

TOWARDS A COMMON FRAMEWORK
OF COLLECTIVE REDRESS IN EUROPE?
AN UPDATE ON THE LATEST INITIATIVES OF THE EUROPEAN COMMISSION

ELISABETTA SILVESTRI,
University of Pavia (Pavia, Italy)

The essay describes the main contents of the Recommendation and the Communication issued in June 2013 by the European Commission on the topic of collective redress with the view to outlining a set of common and harmonized principles that should inspire Member States in their respective regulations on group actions for the judicial enforcement of rights granted under EU law.

Key words: collective redress; class action; representative action; injunctive relief; action for damages.

1. In June 2013, the European Commission issued several important documents concerning group actions. These documents are conceived as a package of measures including a Communication (hereinafter, the Communication)¹⁰⁶ that expands on the European debate revolving around the topic of mass claims and elucidates the policy underlying a new Recommendation (hereinafter, the Recommendation)¹⁰⁷ on the common principles that should guide Member States in regulating collective redress. Along with the Communication and the Recommendation, the Commission adopted a proposal for a Directive on actions for damages arising out of the infringement of antitrust law, both European and domestic.¹⁰⁸

¹⁰⁶ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress" COM (2013) 401/2 <http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf> accessed August 2013.

¹⁰⁷ 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) 3539/3 <http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf> accessed August 2013.

¹⁰⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council 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' COM (2013) 404 final, 2013/0185 (COD) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>> accessed August 2013.

At first sight, it seems that the Commission has resolved to address the issue of devising a pan-European model of group actions that would supersede the multitude of different class procedures existing in Member States and advance the cause of cross-border mass claims. On the contrary, a closer analysis of the measures adopted (and, in particular, of both the Communication and the Recommendation, which are the sole objects of this essay) shows that the approach taken by the Commission is still tentative, and that the prospect of a coherent European approach to collective redress, envisioned by the European Parliament,¹⁰⁹ is not likely to bring about a harmonized and uniform model of European group actions any time soon.

2. A brief recount of the most significant steps taken by the Commission in the field of group litigation is in order. Two main areas of interest have been identified, that is, competition law and consumer protection.

As far as the former is concerned, in 2005 and 2008 the Commission issued two important documents¹¹⁰ in which the problems touching upon the so-called private enforcement of European antitrust regulations are analyzed with the view to establishing collective actions for damages, since 'there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements,'¹¹¹ most of all when those who have been harmed are not encouraged to embark on judicial proceedings due to the costs, the delays and the uncertainties of adjudication.

With reference to consumer protection, the European initiatives aimed at providing for collective actions date back in time and find their source in several Directives, among which of paramount importance is Directive 98/27/CE on injunctions for the protection of consumers' interests.¹¹² According to the Directive, certain 'qualified

¹⁰⁹ See European Parliament resolution 2011/2089 (INI) of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0021+0+DOC+PDF+V0//EN>> accessed August 2013.

¹¹⁰ Reference in the text is made to the Green Paper – 'Damages actions for breach of the EC antitrust rules' COM (2005) 672 final <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf> accessed August 2013, and to the White Paper – 'Damages actions for breach of the EC antitrust rules' COM (2008) 165 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>> accessed August 2013.

¹¹¹ See COM (2008) 165 final (n 110), para 2.1.

¹¹² Directive 98/27/CE has been repealed and replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L110/30 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:110:0030:0036:EN:PDF>> accessed August 2013. The literature on the so-called injunction Directive is extensive: see, among others, C Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe* (Hart Publishing 2008) 106ff; F Caffagi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay between Private and Public Enforcement* (Intersentia 2009); F Caffagi and HW Micklitz, 'Collective Enforcement of Consumer Law: A Framework for a Comparative Assessment' (2008) 16 *European Review of Private Law* 391–425.

entities' identified by Member States as the official representative of the collective interests of consumers can petition a court (or an administrative authority) and seek injunctive relief, that is, 'an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement'.¹¹³ In principle, the importance of injunctive relief for the enforcement of the collective rights of consumers cannot be underestimated: the implementation of the Directive, though, has not been uniform throughout Member States and has seldom produced very successful outcomes. Furthermore, a serious problem has remained unsolved, namely, the problem of compensation of the damages suffered by the consumers, both as a class and as individuals grouped under the label 'consumers'. On this matter it is worth mentioning the position taken by the Commission in 2008 in its Green Paper on Consumer Collective Redress that 'focuses on the resolution of mass claim cases and aims at providing effective means of collective redress for citizens across the EU'.¹¹⁴

All the documents mentioned above revealed that the Commission had become aware of the necessity to get involved in the difficult task of devising for the entire European Union a harmonized pattern for group actions, flexible enough to suit the judicial enforcement of the collective rights arising out of areas of substantive law other than consumer protection and antitrust law. Less clear were the Commission's ideas on the features that such a harmonized pattern was supposed to have: in this regard, the only certainty was the intent to look for an alternative to the American-style class actions, which in the eyes of the Commission were not only at odds with European legal traditions, but also a 'toxic cocktail'¹¹⁵ that could open the door to abusive litigation, replicating the problems that have given a bad name to class actions even in their native country.¹¹⁶

Against this background, the Communication and the Recommendation sketch (or better yet, attempt to sketch) some basic features of a prospective European model of group actions that – at least in the Commission's expectations – would improve access to justice for the victims of infringements of rights granted by the law of the Union and, at the same time, provide for adequate procedural safeguards against the risk of abusive litigation.

¹¹³ See Dir 2009/22/EC (n 112), arts 2–3.

¹¹⁴ See Commission, 'Consumer Collective Redress' (Green Paper) COM (2008) 794 final, para 7 <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf> accessed August 2013.

¹¹⁵ The definition of class actions as 'toxic cocktails', that is, a deadly combination of dangerous elements, such as punitive damages, contingency fees, pretrial discovery and the like, comes from a press release accompanying the Green Paper on Consumer Collective Redress: see Commission, 'Green Paper on Consumer Collective Redress – Questions and Answers' MEMO/08/741, para 9 <http://europa.eu/rapid/press-release_MEMO-08-741_en.htm> accessed August 2013.

¹¹⁶ See extensively the essays prepared for the session on Cultural Dimensions of Group Litigation of the IAPL World Conference on Civil Procedure, 18–21 September 2012, Moscow, Russian Federation, and published in D Maleshin (ed), *Civil Procedure in Cross-Cultural Dialogue: Eurasia Context* (Statut 2012) 413–548.

3. Both the Communication and the Recommendation make reference to ‘collective redress’. Such an expression, already recurring in previous documents issued by the Commission, seems to receive a sort of official ‘blessing’ in the texts at issue. One may infer that, from now on, in the language of the European Union the official denomination of group actions, whether aimed at obtaining injunctive relief or commenced with the view to claiming damages, will be ‘collective redress mechanisms’. As a matter of fact, the Recommendation itself offers a definition of these mechanisms, clarifying that ‘collective redress’ can be both ‘injunctive’ and ‘compensatory’.¹¹⁷ As mentioned before, the Commission has always been adamant in its rejection of class actions, and the choice of ‘collective redress’ as the expression that defines the legal actions available when ‘mass harm situations’¹¹⁸ occur seems to emphasize the resolve of the Commission even more.

The Recommendation lays down a set of principles common to injunctive and compensatory collective actions, followed by more principles applicable only to the former or to the latter. All in all, these principles are supposed to represent the ‘minimum standards’ that Member States are encouraged to apply in the domestic regulation of collective redress, since compliance with these standards – according to the Commission – would improve the judicial protection offered to group rights by means of procedures that are ‘fair, equitable, timely, and not prohibitively expensive’.¹¹⁹

The principles common to injunctive and compensatory collective redress deal with issues such as standing, admissibility of actions, adequate information to potential claimants, funding of collective actions, and application of the ‘loser pays’ principle to the costs of lawsuits.

The prospective European collective action is conceived as a representative action, since standing to sue is granted only to ‘representative entities’ identified in advance by Member States or to public authorities: both shall act on behalf of a group of individuals (or legal persons) equally affected by unlawful acts performed by the same defendant. Group members shall not become parties to the lawsuit.¹²⁰ Member States are advised to pay special attention to the criteria according to

¹¹⁷ See sec II, Definitions and scope, of the Recommendation, para 3 ‘(a): “collective redress” means (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)’.

¹¹⁸ See *ibid*, para 3 ‘(b): “mass harm situation” means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons’.

¹¹⁹ See sec I, Purpose and subject matter, of the Recommendation, para 2.

¹²⁰ See *ibid*, para 3(d); also sec III, Principles common to injunctive and compensatory collective redress, of the Recommendation, paras 4–7 ‘Standing to bring a representative action’.

which 'representative entities' are chosen. The Recommendation itself lists some requirements, such as the non-profit character of the entity, a direct connection between the goals pursued by the entity and the rights that the collective action is supposed to protect, and evidence of the fact that the entity has the financial and human resources as well as the legal expertise necessary to conduct the lawsuit in the best interest of group members.

The admissibility of a collective action must be tested at the very outset of the lawsuit: to this end the courts of Member States shall conduct a thorough examination of the elements that, according to domestic law, are the requirements to be met in order to 'certify' the action as a collective one.¹²¹ Needless to say, the purpose of this scrutiny (which courts are expected to perform *ex officio*) is to prevent groundless cases from crowding the dockets of courts.

The Commission ascribes high value to adequate information about prospective collective actions: Member States shall ensure that the 'representative entities' are allowed to advertise their intention to seek redress on behalf of a class, and that the stakeholders are kept abreast of the developments of the lawsuit, once it has commenced.¹²² All that makes sense most of all in the context of compensatory collective actions, since – as explained below – potential claimants must join the lawsuit, that is, they must opt-in in order to receive compensation for the harm suffered. In any event, the right of potential or actual stakeholders to be fully informed about collective actions brought on their behalf should always be balanced against the risk of damaging the reputation of the defendant when he has not yet been found responsible for the alleged violations.

As far as the costs of collective litigation are concerned, it is recommended to Member States that in the regulation of this matter the so-called 'loser pays principle' be followed, that is, that the costs incurred by the winning party are reimbursed by the losing party.¹²³ In this regard, too, the Commission shows its rejection of American-style class actions, whose success depends to a great extent on the fact that they are made financially affordable by contingency fee agreements between representative plaintiffs and the attorneys for the class. For the Commission, contingency fee agreements are essential components of the above-mentioned 'toxic cocktail' that could poison European collective redress by stimulating frivolous lawsuits. By the same token, the Recommendation seems particularly cautious in allowing another financial feature of contemporary litigation that seems to encourage abusive cases, namely, third-party litigation funding. In fact, the Recommendation provides for a series of safeguards that Member States are expected to implement with the

¹²¹ See sec III, Principles common to injunctive and compensatory collective redress, of the Recommendation, paras 8–9 'Admissibility'.

¹²² See *ibid*, paras 10–12 'Information on a collective redress action'.

¹²³ See *ibid*, para 13 'Reimbursement of legal costs of the winning party'.

view to maintaining that third-party funding is 'designed in a way that serves in a proportionate manner the objective of ensuring access to justice.'¹²⁴

4. For injunctive collective redress the Recommendation lays down two specific principles.¹²⁵ With the first the Commission urges Member States to set up procedures that 'with all due expediency' can grant cease and desist orders against the defendant. Time is of the essence when it is necessary to prevent the unlawful conduct of the defendant from continuing, causing further harm to the victims of such conduct: therefore, it is suggested that injunctive collective redress be conceived as a summary procedure, based on the assumption that summary proceedings can be the optimal choice when the inescapable delay of full-fledged ordinary proceedings would be detrimental to the rights at stake.

If the time-factor is essential for the effectiveness of injunctions, the same holds true as regards compliance with injunctive orders. That is why the Recommendation advises Member States to provide for 'appropriate sanctions'¹²⁶ to be applied if the defendant fails to comply with the court order. National laws shall identify the sanctions that are most suitable for acting as a threat powerful enough to persuade the defendant to comply spontaneously, but the Recommendation makes express reference to a type of sanction closely resembling the French *astreinte*, that is, a penalty amounting to a fine for each day (or another unit of time) of delay in the enforcement of the injunctive order.¹²⁷

All in all, there is nothing really new in the principles devoted to injunctive collective redress. To the contrary, it seems that the model originally devised by Directive 98/27/

¹²⁴ See *ibid*, paras 14–16 'Funding'. Third-party litigation funding (often referred to as TPLF) is one of the 'new frontiers' of financing litigation: quite popular in common law jurisdictions, TPLF does not seem to have conquered the civil law world yet. TPLF in practice may take different forms that share a common feature: at their basis there is always a contract by which the plaintiff commits himself to grant the third party a percentage of the amount of money he will recover in case of victory in the lawsuit; in exchange, the third party relieves the plaintiff from the financial risk of litigation, since the third party will not be entitled to claim any money if the outcome of the case is against the plaintiff. For an accurate analysis of TPLF, see M de Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding' (2011) 19 *Cardozo J Int'l & Comp L* 343, 343ff.

¹²⁵ See sec IV, Specific principles relating to injunctive collective redress, of the Recommendation, para 19 'Expedient procedures for claims for injunctive orders' and para 20 'Efficient enforcement of injunctive orders'.

¹²⁶ See *ibid*, para 20 'Efficient enforcement of injunctive orders'.

¹²⁷ The French *astreinte* was originally devised by courts in order to overcome the rule laid down by the Civil Code (art 1142) according to which failure to comply with legal duties to do something or to refrain from doing something has no consequences other than the right for the creditor to claim damages, since the debtor's will cannot be forced. The penalty amounting to a fine for each day of delay courts can impose works as an effective threat that is likely to persuade the debtor to comply with his duties. At present, courts are allowed to resort to the 'persuasive' force of *astreintes* in a wide variety of situations, well beyond the specific circumstances of their initial use. See R Perrot, 'L'astreinte à la française', in *Mélanges Jacques van Compernelle* (Bruylant 2004) 487ff; Y Desdevises, 'Astreintes – Introduction' in *JurisClasseur Procédure Civile* (2004) vol 10, 2120.

CE on the procedure for injunctive relief in the interest of consumers is confirmed in its (disputable, one might say) efficiency to the point of being presented as the general model for the collective protection of other rights, this in spite of the warning given by the European Parliament, according to which the framework of collective injunctive relief 'can be significantly improved',¹²⁸ considering the important role it might play in the protection of the rights granted to individual and legal entities under EU law.

More significant are the principles laid down for collective actions for damages, or, in the language of the Recommendation, compensatory collective redress mechanisms. Again the Commission seems inclined to mark the distance between these mechanisms and American-style class actions by stating that 'the claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ("opt-in" principle).'¹²⁹

It is well known that the debate over the advantages and disadvantages of 'opt-in' in contrast to 'opt-out' as the methods of choice to determine the subjects that will be bound by the outcome of a group action is very much alive.¹³⁰ The Commission takes a stand on this debate, and expands on the reasons that should (at least, in principle) make 'opt-in' a basic feature of the future European collective actions for damages. According to the Communication, it is essential that the represented group be identified before the court issues the final judgment on the collective action: that becomes possible only insofar as the members of the 'class' willingly take the necessary steps to participate in the proceeding. An opt-in system enhances the freedom and the rights of the parties, including the rights of the defendant, since it allows him to know who his opponents are; it empowers the court to manage the case in a more efficient way, making it easier to assess the admissibility of the claim and its merits. But the 'philosophy' of the Commission on the superiority of an opt-in system is condensed in the following passage: '[T]he right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not.'¹³¹

It must be emphasized, though, that the principle encouraging the adoption of an opt-in system is a principle that Member States may disregard: in relation to this

¹²⁸ See European Parliament resolution 2011/2089 (INI) (n 109), para 11.

¹²⁹ See sec V, Specific principles relating to compensatory collective redress, of the Recommendation, paras 21–24, 21 'Constitution of the claimant party by "opt-in" principle'.

¹³⁰ On the debate at the European level, see eg I Benör, 'Consumer Dispute Resolution after the Lisbon Treaty: Collective Actions and Alternative Procedures' (2013) 36 *Journal of Common Policy* 87, 87–110; DP Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or A Chimera?' (2011) 48 *Common Market Law Review* 1125, 1125–74; C Hodges, 'Collective Redress in Europe: The New Model' (2010) 29 *Civil Justice Quarterly* 370; J Stuyck, 'Class Actions in Europe? To Opt-In or To Opt-Out, That is the Question' (2009) *European Business Law Review* 483, 483–505; D Fairgrieve & G Howells, 'Collective Redress Procedures – European Debates' (2009) 58 *International and Comparative Law Quarterly* 379, 379–409.

¹³¹ See Communication, para 3.4.

issue, the wording of the Recommendation is quite fuzzy, since it makes reference to exceptions to the principle 'duly justified by reasons of sound administration of justice',¹³² a vague expression whose meaning is left open to many possible interpretations, due to the fact that neither the Recommendation itself nor the Communication offers any clues. Maybe, in order to understand the attitude of the Commission, one must recall that even though most Member States have group actions geared to opt-in systems, there are a few examples of very successful collective procedures for damages that work on an opt-out basis,¹³³ and which certainly national legislators would not be inclined to change just for the sake of accommodating the Commission's wishes.

It is commonly accepted that the Commission has great expectations for alternative dispute resolution (ADR) to offer individuals swift and affordable processes by which to seek justice without resorting to traditional litigation. The same attitude is displayed towards collective actions for damages. In fact, the Recommendation encourages Member States to foster the settlement of collective disputes,¹³⁴ not only by way of out-of-court procedures, but also when the litigation is in progress, that is, entrusting the court with the power to invite the parties to attempt mediation or other procedures with the view to bringing their dispute to an end by reaching a mutually acceptable agreement.¹³⁵

With reference to ADR and collective redress, two principles are worth mentioning: the first one emphasizes the voluntary character of ADR procedures, even when their use is suggested by the court handling a collective case.¹³⁶ The rejection of mandatory

¹³² See sec V, Specific principles relating to compensatory collective redress, of the Recommendation, paras 21–24, 21 'Constitution of the claimant party by "opt-in" principle'.

¹³³ On the different models of group actions adopted in Member States, see, in general, E Werlauf, 'Class Actions and Class Settlement in a European Perspective' (2013) *European Business Law Review* 173, 173ff; R Mulheron, 'The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia Journal of European Law* 409, 409ff. One of the most interesting and successful opt-out collective procedures existing in the European Union is the one provided for by the Dutch Act on the Collective Settlement of Mass Damage Claims (known as WCAM) that dates back to 2005. In short, according to the Act a collective settlement agreement can be negotiated between one or more entities – representing a class of individuals who were identically harmed by the defendant – and the defendant. Once a settlement agreement is reached, the parties may jointly request the Amsterdam Court of Appeal to declare the collective settlement binding on the class, except for those class members who have expressed their wish not to be bound by the agreement, that is, those who have decided to opt-out within the time-limit set by the court; on this procedure, see WH van Boom, 'Collective Settlement of Mass Claims in The Netherlands' in M Casper and others (eds.), *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier 2009) 171–192.

¹³⁴ See sec V, Specific principles relating to compensatory collective redress, of the Recommendation, paras 25–28 'Collective alternative dispute resolution and settlements'.

¹³⁵ The Recommendation makes reference to Directive 2008/52/EC on certain aspects of mediation in civil and commercial cases, whose art 5, sec 1 provides: 'A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute'. More generally, Member States are advised to take into account all the requirements laid down by the Directive.

¹³⁶ See sec V, Specific principles relating to compensatory collective redress, of the Recommendation, para 26 'Collective alternative dispute resolution and settlements'.

ADR procedures has a special value for the author of this essay, since in her native country (Italy) there is an ongoing debate on whether out-of-court mediation should be mandatory or strictly voluntary. This debate will take some interesting turns in the near future, since the legal rules providing for mandatory mediation in civil and commercial cases have been repealed by the Constitutional Court, but, in spite of that, they have been recently reinstated by the Parliament:¹³⁷ the perfect scenario for yet another, time-consuming institutional round of 'arm-wrestling'.

The second principle recommends that the collective settlement reached by the parties be subject to judicial control: from the text at issue it seems possible to infer that the court should not only verify the legality of the settlement, but also evaluate its merits, at least as far as the fairness of the agreement is concerned, since due consideration must be paid to 'the appropriate protection of interests and rights of all parties involved'.¹³⁸

As regards the costs of compensatory collective redress,¹³⁹ the concern of the Commission is to prevent the regulation of attorneys' fees and other financial aspects of group actions from turning into a source of abusive litigation. Therefore, Member States – at least in principle – should not allow contingency fee agreements, nor should they provide for third-party litigation funding insofar as the amount of the damages awarded to the class is the basis on which the remuneration of the third party is calculated. Again the Recommendation reveals that, while the ends it is aimed to achieve are stated clearly, the means by which these very ends should be attained are not put forth in a straightforward way. Neither contingency fee agreements nor third-party litigation funding is welcome, but they are not completely banned, since national lawmakers will be able to make either or both admissible provided that the interests of the parties are safeguarded. On the contrary, the attitude of the Commission towards punitive damages is clear-cut: the damages awarded in compensatory collective actions 'should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions',¹⁴⁰ and therefore punitive damages should not be allowed by Member States. Even stronger is the approach taken by the Communication: 'punitive damages should not be part of a European collective redress system',¹⁴¹ in which damages are expected to be solely compensatory.

¹³⁷ On the vicissitudes of mediation in Italy, see E Silvestri & R Jagtenberg, 'Tweeluit – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 29, 29–45.

¹³⁸ See sec V, Specific principles relating to compensatory collective redress, of the Recommendation, para 28 'Collective alternative dispute resolution and settlements'.

¹³⁹ See *ibid*, paras 29–30 'Legal representation and lawyers' fees' and para 32 'Funding of compensatory collective redress'.

¹⁴⁰ See *ibid*, para 31 'Prohibition of punitive damages'.

¹⁴¹ See COM (2013) 401/2 (n 106), para 3.1.

Nothing new under the sun here, one might say, since most Member States are averse to punitive damages and refuse the recognition and enforcement of foreign judgments imposing punitive damages on the losing party.¹⁴²

5. In the paragraphs above, the plans of the European Commission for a uniform and harmonized model of collective redress mechanisms have been described. The question remains whether they truly represent a step forward along the path to a coherent approach to group actions or they are a bit of a 'damp squib', an exercise in wishful thinking if not a dangerous *faux pas* that will not advance the cause of collective redress.¹⁴³ It has been emphasized already that the approach taken by the Commission in regard to some important aspects of group actions covered by the Recommendation seems tentative and inconclusive: principles are laid down, but ample room is left for Member States to deviate from them, which is likely to leave the 'patchwork' of national group actions as it is right now. Whether or not one is inclined to subscribe to this judgment, no one can deny that to devise a common framework for European collective redress implies delicate policy choices, choices that the European institutions, faced with the problems of an unprecedented economic crisis threatening the very stability of the Union, perhaps cannot afford to make at the moment.

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¹⁴² On this issue, see eg H Koziol, 'Punitive Damages. A European Perspective' (2008) 68 *Louisiana Law Review* 741, 741ff; A Pinna, 'Recognition and *Res Judicata* of US Class Action Judgments in European Legal Systems' (2008) 1 *Erasmus Law Review* 31, 31ff, in particular 49–56.

¹⁴³ These comments on the documents issued by the Commission derive from C Hodges, 'Collective Redress: A Breakthrough or a *Damp Squibb*?' (unpublished essay) 22.

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Information about the author

Elisabetta Silvestri (Pavia, Italy) – Professor at University of Pavia School of Law (65 Strada Nuova, Pavia, I-27100, Italy, e-mail: elisabetta.silvestri@unipv.it).