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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)

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1. INTRODUCTION

The Commission has been addressing collective redress issues for almost 20 years, initially in particular in the context of consumer protection and competition policy[1]. On the basis of a broader horizontal approach, the Commission adopted a Recommendation on 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 ('the Recommendation')[2]. The Recommendation established principles which should be applicable in relation to violations of rights granted under Union law across all policy fields and in relation to both injunctive and compensatory relief. It follows from the Recommendation 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 of the Member States and safeguarding against potential abuse. At the same time, in view of the risks associated with collective litigation, the principles set out by the Recommendation also aim to strike an appropriate balance between the goal of ensuring sufficient access to justice and also the need of preventing abuses through appropriate safeguards.

The Commission committed to producing an assessment of the practical implementation of the Recommendation four years after its publication. This report carries out that assessment and focusses on the developments in the legislation of Member States since the adoption of the Recommendation. Furthermore, it scrutinises whether these developments have led to a more widespread and coherent application of the individual principles set out in the Recommendation (section 2). In doing so, the report also examines the practical experience gathered with the rules on collective redress available at the national level, or in the absence of such rules, how effectively situations of mass harm are addressed. Against that background, the report analyses to what extent the implementation of the Recommendation has contributed to achieve its main aims of facilitating access to justice and preventing abusive litigation. Finally, the report contains concluding remarks on whether there is a need for further action concerning collective redress at European Union level (section 3). In that context, the report takes into account the main binding Union instrument touching upon collective redress, the Injunctions Directive[3] requiring that the injunctions procedure for the protection of collective consumers' interests is available in all

[1] Adoption of Directive 98/27/EC on injunctions for the protection of consumers' interests; Green Paper on antitrust actions (COM2005)672; White Paper on antitrust actions (COM(2008)165); Green Paper on consumer collective redress (COM(2008)794).

[2] OJ L 201, 26.7.2013, p. 60–65

[3] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (O.J.E.U. L 110/30 of 1.5.2009) codifying Directive 98/27/EC

Member States, as well as the 2017 Commission Fitness Check of EU consumer and marketing law[4] which evaluated the Injunctions Directive.

The assessment is carried out against the background that four years after the adoption of the Recommendation the risks of cross-border or even EU-wide infringements affecting a multitude of citizens or businesses have further increased, particularly but not exclusively as a result of greater internet use and online shopping. The car emissions case, in which many consumers throughout the EU were affected by the sale of cars with misleading information about the level of emissions, illustrates the challenges in addressing cross-border mass harm situations. These challenges are best demonstrated by the inequalities and differences across the EU leading to a situation in which in some few Member States the affected persons or entities were able to bring their claims to justice jointly whereas in the majority of Member States they were left to insufficient devices or even helpless.

National collective redress mechanisms are used in Member States where they are available. In the Member States where they do not formally exist there appears to be an increasing tendency of claimants attempting to seek collective redress through the use of different legal vehicles like the joinder of cases or the assignment of claims. This may raise issues concerning effective prevention of abusive litigation, since safeguards against abuse that are usually present in collective proceedings, e.g. concerning legal standing or contingency fees, may not apply in relation to such alternative avenues.

This report is mainly based on the following 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[5];

- a call for evidence to which the Commission received 61 replies;

- a study supporting the Fitness Check of EU consumer and marketing law[6]

2. IMPLEMENTATION OF THE PRINCIPLES OF THE RECOMMENDATION

Legislative activities affected by the Recommendation have remained somewhat limited in the Member States. Seven Member States have enacted reforms of their laws on collective redress after its adoption, and, shown in the detailed assessment in this report, these reforms have not always followed the principles of the Recommendation. BE and LT have introduced compensatory collective redress to their legal systems for the very first time. FR and UK have significantly changed their laws to improve or replace some mechanisms that were available earlier but were not considered sufficiently effective. Work on proposed new legislation is advancing in NL and SI, and there is active discussion on possible future legislation in DE. It is worth noting that the majority of projects that have led to new legislation or are in the pipeline are restricted to consumer matters. Moreover, several of them allow the use of the "opt-out"

[4] COM report of the Fitness Check of EU consumer and marketing law, Brussels, 23.5.2017, SWD(2017) 209 final, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[5] To be published soon at http://ec.europa.eu/justice/civil/document/index_en.htm

[6] Available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

principle[7] to a considerable extent. As a result of this limited follow-up to the Recommendation, nine Member States currently still have no compensatory collective redress mechanisms in place.

2.1. Horizontal issues

2.1.1 Availability of collective redress

The Recommendation stresses that all Member States should have collective redress mechanisms at national level, both injunctive and compensatory, available in all cases where rights granted under Union law are, or have been, violated to the detriment of more than one person.[8]

Collective redress in the form of injunctive relief exists in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive[9]. In some Member States collective injunctions are available horizontally (BG, DK, LT, NL, SE) or in other specific areas, mainly competition (HU, LU, ES), environment (FR, HU, PT, SI, ES), employment (HU, ES) or antidiscrimination (HR, FR, ES).

Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK) but in over half of them it is limited to specific sectors, mainly to consumer claims[10]. Other sectors in which compensatory relief is typically available are competition, financial services, labour, environment or anti-discrimination. The differences in scope between the Member States which apply a sectoral approach are substantial: for example in Belgium only consumer claims can be pursued collectively while in France it is possible with regard to consumer, competition, health, discrimination and environmental claims. Only 6 Member States (BG, DK, LT, NL, PT and UK) have taken a horizontal approach in their legislation, allowing for collective compensation proceedings across all areas[11]. In two of them (BG, UK) horizontal mechanisms exist in parallel to sector–specific procedures, which are used more often in practice. In one Member State (AT), despite the lack of legislation on compensatory relief, collective actions are carried out on the basis of the assignment of claims or the joinder of cases. These legal vehicles are also available in other Member States, but the results of the public consultation show that they are used in practice for collective cases only in DE and NL. After adoption of the Recommendation new legislation on compensatory collective redress has been adopted in 4 Member States: in 2 of them (BE, LT) for the first time ever, while in 2 others (FR, UK) important legislative changes have taken place. In SI and NL new bills have been proposed but have not yet been adopted. Except for BE where the legislation concerns only consumer rights, these initiatives have a broad

[7] See point 2.3.1 of this Report

[8] Paragraph 2 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) (OJ L 201 p. 60 of 26.7.2013)

[9] The scope of the Injunctions Directive covers infringements of EU consumer laws as enumerated in its Annex I.

[10] With the exception of DE, where the only specific compensatory collective redress mechanisms does not apply to consumers, but to investors' claims only.

[11] However, in NL collective compensatory relief is currently available only in the form of declaratory judgments, or through special legal vehicles created for the purpose of collecting claims.

scope. All these findings demonstrate that in spite of the Recommendation several Member States have not introduced collective redress mechanisms in their national system. As a result, a great divergence between the Member States persists in terms of the availability and the nature of collective redress mechanisms.

The replies to the call for evidence show that collective redress, where available, is mainly used in the area of consumer protection and related areas such as passenger rights or financial services. Another area where several cases were reported is competition law, especially where alleged cartel victims claim compensation after the decision on an infringement by a competition authority (follow-on actions). The relative absence of recourse to collective redress in other fields is due not only to the fact that in many Member States compensatory or indeed injunctive relief is available only for consumers or in competition law; it also appears to be linked to other factors such as the complexity and length of the proceedings or restrictive rules on admissibility, often related to legal standing. At the same time, in AT, CZ, DE, LU and IE a number of situations were reported, mostly in consumer cases, where no action was taken due to the absence of compensatory relief schemes under national law.

2.1.2 Standing in representative action

The Recommendation calls for the designation of entities that have legal standing to bring representative action where the parties directly affected by an infringement are represented by an organisation which alone has the status of claimant in the proceedings. The Recommendation sets out specific minimum criteria for such designation: the non-profit character of the entity, a direct relation between its objectives and the violated rights and a sufficient capacity to represent multiple claimants acting in their best interest. The Recommendation envisages the possibilities of a general designation entailing a general right of an entity to act or of an ad hoc certification only for a particular case but also refers to the empowerment of public authorities in addition or as an alternative[12].

Rules on standing to bring representative actions are procedural guarantees that benefit both claimants and defendants in collective actions. Standards ensuring the expertise of representative entities and their capacity to deal with complex cases ensure high-quality services for claimants and also protect defendants against frivolous action.

Collective redress in the form of representative action is present in almost all Member States and dominates in environmental and consumer injunctions, its availability in the latter area being required under the Injunctions Directive[13]. Representative collective actions aimed at obtaining compensation are available in BE, BG, DK, EL, FI, FR, LT IT, HU, PL, RO, ES, SE. In 2 Member States (FI and PL) only public authorities are entitled to bring representative actions,

[12] Paragraphs 4 to 7 of the Commission Recommendation

[13] Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of workers (O.J. L 128 p.8 of 30.4.2014) under Article 3(2) requires Member States to ensure that associations, organisations (including social partners) or other entities may represent Union workers in judicial and/or administrative proceedings in order to ensure enforcement of rights.

while in some others non-governmental entities share this competence with public authorities (HU, DK)[14].

All Member States provide for some conditions with regard to the legal standing to act as representative entities both in injunctive and compensatory collective actions. For consumer injunctions, the Injunctions Directive stipulates that the injunction procedure may be commenced by "qualified entities" that are properly constituted according to the national law, which follow the purpose of the protection of collective consumers' interests. The Directive leaves other specific criteria to be possibly complied with by the "qualified entities" to the discretion of Member States. The most common requirements in both compensatory and injunctive action applied by Member States concern the non-profit character of the entity and the relevance of the subject-matter of the case for the aims of the organisation. In line with the minimum nature of the criteria in the Recommendation, some Member States have established additional specific conditions in relation to the expertise, experience and representative nature of the designated entities. For example, in IT consumer associations have to demonstrate 3 years of continuous activity, a minimum number of paying members and presence in 5 different regions. Similar conditions apply in FR where representativeness at national level, one year of existence, evidence of activity in the area of consumer protection as well as a threshold of individual members are required[15]. Some replies lodged to the call for evidence mentioned the national rules on legal standing, in particular in FR and IT, but also to some extent in DK and RO, as a problem affecting access to justice. In the UK, representative compensatory action in consumer matters is mainly carried out by public authorities although it is possible to designate other entities for whom it is "just and reasonable" to act as a representative of the class; currently, one designated non-public body may act in consumer related cases[16]. In DK an association, private institution or other organisation may act as representative where the action falls within the framework of the organisation's objectives.

Overall it can be concluded that the principle is generally complied with, albeit with some variations in different Member States. These variations are of some significance since more stringent rules for representative entities could potentially lead to a limitation of the right to seek collective redress and thereby of access to courts.

2.1.3 Admissibility

The Recommendation urges Member States to ensure that admissibility of the claims is verified at the earliest possible stage of litigation and that cases which do not meet the conditions for collective action and manifestly unfounded cases are not continued[17].

[14] In addition, in DK in private group actions the representative may be appointed from among the class members.

[15] Interestingly, in spite of these demanding conditions 18 organisations are currently registered in Italy and 15 in France. However, only a rather limited number of those entities (6 in FR, 3 in IT during the last 4 years) have actually lodged representative actions.

[16] In addition, in competition cases in the UK a class member can also represent the class which makes this procedure a group action rather than representative action within the meaning of the Recommendation.

[17] Paragraphs 8 and 9 of the Commission Recommendation

The principle on early dismissal of claims that are manifestly unfounded or do not meet admissibility criteria for collective action serves the efficiency of justice and protects against frivolous litigation. The Recommendation does not itself establish specific admissibility criteria, nor does it define the term "manifestly unfounded claim". However, in some Member States the general rules of civil procedure which allow for early dismissal of manifestly unfounded claims are equally applicable in collective actions. Some admissibility criteria could also be deducted from other principles of the Recommendation, e.g. concerning the standing in representative actions. Indeed, for injunctive relief the main admissibility criterion appears to be the standing of the entity. For consumer cases the Injunctions Directive does not require a specific admissibility check or specific criteria apart from those for standing.

More specific criteria, which must be met and are typically examined by the court at an early stage of the proceedings, are laid down in the majority of Member States for compensatory collective redress. Only ES and SE do not have specific rules on admissibility of collective redress, and therefore apply general civil procedural rules. The examination of the admissibility of collective action in some Member States will result in a specific decision on this matter (BE, FR, PL, UK) while in others procedural decisions are issued only if the action is dismissed as inadmissible. Some Member States require justification that collective action is more efficient than individual litigation (BE, DK, FI, IT, LT)[18] while others examine the capacity of a representative entity to protect the interest of the affected persons (FI, IT, NL, RO, UK)[19]. The homogeneous nature (commonality) of the joined individual claims is a condition that applies in all Member States.

The replies to the call for evidence also show the reverse side of the admissibility requirement. While none of the respondents criticised the introduction of this requirement per se, several replies cautioned against the use of this principle as it may make the whole procedure more lengthy and cumbersome, and thereby restrict access to this procedure as a whole. This was highlighted in BE, NL, PL and UK[20].

In general, Member States verify admissibility of claims. They have procedural mechanisms to do so which are established on the basis of general and specific rules in place to dismiss manifestly unfounded collective compensation claims. It is worth noting that recent legislation on collective action enacted in certain Member States subsequent to the Recommendation addresses admissibility in a manner consistent with the Recommendation (BE, LT, SI). On the

[18] For example in Belgium, the court has to take into account inter alia the potential size of the group of affected consumers, the degree of complexity of the action for collective redress, and the implications for efficient consumer protection as well as the smooth functioning of justice.

[19] For example in Italy, apart from the question of the standing of the entity the court has to examine if there is a conflict of interest.

[20] In BE and NL the rules on admissibility were named as being problematic, while the length of that procedure was expressly mentioned for BE and PL. In Demark the rules on admissibility were named as problematic in the context of restrictive rules on legal standing. In PL the requirement that the amounts claimed must be identical at least in several sub-groups may deter potential group members from participating in the action or lead them to reduce their claims to be eligible. Similarly, in the UK the strict interpretation in competition law cases of the requirement that claims should raise the same, similar or related issues of fact or law, as an admissibility requirement, was considered by one respondent to be problematic in the context of gaining access to justice.

other hand, existing divergences in conditions on admissibility may still result in unequal access to justice in compensatory collective actions as overly restrictive rules on admissibility could limit access to this procedure. It should be further noted that, as this is a preliminary phase of the action, expeditious decisions on admissibility are important for the legal certainty of all the parties involved.

2.1.4 Information on collective redress

The Recommendation invites Member States to ensure that the claimant party is able to disseminate information on planned and ongoing collective action. Bearing in mind that information on collective action may have side effects, in particular on the defendant, even before the action is brought to the court, the Recommendation points out that the arrangements for provision of information should be adequate to circumstances of the case and take into account the rights of the parties including the freedom of expression, the right to information and the right to protection of the reputation of the company[21].

Persons who have claims that could be pursued in collective actions should be able to receive information that enables them to make an informed choice on their participation. As advocated by the Recommendation, this is of particular importance in the "opt-in" type of collective redress mechanisms in order to ensure that those who may be interested in joining are not missing their opportunity due to lack of information. In the case of representative action, the provision of information should be not only the right of the representative entity but also its duty[22]. On the other hand, spreading information on (intended) collective action may potentially have an adverse effect on the economic situation of the defendant whose liability has not yet been established. These two interests have to be properly balanced. Although the Recommendation expressly addresses the dissemination of information about the intention to bring collective action, there are no Member States that regulate this issue at the preparatory stage before court action is brought. Once a case is declared admissible by the court, in particular where compensation is claimed, in many Member States (BE, DK, EE, FI, FR, HU, LT, NL, PL SE) courts are entrusted with the determination of modalities of spreading information, including the publication method and the period during which information should be accessible. Member States usually leave substantial discretion to the courts do so, referring in their laws to the circumstances of the case to be taken into account but not mentioning the specific factors laid down in the Recommendation. However, 5 Member States (BG, IT MT, PT, UK) do not regulate provision of information in collective damages actions at all. There is even less regulation on provision of information in relation to injunctive as compared to compensatory action.

[21] Paragraphs 10 to 12 of the Commission Recommendation

[22] As explained in point 3.5 of the 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" (COM/2013/0401 final).

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The call for evidence did not reveal significant problems with the provision of information. Only one situation from IT was reported, where it was cited that the requirement of advertising the case in print media created a significant financial burden for the claimant. In addition, one reply also mentioned the lack of possibility in PL to advertise a collective redress action on the internet as being problematic.
Overall, it has to be concluded that the principle concerning provision of information on collective action is not appropriately reflected in the laws of Member States particularly at the pre-litigation stage and for injunctions.

2.1.5 Loser pays

The party that loses a collective redress action should reimburse necessary legal costs to the winning party, subject to the conditions of the applicable national law[23].

The "loser pays" principle constitutes one of the basic procedural guarantees for both parties of collective actions. On one hand, the risk of the reimbursement of costs to the defendant if the claim is dismissed deters potential claimants from bringing frivolous actions. On the other hand, the fact that a losing defendant will have to cover necessary costs encourages the pursuit of justified collective claims. The Recommendation leaves flexibility to Member States to apply national rules on reimbursement of costs.
All Member States that have collective redress mechanisms, with the exception of LU[24], follow the "loser pays" principle in their civil procedural laws. The overwhelming majority of the Member States apply exactly the same rules to collective actions as they do to individual civil proceedings; where modalities applicable to collective redress exist, they concern mainly an exemption from court fees for representative entities and public authorities in consumer cases (HR, HU, MT, PL, RO)[25]. One Member State (PT) provides for the reimbursement of only 50% of the defendant's costs in case of dismissal of the claim both in group actions and in representative actions, thus limiting the risk for those bringing collective actions.

It can be concluded that Member States largely follow the principle set out in the Recommendation[26]. However, it has to be borne in mind that the rules concerning costs of civil

[23] Paragraph 13 of the Commission Recommendation
[24] In LU the successful party may be awarded a procedural indemnity the amount of which is decided by a judge but this requires a subsequent application to the court and thus additional effort.
[25] Or the absence of fees in consumer injunctive proceedings before administrative authorities (FI, LV). The Injunctions Directive does not regulate the issue of costs related to the injunction procedure. Nevertheless, the financial risk related to injunctions has been identified as the most crucial obstacle to the effective use of injunctions for qualified entities. According to the study supporting the Fitness check the most effective measure would be to include a rule in the Injunctions Directive according to which, in objectively justified cases, qualified entities would not have to pay court or administrative fees.
[26] Several respondents to the call for evidence from BE, NL, RO and FI identified this principle as a potential problem as the potential reimbursement of costs is an important risk factor to be taken into account when introducing a claim. This is more so where no compensatory collective redress is available, such as in CZ, and such claims can be lodged only in individual cases.

procedure and the manner in which they are reimbursed (as well as the amounts of those costs), vary substantially across Member States. Their application may lead to substantial divergences in the actual reimbursement of costs of the winning party in very similar proceedings, depending on the *forum*, e.g. as a result of the definition of the reimbursable costs[27]. Therefore, the aim of preventing abusive litigation through the loser pays principle, in reality, is not equally achieved in all Member States.

2.1.6 Funding of collective actions

The Recommendation proposes a general disclosure rule according to which the claimant party is required to declare the origin of the funds used to support legal action. In addition, the court should be in a position to stay proceedings where there is conflict of interest between the third party providing finance and the claimant, where the third party has insufficient resources to meet its financial commitments or where the claimant has insufficient resources to meet adverse costs in case of the failure of the action. While the Recommendation does not urge the prohibition of private third party financing per se, it should be prohibited to seek to influence procedural decisions, to provide financing for action against a competitor or an affiliate and to charge excessive interest rates. Finally, specifically for cases of compensatory collective redress, it should be prohibited to make the remuneration given to or the interest charged by the fund provider dependant on the amounts recovered, unless such arrangement is regulated by a public authority[28].

The rules in the Recommendation with regard to third party funding aim to ensure that the terms of financing do not create an incentive for abusive litigation or conflicts of interest.
On this point, the Recommendation has not been implemented in any of the Member States. None of them have regulated third party financing, let alone in accordance with the Recommendation. EL and IE generally prohibit third party funding. However, the new pending legislation in SI is the exception to this general situation, as according to that legislation, private third party funding is regulated in accordance with the principles set out in the Recommendation.

This general lack of implementation means that unregulated and uncontrolled third party financing can proliferate without legal constraints, creating potential incentives for litigation in certain Member States. There is evidence that at least in three Member States, namely AT, NL and the UK, private third party financing is available and in two (AT and NL) is resorted to in practice without any regulation (in the UK, general limitations based on common law[2429] apply and some form of self-regulation by the industry was introduced).
The evidence collected in the framework of the public consultation confirms the existence of third party funding: two cases were lodged by alleged cartel victims where third-party financing was used were reported in the UK, while one such case was reported in NL and one in DE.

[27] For example, if lawyers' fees are reimbursed at the level of statutory fees which may be exceeded in practice.
[28] Paragraphs 14 to 16 and 32 of the Commission Recommendation
[29] Under common law, anyone who improperly funds the litigation of another may be found liable for all the (adverse) costs of that litigation if the case is lost.

However, in the latter cases the use of third-party funding was linked to the excessive costs of the collective redress proceedings (in both cases claims were assigned to a special vehicle). In addition, one alleged mass harm situation has been reported in DE where, in pending cases between both consumers and shareholders on one hand and a major automotive company on the other hand, third-party funding has been provided to a considerable extent.

Interviewed practitioners involved in collective actions reported few situations of (at least) potential conflict of interest: e.g. the use of non-distributed damages for re-payment to the fund provider, organisation of the whole action by the fund provider, institutional relations between the law firm representing claimants and the fund provider.

These examples show that private third party financing is increasingly being used in several Member States. In addition, it is clear that this key aspect of collective redress has an important cross-border dimension as funds to initiate litigation can be easily provided across borders. This means that while regulating private third party funding in several Member States would certainly be a step in the right direction in line with the Recommendation, there will always be a possibility for fund providers based in one Member State to avoid stringent national rules by seeking to fund collective actions in another EU Member State, where collective redress mechanisms are available and private third party funding remains unregulated.
It can be concluded that this is one of the points where the Recommendation had almost no impact in the laws of the Member States and where it would be important to analyse how the objectives of this principle could be best achieved in practice.

2.1.7 Cross-border cases

The Recommendation requires Member States to not prevent, through national rules on admissibility or standing, participation of foreign groups of claimants or foreign representative entities in a single collective action before their courts. Designated representative entities should be able to seize the courts with jurisdiction on their claims also in other Member States[30].

Economic activities often spread across borders and may give rise to harm for persons from several Member States resulting from the same or similar activities. Such persons should not be deprived of the advantage of joining forces to enforce their rights. A designated entity in one Member State should be able to bring an action in any other Member State that has jurisdiction to rule on the claim. The Recommendation thus reaffirms the principle of non-discrimination in the context of civil proceedings and advocates the mutual recognition of the status of designated entities.

There are no Member States that have general obstacles to the participation of any natural or legal person from other Member States in group actions before their courts. Participation in a group of claimants is not restricted to those domiciled or established in the Member State in which collective action is undertaken.

[30] Paragraphs 17 and 18 of the Commission Recommendation

The call for evidence revealed that the car emissions case, in which many consumers throughout the EU were affected by the sale of cars with misleading information about the level of emissions, triggered the introduction of collective redress proceedings in four different Member States. These pending cases can lead to different results depending on the Member State where judgments will be rendered. This situation could incentivise forum shopping, where, in a case of a clear cross-border nature, potential claimants will address their claim where the possibility for success seems higher. In addition, other risks were identified, such as the risk of double compensation or, indeed, of conflicting decisions[31].

With regard to the recognition of the representative entities designated in other Member States the situation is more divergent. There are no Member States that provide expressly for the general recognition of representative entities designated by other Member States. The only exception concerns the Injunctions Directive which requires Member States to ensure that qualified entities may apply for injunctions to the courts or administrative authorities in other Member States where the interests protected by that qualified entity are affected by an infringement originating in that Member State[32]. In all other cases, representative entities must meet national conditions of standing, which may be impossible for foreign designated entities, such as the recognition by a specific national public authority (e.g. BE) or the presence and activity on the territory of the Member State concerned (e.g. FR, BG). Therefore, the Recommendation regarding recognition is not followed by the Member States in relation to compensatory collective action and injunctive collective action outside the scope of Injunctions Directive.

2.2 Injunctions

2.2.1 Expediency of injunction proceedings

The Recommendation advocates that claims for injunctive orders should be treated expediently, if appropriate through summary proceedings, in order to prevent any further harm[33].

All Member States provide in their civil procedural laws for a possibility of requesting an order that would compel a defendant to refrain from illegal practices. The possibility of claiming an injunction through collective action exists in all Member States within the scope of Injunctions Directive, i.e. for the infringements of EU consumer law as listed in Annex I to the Directive, as

[31] Finally, two respondents from AT expressed concern that the protective consumer jurisdiction rule of the Brussels I Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1) do not apply to representative entities.

[32] See Article 4 of the Injunctions Directive establishing a system for notification of qualified entities to be included in a list published by the European Commission in the Official Journal of the European Union. However, according to the Fitness Check report qualified entities almost never seek injunctions in other Member States, in particular due to the related costs and because in most cases they can seek injunctions in their jurisdiction also for the infringements with cross-border implications.

[33] Paragraph 19 of the Commission Recommendation

transposed into national legal orders, which harm collective consumer interests. Some Member States provide for collective injunctions in other specified fields.[34]

As regards the length of the injunction procedure, under the Injunction Directive collective injunction actions in the consumer area must be processed '*with all due expediency, where appropriate by way of summary procedure*'[35]. Irrespective of the area of law in question, all Member States provide for a possibility to apply for provisional measures under their general civil procedural rules. Such applications are by definition dealt with rather quickly as their very purpose is to prevent the occurrence of further potentially irreversible damage until a decision on the merits is issued. In the consumer cases the Fitness Check reveals that there is a clear need for making injunctions more effective and the length of the procedure is reported as an issue. However, the practical effectiveness of that tool may be compromised where collective injunction procedures are not available.

2.2.2 Effective enforcement of injunctions

The Recommendation urges Member States to ensure effective enforcement of injunctive orders through appropriate sanctions, including a fine for each day of non-compliance[36].

The enforcement of injunctions is generally carried out through the same measures irrespective of whether the injunctive order was issued in individual or collective proceedings.

The Injunctions Directive requires specific enforcement measures for non-compliance with the injunctions order in consumer matters in the form of payments of a fixed amount for each day of non-compliance or any other amounts to the public purse or other beneficiaries, but only '*in so far as the legal system of the Member State concerned so permits*'[37]. All Member States have such penalties for non-compliance in place, including those in which non-judicial authorities are competent for injunctions. However, according to the Study supporting the Fitness Check it is doubtful in some cases whether the penalties are sufficiently deterrent in nature to discourage continued infringements[38].

As a complementary enforcement method, the Injunctions Directive creates a possibility to order the publication of injunctions orders and corrective statements, albeit only '*where appropriate'.* Such measures can be a very effective remedy in terms of informing consumers of the infringement and as a deterrent to traders who fear damage to their reputation. Information of the general public has been complemented in some Member States by more targeted information of affected consumers so that they can consider follow-on action for damages.

[34] See point 2.1.1 of this Report

[35] Article 2(1)(a).

[36] Paragraph 20 of the Commission Recommendation

[37] Article 2(1)(c).

[38] In addition in some Member States these sanctions are not determined in the injunction order and require additional legal action. Against that background the Fitness Check study recommends clear legal rules at EU level on sanctions for non-compliance with the injunctions order

Outside the scope of the Injunctions Directive, fines are available in all Member States to prompt the losing defendant to quickly implement an injunctions order[39]. In addition, in some Member States (CY, IE, LT, MT, UK) disobedience of a court order is a criminal offence.

2.3 Compensation

2.3.1 Opt-in

The Recommendation urges Member States to introduce in their national collective redress schemes the principle of "opt-in", whereby the natural or legal persons joining the action should do so based on their express consent only. They should be able to join or withdraw from the action until judgment is given or the case is settled. Exceptions to this principle are admissible but should be justified by reasons of sound administration of justice[40].

The background to the adoption of this principle is the need to avoid abusive litigation, where parties are involved in litigation without their expressed consent. The application of the opposite principle, the so-called "opt-out", where parties belonging to a certain class/group automatically take part in the litigation/out of court settlement unless they expressively withdraw, could be considered as problematic in certain circumstances, in particular in cross-border cases. This has to do with the fact that parties domiciled in other countries may not know about ongoing litigation and thus may find themselves in a situation where they participate in a pending case without their knowledge. On the other hand, the "opt-out" principle could be considered a more effective approach and may be justified where the protection of collective interests appears necessary but the explicit consent of affected persons is difficult to obtain, e.g. in domestic consumer cases with low individual damages not incentivising the exercise of an "opt-in" but with high accumulated damages[41].

There is a diverse application of this principle in the Member States where compensatory collective redress mechanisms are available. There are 13 Member States (AT, FI, FR, DE, EL, HU, IT, LT, MT, PL, RO, ES, SE) that exclusively apply the "opt-in" principle in their national collective redress schemes. There are 4 Member States (BE, BG, DK, UK) that apply both the "opt-in" and the "opt-out" principle, depending on the type of action or the specifics of the case, while 2 Member States (NL and PT) apply only the "opt-out" principle.

[39] Except for one respondent from RO who emphasised that the fine imposed by the National Consumer Authority for non-compliance with a judgment is extremely low and has no deterring effect, no special issues with this principle were reported in the call for evidence.

[40] Paragraphs 21 to 24 of the Commission Recommendation

[41] Three replies to the call for evidence expressed support for an "opt-out" system, for instance in specific situations **where it is difficult to identify the persons affected such as where alleged human rights violations are committed in** third countries, in particular related to working conditions, and action can be taken against defendants with a seat in a Member State. However, one respondent from the UK had doubts about the effectiveness of the "opt-out" system, as experience shows that it involves high costs and administrative burden in order to identify the individuals that fall within a certain class. Finally, a respondent from NL expressed support for a system that would differentiate between an "opt-in" for collective court action and "opt-out" for collective settlement, while a respondent from BE specifically favoured the "opt-in" system.

Among the Member States who have adopted or amended their legislation after the adoption of the Recommendation, LT and FR have introduced opt-in systems, while BE and the UK have in the newly introduced schemes (e.g. competition cases in the UK) a hybrid system of either opt-in or opt-out, left at the discretion of the court.

In BE the application of either of these principles is assessed on a case-by-case basis with the aim to see how best to protect the interests of the consumers. However, where the claimants are foreign the Belgian system prescribes the "opt-in" principle. The same trend can be seen in the new UK system in competition law cases where the "opt-out" order made by the court will preclude further litigation only for claimants domiciled in the UK.

The new legislative proposal pending in NL continues the status-quo and applies the "opt-out" principle. The proposal in SI introduces the "opt-in" principle, with "opt-out" being made available as an exception where reasons of sound administration of justice justifies it (e.g. low value of the individual claims).

It can be concluded that while the vast majority of Member States apply the opt-in principle in all or in specific types of collective redress actions, the Recommendation has had a limited effect on the laws of the Member States. At the same time, the new legislation in BE and the UK shows that even where the opt-out principle is applied there appears to be the perception of a need to distinguish between purely domestic and cross-border cases and to rely more on the "opt-in" principle in cross-border contexts.

2.3.2 Collective out-of-court dispute resolution

The Recommendation urges Member States to encourage parties to settle their disputes consensually or out-of-court, before or during the litigation and to make collective out-of-court dispute resolution mechanisms available alongside or as a voluntary element of judicial collective redress. Limitation periods applicable to the claims should be suspended during the alternative dispute resolution procedure. The binding outcome of a collective settlement should be controlled by a court[42].

Collective out-of-court dispute resolution schemes should take into account 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[43] but should also be specifically tailored for collective actions[44].

Introducing such schemes in collective redress mechanisms is an efficient way of dealing with mass harm situations, with potential positive effects on the length of the proceedings and on the costs for parties and judicial systems.

[42] Paragraphs 25 to 28 of the Commission Recommendation

[43] OJ L 136, 24.5.2008, p. 3

[44] Recital 27 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC clarifies that that Directive does not regulate collective ADR in the consumer area but is without prejudice to Member States maintaining or introducing such ADR procedures.

Among the 19 Member States that have compensatory relief schemes, 11 have introduced specific provisions on collective out-of-court dispute resolution mechanisms (BE, BG, DK, FR, DE, IT, LT, NL, PL, PT, UK). This list includes the three Member States that have adopted new legislation after the adoption of the Recommendation (BE, FR and LT) as well as the UK which introduced a specific provision on out-of-court dispute resolution in the competition mechanism. In its legislative proposal, SI is largely following the Recommendation. The remaining 8 Member States that have collective redress schemes apply general provisions on out-of-court dispute resolution to such situations, for instance as implemented in the national legislation pursuant to Directive 2008/52/EC.

While the availability of ADR schemes under national law is positive per se, provisions designed for collective actions could better take into account certain specificities of such collective actions. For instance, the Recommendation provides that the use of collective out-of-court dispute resolution should depend on the express consent of the parties involved whereas in relation to individual claims it may be mandatory[45]. In addition, an important element to ensure that the rights of the parties involved are protected is the subsequent control of settlements by courts.

The call for evidence revealed an important trend in relation to collective out-of-court dispute resolution, namely the conclusion of cases consensually through direct settlement negotiation, without the involvement of a third party[46].

It can be thus concluded that, while all the Member States that recently changed, introduced or are about to introduce new legislation have largely followed the Recommendation, access to collective out-of-court dispute resolution schemes adjusted to the specific context of collective redress is not granted in a significant number of Member States.

2.3.3 Lawyers' fees

The Recommendation provides that the lawyers' remuneration and the method of calculation should not create unnecessary incentives to litigation that is not in the interest of any of the parties. In particular, contingency fees, which risk creating such incentives, should be prohibited; where they are exceptionally allowed they should be appropriately regulated in collective redress cases taking into account the right to full compensation of the members of the claimant party[47].

[45] Point 26 of the Recommendation in comparison with Article 1 of Directive 2013/11/EU which stipulates that that Directive is without prejudice to national legislation making participation in ADR procedures mandatory, provided that such legislation does not prevent parties from exercising their right of access to the judicial system.

[46] For instance several replies mention the NL experience with legislation on collective settlements reviewed by courts (WCAM), where direct settlement negotiations and court proceedings are pending in parallel. One reply mentions that out of the ten consumer collective redress cases lodged in FR since the introduction of legislation in October 2014, two were settled (with the subsequent validation by a court). A similar experience was mentioned in SE, FI and BE, where a court validated recently an agreement reached in a consumer case related to passenger rights.

[47] Paragraphs 29 and 30 of the Commission Recommendation

Generally speaking lawyers' fees are not regulated in Member States depending on the types of cases, such as specifically for collective redress actions.

There are 9 Member States (BG, CY, CZ, DE, EL, PL, SI, ES, UK) that allow for some form of contingency fee, with the amount to be paid to the lawyer ranging from 15% under SI draft legislation to 50% of the value of the award in the UK. In all these Member States, except for the UK, there appear to be specific provisions on the operation of such remuneration in collective redress actions. A notable exception to this rule is found in the UK's competition scheme, where contingency fee agreements are not available in opt-out competition court proceedings. In addition, the legislative proposal in SI specifically reiterates the availability of contingency fees in collective redress cases.

It should be noted that not all forms of contingency fees can be regarded as encouraging litigation against the interest of the parties involved. For instance, in DE contingency fees are allowed only in exceptional circumstances where the alleged victim lacks financial means and can only pursue his claim with a contingency fee arrangement. At the same time, a contingency fee of up to 50% of the award as in the UK or up to 33% in ES appears more likely to incentivise unnecessary litigation.

Other Member States allow for performance fees, either in the form of a success fee, or, on the contrary, a reduction in the remuneration in case certain goals are not achieved (AT, BE, FR, IT, LT, LU, PL, SE). The main difference between the two types of remuneration is that in the case of performance fees, the lawyer gets paid even if he loses the case but will be paid more, the so-called success fee, if he wins whereas in the case of contingency fees the lawyer does not get paid at all unless he wins the case. While performance fees are not an incentive to unnecessary litigation per se and neither does the Recommendation call for their prohibition, they can, in certain circumstances, produce similar effects. They could encourage unnecessary claims for unrealistic amounts particularly where they are calculated as a percentage of the award. On the other hand, a flat rate performance fee appears less likely to create an incentive for aggressive litigation practices.

In the framework of the call for evidence two respondents from NL and FI mentioned lawyers' fees as problematic - not necessarily where based on contingency fee, but as a factor which contributes to the high costs of collective redress proceedings, especially when taken together with the loser pays principle. In addition, a respondent from the UK submitted the example of a case where the national court held that the collective claim, which was driven by a law firm working on contingency fee, was an abuse of process. The same respondent highlighted the potential high revenue for lawyers or for third-part funders as a problem in particular in "opt-out" systems, where it is difficult to provide compensation to the harmed individuals because of the high costs involved to determine whether such individuals fall within a certain class.

It can be concluded that the Recommendation has had a very limited impact on the system of lawyers' fees in the Member States. However the Member States that have adopted new legislation following the adoption of the Recommendation have not introduced contingency fees except SI which provides for such fees in the pending legislative proposal on collective redress. The system of lawyers' fees seems embedded in the national procedural law traditions of the Member States and there is no evidence that any change was contemplated to such systems to address the specific concerns of collective redress actions.

2.3.4 Punitive damages

The Recommendation calls for a prohibition of punitive damages as well as of other awards exceeding the compensation that would have been obtained in individual litigation[48].

The concept of overcompensation by punitive damages is generally alien to the majority of the Member States' legal systems. The call for evidence did not reveal any case where punitive damages were requested or granted in collective redress actions. This means that there was no need for special rules to apply in collective redress actions.

Only three Member States admit some form of punitive damages, albeit in a very limited form. EL for example applies some form of damages akin to punitive damages in the form of monetary compensation for moral damages in representative consumer claims. In IE the recovery of punitive damages is generally rare[49] and is usually limited to public policy grounds. Finally, in the UK (England and Wales) punitive damages are available in very rare circumstances where the defendant must have known he was acting unlawfully and continued with his conduct in the expectation that his gain would exceed any compensation which could be awarded to the victims of his conduct. However, punitive damages are not available in the competition mechanism, introduced by the 2014 Antitrust Damages Directive[50] after the adoption of the Recommendation.

It can be concluded that the majority of Member States do not award punitive damages in mass harm situations as a result of the general approach taken on the basis of a long standing principle in the Member States' civil law systems.

2.3.5 Follow-on actions

The Recommendation urges Member State to include in their legislation a rule based on which if proceedings before a public authority are pending, private action should only start after the conclusion of those proceedings. If such proceedings started after the private action, the court where the latter action is pending should be able to stay proceedings to await a final decision of the public authority. The expiration of limitation or prescription periods before the public authority issues a final decision should not prevent parties from seeking compensation in private action[51].

[48] Paragraph 31 of the Commission Recommendation

[49] Due to the absence of a compensatory collective redress system punitive damages have not been of relevance in this area.

[50] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1

[51] Paragraphs 33 and 34 of the Commission Recommendation

For reasons of procedural economy and legal certainty, compensatory relief action can be more efficient if introduced after the completion of the procedure before a public authority, be it a court or an administrative body such as a competition authority. However, awaiting such a decision should not have the result of depriving potential claimants of their right of access to court, for instance because of the expiry of limitation or prescription periods.

Rules under binding Union law in that respect only exist in the area of competition. Under the Antitrust Damages Directive a finding of an infringement in a final decision of a national competition authority or by a review court is deemed to be irrefutably established in domestic follow-on actions for damages and at least prima facie evidence in follow-on action in other Member States. The Directive also provides for the suspension of limitation periods. It applies to collective actions where they exist, but it does not require Member States to introduce collective actions in their national legal systems.

In regards to consumer law, the Injunctions Directive does not regulate the issue of the follow-on actions. In most Member States the injunction order only has an *inter partes* effect (between the parties). According to the Fitness Check Study, this poses problems for the effectiveness of the procedure since individual consumers who bring claims for damages based on an infringement that gave rise to an injunction have to prove the infringement anew. This in turn increases their litigation risk as well as costs for them and for the court system at large. Therefore, the Study indicates that it should be possible to rely on injunction orders in follow-on actions for compensation both of individual and (where available) collective nature and that prescription periods for follow-on damages actions should be suspended until the final injunctions decision.

In DK, BE and IT it is possible to rely on an injunctions decision in a follow-on collective action in consumer law cases. Collective horizontal actions can be initiated in BG. In NL follow-on actions are possible not as a matter of law but rather of practice

The call for evidence shows that follow-on actions are resorted to mostly in competition law cases, where compensatory relief actions follow a decision of a public authority on an infringement of competition law. Such cases were reported from NL, FI and UK. One interesting consumer case in the area of financial services was reported from FI, where subsequent to the administrative and the court decisions on an infringement, successful direct negotiations were engaged between the consumer association and the defendant.

It can be therefore concluded on this point that the Recommendation is implemented in the laws of the Member States only to a very limited extent. While collective follow-on actions are available in a number of Member States, there is no evidence that[52] the principles of the Recommendation have been followed with regard to the priority to be given to the decision of the public authority and to limitation periods. Therefore, such follow-on actions can have an impact on the right of access to courts of the claimants due to the fact that no specific rules on limitation or prescription period were enacted, contrary to what is suggested in the Recommendation.

2.3.6 Registry of collective actions

[52] Outside the scope of Directive 2014/104/EU inasmuch as Member States allow collective follow-on in the area of competition law.

The Recommendation invites the establishment of national registries of collective redress actions, also disseminating information on the available methods of obtaining compensation, including out of courts methods. Coherence between the information gathered in different national registries and their interoperability should also be ensured[53].

This principle was introduced in the Recommendation in particular due to the fact that only where information is available on pending litigation can the "opt-in" principle be implemented and thus parties can decide whether to join in pending litigation or not. This need is even more pressing in cross-border situations where national methods of dissemination of information are not always directed to a foreign public.

This principle is by and large not followed in the collective redress schemes of the Member States. Only the UK has a national registry for group litigation orders and one for competition actions. SI intends to introduce such a registry in its new legislation on collective redress. It can be thus concluded on this point that the Recommendation had almost no impact on the laws of the Member States.

3 CONCLUSIONS AND NEXT STEPS

As expressed in the Recommendation, appropriately designed and balanced collective redress mechanism contribute to the effective protection and enforcement of rights granted under Union law, since "traditional" remedies are not sufficiently efficient in all situations.

Without a clear, fair, transparent and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often prone to potential abuse negatively affecting both parties to the dispute.

In many instances affected persons who are unable to join forces in order to seek a redress collectively will abandon their justified claims at all, due to excessive burdens of individual proceedings.

The Recommendation created a benchmark comprising the principles of a European model of collective redress. This happened in a situation in which many of its elements were present in the legal systems of a large part of the Member States while in other, albeit smaller group of Member States the very concept of collective redress was not known. Therefore the impact of the Recommendation should be seen and considered in two dimensions: first as a point of reference in discussions on facilitation of access to justice and prevention of abusive litigation, and second as a concrete incentive to adopt legislation complying with these principles in Member States.

With regard to the first dimension, the Recommendation has made a valuable contribution in terms of inspiring discussions across the EU. It also provides a basis for further reflection on how some principles such as those concerning the constitution of the claimant party or financing of litigation may best be implemented to guarantee the overall balance between the access to justice and prevention of abuses.

[53] Paragraphs 35 to 37 of the Commission Recommendation

As far as the transition into legislation is concerned, the analysis of the legislative developments in Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation. The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU. The impact of the Recommendation is visible in the two Member States where new legislation was adopted after its adoption (BE and LT) as well as in SI where new legislation is pending, and to a certain extent in the Member States that changed their legislation after 2013 (FR and UK).

This limited follow-up means that the potential of the principles of the Recommendation in facilitating access to justice for the benefit of the functioning of the single market is still far from being fully exploited. There are 9 Member States that do still not provide for any possibility to collectively claim compensation in mass harm situations as defined by the Recommendation. Furthermore, in some Member States that formally provide for such possibility, in practice affected persons do not use it due to the rigid conditions set out in national legislation, the lengthy nature of procedures or perceived excessive costs in relation to the expected benefits of such actions. The call for evidence has also demonstrated that in some cases collective judicial action can be usefully avoided because of successful out-of-court settlements, sometimes as follow-on to an administrative action. This highlights the importance of effective out-of-court disputes resolution mechanisms in line with the Recommendation.

Whilst the Recommendation has a horizontal dimension given the different areas in which mass harm may occur, the concrete cases reported, including the car emissions case, clearly demonstrate that the areas of the EU law relevant for collective interests of consumers are those in which collective redress is most often made available, in which actions are most often brought and in which the absence of collective remedies is of biggest practical relevance. It is in those same areas that binding EU rules on the injunctive dimension of collective redress exist and have proven their value. The Injunctions Directive regulates representative action initiated by qualified entities in particular in the form of non-profit organisations or public authorities in relation to which concerns regarding abusive litigation driven by profit interests of third-party funders appear to be unfounded.

This picture is confirmed by the results of the call for evidence. While consumer organisations make a strong case for EU-wide intervention in this field, business organisations generally focus their concerns in relation to EU action on the consumer area and refer to proportionality or subsidiarity concerns, urging the Commission to concentrate on public enforcement or on redress via ADR/ODR or the small claims procedure.

Against that background, the Commission intends

- to further promote the principles set out in the 2013 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 better a picture of the design and practical implementation;

- to follow-up this assessment of the 2013 Recommendation in the framework of the forthcoming initiative on a "New Deal for Consumers", as announced in the Commission Work Programme for 2018[54], with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas**.**

[54] COM(2017)650 final