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Communication from the Commission "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401

Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539

Statement of the Austrian Federal Economic Chamber, register number: 10405322962-08

Dear Sir or Madam,

On June 11th, 2013 the European Commission published its Communication "Towards a European Horizontal Framework for Collective Redress" [COM(2013) 401] together with its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [C(2013) 3539].

In formal terms and as it is also stated by the Commission, neither of the two documents is legally binding. Nevertheless, it has to be assumed that the Communication as well as the Recommendation contains political instructions from the Commission to the Member States. Thus, they will also have wide legal implications.

Considering the varied problems which have to be faced in the topic of collective redress, it is to be expected that a coherent implementation of the Recommendation within an implementation phase of only two years will be practically impossible. "It wouldn't be a surprise if the Commission would state after the implementation period that the measures of the Member States are insufficient and thus a legally binding legal instrument has to be implemented by the European Union."[1]

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1 *Balthasar*, NJW, 2013, Editorial.

Thus, the Austrian Federal Economic Chamber would like to comment both documents vis-à-vis the European Commission as follows:

The Austrian Federal Economic Chamber intensively dealt with the various consultations, green and white papers on this topic in the past years. We analysed the questions raised in great detail, going far beyond our purely political field of interest.

There is no change in the position of the Austrian Federal Economic Chamber according to which we refuse any additional measures for the implementation and/or the extension of possibilities for the collective enforcement of claims by measures at the level of the European Union. We do not perceive any need for further action, considering the already existing number of instruments..

Admittedly, the Commission has paid due respect to a number of concerns and objections articulated in previous consultations. Still, it needs to be emphasized that the risk of abuse of collective redress has not been brought under effective control yet.[2]

Remarks to the Communication

The statements of the Commission in its Communication often do not meet our undivided acceptance. This is, however, not really surprising within a topic that is discussed in such controversial manner. According to the context, in a number of points we refer to our statements made to the Recommendation below.

A lot has been achieved in the field of justice policy by the European Union, whereas in a number of areas the confidence placed by the stakeholders in advance needs to receive strengthening by the Union. Economic growth and competition may not only be hampered by different judicial systems but also by disproportionate action by the Union. A fragmentation of a legal matter that is consistent in principle to a number of piecemeal legal measures by the Union without respecting the big overall relations produces a result, that was already meant to be overcome in territorial respects just by means of the creation of an European Area of Justice. This applies both to the substantive law and to the procedural law.

Inaccuracies in the text of the Communication do not foster the confidence in the Commission's objective approach to the problem. The European Small Claims Procedure for instance is a procedure that is not only open to consumers as claimants. The Directive on Consumer Alternative Dispute Resolution[3] has a remarkable deficiency precisely in those areas where only consumers are entitled to start such proceedings.[4]

Beside the serious doubts whether in principle a competence for legislative action of the Union in this area is given at all, the question is to be raised if in respect of the fact that the enforcement of EU law lies within the competence of the respective national courts, the principle of subsidiarity is respected in an adequate manner.

We miss a clear statement that the framework for collective redress applies only to the procedure itself but does not affect the basis of the claim itself. Phrases such as "be capable of

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2 *Wernicke*, Von Sammelklagen und Kaperbriefen - Zum Kiobel-Urteil des US Supreme Court, EuZW 2013, 401 [402].

3 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013.

4 Communication, 2 seq.

effectively resolving a large number of individual claims for compensation of damage"[5] could create a false impression and raise unjustified expectations. A procedure has the purpose of determining in a legally binding manner whether a claim made is legitimate or not. In this point precise legal terminology is essential for adequate differentiation.

In general, we do not share the belief of the Commission that the advantages that should be connected with collective redress only could be achieved when all common principles to be followed under the Commission Recommendation, are appropriately implemented.[6] We are surprised about this firm position of the Commission in this point. Furthermore, this conviction of the Commission could indicate that the Commission seems to have neglected its duty to evaluate the present topic in an objective manner.

The Commission points out as a major advantage that the pooling of similar claims in a collective redress scheme allows persons claiming damages to share the costs. This advantage is prima facie one where the costs of an individual prosecution of a claim are not in an appropriate relation to the claim itself. Considering the loser-pay-principle (a principle which should explicitly be retained according to the Commission) it becomes apparent that this is not the real matter because the loser has to pay the costs. In fact, the matter is the spreading of the risk in relation to the costs of such a court procedure. Taking this into consideration, there is clearly a shift of emphasis.

Thus, it should also be borne in mind that a collective redress scheme causes significant additional expense for all parties involved. Already from an economic point of view such procedures should only be admissible if an ex ante examination shows that the advantages for all parties involved (also for the court and the defendant) are higher than the expected disadvantages of e.g. the court's much more complicated conduct of the case.

According to the basic understanding of the procedure of collective redress, we do not accept the Commissions' point of view that this kind of procedures allows a greater number of potentially harmed persons to lodge their claims. There is no increase in their opportunities, at the most, their motivation changes.

We appreciate the Commission's more explicit commitment to limit the risk of abusive litigation by way of solid safeguards.
Even more so, the clear statement of the Commission has to be supported that punishment and deterrence functions should be exercised by public enforcement and that there is no need for EU initiatives on collective redress to go beyond the goal of compensation and that punitive damages should not be part of a European collective redress system.[7]

Remarks to the Recommendation

It lies primarily in the decision-making authority of the legislator, who is entitled to make a claim for infringement of rights and in which way this has to be done. It is beyond dispute that one of the reasons (beside a relative wide dimension of social acceptance) why in most cases by far the diverse legal relationships under public and private law run without any prob-

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5 Communication, 9.
6 Communication, 7.
7 Communication, 10.

lem, is the fact that everybody knows that in case of an infringement of a legal relationship a sanction may be imposed. Contrary to what is said in recital 6 private law relationships amount to the vast majority of legal relationships. Thus, it seems to be incorrect that the private prosecution of claims is considered only as a supplement to prosecution by public law. The wording is also contradictory to the consultation document "Towards a Coherent European Approach to Collective Redress", SEC(2011) 173.

Furthermore, one and the same case can also trigger both kinds of procedure - private and public - because the respective legal purposes can be different and sometimes also compete with each other.

The topic becomes increasingly complex where it needs to be checked whether an action (seeking injunction or damages for alleged violation) is based on a violation of rights granted under EU law or results from a violation of other rights.

Whereas the Commission in the Communication obviously assumes that all Member States have means to issue cease and desist orders with regard to unlawful practices (injunctive relief) and some Member States introduced collective claims for compensatory relief, the Commission states in Recital 9 of its Recommendation that all Member States introduced types of collective redress mechanisms to ensure that compensation can be obtained for the detriment caused in mass harm situations. This divergence is not explained.

Recital 15 contains explanations that jury awards should be avoided, whereas this point is not mentioned in the Recommendation itself.

Another weak point of the document can be found e.g. in Recital 16 ("alongside, or as a voluntary element"). This recital cannot be brought in line with Point 26. of the Recommendation where the absolute freedom of the participation in collective alternative dispute resolution is stated.

A representation action - as defined in Point 3. lit. d - is an action, which is brought on behalf and in the name of persons. Thus, the issue of legal standing is - contrary to recital 17 - not more difficult than an action brought by the claimant himself.

Purpose and subject matter

The real purpose and subject matter of the Recommendation is not expressed clearly enough for a substantiated discussion. The broad explanations and sometimes also the ambiguity of the terms and definitions used prove to be obstructive.

For example: As set out in detail in Point 1., it is the purpose of the Recommendation to enable injured parties to obtain compensation in mass harm situations. Thus, the purpose of the Recommendation could be understood as interfering with the substantive law, the law of damages.

The overall impression of the Recommendation would allow the conclusion that the Recommendation's main aim is to illustrate ways and means, i.e. the procedure affecting, which are necessary according to the Commission's opinion to obtain compensation in a better way.

In this point the lecture of the Recommendation awakes the suspicion of the one-sidedness of this document. Once an action is pending, normally the final and binding decision of the court determines if and in the affirmative to what extent the claim is justified vis-à-vis the defendant.

Even the Commission makes reference to this important point in its Communication. At footnote 13 the Commission states:

> "For this reason, it is not appropriate to refer to 'victims', 'harm' or 'infringements' in the context of private collective actions before the court decides that damage has been caused by a particular violation of the law."

Appropriate linguistic neutrality could have improved the wording of the Commission's Recommendation in terms of a necessary objectiveness - which is not only a duty of the members of the judiciary bodies.

Without any doubt: The basic principles for a procedure according to Point 2. have to be obligatory for both sides of a procedure.

Definitions and scope

Collective redress

A „collective redress" (or better perhaps: „a procedure for collective claims") should be a legal mechanism according to Point 3. a. This phrase seems to be very vague because we do not know why the Commission does not use the more precise expression "(civil) judicial actions". This is meant when the Commission acts on the assumption that such a procedure is started by a lawsuit. This, too, with view to the Communication according to these actions are civil disputes between two private parties, including when one party is a 'collective', e.g. a group of claimants.[8]

We are convinced that the initial point made that every procedure can be qualified as collective redress even if only more than one person is presenting a claim is a clear misapprehension.

On the one hand the floodgates would be opened for the purpose of evasion.

On the other hand almost all procedures would be covered which could now be handled in all permitted forms for the concentration of procedures (e.g. in form of a joinder of parties or consolidated actions). There is no point for such a "complement" to force existing and well established kinds of procedures into a new corset in which they do not fit - this with all further consequences, such as higher efforts for procedures and higher costs (e.g. for the additional information obligations).

It is a political decision which lower limit should be essential for procedural special provision. However, even such a political decision needs to be measured within the frame of a reasonable factual scope, which we doubt has been done appropiably.

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[8] Communication, 4.

A mass harm situation following which two persons make a claim cannot be considered a mass harm situation, at least not in linguistic terms. Mass harm situations do not occur very often. "Which number of persons is necessary, will at first be answered in a manner that without any doubt the number has to be one for which the existing institutes of a joinder of parties or consolidated actions are not sufficient to handle the procedure with reasonable input."[9]

In the Communication it is pointed out that one of the basic parameters of a procedure for collective claims is that such a procedure needs to be capable of effectively resolving a large number of individual claims.[10] To speak about a large number when meaning only two claimants is contrary to this consent. Thus, the Commission seems to thwart the result of the answers given to the Consultation with its point of view made here. It also has to be assumed that this point of view could not be accommodated with the basic principles of the legal orders of the Member States.

We welcome that procedures for collective claims only allow individuals to present claims who claim personally or via an entitled entity to have been harmed in a mass harm situation. Such a restriction is indeed not *expressis verbis* part of the definition of an injunctive claim, but this is inherent to the system because the danger of repetition needs to exist vis-à-vis the claimant.

The definition lacks one essential element: Such a procedure can only fulfil the Commission's aim to facilitate the access to justice when with this joint lawsuit a claim is asserted which is the result of the same practice. This arises out of the definition of lit. b "mass harm situation" for a claim for compensation but not out of the definition of an injunctive relief.

It should be beyond doubt that this Recommendation does not contain any kind of procedure which does not affect the accumulation of interests of individuals.

Mass harm situation
The definition of lit. b is excessive because a "plurality of individuals" is already a requirement for a procedure for collective claims. As already stated, this point is missed when a mass harm situation is every situation where more than one person is presenting a claim.

In reality and provided that a careful examination takes place, homogeneous questions of fact and homogeneous questions of law in respect of a mass harm situation with a uniform basis for a claim (important common basis) do only very rarely occur in real life.

For example: In court procedures regarding claims for compensation because of alleged incorrect advise on investments buying, time and again the great differences in the various counselling interviews, the different understanding of the investors and the diverging minutes of the interviews have been declared to be of high relevance.

It follows from this that there will not only be different crucial findings of facts but also different legal conclusions. Therefore, such a big court procedure may be considered one court procedure only in formal terms. However, within such a procedure an immense number of problems needs to be solved. Similarities are quickly reduced to a small number of points that affect - if at all - only the basis of the claim, but not the extent of the liability. In such cases,

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[9] *Benn-Ibler*, Überlegungen zur Gruppenklage, 6.
[10] Communication, 6.

it would not be a court, but one judge alone or a council of judges who would be confronted with a mass of lawsuits which de facto cannot be handled in a proper way.

Kalss[11], too believes that the actual execution of collective actions for investors at the Commercial Court of Vienna demonstrates that these procedures are in fact not suitable for procedures handling alleged incorrect advise or for questions of direct causation for the use of information. The reason is that for every single person claiming and for every single claim a separate course of procedure or anyway in the structure of a collective procedure an individual course of procedure is necessary. Only in cases of errors in public prospectuses or of errors of other media of information or booklets does the author believe procedure for collective claims to be suitable.

Regardless of the academic discussion to Section 227 of Austrian's Civil Procedure Code in respect of collective redress it is obvious that in cases of avoidance on the grounds of error the specific circumstances of the individual case are relevant. Thus, for cases of avoidance on the grounds of error, the Austrian style collective redress lawsuit cannot be used.[12]

Hence it seems also in respect to economic aspects to be necessary not to understand the definition of a mass harm situation in such a broad meaning but to limit it in a useful way to the best interest of all parties involved, including the courts. Likewise the Commission states that collective redress is a procedural mechanism for reasons of procedural economy and/or efficiency of enforcement.[13]

It is debatable if claims for scattered and dispersed damages should in fact be defined as mass harm according to the Recommendation. Scattered and dispersed damages are damages which affect a plurality of individuals. But each instance of damage is very low (e.g. undercut of fill quantity). This kind of damages is distinguished in the specialist literature. In these cases the effort often will be higher as the damage itself (even if only the effort for the spreading of the compensation is taken into account).

A criterion for the classification of scattered and dispersed damages on the one hand and of mass harm damages on the other hand is often the fact that the harmed persons do not file a lawsuit for scattered and dispersed damages because of a rational analysis of the costs and the benefits of the risks and the efforts of such an action.[14] The amount of damages for this differentiation is estimated very different. It varies between 25, over 300, up to 10.000 Euro and also above that amount. [15] Likewise, the existence of legal protection insurance for this kind of damage may play a role. Thus, the insurance rates have to be born in mind when adopting an economic point of view.

An objective classification between scattered and dispersed damages on the one hand and mass harm damages on the other side is not possible in respect of the willingness to file a lawsuit.

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[11] *Kalss*, Zeit für gebündelte Verfahren am Kapitalmarkt, GesRZ 2011, 133.

[12] *Kalss*, Schadenersatz und sonstiger zivilrechtlicher Schutz der Anleger, in *WiR - Studiengesellschaft für Wirtschaft und Recht* (Hrsg.), Haftung im Wirtschaftsrecht, 225 [231], with reference to OGH 3 Ob 2/11g (without datum).

[13] Communication, 4.

[14] *Bernhard*, Sammelklagen im Kartellrecht, 33.

[15] Study of 26 August 2008 Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union Final Report, Part I: Main Report, 91.

Stadler who is a pronounced proponent of collective redress as well recognizes that with a collective redress mechanism the problem of scattered and dispersed damages cannot be solved: "Because the experience in the USA demonstrates that there is no fair spreading of the paid compensation. Neither the administrative effort is worth to accord every consumer few Euros ... The idea of compensation is respectable but unrealistic. Thus it is time to say goodbye to the idea of compensation for scattered damages ...".[16]

Therefore, a substantiated analysis and comparison of benefits and disadvantage is necessary. These aspects should not be disregarded when evaluating the legitimacy of such procedures.

Action for damages

If in a lawsuit claims are made e.g. for the loss of income, compensation for pain and suffering and for a declaratory judgment for the liability for prospective damages (this combination often occurs in court actions because of traffic accidents) this combination of claims would also be an action for damages according to lit. c. Apparently, the term "damages" is so clear for the Commission that it considers a definition of this term to be legally superfluous.

Consequently, it should be considered to be equally clear that the question under which legal requirements a compensable damage is given (therefore the provisions for a liability are met) is a question to be answered within the tort laws of the Member States.

Representative action

According to the wording of lit. b the certified entity has to claim on behalf and in the name of a third party. It should be questioned why the conduct of the case should be made by an entity which can act with absolutely no financial or economic risk. This could lead to major disadvantages for the principal and could also have negative impacts for the court action itself. There is no safeguard that this entity acts effectively on behalf of the group of principals. Such additional safeguards are necessary - as also stated in the Communication - to prevent abuse.

However, according to the general legal understanding, the requirements for the filing of a lawsuit on behalf and in the name of third persons is absolutely incompatible with the requirement "whereas those [for whom the lawsuit is brought to court] persons are not parties to the proceedings." In this context we believe that there is a lack of understanding by the Commission with regard to the definition "party of civil proceedings".

Indeed, the Austrian Civil Procedure Code does not contain a statutory definition of the term "party of a civil proceeding" either. However, this definition rather results from the nature and the function of a civil action itself. Accordingly, parties are those legal entities who ask for action by court or to whom this action is addressed always on their own behalf.[17]

As there are fundamental consequences linked to the specification of who is claimant and who defendant, in this area legal certainty is the absolute priority. We are, furthermore, interested to learn what is the Commission's answer to the question in which way injunctive reliefs could be transferred.

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[16] *Stadler*, Kollektiver Rechtsschutz - Vielfalt statt Einfalt! NJW 5/2011, 3.

[17] *Schubert* in *Fasching/Konecny*[2], Zivilprozessgesetze Kommentar II/1, Vor § 1 Rz 1. Ähnlich *Rechberger/Simotta*, Zivilprozessrecht[7], Rz 290, and *Fucik* in *Rechberger (Hrsg.)*, Zivilprozessordnung Kommentar[3], Vor § 1 Rz 2.

It is unclear if such entities need to be authorised in a direct way by the individuals or if other persons could intermediate. Bearing in mind the aim to facilitate and to speed up the procedure, a direct context would be desirable. Apparently the Commission does not see any difficulties when several entities file a lawsuit together for collective redress.

Irrespective of the difficulties of this definition already shown, we are confronted with an additional term which has not been used till now: "who claim to be exposed to the risk of suffering harm ... in a mass harm situation".

According to lit. b an essential part of the definition of a mass harm situation is a claim of at least two persons. Thus a mass harm situation cannot be one where only the risk of the exposure of suffering harm occurs. Only to be exposed to such a risk is not enough.

Even if such constellations could be imaginable where a claim for damages or an injunctive relief would be permitted in these particular circumstances, this kind of claims are not justified in a way of collective procedures brought by an entity when this kind of claim obviously could not be brought to court by the persons concerned themselves.

To sum this up, we believe that the definition of the representative action as contained in lit. d requires an in-depth reform.

Right to bring a representative action

To grant representative organisations the right to bring representative actions along with existing mechanisms is a delicate topic in legal policy.

It needs to be prevented that the expectation on facilitating and fastening the proceedings are overvalued. The participation in such a procedure can be connected with additional effort for every person involved.

It needs to be guaranteed that such a prerogative may not lead to a result of procedure that could be different, depending on whether an individual action or of a representation action has been brought in.

We reject any system in which such representative organisations are financed (partially or in its entirety) by the public authority. This would lead to the result that the defendant enterprise would indirectly finance the action versus itself by means of taxes (this point would also apply when public authorities are empowered to bring representative actions). In addition, it should also be forbidden that the additional cost which accrues from the activity of representative entities has to be borne by the defendant enterprise.

It should also be critically discussed whether public authorities should at all be empowered to bring representative actions. The enforcement of private law claims is at the core a very different exercise from what the enforcement of public law claims is. Such an action by public authorities has to be strictly divided from possible administrative proceedings as antitrust law proceedings. Otherwise the representative action would have an unjustified advantage in comparison to individual lawsuits.

It is important to state that representative organisations, too, are liable for the costs of the prevailing party if they lose a case.

Admissibility

Verification if the conditions for collective actions are met should be come to decision at a very early stage of litigation. This is without doubt reasonable and corresponds to the idea e.g. of Section 244 of the Austrian Civil Procedural Code. The clarification of the formal requirements will be the easier part. The clarification that the action is obviously without merits is not that easy according to the experience. At least the practice of the courts is very cautious in this regard.

As the decision as to whether an action is (obviously) without merits is not necessarily connected to the decision if the formal requirements are met, a clear distinction between these two points needs to be made. This would also favour the speeding up of the proceedings and the avoidance of additional costs.

Not to continue with a case is a measure which is unknown by the Austrian Civil Procedural Code. The consequence would be a dismissal of the action - at least in relation to those claims which do not meet the requirements.

Information on a collective redress action

Providing information on pending collective redress actions creates a particular tension between the parties to the collective redress dispute, as they clearly have conflicting interests.

The Communication of the Commission[18] recognizes that attention should be paid that the freedom of expression and the right to access information should be balanced with the protection of the reputation of the defendant. "The timing and conditions in which the information is provided will play an important role in ensuring that this balance is kept." This part of the Recommendations does not go well together with the wording of the Communication.

The wording of Point 10. is unclear in many points. It is vital that the prospective group of claimants and the representative entity respectively have the appropriate opportunities to inform third persons. It is also important that this information is pertinent and this opportunity cannot be abused to exert unjustified media pressure onto the prospective defendant party.

It is commonly known that the filing for class actions for damages is often "accompanied" by the media. This may in itself already provoke a massive loss of reputation for the defendant reputation - this also in cases where according to the decision of the court the claims are not justified. More and more, media appoint themselves as judges. "There is the risk that the mere allegation of infringements could have a negative influence on the perception of the defendant by its existing or potential clients. Law-abiding defendants may be prone to settle the case only in order to prevent or minimise possible damage. Furthermore, the costs of legal representation in a complex case may constitute substantial expenditure, in particular for

[18] Communication, 12.

smaller economic operators."[19] The danger of an economic demise of the defendant is evidently very high.

Thus, the argument cannot be dismissed that these kinds of action are "decided" in a negative manner for the enterprises by the media - and not any more by the ordinary jurisdiction in civil matters. The negative publicity already leads to a massive pressure onto the enterprise - and this, regardless of the factual and legal situation. Sometimes the enterprise feels forced to give in only for reason of marketing to avoid perpetuated negative headlines (loss of reputation) (so-called „legal blackmailing", e.g. by "black lists").

Irrespective of the verdict, such an action is also negative in the public and customer perception for the enterprise concerned if the action is dismissed by court on the merits. In addition, the media - if at all - does not report about such a decision in the same way. The rehabilitation of the reputation of a brand and/or an enterprise is certainly not finished with the publication of the dismissal of an action but requires time- and cost-intensive marketing.

In addition, it should be recognised that the "legal world" is not only black-and-white. Quite often the law is not very precise. Thus, a great deal of interpretation is possible.

Such negative consequences, as they are also explicitly pointed to in the Commission's Communication and qualified as disadvantageous because of the existent danger of abusive claims, need to be avoided. Solid protections against abusive claims are not shown in the Recommendation in an adequate manner.

The obligation of the Member States to enable the provision of information about collective redress should, therefore, also contain the obligation that the information should be balanced. This aim can especially be achieved if the court itself publishes the respective information.

An active and continuous obligation to inform third persons is rejected. If these persons are neither party nor representatives in this case, we do not see any justification for such an obligation for information. On the contrary, such an obligation could rather lead to a situation where outside the proceeding itself the defendant party is confronted with unjustified pressure. Furthermore, it has to be stated that such an obligation to inform third persons is not accepted as a common principle of a civil court procedure.

To guarantee a coordinated process in a collective redress action, the issuing of a statement of intention to participate in the action should only be possible until a precise point. Any kind of free riding should be prevented. This would not be conducive neither for a speedy litigation nor for an efficient proceeding and/or defence. The continual changing into and withdrawal out of an action cannot be regarded to be within the legal sense of a coordinates process. This, because in every case of a joinder to an action the court first has to check if in this special case the formal requirements for the participation in this collection redress action are met. In addition, it then has to check the claim itself.

In case of a withdrawal, for instance, all court steps for the evaluation of a specific damage of a specific claimant would be frustrated (e.g. compensation for pain and suffering or loss of revenue could be very different). These procedural steps would be worthless especially for

[19] Communication, 8.

the rest of the claimants. Thus, it is very important that only such representative entities will act who possess appropriate experience. These entities are liable for a due action via-à-vis their principals.

The established methods of the various kinds of collective redress systems demonstrate the importance of a well-structured starting phase of an action to conduct afterwards the case in a stable manner.

Thus, all information to the general public needs to be restricted in respect of the intended lawsuit. The information obviously intended according to Point 11. of the Recommendation that the court intends to hold that the suit is founded and, thus, potential claimants have the possibility to take part in the case just before the pronouncement of the (final) judgment infringes the basic and fundamental principle of civil proceedings! If any, the information has to be made known before the courts starts the action in the main point. After this point in time, no further information may be provided until the final judgment in this case is given.

Reimbursement of legal costs of the winning party

We explicitly welcome the adherence to the loser pay-principle. This principle is one step to reduce the danger for action for absolute unwinnable claims.

Funding

We do not know the idea behind Point 14. According to which two or more persons, who claim for themselves and not as representatives a collective redress action are required to declare to the court the origin of the funds that it is going to use to support the legal action. From this point, in any case, the questions need to be distinguished whether there is an entitlement to ask for a security for the costs of the proceedings and the question if on the claimant's side sufficient funds for the action and possibly for the reimbursement of costs of the defendant's side are available.

If the requirements according to Point 15. are not met, the procedure mays not be interrupted , but the action has to be dismissed - at the most after the fruitless expiry of a reasonable period to remedy this missing requirement. Only in this way a pending litigation can be finished and a possible new action within another lawsuit would be enabled.

We agree with the Commission's statement in the Communication[20] that collective redress is a procedure arising in the context of a civil dispute between two parties whereas the Commission does not find it necessary to recommend direct support from public funds. As already stated in addition to this argument in this context, significant disadvantages exist for the defendant's side.

Cross-border cases

According to Art. 81 TFEU the Union only has jurisdiction in the area of judicial cooperation in civil matters in those matters that have cross-border implications. This aspect is absolutely ignored in the basic definitions of the Recommendation. Even every claim itself must comply with this requirement.

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[20] Communication, 15.

If more people of one Member States want to file an action, it is reasonable to centralise the claims at one court. If persons from more than one Member States are affected, it may be possible that various and different territorial substantive laws need to be applied. Likewise, the current relevant regulations (e.g. the Brussels I Regulation) sometimes prevent a single jurisdiction. We agree with the Commission's position that it is not convincing that a court should apply only one substantive law in a pending case. Such a result is to be rejected because it would run counter to the principle that the collective redress procedure should not lead to a result that is different from that of an individual claim.

We have to prevent forum shopping just as well as torpedo actions and the like. Within the framework of the Union's law the claimants have the possibility to choose between different places of jurisdiction. In case several persons want to file a claim within a collective redress system, the place of jurisdiction of the defendant would be a good alternative. Privileges for a litigation industry are strongly refused.

In the Commission's Communication the Commission states that Brussels I should apply in its entirety.[21]

Expedient procedures for claims for injunctive orders

Applications for interim injunctions are a proper instrument to achieve the aims of Point 19. An additional effort to speed up the procedures is not necessary - this also with respect to other people who also are interested in a decision of their matters by a court in due time.

Likewise, the effective enforcement is to be given according to the Member States' law.

Forming of the claimant party by 'opt-in' principle

We explicitly agree with the Recommendation of the Commission that the basis of a procedure for collective claims should be the "opt-in"-principle. However, we do not understand why this basic principle should only apply to compensatory collective redress procedures. This principle should also apply to injunctive reliefs without any differentiation. Exceptions thereof should not be permitted, neither by the law nor by way of a court decision (which itself has to be based on law).

According to Continental-European legal principles it would be highly questionable anyway whether the exercise of an "opt-out"-principle would be in line with the principles of a good administration of justice (e.g. in the context of the safeguard of the hearing in accordance with the law).

A member of the claimant party should be free to leave the claimant party according to Point 22. at any time subject to the same conditions that apply to withdrawal in individual actions. Due to the fact that in a collective redress action the defendant has to face peculiar challenges, no special provisions should alleviate the withdrawal of a claim by the claimant.

The Recommendation in Point 23. is rejected for the same reasons of free riding which we have already expressed in the chapter titled "Information" (Point 10. seqq.).

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[21] Communication, 13.

Collective alternative dispute resolution and settlements

The opportunity to reach an out-of-court settlement is always present the opportunity to reach a settlement within a court procedure, too. However, the threat of filing a lawsuit for a collective redress action with a view to forcing the potential defendant to agree to an out of court settlement is without any doubt unacceptable.

We do not see any necessity for the additional installation of out-of-court mechanism for alternative collective redress procedures in addition to existing facilities or facilities which have to be installed according to Regulation 2013/11/EU. On the one hand, we do not think that in these big cases out-of-courts professional negotiations will be conducted in a more extensive way than nowadays. On the other hand, the implementation of this kind of mechanism is very cost intensive without any knowledge how many cases of these collective redress procedures are to be expected and to which extent.

If during a pending court case settlement negotiations are conducted, the civil procedure code allows the staying of proceedings. It is nevertheless important that during this phase an out-of-court solution is looked for in a serious and intensive manner. Otherwise, the suspension of a limitation period would not be justified. Nevertheless, this constellation would only be the exception because the filing of an action by court suspends a limitation period (provided that the action is continued in a proper way).

According to the principle that the collective redress procedure should not lead to a result that is different from that of an individual claim, the verification by the courts of the legality of the binding outcome of a settlement would not be justified.

In the Commission's point of view[22] this should be of particular importance; however, no compelling reason for this is given. The fact that not all members of the group claiming to be harmed by an alleged illegal practice are able to directly take part in the consensual collective resolution of the dispute does not differ from an in court collective redress procedure.

The main point for an out-of-court settlement is the final settlement of the contentious issues. A subsequent control by the courts would be in conflict with this fundamental concern. In addition, it would lead to substantial delays with regard to the final settlement of the claim to be reached because the court's verification could require all judicial instances to be involved. We do not understand why the freedom of decision of the participants should be limited. In addition, the representative entities are responsible for their decision.

Legal representation and lawyers' fees

We appreciate that the lawyers' remuneration should not create any incentive to litigations that are unnecessary from the point of view of the interest of any of the parties. This is in line with the Austrian law ("adequate") just as the prohibition of contingency fees (*quota litis*).

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[22] Communication, 14.

Prohibition of punitive damages

We explicitly welcome the Commission's commitment to the prohibition of any kind of punitive damages. Punitive damages, treble damages etc. do not fit into the public order of most Member States. An introduction of this kind of substantial claims on the basis of EU-law would not be compatible with the respect of the basic principles of the Member States. The emphasis that a claimant's compensation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions clarifies that the Recommendations are aimed at the procedure for collective claims without affecting the framework of substantial law. Nevertheless, the wording of Point 31. cannot be brought in line with the wording of the Communication in this point where according to the Recommendation an alteration of the respective substantial law could result (e.g. in Point 17.)

In the current discussion we should not entirely ignore the issue of shifting of damages. If the objection of shifting of damages was cut off, the multiple claiming of the injuring party because of the same damage would bring this kind of claim into the reach of punitive damages which would infringe the Austrian public order.

Collective follow-on actions

The claim of the Commission that the Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, should be further discussed.

The result of this would be that in this area stand-alone-proceedings would be forbidden. The consequence would be that one would be dependent upon to public authority actions which cannot be influenced by a prospective claimant. Third parties are not entitled to force public authorities to act. In addition, it is not clear whether it comes to a legally-structured decision stating that EU-law has been infringed (e.g. in the context of leniency programmes). This point is also incompatible with the far-reaching consequences of the prohibition of filing a claim, especially when compared with the extremely low requirements for the number of claimants of a collective redress action.

Contradictory court decisions are also possible within the individual prosecutions of claims. The interruption of an action until the decision of a public authority is taken is not unknown. Considering the differences in requirements and procedures it may well be that the divergent decisions of the authorities may themselves all be totally correct. E.g. the requirements for an antitrust suit by the public authorities are not absolutely equal to the requirements to gain compensation due to anticompetitive practice.

Registry of collective redress actions

Registers can have various functions. These functions need to be evaluated and possible conflicting interests should be well balanced against each other. A clear example for possible divergent interests is criminal records.

The publication of information of a pending collective redress case in a register is relevant for prospective claimants up to the point to which they have the possibility to take part precisely

in this action. As already stated, for reasons of procedural economy we advocate that this point in time should be before the courts starts the action in the main point.

After this point in time the publication of information to the pending actions should be prohibited. This also because of the arguments we pointed out in the Point "Information on a collective redress action". The risk of a lasting damage of the defendant's reputation is still high, whereas the information form the register would not have any additional benefit for the action that would outweigh possible negative consequences.

From this, one needs to distinguish the requirement for public authorities to provide general, balanced and objective information about the existing different legal options of pursuing a claim - also by means of collective redress procedures.

Overall, we perceive a great need for more in-depth discussion and clarification. Therefore, we have serious doubts whether the Recommendation should in fact be implemented in the described manner, as proposed by the Commission in "legally not binding" documents.

There is no change in the position of the Austrian Federal Economic Chamber according to which we refuse any additional measures for the implementation and/or the extension of possibilities for the collective enforcement of claims by measures at the level of the European Union.

Kind regards

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President

Mag. Anna Maria Hochhauser
Secretary-General