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Litigation Committee response to the European Commission's Staff Working Document "towards a coherent European approach to collective redress"

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Litigation Committee.

This is the written response of the Litigation Committee to the European Commission Staff Working Document "towards a coherent European approach to collective redress" SEC (2011) 173 final.

Overview

We believe that each Member State is best placed to develop its own approach to collective redress. This will enable Member States to address specific issues which may apply in their own jurisdictions. We consider that it is premature and over-ambitious to seek a more prescriptive EU-wide approach at the present time. If there are substantive issues which merit an EU-wide approach, the better course is to address the issues through the substantive issue (as was done, for example, in relation to the Transparency Directive) rather than putting the procedural approach first.

The hearings and consultations to date on this question reinforce the lack of uniformity of among Member States in their approach to collective redress. Indeed, this was evident at the most recent public hearing on 5 April 2011, where there were times when it was hard to discern much more than a collection of disparate views being expressed, quite legitimately, by various interest groups.

Set out below are our specific comments on certain of the 34 questions posed.

Specific Questions

Question 1: What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

We are not opposed to the principle of collective redress and acknowledge, as the Green Paper points out, that Member States take a variety of approaches to collective redress. Nonetheless, we are not aware of a significant call for reform in this area from our clients, which are predominantly large commercial enterprises.

Any substantive comments would depend upon the detail of the proposals. Our observation at this stage is that the Commission should think incrementally and not be overly ambitious given the variety of views expressed at the public hearing last month. It may be that high-level principles can be distilled across all sectors, but we are not convinced that a single mechanism will meet the requirement of all forms of dispute.

We note that by virtue of Regulation 861/2007/EC there is already in place a pan-European system for small claims. We suggest that the Commission should wait for an assessment of the strengths of this system before introducing any system of collective redress.

Question 2: Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

We believe that the justification for collective redress should be to afford compensation rather than to police or enforce the law, which should remain in the hands of public authorities. We are broadly in agreement with the views expressed by HH Judge Graham Jones on this point at the public hearing in April 2011 that public enforcement is a punitive measure carried out by public bodies to the general benefit of society and which does not lead to compensation; whereas private actions are based on the idea of compensation to those who have suffered loss. These are complementary systems, and what is needed is a system which enforces the law but which also compensates victims.

Question 4: What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

Any action that the Commission takes needs to have a clear legal base and scope. We have yet to see a clear case made by the Commission that it has a legal basis to intervene into national damages and procedural law (see, for example, the draft report of the European Parliament on the white paper on damages actions 2008/2154(INI))

If any collective redress scheme were to operate across the whole of the EU then serious consideration needs to be given to how it would work within the Brussels I Regulation as it stands and to the extent reformed. In particular, we imagine the Commission would want to avoid a scheme in which there was a race to the courts to be the first seised.

To the extent that the Commission feels it necessary to give guidance on any collective redress procedures, we would counsel against any recommendation of an "opt-out" system preferring instead an "opt-in" model. It is unclear that an "opt out" system is permitted in certain Member States (see, for example, the French

Government's amicus brief in the US Supreme Court case of *Morrison v National Australia Bank Ltd* explaining why opt out is contrary to the French constitution and public policy). There are also challenges, which the Commission needs to consider, in meeting the obligations under Article 6 of the European Convention on Human Rights.

Question 6: Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

We would favour non-binding good practice guidelines over any legally binding approach. See also response to Question 1.

Question 16: Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

While ADR can be highly effective, we that believe it should be non-mandatory.

Question 17: How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

We believe that a key safeguard of a system which is not prey to abusive actions is that parties should bear the consequences of frivolous actions, including bearing the costs. This will not prevent access to justice where there are safeguards to ensure that costs can only be imposed in appropriate circumstances.

Question 21: Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

In England and Wales, the "loser pays" principle operates as an effective safeguard against frivolous and unmeritorious litigation and, while we acknowledge that this system may not be appropriate to litigation in all other Member States, we would not want the Commission to take any steps that might undermine its effectiveness in England and Wales.

In other jurisdictions, the ability to bring an action for frivolous litigation could act as a safeguard. Additionally, a judge-led certification system could weed out unmeritorious or low value claims with little public interest. This could include a superiority test; checks as to the standing of representatives; a preliminary assessment of the merits of a claim; a minimum number of identified claimants; checks on the commonality of the interests represented and remedies sought; an assessment of whether it is likely the claimants will pursue their claim; consideration (non-mandatory) of ADR; and an inquiry into the funding arrangements of the case.

Question 22: Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies

depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

We would not want powers to vest in regulatory authorities (for example, UK Financial Services Authority, Office of Fair Trading and Financial Ombudsman Service) and would prefer the decision to take any class action to be a private (that is, non-public) one with the court as arbiter.

Question 25: How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

We do not believe there is a need to change the current national position in each of the Member States on funding. In this respect, any proposals on collective redress should be treated in the same way as any other litigation. There should be no public funding of collective redress actions nor should, for example, consumer bodies be able to use surplus or unallocated damages to fund further litigation.

Question 29: Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements?

The Commission will of course be alert to the complexities and importance of enforcement of judgments when considering any recommendation. The "global" collective redress settlement regime in Netherlands has not yet been tested: a challenge has not yet been mounted in another Member State of a settlement sealed by the Dutch courts. Until the Court of Justice has given its view on such a challenge, we urge caution.

Question 30: Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

See response to Question 4.

Question 33: Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

We believe that it is consumer bodies and consumer related remedies that should be the focus.

Question 34: Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

See response to Question 1.

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

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