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SPECIAL ISSUE

FOCUS: Recommendation on collective redress (PART II)

Three documents, one purpose

As mentioned in our [first issue](#) the European Commission has published on June 11, 2013 three documents aimed at fostering private claims based on antitrust infringements.

Our second special issue focuses on the European Commission Recommendation on the introduction of injunctive and compensatory collective redress mechanisms in Member States concerning violations of rights granted under Union Law.

The context

The European Recommendation on collective redress establishes that all Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief.

The collective mechanisms should also be inspired to common features and principles (set by the same Recommendation) like fair, equitable, timely and not prohibitively expensive procedures.

In recent time the introduction of a legislation on collective redress has become a priority by EU institution.

The European Commission launched a highly debated public consultation in 2011 followed by the resolution of the European Parliament [“Towards a coherent European approach to collective redress”](#) asking for a horizontal framework for collective redress. This resolution followed studies about the real implementation of collective redress mechanisms in Europe.

The European Parliament has also given its views on collective redress on several occasions: [The Resolution of 2 February 2012 on the coherent European approach to collective redress](#), states the Parliament's preference for a horizontal framework, including a common set of principles, should the Commission propose EU action for collective redress. The resolution also acknowledged the existence and importance of competition-specific issues which, according to the resolution, could be addressed either in a separate chapter of a horizontal instrument or in a separate legal instrument.

In this context, the European Parliament's Economic Committee has commissioned (to LEAR, Paolo Buccirossi and Michele Carpagnano) an [independent study on legislative action in the area of collective redress in the field of antitrust](#).

The content of the Recommendation

The Recommendation defines “collective redress” (not to be confused with a “class action”) as one single procedure to obtain injunctive or compensatory relief for many single claims related to the same case.

The recommendation has an horizontal scope (i.e not specific to a certain sector like antitrust infringements) open to violations of rights granted under Union Law and in particular to those mass claims of consumers and SMEs in financial services, environment protection, consumer law issues and antitrust harm.

The document is made up by seven chapters; below are highlighted the notable:

I. Purpose

According to the Recommendation, access to justice for victims of mass infringements should be facilitated.

Member States should have national mechanisms collective redress procedures respecting the common principles established by the recommendation such as fairness, equitability and ensuring an economical process for all parties.

II. Definitions

The Recommendation contains several definitions. The most remarkable is the definition of collective redress: **Collective redress for injunctive and compensation relief** *is defined as a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entitled entity or a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation.*

III. Common principles

Standing: Representative actions can be brought by representative entities based on certain requirements: non-profit making character, direct relationship between main objectives of the entity and the rights that have been violated, sufficient capacity (financial and human resources).

These entities will be officially designated in advance. *Ad hoc* entities can also be certified for specific actions. If the entities do not longer fulfil the mentioned requirements the Member states will block their status.

This type of standing rule is already in place in certain jurisdictions. However it should also be clarified if these entities could also act in other European jurisdictions different from their Member state.

Public Authorities should also be authorised to bring representative actions.

Admissibility: Verification of collective actions should be provided at the earliest possible stage of litigation in order to dismiss manifestly unfounded cases as soon as possible.

Information on collective redress actions: Groups of claimants or their representative entities will have the possibility to disseminate information about the claimed violation. The particular circumstances of the mass harm, and also the reputation of the company value of a defendant before the responsibility is established should also be taken into account. Of course, general principles as freedom of expression and information, insider trade rules should also be respected by the dissemination mechanism.

Economic aspects: Loser pay principle, funding and lawyers' fees: The Recommendation reminds that the losing party should carry the costs of the process. Although this rule seems to be appropriate in order to avoid abuses an escape rule for special circumstances such as foreseen in several European jurisdictions would be welcomed.

With respect to **third party funding**, the Recommendation establishes strict safeguards: The origins of the funds to support the legal action should be declared to the court. The proceedings should stay in cases where there is a conflict of interest between a third party that is providing financial support and the claimants. The third party should also be able to proof sufficient resources.

The financing third party will not be able to influence procedural decisions including settlements. Financing of claims against competitors or against depending companies shall also be prohibited. Excessive interest on the funds provided should also be forbidden. In this respect the recommendation also prohibits to base the remuneration of funding parties on the amount of the compensation obtained unless public authorities controls this type of arrangements.

Furthermore, Member States should ensure that any litigation incentives for lawyers are mitigated. Contingency fees that could risk such incentives will not be allowed.

Finally the recommendation expressly prohibits punitive damages when they lead to overcompensation.

The aim of this controlled funding system is to avoid potential abuses and the industrialisation of collective claims. Although certain control mechanisms should be welcome, national procedural codes and professional codes already contain safeguards against potential abuses. Third party funding is in many cases the only

alternative to start a claim in particular with respect to mass harm cases with small individual claims.

IV. Injunctive orders

Collective injunctive orders should be treated with all due expediency in order to prevent any or further harms. Sanctions that ensure effective compliance with the injunctive order should also be established by Member States.

V. Compensatory collective redress

Opt-in: The Recommendation chooses for opt-in system requesting the express consent of the persons claiming to be harmed. Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

The members of the claiming party should always have the right to leave the group before the final judgement or before the settlement is reached. Injured victims will also have the possibility to join the claim any time before the judgement is given or settled, but respecting the sound administration of justice.

ADR and settlements: Alternative dispute resolution mechanisms and settlements should be promoted depending on the consent of the parties. Limitation periods would be suspended during the settlement negotiations until one or both parties withdraw from the settlement. The legality of the settlements will be watched and reviewed by national courts.

Collective follow on actions: The recommendation expressly encourages collective follow on claims in antitrust cases although it does not expressly refer to decision of Antitrust Authorities but to public authorities. Despite this express promotion, the recommendation also protects public enforcement, since it submits collective actions to the conclusion of the public proceedings.

General rules: Collective redress actions should be registered on national level. This registry should be available to any interested party.

Next steps: After the adoption of the recommendation Member States have 2 years to implement it; the Commission will then evaluate possible legislative measures within 4 years after the publication of the Recommendation.

Our view

The Commissions' Recommendation opts for a low profile approach that could create serious legal uncertainty (and even a step back) in several European jurisdictions that already adopted collective redress mechanisms.

The recommended system lacks of clear economic incentives to plaintiff to bring collective actions in Court and, after all, does not seem to be able to create a

European alternative way to US style mass litigation.

Gian Antonio Benacchio, Director

Michele Carpagnano, Director

Julia Suderow, Senior Fellow

In order to re-open the debate on this important issue, the Osservatorio Antitrust welcomes brief opinions from legal experts and business community members.

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THINK**

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**c/o FACOLTA' DI GIURISPRUDENZA
VIA G. VERDI, 53
38122 TRENTO**

**info@osservatorioantitrust.eu
Twitter: @OssARC**

WWW.OSSERVATORIOANTITRUST.EU