The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World

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To paraphrase the Beatles, we are coming together.

AN AMERICAN LAWYER reading about a class of graffiti painters contending that a security company violated their privacy rights could be forgiven for thinking he or she had picked up the latest Mealey’s or BNA report. In fact, this case is an example of litigation that has emerged in Europe in the last five years.

Historically, Europe has had little litigation compared with the United States. This is due to several factors. The level of compensatory damages is relatively low by comparison to the United States, and there are no punitive damages. In addition, contingency fees are generally not permitted, so there has been little incentive for lawyers to take the risk of pursuing claims or to push for new theories of recovery. There are no juries in civil cases; rather, judges determine liability and damages. The “loser pays” rule requires the losing party to pay the winner’s costs, including attorneys’ fees, which discourages the filing of weak or problematic cases. Furthermore, U.S.-style discovery is not available, with no depositions and no document discovery in most European countries and only limited document discovery in the United Kingdom and Ireland. Moreover, Europeans have traditionally relied on their regulatory infrastructure and robust social safety nets to protect consumers and minimize out-of-pocket costs like
medical expenses, rather than look to litigation for this protection.

Several forces have come together to produce a change in the European litigation climate. Interest in expanding citizens’ ability to pursue claims, efforts to control government spending, and the cratering of the stock market in 2000, among others, prompted the European Union (“EU”) as a whole, as well as the individual countries making up the EU, to expand opportunities regarding large-scale litigation. Most European countries now recognize some form of multi-claimant litigation—whether class actions, group actions, or representative actions by consumer or public organizations.

This article explores the recent developments in the various forms of multi-claimant litigation in Europe, looking at both EU-wide directives and the legislation enacted or proposed by individual Member States. For convenience, the term “class action” will be used in discussing the various multi-claimant procedures Europeans have adopted. The article will then look at how these procedural changes affect U.S. lawyers and their clients.

THE EFFECT OF EUROPEAN UNION DIRECTIVES • Several European Union directives have spurred the development of class and other collective actions in Europe. European class actions can be adopted either across the European Union by an EU Directive (“vertical”) or by an individual Member State independently adopting changes in its national procedure (“horizontal”). The “vertical” adoption of class actions is complicated by the fact that such Directives must be implemented by the Member States and that the EU lacks the authority to require Member States to adopt judicial procedure. Even in the United States, the U.S. federal government cannot require a state to adopt a rule of civil procedure. Anthony J. Bellia, Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947, 970 (2001). It can require only that the procedure adopted by a state not threaten certain procedural or substantive rights. Similarly, the EU cannot promulgate procedural rules.


The European Parliament and the Council signed Directive 2005/29/EC on Unfair Commercial Practices on May 11, 2005. The Directive’s purpose is to clarify consumers’ rights and boost trade by harmonizing EU rules on business-to-consumer commercial practices. Directive 2005/29/EC, 2005 O.J. (L149) 22. According to the Health and Consumer Protection Directorate General, consumers will now have the same protection against aggressive or misleading marketing, whether they buy locally or from other Member State markets. The Member States have until December 2007 to apply its provisions. They may elect to adopt class actions as a means of enforcing these new consumer rights. For instance, the United Kingdom expressed a desire to have consumer organizations play such a role in its 2005 Consumer Strategy, A Fair Deal For All—Extending Competitive Markets, available at http://www.dti.gov.uk/files/file23787.pdf.

Cross-Border Injunctions Directive 98/27/EC

Under this Directive, European Member States can permit “qualified organizations,” such as consumer associations or public entities, to bring injunctive actions to stop violations of national laws implementing an array of consumer protection directives. Directive 98/27/EC, 1998 O.J. (L166) 51. Thus, the procedural enforcement is arguably the most significant attribute of this Directive, because it opens the door to representative actions. For example, consumer associations can seek to enjoin violations regarding misleading advertising, consumer credit practices, television broadcasting, package holidays, advertising of medicines, and unfair terms in consumer contracts. Annex to Di-
rective 98/27, List of Directives covered by Article 1. However, organizations cannot seek damages under the Injunctions Directive. This means of incorporating group action is one reason why non-injunctive relief, i.e., damages, is often unavailable.

**Who Can Bring The Action?**

The Directive imposes several important restrictions on the power to bring injunctive actions. Laurel J. Harbour, et al., *Representative Actions in Europe: Access to Justice*? 4 Class Action Litig. Rep. (BNA) 473 (June 27, 2003). First, the Member States individually determine whether an entity has standing by designating the qualifications that organizations must meet to bring injunctive actions. Member States have a great deal of latitude to designate a given association. In addition, Member States can require the organizations to consult with the relevant regulatory authority before filing an injunctive action. They can also require the organization to consult with the prospective defendant. A state’s approach to standing provides some insight into its philosophy toward representative actions. For instance, a state with a liberal policy might list numerous “qualified organizations” or list consumer groups with a philosophy of pursuing litigation. It might also adopt less strict requirements regarding pre-suit consultation.

**Who Benefits?**

A significant issue in litigation under the Injunctions Directive is whether and to what extent other consumers may benefit from a determination that a term in a consumer contract is unfair. Some Member States permit consumers who were not parties to the litigation to benefit from such a determination. Indeed, some have determined that such a determination applied to potential defendants who were not parties. For instance, in Spain, the Court of Appeal of Madrid recently determined that boilerplate terms of bank agreements are illicit and abusive, and extended the decision to any financing entity, whether or not a party. The court concluded that Article 221.2 of the Civil Procedure Act permits an extension of res judicata. This ruling has been cited as an example of how the enactment of a class action regulation can result in a significant change in substantive law.

The Injunctions Directive is still in its infancy. Only time will tell how it will interact with other procedures. In December 2004, the United Kingdom’s Office of Fair Trading (“OFT”) won the first European cross-border court action. Office of Fair Trading, *OFT Wins First Ever European Cross-Border Court Action*, 15 December 2004, http://www.of.t.gov.uk/news/press/2004/208.04. The OFT claimed that D Duchesne SA, a Belgian company operating in the UK as TV Direct Distribution and Just 4 You, was sending misleading unsolicited mail order catalogs to UK residents. The court granted an injunction pursuant to Injunctions Directive 98/27, which will allow OFT to enforce the judgment in Belgium.

**Damages Actions For Breach Of EC Antitrust Rules**

Arguably the most important impetus to the adoption of class actions at the EU level is the European Commission’s interest in enhancing enforcement of EC antitrust (“competition”) law. Relatively few antitrust cases have been filed in the courts of the EU Member States—only 60 since 1962 according to a recent survey, compared with 752 U.S. antitrust suits in 2004 alone. Siobhan Morrissey, *Vive Les Class Actions*, 91 A.B.A. J. 48, 49. On December 19, 2005, the Commission published its Green Paper, which considered whether the conditions for bringing a damages claim for infringement of EC competition law should be changed. Commission of the European Communities, *Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 (“2005 Green Paper”); see also Ann Rose Stouthuysen, *Belgium: Votes in Favour of Class Actions*, Ass’n of Corp. Counsel (March 2006). Emphasiz-
ing the importance of “private as well as public enforcement of antitrust law...[to a] competitive economy,” the Commission expressed concern that the current EU system for private enforcement was inadequate. 2005 Green Paper, supra, at 3-4. In the Green Paper, the Commission proposed the use of class actions to improve the enforcement of antitrust rules.

The 2005 Green Paper builds on procedures adopted by the EU in 2004 encouraging parties to pursue lawsuits for breach of antitrust rules in courts, as opposed to regulatory agencies. More than 700 judges throughout the Member States are currently being trained in antitrust. The first case under the new EU procedures was filed in Slovenia against the state-owned Mobitel by Western Wireless Corp., which is based in Bellevue, Washington.


Although the EU is exploring the utility of private enforcement, including class actions, in the antitrust arena, it has not embraced collective actions in products liability litigation. In 1999, the EU Commission considered whether organizations should be permitted to bring injunctive or class actions under the Product Liability Directive. Green Paper, Liability for Defective Products, COM (1999) 396 (July 28, 1999). At that time, the Commission concluded that there was “no indication that action concerning access to justice specifically with regard to product liability cases would be appropriate.” Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(200)893 (Jan. 31, 2001) at 27.

Other EU Initiatives

In addition to these directives, the EU is considering other initiatives regarding class actions. In February 2006, the Presidency of the EU called a meeting to discuss consumer protection through injunctive actions and class actions. Little consensus came out of the meeting for the use of class actions in the EU generally. Based on the meeting, an EU-wide “stand alone” class action appears unlikely at this point. However, some interest was expressed in extending the Cross-Border Injunctions Directive 98/27.

Moreover, the European Commission responsible for Health and Consumer Affairs, DG SANCO, commissioned the Consumer Law Faculty of the Catholic University of Louvain to study alternative means of consumer redress. Their voluminous report was completed in January 2007. An Analysis and Evaluation of Alternative Means of Consumer Redress Other Than Redress Through Ordinary Judicial Proceedings, available at http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm. Ultimately, the report concluded that “no consensus exists about the cost-benefit justification of collective actions.” Id. at 13. In contrast to the United States, where class actions are “embedded in a judicial system that risks promoting extensive or costly litigation,” the report found that the current or prospective European collective actions are embedded in the judicial systems of each Member State. Nevertheless the authors noted the current climate for adoption and experimentation to fill the perceived gaps in the redress systems of many EC jurisdictions. They went on to observe that “in Member States where there is no such collective action available, or in Member States where the experiments may not have the desired effect, consumers may have no means to obtain redress.” Although it is too soon to assess the impact of this study, such comments may be offered to justify the expansion of class actions.