Is US-style class action litigation coming to the EU? European Commission calls for collective redress mechanisms in EU national laws – 8 points to note

Product Liability Alert

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The European Commission is calling for European Union member states to introduce an injunctive and compensatory collective redress mechanism to their national procedural rules by July 26, 2015. In many respects, the concept of a European collective redress scheme is similar to that of US-style class actions.

The new European collective redress mechanism would increase the risk of product safety and product liability litigation against companies.

Collective redress will, above all, affect manufacturers and importers of products. The new landscape would include the potential for large-scale, high-stakes mass tort claims with a high media impact.

1. Collective redress means class actions

Collective redress, in Europe, is popularly understood to mean a representative proceeding – a case brought on behalf of a group of claimants. Notably, a legal definition for the term "collective redress" does not exist in EU law. Moreover, the different cases where collective redress could be used differ greatly. But the common denominator among these scenarios is that collective redress enables a larger number of people to benefit from the effects of a favorable court decision - "larger" in proportion to the subjective accumulation of claims.

Collective redress is a mechanism that is well known, above all, in the United States, where it is commonly called "class action." Under US class actions, the binding impact of a lawsuit is extended, inter alia, to all persons who are affected by a certain product in the same way as the claimant. Combined with an award of punitive damages against companies and conditional fee agreements between lawyers and clients, class actions are a significant feature of the US legal landscape.

2. Collective redress for product safety and product liability

In addition to notable class actions filed with respect to the financial services and securities industries, product safety and product liability is an area that is traditionally very strongly affected by the concept of collective redress. In the US, countless claims have been and are pending against companies in this field, especially in...
respect of motor vehicles, household appliances, consumer electronics, food products, construction materials and pharmaceuticals.

3. No common European approach as of yet

However, in Europe the approach currently varies widely across a broad spectrum. The concept of collective redress does not even exist in all member states. Where it does, it mostly focuses on a very narrow scope of cases and constellations. In Germany, for example, collective redress schemes are admissible under the Capital Investors’ Test Cases Act (Kapitalanleger-Musterverfahrensgesetz) regarding public capital market information. With its recommendation, the Commission aims to create a unified approach across the EU to collective redress and to put an end to this fragmented spectrum.

4. The EU Commission as a driving force

The European Commission has been conferring on collective redress schemes since 2005, and the system it is now recommending arose from a series of green and white papers as well as a public consultation. The European Parliament supported this by a resolution.

In its recommendation this summer, the Commission called for the implementation of its collective redress principles by July 26 2015 at the latest. Although the recommendation is not legally binding, the Commission notes that it will evaluate the status of collective redress laws in the member states after four years. This tight agenda leads observers to believe that the current recommendation is merely an intermediate step. In all probability a further-reaching legal act will follow after the four-year period has expired. Such observers believe that the Commission will then issue a binding regulation or directive.

5. Allegedly injured parties will be able to accede to a European collective redress action: effect on national laws

The EU suggests that the possibility of injunctive and compensatory collective redress should be added to national procedural rules. According to the Commission’s central objective, the mechanism is to make it easier for allegedly injured parties to join such an action against a company. As a result, they would feel more encouraged to pursue their claims judicially in cases where individual damages are small.

In principle, the allegedly injured parties will be able to join a suit or opt out of it at any time. For this purpose, the corresponding information is to be available online in the future. However, any judgment of the claim will only be binding on those who opted in. Hence, unlike in most US based class actions, individuals must explicitly join the action (a so-called opt-in system, in contrast to the US opt-out model).

6. Beyond injured parties: even consumer protection associations and public authorities could act as claimants

It is the Commission's intention that not only the injured parties should be able to litigate. In the EU, unlike in the United States, designated "representative entities" and even authorities would be able to bring an injunctive or compensatory action. Hence, under such laws, manufacturers and importers of products may expect a surge in collective redress litigation. Action may be brought by consumer protection associations or market surveillance authorities seeking to judicially pursue claims for alleged product safety deficiencies.

This kind of representative action has already been partly realized in the member states, inter alia, by way of transposition of Directive 2009/22/EC on injunctions for the protection of consumers’ interests into national laws. Unsurprisingly, companies face a greater risk of litigation if representative action is permitted, because, unlike many private persons, associations are not afraid of lengthy lawsuits.

The idea that authorities can bring a collective civil redress action on behalf of the injured parties against certain companies reaches even further. Not least is the concern that such collective actions may be used for political purposes – for instance, bringing suit against a company just before an election, so that the claims take on a quasi-official appearance. This is a tool which has hitherto not been available to the public sector.
7. Positions of EU member states

It is now up to the 28 member states of the EU to decide if and how they will transpose the Commission recommendation into their national laws.

For Germany, transposing the recommendation would mean a major amendment of its Code of Civil Procedure (Zivilprozessordnung). The parties forming the new coalition government after the federal elections in September 2013 have opposite views on this and, accordingly, have not yet arrived at a decision. The conservative CDU/CSU alliance believes that a far-reaching change of the German law of civil procedure is not justifiable, because there is no recognizable deficit in the enforcement of monetary claims. In addition, it categorically rejects collective redress actions as being inherently prone to abuse. The left-wing Social-Democrats favor the introduction of collective redress. However, they suggest a trial phase for the new mechanism, with a limited term set for its application.

The Government of the United Kingdom has reservations about the horizontal nature of the recommendation which applies to every piece of EU legislation.

France, on the other hand, is just about to include a new group action (action de groupe) into its Consumer Code (Code de Consommation). This instrument, however, will only extend to actions by state authorized consumer protection associations.

8. What is to be done?

Will collective redress become part of the legal system on a European Union level and in its individual member states? The next few years will be decisive. Companies wishing to communicate their expectations and arguments should address the relevant decision-making bodies soon. There is still time enter the conversation.

It cannot be said enough that companies involved in the distribution chain of products will need to adjust to the coming legal situation. This applies in particular to manufacturers and importers. There is good reason to think that the admissibility of collective redress will be increasingly expanded. Many EU member states will follow the Commission’s recommendation. Within a few years, binding rulings will follow.

Companies concerned about this scenario therefore face a threefold task: They need to prepare their compliance and PR departments for the coming challenges. Second, they need to obtain a legal overview of litigation risks in Europe, seeking guidance that takes multiple jurisdictions into account. And finally, they should follow closely monitor the legislative processes around this issue and let their voices be heard.

For more information about collective redress, as well as our vast experience with government relations, public affairs and compliance, and product safety and product liability law, please contact:

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