

Class actions in the EU: a threat to the life sciences industry?



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Stakeholders in the life sciences industry have for some time been witnessing an increasing number of initiatives in the UK and across Europe designed to facilitate collective legal actions. This trend is unlikely to be reversed in the short term with a growing number of private sector entrants to the collective actions and third-party funding marketplace. The impact may increase the litigation risk in Europe for the life sciences industry, although it is important that this risk is not overstated.

This article surveys key developments in collective actions and third-party funding of the past year at a European level and in a number of key European jurisdictions. It then discusses the specific risks for the life sciences industry.

INTERNATIONAL AND EUROPEAN DEVELOPMENTS

The question of collective actions is receiving attention at a high level in the EU, particularly in the areas of consumer protection and competition policy.

The Commissioner for Consumer Protection, Meglena Kuneva, stated in November 2007: “there will not be any [class actions]. Not in Europe, not under my watch.” However, Ms Kuneva expressed the need to confront the fact that at present, almost half of the EU member states have systems of collective redress while the rest do not. The results of a consultative process of the Commission, proposing benchmarks for effective and efficient collective redress systems, were published in August 2008 (see http://ec.europa.eu/consumers/redress_cons/docs/feedback_benchmark_en.pdf). 70 contributions were received from various stakeholders. Consumer bodies supported the benchmarks and emphasised the importance of a working financing mechanism. Lawyers who contributed were also generally supportive and voiced a preference for so-called “opt-in” mechanisms. “Opt-in” describes the case where individual claimants need to adhere to the litigation and “become part of it”. These systems tend to have rather low levels of participation and to be less effective in terms of damages paid to claimants. “Opt-out” refers to the reverse position (seen in the US) where the class is defined by reference to specific criteria and parties need to opt out if they do not want to participate (for example so as not to be bound by the result). Opt-out processes tend to have high participation rates and result in large claims.

Industry participants were concerned that the benchmark discussion was somewhat premature and should take stronger account of the need of industry to be protected from unmeritorious claims. It is expected that a further “communication” will follow later this year (see Ms Kuneva’s press release of 14 March 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/146&format=HTML&aged=0&language=EN>).

The Commission also published a White Paper on 3 April 2008 on damages actions for breach of EC competition rules to empower consumers, including collective redress mechanisms (particularly representative and “opt-in” actions). This White Paper is envisaged to fit in with Ms Kuneva’s initiative.

On the broader international level, the Organisation for Economic Co-operation and Development (OECD) Council adopted the Recommendation on Consumer Dispute Resolution and Redress in July 2007 to improve consumer rights protection and online shopping safety, including “collective action lawsuits” by consumers against companies.

There is also a contemporary example of an interesting potential for globalisation of class actions, in that the National Association of Pension Funds in the US has generally encouraged local and European investors to join US claims. Such developments would no doubt require consideration of the local enforcement of foreign class action judgments. It is also doubtful whether European policy makers would stand back and tolerate in the long run a situation where European parties would be able to seek compensation with procedural effectiveness only in the US.

ENGLAND AND WALES

Collective actions and third-party funding issues have been two of the most discussed litigation topics in the past year, with the consensus moving towards a steady facilitation of both enhanced forms of “collective redress”, and the use of private capital to fund litigation for profit. The debate appears to be focused not so much on whether, but rather on how, it should happen.

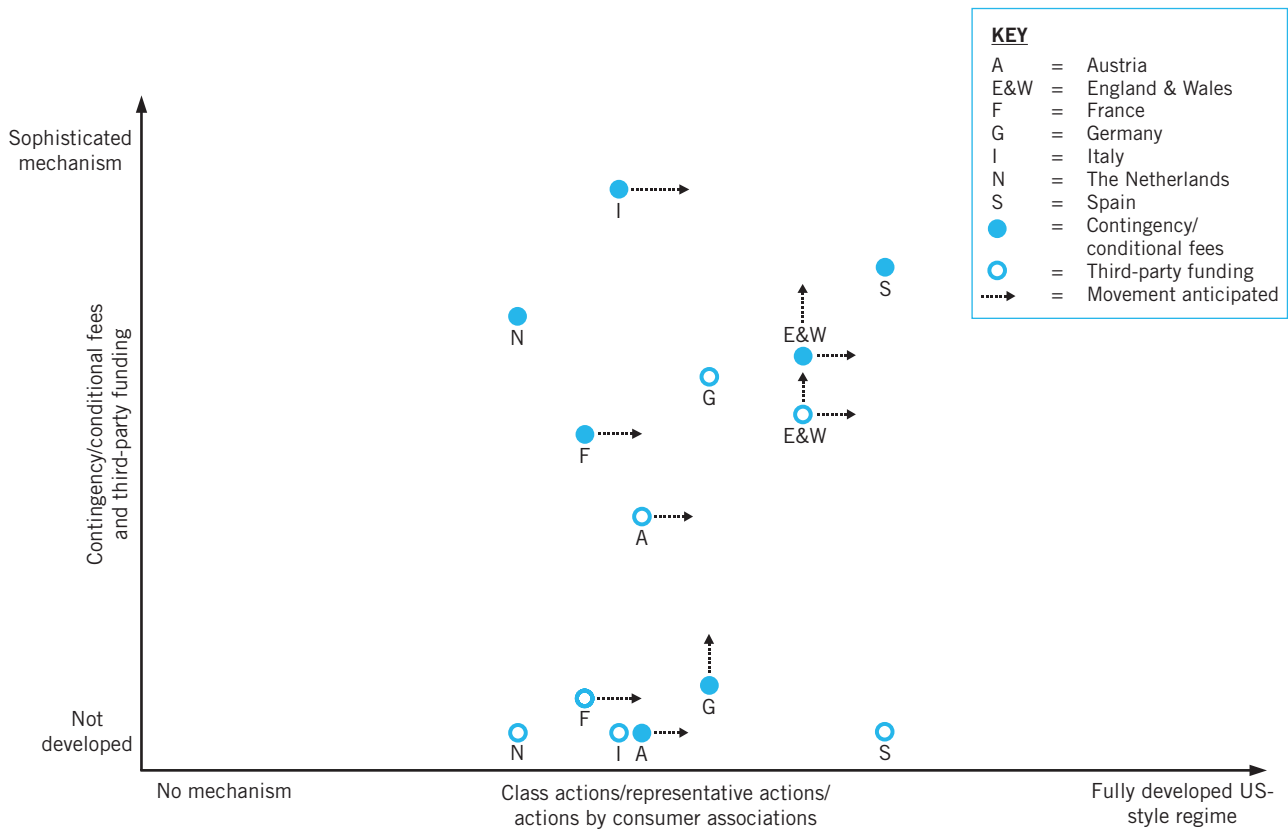
Currently, the options available in England and Wales are:

- Group Litigation Orders (GLOs), in cases of common issues of fact and law: a recent example involved Sanofi-Synthelabo (*[2007] All ER (D) 493 (Jul)*).
- Representative actions (in cases of same interest among claimants).

Both of these are decidedly “opt-in” mechanisms.

Initiatives for future development discussed below are only at the stage of recommendations. If they were implemented as currently proposed, a significant factor reducing their impact would be the absence from the English litigation process of US-style features such as jury trials and multiple damages.

A EUROPEAN COMPARISON: CLASS ACTIONS, CONTINGENCY FEES AND THIRD-PARTY FUNDING



Collective actions

Key developments are the following:

Civil Justice Council Recommendations. The central finding of the Recommendations of the Civil Justice Council (CJC) of August 2008 was that the current system does not provide sufficient access to justice for meritorious consumer or multi-party claims. Its key recommendation was to create a generic class action to be certified as such by the court. There would be no presumption of “opt-in” or “opt-out”, and a possibility of mixed certification. Unlike the common European approach, actions could not only be brought by designated bodies (for example, consumer protection agencies), but also by individual representative parties or ad hoc bodies. The report included a number of other major recommendations (changing the law on limitation, settlements to be approved by the court, new methods of damages calculation, unallocated damages to be distributed by a trustee and so on). However an important albeit discretionary general rule in terms of providing a check on collective actions, namely the “loser pays” principle, would remain; and the courts would have enhanced case management powers and ensure that the procedure is balanced between claimants and defendants.

It is now for the government to consider further action (including the need for legislation), and there may be a significant waiting period. While the possibilities raised by the CJC are far-reaching, it remains to be seen how radical any legislative proposal may eventually turn out to be, and how and whether it would be used in practice.

Research paper commissioned by the CJC. The CJC’s Recommendations were preceded by a research paper. Based on research across Europe and the Commonwealth, this concluded there was overwhelming evidence of the need for an enhanced collective-redress mechanism. This was particularly so in light of the perceived failure of the current GLO regime relative to other jurisdictions, and on the evidence of those who have struggled to bring claims. The solution mooted was an opt-out, generic collective redress regime.

OFT Recommendations. In the competition context, the Office of Fair Trading (OFT) made recommendations to the government in November 2007, including permitting some conditional fee arrangements (CFAs), encouraging third-party funding, and contemplating “opt-out” features.

Other developments.

- The first representative action in the competition context was brought by the consumer body *Which?* against JJB Sports. Instead of the thousands predicted, fewer than 200 individuals joined the action. The later settlement left the representative action mechanism untested; however the case arguably highlighted the merits of “opt-out” systems.
- The mis-selling action brought by policyholders against Equitable Life, commenced in 2004, was settled.

Cross-border

- The High Court and Court of Appeal recently rejected exemplary damages against cartels that have already been fined by the Commission, reducing claim incentives.
- A new derivative action for shareholders under the Companies Act 2006 has been in force since October 2007, but there has not been the flood of litigation that some had anticipated.

Third-party funding

Access to funding is an important current issue in England and Wales due to the relatively restrictive CFA regime, and the private litigation funding market is developing rapidly. There is however a tension between a desire to allow this kind of funding, and public policy militating against allowing funders to control litigation for profit (as highlighted in the case of *Yeheshkel Arkin v Borchart Lines [2005] 3 All ER 613*, and in *Hamilton v Al Fayed (No 2) [2003] QB 1175*). The CJC is considering regulation.

However, concerns about vexatious or unmeritorious litigation can be exaggerated: funders are almost certain to carry out a merits assessment, sometimes requiring a higher than 70% chance of success. Clearly this is not a guarantee that only meritorious claims will be brought, as highlighted when a professionally-funded claim against a firm of auditors was recently dismissed on a well-established legal principle that arguably should have dissuaded the commencement of a claim (*Stone & Rolls v Moore Stephens [2008] All ER (D) 225 (Jun)*).

Funders will typically seek between 20% and 50% of net recovery. While the industry is particularly relevant for potential claimants, some products are also emerging that would assist defendants (for example “risk hedging”, where the third party buys a proportion of the outcome of a claim or of a liability, for a fixed payment or receipt).

The authors note in particular the following developments:

- A recent high-level market survey concluded that the UK funding market is immature but most market participants believe there is a significant opportunity. Key drivers are thought to be changing legal precedent, increasing legal costs and improving levels of awareness of such funding. Competition within the market is evolving, with a range of players and business models apparent. The London litigation market is said to be attractive to funders because of its sophistication and the relative speed with which cases are brought to a conclusion (reducing the pay-back period for funders).
- The number of visible funders in the market is increasing. After successfully financing litigation for a number of years in Germany, Switzerland and Austria, Allianz launched a third-party litigation business in London. A hedge fund (MKM Longboat) is said to be creating a pool of funds to invest in European legal disputes. Juridica, chaired by Lord Brennan QC (a former chairman of the Bar Council who represented the claimants in the GLO case involving Sanofi-Synthelabo), became the first specialist litigation fund to list on AIM. Other players in the market include Harbour, Global Arbitration & Litigation Services, Omni Bridgeway, Calunius Capital and Smith & Williamson.

- Law firms are developing expertise in advising such funders.
- The legal press reported recently that a financial litigation package comprising conditional fee agreements, after-the-event (ATE) insurance (one of the largest ATE packages seen as yet in the London litigation market) and third-party funding was arranged by Calunius Capital and The Judge, and financed by Allianz ProzessFinanz, QBE and Brit Insurance, to finance a planned collective GB£50 million (about US\$90 million) action by 500 individuals against a law firm and a foreign national over advice relating to certain investment schemes.
- The industry seems potentially inclined to fund actions for high-volume low-value consumer claims if they can be made economically viable. Currently, administrative costs and procedural hurdles are still often too high even in potentially strong and successful cases (such as after the OFT's findings in the dairy market in December 2007).
- A June 2007 CJC report recommended, among other things:
 - properly regulated third-party funding to be recognised in mainstream litigation;
 - regulated contingency fees to be permitted in certain circumstances;
 - a Supplementary Legal Aid Scheme; and
 - further research.

The CJC has been further developing its policy in this area. The debate has suggested a growing consensus in favour of a permissive funding environment provided defendants are protected, particularly against costs (it may be that the *Arkin* decision that partial funders are liable only to the level of their partial funding, will be adapted to enhance the protection of defendants). Similarly, claimants need to be protected from poor disclosure by funders and inappropriate contractual terms (given the recent history in the claims management area for consumer cases). Some restrictions to permit only reputable operators, such as a voluntary code for third-party funders, may emerge. The CJC is considering this.

AUSTRIA

Austrian procedural law does not provide for class actions in a formal sense. However the Austrian Supreme Court has recognised a procedure for bringing class actions by allowing claimants to assign claims to a single claimant. Such actions are permitted only where the bases for the claims are similar and where they require a decision on similar questions of fact or law. Certain types of claims can also be dealt with by representative actions.

A proposed amendment to the Austrian Code of Civil Procedure (*Zivilprozessordnung*) provides for group litigation by at least 20 claimants with at least 80 claims asserted against the same person(s), which require a decision on similar questions of fact or law. Claimants can “opt in” and would nominate a *Gruppenvertreter* to represent them. The competent court would only render a declaratory judgment on mutual questions of fact and law.

While this amendment was due to come into force on 1 January 2008, heavy criticism from the Chamber of Commerce, the Austrian Trade Union and the Ministry of Economics and Parliamentary elections in September 2008 mean that it is likely not to come into force before 2009.

Although some funders have established themselves in Austria in recent years, third-party funding is still a rare and restricted phenomenon in Austria.

FRANCE

The key developments in the past year are as follows:

- President Nicolas Sarkozy wrote to the Minister for Economy, Finance and Employment, Christine Lagarde, in July 2007 setting out commitments undertaken to the French electorate requiring rapid action and saying “You shall create a group action *à la française*.”
- On 24 October 2007 and 21 November 2007, two draft bills were presented by socialist members of Parliament providing for the introduction of group actions under French law. The draft bills allow for authorised individuals and certain associations to introduce group actions for civil claims in contract or tort, in matters relating to consumer issues, health, environment or competition. The draft bill proposes an opt-out system, but with a judicial review of whether a case falls properly within the system and is properly administered. Those draft bills will be reviewed by a permanent commission of the Parliament. Although it is likely that class actions will be introduced in some form in France in the near future, the chances that this draft bill will be taken as a basis for any such introduction remain remote, notably because these initiatives come from the opposition.
- On 6 December 2007, the new president of the Paris Bar (*Bâtonnier*) declared that he intended to ensure the French legal profession would be more proactive, including in the area of class actions.
- Luc Chatel, the Secretary of State for Consumption and Tourism, announced in June 2008 that a task force would be set up in July to prepare a bill on group actions before the end of 2008. In February 2008 (amid a general proliferation of discussions, reports and draft bills regarding the introduction of class actions), the president of the Chamber of Commerce and Industry of Paris (CCIP) warned against the dangers of introducing a group action in France. He emphasised that this would result in an increase in litigation costs for corporates, which would ultimately be passed on to the consumer. According to Mr Simon, such an increase would also inevitably reduce the competitiveness of French corporates, notably because higher insurance premiums would apply. Consequently, the CCIP recommended that:
 - group actions, if ever implemented, be strictly controlled to avoid abusive proceedings;
 - an opt-in system be adopted; and
 - the scope of group actions be limited to consumer law and disputes of a contractual nature involving low amounts.
- The Act on modernisation of the economy, which was expected to introduce group actions, was enacted on 4 August 2008. However, it did not implement group actions as expected. Therefore, the final report of the Commission for the Improvement of Growth in France (*Commission pour la Libération de la Croissance Française*) of 23 January 2008, which recommended the introduction of group actions, was not followed. The numerous amendments to the bill introducing a class action were rejected by members of the Parliament.
- A draft bill on the decriminalisation of business law is due by autumn 2008. This draft bill could introduce class actions under French law. Indeed, the report of the Commission for the decriminalisation of business law (*Commission sur la dépenalisation du droit des affaires*) was handed down on 20 February 2008. This report echoes the recommendations of the final report of the *Commission pour la Libération de la Croissance Française*, as follows:
 - only consumer groups with joint authorisation of the Minister for Economy, Finance and Employment and the Minister of Justice would be able to launch a group action;
 - courts would have jurisdiction to rule on the admissibility of the claim brought by groups;
 - courts that would have jurisdiction to hear actions brought by groups would be listed restrictively;
 - only those consumers who had opted-in would be able to take part in the proceedings;
 - a judge would make a ruling regarding the liability of the company and would fix a time-period during which consumers would be able to bring a claim for damages before him;
 - in case of refusal to indemnify or lack of response from the company, consumers would be able to revert to courts to obtain damages and courts would be able to order a periodic delay penalty (*astreinte*);
 - the claimants who launched abusive proceedings would have to pay damages for the loss suffered by the defendants;
 - settlement agreements would have to be approved by the court having jurisdiction to hear the claim; and
 - no criminal action should be brought before the end of civil proceedings unless criminal action is brought by the public prosecutor’s office.)

Under Article 11.3 of the French Bar Rules (*Règlement Intérieur National*), “*avocats* can only receive payment from their clients or a person who has been granted powers of attorney (*mandataire*) by their client”. Payment by third parties is generally viewed with suspicion and *avocats* are advised to refuse such payment. The use of private sources of capital to fund litigation is therefore not expressly permitted under French law and not customary in the authors’ experience.

GERMANY

Key developments regarding class actions in the past year are as follows:

- A list of all current proceedings under the Act on Lead Cases of Private Investors (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*) is now available on the internet (www.ebundesanzeiger.de).
- It may be that the scope of representative actions (*Verbandsklagen*) in Germany will increase as a result of the MiFID Implementation Act (*Finanzmarktrichtlinienumsetzungsgesetz*). From 2008, section 6 of the Securities Trading Act (*Wertpapierhandelsgesetz, WpHG*), which includes transparency obligations, will be treated as consumer protection legislation under the Act on Actions for Injunctions (*Unterlassungsklagengesetz, UKlaG*). Consumer protection associations will be able to file claims against financial institutions arising from breaches of section 6 of the WpHG if their members are affected by the breach.
- Following the decision of the Federal Supreme Court in March 2007 that the current general prohibition on contingency fees violates German constitutional law, on 1 July 2008 the German Act on Lawyers' Remuneration (*Rechtsanwaltsvergütungsgesetz, RVG*) was amended. Contingency fees are still prohibited generally but are permitted in exceptional cases where such fees are necessary to give clients the means to raise a claim. Fee agreements providing for a contingency fee are heavily regulated with regard to their form.
- There are innovative methods of bringing multi-party claims under discussion in Germany. Notably in the "cement-makers cartel case", a number of claims were bought (by assignment) by a foreign corporation (named CDC) set up solely to acquire and enforce competition-related claims for damages. This structure is currently being upheld by the German Courts. The Higher Regional Court of Düsseldorf ruled in May 2008 that CDC was the competent person to bring the action but the question of whether the assignment is legally effective is not a question of the admissibility of the claim but whether the action is well-founded (this has been appealed, but the appeal is unlikely to be successful). This mechanism therefore remains to be fully tested at the main hearing, and a decision will not be forthcoming before 2009.

Third-party funding is well-established in Germany. For example Allianz is a notable player in the market.

ITALY

At the end of December 2007, the Italian Parliament passed the Budget Law and Financial Act 2008 and so finally introduced a specific statutory provision (*Article 140 bis*) into the Consumer Code that contemplates a limited opt-in collective action for damages arising out of liability in connection with mass contracts, torts, unlawful commercial practices or anti-competitive behaviour. The new law was due to become effective on 30 June 2008; however this has been postponed to 1 January 2009.

Under this action (that is somewhat limited in scope), bodies acting on behalf of consumers or investors (previously entitled to seek injunctive relief) will be able to obtain a declaratory judgment of the right to obtain compensation and the refund of sums due (although the collective action will not necessarily lead to a direct order to pay this money). Standing to bring such a claim to protect consumers' interests has been granted to a few entities, namely consumer associations with a nationwide presence, and any other consumer group, investor group or association sufficiently representative of collective interests (as assessed by the judge).

The court will filter the claim to assess admissibility, followed by a trial to obtain the substantive declaration and the criteria for calculating loss, followed finally by individual procedures to determine damages for each claimant. If the action is declared admissible, the claimant must proceed with suitable advertising to inform all class members of the collective action, enabling them to "opt into" the collective action by a simple written notice (without any particular formality) to the group claimant. This must be sent no later than the post-trial hearing at which the relief sought is finally set out. These claimants will then be bound by the result. Individual damages will be determined in special procedures either out of court or (in whole or in part) before a judicial "chamber of conciliation". Individual consumers who do not opt in to the collective action still have the alternative option to bring individual claims against the defendant, either by joining proceedings in the traditional way or by separate proceedings.

The issue of litigation funding has never been topical in Italy and, despite its development in some jurisdictions, is not being widely discussed in the press, by scholars or in Parliament. In theory, a third-party funder could acquire the claims of individuals by means of assignment and then litigate on their behalf. However we are not aware of any examples of such funding to date.

THE NETHERLANDS

Mass claims continue to be a hot topic in The Netherlands as a result of the 2005 Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade, CSMDA*). Although this was originally created for collective redress in cases of physical injury, it has become a useful device for corporate investors. It does not create a "class action" proper, but provides a unique "mass settlement" mechanism by which the Amsterdam Court of Appeals looks at the terms of a negotiated settlement and declares it binding on all injured parties other than those who have "opted out". The recent highlights are set out below.

- Dexia's court-approved collective settlement is the second Dutch-style "class action" under the CSMDA. The compensation arrangements, as negotiated between Dexia and four entities (associations and foundations) representing the class, were joined by almost 90% of the class. The settlement appeared to have survived its opt-out period successfully. However, the recent decision of the Supreme Court (following the opinion of the Procurator General in an individual Dexia case) resulted in Dexia being ordered to compensate certain individual litigants who "opted out" to a substantially greater extent than the settlement provided for. This suggests a clear limit to the popularity of the system for claimants.

- After the Dexia settlement, three other settlements have been concluded which may be declared binding under the CSMMDA:
 - the Royal Dutch Shell settlement with its non-US investors. This settlement agreement provides relief in the amount of US\$352.6 million (about EUR246.7 million) to qualifying non-US shareholders who bought Shell shares on any stock exchange outside the US between 8 April 1999 and 18 March 2004 (the European settlement). The Amsterdam Court of Appeals has scheduled a hearing on 20 November 2008;
 - the Vie d'Or settlement. This settlement relates to damage suffered by 11,000 policyholders due to the bankruptcy of their life insurer Vie d'Or in 1995;
 - the Vedior settlement with Dutch Investors' Association (VEB) relating to a settlement for shareholders who sold Vedior shares on the Friday morning of 30 November 2007, before the publication of a press release regarding the discussions between Vedior and Randstad.
- The VEB obtained a judgment in which the Amsterdam Court of Appeal declared that World Online, ABN AMRO and Goldman Sachs had acted wrongfully against investors by misrepresenting future expectations during World Online's flotation. The foundation, VEB-Actie WOL, which represents thousands of individual investors, is a co-claimant in this case. Its claim was dismissed by the Court of Appeal due to its failure to produce proof that the specified individuals it represented had specifically assigned their claims to it (as is required if it is claiming compensation for damages rather than a declaratory judgment for the class in general). According to VEB, the case (in particular the assignment issue) has been brought before the Supreme Court.
- In the field of equity-linked insurances and investment based mortgages, several insurers have been charging excessive costs to their (private) clients over the last years (so-called *woekerpolsissen*, usurious policies). Associations representing the injured parties in this matter have concluded a settlement agreement with Delta Lloyd on 10 September 2008. This settlement obliges Delta Lloyd to compensate its clients for about EUR300 million (about US\$429 million), which is more generous than the Financial Services Ombudsman had advised in March 2008. Other insurers are expected to follow Delta Lloyd. However, concluding a settlement agreement does not definitely guarantee that the insurers may close their files in this matter: one of the associations has already announced it will aim for more compensation, through judicial instruments or otherwise. According to financial analysts, this affair may cost the financial sector EUR6 billion (about US\$8.5 billion).
- The subject of mass claims is also popular with politicians. The government is currently monitoring the Dutch system and considering adjustments to CSMMDA. Possible amendments to CSMMDA would broaden its scope and improve its legal mechanisms, in particular to tackle large-scale losses (triggered by the EC White Paper on damages for breaches of antitrust rules); however there are no concrete proposals as yet.

In relation to funding issues:

- The issue of funding of class actions is being debated among lawyers and politicians in The Netherlands, as only non-profit organisations are currently eligible to act on behalf of a group, whether in a general collective action or as part of the procedure to request court approval for a collective settlement. Low fees and the "free rider" problem (by which class members unassociated with the organisation representing the class still benefit from the achieved declaratory judgment) may result in insufficient funding, forcing organisations sometimes to abort their actions.
- The Dutch bar prohibits lawyers to work on a no-win-no-fee basis. A pilot scheme is being established (which is expected to take five years) for conditional/success fee arrangements in the areas of personal injury and loss of dependency where access to justice is restricted, due in particular to the high costs of instructing medical experts. The general view is that the independence of lawyers is better safeguarded by conditional/success fees, where hourly fees depend on success, than by contingency fees, where legal fees amount to a percentage of the revenues of the case. Contingency fees remain prohibited in The Netherlands. However, organisations that represent injured parties in negotiations mainly do not engage lawyers (attorneys-at-law) and therefore are not bound by these rules. These organisations are also free to represent their clients in litigation for claims below EUR5,000 (about US\$7,150), as the Dutch Code of Civil Procedure allows parties to appear without a lawyer. Such organisations seem to survive reasonably well, as they remain active in the field.

SPAIN

The key developments in the past year are as follows:

- The most significant recent event was the filing of a quasi-class action by a representative consumer association (*Organización de Consumidores y Usuarios, OCU*) against the companies FECSA-Endesa and Red Eléctrica Española, for compensation for damage caused to an unidentified group of consumers by a blackout in Barcelona on 23 to 24 July 2007. The claim was filed on 30 July 2007 but the "public calling" inviting the affected consumers to join the claim has not yet commenced. The blackout affected around 350,000 consumers and OCU is seeking minimum compensation of EUR300 (about US\$430) per day per consumer.
- On 22 September 2008, the Supreme Court agreed to hear a representative claim by a consumer association (*Asociación de Usuarios de Bancos Cajas y Seguros, ADICAE*) against the Spanish Council of Ministers, for compensation for damage caused to consumers investing in tangible assets (stamps in this case) through the companies Forum Filatélico and Afinsa. ADICAE argues that the Spanish Public Administration is liable for the losses suffered by such investors due to negligence in the supervision of those companies. The claim already represents around 20,000 members of ADICAE but further consumers affected can still join the claim.
- Consumer associations are commencing publicity activities in order to gather and eventually commence collective claims representing consumers affected by the insolvency of Lehman Brothers.

However no substantial legislative amendments have taken place over the past year.

Notably, although not technically a collective action, the first ever claim for an injunction in the area of consumer protection has been filed by the Public Prosecutor. The execution of the judgment was passed by the Provincial Court of Cordoba and recently confirmed by the Spanish Supreme Court. This ordered a gas company to reimburse sums unlawfully charged to its clients, which could lead to the payment of millions of euros (the exact number is still unknown, but certain sources believe there could be more than 200,000 affected consumers).

Third-party funding is a rare practice in Spain as class actions are largely in the hands of consumer associations (as a result, the consumer does not bear much of the cost), and there are restrictions on their funding partly connected to their not being allowed to aim for profit.

THE IMPACT ON THE LIFE SCIENCES INDUSTRY

The potential pool of claimants for product-related issues in the life sciences industry is clearly very large. Therefore, any shift in litigation market mechanisms towards a greater number of class actions is significant. So far, however, any impact has been difficult to detect.

The English High Court judge overseeing the MMR class action (*[2007] All ER (D) 67 (Jun)*), decided in June 2007 to recommend that the group litigation status given to the claims (at one stage there had been over 1,000 claimants against several vaccine manufacturers including GlaxoSmithKline, Aventis Pasteur and Merck) should be ended. Such a small number of claimants had funding that the “class” of claimants was too small for the claim to be continued as group litigation. The court did not get to the stage of assessing the merits of the action. The few remaining claimants (with funding) were told to bring unitary actions if they wished to follow the proceedings through. It is also noteworthy that some UK claimants in the Vioxx litigation headed initially for the US.

Traditionally in Europe class actions have been “opt-in”: claimants have to take positive steps to become part of the litigation process, whereas the US system is “opt-out” in that the class is “certified” by a generic description and those covered have to take a positive step not to be a part of the claim. The difference in the leverage this gives claimants (and a plaintiff bar) is considerable. In the US, contingency fees drive the plaintiff bar and provide further impetus for such claims. Any change in European jurisdictions towards “opt-out” actions would not only boost class actions, but also substantially (and favourably) change the economics for potential funders, and the resulting litigation risk for members of the life sciences industry.

While there is some evidence of gathering momentum to achieve class action and third-party funding regimes across Europe, it should be noted that the current situation is highly diverse. For example, France is as yet largely alien to third-party funding, while the system is fairly advanced in Germany. Further such differences are apparent from our analysis above and suggest that the situation is more complex (and perhaps less alarming) than warnings of an impending class action culture across Europe may suggest.

Further, leaving aside for a moment questions of class action procedure, the history of mass tort and product liability claims in the US and internationally, suggests that wider legal and evidential issues (for example, regarding burden and standard of proof, and the admissibility of statistical and/or aggregated evidence) may frustrate attempts to bring complex litigation by way of class action. To take one example, in US class actions relating to toxic tort/product liability litigation, plaintiff lawyers often try to adduce statistical and/or epidemiological evidence to prove causation for the entire class, without reference to individual class members’ own histories. They do so in order to avoid the logistical difficulties of introducing individual-level evidence (for example, on reliance on a misrepresentation or on disease causation for each member of a class, which may have millions of members). The courts have tended to find that such attempts to “short-circuit” traditional standards of proof are not legitimate, and many claims have failed as a result. There is, however, an increasing tendency in some US states to permit the use of such evidence to prove (or at least to permit inferences as to) causation. At the same time, other jurisdictions (such as Austria and Germany) have relaxed certain evidential rules, including as to burden of proof, to improve access to justice.

Members of the life sciences industry should therefore be particularly alert to developments in jurisdictions where claimant-friendly class action rules and claimant-friendly rules of evidence combine.

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