Kluwer Arbitration Blog

Collective Redress in Austria and the European Union: What's in it for arbitration?

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The development of effective instruments for collective redress is a widely discussed topic among European politicians, consumer protectors, legal scholars and dispute resolution lawyers. The professional discourse was recently fuelled by the Volkswagen emission scandal (also referred to as "emissiongate" or "dieselgate"), which, at least in the US, was already subject to collective actions. Another more recent incident, which only emerged in summer 2017, is the German automotive industry cartel concerning allegations on decades of collusion between large German car manufacturers.

At EU level, collective redress mechanisms were most recently picked up by the European Commission in its (non-binding) Recommendation 2013/369/EU of 11 June 2013 (the "Recommendation"). It states that all EU Member States shall take the necessary measures to implement a general system of collective redress, and suggests concrete principles for collective redress mechanisms to, among others, avoid the development of an abusive litigation culture. Moreover, the European Commission called on the Member States to communicate information on the Member States' experience with collective redress mechanisms, and to assess the implementation of the Recommendation by 26 July 2016. The information gathered in this process will be summarised in a report to be published in the near future.

The increased importance of introducing effective collective redress instruments in Europe is also evidenced by a detailed Report published in March 2017 by the U.S. Chamber of Commerce Institute for Legal Reform, against the backdrop of the European Commission's upcoming assessment of its Recommendation. This publication takes a close look at developments in 10 EU-Member States concerning collective actions and provides several proposals on how to avoid abuses of collective redress.

Despite these recent developments, Vera Jourova, European Commissioner for Justice, Consumers and Gender Equality, is reported saying that the "soft approach" pursued by the European Commission did not have the desired effect (NB: interview in German; last downloaded 18 October 2017). Accordingly, she argues for an EU-wide framework for collective redress instruments to be binding upon all Member States, where especially European consumers may effectively concentrate their efforts against large companies.

Commissioner Jourova definitely has a point when it comes to the development of collective redress instruments in the EU Member States: Even though the collective redress systems currently

in place at national level seem to contain some pertinent instruments. Upon closer examination, it turns out, however, that many of these instruments lack the desired efficiency (e.g. opt-out features), required safeguards (e.g. no regulation for third party funders), or adequate admissibility procedures.

An overview of the instruments of collective redress currently available in Austria confirms, at least to some extent, the need for further development. These instruments are mainly vested in Austrian consumer protection law:

Austrian law on consumer protection offers the possibility of "representative actions" (*Verbandsklage*) brought by certain associations mentioned in the Austrian Consumer Protection Act or the Unfair Competition Act. That would be for example, the association for consumer information or the Austrian Chamber of Labour. These associations are entitled to bring such representative actions if the interests of a large number of consumers are concerned. It is not a requirement for a representative action that a consumer had already suffered damages.

However, the application of representative actions is rather limited, since they merely aim to obtain a cease-and-desist order to control future behaviour of major market participants. What representative actions cannot do, is obtaining a performance judgment for the benefit of consumers.

Further, also based on the Austrian Consumer Protection Act, an association may lodge a test claim (*Verbands-Musterklage*), after having been assigned a claim by a consumer. With this measure it is possible to obtain a performance judgement; and the association may bring the test claim before the Austrian Supreme Court, independent of the amount in dispute. In short, the purpose of a test case is to resolve all claims arising out of the same cause in one go. Yet, this procedure still has its deficiencies: One major disadvantage is that it has no time-barring effect on the claims which are not part of the test claim. Moreover, if other injured parties pursue their individual claims, once the test claim has become final and binding, the defendant could easily torpedo or considerably delay these subsequent proceedings, by simply contesting each claim.

Finally, the third instrument of collective redress available in Austria is the Austrian-type class action (*Sammelklage*). This collective redress tool has been largely developed by case law of the Austrian Supreme Court, due to the lack of a "real" instrument providing legal protection to a large number of claimants. In order to participate in an Austrian-type class action, injured persons, first, need to assign their claim to an association (or person). This means they need to opt in to the class to be part of the suit — unlike in the US, where you have an opt-out system. The association then lodges a single claim which covers all of the individual claims assigned to it. In order to be admissible in court, the assigned claims need to be based on a similar set of legal and factual issues.

The assignment of claims to a single claimant has at least some advantages: the amount in dispute is regularly high enough to cooperate with a litigation funder and all the claims assigned to the leading claimant are prevented from being time-barred. However, a drawback for the effectiveness of Austrian instruments is that they only provide for an opt-in mechanism; an opt-out feature has not been introduced so far. Accordingly, also settlements in Austrian class-actions are only binding on the persons who have assigned their claims; there is no general binding effect for all similar claims as with the Dutch act on class settlements.

It will not only be interesting to see how the Austrian system will develop, but also what approach the European Commission will take in its report and following Commissioner Jourova's statements.

However, even more exciting is the question of what part arbitration will play in the forthcoming development of collective redress instruments in Europe. An attentive reader will have noticed that arbitration has not been discussed much in this blog post. The reason being that the discussion of collective redress instruments almost exclusively relates to litigation (as for Austria, consumer protection law makes arbitration rather impractical, due to the known barriers with concluding arbitration agreements with consumers).

This observation corresponds to Gary Born's statement in his blog post from 2015, namely that group arbitration proceedings are "*relatively rare*".

At least in my experience, this is still the case and, unfortunately, I have not had the chance to work on a group arbitration so far. I wonder how common group arbitrations are in practice. Therefore, I invite the avid readers of the Kluwer Arbitration Blog to share their experiences with group arbitration proceedings in the comment section below.

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