Legal
Protection
International

LPI CONFERENCE REPORT

Collective Redress, Class Action and Legal Protection Insurance

Prof. Dr. Astrid Stadler

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The Theme

On the 50th anniversary of RIAD's (International Association of Legal Protection Insurance) foundation, representatives from the legal protection insurance industry worldwide gathered in Berlin. Over two days, they discussed collective redress procedures worldwide, how they are evolving, and the role insurers, law firms, states, funders and consumers have to play in them. The world of collective redress procedures includes class actions, representative proceedings, Germany's *Musterfeststellungsklage* (MFK) and, imminently, a European Union (EU) Directive in the area. Australia, the UK, and many EU member states have their own systems, all with individual strengths and weaknesses, which international experts discussed in depth during panels and keynote speeches.

State of Play

Created to enable individuals to collectively pursue claims against companies, NGOs and others for alleged wrongs where it would not be financially viable to take action on an individual basis, the system has taken on different aspects in different jurisdictions worldwide. With its roots in the US, where class action lawsuits were introduced in the 1960s, collective redress procedures soon evolved to be used in trials for mass tort events.

Collective redress procedures worldwide are at a crossroads. On the one hand, the field in the US is somewhat in decline, explained Prof. Dr. Astrid Stadler of the University of Konstanz. Quoting US litigator John Coffee, she said that major US class action lawsuits are "much like a grape in the sun, drying slowly into a raisin." On the other hand, the EU is on the verge of completing legislation to ensure that all 28 (soon 27) EU member states have a collective redress procedure (eight currently don't and there are huge variations in national systems).

Policymakers at the European Commission and European Parliament shared insights with delegates on what these new laws could look like. Ioana Pătrașcu, Legal Officer at the European Commission's Directorate General for Justice and Consumers, said that after a decade of trying to "gently coax" member states into doing the right thing with various non-binding instruments, it's time to go further. The fitness check of EU consumer and marketing law of 2017-2017 showed that "EU consumer law in general is, overall, still fit for purpose," she said "However, there was a strong weakness that was also pointed out… which is the enforcement." The Commission is therefore set to issue a Directive, potentially massively expanding the role of collective redress in Europe.

The Congress

It's "a debate more than a congress," said the Association's President Simon Warr. "A sharing of ideas, and possibly a clash of ideals as well." The congress looked at where Europe could be heading. Issues discussed include funding and cover for the adverse cost risks, access to justice, who chooses the lawyers for collective redress cases, the importance of the loser-pays principle, and what justice for consumers really looks like. There were various answers, fascinating insights, and a thorough analysis of competing systems. There was also one definitive announcement: after 50 years, RIAD was rebranded as Legal Protection International - LPI.

With a legal-themed cake to celebrate this half-century, LPI's President and newly elected Board Member Laurent des Brest read out a letter from Carlo Isola, a co-founder of RIAD, recalling the "daring, arguably reckless" decision of a group of Italian lawyers to found the *Rencontres Internationales des Assureurs Défense* in Rome in 1969. Started to promote the interests of legal protection specialists, RIAD now brings together some 40 undertakings from 18 European countries, Canada, South Africa and Japan. Legal protection insurance, "which is so seductive, because it's so complicated," as Carlo Isola wrote, has evolved over the last half century, but remains as fascinating as ever. Members were therefore delighted to discuss the intricacies of collective redress.

A Variety of Systems, and some Key Issues

The US System

Class actions began in the US, in a system which now has so many negative connotations that many practitioners are keen to rebrand it as "collective redress." The main weakness of the US system, as delegates noted is the lack of a "loser pays" principle, where the losing litigant pays the winner's costs and legal fees. There's therefore no disincentive for law firms to bring cases against corporations.

Maxim Baer, Managing Director of Legal Net, a division of ERGO Group AG that settles international legal protection claims for insurance companies, expanded on the theme during the breakout sessions, sharing details of cases from the food and beverage industry in the US, where law firms often find a case, then look for complainants. "Having a footlong Subway sandwich -- or a bit less than a foot long -- that would not be crucial," he noted, but the law firm which got a $525,000 settlement in the case — of which just $5,000 was passed on to consumers — may think otherwise.

"The attorney's incentive? Money," said Pat Monks, Attorney-at-Law of Monks Law Firm in Houston, Texas. With law firms and funders on the lookout for possible cases, there's an "obvious conflict between the funders and the defendants, who really runs the course of action," he added. "That is a problem." The question of funding was raised throughout the congress, and was clearly a cause of great concern: in a Sli.do poll on the issue, around two-thirds of the audience said the EU should regulate the funding of collective redress.

Still, the US system gets results. In the VW Dieselgate scandal, which dominated discussions of what a potential EU law could look like, compensation has already been paid to US owners of various VW-owned makes and models. This was the outcome of a class-action lawsuit and a deal with the Justice Department. "Consumers in Europe can only envy diesel car owners in the US," noted Professor Stadler. "Consumers in Europe have got nothing but a software update, no compensation at all so far."

Divergence of Systems in the EU

European consumers' experience of collective redress varies greatly between member states. The UK has various parallel instruments, including class actions for competition law. France and Belgium have representative actions for consumers, with significant incentives to settle, Professor Stadler explained on a whirlwind tour of the bloc's judicial systems. And "Germany's always a very special case when it comes to collective redress," she said: the only major industrialised country with no collective redress instrument for the recovery of damages.

The German System: the *Musterfeststellungsklage*

The new MFK procedure seeks to rectify that, but it has a structural problem. The initial stage has no immediate benefit for consumers. Instead, it leads to a declaratory decision on what a company has done, after which consumers can pursue individual claims for damages. "Does it really make sense to use this system just for declarations?" asked Prof. Dr. Heribert Hirte. A German parliamentarian and Chairman of the Bundestag's Sub-Committee on European Union Affairs, as well as Deputy Chair of the Committee on Legal Affairs and Consumer Protection, he noted that when it comes to the second stage "there's fear from German business that this will lead to a lot of claims filed against big companies."

Reflecting on a "very nuanced" discussion while drafting the law, he noted that Germany possibly doesn't need to reform the procedure, but the actual structure of the law. Because as several delegates pointed out, a system where, following the declaratory judgment, over 400,000 individuals would then have to file individual claims for damages in the Dieselgate scandal isn't really collective redress — and it could be a headache for legal protection insurance providers.

A declaratory judgment "is of no benefit at all," said Dr. Theo Langheid, a Partner at BLD Bach Langheid Dallmayr, Cologne. It has only benefited VW to spin the case out for as long as possible, he said. In general, the MFK "will lead to frustration for the customers... because even if they win the declaratory judgment they will have to go to another court for their individual claims." And with so many claimants, how could any settlement award be fairly distributed?

Legal Protection Insurers and the Free Choice of Lawyer

Another potential issue for insurers is the free choice of lawyer - the concept that the policyholder can choose their own lawyer from among the circle of lawyers whose fees

Maxim Baer

Pat Monks

Prof. Dr. Heribert Hirte

Dr. Theo Langheid

the insurer will cover. Prof. Dr. Domenik H. Wendt of the Frankfurt University of Applied Sciences discussed this in depth, with examples from the ECJ and EFTA court on the subject. He believes the free choice of lawyer restricts the participation of legal protection insurers in proceedings, and therefore their ability to defend policyholders' interests.

The free choice of lawyer may be especially problematic in Germany under the MFK system. In a case like Dieselgate, if nearly half a million claimants get to choose their own individual lawyers, is that realistic for insurers? Does it remove the benefit of having a collective procedure? Perhaps, as Professor Hirte mused, "collective redress isn't palatable to the German mentality."

Justice through Collective Redress Proceedings

This was one of several slightly philosophical questions posed at the congress. What does justice actually look like in collective redress situations? Ben Phi, Managing Director of Phi Finney McDonald, one of Australia's leading plaintiff class action firms, cited a case where he'd represented child migrants from the UK to Australia. "What the clients wanted... was an acknowledgement and an apology," he said. "It was the apology that did the primary healing."

Moderator Andy Edwards got panellists talking with the example of the UK's National Health Service, where those who pursue cases are usually looking for an apology, rather than a payout. The EU Commission's Ioana Pătrașcu noted that their proposed legislation has a number of measures for redress, including compensation, repair or replacement of the product. She also raised the matter of cases where compensation would become meaninglessly small if distributed among all the claimants. In these circumstances, the cy-près doctrine could apply, with money awarded to relevant consumer organisations.

Safeguards in the Australian System

Returning to Australia's system, which has been described as one of the world's most plaintiff-friendly, Odette McDonald, Director of Phi Finney McDonald noted that it nevertheless has several safeguards in place to avoid it becoming like US class actions. There are cost-shifting rules, as in Europe; class actions can subsequently be de-classed where the case doesn't meet requirements; and the courts and judges have very broad discretionary powers. The court can appoint third party contradictors to ensure settlements are equitable to claimants, her colleague Ben Phi said, and there are measures to stop class members who turn up after proceedings receiving damages. "Australian class action procedures have a certain kind of excitement to them," he said. "Particularly in front of certain judges, where you literally have no idea what you're going to get on a given day."

Funding of Collective Redress and the Role of Qualified Entities in the EU-System

Australia is also, "for better or worse," the birthplace of third-party funding for collective redress cases, Ben Phi added. This came about because lawyers aren't allowed to charge contingency fees and the loser pays principle led to the growth of after-the-event (ATE) insurance on a case by case basis. With class action a well-recognised avenue for dispute resolution in Australia, and settlements (a more common outcome than judgments) often involving significant sums, that only looks set to expand.

Who pays for collective redress cases was a theme which delegates raised throughout the congress, particularly because of its implications for the legal protection insurance sector. As the EU Commission's Ioana Pătrașcu explained, formulating a pan-European rule is difficult because some member states allow third-party funding (TPF) of collective redress cases. However, she added, the Commission can help build the capacities of qualified entities.

Qualified entities are consumer organisations, independent public bodies or, in some member states, ad hoc groups of potential claimants who work together to bring a case. She noted concerns that consumers may not receive the compensation they're entitled to if redress is sought through a for-profit entity. Clear funding for qualified entities is also vital. "The directive also requires, as a safeguard, more transparency about the origins of the funds of the qualified entity," she said. There are "very clear and strict rules on how to address conflict of interest, precisely to prevent any kind of conflict of interest."

French MEP Geoffroy Didier, the European Parliament's

Prof. Dr. Domenik H. Wendt *Ben Phi*

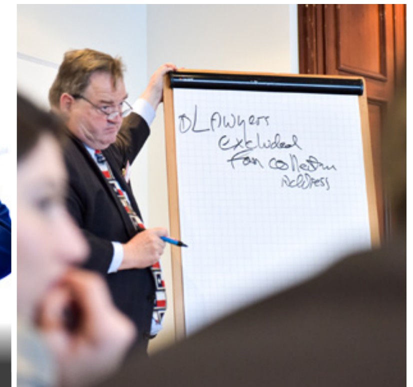
Prof. Dr. Astrid Stadler & Andy Edwards

Odette McDonald *Geoffroy Didier*

Thomas Kohlmeier

Sabine Eichner

John Byrne



Rapporteur on the EU Directive, noted that in France, the funding of entities by third parties isn't allowed, because consumer organisations there receive taxpayers' money. "If, just blindly, we allowed any third party to fund a case of redress, we'd find ourselves with cases of abuse," he added. There's also an issue of access to justice, with consumer organisations able to raise awareness and bring together potential claimants who might otherwise be unaware of their rights.

With funding options including contingency fees, before- and after-the-event insurance, taxpayer- and privately-funded consumer organisations, non-profits and others, the landscape is somewhat crowded. Delegates also heard about another option, litigation funding. Nivalion AG is a Swiss company that supports plaintiffs in claims worth at least CHF 7.5 million by assuming all costs of litigation and arbitration proceedings across Europe for a success-based fee.

"Litigation funding is very expensive," because the funds involved are subject to the risk of total loss of investment, explained Nivalion's Managing Partner Thomas Kohlmeier. For them to take a case on, there needs to be a loan-to-value ratio of 1:10, something not usually seen with consumer cases. But, he said, in the future, legal protection insurers could work alongside litigation funders, providing additional resources in complex cases.

A Bright Future?

With the European Parliament having adopted its position in March 2019, and the European Council potentially ready to decide on an approach at the November Competitiveness Council, it looks likely that the Europe's Collective Redress mechanism will become a reality next year. With potential cases including Cambridge Analytica's use of data, Ryanair's flight cancellations and, of course, VW's Dieselgate, what does that mean for various groups?

The Role of Insurers and other Funders

The legal protection insurer of the future is "more than ever a conflict manager," said Professor Wendt. Insurers would be responsible for marshalling qualified entities, consumer groups, individual claimants, law firms and participants at every level of proceedings as they negotiate new systems. They'd also have a potential new pool of policyholders, as qualified entities, such as consumer organisations, may want to purchase cover to pursue class actions.

They also need to be ready to actively pursue compensation, not just declarations or other forms of redress. "I believe that it's really important to enforce compensation claims and not just declaratory motions," said Sabine Eichner, of ROLAND-Prozessfinanz, Germany, which works with consumer organisations such as Austria's VKI to fund cases.

"You need systems and procedures in place where those who are best able to take the litigation risk, the lawyers, who are working for a contingency fee, the insurers, the funders, to be able to participate so they can maximize the benefit for the claimants," said John Byrne of Therium Capital Management Limited, a British provider of litigation finance and arbitration funding. He addressed an issue that several delegates raised, that the EU mechanism for collective redress would exist alongside (and possibly conflict with) countries' existing systems.

That's not been a problem in the UK, he pointed out, where there are already three parallel systems for collective redress. Group litigation orders, representative actions (which have existed for over a century) and competition class actions (introduced in the last decade) all provide ways for a class of plaintiffs to take an organisation to court.

Lawyers

Asked whether the free choice of lawyer stands in the way of financing mass claims through legal protection insurance, the room was very close to 50/50. Law firms in Europe mainly charge by the hour, which, as Ben Phi noted, creates a "perverse incentive" towards inefficiency, but many class action cases are taken on with the lawyer getting their fees from a share of the payout. As with any field of law there are specialists, so it arguably makes sense for the insurer, or the organisation bringing the case, to group the claims with a single law firm -- rather than thousands of consumers all choosing their own.

"The directive says nothing about the choice of the lawyer, nothing," said Professor Wendt. "Right at the end you also have a lawyer but no-one is really interested in who that will be."

Different Ways in Which Consumers Benefit

Collective redress is one way to counterbalance the so-called "rational apathy" of consumers. If one person's car is faulty, they won't have the time, means or motivation to sue the carmaker. But thousands of them will, meaning that in its ideal form, collective redress is a means of injecting fairness into markets. It was therefore disappointing that not one of the many consumer organisations contacted by LPI took up the invitation to speak at the congress! Instead, delegates played the role of the consumer, putting their concerns to the first day's panel.

There are certainly good ideas for consumers in the proposals. MEP Didier pointed out that cases can be brought in the domicile of the trader, or the member state where the harm occurred, usually the consumer's home. "It means a French consumer could, for example, bring a case in Italy if they've bought an Italian car which turns out to be defective," he explained.

Within the new European representative action, redress orders are the norm, obliging the trader to compensate, repair, replace or otherwise atone for the fault. But there are exceptions, where there is a declaratory decision regarding the liability of the trader towards the consumers. These are only possible "in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex."

That leaves an area open to interpretation subsequently, Professor Wendt noted. "What is complex?" he pondered. "Perhaps we're all complex?" Declaratory decisions are also not possible where consumers are identifiable in cases of loss, which is more frequently the case in an age of internet shopping.

Another plus for the consumer is the range of platforms that enable consumers to pursue claims online, such as MyRight, which can seem more approachable than going directly to a law firm. "No customer is interested in whether it will be a legal services provider, or whether it'll be a lawyers' organisation putting through their claims -- they just want a solution," said Sven Bode of MyRight. It's also easier for such services to book-build. "We come from the online space, and that's more efficient."

Sven Bode

Christoph Arnet

They use an aggressive legal approach, pushing the boundaries of the law by making multiple small claims in courts all over Germany. "No judge wants to pick up on the big ones," he added. "They don't have the capacities, there's no incentive really." But with a series of smaller class actions in cases like VW Dieselgate, cases are already being heard in regional courts.

One other area where the consumer can benefit ties in not with the forthcoming law on collective redress, but another recent flagship EU law: the General Data Protection Regulation. As consumers become more aware of their rights in this area, more cases could emerge, affecting large groups of consumers.

In an ongoing Representative Action in the UK, Richard Lloyd vs. Google LLC., there are more than 4 million potential claimants -- a very specific subset of people who owned iPhones in the UK in 2012. If the way that consumers control fair and effective use of their data is through collective redress, that's a good thing, Therium's Byrne (whose company is funding the case) concluded.

Abuse of Collective Redress Systems and the Interests of Companies

When delegates were asked in a Sli.do poll what they thought was the most decisive feature of Collective Redress, the majority opted for "That these procedures create an equilibrium between consumers and big corporates." Having heard all about US Class Action Cases regarding sandwich length, delegates were concerned but MEP Didier was keen to reassure them.

"Having been called to the New York Bar for several years... I understand very well how the system works in the US," he said. "I believe that we can distance ourselves from the aspects there that haven't worked," he added. "I know that the mechanism of a collective redress has led to a lot of concerns and fears, which is perfectly legitimate." Careful tweaking of the proposals meant that it couldn't be used by companies to destabilize their competitors through abusive litigation, he stressed.

Jacqueline Harvey

Conclusions

As ever, delegates left LPI's annual congress with much to think about. What could it mean for members?

The role of BTE legal protection insurers seems to be limited in the EU Directive but there must be a mechanism for insurers to manage the aftermath of a declaratory judgments. With such huge class numbers for some ongoing cases, grouping together of the second stage of claims in the German MFK should be possible. And there should be a second stage: purely declaratory judgments leave the consumer to pursue their right individually -- so why bother with collective redress at all?

BTE insurance isn't relevant if the 'collective' claim is run by qualified entities for a declaration. It may become engaged once individuals are seeking compensation based on a declaratory judgment, but by that stage, it would be better to have a mechanism for dealing with multiple individual claims.

Qualified entities could ultimately be potential customers for LPI members. "If the qualified entities, [have] no financial means, then maybe you would have to think about insurance solutions here," Professor Wendt notes. "Then maybe it wouldn't be a bad idea, for reasons of transparency, having that written in the directive."

Funding must be assured, both of own costs and to cover the 'loser pays risk', in order to enable access to justice. If this is not secured, the EU Directive will be all bark and no bite. That could mean a bigger role for ATE legal protection insurers, as seen in the British and Australian systems. Collective redress needs to be able to fund itself and also to have protection from 'loser pays'. Procedural rules, including the draft EU Directive, need to facilitate this.

Free choice of lawyer seems to hinder the process at several stages, creating bottlenecks in a situation where the consumer -- who is increasingly engaging with the justice system through an online portal, or his insurer -- has the option to choose any lawyer, but really only cares about getting a result. It also makes it harder to group claims, thus undermining the whole point of collective redress mechanisms. This particular area of law requires a highly specialised lawyer, adds Professor Wendt. "Who knows these lawyers? It is the insurance company. The legal insurance company knows the lawyers, knows how good they are, and probably would know who to recommend."

Legal Protection International

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