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DOES EUROPE NEED SECURITIES CLASS ACTIONS?

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Abstract

Under the impetus of proposals by the consumer protection and competition departments of the European Commission there is now a lively debate within the EU about the merits of American style class actions or similar "group action" techniques. This article will argue that while the arguments in favour of class actions in consumer cases seem overwhelming when there is no membership link between the organisation that allegedly caused the harm that gives rise to the class action and the victims - the main issue being whether they should operate under an opt-in or an opt-out rule- it is far more doubtful that introducing *securities* class actions is a desirable policy goal. This is not because of the often invoked danger of "strike suits" or the possibility that whole industries will suffer from massive damages awards. These are the result of specific American practices (contingency fees, punitive damages awarded by juries) that Europe should not necessarily copy if it decided to introduce class actions. The main arguments against securities class actions are, I will argue, that they are poor at compensating investor losses and are unlikely to have a great deterrent effect under current practices of D&O liability insurance. Class actions are poor at compensating investors because of the well known problem of circularity (one class of investors ends up bearing the cost of another class of investors), which is unique to securities class actions and which is also the most convincing rationale for the restrictions on individual direct shareholder actions that are and most likely will remain part of the law in many member states. Allowing securities class actions would be logically incompatible with those rules.
This article will argue that while most European legal systems are poor at compensating investors who suffered a decrease in value of their investment because of a fault of a

third party, the answer lies not in the introduction of securities class actions, but in the development of a more efficient form of derivative action. In addition, in the exceptional cases where an individual direct claim by a shareholder is or should be permitted, civil law countries should modify their doctrines on causation and the calculation of damages and model them on the American system as it stands after the *Broudo* decision by the US Supreme Court.

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