

1C. BOXES 7 & 8: Key Features of Class Actions (For countries considering adopting them)

In addition to addressing the critical questions above on certification and causation (how to resolve individual claims), Parties considering implementing class action laws to facilitate access to justice for tobacco disease victims will need to address a number of design choices set out below.

a) What type of class action: Opt-in or opt-out class actions?

It is important to recognize a cultural difference between common law and civil law systems in their approach to collective redress procedures. Common law systems that have class action procedures almost always choose opt-out procedures (whereby persons who fall within the definition of the class are bound by the decision unless they affirmatively opt out of the proceedings) while civil law systems typically favour opt-in systems (whereby persons who fall within the definition of the class must affirmatively opt in of the proceedings in order to be bound by them). The preference for opt-in systems is reflected in the European Parliament's resolution on collective redress calling for the introduction of opt-in class actions on a European Union wide basis,¹ although a number of civil law countries in Europe already permit class actions in certain circumstances.

There is no need to rehearse the arguments in favour of opt-in or opt-out systems here.² In the context of tobacco-related class actions, including actions for damage for personal injuries, claims can be viable on either an opt-out or opt-in provided there is widespread notice of the actions, the procedure for opting in is not complicated or costly, and class members are not liable for adverse costs. Accordingly, Parties could reasonably employ either procedure consistently with their own legal traditions.

b) Who has standing: Victims and/or authorized non-governmental organizations (NGOs)?

Most common law jurisdictions that permit class actions allow victims to bring class action litigation in their own right. However, one model of collective redress popular in Europe is to authorize NGOs to bring a class action on behalf of affected consumers, and *only* allow authorized NGOs to bring such claims where they are made in a representative capacity.³ The primary rationale for this approach is, once again, to prevent claimants principally motivated by financial gain from abusing the legal process and pressuring defendants into unfair settlements.⁴ Given there is no risk of blackmail settlements against the tobacco industry, it is not necessary to limit standing to bring tobacco-related class actions to authorized NGOs. Nonetheless, the European model demonstrates that NGO-led class actions can be a successful means of securing redress for consumers – provided the NGO is indemnified from costs liability – and as such common law jurisdictions might wish to also confer NGOs with standing to bring tobacco-related class actions, in addition to claimants who have suffered losses.

Turkey and India provide two other noteworthy examples where standing rules for collective actions have been relaxed. Turkey's Consumer Protection Act is the first regulation that allows Turkish people to bring class actions, and allows consumers, consumer organizations and the government to bring proceedings to enforce the Act.⁵ The Indian Supreme Court has also introduced liberal standing requirements for public interest litigation. The relevant principles are simple: where the rights are of fundamental importance, and the persons who have those rights have difficulty accessing court to enforce them, *anyone* is able to file a claim on their behalf. The Supreme Court in *Gupta v Union of India* held:

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right ... and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any

¹ Towards a coherent European approach to collective redress, 2 February 2012, P7_TA(2012)0021. See also EC Commission Recommendations on Common Principles for Collective Redress 2013.

² A number of civil law countries in Europe also have opt-out procedures including Denmark, Norway, Poland and the Netherlands.

³ An approach reflected by the European Commission's Recommendations on Common Principles for Collective Redress 2013.

⁴ For some civil law jurisdictions it is also an important safeguard that only the state or authorised organisations can commence legal claims on behalf of others without their express consent.

⁵ Such proceedings are to be brought before specialist consumer courts, court fees are limited, and consumer organisations can apply for state funding for expert reports.

*member of the public can maintain an application for an appropriate direction, order or writ.*⁶

The court justified this extension of standing rules in order to enforce the rule of law and provide justice to disadvantaged sections of society.

c) Funding rule

A successful collective redress procedure requires funding rules that allow private parties to fund such actions secure in the knowledge that if the action is successful they will be able to recover their investment and make a reasonable return out of the damages awarded. The need for contingency funding and its general acceptability as a legitimate funding mechanism for promoting access to justice is discussed in the index to procedural reforms. The discussion here relates to issues that arise in collective redress proceedings specifically.

In collective redress contexts, the most efficient means of securing litigation funding is to give a court the power to award the class representative (and hence the funder standing behind them) a ‘success fee’ out of the damages awarded to the class. Borrowing concepts for trust law and restitution, the U.S courts have developed a ‘common fund’ doctrine, by which the court can award fees to class counsel acting for the representative claimant out of the damages awarded to the class as a whole. In *Boeing Co v Van Gemert*, the Supreme Court stated that ‘[t]he doctrine rests on the perception that persons who obtain the benefit of a lawsuit, without contributing to its cost, are unjustly enriched at the successful litigant’s expense,’ and went on to observe that it ‘prevent[s] this inequity by assessing attorney’s fees against the entire fund, thus spreading the fees proportionately among those benefited by the suit.’⁷

Unfortunately a number of other jurisdictions that employ class action procedures do not recognise a similar power in the court to award contingency fees to funders out of the damages awarded to the class, or such a power is subject to very restrictive conditions.⁸ These restrictions which in turn forces funders to enter into contingency agreements with individual class members – a process not likely to be viable in class actions involving thousands of smokers.

There is no real risk of abuse or ‘profiteering’ by third party funders backing class actions against the tobacco industry. Contingency or Success fee can be made dependent upon class members being awarded damages (or obtaining a settlement) and the size of the fee is invariably linked to the size of recovery by class members. Empirical research in the U.S has found that courts focus on proportionality when deciding class counsel’s fees; the amount of client recovery is overwhelmingly the most important determinant of the attorneys’ fee award.⁹

Concerns about profit driven class actions overlooks why collective action procedures are needed in the first place. In most mass harm cases redress is unobtainable because no individual has suffered losses that are sufficiently large enough to motivate them to litigate, even if the collective interest is substantial. To make obtaining legal redress economically viable, collective action needs to be possible and profitable. As the U.S Supreme Court observed in *Amchem Products v Windsor*:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.¹⁰

⁶ *Gupta v Union of India* (1981) Supp S.C.C. 87.

⁷ *Boeing Co v Van Gemert* 444 U.S. 472 at 478 (1980). See also *Re Zyprexa Prods Liability Litigation* 594 F.3d 113, at 129 (New York Court of Appeals, 2010) (‘class members who do not hire counsel nonetheless benefit from any recovery. The doctrine thus prevents the unjust enrichment of these class members at the expense of class counsel by compensating counsel in proportion to the benefit they have obtained for the entire class, rather than just the named class representatives with whom they contracted.’)

⁸ For a discussion see Mulheron, Higgins.

⁹ T Eisenberg and G Miller ‘Attorneys Fees in Class Action Settlements: An empirical study’ (2004) *Journal of Empirical Legal Studies* 1; B Fitzpatrick ‘An Empirical Study of Class Action Settlements and Their Fee Awards’ (2010) 7 *Journal of Empirical Legal Studies* 811.

¹⁰ *Amchem Products Inc. v Windsor* 521 US 591, 617 (1997).

Despite the economies generated by collective action procedures, funding them is rarely cheap and rarely without risk. Unless the profit incentive is built into the procedure it is bound to fail to achieve its primary aim of facilitating collective redress where individual litigation would not be viable. In the United States the courts recognise that the attorney's fee should reflect the risk they undertook in representing the class.¹¹ It is precisely the building in of 'incentives to litigate' that most alarm opponents of class actions. The European Justice Forum, a lobby group founded and comprised of major multi-national companies, acknowledges that class actions will not be utilised without liberal funding rules, but argue that if the opportunity for financial gain from litigation is sufficient to attract finance it is also sufficient to carry the risk of abuse.¹² While making courts more accessible to claimants, and funding access to justice more profitable to third parties, invariably creates a risk that some litigants and funders will try to abuse the system, this claim proves too much. The absence of an incentive to litigate also provides incentives to multi-national companies to breach competition and consumer laws either deliberately or through underinvestment in compliance initiatives at the expense of those who buy or use their goods and services. It is no surprise that European Justice Forum lobbying against collective redress and liberal funding mechanisms for them includes major international tobacco companies such as British American Tobacco and Philip Morris. The lobby group is set up precisely to avoid the kind of legislative reforms that would strengthen civil liability mechanisms which Art 19 is intended to promote. Members should be wary of this form of indirect lobbying by the industry designed to weaken liability mechanisms given the requirements under Art 5.3 to insulate the development of tobacco control policy from commercial interest of the tobacco industry.

¹¹ Higher risk cases results in higher than average fees, but lower risk results in lower than average fees: T Eisenberg and G Miller, (n 108).

¹² www.europeanjusticeforum.org.