

COLLECTIVE ACTIONS FOR DAMAGES IN CONSUMER PROTECTION LAW: *WHY CONSUMER ASSOCIATIONS?*

To date, one can say that an extensive body of consumer protection laws has been enacted all over the world, spanning from developed to transition, to developing and least developed economies, including both advanced and less advanced jurisdictions. Many commentators agree that the existing rules of substantive law provide adequate protection to consumers active in the marketplace. Problems are encountered mainly in the field of ensuring compliance with consumer protection laws; a general criticism is that these laws are insufficiently enforced. Even though one may disagree with the first view, in particular when consumer protection rules are analysed through the lenses of economic analysis of law, lack of enforcement does indeed currently seem to be the major challenge for improving consumer protection in even most advanced jurisdictions, like the European countries.¹

There are many reasons for the insufficient enforcement of consumer rights, particularly in cases of harm inflicted upon consumers in general. Firstly, private enforcement can fail because individual claims are costly, time consuming and risky, due to their uncertain results. Secondly, the remedies awarded in the case of violation of consumer rights could be inadequate. Injunctive actions may not be sufficient to deter conduct harming consumers and damage awards can remain under-compensatory. Moreover, individual consumers also have a dozen of other problems which deter them from initiating lawsuits on their own. They may lack information on infringements of consumer protection laws and it can be difficult for individual consumers to recognize poor quality in markets characterised by serious information asymmetries. Due to this information asymmetry, consumers may not start a lawsuit, even if the product they bought was defective. Consumers will often remain unaware of infringements before harm has occurred. In addition, individual victims might prefer to take a free ride on the efforts of those consumers who decide to act as plaintiffs.

It is due to these reasons that most jurisdictions prefer to establish public enforcement authorities for ensuring that infringements of consumer protection laws will be adequately sanctioned. But even the combined use of individual lawsuits and public enforcement may still fall short of ensuring an adequate level of enforcement of consumer protection laws. Public authorities face budget constraints and government priority considerations may divert resources to other enforcement activities – this is a common fact in developing countries like Vietnam. Individual claims could remain unattractive because the private costs of initiating legal proceedings tend to exceed the expected private benefits, as mentioned above. The combined effect of all these factors is a sub-optimal level of enforcement of consumer rights.

¹ The contrary situation can be seen the case of the United States, where class action lawsuits on consumer issues are extremely prevalent, causing the problem of “abuse of consumer protection laws”. See, for example, ATR Foundation, *‘Private Consumer Protection Lawsuit Abuse: When Claims are Driven by Profit-driven Lawyers and Interest Group Agendas, not the Benefit of the Consumers’* (2006)

Several possibilities exist to enhance the enforcement of consumer protection laws. A first option is the institution of a test case procedure. On request of parties or by decision of the court, the common issues of several claims can be identified and decided in a single trial. Such procedures are available in Germany, Austria and the United Kingdom. A second option is to create the possibility of collective action. A particular form of collective action, the ‘American style’ class action, has been criticized because it puts a large burden on courts and could create scope for frivolous claims. In particular, the attorney acting as the class² representative may bring an unfounded claim to induce the defendant company to accept a settlement out of court. For a *bona fide* large firm, the latter can be more advantageous than paying the costs of a prolonged and expensive litigation, or facing the likely result of having to pay a huge compensation ordered by a biased jury. And profit-driven lawyers capitalize on these settlements to charge sky-high fees, leaving the consumers without additional benefits. Very often, the compensation for each individual consumer in such cases is so small that the consumers do not bother to claim. Sometimes, they are simply unaware of their rights.

Even though the above criticisms should be taken seriously, one must avoid throwing the baby out with the bathwater. The challenge is to design collective actions in such a way that the problems of under-enforcement of consumer rights are solved, while at the same time the potential disadvantages of new enforcement mechanisms are minimized. From the point of view of an individual claimant the cost-benefit ratio of collective actions is clearly superior to the net benefits of an individual claim. If collective actions allow compensation of the losses of an entire group of harmed consumers, making it a more substantial amount; the cost-benefit ratio improves further. Collective actions also spread the risk of uncertainty and the procedural costs over a large number of affected individuals, leading to a ‘higher willingness to sue’. On the other hand, the burden on the court system (general or specialised for consumer protection) would be lessened while efficacy heightened, since the number of cases is lower and common issues can be dealt with in one single trial.

Collective actions may be classified in different categories. Depending on who the plaintiff is, collective actions can be divided into two types: (i) proceedings initiated by an individual claimant (or group of claimants) in the name of a group of consumers; (ii) proceedings initiated by a body representing consumer interests, such as consumer associations which have received legal standing. The first type, however, might not be the ideal solution to deal with problems such as information asymmetries or manipulation by lawyers. The second type (hereinafter referred to as ‘representative actions’) thus is in a better position:

² Rule 23 of the US Federal Rules of Civil Procedure enumerates four prerequisites for class actions: (i) the number of members of the group must be very large so that joinder of all members is impracticable, (ii) there are questions of law or fact common to all members of the class, (iii) the claims of the representative parties are typical of the claims of the class, and (iv) the representative parties will fairly and adequately protect the interests of the members of the class. Accordingly, in the American system, class certification by the court plays a central role as to whether the lawsuits can be brought forward.

Benefits resulting from the reduction of information asymmetries may be particularly large in the case of representative actions. Generally speaking, consumer associations have a better knowledge of the applicable laws than individual consumers, so they are better able to assess whether certain behaviour of firms constitutes an infringement. The organisations can employ lawyers who are specialized in the relevant fields of law. This could even make the consumer organisation the better-informed party regarding the applicable rules. Obviously, there still will be an information asymmetry regarding possible infringements in so far as they are not easily detectable. Detection requires monitoring and supervision, which is costly. For individual consumers these costs are almost by definition insurmountable, but consumer organisations might acquire adequate funding for such investigations by charging their members a membership fee or by means of sponsoring.

Notwithstanding such advantages, representative actions are still a new mechanism. More often, the legal standing of consumer organisations stops at bringing injunctive actions or participating as third-party.³ In Sweden, collective actions for claiming compensation have been possible since the enactment of the Group Proceedings Act in 2003. Group actions are possible if they fulfil the general requirement that the facts are identical and that it is sensible to decide the disputes in a single trial. Collective actions can be initiated both by private individuals and organisations protecting citizens' interests or a public authority, such as the Consumer Ombudsman. An opt-in scheme has been chosen to form the group; as a consequence, only individuals who have adhered will be affected by the judgment.

According to the Dutch Civil Code, a foundation or association with full legal capacity can institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests. The organisation has no standing if, in the given circumstances, it has not made sufficient attempts to achieve the objective of the action through consultation with the defendant. The organisations can sue both for an injunction and for damages regarding losses of the organisation itself, but not for compensatory damages regarding losses of the members of the group. The assessment of damages therefore has to be carried out in individual procedures. However, the collective action can result in a declaratory decision regarding the unlawfulness of the defendants' behaviour, which can be used in the individual procedures. Furthermore, the individual plaintiffs can authorize the organisation to collect the compensatory damages. This Code has been amended in July 2005 in the direction of expanding further the private right of action for consumer organizations.

³ In European countries, rules of procedural law do not generally allow a single individual or a number of individuals to sue without the prior consent of each member of the affected group. Many EU member states (including the United Kingdom, France, Germany, Belgium, the Netherlands and Sweden) have granted standing to private associations or public bodies, which can bring representative actions. However, these rights are mostly limited to obtain injunctive relief and sometimes disgorgement of unlawfully obtained profits (Germany). The vast majority of EU member states presently have no collective action for damages at all.

According to the Draft Law on Consumer Protection of Vietnam, which is currently being put up for national consultation, consumer protection associations in Vietnam have the right to initiate a lawsuit to protect legitimate rights and interest of consumers when all the following conditions are met: (i) [The association] has been operating for at least 5 years at the time of initiation of the lawsuit; and (ii) The lawsuit involves at least 100 consumers. This is a very progressive point as compared to the current legal and regulatory framework in this field in Vietnam. Besides, consumer protection associations are obliged to ensure the regulatory litigation rights of consumers. They are also responsible to make notifications in the mass media in respect of the initiation of the lawsuit before lodging the statement of claims, so that individual consumers can register to participate, etc. However, these provisions need to be reinforced with more details (either in the body of the law, or in the subordinate regulations guiding implementation) on such matters as the role, rights and obligations of lawyers; methods of calculating damages and compensation; distribution of compensation; and class certification, etc so that the feasibility of the future law is ensured. More importantly, awareness raising and advocacy works ought to be done so that these private rights of action by individual consumers and consumer protection associations are publicised, so as to ensure an optimal level of enforcement for the law when it is passed in the future.