

Background Note on the Draft Collective Proceedings Act

What are Collective or Class Actions?

The term “collective proceedings” or “class actions” is a generic term to describe a legal action where proceedings are brought about by a plaintiff on behalf of, or for the benefit of, a class of persons having claims with common issues. The fundamental purpose of collective proceedings is to efficiently address cases of alleged mass tort and to improve access to justice for those whose claims might not otherwise be pursued on an individual basis.

The draft provides that the court can authorise collective proceedings to be brought by a class representative on behalf of persons whose claims raise common issues and which may be instituted as a group action or a representative action.

The Class Representative

The person who files the collective proceedings is known as the class representative.

Collective Proceedings for consumers and businesses

In terms of the draft, both consumers and businesses can benefit from collective proceedings.

Private Individual Group action

Individual group proceedings may be commenced by a person who is a member of the group. This means that the class representative must have a claim within the collective proceedings lawsuit.

Representative action

Collective proceedings may also be filed by a representative body that has no claim in the proceedings. The draft allows that proceedings may be instituted by a registered consumer association on behalf of consumers in dispute with an undertaking relating to goods and services offered by the undertaking. The registered consumer association may claim damages for all the represented persons who opted-in the collective proceedings.

It also provides that representative proceedings may also be instituted by a constituted body acting in the interests of undertakings. This means that representative actions can also be brought on behalf of businesses.

Application of the Act

The Act is only applicable to claims arising under competition and consumer law.

It is possible to claim monetary compensation (damages consisting in actual damages, loss of profits and interest) for a number of class members and also request injunctions.

Standalone and Follow-on actions

The draft makes it possible that collective proceedings may be instituted either by means of a standalone action or a follow-on action.

Standalone action - where the class representative asks the court to determine that there was a breach of the law and to award damages or provide an injunction on the basis of that finding.

Follow-on action - where an action for damages is instituted after there has been a finding in separate proceedings by the Office for Competition, Office for Consumer Affairs, the European Commission, the Competition and Consumer Appeals Tribunal or Courts of a breach of the law.

Opt-in

The draft provides for the participation of class members on an 'opt-in' basis. Therefore, a member of the class must actively choose to be included as a member of the class in order to be a represented person. Only those class members will be bound by any judgment delivered by the Court.

Therefore, it is necessary that every class member registers his claim with the class representative either prior to the filing of the proceedings or within the time period allowed by the Court.

Certain pre-conditions in order to proceed as collective proceedings

The draft provides for when collective proceedings may be commenced. For instance, the class representative must satisfy the Court that the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues. In making such an assessment the Court will amongst other things, take into account the benefits of the proposed collective proceedings.

The Court must also approve the plaintiff to act as the class representative. In such regard, the draft also sets out certain criteria.

Litigation costs

The draft aims to create a balance when providing for the payment of litigation costs. In this respect, it makes special provision on costs with respect to frivolous and vexatious claims and also adheres to the 'loser pays principle' in order to ensure that collective proceedings are only brought when claims are objectively grounded thus avoiding abusive litigation. However, in order not to act as a disincentive for a registered consumer association to institute collective proceedings, the draft introduces a partial modification to the loser pays principle by reducing the costs against the registered consumer association by between one tenth and one half of the costs normally due in the event that the Court finds against it. Moreover a registered consumer association is exempted from the payment of court registry fees upon the filing of the collective proceedings lawsuit.

The major aims behind the draft Collective Proceedings Act

- 1. Increased individual access to justice for those who would otherwise not pursue their claims for compensation for breaches of the law.**

According to the Court of Justice of the EU, any citizen or business who suffers harm/damages as a result of a breach of the EU antitrust rules should be able to seek redress from the party who caused the harm. The Civil Code also provides that every person shall be liable for the damage which occurs through his fault. Moreover, in terms of the Competition Act, any person who suffers harm as a result of a breach of the Competition Act and/or EU antitrust rules (Articles 101 and 102 TFEU) may institute an action for damages. However, due to the specific nature of the damage suffered, in combination with the high litigation costs and the inherent complexity of competition cases, consumers and SMEs often do not take legal action on an individual basis. Furthermore, it is presently not possible for a registered consumer association to access courts in order to claim compensation on behalf of consumers following a breach of competition law or consumer law by an undertaking. Also, a registered consumer association will not engage in actions if the litigation costs are too high in comparison to the expected outcomes.

Hence, the impact of the draft on consumers and businesses suffering harm from breaches of the law by undertakings is a positive one, in that it provides them with an avenue to seek redress for claims that they would otherwise individually not have pursued.

2. Increased behaviour modification (prevention, deterrence) - undertakings are more ready to comply with the law since there is a greater possibility that the victims will seek redress

Undertakings that have breached the law are always liable for the payment of damages to those who have suffered the loss. They are also, aware of the fact that consumers or SMEs are not willing to engage in litigation individually and that consumer associations are handicapped in seeking redress on behalf of consumers. This situation might therefore be abused by undertakings and may amount to a vacuum in access to justice. The possibility of instituting collective proceedings addresses this vacuum, in that, where undertakings become aware that consumers and small businesses may seek redress collectively and hence that they may become liable to pay damages, they would be more willing to comply with the law.

3. Improved judicial efficiency and economy (more efficient handling of potentially complex cases of mass tort).

Whereas the only possibility, up to now, was the institution of individual lawsuits, the introduction of collective proceedings will enable those consumers and undertakings who have suffered damage to institute one lawsuit with a collective claim. This would lessen the burden on the Courts from an administrative point of view since one lawsuit may be instituted rather than multiple lawsuits arising from the same infringement.