

## Ireland: Multi-Party Actions Bill Comments

### 1. Collective Litigation is an outdated mechanism

When the Law Reform Commission considered multi-party actions 12 years ago in 2005, some form of collective litigation was the only mechanism being focused on for providing collective redress. Since then, a number of other mechanisms have emerged, notably:

- (a) '*Regulatory redress*': where a public authority, usually a regulatory authority, uses its authority and power to bring about one or more traders paying redress.
- (b) *Consumer ombudsmen*: the ability of ombudsmen dealing with consumer-trader disputes (usually in discrete market sectors, such as the Financial Services Ombudsman) to effect mass redress. This may be in a number of way, including: processing multiple similar claims (more efficiently than courts); drawing attention to the emergence of an issue or trend, so that it can be stopped, ongoing harm prevented, and provision made for redress, such through the intervention of a regulatory authority; or administering a custom-built redress scheme agreed or mandated by traders and an authority.

### 2. These new mechanisms have appeared in various Member States and have proved to be highly effective. Examples include:

- (a) *Regulatory redress*: This is now the most used mechanism in all Nordic states and the UK. In UK, all leading regulatory authorities use the approach regularly (eg those in financial services, energy, water, rail, general consumer trading). Mass redress powers now exist in sectoral legislation for those sectors, and under the Consumer Rights Act 2015 (redress powers under 'enhanced consumer measures in Sch 7 art 8, inserting Enterprise Act 2008, ss 215, 217, 219) in relation to *all* consumer enforcement authorities. The Central Bank of Ireland, the Italian central bank and regulators in various sectors have used this approach to deliver collective redress.
- (b) *Consumer ombudsmen*: these bodies exist most in the UK and Belgium, although examples can be found in some sectors in Germany, France, Italy and other Member States. Consumer ombudsmen are a specific form of 'alternative dispute resolution' (ADR): they perform more functions than arbitration-model or mediation-model ADR entities, and generally operate on a distinctive model involving an integrated pathway involving information, triage and assessment, assisted negotiation and decision or recommendation. In UK and Belgium there are now many consumer ombudsmen, and governments are taking steps to rationalise their ADR landscapes so as to make the ombudsman mechanism well know, easily identifiable, and the first port of call for consumer advice and assistance. The ombudsmen are independent but function closely with regulatory authorities, notably in securing collective redress.

### 3. The new mechanisms have been shown to be more effective and efficient than a collective litigation mechanism.

A major comparative study of all collective redress mechanisms was recently carried out by the University of Oxford (Professor Christopher Hodges) and the University of Leuven (Professor Stefaan Voet). The results were made available at a conference in December 2016, and are to be published in updated form in April 2018.<sup>1</sup>

That study collected many case studies involving different collective redress mechanisms from across the EU. The results were evaluated against objective criteria.<sup>2</sup>

The study found that the ‘new technology’ mechanisms of regulatory redress and consumer ombudsmen were *clearly* better than the ‘old technology’ mechanism of collective litigation (and various models of collective actions or class actions were noted): the former were notably faster, cheaper, and successful in delivering outcomes, with people being paid what they were due without deduction of intermediaries’ costs.

#### **4. A multi-party litigation mechanism will always involve problems.**

The European Union has wrestled with the problems of collective redress for many years. There are two main problems with collective litigation. First, this is usually big expensive litigation. It needs serious funding. Intermediaries usually have large financial stakes. That creates inevitable conflicts of interest for those funding cases. Accordingly, it is necessary to provide safeguards so as to attempt to control the financial incentives and behaviour of intermediaries. This is inherently difficult to achieve. The European Commission has recognised the difficulty in balancing the policy objections of providing access to justice with prevention of abuse and support of confidence in the legal system.

#### **5. The EU collective action model is still under consideration**

After extensive discussion with the European parliament, the European Commission issued a Recommendation of a model in 2013, that set out a large list of safeguards.<sup>3</sup> The Commission recently issued a Report on that recommendation, which showed that the position across Member States continues to be complex and far from harmonised.<sup>4</sup> No Member State has a

---

<sup>1</sup> C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018).

<sup>2</sup>

1. Establishment of clear rules and their interpretation
2. Identification of individual and systemic problems
3. Cessation of illegality
4. Decision on whether behaviour is illegal, unfair or acceptable
5. Identification of the root cause of the problem and why it occurs
6. Identification of which actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk
7. Application of the actions (a) by identified actors (b) by other actors
8. Dissemination of information to all (a) firms, (b) consumers, (c) other markets
9. Redress
10. Sanctions
11. Ongoing monitoring, oversight, amendment of the rules

<sup>3</sup> Recommendation (EU) 2013/396 of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 OJ L 206/60.

<sup>4</sup> *Report from the omission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under Union law* (2013/396/EU)

litigation mechanism that corresponds to the EU's recommendation. Many Member States are still experimenting. But in most of them, the Oxford-Leuven study has shown that levels of collective litigation are low, and that where the regulatory and ombudsman models exist they deliver extensive collective redress.

The fact that the position on multi-party litigation has clearly evolved since 2005 and is still evolving should give cause for reflection. The Law Reform Commission's 2005 model is now out of date.

## **6. Recommendation**

A government looking at delivering mass redress now should evaluate the 'new technologies' that have become available, rather than default into older methods that have been superseded. There is strong evidence that regulatory redress and consumer ombudsmen perform extremely well.

Regulatory redress mechanisms are likely to spread in Europe, driven by market regulatory requirements. Policy needs to be joined up here, and different approaches being taken by different Ministries responsible for market sectors and courts may raise problems. The introduction of a 'class action' *before* putting in place other mechanisms that are likely to be more effective is only likely to raise expectations and create problems, rather than solve them.

### **Christopher Hodges MA PhD FSALS**

Professor of Justice Systems, University of Oxford

Head of the Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, Oxford

Supernumerary Fellow, Wolfson College, Oxford

Fellow, European Law Institute

Board Member, Foundation for Law, Justice and Society

