

## **INTRODUCTION: COLLECTIVE INTERESTS , ‘PRÊT À PORTER’ JUSTICE?**

Individuals expect to be treated as such. We all want to be considered unique persons with unique characters (and at moments of introspection we may also admit to having character flaws), leading unique lives with unique sets of values and goals. Our sense of justice is modelled accordingly, so we may expect the institutions of the law to treat us as individuals as well.

The reality is, however, that the law can hardly ever live up to this expectation. Take the idea in law that like cases are to be treated alike. Strictly speaking, this fundamental idea may in fact lead courts away from the individual into the direction of a more or less objective reflection on the case at hand rather than on the individual person involved. By comparing and distinguishing cases the person is thought to be treated fairly. In fact, the judicial process aims at categorizing the case fairly.

Moreover, in regulating society, the legislature attempts to balance individual and collective interests. In doing so, it usually categorises individuals into groups of individuals, to attach certain rules to certain groups. Tax law and social security law are notable examples of this balancing act: the tax burden is assessed on the basis of abstract properties that can be applied relatively easily to massive numbers of persons. Social security usually sticks to a system of fixed amounts in benefits and fixed categories of beneficiaries, in order to keep the cost of administration and the likelihood of inequalities at a minimum. Such systems of distribution of wealth operate on the basis of aggregated data, fixed categories, structured templates and protocols. In essence, the law tries to categorize individuals into groups in order to deal with the need for mass justice effectively and swiftly, whilst providing an adequate level of individual justice.

Why should settling mass claims for compensation and redress in private law be any different from this typology? One reason might be that the framework for adjudicating such claims (tort law, contract law) is not primarily concerned with distributing, let alone redistributing, but rather with redressing wrongs committed against individuals. From a historical legal point of view, this might be true. However, it seems a position difficult to maintain in modern society. Try redressing ‘scattered damage’ (also referred

to as ‘trifle damage’) caused by breach of competition law – say, by horizontal price cartels – and resulting in slight price increases in consumer products. Such redress will not be affected by individual consumers, if they are left to individually access the institutions of justice. The costs outweigh the prospect of any benefit, and that would probably result in a sub-optimal number of claims reaching the pinnacle of the so-called conflict pyramid. Under those circumstances, individual access to justice may not be at par with effective resolution and an optimal level of compliance. And if claims are indeed substantial and economically viable, bringing them all to court at once may clog courts. The handling of similar claims in some sort of consolidated procedure may then be a viable alternative, provided that – again – collective interests and individual interests are balanced in a transparent procedure. Admittedly, any system of collective claims settlement has to balance the individual interests, the collective interest and the interest of the defendant (more often than not: industry, insurance, employers, manufacturers, government, et cetera).

This is not a new dilemma, but what is new is that in recent years both the European scholarly and legislative debate on collective access to civil justice have grown more intense. Not only have there been attempts at consolidating the masses and doing justice to individuals simultaneously (for example: in England and Wales, the Group Litigation Order 1999; in Germany, the ‘Kapitalanleger-Musterverfahrensgesetz (KapMuG)’ 2005; in the Netherlands, the ‘Wet Collectieve Afwikkeling Massaschade’ 2005; in Sweden, the ‘Lag om grupprättegång’ 2003), but the European Union seems to want to move forward as well. Recently, suggestions of introducing some sort of class action in consumer issues and in the domain of competition law enforcement have been voiced by the European Commission.

This issue of the Erasmus Law Review adds another piece to the puzzle. The papers that you find in this issue bear witness to the delicate balancing act between ‘prêt à porter’ justice and ‘haute couture’ justice, made to fit the individual. Roger van den Bergh and Louis Visscher analyse the collective approach from a law and economics perspective; they turn to the fundamental matter of goals of private enforcement in the European legal order and they draw attention to the dangers that too much or too little private enforcement can cause. Moreover, they raise the problematic issue of accountability of the legal-service providers directing collective claims and make inventory of available instruments to balance the interests of the collective and their legal head man.

Andrea Pinna addresses private international law issues concerning US class actions within the European legal order. His paper is of relevance for the issue of the ‘import’ of US class actions and implicitly raises an interesting subject for further analysis: the awakening ‘competition’ between the US class-action model and a potential European group action. The paper by Van Houtte and Yi convincingly shows that mass-settlement endeavours

2008] Introduction : Collective interests, 'prêt à porter' justice? 3

in international post-conflict situations struggle with perfectly similar problems of balancing as do civil courts in managing mass claims. Moreover, their paper demonstrates that 'prêt à porter' justice elicits particular standards of due process.

To conclude, we hope that this issue on collective claims will add to the debate on the right balance in European (private) law between individual right and collective enforcement. We thank the authors for their contributions to this issue and the anonymous reviewers for their comments.

*Willem van Boom*