THE INTRODUCTION OF CLASS ACTIONS IN BELGIUM
ADR as a better Alternative Means of Redress

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European Justice Forum
• Founded in 2005 to promote fair and balanced systems for collective redress without the need for class action litigation
• Priority is to support independent legal research into European civil justice systems and redress
• EJF’s positions are based on the output of that research
Why Collective Litigation?

• Courts need a mechanism to handle mass claims
• All Member States have such a mechanism for injunctions and court orders
• Thirteen EU countries have some form of class action for compensatory claims
• EJF does not argue against the need for courts to have such management tools
Are Class Actions the right means for Redress?

- Collective redress is not the same as collective litigation.
- Litigation is slow, costly and risky
- Class actions are little used in the EU for collective redress: there are better alternatives
- They raise issues of abuse; the need for detailed procedural rules; and safeguards
- Class actions do not work properly if an individual claimant’s condition needs to be considered
Use of Class Actions in EU

- **Sweden**: in 11 years only 11 cases brought; only 1 case finalised; and 10 of the cases were against government agencies.
- **Nordic**: all countries have class action laws, but ombudsmen rarely need to use them.
- **Holland**: Compensatory class actions prohibited; sophisticated ADR mechanisms are used.
- **Spain**: 1999–2006 some 50 cases, lasting 1–4 years.
- **Portugal**: since 1995: only six cases, lasting average 5–6 years; disputes normally settled by ADR.
Use of Class Actions in EU

- Germany: shareholder actions only: Deutsche Telekom case has already lasted 4 years and by no means completed
- UK: series of Group Legal Actions in 1980s – 2000s: up to 10 years’ duration; huge cost: no benefit to claimants
- Poland and Italy: too early to say how much these new laws will be used
- Cross Border: Very few of the past Member State cases had a cross border element
Safeguards needed in Class Action Laws

• Abuse in the US is not due simply to jury trials; absence of loser pays; punitive damages etc
• The main cause is the financial incentive to litigate: contingency fees in the US and TPF in Australia
• In Europe, the loser pays rule is being attacked and there is pressure to allow contingency fees. TPF already exists.
• Careful procedural rules; a ban on contingency fees; control of other sources of finance; and the loser pays rule are essential
The Opportunity for ADR

- Over 700 ADR mechanisms in the EU: ranging from simple negotiation, to conciliation, to mediation and arbitration
- Industry is heavily engaged in developing ADR as part of its customer relations policy
- ADR is complimented by the EU culture of public authorities to enforcing private rights
- Governments need to develop ADR in this context
- Contrast the US use of class actions plaintiffs as “private attorney generals”
How to Increase the Use and Effectiveness of ADR?

• Awareness: national registers and advice to potential litigants of ADR alternatives
• Incentives to use ADR where appropriate
• Accreditation and certification of ADR
• Rationalise architecture of ADR to facilitate awareness and certification
• Court to ensure due process and (at the parties’ joint request) to endorse the result
Voluntary Nature of ADR circumvents Problems

- Abuse minimised because parties agree to ADR process
- Cross border disputes handled by agreement: no problem of mutual recognition of tribunals
- Collective disputes are handled by ADR without special procedures
- Many ADR systems operate on-line
- “Rough justice” preferred to court’s cost and delay
- The right to go to court to determine legal rights and obligations must be respected
Examples of ADR

- Nordic: Ombudsmen filter out unmerited claims and settle the remainder
- UK Financial Services Ombudsman has similar experience
- Sweden: statutory insurance resolves emotive claims (e.g. medical) by non-confrontational mechanisms
- Portugal: disputes settled by ADR mechanisms
- UK: restorative justice is basis of policy – e.g. Ofcom
- To avoid over-reaction and to ensure proportionality, regulators need to know the cost of compensation before they impose penalties
The Netherlands

- 49 Business ADR Boards cover most sectors of the economy: separate Board for Financial Services.
- Strong pressure on traders to join and observe outcome of complaints investigation
- Umbrella organisation (Geschillen Commissie) ensures structure and high standards of ADR
- Parties may request court to endorse ADR agreements, making decisions legally enforceable and final: no further dispute over the same problem
- Used in national and cross border EU disputes