

# RECOMMENDATIONS

## 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)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, *inter alia*, by facilitating access to justice, as well as the objective of ensuring a high level of consumer protection.
- (2) The modern economy sometimes creates situations in which a large number of persons can be harmed by the same illegal practices relating to the violation of rights granted under Union law by one or more traders or other persons ('mass harm situation'). They may therefore have cause to seek the cessation of such practices or to claim damages.
- (3) The Commission adopted a Green Paper on antitrust damages actions in 2005 <sup>(1)</sup> and a White Paper in 2008, which included policy suggestions on antitrust-specific collective redress <sup>(2)</sup>. In 2008 the Commission published a Green Paper on consumer collective redress <sup>(3)</sup>. In 2011 the Commission carried out a public consultation 'Towards a more coherent European approach to collective redress' <sup>(4)</sup>.
- (4) On 2 February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of prin-

ciples providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights. The Parliament also stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States <sup>(5)</sup>.

- (5) On 11 June 2013 the Commission issued a Communication 'Towards a European Horizontal Framework for Collective Redress' <sup>(6)</sup>, which took stock of the actions to date and the opinions of stakeholders and of the European Parliament, and presented the Commission's position on some central issues regarding collective redress.
- (6) It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights supplements public enforcement. Where this Recommendation refers to the violation of rights granted under Union Law, it covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons.
- (7) Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in this Recommendation should be applied horizontally and equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.
- (8) Individual actions, such as the small claims procedure for consumer cases, are the usual tools to address disputes to prevent harm and also to claim for compensation.

<sup>(1)</sup> COM(2005) 672, 19.12.2005.

<sup>(2)</sup> COM(2008) 165, 2.4.2008.

<sup>(3)</sup> COM(2008) 794, 27.11.2008.

<sup>(4)</sup> COM(2010) 135 final, 31.3.2010.

<sup>(5)</sup> 2011/2089(INI).

<sup>(6)</sup> COM(2013) 401 final.

- (9) In addition to individual redress, different types of collective redress mechanisms have been introduced by all Member States. These measures are intended to prevent and stop unlawful practices as well as to ensure that compensation can be obtained for the detriment caused in mass harm situations. The possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.
- (10) The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend 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 abuse.
- (11) In the area of injunctive relief, the European Parliament and the Council have already adopted Directive 2009/22/EC on injunctions for the protection of consumers' interests<sup>(1)</sup>. The injunction procedure introduced by the Directive does not, however, enable those who claim to have suffered detriment as a result of an illicit practice to obtain compensation.
- (12) Procedures to bring collective claims for compensatory relief have been introduced in some Member States, and to differing extents. However, the existing procedures for bringing claims for collective redress vary widely between the Member States.
- (13) This Recommendation puts forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States. These principles should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards.
- (14) This Recommendation addresses both compensatory and — as far as appropriate and pertinent to the particular principles — injunctive collective redress. It is without prejudice to the existing sectorial mechanisms of injunctive relief provided for by Union law.
- (15) Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.
- (16) Alternative dispute resolution procedures can be an efficient way of obtaining redress in mass harm situations. They should always be available alongside, or as a voluntary element of, judicial collective redress.
- (17) Legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified.
- (18) In the case of a representative action, the legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner.
- (19) The availability of funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest.
- (20) In order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met.
- (21) A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.
- (22) In fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, it is important to ensure consistency between the final decision concerning that violation and the outcome of the collective redress action.

<sup>(1)</sup> OJ L 110, 1.5.2009, p. 30.

Moreover, in the case of collective actions following a decision by a public authority (follow-on actions), the public interest and the need to avoid abuse can be presumed to have been taken into account already by the public authority as regards the finding of a violation of Union law.

- (23) With regard to environmental law, this Recommendation takes account of the provisions of Article 9(3), (4) and (5) of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') which, respectively, encourage wide access to justice in environmental matters, set out criteria that procedures should respect, including criteria that they be timely and not prohibitively expensive, and address information to the public and the consideration of assistance mechanisms.
- (24) The Member States should take the necessary measures to implement the principles set out in this Recommendation at the latest two years after its publication.
- (25) The Member States should report to the Commission on the implementation of this Recommendation. Based on this reporting, the Commission should monitor and assess the measures taken by Member States.
- (26) Within four years after publication of this Recommendation, the Commission should assess if any further action, including legislative measures, is needed, in order to ensure that the objectives of this Recommendation are fully met. The Commission should in particular assess the implementation of this Recommendation and its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust,

HAS ADOPTED THIS RECOMMENDATION:

#### I. PURPOSE AND SUBJECT MATTER

1. The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.
2. All Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in

this Recommendation. These principles should be common across the Union, while respecting the different legal traditions of the Member States. Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.

#### II. DEFINITIONS AND SCOPE

3. For the purposes of this Recommendation:

- (a) 'collective redress' means: (i) 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 entity entitled to bring a representative action (injunctive collective redress); (ii) 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 or by an entity entitled to bring a representative action (compensatory collective redress);
- (b) 'mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons;
- (c) 'action for damages' means an action by which a claim for damages is brought before a national court;
- (d) 'representative action' means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings;
- (e) 'collective follow-on action' means a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law.

This Recommendation identifies common principles which should apply in all instances of collective redress, and also those specific either to injunctive or to compensatory collective redress.

#### III. PRINCIPLES COMMON TO INJUNCTIVE AND COMPENSATORY COLLECTIVE REDRESS

##### Standing to bring a representative action

4. The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:
  - (a) the entity should have a non-profit making character;

(b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

(c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

5. The Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met.

6. The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 4 or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.

7. In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.

#### Admissibility

8. The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.

9. To this end, the courts should carry out the necessary examination of their own motion.

#### Information on a collective redress action

10. The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, ad hoc certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions.

11. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court.

12. The dissemination methods are without prejudice to the Union rules on insider dealing and market manipulation.

#### Reimbursement of legal costs of the winning party

13. The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law.

#### Funding

14. The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

(a) there is a conflict of interest between the third party and the claimant party and its members;

(b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;

(c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

(a) to seek to influence procedural decisions of the claimant party, including on settlements;

(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;

(c) to charge excessive interest on the funds provided.

#### Cross-border cases

17. The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.

18. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.

#### IV. SPECIFIC PRINCIPLES RELATING TO INJUNCTIVE COLLECTIVE REDRESS

##### **Expedient procedures for claims for injunctive orders**

19. The courts and the competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation.

##### **Efficient enforcement of injunctive orders**

20. The Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation.

#### V. SPECIFIC PRINCIPLES RELATING TO COMPENSATORY COLLECTIVE REDRESS

##### **Constitution of the claimant party by 'opt-in' principle**

21. The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.
22. A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.
23. Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.
24. The defendant should be informed about the composition of the claimant party and about any changes therein.

##### **Collective alternative dispute resolution and settlements**

25. The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle

the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial, taking also 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 <sup>(1)</sup>.

26. The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case.
27. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.
28. The legality of the binding outcome of a collective settlement should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.

##### **Legal representation and lawyers' fees**

29. The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.
30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.

##### **Prohibition of punitive damages**

31. The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In

<sup>(1)</sup> OJ L 136, 24.5.2008, p. 3.

particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.

#### **Funding of compensatory collective redress**

32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

#### **Collective follow-on actions**

33. The Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.
34. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.

### **VI. GENERAL INFORMATION**

#### **Registry of collective redress actions**

35. The Member States should establish a national registry of collective redress actions.
36. The national registry should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information

on the available methods of obtaining compensation, including out of court methods.

37. The Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability.

### **VII. SUPERVISION AND REPORTING**

38. The Member States should implement the principles set out in this Recommendation in national collective redress systems by 26 July 2015 at the latest.
39. The Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases.
40. The Member States should communicate the information collected in accordance with point 39 to the Commission on an annual basis and for the first time by 26 July 2016 at the latest.
41. The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

#### **Final provisions**

42. The Recommendation should be published in the *Official Journal of the European Union*.

Done at Brussels, 11 June 2013.

*For the Commission*

*The President*

José Manuel BARROSO