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Future Prospects for Collective Redress at the European Union level

Edited version of a speech delivered at the Conference on
Collective Redress for European consumers organised by
the Portuguese Presidency

Lisbon, 10 November 2007

I should firstly like to thank the Portuguese Presidency for organising this event, which seems to have provided a very wide-ranging discussion of the issues surrounding collective redress.

What I want to try to do is to give a view from the European Parliament as to what might be my views and those of my colleagues on what will inevitably be a codecision instrument, that is, the result of a legislative process where the European Parliament will have a full and equal voice as legislator with the Council.

Above all, this issue is about the Internal Market. We have created in the European Union an amazing and very successful construct in the Internal Market; we have systematically cleared away most of the barriers that stop our enterprises from doing business across Europe. However, that market is still underused; there still appears to be a lack of confidence amongst consumers when it comes to cross-border shopping. We heard about it from earlier speakers.

It seems that much of this lack of confidence is linked to misgivings and fears about the lack of availability of cross-border access to justice when things go wrong.

Just as I first entered the Parliament in 1999, the so-called Tampere Conclusions spoke of an EU citizen being able to use a "foreign" court in another Member State as easily he could use his own local courts. In the meantime, we have of course been very busy in enacting a number of pieces of legislation which should go to help cross-border redress. We now have the "Brussels I" Regulation, the European Enforcement Order, the European Order for Payment Procedure, the revision of the Service of Documents Regulation, the Small Claims Procedure, "Rome II", the Unfair Commercial Practices Directive and soon also the Directive on Mediation. All this helps, but it still sometimes remains impenetrable to the average consumer and some of it remains to be tested over time once implemented.

However, even with all this in place, will we actually be delivering a cross border justice system that lives up to the Internal Market and that gives our consumers the desired and necessary infusion of confidence? Sadly I think the answer is "no", and the reason I think the answer is "no" is born out of the practical experience of a parliamentarian having to deal with the problems of those I represent. Most particularly, it is due to the experience that I and a number of my parliamentary colleagues have had over the last year or eighteen months sitting on a Temporary Committee

of Enquiry into the collapse of a British insurance company: Equitable Life.

That company sold its policies of insurance and pensions not only in the UK but by virtue of European Internal Market legislation all over Europe. Apart from the numerous policy holders in the UK, there were also many in Germany and Ireland. These many savers lost financial products into which they had put a lifetime of savings, savings that perhaps in many cases were not huge but nevertheless had considerable implications for each individual involved. European legislation had permitted this company to trade across borders, but what assistance was on offer from Europe when things went wrong as a result of this legislation?

Victims first addressed themselves to national regulators of financial services in their own home state, "no" they were told, "not my affair; it's the national regulator in the home state of the business". So some then tried the British regulator, to be told, "no, it's not me; it's your home regulator", or "no, I can't deal with you because you're foreign". So they were passed from pillar to post and back again. Then, some tried to use ADR schemes. Again, there were problems as to whom, if any one scheme would accept responsibility or jurisdiction. Results were variable and many were still left empty-handed or disillusioned. As for traditional legal proceedings cross-border - too complicated, too costly - of all the thousands of victims, as far as we know, only one cross-border legal action is being pursued in a court in Germany.

So this led us to the inevitable conclusion that there remains a gap, indeed a gaping hole in Europe's legal architecture. It cannot be right that such claims should remain unheard and justice denied merely adding insult to injury, whilst those who have perpetrated the wrong are still trading happily and undisturbed across our borders.

The Equitable Life story is probably the most dramatic and obvious example of this lack of justice that we had the possibility to examine closely, but there are many others that cross the desks of myself and my colleagues on a daily basis. This has led to the Parliament to include calls for collective redress mechanisms in a number of recent resolutions, notably Equitable Life, where colleagues from all across the political spectrum, including the right, having heard and understood the difficulties supported this conclusion. Likewise calls for further work on the issue were also included in our resolutions on the Obligations of Service Providers, and the Review of the Consumer Acquis.

So the Parliament has identified a need and is supportive of seeing a proposal from the Commission. But what sort of proposal? Let's start with what it is clear we do not want, and what I have become increasingly clear we could not get in Europe anyway, that is an American-style class action. We should be clear anyway that it is technically impossible to import or transplant a legal mechanism or structure from one tradition or country to another without it being modified by the new surroundings it is received into. So it would be with the US style class action, because Europe's legal tradition and heritage is so different. There are a number of reasons why the class action here would in any event be very different and devoid of many of the abusive characteristics we see in America from where I have just returned, having had some meeting on this very subject.

By and large in Europe we do not have jury trials in civil cases, mostly we do not have contingency fees. Likewise, we do not have punitive damages. Then again, on the positive side we do have the principle of the loser pays and also we have a coherent framework of conflict rules in Brussels I and Rome II which together form an important break on forum shopping.

On top of this, the Parliament as co-legislator is hardly likely to introduce or approve a US-style class action, please give us some credit! And even if we were to take leave of our senses, then it is hardly likely to get past the Member States in Council in such a form. So no US-style class action from the European legislator, and if there were it would clearly take root on European soil in a very different and modified form.

At this stage perhaps I should begin to give you some sense of what I think the European legislator might approve.

Firstly concerning scope, my sense is that in the first instance the scope in terms of the types of claim (e.g. consumer claims) and monetary value might be quite limited, in order to test the water as it were, to see how this works and functions. There has also been some discussion as to the type of instrument. Clearly it might be possible to build on the framework of the Injunctions Directive. However, there could also be good reasons in the interests of legal certainty to opt for a Regulation rather than a Directive, depending largely on the final content of the instrument.

Secondly, I sense that in a European context any mechanism we devise will have to be a public / private mix; that is my sense of what would command a majority amongst both elements of the European legislature. By this I mean that we may have to have some kind of what I would call

a "gate-keeper" who would be from the public sector. So, perhaps we need a regulatory authority or indeed maybe an Ombudsman akin to the Danish model.

Of course, the other possibility is to use judges as the "gate-keepers", like the Canadian model we heard about yesterday. However it is debateable whether we have a coherent European judiciary in the way that was described as being necessary. We are currently conducting a study (through the Legal Affairs Committee of the Parliament) including a questionnaire on the role of national judges in relation to EU law. The results are various; judges are perhaps the epitome of subsidiarity, and that may indeed be appropriate if they are to deliver justice. However, it would mean that any future instrument would be subject to local national judicial diversity, which may not be ideal.

Thirdly, and this flows from the above point I have a feeling that the best we will achieve at this point is a Regulation or Directive that has cross-border relevance only. I say this with personal regret. The Commission will probably propose something with general harmonised effect as it has done in many cases over the last years, but the clear response from the Member States is always cross border only. There is no doubt that such an instrument as is being talked about will have implications for the procedural law of Member States which they guard very jealously. I cannot see us getting beyond a mere cross-border scope unless there is a change to Article 65 EC and no-one seems to be proposing that. I am sorry for this, but on the positive side, we can adopt the solution contained in other mechanisms like the Small Claims Procedure, learn from the cross-border experience and allow Member States to adopt it for their internal system on a voluntary basis in order to improve their system or possibly create a new system where there is no pre-existing instrument. This is at least a start in the right direction.

Then, my last and fourth point. It is clear that this putative proposal is intrinsically and closely linked to the civil justice system in each Member State. It is part of EU civil and commercial justice. As we heard yesterday, we need to clear the surrounding ground in order to make this work. We need to modify Brussels I on jurisdiction and judgments to accommodate collective actions and judgments. We need to ensure our on service of process and documents will work. All this needs the active and engaged input of DG Justice. I do not see them here; they must be here in the future. Whilst it is a delight for me to work with two Liberal lady Commissioners, they also need Commissioner Frattini along with them; if

not, this will not work. The Commission needs to go forward on this together and in step.

In conclusion, it seems to me as an elected parliamentarian that the case for some kind of collective redress is what I would call a political no-brainer. It should deliver better access to justice and save on the number of cases in the legal system. It is for a politician a sort of David and Goliath scenario; we should be supporting the weaker party, empowering our citizens. Making sure that David has the sling and stone to hand, if needed. Mostly importantly, I go back to where I started. If this amazing structure we have created as Europe's Internal Market is really to function well, then it needs equality of arms. It needs to work for all its participants, those who sell and also those who buy.