

CLASS ACTION DEVELOPMENTS

IN EUROPE

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Recommendation on Common Principles for Collective Redress Mechanisms

In June 2013, the European Commission published its long-awaited Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (O.J. (L 206) 60 (EU)). Together with the Recommendation, the Commission published a Communication Towards a European Horizontal Framework for Collective Redress (COM (2013) 401/2), in which the history of the collective redress issue is recounted and in which the Commission elucidates and justifies the enumerated common principles.

The Commission recommends that all Member States should have collective redress mechanisms in those areas where Union law grants rights to citizens and companies: consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in the Recommendation should be applied horizontally and equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.

The goal is not to harmonize the national systems, but to list some common, non-binding, principles relating both to judicial (compensatory and injunctive) and out-of-court collective redress that Member States should take into account when crafting such mechanisms. In that way, the Commission wants to facilitate access to justice, stop illegal practices and enable victims of mass cases to obtain compensation, and at the same time to provide appropriate procedural safeguards to avoid abusive litigation.

Public vs Private Enforcement

At the outset, the Recommendation points out that the collective redress mechanisms it envisages are not of a regulatory nature. It is emphasized that it is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights only supplements public enforcement.

This is made concrete in the promotion of collective follow-on actions. In fields of law where a public authority (*i.e.*, a regulator) is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. The ratio legis is that the public interest and the need to avoid abuse can be presumed to have been taken into account already by the public authority as regards the finding of a violation of Union Law.

If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded. In case of follow-on actions, the persons who claim to have been harmed may not be prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.

Principles Common to Injunctive and Compensatory Collective Redress

First, the Recommendation contains principles common to injunctive and compensatory collective redress. No standing is given to an individual class member. Only associational or organizational plaintiffs, as have no private cause of action or grievance against the defendant, can bring a representative action. Besides public authorities, officially designated representative entities and entities certified on an *ad hoc* basis by a national authority or court for a particular representative action have standing to bring a representative action. The representative entities have to meet three eligibility conditions:

- (a) a non-profit making character;
- (b) a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought and;
- (c) sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The admissibility of any collective action should be verified, *sua sponte*, by the judge at the earliest possible stage of the litigation.

The class representative should be able to disseminate information about a claimed violation of rights granted under Union law and his or her intention to seek an injunction to stop it as well as about a mass harm situation and his or her intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, *ad hoc* certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court. The dissemination methods are without prejudice to the Union rules on insider dealing and market manipulation.

The Commission also pays attention to the funding of collective redress procedures. Besides the application of the loser pays rule, the Recommendation requires the plaintiff to declare to the court at the outset of the proceedings, the origin of the funds that he or she is going to use to support the legal action. Third-party litigation funding is allowed and partially regulated in the Recommendation. On the one hand, the Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

- (a) to seek to influence procedural decisions of the claimant party, including on settlements;

- (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;
- and
- (c) to charge excessive interest on the funds provided.

On the other hand, the court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

- (a) there is a conflict of interest between the third party and the claimant party and its members;
- (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; or
- (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

With respect to transnational or cross-border mass harms, the Recommendation stipulates that the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.

In other words, the Commission believes that in transnational or cross-border cases the current rules on judicial cooperation in civil matters are satisfactory to initiate a single collective action in a single forum. National rules on admissibility or standing may not prevent this. According to the Commission, the European rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters and the rules on the applicable law (*i.e.*, the Rome I and II Regulations) are suitable and applicable in cross-border mass cases, and there is no need for specific rules.

Specific Principles Relating to Injunctive Collective Redress

On the one hand, courts and competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation. On the other hand, the Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation.

Specific Principles Relating to Compensatory Collective Redress

The Recommendation puts forward the opt in principle as default. The claimant party should be formed on the basis of express consent of the natural persons claiming to have been harmed. According to the European Commission, the opt in system respects the right of a person to decide whether to participate or not. It therefore better preserves the autonomy of parties to choose whether to take part in the litigation or not. In this system the value of the collective dispute is more easily determined, since it would consist of the sum of all individual claims. The court is in a better position to assess both the merits of the case and the admissibility of the collective action. The opt in system also guarantees that the judgment will not bind other potentially qualified claimants who did not join.

Nevertheless, opt out as exception, by law or by court order, is possible, as long as this is duly justified by reasons or sound administration of justice. According to the Commission, the opt out system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate. The right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not. In addition, an opt out system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them.

A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the

possibility to pursue its claims in another form, if this does not undermine the sound administration of justice. On the other hand, natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.

Particular attention is paid to collective ADR and settlements. The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial. Appropriate means of collective ADR should be made available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of ADR until at least the moment at which one or both parties expressly withdraw from it. In case a settlement is reached, its legality should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.

The Commission prohibits contingency fees and punitive damages. The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties. Contingency fees risk creating such an incentive. When contingency fees are exceptionally allowed in collective redress cases, appropriate national regulation should be provided, taking into account in particular the right to full compensation of the members of the claimant party.

The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.

The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the

settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

Registry of Collective Redress Actions

The Recommendation wants the Member States to establish a national registry of collective redress actions, which should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods.

Supervision and Reporting

Although the Recommendation is of a non-binding, declaratory nature, it obliges the Member States to implement the principles set out in it in national collective redress systems by July 26, 2015 at the latest. Once they have implemented them, the Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases.

The Commission will assess the implementation of the Recommendation on the basis of practical experience. It will evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission will also assess whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

Directive on Competition Damages

Regarding competition damages, a new and specific instrument was adopted at the end of 2014: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (O.J. (L 349) 1 (EU)). The core is to remove the practical obstacles victims of infringements of the EU antitrust rules currently face when trying to get full compensation,

whether or not an infringement decision was issued by a competition authority. The Directive goes hand-in-hand with the Recommendation on collective redress mechanisms, since these mechanisms also have to be set up in case of violations of EU competition rules.

The Directive fully takes into account the key role played by competition authorities at EU or national level to investigate, find and sanction infringements. The Directive does not seek to leave the punishment and deterrence to private litigation. Rather, its main objective is to facilitate full and fair compensation for victims once a public authority has found and sanctioned an infringement.

The Directive first and foremost focuses on the disclosure of evidence. When a plaintiff has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendants infringement of competition law, national courts can order the defendant or a third party to disclose evidence, regardless of whether or not this evidence is also included in the file of a competition authority. The disclosure of evidence is limited to what is proportionate (taking into account the legitimate interests of all parties and third parties concerned), and must be accompanied by measures to protect confidential information from improper use. Leniency corporate statements and settlements submissions never can never be disclosed. Information that was prepared by a natural or legal person specifically for the proceedings of a competition authority and information that was drawn up by a competition authority in the course of its proceedings, only can be disclosed after the competition authority has closed its proceedings or taken a decision. Finally, an effective, proportionate and dissuasive sanction mechanism must be created by the Member States in case the disclosure rules are not respected.

Furthermore, Member States have to ensure that, where national courts rule, in actions for damages, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. In other words, decisions of national competition authorities constitute full proof before civil courts that the infringement occurred.

The Directive also clarifies the rules on:

- limitation periods for bringing actions for damages; more particular when the limitation period begins to run, the duration of the period (i.e., at least five years) and the circumstances under which the period can be interrupted or suspended;
- joint and several liability;
- the passing-on of overcharges, and more specifically the liability rules in cases where price increases due to an infringement are “passed on” along the distribution or supply chain; the objective of these modified rules is to ensure that those who suffered the harm in the end will be the ones receiving compensation.

In case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption. Moreover the burden and the level of proof and of fact-pleading required for the quantification of harm may not render the exercise of the injured party’s right to damages practically impossible or excessively difficult.

Rules to facilitate consensual dispute resolution are put in place. For example, Member States have to ensure that the limitation period for bringing an action for damages is suspended for the duration of the consensual dispute resolution process and that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution.

ADR & ODR

Finally, it is important to briefly draw attention to the new European ADR Directive and ODR Regulation, adopted in May 2013 by the European Parliament and the Council. Both instruments can play a key role in out-of-court collective redress in the sense that they can offer swift, cheap and effective access to justice for a large number of consumers who are confronted with the same or similar harmful behaviour.

ADR Directive

The 2013 ADR Directive (O.J. (L 165) 63 (EU)) seeks to promote ADR in domestic and cross-border consumer cases concerning complaints arising out of contractual obligations in sale of goods or service contracts by a consumer resident in the EU against a trader established in the EU. The goal is to establish harmonized quality requirements for ADR entities and ADR procedures in order to ensure that consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union. These requirements are as follows:

- the natural persons in charge of ADR have to possess the necessary expertise, independence and impartiality (*e.g.*, regarding their appointment and remuneration);
- transparency: ADR entities have to make publicly available on their websites specific information and are obliged to publish annual activity reports;
- the ADR procedures must be effective: the ADR procedure is easily accessible online and offline; the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor; the ADR procedure is free of charge or available at a nominal fee for consumers and except in case of highly complex disputes, the outcome of the ADR procedure is made available within a period of 90 calendar days;
- the ADR procedures must also be fair: for example, there has to be due process and the parties must be notified in writing of the outcome of the ADR procedure;
- the principle of liberty: an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

The ADR Directive also pays attention to access to ADR. Besides the obligation for ADR entities to maintain an up-to-date and easily accessible website, the Member States must ensure the existence of a residual ADR entity which is competent to deal with disputes for the resolution of which no existing ADR entity is competent. In other words, there has to be full

ADR coverage. Nevertheless, ADR entities can maintain and introduce procedural rules allowing them to refuse to deal with a dispute.

Traders have to inform consumers about the ADR entity or ADR entities by which they are covered. That information shall include the website address of the relevant ADR entity or ADR entities. The information shall be provided in a clear, comprehensible and easily accessible way on the traders' website, in the general terms and conditions of sales or service contracts between the trader and a consumer.

Finally, the ADR Directive deals with the cooperation between ADR entities and national enforcement authorities. This cooperation shall in particular include mutual exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints. It shall also include the provision of technical assessment and information by such national authorities to ADR entities where such assessment or information is necessary for the handling of individual disputes and is already available.

ODR Regulation

Simultaneously with the ADR Directive, the European legislator launched an ODR (online dispute resolution) Regulation (O.J. (L 165) 1 (EU)). The Regulation only applies to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union. Offline transactions are excluded.

The idea is that the European Commission develops an ODR platform that shall be a single point of entry for consumers and traders seeking the out-of-court resolution of disputes. It shall be an interactive website which can be accessed electronically and free of charge in all the official languages of the institutions of the Union. The ODR platform shall have the following functions:

- (a) to provide an electronic complaint form which can be filled in by the complainant party;
- (b) to inform the respondent party about the complaint;

- (c) to identify the competent ADR entity or entities and transmit the complaint to the ADR entity, which the parties have agreed to use;
- (d) to offer an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR platform;
- (e) to provide the parties and ADR entity with the translation of information which is necessary for the resolution of the dispute and is exchanged through the ODR platform;
- (f) to provide an electronic form by means of which ADR entities shall transmit information;
- (g) to provide a feedback system which allows the parties to express their views on the functioning of the ODR platform and on the ADR entity which has handled their dispute;
- (h) to make publicly available specific information, for example statistical data on the outcome of the disputes which were transmitted to ADR entities through the ODR platform.

Particular attention is paid to the processing of personal data and data confidentiality and security.

Each Member State shall designate one ODR contact point, preferable their Centers of the European Consumer Centers Network (ECC-Net), or consumer associations. Each ODR contact point shall host at least two ODR advisors. The ODR contact points shall provide support to the resolution of disputes relating to complaints submitted through the ODR platform. The Commission shall establish a network of contact points (ODR contact points network) which shall enable cooperation between contact points.

Just like the ADR Directive, the ODR Regulation ensures that consumers are informed of the ODR platform. Traders established within the EU engaging in online sales or service contracts, and online marketplaces established within the EU, have to provide on their websites an electronic link to the ODR platform. Consumer associations and business associations shall also be encouraged to provide an electronic link to the ODR platform.

The ODR procedure itself is complicated. The bottom line is that the parties have to agree on an ADR entity in order for the complaint to be transmitted to it, and that, if no agreement is

reached by the parties or no competent ADR entity is identified, the complaint will not be processed further. The question rises what the added value of this prior agreement is.