	√	
Greece		√				
Hungary				√		
Iceland						√
Ireland						√
Italy		√		√		
Latvia						√
Lithuania		√				
Luxembourg						√
Malta						√
The Netherlands			√			
Norway		√				
Poland		√				
Portugal		√				
Romania				√		
Slovakia						√
Slovenia						√
Spain		√		√		
Sweden		√				
United Kingdom		√		√		

*Capital investment

END