CLASS ACTIONS: WHY IS SUCCESS MEASURED BY THE NUMBER OF CONDEMNED COS.?

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Many European countries have collective redress mechanisms, each country having its own system (opt-in/opt-out, 1- or 2-step procedure, legal costs, restricted/broad scope). In most Member States, collective redress is limited to specific sectors, mainly consumer claims. One of the goals of the European Union is to have all Member States have such a mechanism in place.

France has decided to implement a collective redress mechanism, which focuses on specific sectors and can expand with the types of issues that may be raised against companies. This is how a "class action" for consumer claims was first created in 2014, together with competition-related class actions (*follow-on actions*), before specific class action schemes were introduced in 2016 for discrimination, health and cosmetics, environment or data privacy-related issues and, in 2018, for real estate issues.

On June 11, 2020, the working group created by the French National Assembly, issued a report stating that the system of class actions in France is a disappointment. The report mentions that "*In spite of the extension of its scope of application, the outcome of this system is disappointing: only 21 group actions were launched since 2014, 14 of which were consumer claims, without any business having been found liable yet. As a consequence, has the group action not been at the origin of significant progress in defending consumers*".

On June 22, 2020, the European Parliament and Council negotiators reached a deal on the first EU-wide rules on collective redress. The Rapporteur stated in this respect: "w*e have sought to strike a balance between the legitimate protection of consumer interests and the need for legal certainty for businesses. Each member state has at least one entity qualified to exercise a remedy, while at the same time putting in place safeguards against abusive recourse. Europe must become a shield that protects the people. This new legislation offers new rights to consumers in their daily lives and shows that Europe is making a difference*".

Consumer-protection associations used a less balanced language, stating notably that this new mechanism should allow them to launch many more claims that should more easily lead to businesses being sentenced. The BEUC (European Consumer Organisation) is asking all Member States to choose the opt-out system, "*where everyone who suffered damages is included by default unless they decide to withdraw from the court action*".

The French associations specifically welcomed an agreement which should allow more plaintiffs to file more claims against more companies, as if they could not file claims up until now. The reality is that French courts have either dismissed the claims by applying French civil liability principles and notably ruling that the damage claimed falls outside the scope of the law, or have not ruled yet. Pushing for an opt-out system rather than the existing opt-in system and for a widening of third party funding would not have changed the outcome of the cases filed to date in our view.

Yet, the push at both national and European levels to have a wider opportunity to file collective redress actions is justified, according to the French working group, by the fact that the threat of a class action pushes companies to settle in order to avoid litigation, which could tarnish their reputation and trigger significant costs for their defense. This reality, presented as the only fully successful aspect of the existing mechanism by the working group, is however one of the points criticized about the US class action mechanism. The report indeed highlights the fact that "*the legal rules governing US class actions have led to several drifts. The threat of a trial, under the media pressure of consumer associations or attorneys, has forced businesses to accept a settlement without their liability necessarily being established, given the significant costs and damage to their brand image and reputation.* (…) *The French embassy in the United States reminds that one of the main drifts that is often pointed at by the detractors of class actions is that they would be a tool offering significant benefits to attorneys and very small results for the members of the group*".

This warning is however brushed away by the working group stating that the French system is protected against such a situation because it is not exactly the same as the US system (opt in v. opt out, no punitive damages in France, different compensation system for lawyers), while, as mentioned above, consumer-protection associations are suggesting changes aiming at the americanization of the European mechanisms.

All these statements give rise to a number of questions. Why is the success of class actions only perceived through the number of companies prosecuted and, more importantly, through the number of companies sentenced? Shouldn't the success of a legal system be assessed on the correct application of the rule of law by courts instead? Is adding up national and cross-border level mechanisms a balanced approach?

The political agreement obtained at EU-level illustrates the fact that the main goal of the authorities is to increase the number of claims and not to focus on the fact that standard civil liability principles should apply.

Indeed, the press release about the agreement obtained notably states that:

- "*At least one representative action procedure for injunction and redress measures should be available to consumers in every member state, allowing representative action at national and EU level*";

- "*Qualified entities (organisations or a public bodies) will be empowered and financially supported to launch actions for injunction and redress on behalf of groups of consumers and will guarantee consumers' access to justice*";

- "*Negotiators agreed that the Commission should assess whether to establish a European Ombudsman for collective redress to deal with cross-border representative actions at Union level*";

- "*The scope of collective action would include trader violations in areas such as data protection, financial services, travel and tourism, energy, telecommunications, environment and health, as well as air and train passenger rights, in addition to general consumer law*".

Some may argue that the statement also mentions the fact that there should be a "loser pays principle" and the possibility to quickly dismiss manifestly unfounded cases. Based on experience, this is rarely a principle that is fully applied by civil law courts, especially when the plaintiffs are NGOs and/or individuals.

Let's not forget the statement by Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, when commenting on the New Deal for Consumers (in which the upcoming Directive on the European collective redress mechanism will be included)*: "In a globalised world where the big companies have a huge advantage over individual consumers we need to level the odds. Representative actions, in the European way, will bring more fairness to consumers, not more business for law firms. And with stronger sanctions linked to the annual turnover of a company, consumer authorities will finally get teeth to punish the cheaters. It cannot be cheap to cheat".* One can already anticipate that associations will argue that they cannot be penalized for abusive claims as claims would be the only way they have to determine whether or not a company acted illegally, and that courts will be sympathetic to such arguments. This is how, for instance, French courts refuse to penalize market surveillance authorities when they take decisions against products which then prove to be compliant, despite the damage that the decisions triggered on the companies at stake.

In the same line, some Member States, like France, are working at implementing a collective redress mechanism which would apply no matter the topic, damage or industry sector. As such, a section of the report of the working group of the French National Assembly highlights the fact that having a sectorial approach creates legal debate at an early stage of the proceedings which could be avoided if reformed. They also recommend that the number of authorized associations be extended and that companies (mentioning small and middle-size companies) could be plaintiffs against larger companies.

To conclude, companies must get organized to put together strong defenses in future class action claims as the national and European legislators are pushing for reforms that take into account what plaintiffs have learnt through the negative decisions they have experienced to date. The most dangerous aspect of what is being discussed is that the authorities further perceive the success of the mechanisms that they are either amending or creating on the number of claims filed and that will result in the sentencing of companies. The right application of the rule of law is not part of the debate while speaking about a liability regime. Companies should also bear in mind that the European Court of Justice has developed over the years a pro-plaintiffs' case law with a number of national courts complying with it. In other words, if, up until now, collective redress mechanisms may have felt like a fake threat for companies, they should become a real sword of Damocles as legislators, plaintiffs and courts are taking measures to adapt and make this tool "successful", as per their definition.

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