INTRODUCTION

The European Justice Forum (EJF) is a non-profit coalition of businesses, individuals and organisations that are working to promote fair, balanced, transparent and efficient civil justice laws and systems in Europe. Its aim is to ensure that the legal environment in Europe protects both individuals and businesses alike, and that those with a legitimate grievance have, not just access to justice, but efficient means of redress. We wish to see a system in which innovation and enterprise can flourish and which enhances the international competitiveness of Europe.

BACKGROUND

EJF recognises, and fully endorses, the principles that the rights and freedoms of individuals must be protected whenever businesses, or public authorities, process personal data, and that data protection should be modernised, and made consistent, across the EU in response to technology changes.

EJF further recognises the need of the United Kingdom to incorporate the provisions of the Regulation (EU) 2016/679 of the European Parliament and of 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 (“General Data Protection Regulation” or “GDPR”) into local law in anticipation of Brexit.

EJF has serious misgivings about the various amendments proposed to article 183 of the Bill that seek to introduce the possibilities for mechanisms for collective redress. In advancing its position, EJF suggests that the Committee needs to consider the issue in a rounded manner.

Thinking beyond pre-conceived ideas: (1) The class action model is not a panacea (2) Businesses are not against redress

Court-based collective redress mechanism is slow, costly and inefficient

- Outcomes for consumers are often poor when judged against objectively evaluable criteria such as cost, time, level of recovery and when compared to non-judicial alternatives.
- Where lawyers and funders are taking their cut on damages, consumers lose out further.

For example, in the MasterCard case1, a third party-funder financed the claim through an agreement under which, in return for a £35 million investment in the lawsuit, the funder would be entitled to recover the greater of £135 million or 30% of the undistributed proceeds of the claim up to £1 billion and 20% of any unclaimed amount beyond £1 billion. The Competition Appeal Tribunal denied the request for an opt-out class action and issued its judgment on this point 10 months after proceedings began.

1 http://www.catribunal.org.uk/238-9936/Judgment-CPO-Application-.html
Business is in favour of redress when it is due

- It is a myth that business does not want to see consumers compensated for actionable infringements of data protection law but business needs certainty, efficiency, fairness, and an absence of abuse.
- Mass litigation does not meet these criteria. Other redress systems do and can give added value in terms of market behaviour.
- Calling for class actions in the abstract ignores the poor performance of this litigation model compared to the effectiveness of numerous tried and tested out-of-court systems in the UK and across the EU for resolving mass consumer disputes².

Regulatory redress and consumer ombudsmen have proved to be the best mechanisms to implement a modern redress system

Being aware of alternative systems’ features

- One very effective model is that of the public or private ombudsmen, working in conjunction with regulators (if in a regulated sector).
  - For example, the Financial Conduct Authority, has recently required the lender Vanquis to undertake a program to repay £168m in compensation to customers for undisclosed charges. Vanquis will contact all affected consumers³ and there is no need to even consider whether the current court system can cope, let alone consider collective mechanisms.
- Ombudsmen combine multi-dimensional functions which courts lack:
  - consumer advice, including a triage function which singles out cases with no merits;
  - mass dispute resolution, making decisions using experience of the sector and based on what is fair and reasonable in all the circumstances but at a fraction of the time and cost of mass judicial process; and
  - collecting and publishing market data, feeding the aggregated data back towards those institutions which can intervene in an effective way to eradicate systemic misbehaviour. By doing this, they incorporate “virtuous feedback loops” into the centre of the dispute resolution process.
- Ombudsmen are independent, impartial and publicly accountable. For example, despite its detractors, the Financial Ombudsman Service, in 2015/2016, handled 1.6m queries from customers, took on 340,899 new cases and resolved 438,802 cases. It has very high approval ratings from complainants. FOS also resolved two thirds of the non-PPI complaints within three months⁴ - all at no cost to the consumer.

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Prevention is key

EJF strongly believes that prevention is fundamental to avoid large numbers of consumers being affected by poor practices.

One of the best ways to achieve an effective early warning system is to develop platforms for consumers to seek advice or redress, as they can identify systemic issues quicker. The UK has some of the leading ombudsman and systems in the world. For example, in the UK we have the FOS and Ombudsman Services (which runs ombudsman schemes in the communications, energy, property and other sectors). We also have the resolver.co.uk service, which provides advice to consumers and helps route complaints to companies and ombudsman schemes and has already handled complaints for nearly 1.8m consumers.

EJF calls on the Committee to support the continued investment in prevention as a key way to avoid mass consumer problems.

Ensuring the adoption of the most effective and efficient proposal

The necessity to abide by the better regulation commitment

We encourage the Committee to assess objectively whether collective litigation allows the Government to deliver its commitment to regulate more effectively over the course of this Parliament. We also suggest that proper consideration needs to be given to the Better Regulation Framework⁵ and the statements made by the Conservative Party in its 2017 manifesto as the basis upon which it was elected.

Collective redress in the EU

The Committee will also need to consider the 2013 Recommendation of the European Commission⁶ and its report⁷ which highlighted the success of out-of-court settlements. The Recommendation sets out important safeguards to prevent the abuse of any court-based collective redress mechanism.

The idea of a representative body bringing any form of court proceedings without the consent of those for whom it claims to stand raises a risk of speculative and vexatious complaints as well as abusive litigation.

There are no safeguards to prevent abuse in the amendments suggested. If collective redress mechanisms are to be part of these proposals, there must be safeguards against abuse. The first and foremost requirement is that no form of collective complaint or proceeding should be permissible without a complaint by, and with the consent of, the data subjects whose rights are said to be infringed. To have anything else would appear to be at odds with the concept of the Bill itself.

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⁶ 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)

⁷ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847
EJF’S RECOMMENDATION

EJF believes that the revision of the data protection regime in the UK offers a real opportunity to incentivise businesses to embrace fully a positive attitude to compliance and to "doing the right thing".

Despite the rhetoric, court-based collective redress mechanisms do not provide any mechanism for the speedy and effective compensation of data subjects.

Thus, EJF recommends that Parliament should not rush to introduce court-based collective redress without fully considering the landscape of alternatives and minimising the risk of abuse. To do otherwise would be a breach of the Government’s commitments to better regulation.

For example, having a well-thought-out "data ombudsman" who could handle complaints made by data subjects, and on behalf of the ICO for complaints made to it, would seem to offer the opportunity of much greater benefits to consumers, the ICO and business than any possible collective redress amendments to the Bill.

European Justice Forum
13 March 2018
ANNEXES

- **ANNEX I** - Delivering Collective Redress in Markets: New Technologies,
  Authors: C. Hodges and S. Voet

- **ANNEX II** - 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)
Delivering Collective Redress in Markets: New Technologies

Christopher Hodges and Stefaan Voet
European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, including aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.
Executive Summary

This Policy Brief summarizes the findings of a joint project between Oxford University and the Catholic University of Leuven aimed at evaluating different mechanisms for delivering collective redress.

1. **Incoherence in addressing market failures.** The cohort of case studies assembled in this project shows that EU Member States vary enormously in how they address the simple issues that arise in most consumer disputes (unfair contract terms, overcharges, etc.), particularly with regard to public and private enforcement. Where Member States rely on private parties pursuing litigation, the results can be notably slow, expensive, ineffective in providing remedies, and fail to address systemic issues.

2. **Need for a coherent, modernized approach to market behaviour and enforcement.** National systems for addressing market regulatory behaviour badly need attention at policy and governmental levels, since almost no State has taken a sensible joined-up approach to either the relationship between public and private enforcement (including ADR and self-regulation) or how to affect behaviour (hence the concept of Ethical Business Regulation as a balanced policy).

3. **Requirements for control of market oversight.** The objectives of an effective regulatory system should run in the following sequence:
   1. Establishing clear rules and their interpretation
   2. Identification of individual and systemic problems
   3. Cessation of illegality
   4. Decision on whether behaviour is illegal, unfair, or acceptable
   5. Identification of the root cause of the problem
   6. Identification of what actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk
   7. Application of the actions (a) by identified actors (b) by other actors
   8. Dissemination of information to all (a) firms (b) consumers (c) other markets
   9. Redress
   10. Sanctions
   11. Ongoing monitoring, oversight, amendment

4. **Private enforcement.** The EU has harmonized class actions for injunctive relief, and some Member States have introduced them for damages, but national models all differ. There have been relatively few (damages) class actions in Europe. The countries that have the highest usage figures are Italy and Poland, where lawyers and consumer associations try to bring class cases but suffer a high failure rate for certification.

5. **A shift to new technologies.** The ‘new technologies’ of regulatory redress and consumer ombudsmen (in the UK sense, not the Nordic sense) are far more effective, quick, and cheap than the ‘old technology’ of collective litigation. These case studies demonstrate that unequivocally. The new technologies deliver the goals of affecting future behaviour, redress, and efficiency, which the old technology does not.
Delivering Collective Redress in Markets: New Technologies

Objectives of the project

This Policy Brief summarizes the findings of a joint project between Oxford University and the Catholic University of Leuven aimed at evaluating different mechanisms for delivering collective redress. First, national reports were obtained from a wide range of European States, which gave short summaries of the relevant legislative schemes for different mechanisms used to deliver collective redress, and various metrics, but also case studies on significant cases.

Second, the data and case studies were evaluated against criteria, notably ease of accessibility, speed, costs to users and overall transactional cost, ability to deliver effective outcomes, redress delivered, and effect on ongoing behaviour. This evaluation was developed from work conducted at a conference held at Rüschlikon, Zurich in January 2012. This project was timed to contribute to the review in 2017 of the European Commission’s Recommendation relating to collective redress. The results were discussed at an international conference in Oxford on 12–14 December 2016 attended by around fifty officials, scholars, and practitioners.

This Policy Brief states the opinions of the two organizers of the project and conference, including what seemed to them to be a general consensus; however, it should not be understood necessarily to represent the views of any individual attendee.

National data on collective redress mechanisms and cases was kindly contributed from correspondents around the EU. The contributors are listed in Annex 1. The dataset comprised information on redress cases in around eighty class actions, four piggy-back cases, over twenty-four ombudsman cases, and at least twenty-four regulatory cases. There was a further seventeen injunctions (non-damages-redress) cases, and twenty-one mixed cases identified by the European Consumer Organisation (BEUC) and the Consumer Justice Enforcement Forum (COJEF).

New mechanisms

It was clear that some Member States have adopted new mechanisms that score highly against the criteria, principally, in the design of the critical intermediary body including regulatory authorities and/or consumer ombudsmen to deliver collective redress:

- **Regulatory authorities** need to have the function, role, powers, and ability to use redress powers. When these features exist, the evidence indicates that they are more successful, faster, and more economic in addressing systemic infringements of market rules. Rather than increasing the effort, cost, and time of investigations, authorities who have well-stocked toolboxes of enforcement powers, including an ability to order or seek a court order for redress, are able to resolve more cases more quickly, with most settling disputes without the need for court proceedings.

- **Despite much interest in ADR mechanisms, especially consumer ADR, it is only consumer ombudsmen (the leading examples being the UK, Ireland, and Germany) who are able to resolve individual and collective cases. The design is able to deliver the following functions:**
  - Consumer information and advice/Triage
  - Dispute resolution: individual collective redress

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2 • DELIVERING COLLECTIVE REDRESS IN MARKETS: NEW TECHNOLOGIES
- Capture and aggregation of data
- Feedback of information
- Identification of issues and trends
- Publication of data and information
- Pressure on market behaviour.

Litigation class actions are strikingly slow, costly, and ineffective when compared with regulatory and ombudsmen mechanisms.

The partie civile mechanism in which private parties may piggy-back on criminal prosecutions has proved somewhat effective (and involves no cost to individual claimants, since the State assumes the investigation and prosecution costs), but the success of the mechanism relies on defendants being convicted who have adequate funds to pay claimants (deep pockets), and for there to be criminal judges to be required to process the private actions (as in Belgium) rather than, in most States, merely to have the discretion to process such claims.

Data on collective actions

The dataset that was assembled is far from comprehensive, but appears to be more illuminating than has previously been available. The number of litigation collective actions identified is shown in Table 1. This suggests three conclusions:

(a) In many Member States, there has so far been a low number of such ‘class actions’. Some jurisdictions have had such mechanisms in place since the early 2000s, but numbers remain low. There are two exceptions—Italy and Poland—which have had class action laws since 2010, and where a larger number of actions have been commenced (whether by consumer associations or lawyers) but where success in obtaining certification of the action has been disappointing (roughly half of all actions commenced).

(b) 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 claimants through funders’ costs, and deliver limited outcomes. In Poland since 2010, only ten out of possibly 210 cases have yet reached a substantive decision.

(c) In those Member States where regulators have deployed redress powers, or where consumer ombudsmen exist, they appear to have uniformly achieved notably swift, efficient, and effective resolution of mass cases, and prompt payment of redress.

The barriers to class litigation are well-known, and need not be examined in detail here. The two central problems relate to complexities of procedure (certification, investigating evidence, processing common and then individual issues, and enforcement) but especially, as Professor Linda Mullenix (University of Texas) commented, attorneys’ fees. The outcome is that there are numerous

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Year of Introduction</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>2014</td>
<td>5</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>2015</td>
<td>2</td>
</tr>
<tr>
<td>Finland</td>
<td>2007</td>
<td>0</td>
</tr>
<tr>
<td>France</td>
<td>2014</td>
<td>10</td>
</tr>
<tr>
<td>Italy</td>
<td>2010</td>
<td>41</td>
</tr>
<tr>
<td>Lithuania</td>
<td>2015</td>
<td>3</td>
</tr>
<tr>
<td>The Netherlands (Dutch Collective Settlement Act)</td>
<td>2005</td>
<td>9</td>
</tr>
<tr>
<td>Poland</td>
<td>2010</td>
<td>210</td>
</tr>
<tr>
<td>Sweden</td>
<td>2003</td>
<td>17</td>
</tr>
</tbody>
</table>
instances in which collective litigation faces serious challenges concerning viability and the delivery of fair, timely, efficient, and cost-effective redress.

The effects of these factors were clearly illustrated in many case studies from different jurisdictions. In Germany, the Deutsche Telekom case that led to the Capital Market Test Case Proceedings (KapMuG) has not been resolved after twelve years. Access to funding for claimants, consumer associations, or intermediaries who seek to pursue collective litigation, as well as costs rules and risk, present major challenges—and European policy rejects adoption of the liberalized rules (no cost shifting, contingency fees, third-party funding) that exist to promote private enforcement generally under the USA class action paradigm.5 Given the European Recommendation’s emphasis on the need for safeguards to balance the risk of abuse, there will always remain a ‘catch-22’ between liberating access to justice and controlling abuse by private actors.6 Some States have been able to overcome this inherent problem by restricting enforcement of both regulatory and redress issues to public officials, in contrast to the US, where the opposite applies. A hybrid that exists in some European States of restricting control of injunctive action to approved NGOs may work on the basis of responding to individual infringements but does not address ongoing systemic behavioural aspects, and is treated with extreme caution in relation to empowerment to deliver redress.

It is not argued that barriers may exist to effective adoption of regulatory and ombudsman policies in some States (that issue is beyond this Policy Brief, but includes issues of resource and governance), but it is clear that some States have solved such issues and their mechanisms are operating well, delivering significant amounts of redress, and responses to market behaviour and trends.

Some examples

The following are taken from the cohort of cases, to illustrate some of the mechanisms. Nine large cases have been settled in the Netherlands under its Collective Settlement Act (WCAM), of which the following are examples, giving numbers and total settlements:7

- DES: 34,000 DES present and future people injured by a medicine — $48,000,000
- Dexia: 300,000 investment product purchasers — $1,370,000,000
- Vie d’Or: 11,000 insurance policyholders sued a regulatory authority, auditors, and actuaries — $62,000,000
- Royal Dutch Shell Petroleum: 500,000 shareholders alleging securities fraud related to restatement of petroleum reserves — $352,600,000
- Vedior: 2000 shareholders alleging securities fraud related to merger and acquisition — $5,770,000
- Converium: 13,000 shareholders alleging securities fraud related to failure to disclose accurately loss reserves — $58,400,000

In France, the consumer association UFC Que Choisir? sued Foncia in October 2014 in the Nanterre High Court of First Instance, claiming that fees charged to 318,000 tenants for sending them monthly rent payment receipts for €2.30 per month were unfair. The estimated total loss is €27.60 per individual and €44 million in total. The case remains pending.

After the three main French mobile phone operators (Orange, SFR, and Bouygues) were found by the Competition Authority to have been involved in a cartel over prices and market sharing, and fined €534 million, UFC-Que Choisir? initiated a lawsuit in 2006 to obtain compensation of €1.2–1.6 million paid by their 20 million subscribers in overcharges of c. €60 each. 220,000 consumers registered on a website, but only 12,521 sent the documents required to join the action. In December 2007, the Paris Commercial Court held the action inadmissible as the procedure chosen was a disguised action en representation conjointe, under whose rules soliciting of consumers was not allowed. That result was upheld by the appeal court and the Court of Cassation in 2011.

In Lithuania, an investors’ association claimed in 2013 against the auditor of an insolvent bank on behalf of shareholders who had bought shares in 2011. The court refused the class action as there was no commonality in the claims.

In Spain, court proceedings following an electricity outage took four years to reach the result that the case was dismissed because individual damages could not be proved, and the court upheld a
compensation package offered by the supplier three years earlier after the regulator had intervened. In a subsequent case, the company made a settlement offer that was accepted by 99% of customers.

In Belgium, 600 people joined a criminal action as *parties civiles*, and after some defendants were convicted, the court of appeal of Mons appointed two special masters to resolve the civil claims, who encouraged mediation, and the case was settled for around €10 million after two years.

In Denmark, the Consumer Ombudsman (the national enforcement authority) has, since 2008 and for antitrust since 2010, relied on the class action, which only the Ombudsman may use on an opt-out basis, as part of the toolbox of enforcement powers to reach a succession of agreed cases that include redress, without the need to bring an action. The redress power constantly influences discussions and assists businesses to reach holistic solutions.

In the UK, a range of redress powers are relied on by sectoral regulators, such as for financial services and energy to deliver large sums in redress. Other authorities, such as those for water or gambling, achieve redress without having explicit powers. All enforcers of consumer protection law are empowered under the Consumer Rights Act 2015 to adopt ‘Enhanced Consumer Measures’ that give flexibility to include behavioural, redress, and information outputs. Between April 2014 and November 2015, the Financial Conduct Authority established twenty-one informal redress schemes, which it estimates provided £131 million in compensation to consumers. The energy regulator Ofgem has switched its practice, with fines imposed falling from around £15 million in 2010 to £5 million in 2015, whilst redress paid by firms over the same period has increased from virtually zero to over £70 million, coupled with extensive discussions and agreements with firms on actions that they will take to change behaviour. In thirteen cases concluded by Ofgem in 2015/16, £43 million was paid out by licensees (£26m to customers and £19 million to charities). In the first half of 2016, the Environment Agency agreed payments to environment charities by ten firms that contacted it and seven firms that it contacted, totalling £403,000. In 2014, Ofwat (the water regulator) accepted an undertaking by Thames Water on a £79 million prices reduction, spending £7 million on customers, and a £1 fine.

Since 2012, the Bank of Italy has initiated four proceedings in which the regulated entity involved promptly refunded their customers, or provided the Bank of Italy with detailed information about their initiatives, to a total of €692,345.67. In 2014, the Bank of Italy issued two redress orders concerning mistakes in the calculation of interest, for a total amount of €118,506,000. It is standard practice for the Bank of Italy to ask regulated entities to adopt initiatives in order to refund customers for sums unduly paid, even without initiating a proceeding. In 2015, refunds stemming from informal requests by the Bank of Italy totalled around €65,000,000.

An enforcement investigation by the Central Bank of Ireland into tracker mortgage options and rates resulted in firms agreeing to implement a redress and compensation programme in July 2015 to address detriment suffered by 1372 customers arising out of mortgage overpayments, mortgage arrears, legal proceedings, and, in some cases, loss of ownership of properties and some homes. An interim measure was to apply a reduced interest rate to all affected accounts.

Inquiries received by the UK Financial Ombudsman Service have increased from 562,340 in 2003 to around 1.5 million in 2015/16 (peaking at 2.3 million in 2013/14), leading to a total of 340,899 new complaints in 2015/16. The members of the National Energy Ombudsman Network (NEON) comprising just six Member States, handled 92,335 energy-related disputes in 2015 (27.43% more than the previous year), 47% of which deal with invoicing and (e-)billing, 11% with customer services, redress, and privacy, and 10% with provider change/switching.

The ombudsmen at the conference (Caroline Mitchell of the UK Financial Ombudsman, Luc Tuerlinckx the Belgian Telecommunications Ombudsman, and David Pilling from Ombudsman...
Services, who spoke about the UK Energy Ombudsman) explained that their organizations systematically share their experience and knowledge with their sectoral regulator, the industry, and consumers. They have influenced behavioural change by businesses, policy by regulators, and legislation introduced by Parliaments.

It is important to recognize different types of ‘ombudsmen’. In Nordic States, the Consumer Ombudsman is the national enforcement official for consumer law, but does not act as a dispute resolution body between traders and consumer (for which there are separate Complaint Boards). In the UK, Ireland, and Germany, ombudsmen exist to handle consumer–trader disputes (the consumer ADR function) in some individual sectors, such as financial services, pensions, energy, communications, and so on. They operate differently from public sector ombudsmen, which exist in most States to investigate citizen–State complaints.

**Fundamental goals of redress**

We suggest that the fundamental objectives of redress (or payment of compensation through law) are:

1. To deliver appropriate compensation
2. To affect the future behaviour of a defendant and of the market generally, and thereby ensure that an unbalanced market is rebalanced so as to be a level playing field
3. To achieve both of these goals in the most efficient manner, in terms of speed/duration, costs, and finality.

The objective of ‘affecting future behaviour’ has traditionally been stated as the theory of deterrence, but research by Chris Hodges\(^{12}\) has shown that (a) the empirical evidence for deterrence as a means of regulating individual or corporate behaviour is limited, (b) the science of behavioural psychology offers far more effective insights into how to affect future behaviour, through adopting a range of approaches in which most people are supported to achieve performance, as opposed to punished for non-compliance, (c) many UK regulatory agencies have adopted supportive, responsive, and often no-fault regulatory policies rather than deterrence-based enforcement policies, and (d) the ideal model appears to be to encourage consistent systemic ethical behaviour, through various approaches that support relationships built on trust (and hence co-regulatory models).\(^{13}\)

If the above approach has validity, it has fundamental implications for legal systems that are based on principles of fault and deterrence. Their ability to affect future behaviour can be significantly questioned. Equally, this demonstrates why effective regulatory and ombudsmen systems are more effective in affecting behaviour than litigation-based systems. The idea that a single response to a single instance of non-compliance will result in ongoing or systemic change in behaviour, for example, as a result of the imposition of a single financial penalty, is not supported by behavioural or management science.

**The objectives for market regulation**

It follows from the above that redress is only one aspect of how markets should be safeguarded and regulated. Public policy has developed swiftly in the UK in the past ten years,\(^{14}\) such that the role of regulators and public enforcers has broadened to move away from merely achieving safety or well-structured and priced markets, to encompass an aspiration to ensure, firstly, that consumers and vulnerable businesses receive redress as an integral part of a rellevelled playing field and, secondly, that behaviour is effectively changed. Accordingly, the objectives of the most effective regulatory systems (in relevant countries, such as in civil aviation safety, workplace safety, environmental protection, or delivery of energy services) runs in the following sequence:

1. Establishing clear rules and their interpretation
2. Identification of individual and systemic problems
3. Cessation of illegality
4. Decision on whether behaviour is illegal, unfair, or acceptable
5. Identification of the root cause of the problem and why it occurs
6. Identification of which actions are needed to prevent the recurrence of the problematic behaviour, or reduction of the risk
7. Application of the actions (a) by identified actors (b) by other actors
8. Dissemination of information to all (a) firms, (b) consumers, (c) other markets
9. Redress
10. Sanctions
11. Ongoing monitoring, oversight, amendment

In considering what mechanisms of public and/or private enforcement, either alone or in combination, can deliver these objectives, it can be seen how litigation addresses item 9 alone, whereas the integrated co- and public-regulatory and ombudsman systems in some countries are able to address all items.

**An evolution in mechanisms for delivering collective redress: From litigation to regulators and ombudsmen**

There have been some significant shifts in mechanisms. First, the EU rejected the US model of maximizing private enforcement in favour of a more balanced approach involving safeguards. Second, there has been extensive experimentation by Member States in collective action models for damages. The current position would present a huge challenge for harmonization. There is no coherence in national class action laws, none of which correspond to the European Commission's 2013 blueprint. Each national system is tailored to domestic need, often uninfluenced by the Commission's blueprint, and the overview is of piecemeal development, which is uncontrolled.

An important reason for such diversity is the difficulty of introducing the concept of collective litigation into national constitutional and procedural contexts that are based on individual rights, as was stated by Dr Rebecca Mooney. Professor Hans Micklitz suggested there is an ‘absence of law’ and that transnational societal values are being ignored in the obsessive procedural mayhem. He said that respect for cultural values is needed instead of harmonization; an integrated approach to collective redress was valuable but it led to organized irresponsibility. Mr Robert Bray (European Parliamentary Research Service) said he was in favour of law to protect consumers but against any EU class action legislation, since there is too much legislation already which is not being implemented properly.

Third, there has been a shift in the techniques by which redress is delivered. The ‘old technology’ of private litigation has been superseded in some Member States by a highly effective ‘new technology’ involving regulators and consumer ombudsmen. These techniques have been approved by UNCTAD, and deserve to be widely adopted. Examples of redress powers noted above are used by financial services authorities in Italy, Ireland, and the UK. The European Commission has proposed that redress and ‘skimming-off’ powers should be available for all national members of the Consumer Protection Cooperation Network, although the Council prefers freedom for Member States to organize powers inside national administrations.

**Implications for future policy on collective redress**

The European Commission has committed itself to basing policy and rule-making on evidence, and to reducing regulatory burdens. It wants to concentrate on things that matter, rather than on details (‘bigger and more ambitious on the big things, and smaller and more modest on small things’). It aims to simplify rather than complicate. Proposals must satisfy strict ‘impact assessment’ criteria, aimed at ensuring that EU legislation can only be proposed if it will make a significant impact on the market. While wishing to ‘step up enforcement’, the Commission notes that its aim here is ‘to promote a more effective application, implementation and enforcement, in line with the Commission’s political priorities’. In December 2016, it said that it will adopt ‘a more strategic approach to enforcement in terms of handling infringements’, will develop ‘an inventory of the mechanisms of redress available at national level to which citizens may turn to seek remedies in individual cases’, and ‘will ensure the full application of the EU legislation on mediation and alternative dispute resolution’.

We suggest that a significant body of evidence in relation to improving enforcement generally, and collective redress in particular, has been assembled in this project, which suggests clear policy conclusions. The evidence suggests the following conclusions for future policy on collective redress for Europe:

1. Redress should not be considered on its own but as an integral part of contributing to strong and competitive markets. Hence,
mechanisms that address the eleven market functions noted above need to be considered holistically. The goal should be to provide mechanisms that address all eleven functions and outputs in an economic manner as possible, avoiding multiple mechanisms that only address individual functions.

2. The leading contenders for these tasks are the ‘new technologies’ of regulatory and ombudsman mechanisms.

3. Sectoral and generic regulators should have redress powers as part of their enforcement toolboxes, subject to appropriate oversight mechanisms.

4. Both sectoral legislation that requires ADR and the generic consumer ADR legislation should specify that consumer ombudsman models should be required, rather than other types of general ADR.

5. Traditional litigation procedures fail essential criteria of accessibility, speed, cost, efficiency, and outcomes. In comparison, newer technologies score well against those criteria, and when designed appropriately can deliver multiple objectives in relation to making markets work well and protecting consumers and businesses besides just redress.

Notes

1. The National Reports and conference presentations are available at https://www.law.ox.ac.uk/events/empirical-evidence-collective-redress-europe.


13. See the increasing interest and adoption of this approach by governments: C. Hodges, Ethical Business Practice: Understanding the Evidence (Better Regulation Delivery Office, 2016); C. Hodges, ‘Ethical Business Regulation: Growing Empirical Evidence’ (The Foundation for Law, Justice and Society, 2016) available at: http://www.flys.org/content/ethical-business-regulation; Striking the Balance. Upholding the Seven Principles of Public Life in Regulation (Committee on Standards in Public Life, 2016); Delivering better outcomes for consumers and businesses in Scotland (Scottish Government, 2016).


15. This terminology of old and new technology was first used, to our knowledge, by Derville Rowland of the Central Bank of Ireland at the Law Reform Commission’s annual regulatory conference, Dublin, 2016.


17. Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM(2016) 283 final, Brussels, 25.5.2016, article B.2 (n) and (o).


20. Political guidelines for the next European Commission of 15 July 2014 and mission letters of 1 November 2014 from the President to Vice Presidents and Commissioners.


Annex 1: Contributors of national data

Belgium: Prof Dr Stefaan Voet, Catholic University of Leuven
Bulgaria: Deyan Draguiev and Assen Georgiev, CMS Cameron McKenna LLP/Pavlov and Partners Law Firm in cooperation with CMS Reich-Rohrwig Hainz
Czech Republic: Tomas Matejovsky and Petr Benes, CMS Cameron McKenna v.o.s.
Denmark: Christian Alsøe, Gorrisen Federspiel
France: Dr Alexandre Biard and Dr Rafael Amaro
Germany: Prof Dr Astrid Stadler, Konstanz University
Greece: Dimitris Emvalomenos, Bahas Gramatidis & Partners
Hungary: Zsolt Okányi, Péter Bibók, Ormai és Társai, CMS Cameron McKenna LLP
Italy: Prof Dr Elisabetta Silvestri, Pavia University; and Daniele Vecchi, Gianni Origone Grippo Cappelli & Partners
Netherlands: Prof Dr Eddy Bauw, Utrecht University
Poland: Dr Magdalena Tulibacka, Atlanta University; and Malgorzata Surdek, Filip Grycewicz, Aleksander Wozniak, CMS Cameron McKenna LLP
Spain: Alejandro Ferreres, Uria Menéndez
Sweden: Peder Hammerskiöld and Sigrid Törnsten, Hammarskiöld & Co
Romania: Andrei Cristescu and Gabriel Sidere, CMS Cameron McKenna SCA
Ukraine: Olga Vorozhbyt, CMS Reich-Rohrwig Hainz TOV
United Kingdom: Prof Christopher Hodges; with assistance from Caroline Mitchell, Financial Ombudsman Service; Matthew Vickers, Steven Campbell, and colleagues of Ombudsman Services; Nicholas Holloway and colleagues of the Financial Conduct Authority; Alasdair Morgan and Kiera Schoenemann of Ofgem; and Richard Khaldi of Ofwat.
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Professor Dr Christopher Hodges is Professor of Justice Systems at the University of Oxford and a Supernumerary fellow of Wolfson College. He is Head of the Swiss Re/CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford. His latest books are Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics (Hart, 2016); (with Hensler and Tzankova) Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation (Edward Elgar, 2016); (with Benöhr and Creutzfeldt) Consumer ADR in Europe (Hart Publishing, 2012); (with Stadler) Resolving Mass Disputes (Edward Elgar, 2013).

Professor Dr Stefaan Voet is Associate Professor at the University of Leuven and a host professor at the University of Hasselt in Belgium. He is also a Programme Associate at the CMS/Swiss Re Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at the University of Oxford, and he is the 2016–2017 TPR Chair at the University of Utrecht in the Netherlands. His main research interests are civil procedure, complex litigation, ADR, ODR, dispute resolution design, and litigation costs. He is also a substitute justice of the peace in Bruges.

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for Law, Justice and Society
Wolfson College
Linton Road
Oxford OX2 6UD
T: +44 (0)1865 284433
F: +44 (0)1865 284434
E: info@fljs.org
W: www.fljs.org
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.


(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 principles 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 (5).

(5) On 11 June 2013 the Commission issued a Communication ‘Towards a European Horizontal Framework for Collective Redress’ (6), 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.

(5) 2011/2089(INI).
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.

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.

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 (\(^1\)). 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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

\(^1\) 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 (1).

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

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*