



***Class Actions
Developments in Europe***

***Sabine LOCHMANN
November 10th, 2006***


13th Company Lawyers' Day



What means class action?

◆ For some people, it's:

- a pure US legal tool with all limits and phantasms;
- a source of income for lawyers whose purpose is to make money on dreadful situation (some even say that lawyers are the only beneficiary of class action procedure);
- A way for the plaintiff to receive outrageous award compensation;
- Business firm say, by paying very large amounts of money, they are disqualified according to the worldwide competitive market.



Therefore people globally in Europe seems to be very reluctant to set up a class action procedure because it may change the European legal culture

Changing landscape

- ◆ Regulatory impact
- ◆ Procedural reform
- ◆ Involvement of consumer associations
- ◆ Shareholder activism
- ◆ Increased access to documents
- ◆ EU Green Paper on Anti-trust Litigation
- ◆ Interest from US Plaintiff bar

Differences with US legal system

- ◆ Compensation culture
- ◆ Advertising by lawyers
- ◆ “Loser pays” costs rule
- ◆ Contingency fees
- ◆ Level of damages
- ◆ Jury awards
- ◆ Disclosure
- ◆ Size/approach of EU law firms

Types of claim involving class actions

- ◆ Product liability
- ◆ Environmental
- ◆ Transport disasters
- ◆ Consumer protection
- ◆ Anti-trust matters
- ◆ Industrial disease
- ◆ Investor protection
- ◆ Employment claims

The Situation in Europe from 1998

- ◆ “European Directive on Injunctions for the Protection of Consumers” issued by the European Parliament & Council in 1998
- ◆ passed into law in 2000 (UK)
- ◆ The Directive provides that “qualified entities” that are **organizations such as consumer associations or independent public bodies such as administrative agencies** would be allowed to file “group litigation” on behalf of a specifically defined group of people adversely affected by a defendant’s conduct.

and

- ◆ Directive 93/13 (Unfair Terms in Consumer Contracts)
- ◆ Directive 98/27 (Cross-Border Injunctions)
- ◆ Regulation 2006/2004 (Consumer Protection Cooperation)
- ◆ Directive 2005/29 (Unfair Commercial Practices).

Rationale

- ◆ Historically, litigation is based on individual assertion of rights.
- ◆ Modern society involves:
 - mass production,
 - global businesses,
 - Explosion of Internet,
 - Services more than ever (bank, insurance, telephone, tv...)
 - with potential for multiple similar individual damages

Some figures

- ◆ average family manage 25 agreements for daily life
- ◆ new technologies makes life more easy, but relationship between client/ provider is more complex
- ◆ more than 15% of the customers have to face litigation/year
- ◆ litigation related to Internet business has increased in France of 80% in 2005 in France

Facts

- ◆ Access to justice barriers: altering the cost-proportionality balance between customer/company
- ◆ In Europe people do perceive some failure of regulation which are not only the consequence of ignorance of existing mechanisms to obtain compensation for a prejudice
- ◆ On the other side, Authorities want to manage efficiency (cost, protection of judicial system), and avoid multiple court decisions, inconsistencies, and wasted cost.

European Developments

- ◆ US: 1966 (US Federal Rule 23)
- ◆ Portugal: 1995
- ◆ Netherlands, 1994 and 2005 (Netherlands Act on Collective Settlement of Mass Damages (in force on 27 July 2005, response to DES settlement).
- ◆ England and Wales, Group Litigation Order, CPR part 19.III (1999).
- ◆ Spain, 2001

- ◆ Sweden, 2003
- ◆ Germany, 2005
(KapitalanlegerMusterverfahrensGesetz -
KapMuG: Capital Investors' Model Proceeding
Law, 2005).
- ◆ Others – France, Austria, Denmark, Norway,
Finland, Ireland and Italy
- ◆ Green Paper on damages actions for breach of EU
antitrust rules COM (2005) 672.

Focus: England & Wales

- ◆ From « representative actions or proceedings »
 - Exists for two centuries
 - Permitted a person to take legal action on behalf of persons who had « common issues » arising from the same interest in a claim against the same defendant
 - But they were very rarely used because of a « narrow Court interpretation »

To:

- Representative actions rules where plaintiffs can claim for damages
- Even if the class members' loss can be readily ascertained at the time of the judgment
- And class members have waived their rights to individual receipt of damages and wish their compensation to be paid to a body that represents their interest
- Or "Group orders" for clusters of cases with claims giving right to common issues of fact or law

Increase in large-scale multi-party actions

- ◆ Germany (Deutsche Telekom)
- ◆ Holland (Dexia, DES)
- ◆ France (Mobile telephone services, Volvo/Mont-Blanc tunnel)
- ◆ Italy (Parmalat)
- ◆ UK (Railtrack, Equitable Life)

Disadvantages of class actions

- ◆ Lawyer-driven
- ◆ Leverage through size of class
- ◆ Unreasonable burden on corporations
- ◆ Weak claims hidden
- ◆ Expensive
- ◆ Benefits lawyers more than claimants

Advantages of class actions

- ◆ Procedural mechanism
- ◆ Access to justice
- ◆ Consistency of outcome
- ◆ Avoids costs of parallel proceedings
- ◆ Encourages corporate responsibility

What could be a real drain on social welfare?

- ◆ social welfare has to be broadly understood: a customer is not only a physical person, but it is also a company
- ◆ because without aggregation, the claims of individual members would be too small to offset the cost and efforts of the litigation -)
classes can also be efficient for the judicial system which can adjudicate numerous claims at once, rather than having to deal with separate actions

- ◆ Need for lawyers to have ethical rules in term of fees with the class action system;
- ◆ in order to avoid abusive law suites, we need to organize a system where the judge will appreciate the legal ground of the claim;
- ◆ compensation must be based absolutely on the effective lost, so that we will avoid the excessive amount (see the Philip Morris case where punitive damages: 28billionUSD)

Response to class action threat

- ◆ Monitor developments
- ◆ Pan-European approach
- ◆ Lobby where appropriate
- ◆ Proactive risk management
- ◆ Document management and retention
- ◆ Specialist legal advice

Discussion

- ◆ Do we need a unique & harmonized system in the European legal system?
 - To protect customer
- ◆ On a side we have group of customers/ individuals - on the other side we have customers associations?
- ◆ Financial risk: Companies will increase price because of compensation

Conclusion

- ◆ respect for customer;
- ◆ but also respect for economy and performance of the companies which drive growth.

The class action “systems” today in Europe

◆ Bibliography:

- 1/ General presentation Multi-Party Actions:** Outline by *Dr Christopher Hodges of the Centre for Socio-Legal Studies, University of Oxford*
- 2/ US class actions in Europe: A Growing threat?,** by **Linda A Willett**, *for the National Legal Centre for the Public Interest, June 2005*