PART II

STANDING IN CIVIL MATTERS

Chapter 1.

A FEW REMARKS ON STANDING TO BRING A COLLECTIVE REDRESS ACTION

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I. Introduction

The core of civil procedure in contemporary judicial systems of the EU Member States is traditionally described in terms of individual actions and not collective actions. However, the issues of availability of collective redress mechanisms and facilitating collective access (of consumers especially) to justice have been topics of discussion and debate in Europe at various times over the last few years.[2] The question

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2 For more on this see, e.g.: E. Silvestri, *Towards a Common Framework of Collective Redress in Europe? An Update on the Latest Initiatives of the European Commission*, Russian Law Journal 2013, Vol. I, issue 1, p. 46; A. Piszcz, *"Class Actions" in the Court Culture of Eastern Europe*, [in:] L. Ervo, A. Nylund (ed.), *The Future of Civil Litigation – Access to Courts and Court Connected mediation in the Nordic Countries*, Springer International Publishing Switzerland, Cham 2014, p. 357; S.O. Pais, A. Piszcz, *Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?*, Yearbook of Antitrust and Regulatory Studies 2014, Vol. 7(10), p. 209; S.O. Pais, *Private Antitrust Enforcement: A New Era for Collective Redress?*, Yearbook of Antitrust and Regulatory Studies 2015, Vol. 8(12), p. 11; K.J. Cseres, *Harmonising Private Enforcement of Competition Law in Central*

of how to design collective redress mechanisms in the EU Member States has become of wider concern and interest in recent years, particularly in the context of the European 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[3] (hereinafter, the Recommendation), which recommends that all Member States have national collective redress systems based on a number of common European principles. The Recommendation – in contrast to the 2008 Green Paper on consumer collective redress[4] – is not limited to consumer actions. Although the 'consumer' narrative is clearly in the majority in the 2013 Framework for collective redress,[5] the European Commission shifted its focus away from consumers to a broader range of stakeholders (even broader than customers), indirectly acknowledging the limitations of consumer collective redress.

The European Commission wanted the Member States to implement the principles set out in the Recommendation in national collective redress systems till 26 July 2015 at the latest (point 38 of the Recommendation). The deadline passed and it does not seem that a lot of effort on the part of the Member States has gone into the implementation of the Recommendation. We cannot say that good progress is being made in implementing the Recommendation. Some Member States are not very inclined to harmonise their legal frameworks of rules on collective redress. The contribution of the Recommendation to broader objectives of the efficiency of justice is limited by the fact that the Recommendation is only "soft-law" with no binding effect.[6]

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and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions, Yearbook of Antitrust and Regulatory Studies 2015, Vol. 8(12), p. 33.

3 OJ L 201, 26.07.2013, pp. 60–65.

4 COM(2008) 794 final; http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf (26 July 2015).

5 The Recommendation and 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) 401 final; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0401:FIN:EN:PDF (26 July 2015).

6 For B.A. Terradas this political choice is 'very disappointing'; see B.A. Terradas, *Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles*, Journal of Private International Law 2015, Vol. 11, No. 1, p. 148.

However, it is likely that the Recommendation will be followed by the adoption of EU legislation binding on all Member States, most probably a directive. If so, a particular issue in relation to moving from soft to hard harmonisation law is the need to accept that this binding legislation should not deviate from the Recommendation without good reasons. Otherwise, such initiative would not receive acclaim from the Member States which brought about changes in their laws trying to make them compliant with the Recommendation. It is worth adding that the European Economic and Social Committee (hereafter, EESC) called on the Commission to propose a directive as quickly as possible. In the opinion of the EESC only a directive would ensure a solid core of harmonisation while at the same time giving the Member States enough leeway for accommodating the particularities of their national legal systems.[7]

The central themes of the Recommendation are as follows: standing to bring a representative action, admissibility of a collective redress action, information on a collective redress action, reimbursement of legal costs of the winning party, funding, cross-border cases, registry of collective redress actions, some specific principles relating only to injunctive collective redress (expedient procedures for claims for injunctive orders, efficient enforcement of injunctive orders) and some specific principles relating only to compensatory collective redress (constitution of the claimant party by "opt-in" principle, collective alternative dispute resolution and settlements, legal representation and lawyers' fees, prohibition of punitive damages, collective follow-on actions). The emphasis of this paper is directed at standing to bring a collective redress action as a concept broader than standing to bring a representative action (included in points 4-7 of the Recommendation). The representation by a representative entity is not a central feature of collective redress actions.[8] They crop up not only in the form of

7 Point 3.3 of the opinion of the EESC on 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) 401 final, OJ C 170, 05.06.2014, p. 68.

8 However, the philosophy of collective redress is premised on the *largo sensu* representation; in the case of group actions, the statement of claim is submitted by a representative of the entire group, a position that can be held by a member of the group.

representative actions, although the overwhelming emphasis of the Recommendation (Chapter III) is on them. E. Silvestri identified fundamental barriers to legal standing to bring collective redress actions as provided for in the Recommendation; she has pointed to the prospective European collective redress action as a representative action, since 'standing to sue is granted only to "representative entities" identified in advance by Member States or to public authorities'.[9] This view would need, however, to be defended against the charge of the linguistic interpretation independent of the context and the structure of the Recommendation. Certainly, the "body" of the Recommendation with respect to legal standing contains – in Chapter III ('Principles common to injunctive and compensatory collective redress') – only the subchapter 'Standing to bring a representative action'. But at the same time, recital 17 of the preamble to the Recommendation clarifies: "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 (…), the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified". Therefore, the quoted opinion cannot be shared. Collective redress mechanisms surely cannot be considered as tools only for representative entities.

II. Standing to bring a group action

If we stick to the vocabulary known from the Recommendation, a group action is an action which can be brought jointly by those who claim to have suffered harm (recital 17 of the preamble to the Recommendation). The statement of claim is submitted by their representative, a position that can be held by one of them. Those represented who jointly bring an action are a "group".

Does the Recommendation hint at how many claimants should be involved in the group to make their action a group action and, more broadly, collective redress action? On the one hand, recital 2 of the preamble to the Recommendation states that 'modern economy

9 E. Silvestri, *Towards a Common Framework*…, p. 49.

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' and introduces the definition of "mass harm situation" in point 3(b). On the other hand, both the definition of "collective redress" and the definition of "mass harm situation" refer to "two or more natural or legal persons". This "threshold" has been considered in literature as "rather low".[10]

The difficulty that may be encountered in the selection of solutions by the Member States is that collective redress mechanisms do not seem designed for groups comprising two members. It seems difficult to persuade anyone that the Commission would have required the EU Member States to remodel their civil procedural laws with the express intention to submit joint actions of two persons to legal framework for expensive and time consuming group (collective) proceedings.

Regarding the definition of a "group", national laws of Member States (those which have frameworks of legal rules on group proceedings) can be divided into two factions: (1) legislation which determines the minimum number of participants in the group, (2) legislation which does not determine it. Polish legislation belongs to the first group of laws. Under the Polish Act of 17 December 2009 on Pursuit of Claims in Group Proceedings,[11] an action may be pursued in group (collective) proceedings, if a group of claimants (who file claims of the same type based on the same or identical factual basis) comprises at least 10 persons. A member of the group may act as the group representative.[12] There is also another aspect to group actions of which the scope of this paper compels a mention. A group may include businesses, as the Polish Act does not reserve group proceedings exclusively to consumers.

Many national systems are, however, in the second group depending on a court decision rather than quantitative normative evaluation. For instance, in Sweden, which introduced group proceedings as the first country outside Anglo-American legal sphere, a group means the persons

10 F. Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework*, Cheltenham-Northampton 2015, p. 185.

11 Reported in Journal of Laws of 18 January 2010, No. 7, item 44. It came into force on 19 July 2010.

12 Article 4 section 1 of the 2009 Act on Pursuit of Claims in Group Proceedings.

for whom the plaintiff brings the action; the 2002 Group Proceedings Act refers to "several persons" as a group.[13] However, one of the special preconditions for group proceedings is that the group, taking into consideration its size, ambit and others, is appropriately defined.[14] The Swedish law distinguishes a private group action, instituted by a natural person who, or a legal entity that, himself, herself or itself has a claim that is subject to the action. Similarly, regarding Finland, it must be pointed out that a case may be heard there as a "class" (group) action if (*inter alia*): (1) several persons have claims against the same defendant, based on the same or similar circumstances; (2) the hearing of the case as a "class" (group) action is expedient in view of the size of the group, the subject-matter of the claims presented in it and the proof offered in it.[15] However, Finnish legal rules reserve group proceedings exclusively to consumers.[16] Interestingly, also in Bulgaria, which was the first one to introduce the concept of group actions in Eastern Europe, the threshold requirement of standing is not imposed; therefore, hypothetically, a group may comprise two or more persons – either institutional actors or consumers (Article 379 of the Code of Civil Procedure[17]).

Without getting caught up in too much detail, it is possible to make specific suggestions on how national laws on the size of the group can be modified and give a rough idea of the amendments to the legal rules thereon, based on the above examples. The preconditions for group actions differ in different legal cultures. If the Recommendation is to be "a common set of principles providing uniform access to justice via

13 See Section 1 of the Act (*lag om grupprättegång* of 30 May 2002; No. 2002:599). Available in English at: http://www.government.se/government-policy/judicial-system/group-proceedings-act/ (26 July 2015). The Swedish law distinguishes also a public group action (instituted by an authority that, taking into consideration the subject of the dispute, is suitable to represent the members of the group) and an organisation action (instituted by a not-for-profit association). For more see G. Sparrman, L. Göransson, *Sweden*, [in:] P.G. Karlsgodt, *World Class Actions: A Guide to Group and Representative Actions Around the Globe*, New York 2012, p. 202 et seq.

14 Section 8 point 4 of the Act.

15 Section 2 points 1-2 of the Act on Class Actions (*Ryhmäkannelaki*; No. 444/2007). Available in English at: https://www.finlex.fi/fi/laki/kaannokset/2007/en20070444.pdf (26 July 2015).

16 For more details see L. Ervo, *Characteristics of Procedure*, [in:] L. Ervo (ed.), *Civil Justice in Finland*, Nagoya 2009, p. 92; S. Laukkanen, *Last Trends in the Finnish Civil Procedure and Judicial Administration*, [in:] *The Recent Tendencies of Development in Civil Procedure Law – between East and West. International Conference*, Vilnius 2007, p. 79.

17 See Article 379 et seq. of the Code. Available in English at: http://www.lawoffice-bg.net/userfiles/Code%20of%20Civil%20Procedure.pdf (26 July 2015).

collective redress within the Union"[18] and Member States are to have systems mirroring this pattern and/or being compliant therewith, national solutions should be similar to those currently used in Sweden rather than the Polish ones. There is a critical conditioning factor in the shape that national rules should take. It is the ultimate purpose (aim)[19] of the Recommendation that is to facilitate access to effective judicial protection. The rigid determination of the minimum number of participants in a group cannot be used to serve this purpose so well as more flexible solutions. This ultimate purpose should not be forgotten while adopting the vocabulary of the Recommendation. The rigid recognition of a few (e.g. only two) persons as a "group" may be counterproductive, even if the Recommendation refers literally to "two or more natural or legal persons". The requirement of the facilitation of the access to justice allows focusing attention not on the phrase "two or more natural or legal persons" alone but also on the needs of the administration of justice, although this causes that the interpretation of the proposed principles is not as straightforward as it might initially appear. The ultimate purpose of the Recommendation supports the view that the Recommendation makes the Swedish or Finnish model of rules on the court's competences accessible also to the EU Member States which do not have similar solutions. There are no obstacles for the latter to take advantage of the experience of other EU Member States. The Recommendation does not make it impossible for national legislatures to adopt solutions enabling courts to decide whether group proceedings would be expedient in view of the size of the group of claimants.

III. Standing to bring a representative action

The Recommendation throws light on the characteristics of a second type of collective redress actions distinguished therein – representative actions. According to point 3(d) of the Recommendation, a "representative action" means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on

18 See also recital 4 to the preamble of the Recommendation.
19 Recital 10 to the preamble of the Recommendation and point 1 of the Recommendation.

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.

In the case of a representative action, the issue of standing is more complex. The Recommendation allows for a variety of entities to be specified as having legal standing to bring a representative action. It states that legal standing of this type should be limited to: entities certified on an ad hoc basis by Member State's national authorities or courts for a particular representative action, entities officially designated in advance (as recommended in point 4) which fulfil certain criteria set by law (point 6 of the Recommendation). In terms of legal certainty entities officially designated in advance are preferable; nonetheless, the national authorities' or courts' supervisory role in case of entities certified on an ad hoc basis should provide, in M. Ioannidou words, "adequate safeguards regarding the avoidance of speculative litigation."[20]

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

At the same time, it is recommended that the officially designated 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. Point 4 of the Recommendation recognises three minimum conditions of eligibility of representative entities:

(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.

20 M. Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement*, Oxford-New York 2015, p. 140.

The fact that one or more of the conditions are no longer met should lead to the designated entity losing its status.

The EESC welcomed the minimum requirements laid down by the Commission for entities seeking to represent claimants.[21] The EESC considered excessive and unacceptable, however, that these minimum requirements should include sufficient financial and personnel resources and legal expertise. Such requirements would raise the question of what standards will actually be used to decide on this matter in individual cases rather than be able to prevent improper litigation. These are extremely important aspects of the initiative and require as much attention as they can possibly receive. The EESC admitted it expected EU Member States to provide some useful ideas thereon elaborated in recent legislative procedures.

If we look at selected national examples, it is significant in Poland that a collective redress action cannot be an activity of the organisation, provided that the latter is not a member of the represented group. The Polish legal framework on representative actions envisages only the empowerment of public authorities to bring such actions, more precisely regional (municipal) consumer ombudsmen.[22] It is incomprehensible why such an important form of protection of market participants as collective redress actions filed by consumer (non-governmental) organisations has been seen as dispensable by the Polish legislature. This limitation or gap will need to be revoked to enable the development proposed by the Recommendation.

For the sake of comparison, the Swedish law likewise provides for representative actions by public authorities (designated by the government).[23] However, it also provides for representative actions by organisations,[24] that is non-profit associations that protect consumer (defined as a natural person who acted primarily for purposes outside business operations) or wage-earner interests in disputes between them and a business operator and also disputes of another kind, provided

21 Point 4.3 of the opinion of the EESC; *supra* note 3.
22 In Polish *powiatowy (miejski) rzecznik konsumentów*. See Article 4 section 1 of the 2009 Act on Pursuit of Claims in Group Proceedings.
23 Section 6 of the 2002 Group Proceedings Act.
24 Section 5 of the 2002 Group Proceedings Act.

that there are significant advantages with the disputes being jointly adjudicated.[25] Moreover, the Swedish law sets out conditions of eligibility for not only representative entities but for the plaintiff in general. They include the interest in the substantive matter, financial capacity and circumstances in general.[26] The court takes them into account when deciding whether the plaintiff is appropriate to represent the members of the group in the case.

The Swedish provisions on the legal standing to bring a representative action are within the EU standards a little on the "low" side due to the reference to financial capacity criticised by the EESC. The Swedish example shows, however, that financial capacity of a representative entity as a condition of its eligibility is not a novelty created by the Recommendation. It has been applied in practice, and for this reason, one may find the EESC's opinion out of line with 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.

IV. Concluding remarks

The promotion of consumer interests is a primary consideration (at least implicitly) for regulators; a more radical alternative is for greater power to be given to consumers via mechanisms that bypass the regulation, like private collective redress actions.[27] The following years will see how the EU initiatives on collective redress – that, in general, can be described as quite reasonable – contribute to transforming the empowerment of consumers and other stakeholders. However, it seems that the national schemes of collective redress are unlikely to change significantly and look promising as effective policy tools unless EU legislation thereon binding on all Member States is adopted. It is worth

25 These may be actions by organisations devoted to the safeguarding of nature conservation or environmental protection interests and workers' associations in fisheries, agriculture, reindeer husbandry, forestry industries.

26 Section 8 point 5 of the 2002 Group Proceedings Act.

27 D. Deller, F. Vantaggiato, *Revisiting the Regulatory State: A Multidisciplinary Review Establishing a New Research Agenda*, http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+14-9.pdf/6de9dcd3-0b0f-4c1c-a311-cc472f384653 (26 July 2015), p. 7.

recommending that this new piece of EU legislation should rely, as a rule, on the principles set out in the 2013 Recommendation. The EU's decision in this regard should not "roll back" efforts of the Member States already committed to implementing the Recommendation and adopting its principles.

Apart from that, it needs to be pointed out that the assumption underlying a set of common principles proposed in the Recommendation (which is hoped by the author to be repeated in the EU legislation binding on Member States) is not to allow too many exceptions to these principles. Exceptions are allowed to the "opt-in" principle[28] and to the prohibition of contingency fees.[29] The introduction of these exceptions to the scheme at the national level requires reasoned justification.

On the other hand, the proposed provisions on the legal standing to bring a collective redress action are not weakened by significant "flexibilities" and "discretions". It is worth remembering, however, that deviations from their literal meaning may result from the interpretation of these provisions in the context of the ultimate purpose of the initiative, that is to facilitate access to effective judicial protection (and not just collective judicial protection). Both a requirement that the court considers that a collective redress action is the best way of bringing the case and a strong process of judicial certification could serve as safeguards to prevent speculative or unmeritorious claims.[30] Another suggestion submitted by this paper is to reconsider – when working on EU binding legislation on common principles of collective redress mechanisms – the requirements for entities seeking to represent claimants with regard to their financial resources.

28 Point 21 of the Recommendation.
29 Point 30 of the Recommendation.
30 See also A. Nikpay, D. Taylor, *The New UK Competition Regime: Radically Different or More of the Same?*, Journal of European Competition Law & Practice 2014, Vol. 5, No. 5, p. 285.