

# Collective Actions in the European Union— American or European Model?

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## Abstract

Collective redress is a procedural mechanism that allows for reasons of procedural economy and efficiency of enforcement many similar legal claims to be combined into a single court action. Consumers and investors encounter problems with the enforcement of their rights through the individual redress, especially in times of the financial crisis. If a substantial number of harmed individuals decide not to pursue their, usually low, claims, the unduly gained profits of the opposite party can be extremely high. Thus, collective redress mechanisms can represent better option for consumers and investors, as their claims tend to be much less burdensome in case of the collective action. However, such mechanisms can trigger the abuse of the procedures, with the most commonly quoted threat being the example of American regulation of class actions. Negative characteristics of American model are the reasons that EU decided to shape its own concept of collective redress mechanisms. The binding act in this field in the EU is directive on injunctions for the protection of consumers' interests; however, there is no binding act yet regarding compensatory actions. In June 2013, the European Commission published the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. It is not binding on Member States, however, it can serve as a guideline to improve their existing legislations, especially the regulation of collective compensatory actions. In so doing, consumers and investors might be given the possibility to use more efficient mechanism to compensate the harm suffered.

## Keywords

Access to Justice, Collective Redress Mechanisms, Injunctive Relief, Compensatory Relief, Consumers, Investors, Opt-In, Opt-Out, The European Commission's Recommendation

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## 1. Introduction

Collective redress mechanisms are recently gaining in importance and are frequently put on the agenda of the European institutions<sup>1</sup>, currently being at the heart of European debate (Cafaggi & Micklitz, 2009), and numerous conferences (for example last year's European Jurists Forum in Barcelona), especially due to the financial crisis and linked very large number of aggrieved investors in banks, investment funds, consumers, etc., harmed by the same or similar harmful practice. Said harmful practices are the most common in the field of financial services legislation and investor protection, consumer protection, competition, environment protection and protection of personal data.<sup>2</sup> Collective redress is a procedural mechanism that allows for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action.<sup>3</sup> This term encompasses two forms of collective redress. It can take the form of injunctive relief, where cessation of the unlawful practice is sought, or compensatory relief, aiming at obtaining compensation for damage suffered.<sup>4</sup>

The right to an effective remedy before a court or a tribunal in case of violation of rights and freedoms guaranteed by the law of the European Union (hereinafter EU) is one of the fundamental rights, enshrined in Article 47 of the Charter of Fundamental Rights of the EU.<sup>5</sup> Access to justice is a major challenge in the EU consumer law, becoming more pressing with growing cross-border purchases (Benöhr, 2013a). Nevertheless, consumers and investors encounter problems with the enforcement of their rights through the individual redress. The shortcomings of the individual redress lie in the fact that harmed consumers and investors often do not decide to pursue actions in courts, as they are deterred due to high costs of litigation (often higher than the value of the claim) and lengthy procedures.<sup>6</sup> Often, the costs of pursuing the claim are higher than the expected benefits (Van der Bergh, 2013; Tzakas, 2011). The weakness on the side of consumers and small investors is also the imbalance of power and information asymmetry. If a substantial number of harmed individuals decide not to pursue their, usually low, claims, the unduly gained profits of the opposite party can be extremely high.

Due to these disadvantages of individual redress, collective redress mechanisms can represent better option for consumers and investors, as their claims tend to be much less burdensome in the case of the collective action. Moreover, collective redress may also increase the prospect of success for consumers (Benöhr, 2013b). They are also less burdensome for the courts, which might otherwise face the possibility of overload with individual claims. However, such mechanisms can trigger the abuse of the procedures, with the most commonly quoted threat being the example of the American regulation of class actions, where lawyers have a right to the so called contingency fees, which are tight to the success in the dispute, and also punitive damages are allowed (Micklitz & Stadler, 2008). Such regulation, which attracts abusive litigation, would have a negative impact on the economic activities of EU businesses according to the European Commission, especially through harming their reputation in case of unfounded claims and by imposing undue financial burden on them.<sup>7</sup> Europe adheres strongly to the "loser pays costs" rule which largely bans contingency fees, has almost no juries or punitive damages in civil cases, and has far more limited approach to disclosure of documentary evidence in civil law procedures (Hodges, 2010). Thus, negative characteristics of American model are the reason that EU decided to shape its own concept of collective redress mechanisms.

<sup>1</sup>With the term "European Institutions" are meant institutions of the European Union: the European Parliament, the European Council, the Council of the European Union (simply called "Council"), the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. In this field the European Commission adopted White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final) and Green Paper on Consumer Collective Redress (COM(2008) 794 final). The European Parliament adopted resolution towards a coherent European approach to collective redress (2011/2089(INI)) in 2012. The binding act in this field is Directive 2009/22 on injunctions for the protection of consumers' interests (OJ L 110/30, 1 May 2009). There is no binding act yet regarding compensatory actions, however, the European Commission has published the proposal of the directive in the field of competition law. Nevertheless, this directive does not oblige Member States to regulate collective compensatory actions.

<sup>2</sup>See recital 7 of the Preamble of the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter Recommendation), C (2013) 3593/3.

<sup>3</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress" (hereinafter Commission Communication), COM(2013) 401 final, p. 4.

<sup>4</sup>Ibid.

<sup>5</sup>OJ C 83/389, 30 March 2010.

<sup>6</sup>See Recital 9 of the Preamble of the Recommendation.

<sup>7</sup>See also Commission Communication, p. 7.

## 2. Types of Collective Redress Mechanisms

### 2.1. Types of Collective Redress Mechanisms Based on the Linkage of the Plaintiffs

Different types of collective redress mechanisms are known as regards the type of combining claims. We can divide them according to the linkage among the plaintiffs (for example consumers or investors), *inter alia*, into representative actions, group actions and test case procedures.

With respect to the first type, representative action, the legitimized qualified subject, *i.e.* representative organisation, can file representative actions, for example consumer protection organisation on behalf of consumers. Such claims are already regulated in the EU, however, only as far as injunctive relief is concerned, and not also actions for damages.

The second type is group action, which is filed by the member of the group on behalf of certain group of harmful individuals. Unlike in representative actions filed by associations, in group actions, an exactly definable category of persons brings a joint action to enforce individual claims together. The main motive is that not all the affected persons need to carry out the procedure by themselves (Micklitz & Stadler, 2008). They have the possibility to entitle one single individual member of the group to represent the group during the lawsuit.

The third type of collective redress mechanisms is test case procedure, which serves for the adjudication on one typical case, which becomes precedent for future cases. Consumers whose claims fulfil the requirements of a test case can subscribe to a register maintained by the acting claimant of the test case. The particularity of such a case is that the court chooses only one claim and bases its decision on this, which binds all the registered claims. Test case procedures offer the opportunity to have legal questions relevant for a number of claims clarified by the court at once, and can thus reduce litigation costs (Benöhr, 2013a). As an example, German legislator passed a bill governing test cases concerning the protection of investors (KapMuG) (Micklitz & Stadler, 2008).

The most famous and the most commonly discussed in the literature are class actions pursuant to the American model. As aforementioned, EU decided not to follow the American model that opens up possibilities for abuse of litigation.

### 2.2. Types of Collective Redress Mechanisms Based on the Type of Claim

All these types of actions can be either in the form of injunctive relief or compensatory relief. In the field of collective injunctive relief EU already adopted Directive on injunctions for the protection of consumers' interests (hereinafter Directive on injunctions).<sup>8</sup> As a result of the Directive on injunctions, qualified consumer protection authorities and consumer organisations are authorised to commence proceedings before the courts or public authorities in all Member States to request the prohibition of practices that infringe national and EU consumer protection rules.<sup>9</sup> With the collective injunction the organisations can seek an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decision.<sup>10</sup>

EU law does not govern collective compensatory actions yet.<sup>11</sup> With this action harmed individuals request damages for the harm done. Collective compensatory actions are already regulated in some Member States; some of them using the opt-in system and other opt-out system, whereas some Member States do not regulate them yet. This marks a new trend in recognizing consumer protection as a collective procedural right (Benöhr, 2013a). So far, they are regulated in 16 out of 28 Member States.<sup>12</sup> Therefore, there are several differences in this field in the regulations across Member States, allegedly representing an obstacle in filing claims of harmed

<sup>8</sup>Directive 2009/22/EC on injunctions for the protection of consumers' interests, OJ L 110, 1 May 2009.

<sup>9</sup>Commission Communication, p. 4.

<sup>10</sup>Article 2 of Directive on Injunctions.

<sup>11</sup>In June 2013 the European Commission adopted the proposal of the Directive 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 (COM(2013) 404 final), which leaves the regulation of collective compensatory actions to Member States. This proposal is accompanied by Recommendation.

<sup>12</sup>See the European Commission's document overview of existing collective redress schemes in EU Member States (IP/A/IMCO/NT/2011-16).

individuals, and thus leading to restricted access to justice and consequently to unjustified gains of the wrongdoers. Collective compensatory action is already introduced in the Netherlands, where several famous cases have been adjudicated so far (for example *Dexia*<sup>13</sup> with more than 300.000 harmed individuals) (Trstenjak, 2013; van Boom, 2009; van der Heijden, 2010; Kortmann, 2011). In Germany, where for example several thousand small investors were claiming compensatory damages from the Deutsche Telekom, such claims are handled through test case procedures (Micklitz & Stadler, 2008).

### 2.3. Types of Collective Redress Mechanisms Based on the Inclusion of the Individuals in the Procedure

Individual consumers, investors and businesses can be included in these actions on the basis of the opt-in or opt-out principle. Pursuant to the opt-in principle, collective action is filed on behalf of several victims who expressly decide to combine their individual claims in a single action. This model is recommended by European Commission in its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, presented in the next chapter, although in the Green Paper on Consumer Collective Redress from 2008 the opt-out principle is mentioned. Under this system the persons concerned must make themselves known and expressly ask to be part of the action before the decision is delivered (Sorabji, Napier, & Musgrove, 2008). Such system is unquestionably in conformity with the principle of party disposition (“*principe dispositif*”, “*Dispositionsmaxime*”), which underlies the procedural traditions of most of the civil law countries, emanating from the right of each person to commence and end judicial proceedings (Tzakas, 2011).

Pursuant to the opt-out principle the group is composed of all individuals who belong to the defined group and claim to have been harmed by the same or similar infringement unless they actively opt out of the group and thereby prevent the binding effect of the judgment, as in this model judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out.<sup>14</sup> Thus, in other words, in such system claim is able to be instituted by a representative claimant on behalf of a class of persons, who share common grievances with the representative and who are not individually identified at the outset but who are merely described (Muhleron, 2009). Such regulation of collective redress actions is found for example in the Netherlands, Portugal and Denmark. It is the exception, and not the rule, across the twenty-eight European Member States (Muhleron, 2009).

In the opt-in model, the judgment is binding on those who opted in, while all other individuals potentially harmed by the same or similar infringement remain free to pursue their damages claims individually. Conversely, in the opt-out model, the judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out.<sup>15</sup>

The European Commission emphasizes in the Green Paper that opt-out solutions might mitigate some of the difficulties of the opt-in systems, which could be burdensome and cost-intensive for consumer organizations which have to do preparatory work such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff. They may also face difficulties in obtaining a sufficiently high number of consumers opting-in in the case of very low value damage, where consumers are less likely to act. However, they do not involve the risk of promoting excessive or unmeritorious claims.<sup>16</sup>

## 3. Collective Redress in the EU Legislation and the Case Law of the CJEU

Some European directives already regulate some forms of collective redress in relation to consumer protection, for example Directive 93/13 on unfair terms in consumer contracts,<sup>17</sup> which obliges Member States in Article 7 to ensure that persons or organizations, having a legitimate interest under national law in protecting consumers, are authorized to take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms. These legal remedies may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations, which use or rec-

<sup>13</sup>The issue in the case *Dexia* from 2007 was the financial loss caused by retail investment products.

<sup>14</sup>See Commission Communication, p. 11.

<sup>15</sup>See Green Paper on Consumer Collective Redress, COM(2008) 794 final, p. 3.

<sup>16</sup>See points 54 - 55 of the Green Paper on Consumer Collective Redress, COM(2008) 794 final.

<sup>17</sup>Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21/04/1993.

commend the use of the same general contractual terms or similar terms.

Another directive governing collective redress in consumer protection area is Directive 2006/114 concerning misleading and comparative advertising, which provides in Article 5 that Member States shall ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors. Such means shall include legal action against such advertising or the possibility to bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. Member States may decide whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector.

Further, similar provision contains also Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market.

Collective redress is commonly dealt with also by the Court of Justice of the EU (hereinafter CJEU) in the preliminary reference procedures. One example is the case *Invitel*<sup>18</sup>, with the legal dispute in the main proceedings concerning the fairness of a not individually negotiated term in a consumer contract within the meaning of Directive 93/13 (Trstenjak, 2013). In this case, the CJEU held that it is for the national courts of EU Member States, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided. The CJEU emphasized that, although Directive 93/13 does not accomplish a full harmonization of the consequences of a term being found to be unfair within the meaning of the Directive, Articles 7(1) and (2) set a duty for the Member States to ensure, as a minimum standard, that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers, which must include the possibility for persons or organizations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether general contract terms are unfair and, where appropriate, to have them prohibited (for more detailed analysis see Trstenjak, 2013).

#### 4. European Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law

In June 2013 the European Commission published the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter Recommendation).<sup>19</sup> Although the professional public expected the proposal of the directive, the European Commission issued (only) the recommendation.

The aim of the Recommendation<sup>20</sup> is to facilitate access to justice in relation to violations of rights under EU law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions<sup>21</sup> of the Member States and safeguarding against abuse.<sup>22</sup> The Recommendation is, *inter alia*, the result of the conclusions the European Commission made on the basis of the public consultation “Towards a coherent European approach to collective redress”, carried out in 2011. The European Commission is emphasising the importance of the horizontal approach for quite some time now, as the collective redress mechanisms have been regulated only sectorial in the past, and only injunction relief.<sup>23</sup> In 2012 also the European Parliament addressed the Commission with the Resolution to prepare the proposal that would represent horizontal framework for collective redress, relying on the common set of principles.<sup>24</sup>

<sup>18</sup>Case C-472/10, *Invitel*, Judgment of the Court delivered on 26 April 2013.

<sup>19</sup>Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3593/3.

<sup>20</sup>The European Commission adopts recommendations pursuant to Article 292 of Treaty on Functioning of the European Union (hereinafter TFEU). Article 290 TFEU provides that recommendations are not binding.

<sup>21</sup>This is reconciled with the requirement of Article 67(1) TFEU, according to which the Union, while establishing a European area of freedom, justice and security, is asked to respect the different legal systems and traditions of the Member States, in particular in areas (such as procedural law) which are well established at national level while being rather new at EU (see COM(2013) 401 final, p. 3).

<sup>22</sup>Recital 10 of the Preamble of the Recommendation.

<sup>23</sup>Collective injunctive relief in the consumer law is regulated. With regard to collective compensatory actions European Commission published the proposal of the directive in the field of competition law, however, this proposal does not foresee collective actions as obligatory for Member States.

<sup>24</sup>See 2011/2089 (IN).

The aim of the Recommendation, which is applicable to both types of collective redress mechanisms, for injunctive relief and for compensatory relief, is to ensure the holistic horizontal approach in the field of collective redress mechanism in EU. It recommends to the Member States to ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.<sup>25</sup>

#### 4.1. Principles Common to Injunctive and Compensatory Collective Redress

Among the principles common to injunctive and compensatory collective redress, the European Commission gives the recommendations regarding standing to bring a representative action, admissibility, information on a collective redress action, reimbursement of legal costs of the winning party, funding and cross-border cases. The Recommendation suggests that the Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. Such entities should have a non-profit making character, there should be a direct relationship between the main objectives of the entity and the rights granted under EU law that are claimed to have been violated in respect of which the action is brought and the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party (“loser pays principle”). Moreover, 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. A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.

It is crucial for the collective redress that consumer are informed about a claimed violation of rights granted under EU law and intention to seek an injunction to stop it as well as about a mass harm situation and intention to pursue an action for damages in the form of collective redress, therefore the European Commission included also recommendations on information on a collective redress action. 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 judgment of the court.

#### 4.2. Recommendations for Collective Injunctive Relief

As the collective injunctive relief is already regulated at the EU level with the Directive on injunctive relief, the Recommendation contains only two special principles concerning this category of collective redress mechanisms. These principles are expedient procedures for claims for injunctive orders and efficient enforcement of injunctive orders.

#### 4.3. Recommendations for Collective Compensatory Relief

The European Commission has proposed more detailed recommendations on collective compensatory actions, as Member States have different regulations of compensatory actions that should be harmonised to facilitate access to justice. The predominant principle is that the claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (opt-in principle). 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 judgment is given or the case is otherwise validly settled. The defendant should be informed about the composition of the claimant party and about any changes therein. European representative action, based on the opt-in principle, is different from the American class action, based on opt-out principle.

The special emphasis in the Recommendation is given to encouragement of alternative dispute resolution mechanisms, both at the pre-trial stage and during civil trial, taking into account also the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>25</sup>Point 2 of the Recommendation.

#### 4.4. Emphasis on Prevention of Abusive Litigation

The crucial emphasis is given to prevention of abusive litigation, as the European Commission wants to avoid negative characteristics of the American class action system, where lawyers themselves look for the potential plaintiffs, and commonly force companies to settle due to negative publicity, although sometimes unjustifiably.<sup>26</sup> The European Commission recommends to the Member States to 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 and that they should not permit contingency fees which risk creating such an incentive. Moreover, also punitive damages, leading to overcompensation in favour of the claimant party should be prohibited.

The Recommendation contains also the principle related to collective follow-up actions, pursuant to which Member States should ensure that in fields of law where a public authority 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 Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority. It is important to ensure consistency between the final decision concerning that violation and the outcome of the collective redress action.

The European Commission suggests to 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.

The Member States should implement the principles set out in the Recommendation in national collective redress systems in 2 years following its publication. The European Commission should then assess the implementation of the Recommendation on the basis of practical experience in 4 years after the publication, in particular evaluating 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 EU and consumer trust.

#### 5. Conclusion

The number of cases in which large number of consumers, investors and other individuals are harmed by the same unlawful act is growing in times of the financial crisis. As the individual redress is usually ineffective in such cases, the European Commission recommends to the Member States to introduce the systems of collective redress mechanisms, which would encompass injunctive relief as well as compensatory relief. As the national regulations are based on different legal traditions, it is crucial for the improvement of the access to justice that those systems rely on the common set of principles across the whole EU. In so doing, the crucial components are the principle of consent (opt-in principle) and the aim to prevent the abusive litigation, thereby prohibiting contingency fees and punitive damages.

The Recommendation is not binding on Member State, therefore we can only hope that they will take it into account and improve their existing legislations, especially with respect to the regulation of collective compensatory actions, so that harmed consumers and investors have the possibility to use the efficient mechanism to compensate the harm done.

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<sup>26</sup>Contingency fees are extremely high in the event of the success, as they are paid based on the high percentage out of total damages.

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