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*123 Is a Class Action System for Consumers Desirable in Europe?

BARRY O'SULLIVAN

This article purports to examine the viability of a harmonised system of collective redress throughout Europe, insofar as it would be implemented as EU law. In doing so, it will examine the potential proposals put forward of late by the European Commission in its Green Paper,[1] and also the recent Consultation Paper drafted in response to the Green Paper. [2] Each of the four options put forward by the Green Paper will be discussed and critically analysed, and the preferred approach of this author will be indicated.

In justifying this preference, the approaches taken and results experienced in other non-European jurisdictions will be examined, and analysis will be offered. In discussing how to implement a collective redress system in the EU, it is most beneficial to examine the US class action system, given that it is the original form of collective litigation. Thus, it can serve as a useful guideline for the EU, insofar as any problems arising in the US could, by example, be avoided by the EU legislature. The approaches taken in Canada and Australia will also be examined to ascertain whether provisions are in place there that merit inclusion in an EU system.

Then, national collective redress systems already adopted by individual EU Member States will be examined. There will be a particular focus on the existing Irish system and, to a lesser extent, that of the UK, in order to identify what changes are needed. In addition, the approaches of the various civil law continental systems will also be identified and examined, with a view to including them as part of, what I propose to be, an ideal system.

By way of conclusion, this ideal system will be proposed, taking into account the Green Paper's proposals and the benefits of approaches taken in other non-EU jurisdictions, as well as any useful provisions already implemented by Member States individually.

There has been much discussion of late as to whether some system of collective litigation should be implemented in European law, especially in *124 light of the EU aim of protecting consumers, [3] and also due to the rapid development of the class action system in the US. [4] Whilst many of the EU Member States have already individually implemented their own collective redress mechanisms, the need for harmonisation at EU level has become increasingly apparent. Existing case law across Member States shows this need. [5] For instance, in Germany, a situation emerged whereby Deutsche Telekom was sued by 15,000 people, and each of these cases had to be heard separately. [6] Also, Volvo found itself potentially culpable for up to €800 million before various Member State courts arising from its vehicle catching fire in the Mont Blanc tunnel ten years ago. [7] In addition, the Railtrack case in the UK, where 50,000 shareholders each sought to sue, is another glaring example. [8] Allowing cases such as these before the European courts would be far more efficient than several differing and, possibly, contrasting trials and judgements by various national courts.

The Existing Situation at EU Level

The EU was initially reluctant to implement collective litigation,[9] until the European Commission discussed it as part of its Consumer Policy Strategy *125 2007-13. [10] It stated that a system of “collective redress” could operate in the same manner as the Injunction Directive, [11] which is

already in force. In other words, it would not involve conferring new rights. Instead, it would just provide a new harmonised EU forum in which to enforce those rights across the EU.

Although no legislative proposals, or commitments to any such proposals, emerged from the strategy or the subsequent brainstorming event in Leuven,[12] the Green Paper has since been published, evidencing an appetite for change. Even prior to the Green Paper, the then Commissioner Kuneva emphasised that collective redress could be judicial or non-judicial. She advocated an EU cross-border Small Claims procedure, and the use of ADR mechanisms as being effective means to strengthen the redress framework. [13] This approach appears to have been incorporated into the first proposed option of the Green Paper itself. [14]

Green Paper

The purpose for publishing this Green Paper is, according to its introduction, “to assess the current state of redress mechanisms, in particular in cases where many consumers are likely to be affected by the same legal infringement, and to provide options to close any gaps to effective redress identified in such cases.”[15] As already stated, it puts forward four separate proposals for doing so. In discussing each of these, their potential advantages and disadvantages will be identified.

The first option put forward is that no new EC action be taken. This approach involves relying “on the existing national and EC measures to achieve adequate redress for consumers”.[16] These measures include both the judicial route and alternative dispute resolution. For instance, one of the existing measures expressly referenced is the EC's Mediation Directive. [17] However, it is acknowledged in the Green Paper itself that this, along with *126 another relevant existing mechanism, the Small Claims Regulations, [18] has “limited application to mass claims”. [19] So, adopting this approach would only be a short-term measure, as the Green Paper expressly states it would only last until more information is available. [20] Nevertheless, there is no doubt that real change is needed, and it also seems clear that this need is pressing. As the Paper itself notes, “[t]his option would possibly not provide satisfactory redress … or remedy obstacles to the single market.” [21]

The second option proposed is the development of co-operation between Member States so as to ensure all inhabitants of the EU are entitled to the same standard of redress. This would involve making the enhanced redress system of one Member State available to citizens of other Member States, through agreements between Governments, without going so far as to introduce pan-European legislation. It is highlighted in the paper itself, however, that only thirteen Member States currently have some existing form of collective redress.[22] It is also highlighted that these systems differ; they range from representative actions to test cases to group actions. Some of these systems will be discussed below. [23]

Other problems are also highlighted by the Green Paper with regard to the implementation of this measure. Firstly, it is noted that there may be hesitancy on the part of the Member State authority to grant resources to the necessary “competent entity” who is to bring the claim, particularly where the entity is bringing the claim on behalf of consumers from another Member State. The Green Paper proposes, by way of resolving this issue, that the aim of enhanced co-operation between Member States could be achieved through the existing European Consumer Centres Network (“ECC-Net”).[24] However, it also recognises that this ECC-Net network has inadequate expertise to deal with the area of judicial redress. This lack of expertise would require resolution, for which the creation of a new network would be required. As such, merely enhancing co-operation between Member States does not appear to be possible, without introducing a new overarching EU policy measure specifically to focus on collective redress.

Thirdly, the Green Paper proposes that the area be regulated by a combination of policy instruments, both binding and non-binding. Such measures are designed to improve dispute resolution mechanisms, extend the scope of the Consumer Protection Cooperation Regulation (“CPCR”),[25] *127 encourage businesses to improve their complaint handling schemes, and raise consumer awareness of existing means of redress. [26] The CPCR itself is a good example of an existing binding measure. This put in place an EU-wide network of national public enforcement authorities, and the Green Paper proposes that the CPCR be amended to grant to the authority the power to require an offending trader to compensate harmed consumers. Various other

measures were also proposed, such as the implementation of a (non-binding) Recommendation to extend the scope of Member States' small claims procedures, allowing each Member State to deal efficiently with both national and cross-border mass claims. It is submitted that one potential problem arises with this approach, however; as pursuing this option would involve implementing several varying initiatives, it could end up confusing the consumers it would be designed to protect and, as such, the respective mechanisms could be under-utilised.

The final option put forward for consideration by the Commission in the Green Paper is judicial collective redress, which bears the closest relation to the concept of class actions. However, the Green Paper suggests that such a mechanism could be binding or non-binding. Putting aside that particular issue, the main advantage of this avenue of recourse is that it ensures uniform protection for all consumers of the EU. It is crucial to note, however, that this proposal does not involve choosing one set procedure.[27] Instead, it focuses on facilitating mass claims and ensuring efficiency, through methods like ensuring legal standing for consumer claimants and preventing unmeritorious claims. In doing so, it attempts to avoid some of the problems which have arisen with the US class action, which are outlined below. For example, a litigation culture has enveloped the class action concept in the US. To prevent a similar development in this jurisdiction, the Green Paper identifies various “gatekeepers” such as the refusal of public funding by consumer associations for claims considered to be unmeritorious, or adopting a ‘loser-pays’ principle.

Opt-in/Opt-out

In addition to these four options, an interesting proposal is made in the Green Paper with regard to the opt-in/opt-out quandary, which, as demonstrated below, has caused problems elsewhere and is yet to be conclusively resolved. This issue is important as it concerns who is considered part of the claim and, thus, who can benefit from a successful action.

*128

Adopting an opt-in procedure would mean that only those who registered their involvement in the action prior to the successful judgment would receive any benefit. Conversely, with an opt-out procedure, any party who was affected in the same manner as the parties bringing the claim would be entitled to claim a benefit, even after the judgment, unless he/she had expressly “opted out”, ie informed the court that he/she did not wish to be considered as being represented by the parties bringing the action.

On this point, the Green Paper proposes an opt-in procedure, but notes that the problems of this procedure could be solved through the court “distributing the compensation”.[28] This would allow consumers to join a mass claim after favourable judgment has been delivered, albeit subject to “a specific judicial procedure”. [29]

This latter proposal is of definite merit, because it would avoid the over-expansive, ambulance-chasing culture enveloping the US system, whilst still allowing victims to join the claim after judgment where they have established the damage done to them. However, the Green Paper does not seem to concern itself with the practicalities that would be involved. The more recently published Consultation Paper does highlight that it is likely to be more costly,[30] but also notes that such a “harmonised judicial procedure will increase the level of legal certainty for businesses and consumers”. [31] It stipulates that, for cross-border cases, the regulation regarding jurisdiction would apply. [32] However, many other important questions are left unanswered, such as whether or not the system should be binding? If so, on whom should it be binding? How would, and should, a claim be made? It is these questions of detail that this article aims to answer. In answering these questions, existing collective redress mechanisms will be examined, of both EU and non-EU countries, to see what has been most successful in these respective systems.

Existing Collective Redress Mechanisms Elsewhere

USA - The Class Action

The provision of a judicial facility for group redress has a long tradition in the US, via the guise of class actions. Any corresponding measure in Europe would be hugely affected by the

experiences of the American system, given the strong role it plays in the US before both State and Federal courts. This discussion will merely briefly discuss its advantages and disadvantages.

*129

Such a concept can be of real benefit to consumers. It is for this reason it has succeeded and lasted in the US. Such benefits include a reduction in legal costs, faster progress through the judicial system, increased consumer protection (as the strength in numbers means less of an individual burden, a complaint is more likely to be pursued), which provides for a stronger claim, which, in turn, forces businesses to take such claims more seriously.

However, some weaknesses have been exposed, in particular with the US approach. Firstly, the "opt-out" system is very extensive, to the point of being over-inclusive. The opt-out needs to be express, which means that a person, with no idea that the claim had been made, can successfully reap the benefit long after the case has been argued and judgment has been delivered, which is detrimental of those parties who participated extensively in the action. Also, conversely, a failed prior action on similar facts can preclude any subsequent litigation by another party, even where the latter party had no knowledge of the earlier claim. Also, the collective nature of the claim can suppress individual interests and compel a settlement due to coercion within the group as settlements cannot be made individually. Other concerns have also arisen in the US, such as the role taken, and profit made, by lawyers, and the excessively punitive nature of damages.[33]

It is also useful to look at the approaches taken in the other main non-European common law jurisdictions insofar as they may have implemented other provisions which would also prove advantageous for the European legislature to adopt.

Canada

Class actions only operate in three provincial courts in Canada at present (Quebec, British Columbia, and Ontario), but, with three significant judgements issued by the Supreme Court in 2001, they are expected to have even wider operation.[34] Subjects of class actions in these courts can be diverse, unlike the consumer-only approach taken in France, for example. One area where it does differ strongly with the U.S. is that the representative party bringing the action is obliged by the court to provide all class members with notice of the claim. Furthermore, the court monitors how this notice is administered. Also, class members other than the representative may be required to participate in the action through the production of such documents as may be required as part of the discovery process. This effectively removes the injustices that can arise in the US, where the plaintiff is prevented from bringing a claim due to the failure of a prior claim, of *130 which he was part but about which he was completely unaware when the action was brought.

Australia

In Australia, the procedure is restricted to federal court. The approach in this jurisdiction is closer to that in the US, especially in relation to the opt-out procedure. Interestingly, however, no such action can be settled or discontinued without: a) court approval, which may be subject to conditions imposed on the settlement and b) notice being given to the class members.[35] This eliminates the coercion that can occur within the class with regard to accepting settlement offers that are not universally satisfactory.

Collective Redress Systems Already in Place in Individual EU Member States

As mentioned above, some individual Member States have already pursued unilateral approaches.[36] According to Harbour and Shelley, [37] "Sweden has been the focus of much of the discussion of class actions in Europe in the last few years". [38] This is because Sweden has implemented legislation which "marked the first vehicle for bringing private, individual class actions by a plaintiff-class member, in addition to the organization actions and public actions seen elsewhere". [39] Although not all European countries have gone so far towards introducing class actions, the one common theme in many of those thirteen countries that have implemented a collective litigation process, is the permission granted to consumer associations to represent consumers in relation to their claims. [40] This has occurred, typically, to allow such associations to

protect the collective interest of consumers.

*131

This approach of empowering the national consumer association to take claims has only really found favour in continental Europe's civil law systems. The approach taken in the EU's common law countries (Ireland and the UK) differs. However, there may be some aspects of their existing approaches which prove useful in creating an EU-wide system, and thus they will now be briefly examined.

UK

The UK approach has taken the form of Group Litigation Orders ("GLO"). This approach was implemented in 1999 as a result of the Woolf Report,[41] which according to the Irish Law Reform Commission, [42] was responsible for the new GLO procedure being "part of a far-reaching overhaul" of the system. Unlike in Continental Europe, this approach is not restricted to consumer associations. However, it also differs from the US class action concept, in that it is more a form of case management, with each plaintiff listed as a party in the proceedings, rather than where there is one representative plaintiff. Also, a claimant must enlist to partake in the proceedings, rather than being automatically included unless they opt-out.

This system is designed to counteract the above-mentioned weaknesses of the US system. However, it is not without fault itself. Single plaintiff representative actions are not permitted. Also, as highlighted recently by the Court of Appeal in Devenish Nutrition v Sanofi-Aventis SA,[43] damages awarded extend only to cover the actual loss suffered. Tuckey J, one of three judges hearing the appeal, said: "Devenish is entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less". [44]

This can serve to limit damages significantly, which may deter consumers from pursuing claims. Also, the removal of any possible punitive element to damages arising from this ruling may also deter those consumers whose purpose for bringing their actions is solely to see a big company punished. For instance, the emphasis placed on class litigation against the tobacco industry in the US occurs because they "have the potential to win hundreds of billions of dollars".[45] This cannot arise in this context in the UK, [46] due to the aforementioned absence of punitive damages. However, that is not necessarily negative, given that it may also prevent the practice of "ambulance-chasing" which has blighted the US system.

*132

Ireland

The Irish approach reflects the position in England pre-1999. Two different ways of making claims are available. These are, first, representative actions (which are rarely used, due to the lack of damages arising from even successful claims, and also problems in availing of civil legal aid) and second, test cases. The former seems to allow for a similar system to class actions[47] but has been restrictively interpreted by the courts. For instance, in Verbatim Ltd v Duffy, [48] the High Court held that similarly situated employees did not have "the same interest" required to bring a representative action. As Heffernan notes, "taken together, these various limitations have greatly undermined the utility of the representative action as a vehicle for multi-party litigation". [49]

As such, test cases have been more common. Such cases involve one party pursuing a case and, if it is successful, other similarly injured parties following up with their own cases in the expectation that the prior ruling will result in judgements in their favour. Two examples have emerged in Irish courts in recent times: the Social Welfare Equality cases[50] and the Army Deafness cases. [51] No particular system has been developed for dealing with such cases, which means that the State has taken a fragmented, reactive approach in each instance. In this regard, the State was, arguably, lucky in the previous cases, particularly the Army Deafness Cases, where an agreement was reached as to damages and a potentially significant precedent was not set. In a more recent medical negligence case, [52] the plaintiff, Alison Gough, received €273,000 damages. This has gone on to affect 65 subsequent cases, to the extent that the question inevitably must be asked as to whether all subsequent plaintiffs should also get €273,000.

The current approach is thus potentially very financially damaging for the State. Lennox highlights

the impending Sellafield cases as being an opportunity to change the approach.[53] It is also not suitable with regard to the disparity in damages awarded to different, but similarly situated *133 plaintiffs, as, clearly, it would be impractical to answer the above question in the affirmative. Therefore, changing this situation is clearly desirable for all, and the status quo cannot remain. Recent Law Reform Commission publications show the recognition of the legislature of this need to change [54] and offer proposals of merit, such as an opt-in procedure and, also, the use of a single solicitor, which would simplify things. However, this article is not focusing on these proposed reforms, as, even if they were put into place, reform implemented at EU level would take precedence.

What the EU should do next

It is submitted that the fourth option proposed by the Green Paper be adopted, i.e. the creation of a judicial collective redress procedure. In doing so, the European legislature must disregard the earlier remarks of Commissioner Kuneva, which is already acknowledged in the Green Paper.

While then Commissioner Kuneva was quite correct to point out that non-judicial collective redress can be of use, it cannot realistically be the main focus of a legislative approach. Also, her other recommendation, invoking the Small Claims procedure,[55] is completely inapplicable to collective redress, in that the maximum remedy available in this situation is €2,000.

As such, my reasoning for advocating the fourth proposal is this: litigation presents an unparalleled threat to a defendant corporation. While the use of ADR mechanisms is always preferable to litigation, many corporations will only look to settle a claim once litigation has been threatened. For example, in the US, it has been said that lawsuits, as opposed to lawmakers, now make tort policy.[56] Although the then Commissioner Kuneva, in the past, rejected the application of the class action system in the EU, the pitfalls of the US approach can be avoided in implementing judicial collective redress in Europe, as has been shown above.

Although the details provided in the Green Paper on how this fourth proposal should be enforced are somewhat vague, these are easily solidified. Firstly, as has already been highlighted above,[57] the Green Paper makes no distinction as to a preferred method of making claims, between for example, test cases and representative actions. It is not essential which one is chosen by the legislature. Therefore, this article will not enter into a discussion as *134 to choosing which method should be the sole prescribed method of bringing claims.

Nevertheless, it seems clear from the Green Paper itself that “competent entities” will now also be available to pursue claims on behalf of consumers.[58] This method, in theory, seems to be far more advantageous to consumers, for reasons that will be highlighted below and, as such, would become the primary method used. It must also be noted, however, that, more recently, the Consultation Paper drafted as part of the consultation phase of the Green Paper has indicated that a test case procedure would be preferable. [59]

A consumer pursuing a claim under collective redress should therefore proceed as follows. Firstly, he should report the wrong done to him to his local or national consumer association. Upon receiving several of the same complaints, the consumer association would, if it decides these complaints to merit a legal remedy, initiate proceedings against the offender(s). This claim would not be funded by the consumers, but through public funding. To regulate frivolous complaints, this funding could be conditional upon the consumer paying for an initial consultation with a solicitor to discuss the claim. It would then be up to the consumer association to decide how to pursue the claim. Such a court case could be conducted like any other, with the structure being quite similar to a criminal case, insofar as the injured consumer, like the victim of a crime, would not need to play any part in establishing liability. In fact, he would not even have to incur the cost of getting legal advice. For the duration of the case, the association would take total responsibility for the proceedings, and be free to call some of the complainants to give evidence. If the claim is ultimately successful, the court should award a fixed monetary amount, and leave it to the association to ensure fair distribution between claimants.

In distributing the proceeds, the consumer association should prioritise those claimants who have brought their claim prior to the judgment, and award more to them accordingly. Although, the conclusion of the Green Paper regarding the distribution of the compensation has merit,

nevertheless, claimants' coming forward after the judgment should have to undergo a rigorous screening process before receiving compensation, and claims should be subject to a deadline, eg within six months of the judgment. Also, both the court and the consumer association should be mindful of potential future claimants when allocating the proceeds of the judgment.

Although the judicial route is the most successful method of recourse, it must be noted that it is always only a last resort. It would not be practical, even for publicly-funded consumer associations, to proceed directly to *135 litigation in all cases. Alternative dispute mechanisms are of use, particularly given the economic challenges we now face, and they can operate in conjunction with a judicial system. Some of these mechanisms are referred to in the Green Paper in relation to other options and these are more preferable in certain situations. For example, where the claims are relatively minor, the consumers can proceed by themselves through a small claims mechanism. Also, for larger claims, allowing a consumer association enter into mediation with an offender first would prevent costly litigation being an overt burden on public resources.

Conclusion

Ultimately, it is submitted that some system of group litigation is required in Europe. The publication of the Green Paper and the subsequent Consultation Paper indicates that the EU now supports this contention. Existing case law across Member States shows this need. It should also be noted that implementing a collective redress procedure would be compatible with the EU's emphasis on consumer protection, by giving consumers an increased voice.

As already indicated, the existing mechanisms in place, both within the EU and outside, can be influential in deciding how the EU legislates for judicial collective redress. It is necessary to focus on positive aspects of other tried-and-tested national systems, which have been discussed above. Common criticisms of implementing collective redress here typically involve highlighting the flaws of these systems, particularly of that in the US. However, a cohesive, working proposal that avoids these pitfalls can easily be formulated, as above.

In conclusion, I obviously do not conform to the view that judicial collective redress should not be accepted in EU law. In fact, it is important that the European courts hear such cases, as highlighted by the aforementioned Mont Blanc civil lawsuits.[60] Ultimately, it is my view that a class action/collective redress system, incorporating the strengths of the other approaches referred to above can be of real benefit to the law of the EU, once their disadvantages can be avoided. As Woolfe outlines, [61] such a measure is coming, but is "unlikely to emerge before 2011". [62] The Green Paper is only the first step of a lengthy legislative process, so Woolfe's statement is likely to be correct. Notably, newly-appointed Commissioner Dalli has committed to continue the movement towards developing the *136 necessary legislation in this regard. [63] Nevertheless, it is more important that the right approach be taken, as rushing through a flawed system would be highly detrimental to all, especially the consumers such a system is designed to protect.

This journal may be cited as e.g. (2007) Hibernian L.J. 1 [(year) Hibernian L.J. (page number)]

Hibernian Law Journal 2010, 9(1), 123-136

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1. Green Paper on Consumer Collective Redress, published 27 November 2008, http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf, accessed on 17 December 2009 [hereinafter Green Paper].

2. Consultation Paper for discussion on the follow up to the Green Paper on Collective Consumer Redress, published 29 May, 2009, http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf, accessed on 17 December 2009 [hereinafter Consultation Paper].

3. "Consumer policy supports the aims laid out in Articles 153 and 95 of the Treaty establishing the European Community, which promote the interests, health and safety of European consumers" http://ec.europa.eu/consumers/pro/index_en.htm, accessed 17 December 2009.

4. According to Dean, "Unfair Terms: the European Approach" [1993] Modern LR 581, "A class action is where one person wins an action in consequence of which a number of other persons become entitled to remedies for the same wrong". It involves a court action facilitating the recovery of damages by multiple injured parties, usually consumers, against the defendant(s) who caused that injury. It is the original form of collective litigation, commencing in the US in the late 19th century (Kent v Church of St Michael,

136 NY 10, 32 NE 704, 32 St Rep 693 (1892)). It derived from the equitable doctrine of virtual representation, to ensure those who could be deemed to be adequately represented in a judgment already delivered would be bound by, and indeed, could avail of it without the need to obtain another judgment from the same court to the same effect (Arias v Angelo Dairy,

46 Cal 4th 969 (2009), pp 988-989, per Werdegar J). As such, it is an extremely useful device for ensuring court efficiency, and thus has become an "an important and valuable part of the legal system" (US Class Action Fairness Act 2005, Preamble).

5. Smith, "Is America Exporting Class Actions to Europe", The American Lawyer, 28 February 2006.

6. Tate & Sherwood, "Europe Gets Taste of Class Actions", LA Times, 20 June 2005.

7. Indeed, civil proceedings were actually initiated before Belgian, Italian and French courts. Smith, supra note 5.

8. Weir v Secretary of State for Transport (No 2)

[2005] EWHC 2192.

9. eg Kuneva, then Commissioner for Consumer Affairs, 29 June 2007, http://ec.europa.eu/consumers/redress_cons/docs/kuneva_leuven_speech290607.pdf, p 6 and also 10 November 2007, http://ec.europa.eu/consumers/redress_cons/docs/mku_cr_lisbon_final.pdf, p 12, both accessed on 17 December 2009.

10. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013 COM (2007) 99 final http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf, accessed on 17 December 2009.

11. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 166, 11.6.1998).

12. Leuven Brainstorming Event on Collective Redress, 29 June 2007.

13. Ibid, speech of then Commissioner Kuneva, at http://ec.europa.eu/consumers/redress/collect/mku_leuven_speech_en.pdf, accessed on 17 December 2009.

14. Green Paper, supra note 1.

15. Ibid, p 2, para 4.

16. Ibid, p 7, para 22.

17. Directive 2008/52 on certain aspects of mediation in civil and commercial matters, OJ L 136.

18. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199.

19. Green Paper, supra note 1, p 7, para 21.

20. Ibid, para 22.

21. Ibid.

22. Ibid, para 24.

23. Representative actions and test cases are discussed further below insofar as they operate in Ireland.

24. Green Paper, supra note 1, p 9, para 29.

25. Regulation (EC) No 2006/2004 on Consumer Protection Cooperation.

26. Green Paper, supra note 1, p 9, para 32.

27. "[E]very consumer throughout the EU would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases", Green Paper, supra note 1, p 12, para 48.

28. Ibid, p 13, para 57.

29. Ibid.

30. Consultation Paper, supra note 2, p 28, Table 13.

31. Ibid, Table 14.

32. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

33. Heffernan, "Comparative Common Law Approaches to Multi-Party Litigation: The American Class Action Procedure", (2002) 25 Dublin University Law Journal 102.

34. Western Canadian Shopping Centres Inc v Dutton

(2001) 201 DLR (4th) 385; Hollick v Toronto (City),

(2001) 205 DLR (4th) 385; Rumley v British Columbia

(2001) 205 DLR (4th) 39.

35. This was recognised by the Federal Court in ACCC v Chats House Investments Pty Ltd

(1996) 71 FCR 250.

36. Woodroffe & Giannoulopoulos "Comparative Study of Consumer Policy for DTI Consumer & Competition Policy Directorate", (2003), see chart on page 33; France, Italy & the Netherlands being the best examples.

37. Harbour & Shelley, "The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World" (2006) ABA Annual Meeting, Section of Litigation, August 3-6, 2006.

38. Ibid, p 5.

39. Ibid.

40. For example, in Spain, under its Law of Civil Judgment 1/2000, actions by consumer and user associations on behalf of their members and unidentified victims are permitted, only representative associations may apply to have mass damage claims declared binding, and in Finland the Class Actions Act only applies to claims within the competence of the Consumer Ombudsman.

41. Woolf LJ, "Access to Justice: Final Report", (1996) pp 223-48.

42. Law Reform Commission Report: Consultation Paper on Multi-Party Litigation (Class Actions) LRC CP 25-2003, p 46.

43.

[2009] 3 WLR 198.

44. Ibid, p 247, para 161.

45. US NGO Action against Smoking and Health (ASH), at http://www.ash.org/tobacco-class-actions.html, accessed on 17 December 2009.

46. This is best shown by the approach taken in a 1997 class action, where 47 cancer sufferers received only £50,000 each. Buerkle, “Class Action May Give Green Light To Anti-Smoking Forces in Europe: British Court Allows Major Tobacco Suit”, International Herald Tribune, July 5, 1997, http://www.nytimes.com/1997/07/05/news/05iht-smoke.t.html, accessed 17 December 2009.

47. Rules of the Superior Courts 1986, Order 15, Rule 9: “Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued … in such case or matter, on behalf, or for the benefit, of all persons so interested.”

48.

[1994] ELR 159.

49. Heffernan, supra note 33.

50. Cotter and McDermott v Minister for Social Welfare

[1987] ECR 1453; Tate v Minister for Social Welfare

[1995] 1 IR 418.

51. These include Flood v Minister of Defence

[1999] ICLY 366; Smith v Minister of Defence

[1999] ICLY 345; Dunne v Minister of Defence

[1998] ICLY 314.

52. Gough v Neary & Cronin,

[2003] 3 IR 92.

53. Lennox, “Toxic Torts now a Reality in Ireland”, (1997) 15 ILT 236.

54. LRC CP 25-2003, supra note 42, and also the Law Reform Commission's 2005 Report on Multi-Party Litigation (LRC 76-2005).

55. Regulation 861/2007 establishing a European small claims procedure, Article 2(1).

56. Dakss, “Lawsuits, not Lawmakers, Make Policy”, CBS News, 19 April 2003, http://www.cbsnews.com/stories/2003/04/19/politics/main550150.shtml, accessed 24 January 2010.

57. Green Paper, supra note 1, p 12, para 48.

58. Ibid, p 8, para 26.

59. Consultation Paper, supra note 2, p 18, para 62.

60. Smith, supra note 5.

61. Woolfe, “Use of US Class Action gathers apace”, Financial Times, November, 26, 2007, at http://www.ft.com/cms/s/0/8756b210-9c12-11dc-bcd8-0000779fd2ac.html, accessed on 17 December 2009.

62. Ibid.

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