The Commission’s Recommendation on common principles of collective redress and private international law issues

Abstract

For its new policy on collective redress the European Commission has chosen the form of a mere ‘Recommendation’ instead of a binding directive or regulation with respect to the violation of (consumer) rights granted under EU law. The Recommendation provides some basic principles on collective redress instruments which should be taken into account by the Member States when implementing injunctive or compensatory collective redress mechanisms. There is, however, no obligation for the Member States to implement such procedural tools. Despite the attempt at establishing common principles, the European legislature thus seems to accept a heterogeneous landscape of collective redress in Europe and has missed the opportunity to provide rules on international jurisdiction, recognition and the applicable law particularly designed for cross-border mass litigation. As a consequence forum shopping becomes even more important for plaintiffs in mass damage cases.

1. The Recommendation and its background – why only a Recommendation?

In June 2013 the European Commission finally published its long-awaited policy on collective redress. The documents include separate proposals and recommendations for EU competition law and for the violation of (consumer) rights granted under EU law: a Communication to the European Parliament and the Council entitled ‘Towards a European Horizontal Framework for Collective Redress’, and a proposal for a 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’). For the competition law sector, the Commission proposed a directive ‘on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’, and published an impact assessment and some ideas on the calculation of damages in competition cases. The documents are the final result of a long and very controversial debate on a reform of the European system for enforcing consumer rights and the rights of tort victims in mass harm situations. Although the result is disappointing for those who had hoped for a binding European framework of collective redress instruments, it had been clear for some time that the current political situation would not allow a directive or regulation which would impose any obligation on the Member States to implement new instruments for the collective enforcement of damages claims. Therefore it did not come as a surprise that the Commission’s documents were rather cautious. Neither the proposed directive on competition law nor the recommendation on common principles for injunctive and compensatory collective redress for other violations of EU law will oblige the Member States to engage in fundamental reforms of their existing systems.

A brief review of the debate at the European level reveals the controversial positions taken in the Member States and within the Commission. With respect to competition law, Directorate-General (DG) Competition, based on the Ashurst study (published in 2004), from the outset clearly favoured stronger instruments of private enforcement in line with the example of US class actions. This initiative, which resulted in a Green Paper in 2005, a White Paper in 2008, and an internal proposal for a regulation (which never appeared in public), prompted a wave of strong resistance from the business sector all over Europe, particularly in Germany and France. DG Competition’s stance indeed supported, rather uncritically, the idea that private enforcement would be a more efficient instrument than public enforcement in antitrust cases, although it could not produce empirical data or sufficient research on the relationship between public and private enforcement in Europe. Therefore the argument that the idea of class action that had been developed in the completely different US system should not simply be copied in Europe certainly carried some weight. Unfortunately the Commission thus missed the opportunity to start the idea of a European type of group action which would harmonize better with European traditions and would avoid the negative implications of class actions (such as a claim culture and the blackmailing of defendant companies by unmeritorious but expensive mass claims).

Directorate-General for Health and Consumers (DG Sanco) was, for various reasons, more cautious when it published a Green Paper on collective redress for consumers in 2008, but this could not suppress the strong opposition, particularly against opt-out group actions. Thus, before the re-election of Manuel Barroso in 2009, some Member States took the oppor-
turity to wrest from him the concession that opt-out group or class actions would not be implemented in Europe.12 As a result, in February 2011 the Barroso II Commission launched a public consultation to obtain ‘a more coherent approach to collective redress’,13 which was intended to bring together the different positions in the Member States and to establish a common basis. The response to the public consultation was overwhelming with respect to the number of statements filed, but again the positions taken varied considerably.14 Finally, as a reaction to the consultation the European Parliament published a resolution in 2012,15 and warned the Commission to take into consideration the potential for collective redress instruments to be misused, and to provide sufficient safeguards. The resolution also stressed the need for effective instruments for alternative dispute resolution (ADR), but correctly pointed out that ADR or ODR (online dispute resolution) mechanisms cannot provide sufficient protection for consumer rights unless there is some pressure on the business sector to adopt these mechanisms and to make them in fact available to consumers. It has become clear that there needs to be both (consumer) ADR instruments and – as a last resort – procedural tools for the enforcement of mass claims in cases where defendants refuse to cooperate in settling cases.16 Nevertheless, it was also clear at that point of the debate that the development of European instruments of collective redress faces a dilemma that is difficult to deal with: how can efficient tools for enforcing even small and minor damages claims be provided, while the implementation of wrong incentives which may lead to a misuse of these tools is avoided? The Commission’s Recommendation is an attempt to balance these diverging interests. It is a compromise based on the realistic estimation that, for political reasons, nothing else would be possible within the remaining time that the Barroso II Commission is in office.

2. The framework provided by the Recommendation

With the exception of competition law, the Commission recommends the implementation of a horizontal collective redress mechanism for injunctive and compensatory relief. The basic principles of these instruments laid out in the Recommendation attempt to respect national traditions such as the prominent role of representative entities or public authorities like ombudsmen in enforcing consumer rights in the Member States. The principles comprise a series of safeguards to make sure that there are no wrong incentives to bring unmeritorious claims. This includes an opt-in mechanism only,17 the maintenance of the ‘loser pays’ rule,18 and a prohibition on punitive damages19 and contingency fees.20 Paragraphs 8, 14, and 15 of the Recommendation require an initial verification of the case by the court, and impose restrictions on the influence of third party funders on the litigation.21 Legal standing to bring collective actions should only be given to designated representative entities that satisfy clearly defined conditions of eligibility.22 The principles, however, also include many exceptions which will allow Member States to retain existing instruments and even, for example, opt-out group actions.23 The Recommendation emphasizes the need to protect defendants against a US claim culture,24 but it fails to provide the necessary safeguards for an adequate representation of group members or ‘absent plaintiffs’. Although it stresses the key role which should be given to the courts in protecting the rights and interests of the parties, there is – contrary to international standards for group or class action litigation25 – no requirement, for example, for court approval of settlements.26 The most important gap is, however, the failure to provide clear rules for cross-border cases.

3. Private international law issues in cross-border mass torts

3.1 Competition among (some) Member States for the ‘big cases’?

Although it is difficult to predict the future, the consequences of the Commission’s current collective redress policy seem obvious. In recent years we have already been able to observe that, owing to the failure of the European legislature to provide binding instruments or at least a framework for collective redress, Member States have taken very different approaches to reform. While some of them, like Germany, were not very ambitious and faced considerable political resistance to the implementation of new instruments,27 others realized the opportunity to modernize their systems and to make their jurisdictions attractive for the ‘big cases’. Group action proceedings have been available for some time in Bulgaria,28 Italy,29 the

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16 For a detailed discussion of the position of the European Parliament see Hodges 2013 ( supra n. 6).
17 See Recommendation paras. 25-28; Collective alternative dispute resolution and settlements.
18 Recommendation paras. 21-24.
19 Recommendation para. 13.
20 Recommendation para. 31.
21 Recommendation paras. 29-30.
22 For a critical review of these aspects see Stadler 2013, pp. 287-289 ( supra n. 6).
23 Recommendation paras. 4-7.
24 Recommendation para. 21 first requires that the claimant party should be formed on the basis of the express consent of the person. Then, however, it states: ‘Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.’
25 Recommendation recitals 13, 15, and 20.
27 This is mentioned in the Recommendation only with respect to ADR (para. 28) and it is not entirely clear whether a verification by the courts is also intended for settlements negotiated during court proceedings.
28 In Germany, there is, apart from instruments for injunctive relief and for skimming-off illegally gained profits from those violating antitrust laws and the rules on fair competition (Sec. 33, 34a AntiTrust Act; Sec. 10 Unfair Competition Act), only the Capital Market Model Case Act. This came into force in 2005 and provides for test case proceedings for damages claims by investors. In 2012 a moderate reform of that Act came into force which adopted to some extent the (Dutch) idea of opt-out proceedings for a settlement; for more details, see A. Stadler, ‘Developments in Collective Redress: What’s New in the “New German KapMuG”’, European Business Law Review 2013, p. 733.
29 Bulgarian Civil Procedure Code Chapter 33, Arts. 379 to 388: <www.igcl.co.uk/practice-areas/class-and-group-actions/class-&-group-actions-2013/bulgaria>.
30 Art. 140-bis Codice del consumo, enacted 1 January 2010 and reformed by the law of 24 March 2012, see K. Linhart and E. Finazzi Agrò, ‘Kollektiver Rechtsschutz in Italien: die italienischen “azione di classe”’, RfW 2013, p. 443;
Nordic countries, Poland, Portugal, Spain, and maybe soon France, but the number of cases filed under the new provisions is surprisingly small – for various reasons. By contrast, the Dutch Collective Settlement Act (WCAM) enacted in 2005 has been extremely successful, perhaps not so much with respect to the number of cases (six settlements have been approved by the Amsterdam Court of Appeal since 2005, and a seventh case – the DSB case – is pending), but definitely in terms of the number of claimants and the amounts of money involved. Although the WCAM was designed in the first place for domestic cases, it has turned out to be a very effective and popular instrument for settling big international cases with a large number of tort victims and liable parties willing to buy global peace. The most important WCAM cases settled the claims of thousands of shareholders from all over the world (except the United States) who had previously been excluded from US class actions and therefore sought relief in Europe. In the aftermath of two US Supreme Court decisions restricting access to US courts for securities cases and cases under the US Alien Tort Statute, the WCAM has become even more important for claimants. In January 2013, the British Government announced that it will also implement out of court settlement proceedings, following the example of the Dutch WCAM – probably sometime in late 2014 or 2015. This is a reaction to the increasing demand even from the business sector for settlement proceedings that provide court assistance but do not require contentious court proceedings in the first place. This is not the place to go into the details of these proceedings, but the way the debate in Europe is obviously moving reveals that there will be strong competition among at least some of the Member States to attract the big cases to their court systems and, what is probably much more important, to their law firms. Without a uniform instrument of collective redress, forum shopping becomes extremely important for plaintiffs in mass litigation. It is not only the traditional issues of the conflict of laws rules and substantive tort law that have to be taken into consideration. First of all, plaintiffs may look for an answer to the question of which jurisdiction will offer effective instruments for contentious litigation or for court proceedings declaring out of court settlements to be binding upon all the victims of a mass tort. If such a forum is available, the next question will be whether the court will be in a position to apply a uniform set of tort rules to all individual claims or, if not, whether the formation of sub-groups or sub-classes would be possible under the forum’s procedural rules. Both options are important for an efficient handling of complex cross-border cases if no settlement of the whole can be achieved.

3.2 The European jurisdictional regime and the Rome Regulations

The current European system of international jurisdiction and choice of law rules is far from being able to provide satisfactory answers to the questions mentioned above. Neither the Brussels I Regulation nor the Rome II Regulation has been designed for mass harm situations. On the contrary, the choice of law rules provided by the Rome II Regulation, in particular, take a clearly individualistic approach and try to protect the expectations of a tort victim that the rules of the place where the damage occurred (which will often be the place of the tort victim’s domicile) apply or, in product liability cases, that the law of the country where the product was bought and marketed applies.
3.2.1 Brussels I Regulation

The Brussels I Regulation, with its well-established jurisdictional regime in Articles 2-24, does not provide special rules for mass litigation. Article 6 no. 1 of the Regulation allows a claimant to sue several defendants in the Member State where only one of them is domiciled if the claims are closely connected and if there is a risk of irreconcilable judgments resulting from separate proceedings. But there is no corresponding provision for the situation where several plaintiffs intend to file an action against the same defendant in respect of a single event or a single cause mass tort like a mass accident or a series of incidents as in a product liability case. The present system of Brussels I requires that a court hearing mass claims in single proceedings has jurisdiction over all the claims of the absent claimants. This results from the binding effect of a judgment or court approval of a settlement upon all the claimants. In tort cases, only the courts of the place where the defendant is domiciled (Art. 2 Brussels I Regulation) or the courts of the place where the harmful event occurred (Art. 5 no. 3 Brussels I Regulation) have such jurisdiction. The latter refers either to the place where the liable party committed the tortious act (which will often be the same as her place of domicile, as defined for legal persons and companies in Art. 60 of the Regulation) or the place where all the tort victims suffered the injury. Only in the few cases of real mass accidents like a train or plane crash will Article 5 no. 3 lead to the courts of the place of the accident having jurisdiction for all tort victims. In product or pharmaceutical liability cases, as well as securities cases, the place of injury or damage is not the same for all persons affected by the tort. As a consequence, plaintiffs can file an action on behalf of all tort victims only in the country where the liable party is domiciled. Given the current situation of a very heterogeneous landscape of collective redress, it is more or less a matter of coincidence whether group or class action proceedings are available there.

There have been some proposals to supplement the Brussels I Regulation with respect to these mass harm situations, and to implement a special rule for mass litigation. One could choose, for example, the place where the majority of victims are domiciled, as an additional option for the plaintiffs.49 Such a rule would particularly fill a gap if the liable party is domiciled outside the European Union. Others generally prefer the place where the defendant is domiciled,50 leaving it to the national rules of the Member States to determine whether liable parties from outside the European Union can be sued in their courts. Another quite controversial debate was provoked by the Dutch Collective Settlement Act. With an increasing number of international cases being settled in the Netherlands under the WCAM, the question of jurisdiction came to the fore and turned out to be highly controversial.51 The WCAM proceedings, which start with a joint application by the parties negotiating the out-of-court settlement, lead to a reversal of the roles of the parties in the proceedings. The potentially liable party, who would be the defendant in a traditional action for damages, becomes an ‘applicant’ together with the representative entity acting on behalf of the aggrieved persons. This latter group of persons – the so-called ‘interested parties’ – is on the ‘defendant’ side of the WCAM proceedings. If the Amsterdam court finally approves the settlement, the interested parties who had the chance of opting-out during the proceedings will be legally bound by the settlement. Although the settlement might be the best solution for them from an economic perspective, they are legally precluded from individual litigation and cannot sue the liable party for a greater amount of compensation. This preclusive effect may not be welcomed by all of them, and as the interested parties become subject to these court proceedings without their explicit consent their situation is at least similar to that of a defendant.52 They may thus need the protection provided by jurisdictional rules. However, in terms of jurisdiction the WCAM proceedings do not fit into the categories of the Brussels I Regulation. The Amsterdam Court of Appeal has indeed taken the position that the ‘interested parties’ are to be deemed to be ‘defendants’, and the court has offered two different options under the Brussels I Regulation for establishing Dutch jurisdiction over foreign tort victims who are not domiciled in the Netherlands. One option is Article 6 no. 1, based on the idea that it suffices that only one of the ‘interested parties’ is domiciled in the Netherlands.53 As it is the core objective of the whole settlement proceedings to give a binding settlement for all aggrieved persons, the close connection requirement of Article 6 no. 1 seems to be met. Nevertheless, this has the surprising effect (although it is inherent in Art. 6 no. 1) that it does not take a close link to the Netherlands to establish jurisdiction. The Converium case provides a good example: the liable parties were all Swiss companies, and only 3% of the shareholders entitled to compensation were domiciled in the Netherlands. Therefore, the Court of Appeal in Amsterdam preferred to rely on Article 5 no. 1 of the Brussels I Regulation, and argued that the settlement is a contract to be fulfilled in the Netherlands,54 thus ignoring the fact that there is only a contract between the parties negotiating the settlement and that the contract does not become binding on the ‘absent or interested parties’ unless the court approves the settlement.

There is a continuing debate on these jurisdictional issues both within and outside the Netherlands. Some authors strongly suggest that under the present rules it is necessary to leave aside the settlement contract and look to the underlying tort or contract obligations instead.55 Then the WCAM proceedings could be treated like regular actions for the recovery of damages and the liable party would be the ‘defendant’. This solution, however, would considerably narrow the scope of application of the WCAM proceedings to cases in which the

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52 For a detailed discussion of ‘the person to be sued’ under Art. 2 Brussels I Regulation, see Van Lith 2011, pp. 42 et seq. (supra n. 51).
54 Court of Appeal Amsterdam 12 November 2010, NJ: BCO908, NIPR 2011, 85 (Converium), para. 2.8; Van Lith 2011, pp. 37 et seq. (supra n. 51).
55 Van Lith 2011, p. 71 (supra n. 51).
liable party is domiciled in the Netherlands or the ‘harmful event’ occurred there. The global attraction of these proceedings would be lost, although there seems to be a demand for such comprehensive settlements. Another solution for establishing jurisdiction in the Netherlands is to include a choice of forum clause in the Dutch settlement. However, again, it seems highly debatable whether ‘interested parties’ can be bound by a choice of forum clause negotiated by a representative entity to whom they have never explicitly given a power of attorney to act on their behalf.

In sum, neither of the solutions proposed by the Amsterdam court is satisfactory under the Brussels I Regulation system. The more attractive settlement proceedings become, the more important are clear rules on international jurisdiction. Beyond the issue of jurisdiction, it is still an open question whether all Member States will accept the preclusive effect of such settlements. In particular, those states that reject the opt-out mechanism may object to recognition and enforcement of judgments in the Netherlands on the basis of the public policy argument of Article 34 of the Brussels I Regulation. It is not clear at all whether all Member States will accept the preclusive effect of such settlements.

3.2.2 The applicable law

The Commission’s failure to tackle the private international law issues may also influence the effective handling of cross-border cases. As mentioned above, only in rare cases will the Rome I Regulation allow the application of a single set of tort rules to the claims of numerous tort victims. In product liability cases in particular, the well-balanced approach taken by the Rome I Regulation allows the application of a single set of tort rules to the claims of numerous tort victims. In product liability cases, the application of the law of the defendant’s domicile or to the applicable tort law – a well-established way to handle mass torts – is possible only if the tort victim is domiciled in the Netherlands or the ‘harmful event’ occurred there. The global attraction of these proceedings would be lost, although there seems to be a demand for such comprehensive settlements. Another solution for establishing jurisdiction in the Netherlands is to include a choice of forum clause in the Dutch settlement. However, again, it seems highly debatable whether ‘interested parties’ can be bound by a choice of forum clause negotiated by a representative entity to whom they have never explicitly given a power of attorney to act on their behalf.

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So far there has been no ECJ case law dealing with these issues, and the parties negotiating WCAM settlements are probably anxious to avoid bringing disputes before the courts. As soon as other Member States start to offer similar proceedings, these questions will gain in importance and will require answers. Although the European legislature has enacted a fundamental reform of the Brussels I Regulation which will enter into force in January 2015, mass litigation was not taken into consideration and none of the issues mentioned above will be solved by the new provisions. The reason is obvious: at that time there was still a chance (or at least there was thought to be a chance) a harmonization of collective redress, and the answers could have been given in the relevant legislation on collective redress. With only a mere recommendation on collective redress, which we now have received, the whole complex question remains open. The Commission might also have feared the controversial private international law issues to prevent a smooth adoption of the recast of the Brussels I Regulation. This is all the more annoying as the Recommendation will not be able to stop the competition among Member States. Those Member States which have far-reaching reforms on their agenda will continue with these reforms, and even if they are willing to accept the framework established by the Recommendation the many exceptions included in its principles will allow a broad range of approaches. It is only a matter of explaining why exceptions are necessary – and there are always explanations for everything!

3.2.3 Towards a better coordination of parallel mass litigation?

If – for political reasons – the European legislature was not able to provide clear rules on jurisdiction and the applicable law, one could at least expect some regulations on the coordination of mass damage proceedings in different Member States. In the absence of uniform rules on the legal standing of representative entities, there is a high probability that cross-border mass accidents or mass torts will be picked up by various representative associations in different countries. As a consequence, and depending on jurisdiction, there may be parallel proceedings against the same defendant in several courts and on behalf of different groups of tort victims. The

56 Van Lith 2011, p. 74 (supra n. 51); she suggests specific jurisdictional rules for collective litigation and collective settlements.
57 Van Lith 2011, pp. 54-56 (supra n. 51); in the Reform case the ECJ applied rather strict standards for extending choice of forum clauses to third parties (ECJ 7 February 2013, C-543/10, NJR 2013, 154).
58 Hess 2012, Ch. 6.21, fn. 26 (supra n. 50).
60 See Hess 2012, Ch. 6.22-29 (supra n. 50); Halfmeier 2012 (supra n. 51), with numerous arguments as to why the public policy objection cannot be raised in Germany.
62 Green Paper on consumer collective redress, para. 59 (law of the trader as one option) (supra n. 11).
63 Green Paper on consumer collective redress, para. 59 (supra n. 11).
The Commission’s Recommendation on common principles of collective redress and PIL

4. Conclusion

With its Recommendation on collective redress, the Commission has backed down after strong opposition in some Member States to even a moderate reform of private enforcement tools. The non-binding character of the framework and the principles included in the Recommendation is not very likely to change the present situation of collective redress. Whereas some Member States will respect the Recommendation, others will stick to their resistance against collective actions, particularly those for the recovery of damages. Despite the many safeguards against misuse included in the Recommendation, the business sector in some Member States might be tempted to rejoice that a uniform binding instrument has been averted. However, as some Member States are ambitious to strengthen their country as a location for mass litigation or mass settlements, the competition for ‘big cases’ will continue and will barely be affected by the Recommendation. Articles 6 no. 1 and 5 no. 3 allow, to some extent, companies from abroad to be held liable for torts in Member States other than the Member State of their domicile. Nevertheless, the jurisdictional regime of the Brussels I Regulation is still not sufficiently flexible for the effective enforcement of mass claims.

Therefore, the main failure of the European legislature is not its inability to agree on binding harmonized instruments of collective redress. Consumers, potential litigants, lawyers and courts could at least have expected a clear framework of private international rules. Although, or even because, the issues of international jurisdiction and enforcement involve controversial arguments and require a balancing of different national interests, it is up to the European Union to take the lead and to use its core competence for regulating cross-border issues. With respect to mass torts, these issues have now fallen between the cracks – the European legislature neither tackled them in the context of the recent reform of the Brussels I Regulation nor as a minimum approach for its collective redress policy. According to the Recommendation, the Commission will allow Member States a period of two years to implement the new instruments. The Commission will only revisit the situation four years from now. It is not very likely that the chances for the harmonization of collective redress tools will be much better in four years’ time. On the contrary, a successful implementation of far-reaching instruments (for example, based on an opt-out mechanism) in some Member States will not increase their willingness to give them up in order to support a uniform approach in Europe. Thus the European legislature must realize that collective redress is still on the table at the European level. It is necessary to initiate a broad discussion on the private international law issues now, in order to come up with a solution as soon as possible.