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CLASS ACTIONS

A GLOBAL GUIDE FROM PRACTICAL LAW

General Editor:
Omar Shah, *LATHAM & WATKINS LLP*

THOMSON REUTERS™

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PREFACE

Omar Shah, LATHAM & WATKINS LLP

"..[I]f he is so powerful that he can act like this and yet prevent you individually from obtaining satisfaction from him, you ought all of you, in common and on behalf of all, now that he is in your grasp, to punish him as the common enemy of the State" (*Demosthenes, Speeches, 21.142, translated by A. T. Murray, Harvard University Press; London, William Heinemann Ltd. 1939*).

"...since [the defendant] has not paid the penalty for his crimes individually, you must exact satisfaction now for all of them collectively" (*Lysias "Against Nicomachus", 30.6, translated by S.C. Todd, University of Texas Press, 2000*).

Since at least antiquity, human societies around the world have grappled with the problem of how to achieve redress, in a fair and just process, for conduct that is alleged to have caused injury to more than one person, and thus to that collective and arguably to society as a whole.

Ancient Athenian democracy opted for a system of private enforcement where individual citizens could bring claims in court (generally pleading in person before a jury of 201 to 501 citizens) on behalf of themselves and also of the state. In the absence of any formal system of public enforcement, private enforcement was encouraged by for example allowing successful prosecutors in suits recovering state property to collect a portion of the judgment. As a result, litigation tended to be irregular and unpredictable, driven by private interests rather than any conception of the public interest. Parties with greater financial resources and social clout had strong advantages both in court (better speeches; better delivery; greater social standing before the jury) and afterwards in terms of ability to enforce (the absence of state mechanisms meant that verdicts also had to be privately enforced) (*Adriaan Lanni, Social Norms in the Courts of Ancient Athens, Journal of Legal Analysis, 2009, 691-736, DOI: 10.1093/ jla/1.2.691*).

In grappling with the above problem, other societies have made different political choices to the Ancient Athenians on issues such as:

- The balance between public and private enforcement. Should the state have the monopoly over enforcement in a particular area and if not what should be the proper scope for any system of private enforcement?
- How best to structure a system of private enforcement to achieve the society's goals. Who can sue and for what and on whom is the judgment to be made binding?
- How to encourage private enforcement. Should contingency fees be allowed and/or should the loser pay the costs of the litigation?

As a result of the choices made by different societies around the world to reconcile the different interests of individuals (including corporations both as plaintiffs and defendants), collectives and society as a whole, one can find many collective redress forms in different jurisdictions, some of which are confined to particular fields, while others are of more general application. These include class actions, group actions, test cases, representative actions and derivative actions as well as collective ADR mechanisms including collective

arbitration, mediation or voluntary redress (*see for example, Wrbka, Van Utsel and Siems in "Collective actions, enhancing access to justice and reconciling multilayer interests?", Cambridge University Press 2000, pages 9- 11 who refer to the interests of individuals, collectives and society as a whole as "multilayer interests"*).

As noted by Professor Danov in his preface, the publication of this book comes at a point when important political choices relating to collective redress are being made by national governments forming part of the world's largest trading bloc, the European Union. In the absence of full EU political union and given the diversity of national legal systems and potentially very broad scope of issues that could be affected by collective redress, it did not prove possible to make those explicit political choices in advance and enshrine them in binding EU legislation. The EU's Recommendation on Collective Redress (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)) therefore constitutes non-binding "soft law" designed to move the process of making those choices forward in a consistent direction.

By contrast, given the greater depth of harmonisation and convergence between national laws in the specific area of EU competition law, the EU was able to create binding legislation in the form of the EU Damages Directive (Directive 2014/104/EU) designed to facilitate redress (collective or otherwise) for breaches of competition law across the EU.

Despite their different legislative bases, and as noted in detail in several chapters of this book, both the EU Recommendation and the EU Damages Directive are driving change in the area of collective redress for breaches of competition law in the EU. Indeed it is possible that this change could have significant influence in this area beyond the EU, or in fact be significantly influenced itself by developments in other non-EU jurisdictions. This is because of the increasing globalisation of the public enforcement of competition law particularly in the area of international cartels (through the efforts of for example, the UN, OECD and the International Competition Network of competition law enforcement agencies) which has led to increasing number of cases in which parallel public enforcement actions are then followed by parallel private enforcement actions in different jurisdictions around the world. This linkage in international cartel cases between public and private enforcement and across jurisdictions naturally gives rise to strategic and tactical decisions to be made by claimants and defendants in private enforcement actions to advance/protect their interests as effectively as possible in several jurisdictions at the same time. Some of those decisions result in particular outcomes, for example, regarding the scope of disclosure, that then drive changes to public enforcement in the EU and worldwide. This change in the area of collective redress for breaches of competition law may in turn lead to changes in other substantive areas where consumers seek redress, for example, product liability, securities law or environmental claims.

This book, written in the form of specific national chapters as well as broader thematic chapters of more general application by leading firms in each jurisdiction, sets out how different societies around the world have made their choices in solving key aspects of the problem of collective redress. It should therefore allow parties seeking to bring or defend collective actions and public enforcers to analyse the current position as well as the future dynamic on key aspects of collective redress on a consistent basis across 25 strategically important jurisdictions worldwide.

Putting this book together has truly been a "collective" effort and my thanks to all the chapter authors, the highly professional team at Thomson Reuters and the team here at Latham & Watkins; Simon Bushell, Charles Courtenay, Anuj Ghai, Amanda Wadey, Calum Warren and David Zhou, without whom this would not have been possible.

FOREWORD

Dr Milhail Danov, UNIVERSITY OF LEEDS

The cross-border nature of many business activities nowadays strongly suggests that mass harm may be often caused to numerous injured parties residing (or doing business) in different countries. Even if the injured parties had already decided to sue the wrongdoer, they (and their legal advisers) would need to carefully consider where to bring their class/collective actions. The national procedural rules and the specific rules for bringing class/collective actions are important because there appear to be divergent collective redress regimes, representing the diverse legal cultures across Europe. The need for making jurisdictional comparisons becomes a real issue which lawyers advising multinational companies and injured parties would need to carefully consider in a cross-border context.

The editor and all the contributors should be praised for producing this practitioner-led volume, including national chapters from over 25 jurisdictions. An important feature of the book, edited by Omar Shah, is that all chapters are written by legal practitioners who are well aware of the issues which potential litigants would need to consider when deciding whether and where to sue.

Each national chapter provides responses to a set of concrete questions about:

- The definition of class/collective actions.
- Standing to sue.
- The different procedural rules in place.
- Evidence.
- The procedural timeframe.
- The level of litigation costs and available funding schemes.
- The possibilities to obtain an effective remedy (and/or force a settlement).

The recent legislative developments (for example, Consumer Rights Act 2015; Draft Competition Appeal Tribunal Rules) are factored in as well. Moreover, there is a separate chapter which makes a review of the recent EU legislative initiatives and interventions, specifying the main EU principles endorsed in the area. In their analyses of the jurisdictional rules derived from the Brussels I Regulation (recast), the authors conclude that a level of uncertainty in the area remains, suggesting that a reference to the CJEU may need to be made in an appropriate case.

The book is very topical in the light of the following developments at EU level. First, in June 2013, the European Commission published its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU law. Secondly, in March 2014, the EU Civil Justice Agenda for 2020 specified that national procedural rules should not make it excessively difficult for injured parties to obtain effective remedies for breach of rights derived from EU law in cross-border cases (*paragraph 4.1.ii, COM (2014) 144*). Thirdly, in May 2015, the European Commission opened a procedure for awarding a service contract for "[a]n evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of

the procedural protection of consumers under EU consumer law" (*http://ted.europa.eu/udl?uri=TED:NOTICE:188196-2015:TEXT:EN:HTML&tabId=1*).

Therefore, the need for setting up effectively functioning collective redress mechanisms in Europe is as important as ever.

This work on collective actions, reviewing the various national regimes, is much needed and highly recommended.

OVERVIEW OF APPLICABLE EU LAW PRINCIPLES

Marguerite Sullivan and Rüdiger Lahme, LATHAM & WATKINS LLP

INTRODUCTION

There has been much discussion regarding collective redress mechanisms at the EU level. Various stakeholders have developed different concepts of collective redress, which they have presented to the public through green papers, a white paper, studies, communications, draft directives and a recommendation. However, the European Parliament has so far prevented the adoption of binding EU legislation.

Although non-binding, the legal framework that the EU has proposed is of high practical importance for the national legislation of EU member states. This article traces the developments to establish a legal framework for collective redress and provides an overview of the current state of EU legislation in this field. In particular, this article focuses on:

- The EU initiatives on collective redress mechanisms.
- The existing EU sectoral rules that provide for collective redress mechanisms.
- The European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms (*OJ 2013 L 201/60*) (Collective Redress Recommendation).
- Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Antitrust Damages Directive).

MAIN EU INITIATIVES ON COLLECTIVE REDRESS MECHANISMS

Collective redress is not a new issue in the EU. However, there is currently no comprehensive binding EU legislation regarding collective redress mechanisms. The most comprehensive set of "rules" is the 2013 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms (*OJ 2013 L 201/60*) (Collective Redress Recommendation), which invites member states to introduce collective redress mechanisms by 26 July 2015 (*see below, Collective Redress Recommendation*). Before issuing this recommendation, the European Commission and the European Parliament have, on several occasions, taken initiatives for the development of an EU legal framework on collective redress. Although the Collective Redress Recommendation is a significant step, the development of a comprehensive system has not been completed.

INITIATIVES OF THE DIRECTORATE-GENERAL FOR COMPETITION (DG COMPETITION)

To identify potential obstacles to private enforcement of EU competition rules, the DG Competition commissioned a comparative study on the conditions for antitrust damage claims in the member states (Ashurst Study), which was published in 2004. The Ashurst

Study noted limitations to collective actions in the member states and specifically highlighted the rarity of both:

- Collective actions (that is, single claims brought on behalf of a group of affected persons).
- Representative actions (that is, actions brought by representative organisations, such as consumer organisations).

The study explained that these types of claims were, at the time, pending only in Austria and The Netherlands. It concluded that collective redress was not a viable option for potential private claimants, and that the lack of such an option was a significant obstacle to private damages claims.

To address the conclusion of the Ashurst Study, the DG Competition published suggestions and proposals on collective redress in its Green Paper on damages actions for breach of the EC antitrust rules (*COM(2005) 672*). The Commission asked whether special procedures should be available for bringing collective actions and protecting consumer interests, and if so, how such procedures could be framed. It proposed the following options:

- A cause of action for consumer associations, without depriving individual consumers of the possibility to bring an action (Option 25). The Commission stated that consideration should be given to issues such as:
  - standing (a possible registration or authorisation system);
  - distribution of damages (whether damages are awarded to the association itself or to its members); and
  - quantification of damages. Damages awarded to the association could be calculated on the basis of the illegal gain made by the defendant, whereas damages awarded to the members could be calculated on the basis of the individual damage suffered.
- A special provision for collective action by groups of purchasers other than final consumers (Option 26).

In summary, the DG Competition considered granting consumer associations standing for damages actions (Option 25) and an opt-in collective redress mechanism for intermediaries (Option 26).

On 2 April 2008, the DG Competition published a White Paper on damages actions for breach of the EC antitrust rules (*COM(2008) 165*) in which it further expanded on its collective redress proposals. The European Commission continued to maintain the suggestions made in the green paper (*see above*) to have two complementary mechanisms:

- **Representative actions.** These are brought by qualified entities (such as consumer associations, state bodies or trade associations) on behalf of identified or, in restricted cases, identifiable victims. Such entities are either:
  - officially designated in advance; or
  - certified on an ad hoc basis by a member state for a particular antitrust infringement to bring an action on behalf of some or all of their members.
- **Opt-in collective actions.** These enable victims to expressly decide to combine their individual claims for damages into a single action.

The European Commission emphasised the importance of enabling victims of infringements to pursue individual actions for damages, while preventing overcompensation (double recovery) for the same harm. The Commission elaborated on its proposal in further detail in a Staff Working Paper (*SEC(2008) 404*) issued simultaneously

with the white paper. In its working paper, the Commission focused on certain key issues, including (*recitals 38 et seq*.):

- Funding for the action.
- Definition and representation of the group that collectively pursues claims.
- Distribution of damages.

In June 2009, the Commission proposed a directive on antitrust damages actions for breaches of EU competition law that contained a set of rules to implement the ideas articulated in the white paper (see *Hempel, NZKart 2013, 494, 496*). However, political headwinds from the European Parliament (*see below, Views of the European Parliament*) and the Commission's end of term coincided to prevent the initiative, and the directive was never officially published.

The Commission's efforts to impose collective redress mechanisms as a supplement to individual actions for the enforcement of EU competition rules were ultimately unsuccessful. The Antitrust Damages Directive, signed into law on 26 November 2014, explicitly provides that member states are not required to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). However, to the extent that a member state allows collective actions, the provisions of the Antitrust Damages Directive apply to such actions (for example, regarding disclosure, presumption of harm, pass-through, and so on). See below, *Antitrust Damages Directive*.

INITIATIVES OF THE DIRECTORATE GENERAL FOR HEALTH AND CONSUMER AFFAIRS (DG HEALTH AND CONSUMERS)

In 2008, the DG Health and Consumers began its own initiative with the Green Paper on Consumer Collective Redress (*COM(2008)794 final*). This paper explicitly excluded breaches of competition laws, as these were covered by the initiatives of the DG Competition (*see above, Initiatives of the Directorate-General for Competition (DG Competition)*).

The primary purpose of the paper was to assess the current state of redress mechanisms for consumers in the member states (*recital 4*). It concluded that options for consumer redress in the EU in 2008 were unsatisfactory, and prevented large numbers of consumers who were affected by a single breach of law to obtain redress and compensation (*recital 19*). Only 13 member states (France, Germany, Finland, Sweden, Denmark, Bulgaria, Greece, The Netherlands, Italy, Spain, Portugal, Austria and the UK) had introduced collective redress schemes in their legal systems, some of which were in their infancy.

The DG Health and Consumers proposed several solutions, some of which involved a significant role for the EU, and stated that any one option or a combination of different options could be implemented:

- No immediate action.
- Co-operation between member states to extend national collective redress systems in those member states with such systems to consumers in other member states that lacked them.
- A mix of policy instruments to strengthen consumer redress, including:
  - collective consumer alternative dispute resolution mechanisms;
  - a power for national enforcement authorities to request traders to compensate consumers; and
  - extending small claims to address mass claims.

- Binding or non-binding measures for collective redress judicial proceedings to exist in all member states.

The DG Health and Consumers received more than 100 responses to its green paper. Based on those responses, it issued a follow-up consultation paper in which it addressed the replies and presented an analysis of their impact on the options. In May 2009, the DG held a public hearing. Interested parties, including the European Parliament, criticised the sectoral approach, which focused on consumers' actions, as incoherent and inconsistent. The European Parliament expressed its concern that unco-ordinated EU initiatives in the field of collective redress would result in a fragmentation of national procedural and damages laws, which would weaken, not strengthen, access to justice within the EU. The stakeholders argued in favour of a more inclusive regime, and questioned the need for a regulation in light of collective redress mechanisms that already existed in several member states.

Ultimately, the DG Health and Consumers' initiative suffered the same fate as that of the DG Competition and did not lead to any legislative proposal.

JOINT INITIATIVE OF THE DG COMPETITION, DG HEALTH AND CONSUMERS AND DG JUSTICE

After the individual efforts of the DG Competition and DG Health and Consumers had failed, the "new Commission" launched a concerted initiative. Vice-President Reding (responsible for justice, fundamental rights and citizenship), Vice-President Almunia (responsible for competition) and Commissioner Dalli (responsible for health and consumer policy) underlined in their joint information note of 5 October 2010 (*SEC(2010) 1192*) the need for a coherent European approach to collective redress. The commissioners identified a set of core principles that could form part of a European framework for collective redress:

- Any EU initiative on compensatory collective redress should first and foremost ensure that injured parties can effectively and efficiently exercise their right to seek compensation.
- Parties should have the possibility to pursue a collective consensual resolution of their disputes by either settling among themselves or using an alternative dispute resolution (ADR) mechanism in connection with a collective court case.
- Adequate means of financing should be available to allow citizens and businesses to have access to justice.

The Commissioners expressly stated that they unanimously and firmly opposed introducing US-style class actions in Europe. Because many believe that the US system fosters abusive litigation, the Commissioners made clear that in their view, any European approach to collective redress would have to include procedural safeguards to minimise the risk of abuse. They explained that the following characteristics of the US class action system are incompatible with the European legal tradition as they incentivise claimants' lawyers to engage in abusive litigation:

- Availability of punitive damages.
- Absence of limitations on standing (virtually anybody can bring an action on behalf of an open class of injured parties).
- Availability of contingency fees for attorneys.
- Excessively broad discovery.

The joint information note is available at: *http://kartellblog.de/wordpress/wp-content/uploads/Kommission-2010-information-Towards-European-Collective-Redress*.

In 2011, the European Commission published a public consultation paper (*Towards a Coherent European Approach to Collective Redress* (*SEC(2011)173*)) (*http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf*). The purpose of the consultation was to identify the forms of collective redress that may fit into the EU legal system and the legal frameworks of the member states. The paper raised 34 questions regarding principles and features for EU-style collective redress mechanisms. The Commission received more than 300 replies and held a public hearing in April 2011.

In June 2013, based in part on the public response to the 2011 consultation paper, the Commission published the Collective Redress Recommendation which:

- Encourages member states to implement collective redress systems to allow groups of natural and legal persons to seek injunctive and compensatory relief for infringements of rights granted under EU law.
- Sets out common principles for the member states to follow in designing or modifying their collective redress systems.

See below, *Collective Redress Recommendation*.

VIEWS OF THE EUROPEAN PARLIAMENT

The European Parliament has offered its views on collective redress on several occasions, and has expressed growing scepticism regarding a European collective redress regime.

In its resolution of 25 April 2007 on the DG Competition's Green Paper on Damages actions for breach of the EC antitrust rules (*2006/2207(INI)*), the European Parliament expressed the view that, in the interests of justice and for reasons of economy, speed and consistency, victims should be able to bring collective actions voluntarily, either directly or via dedicated organisations (*recital 21*). The text of the 2007 resolution is available at: *www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0152+0+DOC+XML+V0//EN*.

However, the Parliament's tone changed in its resolution on 26 March 2009 on the DG Competition's White Paper on damages actions for breach of the EC antitrust rules (*2008/2154(INI)*). Although the Parliament was generally receptive to the idea of establishing mechanisms to improve collective redress while avoiding excessive litigation (*recital 4*), it also suggested limitations on such measures. Specifically, the Parliament stated that measures at the Community level should not "lead to arbitrary or unnecessary fragmentation of procedural national laws and that, therefore, careful consideration should be given to whether, and if so to what extent, a horizontal or integrated approach should be chosen to facilitate out-of-court settlements and the prosecution of actions for damages". The Parliament criticised the DG Competition's sectoral approach focused on competition law infringements and insisted on being involved in any legislative initiative in the area of collective redress. It demanded that the European Commission refrain from presenting any collective redress mechanism for victims of breaches of the EC competition rules without allowing Parliament to participate in the adoption of such a mechanism under the co-decision procedure. The Parliament's "hold-notice" was successful. The text of the 2009 resolution is available at: *www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN*.

On 2 February 2012, the Parliament issued its resolution on the European Commission's 2010 Annual Competition Report (*2011/2094(INI)*). In this resolution, the Parliament

welcomed the Commission's legislative initiative on antitrust damages actions that led to the Antitrust Damages Directive (*see below, Antitrust Damages Directive*). However, regarding collective redress, the resolution emphasised that the Commission must ensure that collective redress did not compromise the effectiveness of the competition law leniency system and settlement procedure. Further, the Parliament reiterated that a potential collective redress regime must prevent the development of a US-style class action system that enables frivolous claims and excessive litigation. The Parliament stressed that the following safeguards should be adopted:

- The procedure should require class members to opt in to the proceedings, and should not be an opt-out procedure similar to that in the US. Individual actions should still be allowed.
- Claimants should be compensated for actual damages only, and should not be entitled to seek punitive damages or unjust enrichment.
- The European "loser pays" principle should remain in place.
- Attorneys that assert claims on behalf of representative claimants should not be remunerated through contingency fee arrangements.
- Collective actions should be funded by representative claimants, and not third parties.

In the Parliament's resolution of 2 February 2012 on the 2011 Commission's consultation paper "Towards a Coherent European Approach to Collective Redress" (*2011/2089(INI)*), the Parliament essentially repeated the points mentioned above. It once again expressed its preference for a horizontal framework and reiterated that safeguards must be put in place to avoid unmeritorious claims and misuse of collective redress. The Parliament expressed its doubts concerning third party funding principles and stressed that there "can be no action without financial risk".

The texts of the 2012 resolutions are available at: *www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0031+0+DOC+XML+V0//EN* and *www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN*.

The 2013 European Commission's Collective Redress Recommendation is based on these last two resolutions.

SECTORAL EU LEGISLATION ON COLLECTIVE REDRESS PROCEEDINGS

EU law provides the possibility to protect collective interests through actions of representative bodies in several fields of law (sectors). These quasi-collective redress procedures are outlined below.

CONSUMER LAW

Directive 2009/22/EC on injunctions for the protection of consumers' interests (Injunctions Directive) requires member states to grant qualified entities standing to seek court orders requiring cessation or prohibition of violations of EU consumer measures. In the event of a cross-border infringement, the Injunctions Directive provides that qualified entities from one member state have legal capacity to bring an action before legal or administrative authorities of a member state where the infringement has originated. The Injunctions Directive applies (among others) to infringements related to:

- Consumer credits under Directive 87/102/EEC on consumer credit (Consumer Credit Directive).
- Package travel under Directive 90/314/EEC on package travel, package holidays and package tours (Package Travel Directive).
- Unfair terms in business-to-consumers contracts under Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive).
- Unfair commercial practices under Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive).

COMMERCIAL LAW

Directive 2011/7/EU on combating late payments in commercial transactions (Late Payment Directive) requires member states to provide "adequate and effective means" to prevent the continued use of contractual terms and practices that are grossly unfair regarding interest rates. The directive specifies that "adequate and effective means" encompass the right of organisations that are officially recognised as representing undertakings, or organisations that have a legitimate interest in representing undertakings, to take measures before the national courts to prevent the continued use of unfair contractual terms.

ENVIRONMENTAL LAW

Regulation (EC) 1367/2006 implementing the Aarhus Convention in relation to European bodies and institutions provides criteria for enabling non-governmental entities to make requests at the EU level for an internal review of administrative acts adopted under environmental law

The European Commission's proposal for a directive on access to justice in environmental matters (*COM/2003/0624 Final*), transposing the third pillar of the Aarhus Convention, was not supported by the European Council and was ultimately withdrawn.

DATA PROTECTION LAW

In 2012, the Commission submitted a proposal for a General Data Protection Regulation (*COM(2012)11 final*), which is currently being negotiated at the European Council. The proposal includes a provision that empowers representative bodies to file complaints with supervisory authorities (*Article 73(2)*). However, the proposal does not include collective actions as a mechanism for redress.

COLLECTIVE REDRESS RECOMMENDATION

To date, the Collective Redress Recommendation is the only comprehensive set of EU regulatory proposals on collective redress. However, under Article 288 TFEU, the recommendation is not binding.

The Collective Redress Recommendation invites member states to introduce collective redress mechanisms in accordance with the principles set out in the recommendation by 26 July 2015 (*recital 38*). By 26 July 2017, the European Commission will:

- Assess the member states' implementation of the recommendation based on two years of practical experience.
- Make a determination as to whether it should propose further measures to consolidate and strengthen the horizontal approach on collective redress provided under the recommendation.

The Commission explained these principles in greater detail in a communication that was published in connection with the recommendation (*Towards a European Horizontal Framework for Collective Redress* (*COM(2013) 401/2*)).

Although the recommendation is not legally binding, it is highly significant in practice. The UK has already adopted new rules to implement the recommendation through the Consumer Rights Act 2015, which goes further than the Commission's recommendations.

SCOPE

The Collective Redress Recommendation adopts a horizontal approach to collective redress and applies to any area in which collective claims on the basis of violations of rights granted under EU law are relevant, such as:

- Consumer protection.
- Competition.
- Environmental protection.
- Protection of personal data.
- Financial services.
- Investor protection.

Under the recommendation, two or more natural and legal persons that have suffered harm resulting from the same illegal activity (constituting a "mass harm situation") should have recourse using collective redress mechanisms. The recommendation adopts a restrictive concept of tort, under which violations of rights granted under EU law can only be evoked and collectively enforced if they arise from illegal activities (*paragraphs 3(a) and (b), Collective Redress Recommendation*). The Collective Redress Recommendation does not indicate whether collective redress is available if the harm was caused by legal behaviour (for example, in product liability cases). The Commission's silence on this issue could suggest that it did not intend to extend collective redress procedures to claims other than those that arise from illegal activities. In that sense, it is inconsistent with the Directive 85/374/EEC on liability for defective products (old Product Liability Directive), as amended, which does not distinguish between legal and illegal behaviours, but allows consumers who have been harmed by defective products to pursue claims for compensation.

The Collective Redress Recommendation envisions that collective redress mechanisms will provide for compensatory and injunctive relief. The recommendation defines collective redress as a legal mechanism that provides the possibility to both (*paragraph 3(a)*):

- Bring a representative action to seek injunctive relief, for natural or legal persons, or entities entitled to do so.
- Claim compensation collectively, for a group of natural or legal persons claiming to have been harmed in a mass harm situation (*see above*) or for entities entitled to bring representative actions.

STANDING

The European Commission recommends two types of collective redress mechanisms:

- Group actions brought jointly by natural and legal persons who claim to have suffered harm.
- Representative actions.

Group actions do not pose significant difficulties regarding standing since the parties enforce their own claims. For representative actions, the issue of legal standing must be clarified as representative actions are defined as actions on behalf of third parties, and the continental legal tradition does not generally recognise such actions.

The Collective Redress Recommendation specifies that three types of representative bodies should have standing to bring actions on behalf of a defined group of individuals or legal persons:

- Private representative entities that are duly designated by the member states.
- Representative bodies that are certified on an ad hoc basis for a specific action.
- Designated public authorities.

The minimum requirements to obtain general or ad hoc certification as a designated entity are fairly stringent (*paragraph 4, Collective Redress Recommendation*):

- The entity 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 for purposes of the action.
- 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.

These requirements are stricter than those for a "qualified entity" under the Injunctions Directive (*see above, Sectoral EU legislation on collective redress mechanisms: Consumer law*). The Injunctions Directive allows a qualified entity to bring an action in the interest of consumers for injunctive relief, but does not require the entity to be officially certified. A "qualified entity" is defined as any entity that is duly established under national law and has a legitimate interest in ensuring compliance with the relevant consumer laws (*Article 3, Injunctions Directive*). In this respect, the Collective Redress Recommendation adopts a more restrictive approach. It should be interesting to examine the interplay between member states' implementations of the recommendation and the national laws that have been adopted to implement the Injunctions Directive.

ADMISSIBILITY

The Collective Redress Recommendation provides that courts should verify at the earliest possible stage of litigation whether the conditions for filing a collective action have been met. It also suggests a summary verification of the claim so that the court can dismiss manifestly unfounded cases early in the proceedings (*paragraphs 8 and 9, Collective Redress Recommendation*). Courts should carry out the necessary examinations of their own initiative.

The likely impact of this proposal is difficult to predict; it could be minimal or far reaching depending on how it is interpreted. The need for courts to assess the admissibility of a claim at the earliest stage, and to dismiss claims that are frivolous or "manifestly

unfounded", is not unique to collective redress proceedings. A dismissal of a claim on such grounds does not address the merits of the claim, and leaves open the possibility for a claimant to re-file its action. However, a dismissal based on the merits has preclusive effect and renders the claim unenforceable (*res judicata*). Therefore, dismissals based on the merits require (at least from a continental point of view) a thorough assessment of the legal implications and, if necessary, the taking of evidence. The Collective Redress Recommendation does not specify the factors that courts should consider to make the suggested verification. This is an issue that is likely to generate considerable debate in practice, similar to that in the US, where courts disagreed for years on the extent to which they should consider the merits of a claim in determining whether to certify a class action; a debate that the Supreme Court finally resolved in *Wal-Mart Stores v Dukes 564 US (2011)*. See also *Class/collective actions in the United States: overview*.

FUNDING

The Collective Redress Recommendation provides that member states should allow third party funding for collective claims, including by private parties, provided that there is no conflict of interest between the third party funder and the claimant. This is an interesting development in light of the European Parliament's fundamental opposition to third party funding (*see above, Main EU initiatives on collective redress mechanisms: Views of the European Parliament*).

The Collective Redress Recommendation does not specify, or impose limitations on, the bodies that should be entitled to provide the necessary funds. However, it requires the claimant party to declare the origin of the funds committed to support the collective action at the outset of the proceedings. The court that hears the case should stay the proceedings if either:

- There is a conflict of interest between the third party funder and the claimant.
- The funds are insufficient.

This is intended to ensure that there is an appropriate balance between guaranteeing access to justice and preventing abusive litigation (*paragraphs 14 and 15, Collective Redress Recommendation*).

In addition, to ensure that funding arrangements do not create conflicts of interest, including conflicts that arise from a financial or competitive interest in the outcome of a case, the Collective Redress Recommendation proposes several safeguards that restrict the role of a private third party funder:

- Courts should (*paragraph 16, Collective Redress Recommendation*):
  - prevent the funder from exerting influence over the claimant's procedural decisions, including decisions related to settlements; and
  - prevent a funder that is a competitor of the defendant, or an entity on which the funder is dependent, from providing resources for the action.
- A private funder should not be permitted to request remuneration, or charge interest for funds that it provides, based on the amount of any settlement reached or compensation awarded by the court, unless the funding arrangement has been approved by a public authority (*paragraph 32, Collective Redress Recommendation*).

Finally, the Commission did not consider it necessary to advocate for the use of public funds to support collective actions. The Commission simply suggests that member states should make national legal aid mechanisms available to prevent denial of access to justice (*COM(2013) 401/2*).

LAWYERS' REMUNERATION AND LEGAL COSTS

The Collective Redress Recommendation encourages member states to prohibit contingency fees. This procedural safeguard aims to mitigate the risk of abuse of excessive litigation, which the Commission believes is encouraged by contingency fee arrangements. If a member state allows contingency fees on an exceptional basis, the recommendation provides that the relevant national rules should ensure that due account is taken of the right to full compensation (*paragraphs 29 and 30*). However, the Commission did not mention plain success fees that are, unlike contingency fees, not paid from awarded monies.

As a general rule, and consistent with the European approach to litigation, the Collective Redress Recommendation endorses the "loser pays" principle (that is, the losing party bears the costs of litigation). However, not all costs should be covered and the recommendation suggests limiting the scope of reimbursement to "necessary" legal costs (*paragraph 13*).

OPT-IN FOR COMPENSATORY RELIEF

The Collective Redress Recommendation explicitly advocates for an opt-in mechanism for compensatory collective relief. This requires any person that wishes to participate in a collective action to affirmatively express its consent to be a party. However, the recommendation states that an opt-out system may be acceptable in cases where it can be duly justified. In allowing this exception, the European Commission acknowledges the different legal traditions and collective redress systems across member states (*paragraph 21, Collective Redress Recommendation*).

As a matter of principle, a claimant should be able to both (*paragraphs 22 and 23, Collective Redress Recommendation*):

- Join the group at any time before the judgment is adopted.
- Leave the group any time before the final judgment is adopted, or the case settles, provided that:
  - withdrawal in an individual action would still be possible; and
  - this does not undermine the sound administration of justice.

The recommendation gives considerable leeway to the member states to determine when a withdrawal undermines the "sound administration of justice".

CROSS-BORDER COLLECTIVE REDRESS CASES

To date, collective redress cases are not specifically addressed in:

- Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).
- Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I)
- Regulation EC 864/2007 on the applicable law to non-contractual obligations (Rome II).

Consequently, courts will need to assess jurisdiction in European cross-border collective redress cases under the general rules provided in the Recast Brussels Regulation. This includes assessing the risk of irreconcilable judgments where there are parallel

proceedings before courts in different member states (*Articles 29 et seq, Recast Brussels Regulation*).

In many cases, the provisions of Rome I and Rome II will lead to the application of several national laws, rather than a single set of rules. However, one important exception applies for cartel cases after 11 January 2009 (*Article 32, Rome II*). In cross-border cases, the claimant that sues in the court of the defendant's domicile can choose to base all claims on the law of that court, provided that the market in that member state was among those that were directly and substantially affected by the restriction of competition (*Article 6(3)(b), Rome II*).

In the context of cross-border cases, the Collective Redress Recommendation only addresses the standing of representative entities and recommends that member states should not exclude foreign groups of claimants or representative entities on the basis of national rules regarding admissibility or standing (*paragraph 17*). In particular, the recommendation encourages all member states to grant standing to any entities certified by other member states. This could limit the significance of the strict requirements for certification of designated entities (*see above, Standing*), as a certification by the least demanding member state would be sufficient.

COLLECTIVE ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

The Collective Redress Recommendation endorses out-of-court settlements of collective claims and encourages member states to adopt appropriate mechanisms for collective ADR throughout the proceedings. The recommendation does not provide for mandatory ADR procedures, but rather suggests that these procedures should be voluntary (*paragraph 26*).

If the parties decide to pursue ADR procedures, courts should suspend any applicable limitation periods until such procedures have concluded (*paragraph 27, Collective Redress Recommendation*). The recommendation further provides that the binding effect of a collective settlement is subject to a verification of the court. As part of this verification, the courts should take into consideration the appropriate protection of interests and rights of all parties involved (*paragraph 28, Collective Redress Recommendation*). This mirrors the provision of Directive 2008/52/EC on mediation in civil and commercial matters (Mediation Directive), under which courts must approve the outcome of a mediation procedure unless a member state does not recognise its enforceability, or considers it contrary to national law.

SCOPE OF RECOVERABLE DAMAGE

Under the European approach to civil liability, damages must be fully compensated, but only to the actual extent of the injury suffered by a natural or legal person, regardless of whether the claim has been pursued by means of individual or collective actions.

Punitive damages are viewed as a form of overcompensation, and have been identified as one of the toxic aspects of US-style class actions. For this reason, the Collective Redress Recommendation explicitly excludes punitive damages from collective redress proceedings (*paragraph 31*).

ANTITRUST DAMAGES DIRECTIVE

The Antitrust Damages Directive expressly provides that member states are not required to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.

However, the directive applies to collective damages actions in member states where such redress mechanisms are (or will be) available for violations of competition law. The European Commission is certainly aware of the overlaps between the Antitrust Damages Directive and the Collective Redress Recommendation with regard to collective damages claims, and will be monitoring the impact of the implementation of both instruments. In the communication published with the Collective Redress Recommendation, the Commission explained that the Recommendation and the Directive are a "package" that reflects a balanced approach deliberately chosen by the Commission and that "significant changes to this balanced approach would require the Commission to reconsider its proposal".

This section of the article provides an overview of the aspects of the Antitrust Damages Directive that are likely to be most relevant to collective redress actions.

DISCLOSURE

The Collective Redress Recommendation does not address the extent to which member states should adopt specific procedural rules setting out the types of disclosure that are, or should be, available to claimants in collective actions. Therefore, existing legal instruments or national laws that address disclosure should also apply to collective actions.

Regarding private enforcement of competition law, the Antitrust Damages Directive grants national courts a central role in determining the appropriate disclosure of evidence. The directive states that courts can order a defendant or third party to disclose relevant evidence that is within its control.

However, the court can limit the disclosure to evidence that it considers proportionate in light of the legitimate interests of all parties, including third parties (*Article 5(1), Antitrust Damages Directive*). The power of the courts to order the production of evidence is limited to documents that are not protected under any legal professional privilege. However, confidentiality is not a basis to prevent disclosure. The Antitrust Damages Directive specifies that, in principle, courts must not prevent the disclosure of evidence containing confidential information in damages actions. However, when ordering the disclosure of such information, courts must take appropriate measures to protect it.

The Antitrust Damages Directive sets out separate rules for documents categorised as "black", "grey" or "white", as follows:

- **Black list documents.** These are documents that can never be disclosed and include leniency corporate statements and settlement submissions. The prohibition on disclosure extends to extracts from such documents which appear in otherwise grey or white list documents. However, national courts can access this evidence following a reasoned request by a claimant and exclusively for the purpose of confirming that the documents have been appropriately identified as black-listed.
- **Grey list documents.** These cover the European Commission's requests for information, statements of objections, parties' replies to requests for information and settlement submissions that have been withdrawn. These materials can be disclosed once the

Commission has closed its proceedings (*Article 7, Antitrust Damages Directive*), although the directive does not specify when closing is deemed to occur.

- **White list documents.** These include all documents that do not appear on the grey or black list, such as corporate documents that were created in the ordinary course of business and that existed before an investigation. Such documents can be disclosed at any time. Annexes and other documents that a leniency applicant provided to an authority in support of a leniency application will be subject to the general disclosure rules if they are considered evidence that existed regardless of the authority's proceedings.

The directive also provides for limited disclosure of documents contained in the file of a competition authority. A court can only make an order requiring such disclosure after taking due account of the interests of effective public enforcement and considering whether the evidence can be obtained from the parties or third parties instead.

Additionally, the Antitrust Damages Directive provides that black-listed evidence that a party obtains solely through access to the file of a competition authority is inadmissible in actions for damages.

LIMITATION PERIODS

There is no single set of rules determining the limitation periods for claims related to the violations of rights granted under EU law. If an EU legal instrument creates an individual or collective right but does not define the applicable time limit, national statutes of limitations apply, subject to the EU law principles of effectiveness and equivalence.

However, the Antitrust Damages Directive harmonises national rules on limitation periods in relation to competition law violations. Actions in the EU must be subject to a minimum five-year limitation period (*Article 10, Antitrust Damages Directive*). In the case of a follow-on action, the limitation period is suspended until at least one year after the infringement decision has become final or proceedings have been otherwise terminated.

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