Reflections on the Commission Communication on Collective Redress

John Sorabji*

In June 2013 the European Commission published its collective redress reform package via a Communication to the European Union (EU) Member States, a non-binding Recommendation containing common reform principles, and a Green Paper on antitrust damages actions. This article considers how the reform proposals contained in the first two documents are likely to secure the European Commission’s aim of bringing procedural coherence to the EU’s and Member States’ approach to collective redress and to do so as a matter of urgency. It is argued that the reform package is unlikely to secure effective reform in the short term or produce coherence in respect of either the scope or nature of such measures. The article then looks at a number of potential reform options that the European Commission could take when it looks at this issue, and the Member States’ responses to its reform package, in 2017. It considers whether successful reform in 2017 will require further study by the Commission, a specific collective redress directive or regulation, or whether the optimum approach might be to introduce reform via an optional instrument akin to that set out in the Commission’s Proposal for a Common European Sales Law.

1. Introduction

On 19 December 2005 the European Commission started to consider collective redress reform through issuing its Green Paper on damages actions for breach of EC antitrust rules. On 11 June 2013, nearly eight years later, that process culminated with what has been described by more than one commentator as its ‘long-awaited’ policy on collective redress reform. That policy was set out in a package of three interlinked documents: a Communication to the European Union (EU) Member States (the Communication), a non-binding Recommendation setting out common principles for the development of collective redress mechanisms (the Recommendation) and a Proposal for a Directive on damages arising from competition law infringements. As the last of the three does not pertain to collective redress it is not considered here. The Communication summarised the work the Commission, and also the European Parliament, had carried out in the area since 2005. In particular it set out the conclusions the Commission had drawn following on from its 2011 public consultation on collective redress reform. Furthermore, it stressed the need to ensure that reform measures must set

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*I Dr John Sorabji, UCL Judicial Institute, email: j.sorabji@ucl.ac.uk.

1 European Commission, ‘Damages actions for breach of the EC antitrust rules’ (Green Paper) COM (2005) 672 final (Commission Green Paper). Collective redress being, as defined in European Commission, ‘Public Consultation: Towards a Coherent European Approach to Collective Redress’ (Working Document) SEC (2011) 173 final (Commission Working Document), s 7, ‘a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices’.


7 Commission Working Document (n1).
out a coherent European horizontal framework for collective redress. The Recommendation complemented the Communication by setting out the specific non-binding policy reform recommendations that the Commission intended should be implemented by the Member States and implicitly by itself. The recommendations take the form of eleven reform principles that are to guide Member States’ reforms, consistently with a number of specific reform aims, which are set out below.

The Communication and Recommendation have not met with universal approval. While they have been welcomed by some consumer groups and civil procedural scholars, Stadler, for instance, has noted how some such groups and individuals who were hoping for a ‘binding European Framework of collective redress instruments’ have greeted the reform package with disappointment because it did not, in their view, go far enough. BEUC, the European Consumer Organisation, in this vein, described the Commission’s approach as no more than a ‘baby step forward’. In more dismissive terms it has been described by the Secretary-General of the Council of Bars and Law Societies of the European Union (CCBE) to be no more than a ‘squeaking mouse … frightening no one’. Conversely others have been disappointed because, in their view, it went too far. Hodges has, in this regard, noted that it has been viewed by some businesses and Member State governments as an ‘unwelcome development’. As Luc Hendrickx, Enterprise and Legal Affairs Director of UEAPME (the EU-wide employers’ organisation for SMEs), put it, the UEAPME continued to question, following the reform package’s publication, ‘whether the need for creating a collective redress mechanism has been established, both at Member States [sic] level and European level’. In the light of such a view, any positive policy recommendation could not but be viewed as going too far.

This article does not consider the reform package from these perspectives, all of which could have been anticipated, given the nature of the reform debate that had taken place from 2005-2013. It does not, as a consequence, consider whether the package goes too far, as some members of the business community have argued. Equally, it does not consider the package from the consumer or academic perspective to assess whether or not the package goes as far as it might have done. Rather than examine it from what might be termed external perspectives, this article examines the reform package from what might be said to be the Commission’s perspective. In order to do this, it first outlines the Commission’s reform aims. It then examines those aims to ascertain whether they are achievable via the Communication and Recommendation. Finally, it considers how the Commission might approach further reform when it revisits its proposals in 2017 in order to better achieve those aims.

8 Commission Communication (n3) s 3.
9 Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2).
10 Stadler (n2).
11 As Monique Goyens, Director General of The European Consumer Organisation, stated, ‘[i]t is a pity the European Commission has dragged its feet on this burning issue. The absence of a uniform collective redress mechanism has been a glaring omission of the Single Market for decades. 79% of European consumers have called for it, lamenting the fact their rights remain on paper. This is a basic question of access to justice ... The system recommended by the Commission disappointingly asks each person to sign up - automatic inclusion of all victims should be the norm. We need to see all EU countries now pick up the ball and run with it by including in national law without delay. After a generation, the Commission has taken this baby step and European consumers expect them to closely monitor the progress and at least fill the gaps where necessary’ (cited in BEUC, ‘EU Takes Baby Step Towards Collective Consumer Court Actions’ (EUbusiness.com, 10 June 2013) <www.eubusiness.com/Members/BEUC/court-actions/> accessed 26 June 2014).
13 Stadler (n2) 483: Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2) 67.
15 The Commission Communication (n3) s 2.1 can be seen to, in a certain respect, anticipate the criticisms made of the Commission’s reform package in that it noted the difference in opinion that the various stakeholders – consumer, business, academic, legal profession and Member States – has expressed regarding it and how reform should be developed.

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2. The Reform Aims and Principles

The Commission has, since it first began work on collective redress reform in 2005, articulated a number of reform aims. In order to consider whether and to what extent the Communication and Recommendation are likely to achieve those aims, it is necessary to set them out and, in particular, outline the aims that this article intends to examine.

The first and most consistently articulated reform aim has been the need to develop effective collective redress mechanisms that are able to vindicate the infringement of individual rights through the provision of compensation for harm. As DG Competition (DG Comp) put it, for instance, in 2008, victims of breaches of antitrust law were to be able to achieve ‘full compensation’. This principle is ‘the first and foremost guiding principle’. Secondly, reform must respect defendants’ substantive and procedural rights. Reform must therefore minimise the risk of abusive litigation, which might lead defendants to over-settle claims or settle claims where, arguably, there had been no rights-infringement or, at least, if litigation proceeded to trial the claim would not be made out. Accordingly, no developments should permit the problems understood to be inherent in the US class action system to arise in any European collective redress mechanism. Equally, there should be no economic incentives to bring speculative claims. Thirdly, reform must form part of an overall strategy to secure the enforcement of rights arising under European law. Private enforcement, through collective redress, must complement public enforcement; a point DG Comp noted in its 2005 Green Paper, when it emphasised the fact that since the European Court of Justice’s decision in Van Gend en Loos, competition law enforcement was a partnership between the two enforcement methods. There was, however, a problem with this partnership. While public enforcement mechanisms were well-developed, the same was not necessarily the case in respect of private enforcement. Collective redress reform must therefore produce an effective private enforcement mechanism, one that could

16 Although see Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2), who traces its ultimate origin back to the 1980s.
17 A number of political aims have been attributed to the reform process. Neelie Kroes, Member of the European Commission in charge of Competition Policy, ‘The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce Their Rights’ (Opening Speech at the European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules, Brussels, 6 June 2006) 6 <http://ec.europa.eu/competition/speeches/text/06062006_en.pdf> accessed 26 June 2014, for instance, suggested in 2006 that one of the aims of collective redress reform was to ‘give EU citizens a central role in our European project’. More recently, the Commission Communication (n3) s 1.1 suggests that reform has, as one of its aims, furthering economic growth. It is not intended to consider such aims here.
19 Ibid. This point is reiterated by DG Health and Consumers, ‘Consultation Paper for Discussion on the Follow-up to the European Commission Collective Redress’ (Brussels, 8 May 2009) para 69 <http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf> accessed 26 June 2014. Note that the Commission Working Document (n1) para 7 states that ‘there are two main forms of collective redress: by way of injunctive relief, claimants seek to stop the continuation of illegal behavior; by way of compensatory relief, they seek damages for the harm caused’; Commission White Paper (n18) s 2.9.
20 DG Health and Consumers (n19) 12–13. This issue focused to a large extent on the need to avoid the introduction of US-style class actions. See, for instance, Meglena Kuneva, Commissioner for Consumer Protection, ‘Healthy Markets Need Effective Redress’ (Speech at the Conference on Collective Redress, Lisbon, 10 November 2007) 2 <http://ec.europa.eu/consumers/redress_cons/docs/mku_cr_lisbon_final.pdf> accessed 26 June 2014, who stated, ‘to those who have come all the way to Lisbon to hear the words “class action”, let me be clear from the start: there will not be any. Not in Europe, not under my watch’; Commission Communication (n3) 3, 7; Commission Recommendation (n4) recitals (10), (13), (15), (19), (20), (26), and paras 1 and 41.
21 Commission Communication (n3) s 3.
23 Commission Green Paper (n1) s 1.2, which noted the then ‘total underdevelopment’ of effective private collective enforcement mechanisms in the Member States. By 2013 that underdevelopment had been ameliorated, to a certain degree, through various reforms in a number of Member States. For an overview of such developments, see Duncan Fairgrieve and Eva Lein (eds), Extraterritoriality and Collective Redress (OUP 2012) 19ff.
complement public enforcement effectively. This aspect of the reform process had another aspect to it. Public enforcement was to have, as its primary role, the aim of deterring unlawful conduct. Private enforcement was, as per the first reform aim, to focus on securing compensation for harm. As the Communication put it, there was ‘no need for EU initiatives to go beyond the goal of compensation’. The fourth reform aim was to ensure that any developments were consistent with, and reflected, European legal culture and traditions. They would thus have to be consistent with the procedural approaches taken by Member States, both common law and civil law. It was to do so through pursuit of the final aim, which, as Commissioner Reding put it, echoing DG Comp in 2008, was the urgent need to secure procedural coherence across the Member States in respect of collective redress. The Commission was thus to ensure that what had historically been the piecemeal, and varied, development of redress mechanisms across the Member States was to be replaced by ‘coherence in civil procedural law’.

Coherence was essential because of the inconsistent approach to collective redress throughout the Member States. These aims are to be implemented by the Member States through their implementation of the reform principles set out in the Recommendation. Procedural economy and increased access to justice, and hence access to compensatory damages, was, for instance, to be secured through the introduction of opt-in forms of collective action, as well as the promotion of collective settlement mechanisms. To protect against abusive or speculative litigation: only specially authorised entities and public bodies were to be capable of bringing collective claims; admissibility criteria were to be applied at the earliest possible stage of the proceedings to avoid abusive claims; and the promotion of collective redress was to be complemented by national measures in order to make it more effective. These aims are to be implemented by the Member States through their implementation of the reform principles set out in the Recommendation. Procedural economy and increased access to justice, and hence access to compensatory damages, was, for instance, to be secured through the introduction of opt-in forms of collective action, as well as the promotion of collective settlement mechanisms. To protect against abusive or speculative litigation: only specially authorised entities and public bodies were to be capable of bringing collective claims; admissibility criteria were to be applied at the earliest possible stage of the proceedings to avoid abusive claims; and the promotion of collective redress was to be complemented by national measures in order to make it more effective.

Taking into account the complexity on the one hand and the need to ensure a coherent approach to collective redress on the other hand, the Commission adopts, in parallel with this Communication, a Recommendation … that suggests horizontal common principles of collective redress in the European Union that should be complied with by all Member States.

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stage of litigation, so as to ensure that only meritorious claims were permitted to proceed on a collective basis; the loser pays costs rule was to apply to act as a disincentive to parties who might otherwise bring speculative claims; while third party funding for such litigation was permissible it was only to be made available subject to specific safeguards, ie a prohibition on conflicts of interest and third party influence over the conduct of litigation and notice of such funding to be given to the other party at the outset of the litigation. Further safeguards were also to be put in place, such as a prohibition on contingency fee funding, a bar on lawyers’ remuneration being such as to create an incentive to litigate contrary to the interest of the party they represent, and a bar on punitive damages. In addition to these safeguards, the other principles were to be implemented through: the introduction of opt-in forms of collective action and effective notice provisions; the creation of collective alternative dispute resolution (ADR) and settlement schemes, which should then be subject to court approval mechanisms to ensure that any such settlement is fair and is consistent with the rights and interests of all the parties to the dispute; and, finally through the introduction of a central registry for collective actions in each Member State.

The principles are not, however, absolute; a number of them allow Member States to adopt alternative approaches. For instance, while the Recommendation specifies that collective actions should be permitted on an opt-in basis, it accepts that in exceptional circumstances, where it is in the interests of the sound administration of justice, opt-out forms of collective action are permissible. Equally, it tempers the prohibition on contingency fee funding agreements by, again on an exceptional basis, permitting those Member States that have already introduced such funding schemes to maintain them subject to regulation. Furthermore, both the Communication and Recommendation stress that the principles and recommendations they set out are not mandatory. Neither the various policy areas in the Commission nor the Member States were required to implement them. On the contrary, the two were to form part of what might be viewed as further, and in this case practical, study by the Commission following on from the policy and theoretical debate that had taken place from 2005-2013. While it would be expected that the Commission would follow its own policy there was no stated obligation to do so. Where the Member States were concerned they were given two years to implement the policy set out in the two documents on a voluntary basis. The Commission would then, two years after that date, ie four years after the publication of the Recommendation and Communication, revisit the area. It would do so in order to draw practical lessons from the manner in which the Member States had implemented its policy recommendations. Based on that experience, it would then consider what, if any, further steps would be taken. It will therefore be 2017 at the earliest that the Commission will start to consider what legislative measures may need to be taken to, for instance, ‘consolidate and strengthen [its recommended] horizontal approach’ to collective redress.

Questions concerning whether the Communication and Recommendation are likely to achieve the first four aims have been considered by a number of commentators. There has, however, been little discussion of whether the reform package is likely to achieve coherent and consistent reform across the Member States, and whether it will do so urgently. The following section examines this issue.

3. Is the Reform Package Likely to Produce Coherence across the Member States?

The starting point of an assessment of the issues is to look at the timescale for reform: the ‘urgent need to bring procedural coherence’ to collective redress throughout the EU and its Member States. The Communication and Recommendation are unlikely to be able to achieve this aim. This is for two reasons. First, the Commission is unlikely to be able to achieve the necessary coherence at the beginning of the timescale. Second, the two years envisaged by the Commission for Member States to implement the policy in the Communication and Recommendation are unlikely to be sufficient to achieve coherence.

33 Commission Recommendation (n4) recitals (6)–(9).
34 ibid recital (4), where the voluntary nature of the recommendations was stressed.
35 ibid recital (26), where the criteria to be applied to this assessment are set out: ‘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 [to] prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust’.
36 Commission Communication (n3) s 4; Commission Recommendation (n4) para 41.
37 For example, Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2); Ethan Litwin and Morgan Feder, ‘European Collective Redress: Lessons Learned from the US Experience’ in James Langenfeld (ed), The Law and Economics of Class Actions (Emerald Group Publishing 2014) 209.
38 See (n35) above.
reasons. First, and most obviously, they provide a long-term timescale for action. The proposals do not have to be acted on by the Member States until 2015. The Commission will not then begin to assess what steps they have taken until 2017. Only after that will it be in a position to identify the extent to which increased procedural coherence has arisen as a consequence of its reform package and consider what, if any, further steps need to be taken to effect that aim. Given this timescale it appears unlikely that the timescale set by the Commission meets the requirement for urgency identified in 2011 by Commissioner Reding.

In its defence the Commission might, however, suggest that the reform package does meet the need of securing urgent reform. The reform package, it might be argued, was published within a reasonable period of time after the Consultation closed, given the need to allow a proper time to consider its results. It might then also be argued that the reform package does provide for coherent reforms to take place in the Member States within a reasonable timeframe, given the need in some cases for legislative amendments to be considered and enacted, i.e. where existing collective redress mechanisms exist, and the need in other cases, where there are no extant mechanisms, for legislation to be prepared, debated and enacted. The Commission may well, in the light of this, suggest that setting a two-year implementation timescale (with a review of developments to then come at EU-level two years later) was practical and realistic in terms of introducing urgent reforms in this area. Here, however, the second and substantive issue arises: the nature of the Recommendation and whether it is able to produce the necessary type of reform.

If concrete reform by 2015 or 2017, at the latest, had been intended, one clear way to effect it would have been through the introduction of either a directive or regulation. Legislation would have produced procedural coherence and harmonisation across the Member States and could have done so in a timeframe running to 2017. For a variety of political reasons, that was not, however, an option, as commentators and the Commission have acknowledged. Due to the permissive nature of the reform package there is, however, no guarantee that Member States will implement it. The Recommendation, as noted above, only provides guidance and does not mandate action on the part of any of the Member States. Member States may well decide that their pre-existing mechanisms are adequate and thus no reform is necessary. Equally they may conclude, for political reasons for instance, that reform is something that is off the legislative agenda for the foreseeable future. They may also decide that any reforms they intend to introduce, whilst divergent from other approaches across the Member States, are nevertheless consistent with the Recommendation.

In each of these possible scenarios there is nothing in the Recommendation itself to require certain steps to be taken by the Member States, nor does it bar them from taking such approaches. Whether and what steps are taken remains a matter for the Member States and, as such, may produce the situation where little reform has taken place by 2017. It may equally see reform take place, albeit different reform approaches may be adopted across the Member States. Moreover, there is nothing to stop Member States from adopting differing approaches in different sectors, i.e. an opt-in form of group action for general civil claims, with an opt-out form of collective action for competition claims, as in England and Wales. The risk therefore remains of uncoordinated or at the least inconsistent sectoral approaches, contrary to the position outlined in the Communication, both within and across Member States. That these points are live ones can be illustrated by recent developments in England and Wales and France.

Collective redress reform has been discussed in England and Wales since the early 1980s. Those discussions produced a recommendation in 2008 that a horizontal form of collective action ought to be introduced, one that could be brought on either an opt-in or opt-out basis. The then Labour

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39 For example, see generally Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2); Commission Communication (n3) s 2.1, where the Commission notes that the Member States hold varying views on the way in which reform should develop.
40 The Group Litigation Order (GLO) under the Civil Procedure Rules (CPR) 19.10 – 19.15, CPR PD 19B.
41 Consumer Rights Bill 2013 (UK) sch 8, pt 1.
42 Commission Communication (n3) s 4.
43 For an overview, see John Sorabji, ‘Collective Action Reform in England and Wales: Are Class Actions Really on the Way?’ in Fairgrieve and Lein (n23).
government rejected that recommendation in favour of a sectoral approach. Reform was only to be introduced in discrete sectors, such as financial services or consumer litigation, and then only introduced if there was clear evidence to show that such innovation was needed in that area.\(^{45}\) The current UK coalition government has done nothing to suggest that it takes a different view to reform. It has in fact taken positive steps to introduce sectoral reform (in the competition sector), through the Consumer Rights Bill 2013. This raises a number of issues.

The first issue focuses on sector-based reform itself, ie on the scope of application of collective redress reform. In England and Wales, for instance, collective claims can be brought in the Competition Appeals Tribunal.\(^{46}\) These actions can be brought only where either the Office of Fair Trading (now the Competition and Markets Authority) or the European Commission has established that there has been a competition law infringement. They are thus dependent on prior use of public, regulatory enforcement. Such follow-on actions are collective in nature; albeit they operate at present on an opt-in basis. This form of procedure has not been without its critics.\(^{47}\) It has, for instance, been criticised on the basis that, as an opt-in form of action, it is unable to ensure that sufficient numbers of individuals actually opt in to it. In the one action brought using it, less than one per cent of the total potential class is said to have opted in.\(^{48}\) The conclusion drawn by a number of commentators to this was that the procedure ought to be replaced by an opt-out form of process.\(^{49}\) The UK government accepted those conclusions and is presently attempting to reform the action via the Consumer Rights Bill 2013.\(^{50}\) It seeks to do so by, amongst other things, enabling that type of action to be brought on either an opt-in or an opt-out basis.\(^{51}\) The UK government has not suggested that it intends to go wider than this reform.

For there to be coherent development across the Member States, a similar approach to reform to that adopted in the UK (or for that matter in any other Member State) would need to be taken across the EU. Two problems arise here. First, it may be the case that one or more Member States would consider that there was no evidence-base in their jurisdiction to introduce such a reform, whether in the competition law sector or any other relevant sector. The Danish government, for instance, might conclude that, in light of the claims that can be dealt with by its Consumer Ombudsman, such a reform would be unjustifiable. Its existing mechanisms would be viewed as capable of dealing effectively with the harm that the English and Welsh follow-on action was intended to deal with.

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\(^{46}\) Competition Act 1998, s 47B (UK).


\(^{49}\) For example, Sorabji, Napier and Musgrove (n44). It was not entirely clear whether this was suggested on the basis that it would enable more individuals to secure compensation or because it was thought to create a more effective means of disgorging unlawfully obtained profits from those who had breached competition law even where there was little to no prospect that there would be any real increase in compensation to individual victims. What was clear though was that the view taken by Which?, the one body authorised to bring such proceedings, was that an opt-out based reform was preferable even though there was little prospect of the latter. As it set out in its response to the 2011 Consultation, Deborah Prince, ‘Consultation Response: European Commission Consultation on Collective Redress’ (Which?, 26 April 2011) <http://ec.europa.eu/competition/consultations/2011_collective_redress/collective_redress_en.pdf> accessed 26 June 2014: ‘We found that insufficient consumers signed up to make the (opt-in) action proportionate. Nevertheless, the overwhelming response of consumers was that the action was a positive move and that we should have had the power to claim all the unlawful profit and use this for charitable purposes (ie apply a cy-près distribution of unclaimed damages):’ In other words the power should exist to bring such proceedings even where there was no prospect of securing compensation for actual victims.

\(^{50}\) The present position may soon however be revised as the Consumer Rights Bill 2013 (UK), cl 80, sch 8 <www.publications.parliament.uk/pa/bills/cbill/2013-2014/0180/14180.pdf> accessed 14 May 2014 (Bill version 55/3), if enacted, will introduce the option to bring such proceedings on an opt-out basis.

\(^{51}\) Ibid sch 8, pt 1, para 5 (as at 14 May 2014).
Secondly, some Member States, where there was no such extant mechanism, might conclude that there was no evidence justifying the introduction of such a form of action either at all or in any similar form to that in place in the UK. There might, for instance, be evidence to support no reform, or wider reform. In France, for instance, the recently adopted consumer collective action law applies to both competition and consumer claims and, as such, is wider in scope than the UK follow-on action.\(^52\)

The first problem then that the Commission’s approach creates is that it does not provide a basis for the development of a coherent approach to reform in so far as the scope of collective actions is concerned. It provides little prospect that Member States will introduce, or reform, their collective action provision to cover the same sectors. The UK approach is one that limits such actions to competition claims, while the French approach covers competition and consumer claims. Other Member States adopt differing approaches to scope. Portugal, for example, permits claims to be brought in a broad range of areas, such as ‘public health, the environment, quality of life, consumer protection and consumer services, cultural heritage and public domain’.\(^53\) Coverage may therefore continue to be inconsistent across the Member States, with only general consumer protection or competition law being the norm in some, whilst other specific types of claim will be covered in others. It is difficult to see how the Recommendation will facilitate the development of a consistent approach – in terms of scope – across the Member States to those areas in which collective claims can be brought. Furthermore, given the recent sector-specific developments in the UK and France, it is difficult to see there being any real prospect that the Member States will take concrete steps between now and 2017 to introduce horizontal collective actions which, if introduced throughout the Member States, would produce coherence in so far as scope is concerned. What appears more likely is that there will continue to be differing piecemeal development across the Member States. As such the prospect of greater coherence by 2017 appears low.

The contrasting approaches taken in France and the UK are illustrative of a further issue that arises concerning coherent development: the promotion of consistency in collective actions. The new French action de groupe is, consistent with the general principle articulated in the Recommendation,\(^54\) an opt-in form of action\(^55\) in that it mirrors the approach to such actions taken in, for instance, Sweden\(^56\) and Poland.\(^57\) Given this, it might be suggested that this post-Recommendation development in France is a step towards greater coherence in approach across the Member States to, at the least, the issue of whether such actions should be brought on an opt-in or opt-out basis. That is to assume that the French development was influenced by the Recommendation. It is doubtful, however, that this was the case. The French approach to this aspect of reform was more properly one of seeking to ensure the new provision was consistent with its Constitution, which is understood to prohibit opt-out forms of collective action.\(^58\) This suggests that where reform comes it is as likely to stem from Member States’ legal traditions, rather than from the terms of the Recommendation.\(^59\) If this is correct, it raises the question whether the Commission’s aim of securing procedural coherence and consistency might be

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\(^{52}\) See Action de groupe, Loi n° 2014-344 du 17 mars 2014 relative à la consommation <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036&categorieLien=id> accessed 26 June 2014. Under the French group action only a body authorised by the State to bring such actions and on an opt-in basis can for instance, bring the proposed French group action. Moreover, it would apply to both consumer claims and claims arising from competition breaches. The reformed UK action only applies to competition law breaches and would be capable of being brought by any individual or body authorised by the Competition Appeal Tribunal.

\(^{53}\) Mulheron (n47) 98.

\(^{54}\) Commission Recommendation (n4) para 21.

\(^{55}\) Action de groupe, Loi n° 2014-344 (n52), art L423-5.

\(^{56}\) Group Proceedings Act 2002 (Sweden).

\(^{57}\) Act on Pursuing Claims in Group Proceedings 2009 (Poland).

\(^{58}\) As noted by Jérôme Philippe, Maria Trabuccci, Stephane Benouville, Dimitri Lecat and Alexandra Szekely, ‘France adopts class action’ (Lexology, 29 April 2014) <www.lexology.com/library/detail.aspx?g=51588eda-987a-442f-8601-fc5f40e5575> accessed 26 June 2014: ‘Although this … procedure might seem to be an opt-out action, paragraph 3 of Article L 423-10 of the French Consumer Code refers to “consumers having agreed to compensation”. Therefore, the Constitutional Court held that the simplified procedure qualifies as an opt-in action and that the procedure does not breach the Constitution.’

undermined by the extent to which Member States adhere to their own legal and constitutional traditions. This is further exemplified by the UK approach via the Consumer Rights Bill 2013.

The Consumer Rights Bill 2013 is intended, as noted above, to reform the extant follow-on collective action so as to enable it to be brought on an opt-out basis. Such a development is understood in the Recommendation to be the exception to the general principle that such actions should be introduced on an opt-in basis only. The exception can, however, be invoked where it is justified by reasons of sound administration of justice. The UK government considered whether such reasons existed and concluded that, in so far as its reforms were concerned, they did. As Jo Swinson MP put it:

There has however been extensive research carried out by the Office of Fair Trading and the Civil Justice Council, which supports that [sic] a more effective means to redress for parties affected by an infringement of competition law comes through an ‘opt-out’ approach. This is backed up by evidence gathered through the Government’s own Impact Assessment and consultation on the draft Bill. An efficient means to redress within a competition regime is essential for making markets work. The Government believes this does provide the necessary justification ‘on grounds of sound administration of justice’ and therefore, sufficient leeway to take advantage of the Commission’s exception.

There was nothing, unlike in France, in England and Wales’ legal tradition that precluded the introduction of an opt-out form of action. Moreover, there was a body of research carried out by government and non-governmental bodies and the UK government itself that supported the introduction of such actions as a means to secure the efficient resolution of claims that would not otherwise be prosecuted. Given this, the UK government introduced the Commission’s exception, facilitating opt-out as a permissible form of class action. It is likely that during the course of 2014 the Consumer Rights Bill will become law.

Such a development will, in the first instance, underscore the divergence in approaches between France, and the other Member States that have adopted opt-in only forms of collective action, and the UK and, for instance, Portugal and Sweden, where opt-out actions are available. That the UK government could justify reliance on the exception raises the possibility that other Member States could equally do so. There is no reason, in principle, why the Irish government could not obtain similar evidence to that obtained by the UK government. The same point applies equally to other Member States (and to Scotland, which also as yet does not have its own form of collective action), which do not as yet have fully developed collective action mechanisms. Thus, consistency with the Recommendation’s approach to opt-in and opt-out coherence, in so far as the nature of collective action mechanisms throughout the Member States is concerned, is not, or at best is unlikely to be, promoted. On the contrary, because the Recommendation provides both a general principle and an exception to it, both of which are consistent with extant traditions in the Member States and capable of justification on reasoned grounds, coherent development is capable of practical frustration. The possibility remains that, for instance, consumer claims will be subject to opt-in collective actions in one Member State, but opt-out actions in another.

The position regarding opt-in and opt-out is illustrative of a wider point. A number of the other reform principles set out in the Recommendation provide a general default principle and an exception to it. For instance, the Recommendation prohibits third party funding arrangements to base the funder’s remuneration on the amount due to the class claimants under a settlement or judgment award. That prohibition is, however, subject to the proviso that such arrangements are permitted if they are subject to public regulation. Just as with opt-in/opt-out, the possibility exists that different Member States will take differing views to implementation; some will prohibit such remuneration arrangements, others will

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60 Commission Recommendation (n4) para 21.
62 Swinson (n61) 3.
63 Law 83/1995 of 31 August 1995 (Portugal); Code of Civil Procedure 1961 (Portugal), art 26A.
64 Commission Recommendation (n4) para 32.
facilitate them by introducing appropriate regulation. The same point arises regarding contingency fee funding for collective claims. The general rule provided by the Recommendation is to prohibit them, while an exception permits them if they are regulated.\footnote{ibid para 30. A similar point can be made regarding standing to bring such actions. The default position (para 4) is that only bodies authorised by the State may bring collective actions. That general rule is subject to the exception that Member States may allow bodies also to bring such claims, if they are authorised on an \textit{ad hoc} basis by national authorities or the courts. Member States are equally likely to take divergent approaches to this rule and its exception ie, the French \textit{action de groupe} can only be brought by a consumer association, whereas the UK’s proposed reformed following-on action will be capable of being brought by, in principle, entities authorised by the court on an \textit{ad hoc} basis.}

The Recommendation therefore seems to pose a specific problem; by setting out a number of principles which are then subject to exceptions, it permits continuing differential development across the Member States. Just as it does not seem to provide a solution to piecemeal development concerning the scope of application of collective actions, it seems to allow the continuing development of divergent and piecemeal development in terms of the mechanics of such actions. Given this, it is questionable whether a coherent, consistent, approach to reform will be adopted across the EU. In this regard it is notable that this problem may stem from the Commission’s aim of trying to ensure that the Recommendation, and any developments it effects, coheres with Member States’ legal traditions. The exception to the bar on contingency fees can, for instance, be seen to reflect England and Wales’ introduction of such funding methods in the Access to Justice Act 1999\footnote{s 58.} and their extension via the Legal Aid, Sentencing and Punishment of Offenders Act 2012.\footnote{s 45.} The balance struck between opt-in and opt-out, again, can be seen to reflect the fact that some Member States had already introduced opt-out mechanisms whereas others favoured opt-in and some, such as France, could not, for constitutional reasons, introduce opt-out actions. The difficulty with striking such a balance though is that it is unlikely to secure the aim of consistency and coherence. In one sense, it enables Member States to continue to develop collective redress mechanisms as they see fit; it leaves them with what is in reality a free choice. Allowing such flexibility does not provide sufficient normative guidance to increase harmonisation or ensure increased coherence.

The overall conclusion then appears to be that the Commission’s reform package is unlikely to produce the intended results. Given its permissive nature, the Member States are not required to implement the Recommendation. There is thus no guarantee that there will be any reforms to Member States’ approaches to collective actions. Should reform be effected however, the Recommendation’s terms do not offer a reasonable prospect of coherent development across the EU. It provides no guarantee that Member States will introduce reform in comparable sectors. Equally, it does not appear to guarantee that they will introduce comparable collective action mechanisms. A realistic conclusion to draw therefore would be that, even if acted upon, the Commission’s reform package is unlikely to produce any or any significant harmonisation of approach across the EU. 2017 may well then not produce the advance in procedural coherence the Commission desires.

4. Possible Post-2017 Developments

The Communication and Recommendation are not the end point of the reform process. Further EU reform may be off the agenda until at least 2017, but the question is what the Commission might choose to do then. Assuming there have in fact been no significant improvements, a number of possible options appear to be available.

The first option available to the Commission would be simply to accept that collective redress reform is an issue that is too contentious a matter for resolution through EU-wide initiatives. The view might be taken that this was a problem that it could not solve; that it was simply too difficult. If this were the case, the final outcome of the reform process might be for the Commission to simply reissue the Recommendation, following a review of the position in 2017, and leave further development to the Member States. Bodies that had opposed the introduction of a binding EU instrument in this area, including (as the Commission noted in the Communication) the five Member States that prior to 2013...
had expressed their own scepticism over the merits of introducing such measures,\(^{68}\) would no doubt welcome such an eventuality.\(^{69}\) It would however seem to leave the problem of under-enforcement of rights and the identified need to secure effective compensation unaddressed at an EU level. Equally, it would leave in place the weaker than ideal approach to deterrence, and a multiplicity of national approaches to the issue in place, which the Commission had intended to replace. As such, it is doubtful that it is an option that could properly be taken. It would not appear capable of meeting any of the Commission’s reform aims.

The Commission could, however, accept that the issue remains highly contentious, yet do more than maintain the status quo. Arguably, it would have a number of positive options open to it in 2017 which could further its reform aims. The first such option is one that might look like another attempt to push the issue into the long grass: further study. Such an approach is not without its problems. Given that it had identified the need for urgent reform in 2008,\(^{70}\) further study from 2017 may very well appear to be untenable. The Civil Justice Council of England and Wales (CJC), for instance, noted in 2011 that the Commission’s failure at that time to move beyond consultation and analysis was a matter of concern.\(^{69}\) If consultation and analysis were to recommence in 2017, such concerns might well become all the more acute. That being said, urgency might call for action, but the key issue ought to be to ensure that the right action is taken. Matters may be all the more urgent in 2017, but that ought not push the Commission towards taking any specific step simply because action is called for or is perceived by some to be called for. Notwithstanding such concerns, there is a good argument for further study. This argument is that the Commission, according to some commentators, has so far failed to look at the issue in sufficient depth or at the appropriate theoretical level. Hodges put the argument this way in 2011 in his response to the Commission’s 2011 Consultation, when he said:

This consultation raises issues of fundamental importance for EU policy: what should European policy be on public and private redress, and what should be the inter-connection between those two elements? I fear that these issues require far more detailed and deep consideration than is envisaged in a consultation aimed at just private mechanisms of redress. I call on the EU institutions to undertake a fresh and detailed examination of all options for redress.\(^{72}\)

The problem underlying Hodges’ argument was that the Commission had approached the issue primarily through the lens of collective litigation: it had failed to give sufficient consideration to regulatory reforms, to the use of ADR, the proper relationship between deterrence and compensation, and between judicial and non-judicial redress mechanisms.\(^{73}\) Given this, the concern was that whatever proposals might come out of the 2011 Consultation would be inadequate as they would, for instance, focus too heavily on developing collective action mechanisms rather than a more integrated, theoretically robust and practically effective model that Hodges was concerned should be developed. According to this view, if the CJC’s concern that action was not being taken with the proper degree of urgency had been heeded, the proposed reforms would have been the wrong type of reforms. Urgency would have produced error.

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\(^{68}\) Commission Communication (n3) s 2.1; Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2) footnote 93 notes the five sceptical Member States as being Austria, Czech Republic, France, Germany and Hungary.


\(^{70}\) Commission White Paper (n18) s 2.1.


In any event, the Commission did not approach the issue following the 2011 Consultation in this way, nor did it heed the CJC’s concerns by bringing forward more substantive proposals than those contained in the Recommendation. If the Commission intended to do more than endorse the status quo in 2017, it might well be advised to take up Hodges’ suggestion and undertake the type of fundamental study he recommended be embarked upon in 2011. Such an approach would have a number of advantages. Most obviously it would be able to draw upon six years’ more evidence than would have been available to the Commission in 2011 if it had adopted Hodges’ proposal at that time. It would, for instance, be able to draw on developments that had occurred in the light of the ADR Directive\(^\text{74}\) and the Online Dispute Resolution (ODR) Regulation\(^\text{75}\) in order to devise a consistent approach across the Member States to the issue of collective settlement across the EU. It would also be able to consider further evidence regarding the effective operation of the European small claims procedure. In addition, it would be able to consider, and compare, how Member States’ collective redress mechanisms operated. Such an examination, taken in the context of a theoretical examination of the interrelationship between public and private enforcement, might well produce a politically acceptable, and effective, proposal. Importantly, such an examination could ensure that the spectre of the US class action would not disfigure that discussion, as it did the debate from 2005-2013. It could avoid this problem because such a theoretical examination would not take as its starting point the development of collective litigation procedures, which is obviously a significant element of the US system.

A theoretical approach, taking as its starting point an examination of the role of public and private redress mechanisms, and the proper relationship between regulation, litigation and ADR, is likely to produce reform proposals that do not preclude consideration of the US model. Such an approach would, however, be more likely to produce an integrated approach that placed primary weight on public enforcement and deterrence, contrary to the private attorney-general approach that underpins the US class action system, whilst complementing this with a combination of, in the first instance, recourse to non-judicial compensatory mechanisms, eg Ombudsman, ADR and ODR mechanisms, and finally judicial mechanisms. These judicial mechanisms could then be tailored to the nature of the claim, as the CJC recommended in 2008, ie a number of different collective action mechanisms could be made available with the courts determining on a case-by-case basis which of those was the most appropriate.\(^\text{76}\) The mechanisms could encompass test case procedures, joinder of actions, consolidation of proceedings, and the English Group Litigation Order (GLO) process for those mass claims where each individual claim could properly be pursued in its own right by individuals actively choosing to litigate.

More detailed consideration could then also be given to the development of a more proportionate approach to multiple small claims. Such an approach might possibly be the one taken in the UK through the 2013 Consumer Rights Bill, ie to introduce an opt-out form of collective procedure. An alternative suggestion, one that might perhaps flow from a theoretical study and which would avoid the use of an opt-out mechanism and its potential for bringing with it any fears of US-style class actions, might be to refashion the follow-on action as a collective small claims procedure. Such a process might have a number of features, in addition to being a follow-on action. It could, for instance, have a simplified form of procedure, which could be proportionate to the individual amounts at stake. As such it could be devised and operated in order to deliver decisions speedily and at minimum cost to individual litigants. Moreover, it might, as with the current English and Welsh small claims procedure, operate a no costs-shifting rule. Low, fixed, court fees might complement this. It might also, again as with the English and Welsh small claims procedure, have limited disclosure, relaxed rules of evidence and be such as to enable the court to adopt a more inquisitorial approach, thus enabling claimants to limit their use of legal representation. A follow-on opt-in mechanism revised along these lines would, arguably, have a number of advantages. It would help to minimise the prospect that litigation costs would be a barrier to entry for individual litigants. It would also minimise the cost-risk to defendants, thus obviating one of the arguable problems associated with US class

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\(^{76}\) Sorabji, Napier and Musgrove (n44) 145ff.
proceedings. It would equally have the advantage of ensuring that litigation would continue, in this area, to be secondary to public, regulatory enforcement, while also ensuring that any compensation ordered as a consequence of the action would go directly to only those individuals who had chosen to vindicate their substantive rights. This is, of course, just one possibility that a more detailed examination of the issues might produce. At the very least, it suggests that there are possibilities that may well call for the greater scrutiny that the Hodges’ option would entail. On this premise, if the Commission was to take this option and engage in further examination of the issues in 2017, it may produce a detailed set of effective reform proposals which could be capable of application in all sectors across all Member States: a properly coherent set of reforms could be devised and thereafter implemented.

The Commission could also take either of two further reform options. It could make a further attempt at a directive or regulation, although, given the pressure that was brought to bear regarding the 2009 draft Directive in respect of collective redress in the field of competition law, that would arguably be highly contentious and, arguably, equally unlikely to yield a positive result.\footnote{77 For a discussion of the abortive 2009 draft Directive, see Maria Ioannidou, ‘Enhancing the Consumers’ Role in EU Private Competition Law Enforcement: A Normative and Practical Approach’ (2011) 8(1) Comp L Rev 59; Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2) 72, footnote 38, ‘[i]n the last days of the Commission (in 2009), Competition Commissioner Kroes was poised to table a legislative proposal in the College of Commissioners that collective actions be introduced for private parties to claim damages for breach of competition law. However, the proposal leaked and resulted in very heavy pressure being imposed on President Barroso, who was then seeking reappointment. As the pressure was led by the German and French governments, supported by business, Barroso dropped the Kroes proposal.’}

\footnote{78 Wet Collectieve Afhandeling Massaschede 2005 (Holland).}


\footnote{80 ibid 6.}

If it took this approach, such legislative action could take a number of forms, each of which could produce coherent harmonisation. It might, for instance, seek to introduce an opt-in or an opt-out form of collective action. Equally, it might seek to introduce a collective settlement procedure based, perhaps, on the Dutch Collective Settlement Act\footnote{78} or a combination of these possible alternatives. Such an option, however, runs the obvious risk that it would simply result in a repeat of the political debate and controversy that was symptomatic of the 2005-2013 reform process. As such, it might be thought that, if mooted, this option would be unlikely to yield concrete reform.

Given this, a fourth option suggests itself: an optional instrument. In 2011 the European Commission issued a Proposal for a Common European Sales Law (the CESL).\footnote{79} The intention behind the Proposal is that the CESL, which is to say the substantive sales law code, will be introduced via a regulation. It will, however, be introduced in a novel way. The Regulation will not introduce a single European sales contract law across the EU. It will, on the contrary, insert a second contract law, dealing with sales contracts, into each of the Member States’ domestic legal systems. This second contract law system will only apply to cross-border sales transactions and will not be mandatory. It will simply be available for the use of transacting parties if they decide to use it: it is to be an optional instrument. The Commission explained this innovation in this way:

\begin{quote}
The Common European Sales Law will be a second contract law regime within the national law of each Member State. Where [contracting] parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules. This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules.\footnote{80}
\end{quote}

The CESL need not, however, remain a purely cross-border instrument. If Member States choose to do so, they can apply it to domestic contracts. In other words, the UK government could choose to replace its Sale of Goods Act 1979 with the CESL. Incrementally, as more Member States replaced their domestic sales law with the CESL, there would be fewer such laws, until at some point perhaps there would be only one sales law across Europe.
If a traditional directive or regulation was still too problematic, politically speaking, in 2017, the Commission could seek to introduce a cross-border collective redress mechanism via a CESL-style optional instrument. The substantive terms of such an instrument would still need to be worked out and agreed, and may well still need to be determined through a Hodges-style further examination of the issues. Assuming that this could be done, such an approach would have some distinct advantages. In the first instance, it could lead to greater coherence across the Member States regarding their individual approaches to collective redress. If the instrument proved to be successful at the cross-border level, Member States might be more inclined to either revise their domestic approaches to bring them into line with the optional instrument’s provisions or replace the former with the latter. Over time then, assuming the instrument’s utility is established in practice, the present patchwork of collective redress mechanisms across the Member States may start to decline as greater uniformity is achieved through its adoption as the default approach in each national system. Secondly, because it is an optional instrument, it would have to contain substantive provisions that were acceptable to both potential claimants and defendants. Unless this was the case, one or the other could refuse to use it. It would, as a consequence, have to be drafted to facilitate effective and cost-effective access to compensatory redress for claimants, whilst not incorporating provisions that might give rise to the potential for costly or abusive litigation, which would render it unattractive to potential defendants. Thirdly, as an optional instrument whose use depended on active agreement by the parties, it could potentially avoid the political difficulties that a directive or regulation may, as noted earlier, give rise to. Since its introduction would not alter either domestic law or EU law in the same way as a binding instrument, it is possible that Member States may not be as motivated to oppose it on principled grounds, just as the opponents of reform might equally be less motivated to oppose it. Its introduction would require no one to use it, and those who did use it would have had to have chosen to do so. An approach that respected individual litigant autonomy and did not impinge necessarily on Member States’ systems might mitigate against any further such objections and enable the post-2017 reform process to develop consistently with the Commission’s aims and in a way that does not garner the controversy, noted at the outset of this article, that affected the process from 2005-2013. It is an approach that might then stand a better chance of producing procedural harmonisation across the EU, albeit in the medium to long-term.

5. Conclusion

The Communication and Recommendation are unlikely to achieve the aim of producing procedural coherence in respect of collective actions across the EU by 2017. Unlike either a directive or regulation, which would have brought about coherence across the Member States in a short period of time, the optional nature of the Recommendation and its guidelines cannot promise to do so. That a further period of examination of the issue will take place post-2017 cannot but only further push the date when, or if, a specific EU instrument in this area will be introduced. As such, it is likely that the sought-for procedural coherence will not be a realistic possibility prior to the 2020s. With this in mind, it is understandable why the 2013 package of reforms may have given the appearance to some commentators that it achieves little; that it is no breakthrough but rather a damp squib. Looked at more positively, or rather, more optimistically, it might be viewed as a necessary staging post to further reform, which, given the disparate views taken by the various stakeholders and noted by the Commission, could not be achieved in the short term; necessary, because further work needed to be done and more innovative ways, such as the use of an optional instrument, were needed to implement concrete reform. Whether that is the case or whether the 2013 reform package ought properly to be viewed as a failed attempt at reform, or perhaps as a compromise solution that, as noted at the outset of this article, pleased few who are interested in the field, remains to be seen, however. If effective compensatory mechanisms, which respect individual party autonomy in so far as bringing proceedings is concerned, whilst complementing effective public enforcement, are to be implemented then work needs to be done to ensure that 2013 is, as the Commission intends, a staging post and not the end point for reform. If that is done then the likelihood increases that DG Justice may well not just improve access to justice in the field of collective redress, but may also

81 Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (n2).