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Euro-Class Actions: The Next U.S. Export?

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U.S.-style class actions are such a good idea, so why keep them to ourselves? Apparently, many in the European Union are wondering just that. Currently, however, only Portugal and the Netherlands have class action procedures that might be familiar to practitioners in the U.S., Canada, or Australia. That may change.

On November 27, the European Commission issued its “Green Paper on Consumer Collective Redress.” Under those proposals, EU consumers could be given broad new powers to file collective actions. Indeed, not to be outdone by their overseas counterparts, the Commission’s proposals include a suggestion that “class action” lawsuits could be publicly funded.

By contrast, in Austria, France, Spain, Sweden, Germany, and the UK, those who wish to benefit from a collective action for individual damages must affirmatively declare their position by opting in to the collective action, usually from the outset. This routinely means that the take-up in any “class” is low and as a result many actions never begin.

The French “Chate” proposal currently under consideration takes the middle ground between these two options: under a certain threshold, consumers are automatically associated (an element of an opt-out system); above that threshold, the consumer has to take steps to opt in. A similar stance can be found in the report of the Danish Administration of Justice Committee: an “opt in” model is proposed; however, where only minor damages can be claimed.

Major jurisdictions, such as France, Germany, Italy, Sweden, Austria, the Netherlands, and others, have recently adopted or are about to adopt legislative reform in this field generally towards making collective actions (more) feasible. In the UK, the government is considering the Civil Justice Council Report, which recommended class action as part of the procedural legal landscape.

It is the degree of variation across the EU, in approach, application, use, and proposed reform that is a significant driving force behind the Green Paper, where (consistent with EU policy) consumers are increasingly purchasing from across the Member States. The EU is keen to provide some sort of consistency for its consumers, but that is hugely difficult across so many different Member States, each with hundreds of years of legal development, and often underpinned by wholly different approaches to standing, damages, and judicial inquiries.

There are, of course, tensions for those who do business in the EU. The Green Paper does specifically reference the need to provide for necessary safeguards so as not to burden business with unmeritorious claims, punitive damages, or excessive costs. It does not promote class actions above alternative dispute resolution techniques, small claims courts, and industry ombudsmanship, but does firmly put the class action on the menu.

By taking the position it has, the Commission has put business interests to the challenge of either embracing a middle-ground albeit imperfect approach, or opposing these proposals at the risk of seeing a hodgepodge of more radical outcomes emerge, enforced differently by individual Member States.

Comments on the Green Paper can be submitted until March 1, 2009, and the Firm plans to submit comments. If you would like a hard or soft copy of the Green Paper, please get in touch. Our expert teams in the UK, Brussels, and the U.S. can help you understand the ramifications for your business, and assist in any direct representations you may wish to make to the Commission at this critical stage.

For further information on this topic and other consumer litigation matters, please contact Alan Owens at AOWens@mofo.com, Will Stern at WStern@mofo.com, or Penelope Preovolos at PPreovolos@mofo.com.