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Class Actions - The Experience of Western Europe

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I. Definitions

“Before you discuss matters, define your terms” (*Voltaire*)

Definition of a Class action in US law:

„A class action provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.“

Definition per Black’s Law Dictionary, 8th ed. 2004

Note: Understanding of class action mechanism is different in different jurisdictions !

II. History of the introduction of the class action mechanism in Europe

Definition of a Class action in the European Union

- No set definition by the EU Commission
- The Commission is seeking to strengthen **collective redress mechanisms** (class action systems) within the European Union in order to encourage competition and enhance consumer rights.
- **Key ingredients** of EU-type class actions:
 - Enhancement of consumer protection
 - Improving access to justice for the individual consumer
 - Avoid negative experiences made with US-type class actions
- Substantive law for class actions is not harmonised on an EU-wide basis.

II. History of the introduction of the class action mechanism in Europe

Traditional methods of joining trials in Europe

(Options for joining trials are ringfenced by the statutes of the respective Rules of Civil Procedure of the various EU-countries)

- **Joint Litigation** (disadvantage: no necessity for joint & identical judgement; *subject matter* must be absolutely identical)
- **Connexion of suits** (disadvantage: see comment above)
- **Representative suit** (disadvantage: decision of plaintiff needs the consent of all litigants, i.e. all plaintiffs and the defendant party. -> This is difficult to achieve; no interruption of limitation period; decision has no *res judicata*/binding effect on other pending suits.
- **Group litigation** (mainly by consumer associations; e.g. violations of the UCTA or Antitrust law. Claims for a) **damages** and/or b) **injunctive relief**.



II. History of the introduction of the class action mechanism in Europe

Traditional methods of joining trials in Europe not found sufficient by EU to ascertain

- an improved consumer protection
- an eased access to justice for both individuals and groups ¹

¹ See EU Green Paper on Consumer collective redress, COM (2008), p. 794 (27 November 2008)

III. EU Commission / EU Green Book

- EU Commission supports implementation of collective redress instrument across European Union; see “Greenbook of collective redress for consumers” – circulation EG 2417/2008 (sec. 95, 153 65 lit. c EG)
- Group aimed at: Consumers
- Forms of collective actions already implemented:
Group Litigation Orders, Representative action, Litigation by consumer associations, Group injunction proceedings.
- Recently suggested: **Europeanwide Class Action** similar to US class actions, however, embedded into European legal landscape/principles (e.g. loser pays cost rule).



IV. Class Action Regimes in Europe, per May 2010

Country	Group Action	Representative Action
Austria	proposed	implemented
Belgium	proposed	
Denmark	in force	implemented
Finland	in force	implemented
France	proposed	implemented
Germany	in force (ltd. scope)	implemented
Italy	in force	implemented
Netherlands		implemented
Poland	in force (ltd. scope)	
Spain	in force	implemented
Sweden	in force	
United Kingdom	in force	implemented

V. Class action implementations in the EU, in 2010

■ Italy, per 1 January 2010

- Codified in Consumer Code (*“Codice del Consumo”*)
- Aim: Decisions on both liability and quantum
- Opt-in system
- First class actions in Italy launched on 5 January 2010 already !

■ Poland, per July 2010

- Enactment after draft legislation on pursuing claims in group actions produced in December 2009 by the Polish Civil Law Codification Commission.

■ Belgium

- Class action law proposal brought in November 2009 by Belgian Minister of Justice. Proposal exp. to become law until end of 2010.

V. Class action implementations in the EU, in 2010

■ UK Financial Services Bill; Key Features

- **Scope:** applicable to FSA regulated financial services, would include banks, brokers, insurers, accountants
- **Opt-Out:** Court discretion whether to order opt-out; rule: opt-in
- **Claimants:** actions could be brought by individuals / businesses / representative groups
- **Damages:** Allows for aggregated damages awards
- **Timescale:** Expected to be enacted Q1 2010

Example of most recent UK Group Litigation (GLO), September 2009: High Court trial in London in re **Trafigura Group**. Litigation in connection with 30.000 claimants, residents of Abidjan, Ivory Coast/Africa. Plaintiffs claimed damages because of bodily injury allegedly caused by toxic waste. Case settled for nominal amount.

V. Class action implementations in the EU, in 2010

■ Poland, Class Action Bill of January 2010, eff. July 2010, Key Features

- **Scope:** Certification of Class in case claims are asserted by at least 10 persons, based on identical facts or on identical legal grounds.
- **Types of claims allowed:** Claim must be in connection with consumer protection and resulting from **hazardous product** (tort law based liability); law not applicable on e.g. employment contracts.
- Proceedings run by representative of class.
- **Claimants:** Consumers only.
- **Deposit:** On the defendant's demand, the plaintiffs have to pay a deposit upfront to the trial to secure the costs of the proceedings.
- **Opt-in system:** Law provides for an opt-in system, allowing potential class members to join the case.
- **No punitive damages** allowed.

VI. Class action experiences from the insurers & reinsurers perspective (1)

- Deutsche Telekom (Germany)
- Hypo Real Estate (Germany)
- AWD (Austria)
- Uni Credit s.p.a. (Italy)

VI. Class action experiences from the insurers & reinsurers perspective (2)

Deutsche Telekom, 2005 (I)

- Claim according to the regulations of the German **Investor Protection Class Action Bill** (Kapitalanlegermusterverfahrensgesetz), effective 1.11.2005
- 2.200 single suits representing 17.000 investors against Deutsche Telekom before the Oberlandesgericht (Court of Appeals) Frankfurt.
- Damages sought total some 100m Euro.
- Reason for complaints: Deutsche Telekom in 1994, before placing further stock on the capital markets, grossly overestimated the value of their real estate. The valuation of the property was dealt with in a manner that not each object was taxed separately but was estimated in a so called cluster-valuation in which many objects are compiled to clusters who afterwards get taxed.
- Method shown lead to an overvaluation of Deutsche Telekom real estate of 2,8 billion Euros.

VI. Class Action experiences from the insurers & reinsurers perspective (2)

Deutsche Telekom, 2005 (II)

- After a re-evaluation, performed *post* full placement of the stock on the markets, the stock price fell sharply.
- Suits (2.200 in number) could not be handled within the ordinary structures of the court. „Connexion of suits according to sec. 147 ZPO not practicable“, per Judge *Woesthoff*.
- Pressure level on the judiciary and politicians raised.
- Ministry of Justice intended to find a relief by way of introducing a bill, allowing plaintiffs to pursue their rights in a class (class action).
- Proceedings still pending; it is uncertain whether a decision will be rendered still in 2010. Court indicated that chances of success for the plaintiffs are rather limited. After 1st Instance judgement, appeal before the German Supreme Court is expected.

VI. Class Action experiences from the insurers & reinsurers perspective (3)

Hypo Real Estate, 2009

Allegations are in connection with two Ad-hoc statements of the bank

- Ad hoc-Statement 15 January 2008 (“Complex CDO”). Claimants allege that the information given by HRE regarding their involvement in CDO/subprime products and in the financial crisis was incorrect and/or delayed which resulted in them suffering losses.
- Ad hoc-Statement 24 October 2008 (“Complex DEPFA”). Statement was primarily related to HRE subsidiary DEPFA, a company registered in Dublin/Ireland. Allegation same as above, i.e. incorrect and/or delayed information to investors, respectively the public.
- Number of suits: 180 / Claimed amount: 980m EUR
- Motion to allow Class Action procedure approved by Munich District Court (Landgericht München) on 18 March 2010.



VI. Class Action experiences from the insurers & reinsurers perspective (4)

AWD (Austria), 2009

- AWD is an International Financial adviser
- Allegation: Misrepresentation in connection with selling financial products (Real Estate Funds)
- Three separate Group Litigations run by Austrian Consumer protection Group VKI, representing AWD customers/clients
- Number of claimants: 2.500
- Claimed amount: 40m Euro
- Group litigation financed by **Third Party Funder "FORIS"** (Germany)

VI. Class Action experiences from the insurers & reinsurers perspective (5)

Uni Credit s.p.a. & Banca IntesaSanpaolo (Italy), 2010

- Allegation: Charging of inflated fees and interest on account overdrafts
- Number of claimants: 1.000
- Claimed amount: 6.25 billion Euro (!)
- Class Action, based on Consumer Code ("Codice del Consumo"), filed before Italian court on 5 January 2010.

VII. Differences and similarities between European and US types of Class Actions (1)

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European-type Class action

Class actions limited to certain areas of the law, especially consumer protection.

Various forms of notification of potential class members.

Opt-In procedure (as a general rule)

Lead plaintiff chosen by court; no „race to the court-room“

US-type Class action (F.R.Civ.P. 23)

No restrictions in bringing class actions in general

Notification of potential class action members through court, by mail

Opt-Out procedure (as a general rule)

„beauty contest“ of plaintiff counsels

VII. Differences and similarities between European and US types of Class Actions (2)

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European-type Class action

Pressure element on plaintiff appears not to be significant

Costs shared between plaintiffs; recovery of costs only in case of winning trial

Loser pays-rule

Upfront payment of fees into court by plaintiff

- > **No Pre trial discovery**
- > **No Jury trial**
- > **No punitive damages**

US-type Class action (F.R.Civ.P. 23)

Class action can be used to exert pressure on plaintiff (so called „settlement class actions“)

Claimants costs borne by lead counsel.

Defence costs borne by defendant; no reimbursement of costs in case of winning trial.

- > **Pre Trial Discovery**
- > **Jury trial (as a rule)**
- > **Punitive damages**



VIII. Conclusions (1)

- Class Actions suits to be considered set principle in Europe.
- Class Actions/Group litigation gaining further momentum, however, not yet made general instrument in all countries of the European Union.
- Class actions at some future point in time will become standard instrument in all EU-countries. -> Reason: Every state must keep their legal system attractive to compete with other forums in order to avoid excessive forum shopping and thus create an unattractive local forum.
- More public awareness in respect of Class actions in recent years.
- Rising number of Class actions in prominent cases, e.g. Hypo Real Estate (Germany), AWD (Austria), UniCredit (Italy), Trafigura (UK).
- Banks and financial institutions seem to be key litigation objects.
Main exposed lines of business: PI, E&O, D&O

VIII. Conclusions (2)

- Class action principles in Europe differ significantly from those in the United States.
- US-style class action as such is non-conformant with the European civil law system
- US principles not adopted:
 - Jury system
 - Pre-Trial discovery
 - Defense cost borne by defendant, even in case of winning trial
 - Punitive damages
- Thus, in the EU avoidance of consequences experienced with US Class Actions.

VIII. Conclusions (3)

- Class actions save defence & administration cost for the insurer since other suits belonging to the class are being suspended until class representative suit is finally decided upon.
- **Class actions** in connection with **Forum Shopping** considered an issue (-> see case **Trafigura Group: Group Litigation in London** by Ivory Coast claimants).
- Forum Shopping not new, however, options to do so widened by ROME II directive. Directive effective January 2009, allowing on situations involving a conflict of laws, to non-contractual obligations, i.e. tort / liability claims.

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Thank you