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The European Commission recently released a request for public comment (or "Consultation") concerning its ongoing consideration of whether to permit class actions in the European Union. The Consultation document, *Towards a Coherent European Approach to Collective Redress*, poses 34 questions and encourages interested parties to submit comments by April 30, 2011.

## European Union's Renewed Consideration of Class Actions May Create a New Mechanism for Employment Law Claims

By Philip Berkowitz, Peter Susser, Stefan Marculewicz and Kristen O'Connor

On February 4, 2011, the European Commission ("Commission") issued a Public Consultation to determine whether to propose a new mechanism aimed at creating a coherent form of class actions (or "collective redress") in the European Union (EU). Currently, there is no mechanism in place for claimants to bring collective claims where an alleged breach of European law harms a group of citizens or businesses. Individual and smaller scale claimants often do not bring claims because the cost of bringing a claim outweighs the potential recovery. The Commission believes these claimants should have an opportunity to adjudicate their claims. However, the Commission wants to avoid implementing a form of collective redress that would mimic the U.S. class action lawsuit.

In previous public pronouncements concerning collective redress, the Commission has focused on antitrust and consumer protections, but the current Consultation is not limited to a specific area of law or a particular industry. The Commission does not explicitly include employment law as an area of law where multiple claimants could bring a consolidated lawsuit, nor does it exclude employment law claims.

The Commission is seeking public comments in order to shape the future of EU collective redress and to improve the enforcement of EU law. EU Member States and other interested parties and organizations are encouraged to contribute answers to 34 questions posed in the Consultation, ranging from whether there should be an EU initiative on collective redress to what special rules should be included for cross-border collective redress.<sup>1</sup> The public commentary period closes on April 30, 2011. As discussed further below, Littler is taking an active role in gathering these comments and will be submitting observations from clients, attorneys and interested organizations.

### The Stated Need for Collective Redress in the EU

The Commission, which is an independent body comprised of one representative from each of the 27 EU Member States, drafts proposals for new European laws, implements decisions of the European Parliament and the Council, and acts as a representative of the EU (for example, by negotiating agreements between the EU and other countries). It is solely responsible for developing proposals for new EU legislation. Before making a

proposal at the EU level, the Commission consults interest groups and advisory bodies, as well as national parliaments and governments, to see if the issue it has identified can be resolved.

According to the Commission, effective enforcement of EU law has become increasingly difficult as the EU has become larger, especially for individuals seeking to obtain enforceable cross-border judgments. The Commission has drafted the current Consultation to determine whether it is appropriate to establish an EU-level mechanism for collective redress for cross-border and group claims. Several Member States have proposed legislation to create collective redress mechanisms. For example, Bulgaria established an opt-in collective action mechanism in 2006 that allows certain private organizations to bring suit. Denmark created opt-in and opt-out procedures for its group action in 2008 that permit individual claimants, the Consumer Council (Denmark's private consumer association), any representative organization, or the Consumer Ombudsman to file collective claims. The UK's Financial Services Bill, which was introduced in 2008, would empower the courts to determine whether to allow opt-in or opt-out collective proceedings for financial services claims, which is broadly defined to encompass, among others, claims against authorized financial services representatives and investment institutions relating to financial products. The Financial Services Bill also includes an opt-in mechanism for non-UK-domiciled claimants.

The patchwork of collective redress emerging across Europe demonstrates that collective redress is, to a degree, becoming a component of European legal systems.

## The Commission's Prior Proposals

The Commission proposed several mechanisms for collective redress prior to issuing the current Consultation. On April 2, 2008, the Commission issued a White Paper on *Damages Actions for Breach of the EC Antitrust Rules*.<sup>2</sup> The White Paper only addressed collective redress for victims of alleged antitrust law infringements in the European Community.

Shortly after issuing the White Paper,<sup>3</sup> on November 27, 2008, the Commission issued a Green Paper called *On Consumer Collective Redress*.<sup>4</sup> The Green Paper focused on the issue of providing collective redress to groups of consumers across the EU who were allegedly harmed by the same or similar practices of a trader (e.g., regularly overcharging customers).

After obtaining public comments on the Green Paper, the Commission determined that it needed to identify common legal principles on collective redress, and to determine how these principles could fit into the EU legal system and be applied across the 27 Member States.

## The Commission's 2011 Public Consultation

The Commission has combined elements of its prior initiatives, public commentary and collective redress systems in several Member States to form its latest Consultation on EU collective redress. The Commission's February 4, 2011, Public Consultation,<sup>5</sup> *Towards a Coherent European Approach to Collective Redress*,<sup>6</sup> is a much broader proposal than the White Paper or Green Paper. The Consultation also contains many more questions for public comment than the previous proposals.

The Commission's premise in the Consultation is that where an alleged breach of European law affects a large segment of citizens or businesses, there should be a mechanism to obtain collective relief. Similar to U.S.-style class action, European collective redress would take two forms: injunctive relief, whereby claimants seek to stop the continuation of allegedly illegal behavior; and compensatory relief, whereby claimants seek damages for the harm caused by allegedly illegal behavior.

However, stakeholders, such as representatives of industry and consumer organizations, are concerned that the EU collective redress may morph into a U.S.-style class action system. The Commission seeks to prevent what it views as incentives for "abusive litigation," which include (in its view) punitive damages, the possibility of contingency fees for attorneys, broad discovery and the absence of limitations on standing to bring a collective claim. These aspects of U.S. class action are regarded as negative aspects of collective redress, and the Commission wants to ensure that there are safeguards in the EU model that would minimize these incentives. One such proposal is the "loser pays" principle, pursuant to which the losing party pays the court fees and attorneys' fees for both sides.

The Consultation asks for comments on how to develop appropriate mechanisms for funding collective redress brought for citizens and small and medium-sized enterprises. The Commission recognizes that the expenses of bringing a lawsuit, including paying for counsel

and court fees, may preclude these types of claimants from filing a claim. The Consultation includes questions about how to fund collective redress actions and whether non-public financing, such as third-party funding or legal cost insurance, would be appropriate mechanisms for funding. The Commission seeks to ensure that funding is provided to meritorious claims while avoiding incentives for pursuing unmeritorious claims.

There has been little debate about how to enforce judgments from the Commission's prior proposals on collective redress claims. Stakeholders have not raised enforcement issues as a concern during prior periods of public commentary on collective redress, but the differences between national legal systems, especially regarding compensatory collective redress systems, means that effective cross-border enforcement must be an element of EU law to prevent forum shopping.

The Commission raises 34 questions in this Consultation.<sup>7</sup> These questions are aimed at gauging public opinion on whether EU collective redress would be the proper mechanism to facilitate cross-border claims and what approach to collective action would work best for the EU. As noted above, interested parties are encouraged to submit their comments, either by e-mail or in writing, through April 30, 2011.<sup>8</sup> Comments will be published on the EC's Europa website, to stimulate a real debate on collective redress.<sup>9</sup>

### Collective Redress in Employment Law and Littler's Commentary

The Commission's Public Consultation on collective redress does not address employment claims, but the proposals also do not exclude employment claims. Employers, especially those with operations in EU Member States, are advised to review the Consultation and consider preparing comments on whether collective redress should apply to employment claims and/or how collective claims should operate. Employers need only look to the U.S. class action system to see the financial impact employment class actions have on employers and the challenges in defending these complex cases.

The current Consultation gives employers a unique opportunity to opine about the types of claims that should be permitted under collective redress. Such dialogue is crucial in the employment sphere, because it may influence whether the Commission recommends EU legislation that limits the type of employment law claims that may be brought under collective redress, or if collective redress will be applicable to employment claims at all.

Littler is actively monitoring developments in EU collective redress and will provide follow-up information in future ASAPs. Littler is also collaborating with the U.S. Chamber of Commerce and the United States Council for International Business to contribute meaningful responses to the 34 questions posed in the Consultation. We invite our clients to submit comments by e-mail to [kmoconnor@littler.com](mailto:kmoconnor@littler.com) so that we may address your concerns and express your opinions in our correspondence to the Commission.

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<sup>1</sup> Public Consultation: Towards a Coherent European Approach to Collective Redress, full text *available at* [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm).

<sup>2</sup> COM(2008)165, 2.4.2008, *available at* <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>.

<sup>3</sup> White Papers are Commission proposals for EU legislative developments in a particular area. If the European Council is receptive to the proposals, it can lead to action in that area. A Green Paper invites relevant bodies and/or individuals to participate in the consultation process and debate on EU-level proposals.

<sup>4</sup> COM(2008)165, 2.4.2008, *available at* [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm#Green](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Green).

<sup>5</sup> European Commission Public Consultations invite the public to respond to proposals for EU initiatives and policies. Individuals and organizations

are permitted to submit comments and the Commission considers the comments it receives in recommending new European policy to the European Parliament and Council. The Commission encourages organizations to file with the Register of Interest representatives in order to let citizens know which organizations are influencing the decision-making process of European Institutions. See <https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en>.

<sup>6</sup> Public Consultation: Towards a Coherent European Approach to Collective Redress, full text *available at* [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm) .

<sup>7</sup> Public Consultation: Towards a Coherent European Approach to Collective Redress, full text *available at* [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm) .

<sup>8</sup> E-mail submissions should be sent to [EC-collective-redress@ec.europa.edu](mailto:EC-collective-redress@ec.europa.edu). Written submissions should sent to: European Commission; "Consultation on collective redress"; Avenue de Bourget 1-3; B-1140 Brussels (Evere); Belgium.

<sup>9</sup> See [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0054\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm).