Report II on collective redress

November 2014
Table of contents

Collective redress in light of the European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) ................................................................. 6

1. Collective redress in Austria in light of the EC Recommendation ........................................... 6
   1.1. Introduction .......................................................................................................................... 6
   1.2. Legal standing .................................................................................................................... 7
   1.3. Admissibility ..................................................................................................................... 7
   1.4. Publicity of claims ............................................................................................................. 8
   1.6. Participation of foreign plaintiffs ...................................................................................... 8
   1.7. Available remedies ........................................................................................................... 8
   1.8. Costs ................................................................................................................................. 9

2. Collective redress in Italy in light of the EC Recommendation ................................................. 9
   2.1. Introduction ...................................................................................................................... 9
   2.2. Admissibility and standing .............................................................................................. 10
   2.3. Opt– in versus opt– out ..................................................................................................... 10
   2.4. Information ...................................................................................................................... 10
   2.5. The relationship between public enforcement and private collective redress - compensation as an object of collective action ................................................................. 10
   2.6. Funding and costs ............................................................................................................. 11
Focus on Collective Redress

2.7. ADR mechanisms ................................................................. 11
2.8. Cross-border cases .................................................................. 11
  3.1. Introduction ............................................................................ 12
  3.2. Opt-in versus opt-out. Legal standing ........................................ 14
  3.3. Costs .................................................................................... 14
  3.4. Admissibility .......................................................................... 15
  3.5. Funding, private and public enforcement and information on collective redress actions .................................................................. 15
4. Collective redress in Poland in light of the EC Recommendation ............... 17
  4.1. Introduction ............................................................................ 17
  4.2. Legal standing .......................................................................... 18
  4.3. Admissibility .......................................................................... 19
  4.4. Opt-in versus opt-out ................................................................. 19
  4.1. Information on collective redress actions ...................................... 19
  4.6. Costs and funding .................................................................... 20
  4.10. Collective dispute resolution and settlements ............................ 21
  4.11. Legal representation and lawyers’ fees ....................................... 21
  4.12. Prohibition of punitive damages .............................................. 21
  4.13. Collective follow-on actions .................................................... 21
5. Collective redress in Portugal in light of the EC Recommendation ................ 22
  5.1. Introduction ............................................................................ 22
  5.2. Legal standing .......................................................................... 22
  5.3. Costs .................................................................................... 23
## 5. Focus on Collective Redress

### 5.4. Opt- in versus opt-out

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.4. Opt- in versus opt-out</td>
<td>23</td>
</tr>
</tbody>
</table>

### 5.5. Funding and costs

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.5. Funding and costs</td>
<td>24</td>
</tr>
</tbody>
</table>

### 5.6. Punitive damages

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.6. Punitive damages</td>
<td>24</td>
</tr>
</tbody>
</table>

### 5.7. ADR mechanisms

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.7. ADR mechanisms</td>
<td>24</td>
</tr>
</tbody>
</table>

## 6. Collective redress in Spain in light of the EC Recommendation

### 6.1. Introduction

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1. Introduction</td>
<td>25</td>
</tr>
</tbody>
</table>

### 6.2. Legal Standing

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2. Legal Standing</td>
<td>25</td>
</tr>
</tbody>
</table>

### 6.3. Admissibility

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.3. Admissibility</td>
<td>26</td>
</tr>
</tbody>
</table>

### 6.4. Publicity of claims

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.4. Publicity of claims</td>
<td>27</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
</table>

### 6.6. Participation of foreign plaintiffs

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.6. Participation of foreign plaintiffs</td>
<td>32</td>
</tr>
</tbody>
</table>

### 6.7. Remedies

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.7. Remedies</td>
<td>32</td>
</tr>
</tbody>
</table>

### 6.8. Costs

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.8. Costs</td>
<td>33</td>
</tr>
</tbody>
</table>

### 6.9. ADR mechanisms

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.9. ADR mechanisms</td>
<td>34</td>
</tr>
</tbody>
</table>

## 7. Collective redress in Sweden in light of the EC Recommendation

### 7.1. Introduction

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1. Introduction</td>
<td>35</td>
</tr>
</tbody>
</table>

### 7.2. Legal standing

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.2. Legal standing</td>
<td>35</td>
</tr>
</tbody>
</table>

### 7.3. Opt- in versus opt-out

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.3. Opt- in versus opt-out</td>
<td>36</td>
</tr>
</tbody>
</table>

### 7.4. Funding and costs. Punitive damages

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.4. Funding and costs. Punitive damages</td>
<td>36</td>
</tr>
</tbody>
</table>

### 7.5. Injunctive and compensatory relief

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.5. Injunctive and compensatory relief</td>
<td>36</td>
</tr>
</tbody>
</table>

### 7.6. Cross- border cases

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.6. Cross- border cases</td>
<td>37</td>
</tr>
</tbody>
</table>

## 8. Collective redress in The Netherlands in light of the EC Recommendation

### 8.1. Introduction

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.1. Introduction</td>
<td>38</td>
</tr>
</tbody>
</table>

### 8.2. Injunctive and compensatory relief

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.2. Injunctive and compensatory relief</td>
<td>39</td>
</tr>
</tbody>
</table>
8.3. Legal standing........................................................................................................... 39
8.4. Admissibility ............................................................................................................. 40
8.5. Information on a collective redress action .............................................................. 40
8.6. Funding and costs .................................................................................................... 40
8.7. Cross-border cases .................................................................................................. 41
8.8. Specifics for injunctive collective redress ................................................................. 41
8.9. Specifics for compensatory collective redress .......................................................... 41
8.10. National register .................................................................................................... 43

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Collective redress in light of the European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)

1. Collective redress in Austria in light of the EC Recommendation

1.1. Introduction

The Commission's Recommendation apparently failed to provide new impetus to political discussion on the introduction of a group action proceeding in Austria. Rather, the reform efforts have been stalled in a stalemate between the coalition partners. The 2007 draft of a proposal for a group litigation was never brought before parliament. Since then, only occasionally Social Democrats, the Chamber of Employees and members of the Green Party have demanded the introduction of a group action proceeding, but not even they seem to attach high priority to this matter.

In addition to traditional forms of multiparty-practice such as, e.g., joinder, Austrian practice has developed a form of group litigation based on a combination of joinder of claims and litigation finance ("Austrian model of group litigation"). Under this scheme potential claimants assign their claims to an association (typically a consumer association) which then files a complaint on its own behalf. Assembling a large number of claimants in this fashion enables the association to avail itself of commercial litigation finance. This enables the claimant to pursue his or her claim without any risk. It is this type of procedure which I will examine in light of the Recommendation since it is the closest equivalent to collective redress available under Austrian law.

1 By Georg Kodek.
1.2. Legal standing

There are no restrictions as to whom the procedures outlined above are available. There is no equivalent to para 4 of the Recommendation. However, as a practical matter, in the “Austrian model of group litigation” consumer claims are more likely to be pursued because the assignees bringing the cases are mostly consumer organizations.

Indeed, in practice, almost only the Consumer Information Association (*Verein für Konsumenteninformation*) and the Employees’ Chambers (Arbeiterkammern) bring such proceedings although, e.g. the Chamber of Commerce would be entitled to do so as well. If these organisations appear as plaintiff, special rules apply for appellate proceedings. Basically, all restrictions based on the amount in controversy which in other cases may restrict the grounds that can be raised on appeal to the Court of Appeals and which could bar access to the Austrian Supreme Court altogether do not apply if these organisations initiate the proceeding.

Apart from this, there are no special restrictions on standing. Thus, any other association would be entitled to pursue claims assigned to it. Also, it has been suggested in legal literature that a special limited liability company could be set up to serve as a vehicle for collectivization of mass claims. However, it seems that this has never been done so far. In all these cases the special rules for appellate proceedings mentioned above do not apply. Thus, a mass case brought by a “normal” association or other body is simply governed by ordinary rules of civil procedure.

1.3. Admissibility

The Austrian model of group proceeding is not restricted to a particular area of the law. In practice, mass claims are mostly found in tort cases and in cases for damages in connection with false investment advice.

No special certification criteria apply. There is no equivalent to the requirements under para 8, 9 of the Recommendation. Thus, in this respect, the present situation arguably is less favourable for defendants than under the Recommendation.

The only criterion which at least somewhat resembles a certification is the requirement imposed by the Austrian Supreme Court that raising several claims in one action is only permissible if the claims are based on substantially the same cause of action and concerned substantially similar questions of law and fact. In

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2 Austrian Supreme Court, 12 July 2005, 4 Ob 116/05w.
practice, this does not bring about a significant restriction since no sensible plaintiff would bring totally unrelated claims in one proceeding.

In practice the biggest hurdle is that a person who wants to pursue a mass claim has to persuade a consumer organization to take up his claim and organize a group proceeding. Occasionally, claimants have taken the initiative themselves and have founded an association or a limited liability company as a vehicle to raise their claims.

1.4. Publicity of claims

There is no equivalent to paras 10-12 of the Recommendation. Rather, the publication of a contemplated group proceeding depends on the initiative of the organization intending to bring the claim. In practice, some such proceedings are widely publicized, with the claimant organization actively trying to assemble additional members of the group.

1.5. Opt-in versus opt-out. Res judicata and lis pendens

Since the “Austrian model of group litigation” is based on an assignment of the individual claims to an institution, this proceeding can be described as being of the “opt-in” type. The procedure applies only to those who have taken steps to join the proceedings. This is an important difference from the US type class action.

Technically, not the individual members of the group, but only the consumer association and the defendant are parties to the proceeding. Therefore, the res judicata effects of a judgment can comprise only these parties. The same holds true for lis pendens. However, since the participating members of the group have to assign their claims to the association, they cannot assert their claims in a subsequent or otherwise separate proceeding.

Other members of the respective group who did not take part in the proceeding are not bound by the outcome, nor are they prevented from asserting their claims individually while a group action proceeding is pending.

1.6. Participation of foreign plaintiffs

There are no restrictions as to the participation of foreign plaintiffs.

1.7. Available remedies

The possible scope of application of this procedure is extremely broad. There is no restriction to a special area of the law such as consumer protection, labour law etc. However, since the procedure, in large measure, is based on an assignment of claims to an association or other institution it is limited to money claims since under Austrian case law claims for declaratory judgments ordinarily cannot be assigned.
For certain declaratory judgments also several institutions have standing to bring
suit, particularly under the Unfair Contract Terms Directive.

1.8. Costs

Austria has a “loser pays” rule. In recent years commercial litigation finance became
increasingly important. The “Austrian model of group litigation” has the advantage
of yielding a sufficiently high amount in controversy which enables the claimants to
use commercial litigation finance. The fee for the litigation finance will generally be
between 30 and 40 percent of the overall amount of claims.

There is no equivalent to paras 29, 30 and 32 of the Recommendation. While
lawyers in Austria are not allowed to base their remuneration on a percentage of the
award, litigation finance companies may do so. Thus, in this respect, the present
situation arguably is less favourable for defendants than under the
Recommendation.

2. Collective redress in Italy in light of the EC Recommendation

2.1. Introduction

Article 140-bis of the Italian Consumer Code introduces the Azione di classe. In line
with the objectives of the EC Communication, the Azione di classe represents “a
procedural mechanism that allows, for reasons of procedural economy and/or
efficiency of enforcement, many similar legal claims to be bundled into a single court
action”.

The Azione di classe has not significantly changed the landscape of mass litigation in
Italy. About 40 actions have been filed before the Courts since the adoption of the
Article 140-bis of the Italian Consumer Code. On 28 February 2013 the Tribunal of
Naples decided the first action in a case about tourist services. The amount of the
damage awarded to the plaintiffs was not very significant.

3 By Cristina Poncibò and Eleonora Rajneri.
A team of legal scholars of the University of Trento reports new actions. The link to the information is available at http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/

Plaintiffs also adopt other (and traditional) instruments, like the joinder of parties and the civil action before Criminal Courts (Costituzione di parte civile nel processo penale).

2.2. Admissibility and standing

The Azione di classe presents very precise and strict criteria concerning legal standing and admissibility. This could explain the fact that some actions have been rejected by Italian Courts for the lack of such requirements.

2.3. Opt-in versus opt-out

The Azione di classe provides for an opt-in mechanism. There is a wide consensus among legal scholars about the fact that this option is preferable.

2.4. Information

Italian law provides that consumer association or other representative entities have an obligation to effectively inform potential members of the represented group. Article 140-bis specifies this obligation. The main problem here is the lack of public or private funding to support the costs of the actions.

2.5. The relationship between public enforcement and private collective redress - compensation as an object of collective action

Public enforcement remains central in the Italian legal system. The Italian Competition Authority (ICA) plays a role and also the most important consumer associations registered with the Ministry of the Economy. The latter can file an action for injunction to protect the collective interests of the consumers against professionals (Article 139 fs. of the Italian Consumer Code).

The Azione di classe has been introduced to give compensation to damaged consumers. It is a compensatory mechanism. The Italian legal system does not admit punitive damages.
2.6. Funding and costs

The funding issue is receiving too little attention in Italy. Consumer associations are complaining about the lack of public funding to introduce the *Azione di classe*. Third party funding is not developed in Italy and this probably because the length of proceedings. The Italian Government is working on a Bill to reform civil proceedings to solve this problem.

Interestingly, Italian law firms have not taken the introduction of the *Azione di classe* as an opportunity to develop their business in mass litigation. Law firms are not very willing to invest time and money to introduce actions. This because of the uncertainties related to the introduction of a new kind of action before Italian Courts, the limited case law and the length of the proceedings. Consumer associations and their legal consultants drive the majority of the actions.

Furthermore, the principle that the losing party should bear the costs of the court proceedings is recognised by the Italian legal system although, in daily practice, the Courts may also tend to ask each party to bear her/his costs.

The said principle applies to collective redress and this represents a serious obstacle to the introduction of the action. Consumer associations fear that, if they lose the case, the association will be asked to bear the huge costs of the entire litigation (“Loser pays principle”).

2.7. ADR mechanisms

Collective consensual dispute resolution or ADR is not very developed in Italy. There are some schemes of joint conciliation (*Conciliazione*) for mass torts that have been occasionally used to settle a large number of identical/similar claims against a company. These schemes are adopted on a case-by-case basis. The topic is now attracting the interest of legal scholars⁴.

2.8. Cross-border cases

The *Azione di classe* does not provide any specific rule for cross-border cases.

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3. Collective redress in Lithuania in light of the EC Recommendation

3.1. Introduction

In June 2013, after long and thorough consideration concerning the European vision, common approach and ways of regulation in the area of the collective redress, the European Commission (EC) adopted a European concept of collective redress by publishing its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (the Recommendation). The goal of the Recommendation is not to harmonize the national systems of the Member States of the European Union (EU), but rather to create a unified approach towards collective redress across the EU by establishing common, non-binding principles of collective redress. The principles set out in the Recommendation should be implemented by the Member States by 26 July 2015 at the latest. The Recommendation provides two types of principles: common principles of collective redress and specific principles concerning injunctive and compensatory collective redress. Generally, the principles regulated in the Recommendation could be summarized as principles establishing two types of rules which are different by nature: (i) safeguards against abusive litigation (limited standing for representative action, admissibility check; loser pays principle, opt in rule with the exception to apply an opt out system, conditions for funding and lawyer’s fees, the prohibition of the punitive damages); and (ii) measures promoting collective redress (the procedure should be fair, equitable timely and not prohibitively expensive, adequate information, cross - border cases, effectiveness of injunctive collective redress, consensual dispute resolution and registration of collective redress actions).

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5 By Danguole Bubliene.


8 Communication from the Commission of the to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions „Towards a European
Focus on Collective Redress

In March 2014, after almost two years\(^9\) of consideration, the Parliament of the Republic of Lithuania adopted amendments of the Civil Procedure Code of Republic of Lithuania\(^10\) (Civil Procedure Code or CPC) introducing in essence a new instrument in civil procedure law – group action (the Amendments to CPC). After the Amendments to CPC, the Lithuanian collective redress system can be systematized as follows.


\(^9\) The proposal to the Lithuanian parliament was provided in June, 2012 by the Government of the Republic of Lithuania.

\(^{10}\) Law of the Republic of Lithuania Amending Articles 49, 80, 182 of the Civil Procedure Code of the Republic of Lithuania and Supplementing the Civil Procedure Code of the Republic of Lithuania by Article261/1 and XXIV/1 division.
Focus on Collective Redress

3.2. Opt-in versus opt-out. Legal standing

The Lithuanian group action model corresponds in essence to the concept of the European collective redress Recommendation as it reflects the main safeguards established in the Recommendation. First, the main procedural safeguard and guarantee of the parties to group actions is that the Lithuanian group action model is based on the opt-in system. Despite the fact that the Recommendation as an exception admits the opt-out system, Lithuanian legislator established a stricter rule and does not provide any possibility for opt-out model which, as is pointed out in the preamble of the Recommendation, is quite foreign to the legal traditions of most Member States. The same is truth for punitive damages, which are not allowed according to Lithuanian Civil Code. The same is also true for both intrusive pre-trial discovery and jury trials\(^\text{11}\). The opt-in system is, according to the Recommendation, closely related to the right to freely join the group and leave the group. Despite the fact that according to the CPC the right of joining the group may be realized without restrictions through the time period indicated by the court and later the right might be realized only if there were important reasons for the omission, it is considered that this rule would be in line with the sound administration of justice at is indicated in the Recommendation (point 23 of the Recommendation).

Whereas in essence the aim of the Recommendation is to limit representative actions by establishing strict criteria of eligibility, the fact that the representative action (as it is described in the Recommendation), according to the Lithuanian group action model, is not possible at all corresponds the spirit of the Recommendation. It should be noted that representative actions are possible within the framework of the ‘protection of public interest’ mechanism. Therefore, the eligibility criteria become important for these particular cases. However, the law does not limit the representative entities by the criteria established in the Recommendation.

3.3. Costs

The loser pays principle, which is considered as very important safeguard in collective redress system, prevails in the Lithuanian CPC.

\(^{11}\) Recommendation, paragraph 15 of the Preamble.
3.4. Admissibility

The rules on admissibility established in the Lithuanian regulation ensure that an admissibility check occurs at the first stage of the proceeding. The rules are quite conservative and cautious and refer to the priority of the individual litigation rather than to the group action litigation. This is clearly evidenced by the numerosity criteria. It should be noted that the numerosity criteria does not coincide with the description of the term “collective redress” provided in the Recommendation. Both injunctive collective redress and compensatory collective redress mechanisms should be allowed where two or more persons collectively are entitled to bring action. The Lithuanian group action model is based on a different threshold – 20 and more persons. Moreover, even this criterion itself does not guarantee that the court will maintain that the case should be examined according to the group action rules. The court among other things should evaluate all circumstances ensuring that the group action mechanism is more expeditious, effective and appropriate way to solve claim comparing with the individual claim procedure. It is doubtful, whether the court would be convinced that for two claimants the group action mechanism is more expeditious, effective and appropriate way to solve claim.

Finally, the court has active role in the group action proceeding, which will help to protect the rights of the group members and effectively manage the group action proceeding.

3.5. Funding, private and public enforcement and information on collective redress actions

At this point the lack of the implementation in Lithuanian legal system of some concepts established in the Recommendation should be considered.

Firstly, the fact should be noted that Lithuanian law lacks rules pertaining to legal financing. The Lithuanian regulation does not oblige the representative of the group (or the members of the group) to provide a declaration about the origin of the funds that is going to use to support the group action, does not entitle the court to stay the proceeding in the cases established in the point 15 of the Recommendation and does not establish rules for third party funding. Although Lithuania does not have a culture of third party funding in litigation, it does not mean that such demand will not arise in the future. Moreover, as has been indicated, Lithuanian legal regulation allows a success fee and do not provide any particular restrictions in case of group action. It is doubtful whether ethical principles will be an appropriate safeguard ensuring the parties’ right to full compensation. Therefore, in this regard the Lithuanian regulation should be reviewed and, accordingly, amended.
Secondly, the Amendment to CPC did not clarify clearly the relationship between public enforcement and private enforcement. As indicated in the Recommendation, the collective redress mechanism should supplement a public enforcement (Recommendation, paragraph 7 and 22 of the preamble, points 33, 34). The ratio legis of that principle is twofold: firstly, there should be consistency between public enforcement and collective redress mechanisms; secondly, in 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 violations of Union law. The Lithuanian regulation does not provide the ground for refusal to accept the statement of claim in case there has been launched the public enforcement proceeding. Accordingly, there is no ground for suspension of the procedure if the proceeding of the public authority are launched after the commencement of the group action. According to the CPC the obligatory ground to suspend the procedure in a case is when hearing of a particular case is impossible before another case is decided in the civil, criminal or administrative procedure. However, this ground could be applied only in the event where the case is examined by the court. Accordingly, the court has the right to suspend the case in other instances when a court admits to a necessity to suspend a case. However, it is doubtful whether the court will apply this ground in the cases mentioned in the Recommendation.

Additionally, there should be a basis for the realization of the ECJ idea that the national court should take the Recommendation into account when applying national law implementing it. In this regard the national law should not go into confrontation with the Recommendation and the court would not face with the problem to interpret the law contra legem. In this case the Recommendation would influence only the application of the rule and the practice of the application. The same is applied for the collective redress mechanism based on the protection of the public interest. However, this is not so simple an issue as it appears at first glance. It is not clear what kind of public enforcement mechanisms should fall into this rule: for example, should this rule comprise the administrative control of unfair contract terms in consumer contracts, where the state authority has the right to declare the unfairness of the standard contract terms (it should be noted that in case of this procedure, if the business does not agree to change standard terms, the state authority should submit the claim to the court). In particular, it is not clear what it is the meaning of the term of final decision, i.e. whether the court should stay the procedure till end of the revision of the decision of the administrative authority in the court. In that case there are doubts whether the mechanism would be very effective due to the reason that the process will elongate. In order to correctly comply with the Recommendation concerning the consistency of public enforcement of the collective redress mechanism, the regulation of all administrative processes which are designed to protect individual rights
Focus on Collective Redress

consecrated in EU law should be reviewed, and the Lithuanian regulation on collective redress should establish clear rules regarding those mechanisms, whilst ensuring the mechanism's effectiveness.

Thirdly, the Recommendation established the principle of effective provision of information thus trying to ensure balance between freedom of expression and the right to access information with the protection of the reputation of the defendant. The regulation of protection of the public interest does not establish specific requirements for the provision of the information. The regulation of group actions indicates two types of requirements on publicity: through the announcement of the representative to the group and through a special internet site. The law does not indicate any criteria or method for the provision of the announcement relating to the information, which should be provided by the representative of the group. Therefore, taking into account points 10 to 12 of the Recommendation it is debateable whether the general regulation of mass media in Lithuania would help to ensure the right balance and whether the key specific principles should be indicated in the law in order to ensure such balance.

Fourthly, the Recommendation commits the Member States to establish a national registry of collective redress actions. Such a registry is not established in Lithuania neither for claims realized through the protection of public interests nor for group actions. Such a registry might be useful for the monitoring the collective redress system.

4. Collective redress in Poland in light of the EC Recommendation12

4.1. Introduction

The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013) concerns both injunctive and compensatory type of actions. It also goes beyond consumer law to include any rights conferred by EU law (consumer protection,

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12 By Magdalena Tulibacka.
competition, environment protection, protection of personal data, financial services regulation, investor protection and any other areas where collective actions may be relevant).\textsuperscript{13} The Commission recommends for all Member States to 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’.\textsuperscript{14} This short Report examines the Polish collective redress system with reference to the key parts of the Recommendation.

Poland has had a class action law since 2010. The Class Actions Act of 17 December 2009\textsuperscript{15} brought about a significant number of class actions (more than 100 until January 2015).\textsuperscript{16} Many were rejected because of various formal weaknesses, others because of failure to satisfy substantive requirements for class certification. A small number have gotten through the first certification hurdle. Only a few (two were reported so far)\textsuperscript{17} were concluded with judgments, and most are still in various stages of proceedings. In most of these cases, the procedure turns out to be long, complex and relatively costly.

4.2. Legal standing

The Act allows a class action to be brought only by a class member or by a regional consumer ombudsman (public body).\textsuperscript{18} The Act requires that ombudsmen act as class representatives ‘within the scope of their prerogatives’\textsuperscript{19}. The prerogatives of

\textsuperscript{13} Recital 7.

\textsuperscript{14} Recommendation I.2.

\textsuperscript{15} (Ustawa o dochodzeniu roszczeń w postępowaniu grupowym), published in Dziennik Ustaw (Journal of Laws) of 2010, no 7; item. 44 p. 1. In force since July 2010.


\textsuperscript{17} Not all Polish court judgments are published, and there is no official journal or collection of judicial decisions.

\textsuperscript{18} Article 4.2.

\textsuperscript{19} "w zakresie przysługujących im uprawnień" Article 4.2.
consumer ombudsmen, as specified by legislation, cover protection of consumer rights (see Recommendation III. 4).

4.3. Admissibility

The Act does not have many detailed criteria for certification (such as typicality or adequacy of representation – See Recommendation III. 8). The requirements for certification of a class action are as follows: it must be brought in the name of at least 10 people with claims of the same kind and with the same or similar factual basis.\(^\text{20}\) The Act includes a very interesting requirement of commonality. If a suit concerns monetary claims, a class action is possible only if the amount claimed by each class member has been made equal with the others (this may be done in subclasses of at least two people).\(^\text{21}\) On the other hand, in cases involving monetary claims the suit may be limited to a mere declaratory relief, and then followed by individual lawsuits.\(^\text{22}\)

4.4. Opt-in versus opt- out

It is an opt-in mechanism. The courts with the jurisdiction to consider class actions are district courts, not the lower regional courts. A panel of three judges is required.

4.5. Information on collective redress actions

The Recommendation III.10-12 requires that it ought to be possible for representative entities or groups of claimants to disseminate information about claimed violations of rights and their intention to claim injunction, as well as a mass harm situation and their intention to bring a compensatory claim. There are no obstacles in Polish law to such dissemination of information, and indeed it is common for groups of claimants or potential claimants to set up websites or blogs where information about potential and ongoing collective claims is disseminated.

\(^{20}\) Article 1.1.

\(^{21}\) Article 2.1 and 2.2.

\(^{22}\) Article 2.3.
4.6. Costs and funding

The ‘loser pays’ rule (see Recommendation III. 13), albeit modified to include a tariff for lawyers’ fees and some judicial discretion for awarding a percentage or even no costs to winner if the loser's circumstances call for it or if the winner behaved unreasonably during proceedings, applies to class actions.23 Thus, even if a 20% success fee is agreed, the lawyer will only be able to recover from the loser what the tariff system indicates. The remaining money will need to be covered by the class members.

On funding (Recommendation III. 14), the Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees).24 Polish law does not regulate third party funders of litigation apart from insurers offering add-on litigation expenses policies. Third-party funding of litigation is not very common.

4.7. Cross-border cases

While only the Polish regional consumer ombudsman can bring a class action as a representative body, there is no restriction on a class member bringing the action and it is possible the class member may be based in another state (Recommendation III.17-19).

4.8. Expedited procedures for injunction and expedited enforcement of injunctive orders

The Class Actions Act does not prescribe any specific expedition rules concerning injunctive actions (Recommendations IV.19-20).

4.9. Constitution of claimant and opt-in principle

The Polish class action is an opt-in procedure. The decision to certify the class action, which can be appealed, contains information about the action, the class representative, arrangements concerning remuneration of lawyers, and the names

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23 The ‘loser pays’ principle is regulated by Articles 98 and 108 of the Code of Civil Procedure of 1964.

of class members who joined so far. After the decision becomes final (either it has not been appealed or the appeal did not succeed), the court coordinates activities aimed at notifying all potential class members of the class action: by placing information in national or in regional press. It can also decide that no further notification is required if all potential claimants joined the class already. After the time limit passes, the court decides on who the class consists of. The decision can be appealed by the defendant, questioning class membership of specific persons. After the decision is final, class members are covered by the proceedings and will be covered by the final decision or settlement (Cfr Recommendations V.21-24).

4.10. Collective dispute resolution and settlements

The Class Actions Act contains a provision stating that a court may refer the parties to mediation at any stage (Art. 7). (Cfr Recommendations V.24-28).

4.11. Legal representation and lawyers’ fees

In contrast to the rules of lawyers’ ethics, the Class Actions Act allows lawyers to agree to a success fee limited to the maximum of 20% of the amount recovered for the class. Indeed, legal representation is a requirement – both for a class representative who is a class member and for a regional consumer ombudsman (Recommendations V.29-30).

4.12. Prohibition of punitive damages

The rules of Polish tort and contract law do not allow an award of punitive damages (Cfr Recommendation V.31).

4.13. Collective follow-on actions

The Class Actions Act does not contain a provision on follow-on action (Cfr Recommendations V.33-34).

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5. Collective redress in Portugal in light of the EC Recommendation

5.1. Introduction

According to the EC Recommendation, Member States should have a system of collective redress that allows private individuals and entities to seek court orders requiring cessation of infringements of their rights granted by EU law (so called "injunctive relief") and to claim damages for harm caused by such infringements (so called "compensatory relief") in a situation where a large number of persons are harmed by the same illegal practice. In this regard, Portuguese legislation covers the principle. Law 83/95, of 31 August 1995 regulates the acção popular (popular action)), combined with the Civil Procedure Code, grant:

- Civil liability (compensation by damages). This liability may be based on fault (negligence or dolus), but also can be effective regardless of fault, when the conduct derives from a dangerous activity; and

- Conservatory and temporary measures.

Further, Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive. There is no red flag on this principle to point out.

5.2. Legal standing

On the Portuguese legal framework, standing is granted not only to non-profit entities. To fully address the principle, the legislation must be changed.

In fact, standing rules are considerably broad. Any citizen in the enjoyment of their civil and political rights has standing, as well as associations and foundations that defend the interests referred to above, regardless of whether they have a direct interest in the claim (e.g. Associação Portuguesa para a Defesa do Consumidor (DECO) (Portuguese Association for Consumer Protection, Quercus - Associação Nacional de Conservação da Natureza (National Association for Nature Conservation)).

By Rafael Vale e Reis.
5.3. Costs

Regarding costs, when a popular action is filed, preliminary costs are not demanded against the claimant. After the judgment, the claimant is exempted of any payment in cases of a favourable (even in a partially favourable) judgment. In cases where there is a no favourable judgement, costs are decided by the court, up to a maximum of 50% of regular costs, taking into account the economic situation of the claimant and groundings for the no favourable judgement.

5.4. Opt-in versus opt-out

On the opt-in versus opt-out debate, as a general rule, the Recommendation advocates for the "opt-in" principle, under which claimant parties are formed through directly expressed consent of their members. Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice. In parallel, the Recommendation stresses the need to provide information to potential claimants who may wish to join the collective action. To fully address this principle, the Portuguese system has to be changed. Portuguese popular action is basically an opt-out system. This point is regulated by articles 14 and 15 of Law 83/95, of August 31. The claimant represents, without the need for a mandate or express authorization, all the other holders of the rights or interests in question.

After the procedure is initiated by the entity with standing, interested parties are notified within the term fixed by the judge:

(a) to intervene in the main proceedings;

(b) to declare whether they accept to be represented by the claimant; or

(c) to exclude themselves from this representation.

In the latter case, the final decision will not be applicable to them. In the scenario where the interested parties do not take any of the actions described above, the law considers that as an acceptance of the representation. Nevertheless, the representation by the claimant can be expressly refused by interested entities until the end of the collection of evidence, or equivalent stage.

To protect the interest of subjects that are represented by the claimant, the Public Prosecutor (Ministério Público) has the responsibility of protecting legality, and may replace the claimant in the case of withdrawal from the procedures, transaction or
conduct which is harmful to the interests at stake (Article 16, no. 3 of Law 83/95, of 31st of August).

5.5. Funding and costs

Contingency fees are prohibited in any case by the Portuguese legislation (article no 101 of Law 15/2005, of January 26th). The EC Recommendations also states that “The central role in the collective litigation should be given to the judge, who should effectively manage the case and be vigilant against any possible abuses. The Commission has not ruled out third party financing for European collective redress, but proposes conditions, in particular related to transparency, to ensure there is no conflict of interests.” The Civil Procedure Code grants this principle. In fact, after the 2013 reform, the power of the judge to manage any procedure was reinforced in article 6 of the Civil Procedure Code.

5.6. Punitive damages

On damages, it should be highlighted that the Portuguese legal system does not allow punitive damages.

5.7. ADR mechanisms

On ADR, the Recommendation also promotes Alternative Dispute Resolution, requiring that this possibility is offered to the parties on a consensual basis. In this regard, the Portuguese legal system addresses this principle, as Alternative Dispute Resolution mechanisms are regulated (Law 63/2011, of December 14th for arbitration; Law 29/2013, of April 19th for mediation) and available for collective redress cases.
Focus on Collective Redress

6. Collective redress in Spain in light of the EC Recommendation

6.1 Introduction

The need to reform current Spanish legislation in order to implement or clarify the principles set out in the EC Recommendation does not seem to be on the agenda of either the Spanish legislative or executive branches. However, these restructuring tasks have to be completed, as some of the principles of the Recommendation do not fit the existing Spanish provisions and some of the proposed EC tools are not even available at the moment.

An analysis of the Spanish framework indicates that when accessing justice in mass harm situations a claim is still conducted via individual litigation. Until now, the only exceptions have been led by representative entities (consumers and users associations), which have filed hundreds of representative claims. Nevertheless, it should be highlighted that the majority of those claims have pursued injunctive/prohibitory relief exclusively and only lately has the trend moved towards claiming monetary compensation.

6.2. Legal Standing

As we have already mentioned in our previous Country report, Spanish law does not provide for a proper and coherent general collective redress mechanism. Nevertheless, forms of collective litigation are allowed, though there is a lack of harmonized and methodical treatment since these rules are dispersed through the legal system. In 2000, the LEC was passed introducing a specific litigation procedure before a court in consumer law cases – a representative action – in article 11 LEC (Cfr points 4-7 of the EC Recommendation). Since then, this provision has been amended on several occasions and the existing wording allows for the following

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28 Changes were inserted in 2002, 2007 and more recently in March 2014.
Focus on Collective Redress

With financial support from the Civil Justice Programme of the European Union

types of legal standing: First and mainly, article 11 LEC grants standing for the protection of rights and interests of consumers and users to legally constituted consumer and user associations. These shall be empowered to defend in court the rights and interests of their members and of the association itself, as well as the general interests of consumers and users. In cases of collective and diffuse interests, if the identity of the injured parties is not easy to ascertain, only associations that are representative in accordance with the law may file a claim.

Secondly, authorized public entities (article 6.1.8 LEC) may also start proceedings to defend collective and diffuse interests of consumers and users. However, these entities shall only exercise actions looking for injunctive relief – not compensatory actions.

Thirdly, the Public Prosecution Service may also file any type of claim to defend consumer and user rights, including either injunctive or compensatory relief (article 11.5 LEC). Prior to the March 2014 amendment, the Public Prosecution Service was only entitled to file actions looking for injunctive relief – though the same option was available for authorized public entities.

6.3. Admissibility

Class certification is not required as there is no certification criterion as such. However certain requisites must be met in order to file a collective lawsuit. For instance, consumer associations entitled to issue a claim in collective redress cases are defined in article 23 Consumer Law Act 2007. To file a representative action they must have legal ability, be not-for-profit and with constitutive objectives to protect consumer interests. On standing, under article 24 Consumer Law Act, in


30 This provision should be put in connexion with arts. 54 to 56 of the Act on Consumer law 2007 where legal standing and injunctions in consumer law cases are disciplined. Once more, the Public Prosecution Service shall be empowered to exercise injunctions together with actions for damages, to declare null and void oppressive clauses, annullment, etc.

31 This paragraph 5 has been heavily criticized already by academics as it grants an unreasonable – emphasis added – standing to the Public Prosecution Service. See F. Cordón Moreno, 'Reformas procesales introducidas por la Ley 3/2014 de 27 de marzo. En especial, la legitimación del Ministerio Fiscal para el ejercicio de las acciones en defensa de los consumidores', Revista CESCO de Derecho de Consumo, nº 9 / 2014, at 27- 32.
cases of collective and diffuse interests, if the identity of the injured parties is not easy to ascertain, only associations that are representative in accordance with the law may file a claim (adequacy of representation).32 However, in reality Spanish case law seems reluctant to admit the plea of lack of legal standing – a tool normally used by defendants.33

6.4. Publicity of claims

On publicity of claims, Article 15 LEC stipulates rules in order to disclose the proceedings and make the intervention of affected persons in the collective proceedings possible. When proceedings are brought by associations or entities constituted for the protection of the rights and interests of consumers and users or by groups affected, aggrieved parties will be summoned to the hearing in order to claim their individual interests34. This general announcement or call shall be made by the Court Clerk (Secretario Judicial), publishing the admission of the claim in the corresponding media with territorial coverage where the damage has occurred. Once more, the wording does not mention the requisites to be met when publicizing the admission of the claim; who should pay for it; which media should be used – TV, internet, newspapers, official journals; or which (relevant) data should be communicated.35

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32 For the purposes of art. 11. 3 LEC, associations which are members of the Consumers and Users’ Council hold the legal status of representative consumer and user associations under art. 24 Consumer Law Act 2007. To become a member of that Council it is necessary to fulfil certain requirements.

33 Further, anti-discrimination associations must have legal capacity and pursue, as a main goal, the protection of equality between women and men. Once those associations have proven their legal standing to file a suit, there are no further requirements (art. 11 bis LEC).

34 The importance of information on a collective redress action has been highlighted by the EC Recommendation. In this regard the Member States should ensure that it is possible for representative entities, or for a group of claimants, to disseminate information about a claimed violation of rights granted under Union law as well as their intention to obtain both injunctive and/or compensatory relief. Further, the same possibilities for the representative entity, an ad hoc certified public authority, or for the group of claimants should be ensured as regards the information on the on-going compensatory actions. For further details, points 10, 11 and 12, EC Recommendation 11 June 2013.

Focus on Collective Redress

In addition to this general call, the LEC establishes some peculiarities following the distinction according to whether the aggrieved parties are known (determined) or easily determined, or whether they are an indeterminate number of persons or a number which is difficult to determine. If the aggrieved parties are determined or easily determined, the LEC establishes an additional informative burden upon the plaintiff as he has to communicate his intention of filing the claim to the other aggrieved persons who are already known prior to the general announcement. After this call, the consumer or user may join the proceedings any time. However, he will only be allowed to undertake those procedural steps that have not yet been precluded. The LEC does not specify the type of notification (should it be a personal notice?) nor the content to be communicated.

In cases where damage is caused to an indeterminate number of persons or a number which is difficult to ascertain, the call shall suspend the proceedings for up to two months – if the Spanish system is interpreted as an opt-out regime, we may discuss if this would work as the period in which the aggrieved parties have to declare whether or not they join the proceedings in order to bound themselves to the final result of the process. The Court Clerk shall decide the timing in each case depending on circumstances, the complexity of the event, and the difficulties in finding those damaged. The proceedings shall resume with the intervention of all the consumers who have obeyed the call, and the individual appearance of consumers or users shall not be allowed subsequently, notwithstanding the fact that these may assert their rights or interests in accordance with the provisions of articles 221 and 519 LEC.

Furthermore, article 256.1.6 LEC provides for a preliminary investigation with the aim of identifying the aggrieved parties when they may be easily singled out (collective interest). This preliminary measure may be contrary to the fundamental right to the protection of personal data, as the Constitutional Court Judgment 96/2012 of 7 May has declared.36

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36 In the case, a consumer association (AUSBANC) filed a request before a First Instance Court in Madrid under article 256.1.6ª LEC, addressed to a Bank (BBVA) in order to identify the clients who had acquired a specific financial product. AUSBANC’s aim was to file a representative claim requiring BBVA to have the personal data of the clients affected in order to communicate them the existence of the proceedings. The Constitutional Court decision stated that the LEC allows, in certain cases, the transfer of personal data without the consent of the relevant clients. However, at the same time, the Constitutional Court declared that this measure – the facilitation of personal data – is to be justified on a strict assessment of motivation, adequacy, necessity and proportionality. If those requirements are not met, the fundamental right to protection of personal data protected by the Spanish Constitution will prevail over the interests of the representative association – grounded on an “ordinary law”, as the LEC is.
6.5. Opt-in versus opt-out. *Res judicata* and *lis pendens*

There is no express rule in Spain specifically advocating for any of these mechanisms (cfr EC Recommendation, which favours opt-in mechanisms). In fact both options seem to be available depending on the interpretation provided. Leaving aside the intervention of the Public Prosecution Service, when an individual plaintiff, an association legal entity or group, has brought proceedings, the remaining aggrieved parties can choose to join the claim, thus assuming the personal defence of their interests in court.

However, what happens if an aggrieved individual does not take part in the proceedings? Is she or he finally bound by the final result of the process – even if the judgment is not favourable to the aggrieved parties who actually took part in the proceedings? Some scholars have defended that the Spanish system advocates for an opt-out *sui generis* regime under these circumstances.37 Nevertheless, from our perspective the question remains unclear and leads to conflicting solutions. On one hand, fundamental procedural rights are at stake (right of access to justice, due process, etc – see Article 24 of the Spanish Constitution), on the other hand, it has been argued “the need to harmonise the right to protection of the aggrieved party, and that of the professional against which the claim is brought”.38 From our angle, taking into account the fundamental procedural rights granted by the Spanish Constitution, it cannot be stated that a non-party to a process is bound by its final outcome, irrespectively of the interpretation provided to those LEC articles. A solution supporting this view might be contrary to the Constitution.

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37 F. Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas*, (Ed. Civitas, Madrid, 2010), at 26, asserts that the Spanish system is based on an opt-out model. However, its current legal design is far from being complete.

38 This article proclaims the right to action in court together with judicial guarantees. Literally, “1. All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense. 2. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent. (...)”.


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In the light of the EC Recommendation the Spanish system should be clarified or at least interpreted as advocating for an opt-in system to comply not only with Constitutional requirements but also with Art 6 of the European Convention of Human Rights and Art 47 (1) of the Charter of Fundamental Rights.

Article 15 LEC allows for injured parties – other than the plaintiff – to choose between joining the proceedings and delegating their defence to the current plaintiff. But if those injured parties try to file a separate claim, is the victim bound by the final judgement of the process, even if the judgment is unfavourable to the aggrieved parties who took part in the proceedings? Is the victim then allowed to file a new action or may the new action be neutralized by the res judicata or lis pendens replies? The positive answer to the application of the lis pendens or res judicata replies seems to be a sound option. However, Spanish Courts do not seem to follow this precedent and recently, on August 2014, the ECJ has received two preliminary ruling requests. In both cases, the referring court (Juzgado de lo Mercantil nº 9 de Barcelona) questions the compatibility of article 43 LEC (stay of proceedings) with Directive 93/13 on Unfair Terms in Consumer Contracts in application to cases where an individual action is brought after the exercise of a collective claim. By applying article 43 LEC, the individual action filed in the second place must be stayed and treated as a preliminary issue pending final judgment in collective proceedings. The consumer is bound by the decision adopted in those proceedings without having the opportunity to put forward the appropriate pleas or adduce evidence with full equality of arms. So the questions raised to the ECJ are (1) whether the Spanish legal system provides an effective means or mechanism pursuant to Article 7 (1) of Directive 93/13, (2) to what extent does a stay of proceedings preclude an individual consumer from pleading in court in a case where the unfair terms in the contract individually concluded with him are void, thereby infringe Article 7(1) of the Directive, and (3) whether the fact that a consumer is unable to dissociate himself from collective proceedings constitute an infringement of Article 7(3) of Directive 93/13.


The Court has also been requested to examine whether the effect of a stay of proceedings provided in article 43 of the LEC is compatible with Directive 93/13 on the grounds that the rights of consumers are fully safeguarded by a collective action. The question has been raised because the Spanish legal system provides for other equally effective procedural mechanisms for the protection of consumer rights and by the principle of legal certainty. Both requests for a preliminary ruling will hopefully shed light on the intricate Spanish procedural regulation.

Furthermore, on the res judicata debate, the Court’s decision has the force of res judicata between the parties to the proceedings (article 222.3 LEC). Holders of the rights that provide the grounds for standing according to article 11 LEC will also be bound by the outcome of the proceedings. According to article 222.3 LEC, when claims are lodged by associations, legal entities, or groups acting in defence of both supra-individual interests and individual’s uniform interests, and the Public Prosecution Service, the binding effect of a judgment is that it can affect non-claimants who were also entitled to the rights protected by article 11 LEC. However again, from our point of view, the res judicata effect should be limited to those who have actually joined the claim following article 15 LEC and not to those remaining absent. We consider that the right of access to justice would be violated by accepting a wide extension of the res judicata effect: aggrieved individuals who have not heard about the proceedings in the media must not be bound by an extraneous court decision and, vice versa, representative entities which are unaware of a claim filed by a group of consumers must not be bound by any previous judgement. As mentioned above, this option seems more likely to respect Spanish (and even European) constitutional and procedural rights.

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43 This is clearly contrary to the EC Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11 June 2013, where the opt-in principle is considered to be the general rule (“Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice”). See ff. 21. Art. 222. 3 LEC states that “Res judicata shall affect the parties to the proceedings in which it is ruled, as well as their heirs and successors and any non-litigants holding rights upon which the parties’ capacity to act is grounded in accordance with the provisions set forth in Article 11 herein”.

44 M. Requejo Isidro/ M. Otero Crespo, supra, at 317.
6.6. Participation of foreign plaintiffs

Participation of foreign claimants is possible according to the general rules, but the Spanish jurisdiction has not dealt so far with any situation involving international collective redress.

6.7. Remedies

On remedies, the Recommendation recommends both injunctive and compensatory relief. Since 2000 compensatory relief is available in consumer affairs, and since 2007 is also available in gender equality matters. A compensatory claim founded in article 12.3 General Contractual Conditions or Standard Form Contracts Act and in articles 32 and 33 Competition Law is also possible (but only if consumers are involved). In other areas, compensatory relief for collective losses is not recognized by Spanish Law. Nevertheless, each harmed person is entitled both to claim damages individually, and to join other claimants through a joint action with several co-plaintiffs. According to article 221 LEC, in claims for a money award or personal services, the judgment upholding the claim shall individually specify the consumers or users who will benefit from it. When individual identification is not possible, the judgment shall determine the conditions to be met in order to be eligible for payment. If specific consumers who are to benefit from the judgment cannot be identified, the enforcement court will issue an order on whether the requirements established in the judgment are satisfied by the individuals who claim

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45 See also art. 55 General Consumer Act, about the injunction claim in other European Union States and art. 6.18 LEC, recognizing capacity to be a party to qualified entities according to the former Directive 98/27 and current Directive 2009/22/EC on injunctions for the protection of consumers’ interests.

46 In fact art. 12.3 Standard Form Contracts Act 1998 allows the recovery of sums effectively paid by the aggrieved parties on the ground of the clauses declared null and void (unjust enrichment) together with the damages caused by the application of those general standard terms. The Competition Law Act is drafted in similar terms allowing for the same type of actions.

47 See the Auto of the Audiencia Provincial de Barcelona of 24 January 2013. AUSBANC (consumers’ association) filed a claim against a bank asking for the nullity of oppressive clauses determining interest rates and the reimbursement of the corresponding amounts to the clients. AUSBANC, following the decision, issued a request to the court requiring the bank to facilitate a detailed list with the identification of the clients affected. This is a means of identifying the injured parties after the court’s decision. See F. Cordón Moreno, ‘Acciones colectivas para la defensa de los derechos de los consumidores: ejecución de sentencia y deber de la entidad condenada de entregar el listado de todos los clientes afectados’, Revista CESCO de Derecho de consumo, Nº9/2014, at 187- 188.
damages (article 519 LEC). The Public Prosecution Service also has standing to seek enforcement on behalf of the consumers and users affected. As regards injunctive relief, a judgment upholding an action for cessation in defence of collective interests and in the diffuse interests of consumers and users, may impose a fine ranging from sixty thousand to six hundred thousand euros per day of delay in the enforcement of the court decision within the time limit set forth therein. That fine is to be paid to the Public Treasury (article 711 LEC).

6.8. Costs

Regarding costs, Spain has a “loser pays” general rule. However, contingency fees/quota litis agreements are considered valid in Spain – lost cases included – after the decision of the Administrative Chamber of the Supreme Court of 4 November 2008. Third party funding is not expressly regulated, although Spanish consumer organizations can obtain legal aid (article 37 RDLeg 1/2007) to defend consumer interests (both collective and diffuse interests). In addition, the Free Legal Assistance Act (Ley de Justicia Gratuita 1/1996, January 10th) provides the right to apply for free justice benefits to associations declared to be in the public interest or foundations registered in the corresponding administrative register (article 2 c), if they cannot afford to litigate. The claimant party might be obliged to post security. However, in the procedures in which an action for cessation is filed in defence of the collective interests and the particular interests of consumers and users, the court

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49 As was mentioned above, 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 per day of delay. See EC Recommendation “Efficient enforcement of injunctive orders”.

50 This criterion was followed in other Supreme Court decisions - See also the Decisions of the Supreme Court 357/2004, 13 May, 446/2008, 29 May and 314/2013, 17 May. Nevertheless, on contingency fees, the Commission Recommendation adopts an ambiguous approach. First, the Recommendation seems to generally reject these lawyers’ fees based on the grounds that this kind of remuneration and the method by which it is calculated, may create incentives to litigate. Secondly, being aware that those contingency fees do exist in some Member States, the Recommendation states that they can be allowed exceptionally, having taken a series of safeguards (see points 29 and 30).

51 From the Spanish perspective the regulation of “Funding” in the Recommendation is quite illustrative as it provides for a series of criteria to be taken into account within a system that ignores the institution itself.
may exempt the applicant for the injunction from the obligation to post security taking into account the circumstances of the case and the financial significance and social repercussions of the various interests affected.

6.9. ADR mechanisms

Furthermore, in clear contrast to the EU instruments and corresponding national legislation, collective settlement procedures or collective ADR mechanisms appear irrelevant in practice. Following an ADR model, on March 2013, the Spanish Ombudsman suggested setting up a special arbitration system to compensate for a wide spread issue of “collective interest”: investor losses being compensated in preference shares. Although it might have been a good starting point to test collective arbitration, as well as in claims brought before the courts, most of those cases have been settled through individual arbitration. In contrast, it should be highlighted that the use of arbitration mechanisms is expressly regulated when dealing with collective claims that concern a certain or determinable number of consumers. Collective consumer arbitration is available under Royal Decree 231/2008 regulating the Consumer Arbitration System (articles 56 – 62). The goal of this collective consumer arbitration is the resolution in a single consumer arbitration of those conflicts that, based on the same factual presumptions, would have injured the collective interests of consumers and users and that affect a determined or determinable number of such persons.

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52 On collective settlements and their potential regime under Spanish law, F. Gascón Inchausti, supra, especially, at 147 ff.

53 Once again it suggests that the precise identity of the members of the collective might take place time after the initiation of the arbitration. See European Parliament Resolution of 2 February 2012.

54 The decision to proceed collectively is not made by the parties themselves: the president of the relevant Consumer Arbitration Board makes the initial determination about whether and to what extent a collective arbitration may be appropriate – acting on his or her own initiative or responding to a request from a local consumer association. Then, the respondents (who are either businesses or professionals) must agree to collective arbitration within 15 days of being notified. Respondents may then propose a settlement at the time that they indicate their agreement to collective proceedings, although a settlement offer is not required. If the respondent agrees to collective arbitration, then the Consumer Arbitration Board provides notice to potential claimants in the relevant territory through publication in the relevant territorial Official Journal – additional means of publicity shall be used as well. According to art. 59, the notice must indicate that the consumers can protect their individual rights and interests through the collective proceeding; where the consumers and users may go to access the terms of any proposed settlement; and the consequences of a failure to join the action in a timely manner. The notice period runs for 2 months from the time of publication in the Official Journal. Once the notice period has run, the president of the relevant Consumer Arbitration Board appoints the arbitral tribunal. It is important to highlight that the agreement by the respondent to
7. Collective redress in Sweden in light of the EC Recommendation\(^55\)

7.1. Introduction

According to the Swedish Justice Department, the Recommendation on collective redress has not yet resulted in any new inquiry to propose changes in the Group Proceedings Act.\(^56\) Thus, the Swedish government will probably not advocate further rules on the matter with the exception of a national registry of collective redress actions (compare p. 35-37 in the Recommendation). It is not a surprising statement, as most of the recommendations are already fulfilled in the present legislation.

7.2. Legal standing

According to p 4-7 of the Recommendation, the Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. This entity should therefore have a non-profit making character and have sufficient capacity in terms of financial resources, human resources and legal expertise. There should also 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. The entity must be officially designated in advance and it can be a public authority. Sweden’s system with KO, that can initiate group actions both in front of a court or the National Board of Consumer Disputes, fits well in with this recommendation.

\(\text{pursue collective arbitration automatically suspends any individual arbitrations that may be underway. Arbitral submissions presented outside of the period of the publication notice will only be accepted when the presentation is before the date anticipated for the hearing. The admission of those petitions will not have a retroactive effect on the submissions: the consumer or user will only be able to intervene in all the steps following the date of the admission. Further details in S.I. Strong, ‘Collective consumer arbitration in Spain: a Civil Law Response to US-Style Class Arbitration’, Journal of International Arbitration 30, n° 5 (2013), at 495-510.}\)

\(^55\) By Laura Ervo and Annina H. Persson

\(^56\) According to Kanslirådet Rebecca Heinemann, 29th of September 2014.
7.3. Opt-in versus opt-out

Point 21 of the Recommendation states that the opt-in is the general principle, which has already been applied in Sweden. This means that it will not be a problem for the Swedish legislator to meet that demand of the Recommendation for the time being.

7.4. Funding and costs. Punitive damages

Points 14-16 and point 32 of the Recommendation states the Member States should provide national rules to ensure that the claimant only has to declare the origin of the funding to the court. Furthermore, there should be i.e., national rules that prevent third party funders from abusing their position. As there have been very few cases according to the Swedish law on group proceeding, it is difficult to say if we have had any problems with the permitted methods of funding. In at least four cases regarding private group actions, private entities who have not been parties or group members have contributed to the financing and sponsoring of such trials as they had considered them worthy of support. The third party funders have also provided expertise to the plaintiff or the group members. The funding in these cases has come from individuals, but also trusts, companies or special associations, formed for this specific purpose. The special procedural rules in Section 8 of the GRL have probably been sufficient to prevent third party funders from abusing their position, but a new and practical analysis of the funding methods would be necessary in order to be certain.

On points 29-31 the Recommendation states Member States must ensure that the lawyer’s remuneration and the method by which it is calculated do not create any incentive for litigation. As lawyers in principle can only demand fees that comply with Chapter 18, Section 8 RB in Sweden and Chapter 21, Section 1, and that contingency fees and as punitive damages are not allowed under Swedish law, it will not be difficult for Sweden to meet this requirement of the Recommendation.

7.5. Injunctive and compensatory relief

Member States should provide mechanism for both injunctive and compensatory relief. Point 20 of the Recommendation provides that 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 for a

fixed amount for each days delay or any other amount provided stated in national legislation. In Sweden, the national laws on group actions do not set any limitations on the civil law remedies to be obtained. Mechanisms for both injunctive and compensatory relief are therefore already in place with the present legislation. Therefore, the Recommendation can be fulfilled through the legislation. Furthermore, the Consumer Ombudsman in Sweden can also ask for a prohibition order or an information disclosure order according to Section 28 of the Market Practises Act (2008:486). The order can be sanctioned with a fine.

**7.6. Cross-border cases**

Member States should ensure efficient handling of cross-border collective redress. Point 17 of the Recommendation states that the Member States should ensure that where a dispute concerns natural or legal persons from several Members 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. As the Swedish Group Proceedings Act does not establish any limitation concerning the nationality of the group members and seeing as there are no restrictions to the participation of foreign plaintiffs, it will not be a problem to comply with this part of the recommendation.
8. Collective redress in The Netherlands in light of the EC Recommendation

8.1. Introduction

The European Commission Recommendation 2013/396/EU and Communication COM (2013) 401 final have been received with some interest in the Dutch legal community.

As explained in the first report, Dutch law currently has three interrelated ways to organise collective action: (1) the collective action of art. 3:305 BW (Dutch Civil Code) which allows a foundation or association to obtain an injunction or declaratory judgement, but cannot lead to an award of damages, (2) representation by a legal entity of actual individual claimants on the basis of individual mandate, which can lead to an award of damages but only for the individuals involved, and (3) extrajudicial negotiation (mostly by representative organisations) that may lead to a settlement which the court may at request declaring binding to all victims, even those not involved in the procedure, except insofar they opt-out of the settlement (the WCAM procedure).

These various options contain more or less the elements that are required by the EU Recommendation, in particular on injunctive collective redress. Compensatory collective redress is only available in limited form by the mandate construct or a WCAM settlement, but a new legislative proposal (opened for consultation from July-October 2014) will – if it becomes law – create a collective action to obtain damages.

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58 By I. Tzankova & E. Tjong Tjin Tai.

8.2. Injunctive and compensatory relief

The Recommendation distinguishes between injunctive collective redress and compensatory collective redress (limited to mass harm situations). Dutch law already allows both forms of redress. Individuals harmed can obtain injunctions and award damages, while a representative entity may obtain an injunction on the basis of art. 3:305a BW. An award of damages may be demanded by a representative entity, but only for individuals that it has been mandated to represent, or conversely it may negotiate out of court for a settlement which the court can subsequently declare binding for all victims (except those who opt-out).

8.3. Legal standing

The Recommendation sets standards as to the standing of representative organisations, primarily requiring advance designation (point 4 and 6) but allowing also ad-hoc certification by the court (point 6). Dutch law operates on the second, ad-hoc, basis. Advance designation has been advocated by some but appears to be found to impose needless administrative burdens.

Dutch law as yet does not contain a material non-profit criterion (point 4(a)). The collective action of art. 3:305a BW is only open to a ‘stichting’ (foundation) and ‘vereniging’ (association), which legally may make profits but these cannot be paid out as such to the board and may only benefit the goals of the entity. However, in practice it is easy to circumvent these restrictions by allowing board members or related persons or companies to ask substantial fees for their work, whereby these may materially profit from the collective action. Other claim organisations, including mandated entities, may operate on a for-profit basis whereby their work is paid at commercial rates, although usually the structure of a non-profit entity with commercial fees for advisors is chosen.

The (statutory) objectives of the entity (point 4(b)) in case of a collective action are to be (also) aimed at protection of the rights involved in the action (art. 3:305b BW). For a WCAM request only representativeness is required (art. 7:907(2)(f) BW).

It is not entirely clear what the capacity test of point 4(c) involves. Few claim parties have complete in-house expertise; capacity will usually be hired from outside services providers. Demanding in-house capacity will set an overly high barrier to claim parties. Art. 3:305a BW does not contain a requirement of sufficient capacity. The court that receives a WCAM request has to reject a claim party if the interests of the parties on behalf of whom the action is started are is insufficiently safeguarded.
Public authorities can bring injunctive representative actions on the basis of art. 3:305b(1) BW.

8.4. Admissibility

The conditions for admittance of a case (including the conditions for collective actions) can and must be verified by the courts at the beginning of the procedure, in order to determine admissibility. This is to be done both of their own motion as when a specific defence as regards admissibility is raised by the defendant. Manifestly ill-founded cases can be rejected insofar as the introductory summons does not contain sufficient facts and (legal) grounds (cf. art. 111(2)(d) Rv). Cfr points 8-9 of the EC Recommendation.

8.5. Information on a collective redress action

Given the freedom of expression as guaranteed by art. 10 European Convention on Human Rights there is no significant restriction for organisations to disseminate inform about the action (see points 10-12 EC Recommendation).

8.6. Funding and costs

Dutch law has a costs system which allows the judge large discretionary powers (art. 237 BRv); the procedural costs awarded generally do not cover the real costs. However, the court may order the actual legal costs to be paid, and for IP infringement cases the full costs have to be paid following art. 1019h BRv, implementing the IP enforcement Directive. Costs incurred outside and before the procedure have to be compensated as well on the basis of general liability rules, but these costs also are generally not fully compensated (see point 13 EC Recommendation).

At present claimants are not required to give any insight as to the source of funding (point 14-15). This is connected to the fact that as yet there is no real market for third-party funding, hence funding is done primarily by the principal victims. In case of third party funding there are as yet no legal procedural restrictions (point 15-16), although some mandatory rules regarding the quality of service and avoiding of conflict of interests may apply (cf. art. 7:416-418 BW).

If the defendant doubts whether the claimant has sufficient funds to pay the defendant’s procedural costs in case the claimant loses (point 15(b-c)), and the claimant has no fixed abode in The Netherlands, the defendant may request a guarantee or security for these costs (art. 224 Rv). However, this is to be requested
by the defendant and is not ordered by the court of their own motion. There is no such general rule for a claimant with fixed abode in The Netherlands.

8.7. Cross-border cases

Dutch law allows foreign representative entities to initiate or participate in a procedure on the same basis as national entities (point 17-18).

8.8. Specifics for injunctive collective redress

Injunctions are usually requested in summary proceedings, which form an efficient and speedy procedure (point 19). Injunctions in summary proceedings can as a matter of course be obtained in 4-8 weeks, and if need be within 24 hours. Parties may, if so desired, subsequently or concurrently ask the court in a normal procedure to examine the legality of the injunction, but this is not necessary except in case of injunctions related to IP-rights (as required by the TRIPS-treaty).

Enforcement of injunctions is usually done on the basis of a penalty payment amounts (dwangsom) for each violation or each day of non-compliance (art. 611a Rv). The party that requested the injunction is entitled to the penalty. This is a practical and efficient method (point 20) as the party that requested the injunction is usually also motivated and well positioned to monitor any violations.

8.9. Specifics for compensatory collective redress

The requirement that claimant party should be constituted on the basis of ‘opt-in’ (point 21) means that the Dutch construct of mandate is the most appropriate method for collective redress according to the recommendation. The WCAM settlement forms an exception to this principle, which however may be justified on the basis of sound administration of justice (since an opt-out is allowed, and the choice of opt-out instead of opt-in can be justified for these reasons). The proposed collective action for damages is to be based on opt-in.

In principle a mandate can be revoked at any time, in which way the individual can leave the claimant party at any time (point 22). However, it is possible to contractually limit the individual’s discretion. The requirement of the recommendation could be read as a public order or mandatory law requirement that would annul any contractual limitation to the contrary.

Joining a claimant party (point 23) is in principle possible if the party allows this, which in general would be expected as that is in line with the aims of the party and
to the benefit of all concerned. Changes as to the composition for a claim on the basis of mandate entail a change to the grounds of and extent of damages demanded, and therefore are only possible by a modification of the claim (eis) (art. 129-130 Rv). This requires a request to the court of which the defendant is to be notified, and may be refused if the modification (in case of an increase) is contrary to a good administration of justice (art. 130 Rv). If claimant litigates on the basis of mandate, the defendant has a right to be informed of the individuals who have mandated claimant (VEB/World Online). Hence the requirement of point 24 is fulfilled.

Out-of-court settlement is encouraged (point 25), and is possible both before and during the proceedings (point 26). The court can of its own motion suggest mediation to parties; art. 87 and 133 BRv specifically require the court to call parties for a hearing to investigate the possibility of a settlement. The WCAM-procedure is based on out-of-court settlement, with the incentive for defendants that the WCAM-settlement can be declared binding on all victims (except those who opt out) instead of only those who actively opted in the settlement. Furthermore a party may ask for a pre-trial meeting if no agreement is reached (art. 1018a BRv). A collective action on the basis of art. 3:305a BW has to be preceded by sufficient attempts to reach the desired result through negotiations (art. 3:305a(2) BW).

The prescription of a claim (point 27) is stayed during a mediation (art. 6 Law of 15 November 2012, Stb. 2012/570 implementing the Mediation Directive 2008/52)

Court verification of binding outcome (point 28): if the settlement is reached on the basis of mandated parties, this only binds the individuals who mandated the claiming party, and no court is necessary as the binding force derives from a contract. In case the WCAM procedure is followed the settlement becomes binding on all victims except those who opt out, and the court verifies the proposed settlement.

Collective claim actions involve mandatory representation by an advocate, who is subject to professional ethical rules and professional sanctions. Currently the Dutch Bar Association (advocatenorde.nl) to a certain extent prohibits payment structures that would lead to incentives counter to parties’ interests. Pure contingency fees (point 30) are not allowed (Gedragsregel 25, art. 7.7 Verordening op de Advocatuur, exception for certain personal damage claims), although success-dependent limits on the fee are not uncommon, especially in collective claim actions.

Punitive damages (point 31) cannot be awarded, as damages are measured by the actual loss suffered (art. 6:95 and 96 BW).
There are no particular prohibitions on funding of collective redress actions (point 32). The victims usually bear the cost of the actions themselves.

Collective follow-on actions (point 33-34): there is no general rule to stay private proceedings in case of an action by a public authority.

8.10. National register

There is as yet no register for collective redress actions (see points 35-37).