12 Recommendation on Common Principles for Collective Redress Mechanisms

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12.1 Introduction – The Birth of the Recommendation[1]

In December 2005, the European Commission adopted a Green Paper[2] on Damages actions for breach of EC antitrust rules, the purpose of which was to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions (e.g. cases in which the civil action is brought after a competition authority has found an infringement) and for stand-alone actions (that is to say actions which do not follow on from a prior finding by a competition authority of an infringement of competition law).

The most important finding in the Green Paper was that, in practice, the damage suffered by the victims of breaches of EC antitrust rules is only rarely compensated, thus the amount of compensation which is foregone by the victims each year is tens of billions of euro.[3] In the Green Paper, this situation, which is of concern both from an economic and a legal point of view, was attributed mainly to the various legal and procedural obstacles in the rules of the Member States governing actions for antitrust damages.[4]

The European Parliament concurred with the conclusions of the Green Paper and, therefore, invited the Commission to prepare a White Paper with detailed proposals to

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1 In the Hungarian translation of the sources of Community law, the word "jogorvoslat" (in English: remedy) is used. In the English text, the term "redress", while in the German text, the terms "Rechtsverfolgung" or "Ansatz" are applied. It is clear from the content of the sources of law as well as the English and especially the German terminology that the procedures laid down in the sources of law are not review procedures, that is, these sources of law do not provide for an appeal against an existing decision or judgement, but for an opportunity to collectively remedy a legal situation. Accordingly, in the study, the word "jogorvoslat"/"redress" is only used when indicating the titles of the sources of law, in all other cases the terms "enforcement of rights" and "enforcement of claims" are used.

2 COM(2005) 672, 19.12.2005.

3 See Point 2.2 of the Impact Assessment Report for the Green Paper.

4 See ibid., point 2.3.

ensure the dismantling of the obstacles to effective antitrust damages claims. The Commission prepared the White Paper[5] on Damages actions for breach of the EC antitrust rules by April 2008. The purpose of this White Paper was to consider and recommend such policy choices and specific measures which would more efficiently ensure that effective procedures for the enforcement of rights are available to all the victims affected by breaches of Community competition law and, thus, they are fully compensated for the damage they have suffered. The White Paper was based on the principle of full compensation and, therein, the Commission made recommendations on the issues of standing to bring an action (indirect purchasers and collective enforcement of rights), access to evidence, inter partes disclosure of such evidence, binding effect of national competition authority decisions, fault requirements, damages, passing-on of overcharges, limitation periods, costs of damages action, and interaction between leniency programmes and actions for damages.

While the possibility of the collective enforcement of claims was only indirectly addressed in the Green Paper of 2005, the White Paper of 2008 dealt with this subject independently, thus, proposing the combination of two complementary mechanisms[6] to address the shortcomings in the field of antitrust.

In addition to competition law, the requirement arose on the part of the European legislator also in the area of consumer rights to settle the issue of the collective enforcement of claims. As a result, in November 2008, the Commission adopted a Green Paper[7] on Consumer Collective Redress. The purpose of this Green Paper was to assess the state of enforcement mechanisms, in particular in cases where many consumers are likely to be affected by the same legal infringement, and to provide options to close any gaps to effective enforcement identified in such cases. (Point 4.) In that regard, the Green Paper concluded that the situation regarding the enforcement of claims by consumers in the EU was unsatisfactory and was not allowing large numbers of consumers affected by a single breach of the law to enforce their rights collectively and to obtain compensation on that basis. (Point 19.) For the functioning of effective mechanisms which are for the common benefit of the consumers and traders, the Commission offered four possible solutions in the Green Paper: applying solutions with no EC action, cooperation between Member States, a mix of policy instruments and collective judicial procedure for the enforcement of rights by consumers. The responses to the Green Paper received from certain consumer organisations highlighted that they encouraged the introduction of a Union-level collective procedure for the enforcement of damages claims, however, the representatives of the sectors feared abusive litigation. Responses expressed by the interested parties also

5 COM(2008) 165, 02.04.2008.

6 These two mechanisms: representative actions, which are brought by qualified entities (such as consumer associations, state bodies or trade associations) on behalf of identified or, in rather restricted cases, identifiable victims and opt-in collective actions.

7 COM(2008) 794, 27.11.2008.

confirmed that the various Commission initiatives on the collective enforcement of rights were inconsistent, due to which it was necessary to increase consistency.[8]

Against this background, in 2011, the Commission launched a Europe-wide public consultation[9] entitled "Towards a more coherent European approach to collective redress", in the framework of which 300 institutions and experts as well as 10 000 citizens were consulted on the European framework of the collective enforcement of rights. The results of the consultation and the objectives set on the basis thereof were adopted by the European Parliament in the form of a resolution[10] in February 2012. In the resolution entitled "Towards a coherent European approach to collective redress" the European Parliament called for any proposal in the field of the collective enforcement of claims to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective enforcement of rights within the EU and specifically but not exclusively dealing with the infringement of consumers' rights.[11] At the same time, the Parliament stresses the importance of taking into account also the national legal traditions and the legal order of individual states.

Thereby, the Parliament essentially gave a mandate to the Commission to adopt legislative acts in the field of the collective enforcement of rights. It was against this background that the communication of the Commission[12] entitled "Towards a European Horizontal Framework for Collective Redress" was issued on 11 June 2013. In its communication, the Commission actually summarized the views and opinions expressed on the issue of the collective enforcement of claims, presented, in relation to the collective enforcement of rights, the history of the development of EU law spanning almost a decade, and stated the view of the Commission itself on this issue.

12.2 The General Description of the Recommendation

After the abovementioned history, which is relatively long and affects very diverse areas, the European Commission adopted its recommendation on the common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[13] (hereinafter: Recommendation) on 13 June 2013.

8 SEC(2011)173 final, 04.02.2011, Point 11.
9 COM(2010) 135 final, 31.03.2010.
10 2011/2089(INI).
11 Id., point 15.
12 COM/2013/0401 final.
13 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

Concerning the length of the Recommendation, it consists of 26 recitals and 42 points. The 42 points are divided into seven chapters, of which chapter II containing the definitions is especially welcome.

The proclaimed objectives of the Recommendation was to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation. (Point 1.)

To achieve these objectives, the Recommendation envisaged for the Member States that until 26 July 2015 they should set up mechanisms at national level for the collective enforcement of claims, for both injunctive and compensatory relief, which mechanisms are fair, equitable, timely and not prohibitively expensive and respect the basic principles set out in the Recommendation. Thus, the principles should be applied across the Union, while respecting the different legal traditions of the Member States, either in all instances of collective enforcement of claims or certain common principles should be applied expressly in relation to the collective enforcement of rights for injunctive or compensatory purposes. (Points 2. and 3.)

As defined in the Recommendation, the collective enforcement of rights can be injunctive or compensatory. The first ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action,[14] while the latter ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation[15] or by an entity entitled to bring a representative action. (Point 3. a)

12.3 The Principles Laid Down in the Recommendation[16]

The Recommendation sets out the specific principles relating to the collective enforcement procedures for injunctive and compensatory purposes separately, and, in addition, it also lists the common principles. These principles, however, cannot be regarded as

14 'Representative action' means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings. (Point 3. d)).

15 'Mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons. (Point 3. b)).

16 For the principles and whether they can be considered as real principles, *see*, in detail: Írisz E. Horváth, 'Uniós elvek? A kollektív igényérvényesítés elvei Európában' (EU principles? The principles of collective enforcement of claims in Europe), *Európai Jog*, 2016/4. 1-6.

classic (basic) principles, but rather as action plans which provide for specific legislative tasks for the Member States, similarly to the legislation at directive level.[17]

Principles common to the collective enforcement of rights for injunctive and compensatory purposes:

- Standing to bring a representative action
- Admissibility
- Information on a collective action relating to the enforcement of rights
- Reimbursement of legal costs of the winning party
- Funding
- Cross-border cases

Specific principles relating to the collective enforcement of rights for injunctive purposes

- Expedient procedures for claims for injunctive orders
- Efficient enforcement of injunctive orders

Specific principles relating to the collective enforcement of rights for compensatory purposes

- Constitution of the claimant party by 'opt-in' principle
- Collective alternative dispute resolution and settlements
- Legal representation and lawyers' fees
- Prohibition of punitive damages
- Funding of collective procedures relating to the enforcement of claims for compensatory purposes
- Collective follow-on actions

12.4 The Recommendation in Practice

12.4.1 The Inclusion of the Recommendation in National Law

The Member States had to implement the principles laid down in the Recommendation into their own national system for the collective enforcement of claims by 26 July 2015 at the latest and they have to provide reliable statistical data on the number of out-of-court and judicial collective enforcement procedures, on an annual basis, to the Commission. According to the Recommendation, the Commission had to assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In so doing, the Commission had to evaluate the impact of the Recommendation on access

17 Brukhard Hess, 'European Perspectives on Collective Litigation', in: Harsági & van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking MIce?* Cambridge – Antwerp – Portland: Intersentia, 2014. p. 5.

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. And in the light of these results, the Commission had to assess whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed. (Articles 38 to 41)

12.4.2 The Report from the Commission on the Implementation of the Recommendation

The Commission adopted its report[18] (hereinafter: Report) on the implementation of the Recommendation, on the practical application thereof, with a slight delay, on 25 January 2018. The Report, obviously and expressly, highlights the provisions of the Recommendation: the developments in the legislation of Member States since the adoption of the Recommendation were examined and assessed, and, furthermore, the Report sought to verify whether these developments had led to a more widespread and coherent application of the individual principles set out in the Recommendation.

The Report was mainly based on four sources of information: the information delivered by Member States on the basis of a Commission questionnaire, a study supporting the assessment of the implementation of the Recommendation covering all Member States,[19] a call for evidence to which the Commission received 61 replies, and a study supporting the Fitness Check of EU consumer and marketing law.[20]

12.4.2.1 The Findings of the Report

In Point 2, the Recommendation laid down that the Member States should set up collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation. The Report held that seven Member States enacted reforms of their laws on collective redress after the adoption of the Recommendation, but these reforms did not always follow the principles of the Recommendation. Belgium and Lithuania introduced compensatory collective redress to their legal systems for the very first time, while France and the United Kingdom significantly changed their laws to improve or replace some mechanisms that were available earlier but were not considered by the Commission sufficiently effective. Work on

18 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU). COM(2018) 40 final, 25.01.2018.

19 The study is available: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/access-justice_en#collectiveredress.

20 The study is available: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

proposed new legislation was advancing in the Netherlands and in Slovenia, and there was active discussion on possible future legislation in Germany. It was mentioned in the Report that the majority of projects that led to new legislation or were in the pipeline were restricted to consumer matters and several of them allowed the use of the "opt-out" principle to a considerable extent.

Overall the Commission established that collective redress in the form of injunctive relief existed in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive,[21] but, notwithstanding the obligation under Point 2 of the Recommendation, compensatory collective redress was available in nineteen Member States, but in over half of them it was limited to specific sectors, mainly to consumer claims. On the grounds of the replies to the call for evidence, the Commission concluded that collective redress, where available, was mainly used in the area of consumer protection and related areas.[22] Another area where several cases had been reported was competition law, especially where alleged cartel victims claimed compensation after the decision on an infringement by a competition authority (follow-on actions). The Commission found that the relative absence of recourse to collective redress in other fields was due partly to the fact that in many Member States compensatory or indeed injunctive relief was available only for consumers or in competition law; and partly to the complexity and length of the proceedings or restrictive rules on admissibility, often related to legal standing.

12.4.2.2 The Commission's Plans with regard to the Recommendation

In its Report, having regard to the limited success of the Recommendation, the Commission intended to take further measures, such as

- to further promote the principles set out in the Recommendation across all areas, both in terms of availability of collective redress actions in national legislations and thus of improving access to justice, and in terms of providing the necessary safeguards against abusive litigation;
- to carry out further analysis for some aspects of the Recommendation which are key to preventing abuses and to ensuring safe use of collective redress mechanisms, such as regarding funding of collective actions, in order to get a better picture of the design and practical implementation;
- to follow-up the assessment of the Recommendation in the framework of the forthcoming initiative on a "New Deal for Consumers", as announced in the Commission Work Programme for 2018, with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas.

21 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers (OJ L 110, 1.5.2009, p. 30).

22 For example, passenger rights or financial services.

12.5 Is the Recommendation a Recommendation? – Conclusions

Because of the content of the Recommendation detailed above and its drafting history as well as the Member States' reporting obligation with regard to the Recommendation, one can legitimately ask whether the Recommendation is a recommendation, or it is rather a "directive hidden in the form of a recommendation."

"A 'recommendation' is not binding. (…) A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed"[23] – states the website of the European Union, which is actually a summary of some of the provisions of the TFEU. If we examine these criteria in relation to the Recommendation one by one, we can draw the following conclusions:

Ad non-binding nature: The European legislator uses the indicative (i.e. not the imperative) throughout the Recommendation, but almost every single provision contains the modal auxiliary verb "should", and, in recital (18) and in Point 14, the phrase "should be required" also appears. The use of the indicative tense (but "hidden" imperative) points much more to the binding nature than to the contrary, since the non-binding nature of the Recommendation could have been spelled out by using the conditional tense or a formulation expressing that the compliance with the provisions was only a possibility.

Ad the possibility to communicate positions: As shown by the background of the Recommendation set out above and the direct circumstances of its preparation, the Recommendation was clearly established for the purpose of legislative harmonisation, thus it is rather a secondary law the purpose of which was to give a comprehensive picture of some procedural solutions existing in Member States, quasi laying down the frameworks of legislation to be followed by which the purpose of the Recommendation specified in Point 1 might be achieved to the fullest extent possible. Consequently, although it may have previously happened in several rounds when preparing the Recommendation, the Recommendation itself no longer provides for the possibility of communicating the Member States' positions, but it is undeniable that the Commission's position is reflected in the Recommendation.

Ad proposal for an action strategy: The Recommendation complies fully with this criterion, since the whole Recommendation is, in reality, a set of measures to be taken and introduced by the Member States.

Ad the lack of any kind of legal obligations for the addressee: Having regard to the mandatory rather than "optional" nature of the Recommendation as specified above, by which it provides for a whole range of measures for the Member States, it is not possible to speak of the absolute lack of legal obligations for the Member States addressed.

23 Regulations, Directives and other acts. Source: https://europa.eu/european-union/eu-law/legal-acts_en.

As regards directives, the following short description can be found on the website of the European Union: "A directive is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals."[24] Let us now take a look at the extent to which the main characteristics of directives are met as regards the Recommendation:

Ad setting out of a goal that all EU countries must achieve: The binding nature of the Recommendation has been discussed above, however, it is necessary to refer to the characteristic of directives, relevant in this regard, that they set a deadline for the realization of the goal to be achieved and the failure to comply with such a deadline is investigated and may also be sanctioned in the course of an infringement procedure. According to Point 38 of the Recommendation, the Member States should have implemented the principles set out in the Recommendation in national collective redress systems by 26 July 2015 at the latest: thus, a deadline was set for the implementation, but there is (was) no possibility of initiating an infringement procedure due to the nature of recommendations.

Ad leaving the choice of decision-making methods to the Member States: The Recommendation complies fully with this criterion, since, in Point 2, it lays down that the Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation. Thus, the Recommendation sets out only the scope and direction of legislation, leaving it to the Member States to decide on the actual decision-making process.

In conclusion, the Recommendation does not contain all the features of either the recommendations or the directives, it can be characterised rather as a combination of the features of directives and recommendations. This can certainly be explained by the fact that the initial intention of the European legislator was not the adoption of a recommendation: this is evident from both the long preparatory work of nearly a decade and the documents resulting therefrom, but especially from the secondary law (directives)[25] drawn up in certain areas. Presumably, the original objective, that is, the regulation of the collective enforcement of claims with comprehensive secondary legislation, generated reasonable resistance from the Member States, that is why rules were adopted in certain sub-areas, delaying the comprehensive regulation, or it might even be thought that the European legislator abandoned this objective. However, if we look more closely at the Recommendation and, in particular, the Report from the Commission on the implementation of the Recommendation, it can be concluded that by adopting the Recommendation, the European legislator took a short break prior to achieving its original objective, that is, it has not in any way abandoned it, as underpinned, in particular, by the plans specified at the end of the Report.

24 Regulations, Directives and other acts. Source: https://europa.eu/european-union/eu-law/legal-acts_en.

25 For example, the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

Nowadays, we can learn of more and more cross-border cases from the news in the cases of which consumers, a huge number of EU citizens encounter such an economic activity and damage that causes a significant disadvantage and harm to them. The development of a framework for unified and effective action against these infringements and damage is therefore vital: the Recommendation discussed in this study is an excellent initial step thereof, but it is considered essential to adopt secondary legislation in order to avoid the uncertainties resulting from the regulation through a recommendation as outlined above.