INCREASING ACCESS TO JUSTICE THROUGH EU CLASS ACTIONS: A CONFERENCE FOR LITIGATORS & POLICY MAKERS

PROGRAM AGENDA

All events to be held at the European Parliament, Place du Luxembourg, Brussels, Belgium unless otherwise indicated.

Monday, November 12, 2012

8:00 AM – 8:30 AM  REGISTRATION / CHECK IN
Registration and check in will be available at the European Parliament beginning at 8:30 AM

Please Note that due to our event being held at the European Parliament, you will need to bring your passport as identification for checking in and all attendees must be pre-registered for the conference.

9:00 AM – 9:30 AM  INTRODUCTORY SESSION

All participants will hear: (A) clarification on several glossary terms (e.g. opt-out v. opt-in; group/class/collective action; representative action) and the motivating purpose of the conference to show different points of view, hear from people with experience and empirical and objective knowledge about class actions, and examine assumptions and popular misconceptions; (B) general remarks about collective redress in 17 Member States and under consideration by the European Commission and European Parliament; and (C) introduction of jointly presenting entities and expression of gratitude to sponsoring MEPs; and (D) remarks by MEP hosts of the conference.

Speakers:
Antoinette Collignon-Smit Sibinga, President, PEOPIL
Robert J. Gaudet, Jr., RJ Gaudet & Associates LLC, and National University of Ireland Maynooth
MEP Daniël van der Stoep, European Parliament DROI Subcommittee on Human Rights

9:30 AM – 11:00 AM  CONCURRENT SESSION No. 1

How to Defend a Class Action: An Overview of Tactics and Strategies (LITIGATOR TRACK)

This panel will discuss some of the successful defenses that may be used against class actions. The panelists will discuss the legal reasons why a particular class action lawsuit was defeated in their country and provide the details of a few cases from their home countries to use as illustrations. The speakers will come from USA and Member States where plaintiffs experienced difficulties in bringing successful class actions due to problems in meeting the basic procedural requirements for standing or other matters. The panelists will also discuss strategies for class settlement in anti-trust and securities fraud cases, as done in the USA and under a Dutch law that permits opt-out class settlements, and the right time to enter into such negotiations.

Moderator:
Albert Knigge, Houthoff Buruma, The Netherlands

Speakers:
Michael Hassan, Lawyer, Jeffer Mangels, Butler & Mitchell, San Francisco, USA
Petri Taivalkoski, Lawyer, Roschier, Helsinki, Finland
Daniele Vecchi, Lawyer, Gianni Origoni Grippo Capelli Partners, Milan, Italy

11:00 AM – 11:30 AM  COFFEE BREAK

11:30 AM – 1:00 PM  CONCURRENT SESSION No. 2

Myths and Realities of Financing Collective Actions (LITIGATOR TRACK)

A July 2011 report commissioned by a committee of the European Parliament stated, “users of national schemes [for collective redress] encountered significant difficulties in terms of funding” and a February 2, 2012 EP resolution said, “recourse to third party funding is unknown in most Member States.” This panel will address the myths and realities of financing collective redress with respect to (1) legal aid, (2) third party commercial financing, (3) self-financing law firms, (4) consumer associations, and (5) victims. The speakers will also discuss various myths and contrast them with the reality. Myth: legal aid available for class actions? Reality: Spain allows legal aid...
for class actions but it is rarely used. Myth: commercial financing available? Reality: a 2008 report commissioned by DG SANCO reported, “third party financing is so far rare in the consumer sector.” Myth: law firms self-finance, especially in USA? Reality: a small handful of USA firms self-finance but most do not have capacity and European firms are barred by professional rules, e.g., Dutch lawyers must recover some hourly fee from clients to perform work. Myth: consumer associations can finance litigation? Reality: associations lack resources and expertise. Myth: victims can finance cases? Reality: victims cannot afford it. In the Netherlands, on a few occasions, lawyers have organized foundations to accept victim contributions but that was administratively expensive. Are there any financing solutions for the EU?

Moderator:
Prof. Catherine Kessedjian, Université Panthéon-Assas (Paris II)

Speakers:
Nathan W. Bear, Robbins Geller Rudman & Dowd LLP, San Diego, CA, USA
Pierre Bos, BarentsKrans NV, The Hague, The Netherlands
David Greene, Edwin Coe, London, United Kingdom
Joseph Gulino, DRRT, Miami, FL, USA
Peter Koutsoukis, Claims Funding International

The New Paternalism: Why Do Some Trust Governments and Associations More than People to File Class Actions? (POLICY MAKER TRACK)

Is there a new form of paternalism that mistrusts victims to handle their own class actions with private legal representation? A July 2011 report by the European Parliament noted that some Member States allow only public authorities or quasi-public bodies, like consumer associations, to bring class actions (Finland, Hungary, France, Greece) while Denmark allows only the Consumer Ombudsman to bring opt-out class actions but allows victims to bring opt-in class actions. In the Netherlands, only a private foundation or special purpose vehicle (stichting) may ask the Amsterdam Court of Appeals to approve an opt-out class settlement. In Spain and Sweden, there is less distrust of private victims since both individuals and consumer associations are allowed to bring class actions, but why did Spain and Sweden bother to carve out special rules for consumer associations? In Germany, the test case procedure is used to see how one case with a single victim turns out rather than allowing all of the victims to be bundled into a single claim. Is it in the DNA of Member States to carve out a special place for consumer associations? Is there any proof that such associations provide any real assistance for consumers? This panel considers how distrust of private enforcement affects policy choices in EU and U.S.

Speakers:
Arthur Bryant, Executive Director, Public Justice
Robert J. Gaudet, Jr., RJ Gaudet & Associates LLC, and National University of Ireland Maynooth
Professor Laura Carballo Piñeiro, University of Santiago de Compostela, Spain
Katrine de Neergaard, Chief Advisor, Office of Denmark Consumer Ombudsman
Nicholas Pace, Staff Behavioral Scientist, Institute for Civil Justice, RAND Institute
MEP Peter Skinner, European Parliament Economic and Monetary Affairs Committee and Delegation for Relations with the United States (invited)

2:00 PM – 3:30 PM PLENARY SESSION
Access to Justice as a Human Right

Speakers will discuss the theoretical underpinning of access to justice as a human right in (1) European Charter of Fundamental Rights; (2) European Convention for Human Rights and Fundamental Freedoms Article 6; (3) Article 81(2)(e)-(f) TFEU; (4) Int’l Covenant on Civil and Political Rights, Articles 2 and 9(4); and (5) domestic laws such as the Ireland Constitution. Do Member States allowing the proceeds from collective actions to be distributed to victims provide greater access to justice than Member States without any form of private collective redress? A 2008 report commissioned by DG SANCO stated, “[c]ollective redress mechanisms have an added value to consumers’ access to justice in all Member States where they exist, even in those where individual litigation and ADR is easily accessible.” In Golder v. the United Kingdom, Judgment of 21 Feb. 1975, Appl. No. 4451/70, Series A, No. 18, para. 35, the ECtHR held “access to a court” is an essential pre-requisite to fair judicial proceedings. It has been said the “goal of increased access to justice and compensation is reached” with Sweden’s new class action rules. The U.S. Supreme Court in Phillips Petroleum v. Shutts held that class actions provide access to justice for victims who would otherwise not be likely to file small claims. The UK is considering opt-out class actions to increase access to justice for competition law and, in the future, possibly all claims. Some Member States, like Ireland, do not have any form of collective redress. What does this mean for the guarantee of access to justice for all EU citizens? Does this right depend on the vagaries of birth.

Speakers:
Rafael Kos, Kubas Kos Gaertner, Poland and Expert Advisor to Poland Parliament Committee of Justice and Human Rights
Prof. Federico Lenzerrini, University of Siena, Italy (invited)
Hélène van Lith, International legal consultant, Paris, France
Michael McDowell, Former Minister of Justice and Attorney General for Ireland
Professor Rachael Mulheron, Queen Mary University
Brian Wolfman, Visiting Professor, Georgetown Law School; Former Director, Public Citizen Litigation Group

3:30 PM – 4:00 PM COFFEE BREAK

4:00 PM – 5:30 PM PLENARY SESSION
Is the Opt-Out Mechanism Better or Worse than the Opt-In Mechanism?

Which mechanism would best fulfill the EU’s treaty obligations: the opt-out or opt-in mechanism for class actions? The opt-out mechanism (Netherlands, Portugal, USA, Denmark in some circumstances; and Norway in some circumstances) means that all victims with the same problem are automatically included in class actions brought by similarly situated victims. Other victims can “opt out,” if they wish, to pursue their own remedy or do nothing. An opt-in mechanism (Finland, France, Germany, Italy, Poland, Spain, Sweden, UK, Denmark, certain cases in USA) is different because it requires each victim to write to the court or otherwise opt in if she wishes to participate in the proceedings. The opt-in naturally leads to smaller class sizes since victims have to take a positive step of writing to the court to participate and, if they do not, then they are not affected by the litigation proceeding. In England, there is debate about whether to adopt an opt-out system for competition law or more generally. A July 2011 European Parliament report wrote that all of the existing mechanisms “fail on full effectiveness test, except for schemes running opt-out model” and that “several Member States
consider opt-out mechanisms to remedy general low participation resulting from opt-in." In the State of Massachusetts, both opt-in class actions may be filed under State law and opt-out class actions may be filed under federal law. On February 2, 2012, the EP adopted a resolution rejecting US style class actions and claiming that the US Supreme Court in Wal-Mart tried to limit frivolous litigation and abuse of class actions but is that what the decision really said? Why doesn’t the EU adopt the only successful model, i.e., the opt out, for all of the Member States?

Moderator:
Professor Rachael Mulheron, Queen Mary University

Speakers:
Henrique Sousa Antunes, Dean, Catholic University of Portugal, Lisbon School of Law
Elisabeth Helmersen, Political Advisor, Norway Ministry of Justice and Public Security (invited)
Emmanuel Gybels, Crowell & Mooring, Brussels, Belgium
Judge Katarzyna Lis, Poland Ministry of Justice, Civil Law Department
Nicholas Pace, Staff Behavioral Scientist, Institute for Civil Justice, RAND Institute
Jan Schlichtmann, Lawyer Portrayed by John Travolta in “A Civil Action”, Boston, MA, USA

6:30 PM – 8:00 PM SOCIAL RECEPTION
The Reception will be held at the Renaissance Hotel at the Luxembourg/The Hague Room

Tuesday, November 13, 2012

8:00 AM CHECK IN
Meet at European Parliament to Enter Through Security.

Please Note that due to our event being held at the European Parliament, you will need to bring your passport as identification for checking in and all attendees must be pre-registered for the conference.

9:00 AM – 10:30 AM PLENARY SESSION
Mock Exercise to Explain How Collective Redress Mechanisms work in Several Member States

This panel will engage in a mock exercise in which airlines in the Netherlands (KLM), Germany/Greece (Lufthansa)/(Olympic Airways), and Poland (LOT Polish Airlines) agree to fix prices for passenger ticket prices. Victims in each of these Member States then go to private lawyers and ask whether, and how, they can use collective redress mechanisms in their Member States. The panelists will play the roles of lawyers in Germany, Poland, the Netherlands, Italy and Denmark and offer detailed advice on how the various systems work: test case procedure (Germany); opt-out class action for monetary damages (Denmark); opt-in class action (Poland); opt-in class action (Italy); and a class action for declaratory judgment (Netherlands). The victims (in role play) will press them with the usual questions of how much it will cost, what they might gain, how long it will take, etc. This will provide an opportunity for participants to learn how class actions operate in several Member States while a generalist with comparative knowledge of the different systems moderates and offers some general remarks.

Moderator:
Arnaud Nuyts, University of Brussels, Brussels, Belgium

Speakers:
Franz Braun, Lawyers, CLLB, Germany
Michele Carpagnano, University of Trento
Rafael Kos, Kubas Kos Gaertner, Poland and Expert Advisor to Poland Parliament Committee of Justice and Human Rights
Katrine de Neergaard, Chief Advisor, Office of Denmark Consumer Ombudsman
Flip Wijers, Lemstra Van der Korst, Amsterdam

11:00 AM – 12:30 PM PLENARY SESSION
Class Actions to Enforce Basic Human Rights

Aside from increasing access to justice (which is itself a human right), class actions can be used on behalf of human rights victims. In Sweden, an opt-in class action was filed on behalf of children who were allegedly taken from their original homes, wrongly, and placed into foster care; the case cited the European Convention on Human Rights but was ultimately dismissed. Is this a new frontier for class actions in Europe as a mechanism for enforcing human rights, e.g., among the Roma? Panelists will discuss human rights class actions including class actions in USA for employment discrimination and on behalf of Saipan garment workers in forced labor including the Gap and Ralph Lauren; victims of extrajudicial killings; and crimes against humanity by Texaco/Chevron in Nigeria.

Moderator:
Pascal Maurer, former President, UIA, Geneva, Switzerland

Speakers:
Baber Azmy, Legal Director, Center for Constitution Rights, New York
Rory Stephen Brown
Ruby Harrold-Claesson, Chair, Nordic Committee for Human Rights, Gothenburg, Sweden
Patrick Daniels, Robbins Geller Rudman & Dowd LLP, San Diego, California
David Watkinson, Barrister, Garden Court Chamber, London, UK

12:30 PM – 1:00 PM LUNCH BREAK
Sandwich Lunch Outside Committee Room (can take lunch into Keynote Speech)

1:00 PM – 1:45 PM PLENARY SESSION
Keynote Speech: Matching the Desire for Access to Justice with Political Realities in Brussels

According to a July 2011 European Parliament report, there are inconsistencies between Member States on many important issues (e.g. right to sue, scope of application, costs of proceedings) and “no two national systems ... are alike” which creates legal uncertainty and different levels of access to justice. Articles 81, 101, 102 TFEU, the European Convention for Human Rights Article 13, and the right to access to justice under customary international law might provide legal authority for collective redress. There are political difficulties in passing such a measure in light of the different legal traditions of Member States, the influence of lobbyists,
and the views of larger Member States such as France and Germany that do not have opt-in or opt-out class actions. Are class actions a progressive experiment in a few Member States or the future for all EU citizens? On the one hand, Eurobarometer surveys show that 79 percent of Europeans would be more willing to defend their rights in court if they could join other consumers complaining about the same thing. On the other hand, there are 14,000 lobbyists in Brussels, mostly opposed to any form of class actions. Collective redress is under consideration by the European Commission DGs Justice; Health and Consumer Affairs; and Competition (with the latter taking the lead on its own proposals ahead of the other D-Gs); and European Parliament’s Economic and Monetary Affairs Committee; EP’s Internal Market and Consumer Protection Committee; EP’s Legal Affairs Committee. Should it be more actively considered by European Parliament’s Foreign Affairs Committee’s Human Rights Subcommittee; EP’s Civil Liberties, Justice and Home Affairs Committee; EP’s Employment and Social Affairs Committee; Environment, Public Health and Food Safety Committee; Constitutional Affairs Committee; Women’s Rights and Gender Equality Committee?

Introduction by:
Antoinette Collignon-Smit Sibinga, President, PEOPIL

Speaker:
Diana Wallis, Former Vice President, European Parliament

1:45 PM – 3:15 PM  PLENARY SESSION

How Claimants Can Recover Compensation Through Collective Actions Prosecuted by Victims

This panel will discuss the methods by which the victims of mass torts, consumer fraud, and other legal violations can collect compensation by prosecuting their own collective actions with the assistance of private lawyers. The speakers will draw upon their own experience working on collective actions to explain tactics and strategies for launching and litigating a successful class action under existing rules in certain Member States. Errors can result in dismissal. In Poland, plaintiffs must avoid pleading damages for violations of “private interests/rights” since those may not be the subject of class actions. In England, it is necessary to get the court’s approval for funding to proceed with a Group Litigation Order. In the Netherlands, to prosecute a class action for injunctive relief or a declaratory judgment, one must set up a foundation or association and ask victims to assign their claims to it. In the United States, compensation is generally distributed after settlement by private lawyers with the help of settlement administrators paid out of the settlement. This panel will walk through important steps in different jurisdictions. In addition, the panel will discuss the practicality of litigation in the event the Commission follows European Parliament resolution of February 2, 2012 asking that any EU measure for collective redress require that class members be identified “before the case is brought” and that the opt-in mechanism be used rather than the opt-out mechanism.

Moderator:
Arthur Bryant, Executive Director, Public Justice

Speakers:
David Body, Irwin Mitchell, Sheffield, U.K.
Iwo Gabrysiak, Wierzbowski Eversheds, Poland
Martijn van Maanen, BarentsKrans NV, The Hague, The Netherlands
Nicholas Pace, Staff Behavioral Scientist, Institute for Civil Justice, RAND Institute
Jan Schlichtmann, Lawyer Portrayed by John Travolta in “A Civil Action”, Boston, MA, USA

3:15 PM – 3:45 PM  COFFEE BREAK

3:45 PM – 5:15 PM  PLENARY SESSION

The Legal Authority for Collective Redress

The speakers on this panel will review the legal authority in the Treaties for class action legislation in the EU, e.g., Articles 81, 101, 102 TFEU and other provisions; talk about any limitations that may be imposed, or not, by the principles of subsidiarity and proportionality; discuss the political will in the EP for collective redress; reflect on the proposals of the European Commission; discuss the impact of lobbyists in this field; discuss Commission and European Parliament’s sectoral approach to redress, e.g., starting with D-G Competition and the European Parliament Economic and Monetary Affairs Committee; reflect on advantages and disadvantages of a more integrated – and less sectoral – approach to proposals and legislation. The choice of legal authority for class actions could determine whether the EU should continue with its current sectoral approach or change to a more comprehensive strategy based on access to justice across all of the sectors in which victims find it difficult to bring claims into court.

Moderator:
Prof. Stefaan Voet, University of Ghent

Speakers:
Professor Suzanne Augenhofer, Humboldt University, Berlin, Germany (invited)
Judge Katarzyna Lis, Poland Ministry of Justice, Civil Law Department (invited)
Professor Giorgio Monti, Professor, European University Institute, Italy (invited)
MEP Andreas Schwab, European Parliament Economic and Monetary Affairs Committee
Eva Storskrubb, senior associate, Roschier, Stockholm, Sweden (invited)

5:15 PM – 5:45 PM  CLOSING REMARKS

Speakers:
Stephane Bonifassi, Partner of Lebray & Associés and Member of UIA, Paris, France
MEP Marian Harkin, Member of European Parliament Delegation for relations with the United States and Committee on Employment and Social Affairs
Joseph P. Federici, ABA Section of International Law, International Human Rights Committee