REGULATORY & LEGAL RISKS

EUROPEAN SOIL STRATEGY

In September last year, the European Commission published its strategy to ensure that Europe's soils—which provide food, drinking water, biomass and raw materials—remain healthy and capable of supporting human activities and ecosystems.

Soil degradation is accelerating across the European Union, with negative effects on human health, ecosystems and climate change, according to a Commission statement at the time.

Different E.U. policies already contribute to soil protection, but no coherent policy exists, the Commission said. It added that only nine member states have specific legislation on soil protection, often covering a specific threat, in particular soil contamination.

To better protect Europe's soil, the Commission has proposed a common E.U. framework for action to preserve, protect and restore soil. It would require member states to take action to tackle threats such as landslides, contamination, soil erosion, the loss of soil organic matter, compaction and salinization wherever they occur, or threaten to occur, on their national territories.

The strategy is one of seven European Commission "thematic strategies" that cover air pollution, the marine environment, waste prevention and recycling, natural resources, the urban environment and pesticides.

As part of the soil strategy the Commission has proposed a framework directive and an impact study. Under the proposed framework directive (COM(2006) 232), member states would be required to:

- Identify areas where there is a risk of erosion, organic matter decline, compaction, salinization and landslides
- Set risk reduction targets for those areas and establish programs of measures to achieve them
- Prevent further contamination, establish an inventory of contaminated sites on their territory and draw up national remediation strategies.
- Limit or mitigate the effects of sealing, for instance the rehabilitation of brownfield sites

WHO IS RESPONSIBLE?

The proposed European Commission soil directive is vague on who should be responsible for the remediation of a contaminated site, lawyers say. Although the proposed directive requires the owner of a site and the buyer of that site to carry out reports on the status of the soil before a sale, the directive only says that the "polluter-pays principle" should apply for cleaning up a contaminated site.

If the polluter cannot be found to bear the costs of remediation, then responsibility for cleaning up the site should fall to the member states, the directive says. For these orphan sites, "member states should put in place specific funding mechanisms to ensure a durable financial source for the remediation of such sites," the directive states.

However, a decision in the House of Lords, the U.K.'s highest court, this summer has had huge implications on who should pay to clean up a contaminated site, particularly for sites that were polluted by public utilities many years ago, lawyers say.

The Lords were asked in the case of National Grid Gas P.L.C. (formerly Transco P.L.C.) vs. Environment Agency to decide whether a company whose predecessors polluted a site decades ago were responsible for the cleanup of that site or whether the current homeowners were responsible.

The Environment Agency maintained that National Grid was liable for the clean up because National Grid's predecessors polluted the site at Bawtry in Doncaster, England, between 1912 and 1950, and those liabilities were passed down to National Grid under contractual arrangements during various mergers, nationalization and privatization. The High Court granted the Environment Agency's application to charge National Grid £66,000 (e 94, 932) to clean up each of the 11 homes that are currently on that site.

However, the Lords disagreed in its June 27 decision that National Grid was liable to pay these costs as such a liability to clean up the site did not exist until Part IIA of the Environment Act of 1990 was inserted by amendment in 1995. "Very careful statutory language would be needed to impose on a company innocent of any polluting activity a liability to pay for works to remedy pollution caused by others to land it had never owned or had any interest in," the Lords stated. As a result of the Lords' decision, the homeowners would have been responsible for cleaning up the site, but the Environment Agency did not pursue them for the costs.

By Stacy Shapiro

European Parliament report calls for collective action law

E.U. MOVES TOWARDS OWN VERSION OF CLASS ACTIONS

By Rick Mitchell

The European Parliament in late September called on the European Commission to consider introducing pan-European collective actions to allow consumers to obtain legal redress and compensation in cross-border disputes.

In a report addressing what Parliament termed "unresolved consumer and business issues in the European services industry," Parliament asked the Commission to submit a work program within 12 months, that among other things would "[introduce] a legal instrument at [European] Community level to facilitate collective action by consumers on a cross-border basis so as to allow greater access to legal redress."

Bad for business

The request marks the European Union's latest gesture toward its own version of U.S. class action-style litigation to resolve consumer, shareholder and other grievances. As several member states have already adopted or are considering collective actions (see box, page 16), risk managers say that, whether E.U.-wide or national, they are bad for business, though risk managers disagree on the level of near-term risk (see box below). Legal experts say U.S.-type excesses are unlikely to accompany European collective actions.

The report, "European Parliament Resolution of Sept. 27, 2007, on The Obligations of Cross-border Service Providers" laments that European consumer confidence in cross-border consumption is low, as evidenced by the fact that only 6% of consumers made an Internet cross-border purchase in 2006.

Parliament asserts that the lack of any legal structure at Community level allowing consumers to take collective action on a cross-border basis against fraudsters and deficient service providers constitutes both a gap in the regulatory regime and more importantly a barrier to consumers obtaining cost-effective legal redress and cross-border compensation.

iSTOCKPHOTO.COM

Champion of collective redress: European Commissioner for Consumer Affairs. Meglena Kuneva.

French resistance

"In some member states, there is no body competent to assist in out-of-court dispute resolution and existing structures at [E.U.] level ... are both insufficiently well-known and under-resourced," it says.

Parliament's call echoes one made in March by European Commissioner for Consumer Affairs, Meglena Kuneva, who announced a study of Europe's mechanisms for collective redress of consumer claims, with a view to finding ways to advance group claims on an E.U. scale (see *BIE*, March 12, page 1). The report is expected in mid-2008.

European and member state governments increasingly see collective actions as

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Collective actions in Europe: What's the risk?

Experts say European legal systems traditionally lack features that have contributed to huge settlements in U.S. class actions.

With no jury trials, punitive damages, or contingency fees to motivate trial lawyers, big settlements are rare in Europe. Typical legal mechanisms such as pre-trial document discovery and depositions also do not exist. Europe's prevalent "loser pays" approach to legal fees, which does not exist in the United States, discourages suits that do not have a very strong basis.

Still, changes are afoot that increase risks for companies.

"The law and political will are moving on class actions. For risk managers there are certainly risks out there. They will have to anticipate that and react to it," said Neil Mirchandani, a partner in London-based Lovells L.L.P.'s dispute resolution practice.

Risk managers disagree on the level of near-term risk posed by recent developments.

"Class actions are not really a reality on the European scale yet. We do not see any particular risk right now. But you never know tomorrow," said Thierry Van Santen, risk manager at Paris-based food company Groupe DANONE S.A.

"DANONE is a global company, so of course we think about class actions in the United States. But in Europe cases are managed by professional courts. There are many restrictions, and remuneration of lawyers is tightly controlled. As long as we keep those bases, there could be a threat, but nothing like in the U.S. system," said Mr. Van Santen, also a vice president and head of European affairs with the Federation of European Risk Management Associations.

Franck Baron, director of global insurance and risk management at Geneva-based chemical manufacturer Firmenich S.A., sees greater risks. "It is not a question of if, but when class actions are going to arrive in Europe. Everything is in place for that to happen. The domino is England, which has a system very similar to the United States." Other countries could follow England's lead, he said.

Marie-Gemma Dequae, FERMA president, said the risk posed by collective actions depends on your company's products. "I think everybody knows things are changing."

"The best way to react to potential class action claims is to try to prevent them," said Ms. Dequae, also risk manager at Kortrijk, Belgium-based N.V. Bekaert S.A. "That means very carefully evaluating risks as thoroughly as possible, across the whole enterprise. You have to look broadly at the products you make and where there might be potential harm."

"A little problem today can become a bigger problem due to a class action, so prevention becomes much more important," she said. "You will need technological reports on potential problems a product can have. You need to stay informed on all evolutions that are possible."

Mr. Baron, a FERMA vice president, agreed. "As more and more countries adopt class actions, the role of the risk manager is to identify risks in all domains, with a very wide radar scope. Not just fire and operations risks. That is what enterprise risk management is all about."

Companies need "product stewardship from cradle to grave, to avoid delivering dangerous products to markets and, increasingly, to avoid problems with shareholders," said Mr. Baron.

"The risk manager's job is to alert the company when there are problems. But the risk manager has limits. The real person in charge of risks is the CEO, and if that person does not take the risk manager's warnings into account, you can end up with shareholder suits and class actions," he noted.

Mr. Baron said a company needs good directors and officers coverage to contend with rapidly changing liability issues, as suits may become hard to avoid.

By Rick Mitchell

REGULATORY & LEGAL RISKS

EUROPE'S PATH TO COLLECTIVE ACTIONS

Several E.U. directives have paved the way for both national collective action laws and a possible E.U. system for collective redress, experts say.

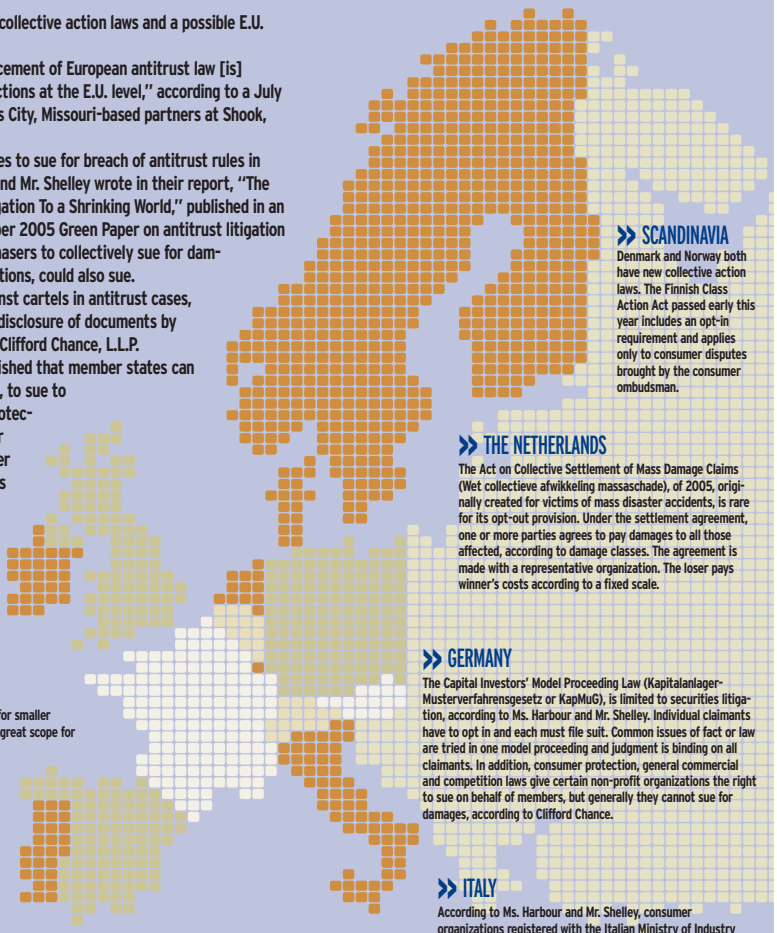
"The European Commission's interest in enhancing enforcement of European antitrust law [is] arguably the most important impetus to adoption of class actions at the E.U. level," according to a July 2007 report by Laurel J. Harbour and Marc E. Shelley, Kansas City, Missouri-based partners at Shook, Hardy & Bacon L.L.P.

In 2004, the E.U. adopted procedures to encourage parties to sue for breach of antitrust rules in courts, rather than using regulatory agencies, Ms. Harbour and Mr. Shelley wrote in their report, "The Emerging European Class Action: Expanding Multi-Party Litigation To a Shrinking World," published in an American Bar Association journal. The Commission's December 2005 Green Paper on antitrust litigation further proposed allowing consumers and/or groups of purchasers to collectively sue for damages. Representative groups, for example, consumer associations, could also sue.

The Commission is also considering double damages against cartels in antitrust cases, dropping the "loser pays" rule in some cases, and requiring disclosure of documents by defendants, according to a report by London-based law firm Clifford Chance, L.L.P.

The Cross Border Injunctions Directive (98/27/EC) established that member states can allow qualified organizations, such as consumer associations, to sue to stop violations of national laws that implement consumer protection directives, Ms. Harbour and Mr. Shelley wrote. The Unfair Commercial Practices Directive (2005/29/ EC) allows member states to adopt collective actions to enforce consumer rights and protect against aggressive or misleading marketing.

Several E.U. national governments allow collective actions but none allow U.S. style class actions, experts said. A key difference is that affected parties must "opt out" of U.S. actions, whereas most European actions require parties to opt in to cases. Major damage settlements are rare.



UNITED KINGDOM

The revised U.K. Companies Act that came into force in October makes it easier for smaller investors to launch derivative actions against companies. "It gives shareholders great scope for claims against company directors," said Neil Mirchandani, partner in London-based Lovells L.L.P.'s dispute resolution practice. The United Kingdom allows collective actions to recover damages in competition disputes.

According to Clifford Chance, major collective actions have also been filed under U.K. civil law, which requires no procedural mechanism for claimants with similar grievances to bring a collective action. Procedural reforms in 1999 introduced "group litigation orders" for managing claims with common questions of fact or law involving at least 10 claimants. Claimants must opt in.

The United Kingdom is considering allowing consumer bodies, or similar organizations, to bring cases to recover damages on behalf of consumers.

SCANDINAVIA

Denmark and Norway both have new collective action laws. The Finnish Class Action Act passed early this year includes an opt-in requirement and applies only to consumer disputes brought by the consumer ombudsman.

THE NETHERLANDS

The Act on Collective Settlement of Mass Damage Claims (Wet collectieve afwikkeling massaschade), of 2005, originally created for victims of mass disaster accidents, is rare for its opt-out provision. Under the settlement agreement, one or more parties agrees to pay damages to all those affected, according to damage classes. The agreement is made with a representative organization. The loser pays winner's costs according to a fixed scale.

GERMANY

The Capital Investors' Model Proceeding Law (Kapitalanlager-Musterverfahrensgesetz or KapMuG), is limited to securities litigation, according to Ms. Harbour and Mr. Shelley. Individual claimants have to opt in and each must file suit. Common issues of fact or law are tried in one model proceeding and judgment is binding on all claimants. In addition, consumer protection, general commercial and competition laws give certain non-profit organizations the right to sue on behalf of members, but generally they cannot sue for damages, according to Clifford Chance.

ITALY

According to Ms. Harbour and Mr. Shelley, consumer organizations registered with the Italian Ministry of Industry can sue to stop acts and conduct that damage interests of consumers and of users. One lawyer can act on behalf of numerous plaintiffs, but individual plaintiffs must grant power of attorney. Parliament is considering expanding availability of collective consumer redress.

SPAIN

Spain permits collective actions by victims, consumer and user associations on behalf of their members and unidentified victims, to defend consumers and users' interests. Collective action is not available for damages resulting from securities and environmental violations.

FRANCE

France does not allow lawyer contingency fees, punitive damages or jury trials. A mass consumer action against mobile phone operators (BIE July 30, 2007) under existing civil law has served as a rallying point for consumer organizations demanding class action legislation. In February 2007, the government withdrew a consumer rights bill that would have introduced collective actions. The government has said it will consider a new consumer bill that may include group actions.

–By Rick Mitchell. Diagram: Alan Booth

CLASS: E.U. report considers collective action law

CONTINUED FROM PREVIOUS PAGE

a means to provide citizens with access to justice and to regulate corporate behavior while reducing state spending, experts say. Another key factor is that collective actions can economize courts' judicial resources.

"There is greater consumer awareness of compensation opportunities, not least as U.S. class-action lawyers have begun to trawl Europe for claimants and European businesses have increasingly been drawn into U.S. class actions," according to a 2006 report by London-based law firm, Clifford Chance L.L.P.

In March, Ms. Kuneva's spokeswoman insisted that "collective actions are not the same thing as class actions." The reticence is understandable. Recent experience in France, in which fierce business resistance induced the government under former President Jacques Chirac to withdraw a consumer protection bill—including provisions for "actions de groupe" at the last minute in February—suggests business support would be critical to adoption of an E.U. system, sources say.

Transatlantic moves

"I cannot imagine how a company could find a European class action law in their interests," said Laurel Harbour, a partner at Kansas City, Missouri-based law firm Shook, Hardy & Bacon L.L.P. and an international expert on class actions. "A law with very robust protections for business with very strict criteria on what plaintiffs have to prove to be certified as a class, might get support. [But] even a very weak class-action law all over Europe would greatly increase [business'] risks," she said.

Neil Mirchandani, a partner in the dispute resolution practice at London-based law firm Lovells L.L.P., said an E.U.-wide collection action "might well become reality in the next 10 years. There appears to be an appetite for it in Brussels."

Ms. Harbour said a 2005 tort reform in the United States may have indirectly contributed to quickening Europe's pace toward collective actions. The reform allowed moving many class action cases out of state courts—seen as more unpredictable—into much more conservative federal courts.

The subsequent reduction in their U.S business may be what is behind class action law firms' recent move to Europe, in particular to London, she said. Also making the move are professional litigation funders, which she called "venture capital funds that speculate on class actions," from Australia and the United States.

Investor friendly

"It is very expensive to set up in London, so [their arrival] is a very significant development. They see Europe as a new market. That is a sign that Europe could start seeing a lot more class actions," said Ms. Harbour, who worked 11 years in her firm's London branch, including seven as managing partner.

The Clifford Chance report, "Are Class Actions on the Way to Europe," said that institutional investors, including hedge funds, are likely to take a more aggressive lead in seeking redress from those involved in securities issues, as happens in the United States.

It cites the cases of Deutsche Telekom A.G. shareholder action in Germany, the action by Railtrack P.L.C. shareholders against the U.K. government, and a Dutch action against Royal Dutch Shell P.L.C.

Ms. Harbour agreed that Europe's well-heeled large institutional investors and pension funds are best placed to gain from class actions in securities cases.

"U.S. experience is that class actions are often not worthwhile for individual investors to respond to. They are for very small money and are often not worth the effort," she said. "Lawyers and big funds, on the other hand, get a lot of money," she said.