

Collective redress in the EU: a rainbow behind the clouds?

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Abstract In early 2018, the tortuous process towards the establishment of a framework for collective redress at the EU level reached new milestones. In January, the European Commission published its long-awaited report assessing the practical implementation of the 2013 Recommendation. As many had predicted, the Recommendation has failed to secure a consistent and coherent framework for collective redress in the EU and national legal landscapes remain highly fragmented. In April, the Commission presented new measures supporting collective redress for consumers in the context of its ‘New deal for consumers’. In particular, a new draft Directive intends to maximise the potential of injunctions orders to facilitate redress in mass harm situations. The question is now whether the proposed instrument is likely to successfully put an end to the collective redress conundrum and to provide an effective tool for resolving mass claims in the EU.

Keywords Collective redress · New deal for consumers · Mass harm situations · Collective settlement · Representative action

In early 2018, the tortuous process towards the establishment of a framework for collective redress at the EU level reached new milestones. In January, the European Commission published its long-awaited report on the practical implementation of the 2013 Recommendation on common principles for injunctive and compensatory

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collective redress mechanisms (hereinafter, the ‘evaluation report’).¹ As many had predicted, the Recommendation has failed to secure a consistent and coherent framework for collective redress in the EU and national legal landscapes remain highly fragmented. Nine Member States still do not provide for any compensatory collective redress mechanism. In the Member States where collective redress mechanisms are available, they tend to vary greatly and are not sufficiently effective. In the meantime, mass harm situations have multiplied. The cars’ emissions scandal (‘Dieselgate’) in 2015 or Ryanair’s massive flights cancellation in September 2017 are among many examples of mass damage affecting hundreds of individuals across the EU. In this context, the Commission seemed caught between a rock and a hard place. On the one hand, the issue of collective redress continues to be sensitive across the EU and still divides Member States. A regulation setting down a horizontal compensatory collective redress mechanism with detailed procedural rules was unrealistic. This would be perceived as disproportionate and as going against the legal traditions of Member States. On the other hand, the Commission was urged to take actions as the ever-increasing digitalisation and globalisation of good and services in various economic sectors have multiplied the risks of mass harm while tools for compensating consumers in such situations are often still lacking. It appears for example that European consumers affected by the Dieselgate scandal received lower compensation than US consumers and were compensated less quickly.² In April 2017, the European Parliament called for ‘a legislative proposal for the establishment of a collective redress mechanism in order to create a harmonised system for EU consumers, thus eliminating the current situation in which consumers lack protection in most Member States’.³ In October 2017, thirty-eight Members of the European Parliament and the European Consumer Association (BEUC) wrote to President Juncker and Justice Commissioner Jourová asking for measures to compensate individuals involved in mass harm situations.⁴

In April 2018, the Commission finally presented a legislative package entitled ‘a New deal for consumers’ with new measures supporting collective redress for consumers. Among other things, the legislative proposal includes a draft Directive modernising the framework for injunctions orders and introducing a new instrument enhancing redress for consumers in mass harm situations. The question is now whether the proposed instrument is likely to successfully put an end to the collective redress conundrum and to provide an effective tool for resolving mass claims in the EU.

¹ *EU Commission*, Report 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, COM(2018) 40 final, 25 January 2018, available at www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49502.

² *Euractiv*, ‘EU clear path for collective law suits’, 11 April 2018, available at: www.euractiv.com/section/eu-priorities-2020/news/eu-clears-path-for-collective-law-suits/.

³ *EU Parliament*, Recommendation following the inquiry into emission measurements in the automotive sector, P8-TA (2017)0100, 4 April 2017, para. 59, available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0100+0+DOC+XML+V0//EN.

⁴ *European Consumer Association*, Letter sent to President Juncker and Commissioner Jourová ‘Time for the European Commission to legislate on Collective Redress’, 10 October 2017, available at www.beuc.eu/publications/beuc-x-2017-107_time_for_the_european_commission_to_legislate_on_collective_redress.pdf.

This article reviews the failure of the 2013 Recommendation (Sect. 1) and discusses follow-up EU initiatives in the context of the New deal for consumers. Ultimately, it appears that the new instrument contains some interesting evolutions that are likely to improve consumers' access to justice, but it also fails to fully address some key issues that could contribute to an effective resolution of mass claims (Sect. 2).

1 The predictable failure of the 2013 Recommendation

It is essential to keep in mind the highly complex policy process that led to the 2013 Recommendation. This document was first and foremost a political one, shaped by pressure and intensive lobbying from the industry,⁵ disagreements between Member States, and compromises within the European Commission. From the very beginning, the Recommendation met with fairly limited enthusiasm (Sect. 1.1). At the time of its assessment, many of these early criticisms had indeed materialised (Sect. 1.2).

1.1 2013: early criticisms and missed opportunities

In 2011, after years of patchy initiatives within the Commission that resulted in several studies and policy papers,⁶ President Barroso asked his Commissioners in charge of Competition, Consumer Affairs and Justice to address the issue of collective redress jointly and coherently. In a collaboration note of 2010, the three Commissioners announced the launch of a public consultation on a 'European approach to collective redress in order to identify which forms of collective redress could fit into the EU legal system and into the legal orders of Member States.'⁷ The consultation took place in 2011 and met with a considerable response. The Commission received 310 replies from stakeholders and organised public hearings attended by 300 individuals.⁸ In 2012, the European Parliament decided to take part in the debate and adopted a resolution based on a report conducted on its own initiative. It urged the Commission to adopt a horizontal approach to collective redress, 'specifically but not exclusively dealing with the infringement of consumer' rights' so as to avoid further fragmentation and uncoordinated EU actions.⁹

In 2013, the process resulted in a package of three documents: a Communication in which the Commission explained its philosophy and approach to collective

⁵Gross [5].

⁶Among others: *EU Commission*, Green paper on consumer collective redress, COM(2008)794 Final, 27 November 2008; White paper on damages actions for breach of the EC antitrust rules, SEC(2008)405, 2 April 2008; *Civic Consulting & Oxford Economics*, Study on the effectiveness and efficiency of collective mechanisms in the European Union, SANCO/2007/B4/004, 2007.

⁷*EU Commission*, Joint information note 'Towards a Coherent European Approach to Collective redress: next steps', SEC(2010)1192, 5 October 2010, available at: ec.europa.eu/competition/antitrust/actionsdamages/Commission_2010_information_towards_european_collective_redress.pdf.

⁸*EU Commission*, 'Towards a European Horizontal Framework for Collective Redress', COM (2013) 401 Final, 11 June 2013 (hereafter, '2013 Communication on collective redress'), at p. 5 and 6.

⁹*EU Parliament*, Towards a coherent European approach to collective redress, 2 February 2012, para. 15, available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0012+0+DOC+XML+V0/EN.

redress,¹⁰ a Recommendation listing eleven non-binding criteria that should guide Member States when designing their respective national legislations on collective redress,¹¹ and a draft Directive on damages for breach of EU Competition law.¹² Regarded as ‘a light at the end of the tunnel’¹³ or as ‘an important step for the future of EU collective redress’,¹⁴ the Recommendation pursued several objectives. First, taking into account existing divergences across Member States, it did not seek harmonisation but intended to promote general principles bringing some coherence and consistency between national collective redress mechanisms. Second, navigating competing political considerations, it aimed to promote a balanced framework ensuring both effective access to justice for individuals involved in mass harm situations while establishing sufficient safeguards to avoid abusive litigation. It is commonplace to say that the Commission viewed the US class action experience and its ‘toxic cocktail’¹⁵ as a counter-model for the EU. Conversely, it aimed at encouraging a European approach to collective redress taking into account the different legal traditions of the Member States. Third and finally, the Recommendation intended to serve as a starting point for discussions in Member States with the intent to trigger some law-making.

Soon after its publication, the Recommendation faced limited enthusiasm among stakeholders. The European Consumer Association for instance regretted the Commission’s ‘baby steps’ and considered that it ‘ha[d] dragged its feet on this burning issue’.¹⁶ Businesses also reacted negatively,¹⁷ even though some viewed the use of a non-binding instrument as ‘a least bad approach to collective redress’.¹⁸ More worryingly, observers enumerated several shortcomings likely to undermine the overall coherence of the European initiative. First, inconsistent approaches across Member States were likely to subsist due to the absence of a binding instrument. The Recommendation indeed provided Member States with guidance on collective redress but did not require them to take actions. The latter remained free to introduce such mechanisms in their legislations but also free to decide whether the mechanism had to be available horizontally or only in specific sectors. Hence, as some anticipated, ‘whether and what steps are taken remains a matter for the Member States and, as

¹⁰2013 Communication on collective redress.

¹¹*EU Commission*, Recommendation 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, 11 June 2013 (hereafter, ‘2013 Recommendation on collective redress’).

¹²Directive 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.

¹³*Voet* [16].

¹⁴*Kramer* [8], p. 236.

¹⁵*EU Commission*, Green Paper on Consumer Collective Redress—Questions and Answers, MEMO/08/741, 27 November 2008; see also: 2013 Communication on collective redress at p. 8.

¹⁶*European Consumer Association*, ‘EU takes baby step towards collective consumer court actions’, PR2013/10, June 2013, available at: www.beuc.eu/publications/2013-00408-01-e.pdf.

¹⁷*UEAPME*, ‘SMEs say no to collective redress, but react positively on antitrust damage proposal’, 12 June 2013, available at: www.ueapme.com/IMG/pdf/130612_pr_Collective_redress.pdf.

¹⁸*Eurochambres*, ‘Last bad approach on collective redress’, 11 June 2013, available at www.eurochambres.eu/objects/1/Files/EUROCHAMBRES_PR-Approach_collective_redress.pdf.

such, may produce the situation where little reform has taken place by 2017'.¹⁹ Back in 2013, the Commission knew that a binding proposal would have faced considerable political resistance and probably been barred by the Council and the Member States. Given the short period of time left before the end of the Barroso II Commission, a non-binding proposal appeared as the only realistic—albeit unsatisfactory—option.²⁰ Second, heterogeneity across national collective redress mechanisms was also likely to persist due to the flexibility of the principles laid down in the Recommendation.²¹ The definition of a coherent and consistent framework appeared indeed plagued by several exemptions allowing Member States to ultimately depart from the Recommendation. For example, the Recommendation supported the use of the opt in system, but also admitted exceptions and the use of opt out when justified 'by reasons of sound administration of justice', which was rather a fuzzy exception leaving Member States free to follow alternative approaches.²² Furthermore, even though Member States were recommended to not permit contingency fees, the Recommendation still admitted their use, if regulated. Finally, as some scholars observed in 2014, 'what is claimed to be a solid statement of safeguards turns out on closer inspections to be a flaky, permeable and porous wall, with little stability'²³ and the Recommendation ultimately appeared as 'a disappointing turnaround establishing a feeble and emasculated scheme'.²⁴ In parallel, the document was also criticised for its lack of clarity and guidance on several key issues. It was for instance inconclusive on the application of private international rules to cross border cases and did not provide sufficient clarifications on issues relating to international jurisdiction, recognition and enforcement, which are yet cornerstone for the resolution of cross border cases. In 2013, many stakeholders had requested additional clarifications on the application of jurisdictional rules. However, views differed too widely on the matter and no agreement could be found. Consequently, the Commission took the view that existing rules laid down in the Brussels I Regulation²⁵ (now Brussels I *bis* Regulation)²⁶ 'should be fully exploited',²⁷ even though Brussels I had obviously not been tailored to address mass claims. Uncertainties thus remained regarding its application in such peculiar circumstances.²⁸

Member States were given until June 2015 to implement the principles laid down in the Recommendation. Yet follow-up studies quickly showed that many of the anticipated concerns had materialised. In particular, a joint research project conducted

¹⁹ Sorabji [13], p. 67, Tzakas [15].

²⁰ Stadler [14].

²¹ Benöhr [2].

²² Silvestri [12], p. 53.

²³ Hodges [6], p. 79, Hodges [7].

²⁴ Nagy [10], p. 532.

²⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

²⁶ Regulation EU No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

²⁷ 2013 Communication on collective redress, p. 13.

²⁸ Kramer [8], p. 247.

by the Universities of Leuven and Oxford in 2016 that built on national reports and case studies pointed out that ‘almost without exception, class action mechanisms take time, involve cost (which can act as a significant barrier to claimants and those who wish to initiate an action), reduce sums paid to the claimants through funders’ costs, and deliver limited outcomes’.²⁹ It further pointed out that ‘each national system is tailored to domestic needs, often uninfluenced by the Commission’s blueprint, and the overview is of piecemeal development which is uncontrolled’.³⁰ In this context, the evaluation report, which was expected for the end of 2017, left little room for optimism.

1.2 2017: evaluation time

The Commission committed to review the practical implementation of its Recommendation four years after its publication and to assess whether further legislative measures were necessary to consolidate the horizontal approach. Postponed several times, the report was finally published in January 2018. One important question regards the benchmark against which the Recommendation had to be assessed. The criteria set out by the Commission were ‘the impact on access to justice, the right to obtain compensation, the need to prevent abusive litigation, the impact on the functioning of the single market, the economy of the EU and consumer trust’.³¹ The evaluation report was based on several sources of information, including responses of Member States to a questionnaire sent by the Commission, replies of stakeholders to a ‘call for evidence’ that took place between April and August 2017,³² and a very extensive and detailed study conducted by a consortium of external consultants analysing collective redress mechanisms in all Member States.³³ It also built on the findings of the 2017 Fitness Check of EU consumer and marketing law as regards the use of injunction procedures in the EU.³⁴ Strikingly, the number of responses (61) to the call for evidence appeared quite small compared the number of responses collected during the 2013 public consultation. In addition—and unsurprisingly for such a controversial matter—contributions from stakeholders turned out to be highly polarised. The European Consumer Association for instance highlighted that ‘it is clear that the Recommendation did not produce necessary results for access to justice and compensation in mass harm situations in Europe. Huge gaps continue to exist

²⁹Voet/Hodges [20], p. 3.

³⁰Voet/Hodges [20], p. 7.

³¹2013 Recommendation on collective redress, para. 41.

³²EU Commission, ‘Call for evidence on the operation of collective redress arrangements in the Member States of the European Union’, 22 May 2017, available at www.ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539.

³³‘State of collective redress in the EU in the context of the implementation of the Commission Recommendation’, JUST/2016/JCOO/FW/CIVI/0099, study prepared by the British Institute of International and Comparative Law, Civic Consulting and RPA, November 2017 (available at: www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=50236).

³⁴EU Commission, Fitness check of consumer and marketing law and of the evaluation of the Consumer Rights Directive, SWD(2017)209 Final, 23 May 2017, www.ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 (hereafter, ‘2017 Fitness check’).

(...)'.³⁵ Representing the US Chamber of Commerce, the Institute for Legal Reform argued that 'there are a number of very powerful indicator that all of the same incentives and forces that have led to mass abuses in other jurisdictions are also gathering force in the EU' and added that 'there are already worrying signs that some Member States are allowing relatively unsafeguarded mechanism to develop'.³⁶

The report noted the persistent diversity of collective redress mechanisms across the EU.³⁷ Nine Member States have no compensatory collective redress. Seven of them have enacted reforms, which have not always complied with the principles laid down in the Recommendation. Where they are available, national collective redress mechanisms differ significantly with regard to their scope (some Member States have collective redress mechanisms available horizontally, while others rely on sector-specific mechanisms), standing (most of the time, representative entities such as associations have standing, but some Member States have also imposed some stringent rules requiring representative entities to demonstrate sufficient expertise or experience), or use of the opt in system (thirteen Member States exclusively apply the opt-in principle, four apply both opt in and opt out depending on the type of actions and specificities of the case, and two exclusively rely on the opt out).³⁸ As several scholars highlighted, these disparities can be explained by the weight of national political realities, domestic policy-making and divergent legal traditions, which ultimately have profoundly influenced the shape and design of collective redress mechanisms across the EU.³⁹ Finally, the effectiveness of collective redress mechanisms, where they exist, seemed quite limited as 'in practice affected persons do not use them 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'.⁴⁰

In parallel, the Commission also noted several growing concerns. One of them notably regards the funding of collective actions and the increasing role played by third-party funding, which is an emerging phenomenon in Europe⁴¹ with potential long-lasting implications for collective litigation. The Recommendation did not prohibit third-party funding but recommended some forms of regulation to avoid conflicts of interest, excessive interest rates or economic incentives potentially leading to abusive litigation. Yet, as the Commission observed 'this is one of the points where the Recommendation had almost no impact in the laws of the Member States (...). This general lack of implementation means that unregulated and uncontrolled third-

³⁵ *European Consumer Association*, 'European Collective Redress—What is the EU waiting for?', July 2017, available at www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf.

³⁶ *Institute for Legal Reform*, 'The Growth of Collective Redress in the EU—A Survey of Developments in 10 Member States', March. 2017, available at: www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf.

³⁷ Evaluation report, p. 3.

³⁸ Evaluation report, p. 13.

³⁹ *Mulheron* [9], *Voet* [17], *Voet* [18].

⁴⁰ Evaluation report, p. 20. For a national illustration, see for instance *Biard* [3].

⁴¹ For example, third party litigation funding is still in its infancy and debated in France. See (inter alia): *Ancelin/De Causans* [1].

party financing can proliferate without legal constraints, creating potential incentives for litigation in certain Member States'.⁴²

Since the Recommendation did not touch upon the question of jurisdictional rules for cross-border mass cases, the evaluation report was also silent on this topic unfortunately. However, it pointed out several issues directly connected to the application of jurisdictional rules, such as the introduction of different collective redress proceedings in four different Member States in the context of the Dieselgate with inherent risks that 'these pending cases [may] lead to different results depending on the Member States where judgements will be rendered', risks of forum shopping or double compensation. After the Recommendation,⁴³ the evaluation report is therefore another missed opportunity to start discussions on the application of private international rules to cross border cases. Coincidentally, on the very same date of the publication of the evaluation report, the Court of Justice of the European Union (CJEU) handed down a decision in which it had the possibility to bring some clarity on the application of private international law rules in cross border mass cases.⁴⁴ One of the questions referred to the Court dealt with international jurisdiction rules for disputes concerning consumer contracts where claims have been assigned. Yet the Court dismissed an attempt to bring a class action on behalf of 25,000 consumers before Austrian courts. As the Advocate General pointed out, 'Regulation No 44/2001 does not provide specific provisions on the assignment of claims or procedures for collective redress. This (presumed or real) lacuna has long been debated by the legal scholarship, which has expressed the view that the regulation is an insufficient basis for cross-border EU collective actions. The application of the consumer forum in cases of collective action is the object of heated debate'.⁴⁵

At the end of the journey, the Recommendation has certainly been a useful brainstorming exercise and, as the Commission highlighted, constituted a starting point for discussions across the EU 'on how some principles (...) may best be implemented to guarantee the overall balance between the access to justice and prevention of abuses'.⁴⁶ Although important, these achievements seem however quite limited compared to initial expectations, which, back in 2013, targeted the development of a coherent and consistent framework for collective redress in the EU.

2 The New deal for consumers and the revival of collective redress

The European Commission announced several actions to follow up on its evaluation report. Consumer protection was a field where measures could be expected. As the evaluation report highlights, 'whilst the Recommendation has a horizontal

⁴²Evaluation report, p. 5.

⁴³Stadler [14], Kramer [8].

⁴⁴Case C-498/16 *Schrems v Facebook Ireland Ltd*, EU:C:2018:37.

⁴⁵Opinion of Advocate General Bobek in Case C-498/16 *Schrems v Facebook Ireland Ltd*, 14 November 2016, EU:C:2017:863, para. 121.

⁴⁶Evaluation report, p. 19.

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'.⁴⁷ The 'New deal for consumers' package presented on 11 April 2018 intends to introduce a new instrument supporting collective redress for consumers in the context of a revision of the 2009 Injunctions Directive (Sect. 2.1). It now remains to be seen whether the new proposed instrument will be an effective tool for resolving mass claims (Sect. 2.2).

2.1 The New deal for consumers: a new instrument for collective redress

On 13 September 2017, in the aftermath of the Dieselgate scandal, Commission President Juncker announced a 'New deal for consumers' to promote fairer and more efficient rules for consumers. Back then, the new package was presented as an attempt for 'stepping up the enforcement of EU law in a holistic way and securing more effective consumer redress in mass harm situations'.⁴⁸ The package was officially published on 11 April 2018.⁴⁹ It builds on the findings of the Fitness Check of EU Consumer and Marketing law of May 2017, the evaluation of the 2011 Consumer Rights Directive,⁵⁰ and the report on collective redress of January 2018. It also takes into account the revision of the Consumer Protection Cooperation (CPC) Regulation of December 2017,⁵¹ and the Directive on consumer Alternative Dispute Resolution (ADR).⁵² The package includes a Communication from the Commission detailing its action plan⁵³ and two legislative instruments. A new proposal for a Directive on representative actions for the protection of collective interests of consumers aims to facilitate redress for consumers in mass harm situations.⁵⁴ Its inception Impact Assessment was opened for public consultation between October and November 2017

⁴⁷Evaluation report, p. 20.

⁴⁸EU Commission, New deal for Consumers—Inception Impact assessment, September 2017, available at www.ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969_en (hereafter, 'Inception Impact Assessment').

⁴⁹EU Commission, Work Programme 2017, at p. 7 available at www.ec.europa.eu/info/sites/info/files/cwp_2018_en.pdf.

⁵⁰2017 Fitness check.

⁵¹EU Regulation 2017/2394 of the European Parliament and of the Council of 27 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation No 2006/2004 [2017] OJ L 345/1 ('CPC Regulation').

⁵²Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ L 165/63.

⁵³Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM (2018) 183/3, April 2018.

⁵⁴Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184/3.

and received twenty-four replies.⁵⁵ In parallel, a proposal for a Directive as regards better enforcement and modernisation of EU consumer protection rules intends to introduce several targeted amendments to substantive consumer rules laid down in four different directives⁵⁶ that were considered by the Commission as ‘overall still fit for purpose (...) including in the digital and online markets’.⁵⁷

The 2017 Fitness Check identified several shortcomings in the Injunctions Directive,⁵⁸ namely the length and costs of the procedure, its limited enforcement and the absence of compensatory effects for consumers.⁵⁹ The objective of the draft Directive is thus twofold: it strengthens the framework for injunction procedures and includes an instrument for compensating consumers in mass harm situations. Under the new proposed rules, non-profit qualified entities, such as consumer associations or independent public bodies, can bring representative actions to seek measures that include ‘an injunction order as an interim measure, an injunction order establishing an infringement and measures aimed at the elimination of the continuing effects of the infringements, including redress orders’. Those entities will be allowed to seek the above measures within a single representative action’.⁶⁰ Member States will be free to decide whether the procedure will be a judicial or administrative one, or both. In order to better understand the functioning of the proposed instrument, it might be useful to consider the way the European Commission initially sketched it in its inception impact assessment:

*‘(...) a single procedure (“one stop shop”) in which qualified entities could simultaneously ask the courts and/or administrative authority to stop the breach and ensure redress for the victims. In such scenario, the court/administrative authority would be able to issue, next to the injunction order, a direct redress order or to invite the infringing trader and the qualified entity to enter into out-of-court redress negotiations (...). If the negotiations lead to an amicable settlement, the court/administrative authority would check the fairness of the settlement and approve it in order for it to become enforceable. However, if the negotiations were unsuccessful, that court/administrative authority would continue the proceeding in view of providing consumer redress according to rules defined by Member States’.*⁶¹

⁵⁵Inception Impact Assessment (received feedbacks are available at www.ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969/feedback_en).

⁵⁶Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM (2018) 185/3.

⁵⁷2017 Fitness check, p. 76.

⁵⁸Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests.

⁵⁹2017 Fitness check, p. 102.

⁶⁰Explanatory Memorandum accompanying a Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018)184/3, p. 14.

⁶¹Inception Impact Assessment, p. 4.

2.2 An effective instrument for the resolution of mass claims? Some preliminary remarks

The publication of the New deal for consumers package triggered many diverse reactions. From the consumers' side, the new instrument was overall well-received and perceived as an improvement, although several problems continue to exist. The European Consumer Association for instance views it as 'only a first step but not a fully-fledged collective redress scheme across the EU'. In particular, it feared that 'Member States will be given too much discretion to decide which cases are fit for a collective redress procedure and which are not'.⁶² Conversely, business representatives were much more critical and vehemently rejected the proposed mechanism⁶³ described as 'an example of needless overshooting',⁶⁴ as 'unbalanced in favour of consumers' and 'missing the necessary safeguards'.⁶⁵ The Director of EDiMA, the trade organisation representing the interests of large internet companies such as Google, Ebay, Facebook or Amazon argued that the proposal 'lack[s] robust procedural guarantees that prevent opportunist litigation and meritless claims similar to the US experience with class action'.⁶⁶ The European Commission has insisted on the fact that the 'EU representative actions will be different from the US style class action'. As stated upfront in Article 1, the Directive seeks to preserve the collective interests of consumers while ensuring appropriate safeguards to avoid abusive litigation. Only qualified independent entities, such as consumer organisations or independent public bodies, complying with strict criteria will be able to initiate the actions. As Commissioner Jourova said during the official presentation of the new package, 'representative actions in the European way will bring more fairness to consumers, not more business for law firms'.⁶⁷ Those qualified entities will be subject to transparency requirements with an obligation to disclose the origins of the funds used for their activities in general and the funds used to support the action in particular.⁶⁸ As a follow-up on the observations made in the evaluation report of January, the draft Directive also includes rules enhancing transparency on third-party funding. An important question though

⁶²BEUC, "New deal for consumers"—clear improvement but not the needed quantum leap', 11 April 2018 (available at: <http://www.beuc.eu/publications/%E2%80%98new-deal-consumers%E2%80%99-clear-improvement-not-needed-quantum-leap/html>).

⁶³VN, 'Neuer EU-Deal für Konsumenten in der Kritik', 12 April 2018 (available at: www.vn.at/markt/2018/04/11/neuer-eu-deal-fuer-konsumenten-in-der-kritik.vn); MEDEF, 'Nouvelles de Bruxelles', 11 April 2018 (available at: www.medef.com/fr/actualites/nouvelles-de-bruxelles-49).

⁶⁴Eurochambres, 'The New deal for consumers or how to open the door for abuses: an example of needless overshooting', 11 April 2018 (available at www.eurochambres.eu/content/default.asp?PageID=1&DocID=7850).

⁶⁵UEAPME, 'New deal for consumers: missed chance for SME-friendly law', 11 April 2018 (available at: ueapme.com/IMG/pdf/180411_-_pr_New_Deal_for_Consumers.pdf).

⁶⁶EDiMA, 'EDiMA's reaction to the Commission's New deal for consumers', 11 April 2018 (available at: www.edima-eu.org/news/edimas-reaction-to-the-commissions-new-deal-for-consumers/).

⁶⁷Euractiv, 'EU clear path for collective law suits', 11 April 2018 (available at: www.euractiv.com/section/eu-priorities-2020/news/eu-clears-path-for-collective-law-suits/).

⁶⁸Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018)184/3, Art. 7.

regards the connection existing between the 2013 recommendation and the rules set down in the proposed directive. The proposal does not reproduce the principles of the 2013 Recommendation in their entirety as ‘it only regulates certain key aspects that are necessary for the establishment of a framework (...)’.⁶⁹ Yet, for the sake of visibility and consistency, it would certainly have been preferable to have a continuity between the two texts, with the new proposal ultimately fully duplicating the principles laid down in the 2013 Recommendation.

Interestingly, the new instrument includes several tools that support the action of qualified entities. This evolution should be welcomed as past experience has showed that limited resources of representative entities often prevented them from initiating mass claims. Among other things, Article 15 of the draft Directive entitled ‘assistance for qualified entities’ now provides that Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or by providing them with public funding for this purpose.’ Obviously, the type of measures that subsequently will be introduced by Member States in this respect will need to be carefully scrutinised and assessed. The proposal also seeks to alleviate the burden of proof of qualified entities and to facilitate their access to evidence by allowing them to request from the court an order requesting the defendant to provide evidence lying in its control.⁷⁰

Importantly, the success of the proposed mechanism will be highly dependent on the good articulation between the injunction order and the redress mechanism. In this view, the draft Directive appears to clearly encourage the use of alternative dispute resolution (ADR) mechanisms to resolve mass claims.⁷¹ This does not come as a surprise given the interest of the Commission in ADR in general and for the resolution of mass claims, in particular. The evaluation report of January 2018 already highlighted that ‘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’, whereas the call for evidence conducted with stakeholders in parallel revealed ‘an important trend in relation to collective out-of-court dispute resolution’.⁷² However, as scholars pointed out, ‘a theory that defendants who are found to have infringed trading law would then typically avoid mass damages claims by settling them has not been established to be valid in practice. Indeed, there is empirical evidence that cases of this type have not been swiftly settled’.⁷³

Provided that parties agree to settle, the fairness and legality of the settlement agreement will have to be reviewed by a court or an administrative authority. This

⁶⁹European Commission, Explanatory memorandum accompanying the proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184/3.

⁷⁰*Idem*, Art. 13.

⁷¹*Idem*, Art. 8.

⁷²Evaluation report, pp. 14–15.

⁷³*Voet/Hodges* [19], p. 5.

task will be essential to preserve the right and interest of all parties but is also likely to be particularly complicated. It may thus be useful to develop Best Practices and guidance for judges and authorities listing key issues requiring specific attention during the review of settlement agreements. This is the path that has for instance been followed by the US Federal Judicial Centre with the publication of a ‘pocket guide’ assisting judges when reviewing mass settlements. The guidelines list several ‘hot button indicators’ highlighting potential risks of unfair settlements.⁷⁴ Obviously, these documents have been designed in the US context and should be adapted to the EU framework. However, the underlying problem remains the same as the court/the authority must in both cases protect the interests of all represented and absent parties.

Moreover, the proposal includes some rules for facilitating cross-border representative actions, in particular the mutual recognition of the legal standing of entities designated in different Member States and the possibility for entities from several Member States to act jointly within a single procedure in front of a single forum.⁷⁵ However, the draft Directive once again fails to clearly solve the issue of private international law rules applicable for the resolution of mass cases, in particular rules concerning jurisdiction, recognition and enforcement of judgements and applicable law.⁷⁶ In the context of a multiplication of cross border mass harm situations, this comes as a major disappointment. Advocate General on previously-cited case C-498/16 of 25 January 2018 indirectly called for clarifications from the policy-maker on this aspect when highlighting that ‘the issue is too delicate and complex. It is in need of comprehensive legislation, not an isolated judicial intervention within a related but somewhat remote legislative instrument that is clearly unfit for that purpose’.⁷⁷ Discussions seem now to be postponed to the publication of a report on the application of the Brussels I Regulation, which will review experience with cross-border mass cases.⁷⁸ However, this report is only due in 2022, whereas the application of private international law in cross border cases requires urgent consideration.

2.3 The continuation of the collective redress saga

The New deal for consumers is obviously not the end of the collective redress saga in the EU, but rather a new departure. According to its 2018 Justice Programme, the Commission might shortly launch ‘a study on access to justice in mass harm situations’ following-up on the 2018 evaluation report.⁷⁹ In addition, a draft resolution accompanying a European Parliament’s own initiative report on the 2017 EU Justice

⁷⁴Rothstein/Willging [11].

⁷⁵Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018)184/3, Art. 16.

⁷⁶*Idem*, Recital 9.

⁷⁷Opinion of Advocate General Bobek in Case C-498/16 *Schrems v Facebook Ireland Ltd*, 14 November 2016, EU:C:2017:863, para. 123.

⁷⁸2013 Communication on collective redress, pp. 13–14.

⁷⁹*EU Commission*, Implementing Decision concerning the adoption of the work programme for 2018 and the financing for the implementation of the Justice Programme, 19 December 2017, at pp. 19–20, available at www.ec.europa.eu/research/participants/data/ref/other_eu_prog/justice/wp/justice-awp-2018_en.pdf.

Scoreboard recently requested the Commission ‘to consider collective redress procedures in next year’s comparative exercise on accessibility factors of justice systems, as it is increasingly significant for facilitating access to justice and efficient dispute resolution’.⁸⁰ In parallel, several evolutions can be expected in the coming months. In particular, privacy and data protection are fields where significant changes are awaited. The EU General Data Protection Regulation 2016/679 (GDPR) that will take effect in May 2018⁸¹—and in particular its Article 80—have already started to trigger some policy discussions at Member States level. In France for instance, privacy class actions can today not be used to obtain compensatory relief and the mechanism is only possible to request the cessation of a violation.⁸² However, the French Parliament, which is currently strengthening privacy laws in order to bring France into line with the GDPR,⁸³ will very likely adopt an amendment giving plaintiffs the possibility to also claim compensation for violations of data protection and privacy rules.⁸⁴ In England where the Data Protection Bill is currently debated by Parliament, several civil society organisations including Which?, Privacy International, or Open Rights Group, have written to the Minister of State for Digital claiming that ‘it is time for the Government to do the right thing by amending the Data Protection Bill and facilitating the implementation of an effective system for collective redress’.⁸⁵ They took the view that ‘implementing Article 80(2) of the GDPR would create a collective redress regime for breaches of data protection law. This would complement the existing collective redress regime introduced under the Consumer Rights Act 2015 (...)’.⁸⁶ Finally, some changes could also be expected in the field of human rights. In April 2017, the EU Agency for Fundamental Rights encouraged the adoption of collective redress mechanisms to facilitate remedies for victims of human rights violations.⁸⁷ As the Agency highlighted, ‘the EU should provide stronger incentives to Member

⁸⁰EU Parliament, Committee on Legal Affairs, Draft report on the 2017 EU Justice Scoreboard, 2018/2019(INI), 6 February 2018.

⁸¹Regulation 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

⁸²*Biard/Amaro* [4], p. 9.

⁸³Projet de loi relatif à la protection des données personnelles, JUSC1732261L, 13 December 2017, available at www.legifrance.gouv.fr/affichLoiPreparation.do?jsessionid=2685BD989BE8B61EBCD95903A9F80A47.tplgfr41s_2?idDocument=JORFDOLE000036195293&type=general&typeLoi=proj&legislature=15.

⁸⁴Amendment CL262 of 23 January 2018, www.assemblee-nationale.fr/15/amendements/0490/CION_LOIS/CL262.asp. See also for discussions before the Senate, S. Joissains, Rapport no. 350 relatif à la protection des données personnelles, 14 March 2018 (pp. 127–133), www.senat.fr/rap/17-350/17-350.html.

⁸⁵Open Rights Group, ‘Letter to the Minister of State for Digital: give us the right to defend the elderly and children’s privacy’, 22 November 2017, available at www.openrightsgroup.org/ourwork/correspondence/letter-to-the-minister-of-state-for-digital:-give-us-the-right-to-defend-the-elderly-and-children%E2%80%99s-privacy.

⁸⁶*Idem*.

⁸⁷EU Agency for Fundamental Rights, ‘Improving access to remedy in the area of business and human rights at the EU level’, Opinion of 10 April 2017 available at www.fra.europa.eu/en/opinion/2017/business-human-rights.

States to provide for effective collective redress in cases of business-related human rights abuse'.⁸⁸

Discussions on collective redress have recently accelerated with the publication of the evaluation report of January and the presentation of the New deal for consumers in April 2018. Yet debates are far from being over. The proposal will now be discussed by the European Parliament and the Council and will, undoubtedly, be subject to heated discussions among stakeholders and Member States. On several aspects, the draft Directive introducing new measures for collective redress is an improvement compared the 2013 Recommendation. Yet several important issues still need clarifications. The New deal for consumers may therefore be a rainbow in the gloomy collective redress sky, but new rain showers cannot be excluded.

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⁸⁸*Idem*, at p. 7.

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