



EU Law for Collective Redress

Case for the environment, human rights and fair competition

In October 2017, EU Commissioner Věra Jourová announced that a European class action or collective redress possibility for EU consumers will be discussed as part of the “New Deal for Consumers plan” in March 2018. The Commissioner was explicit that this proposal was compelled by the “Dieselgate” scandal in which class-action proceedings lead Volkswagen to admit wrongdoing and provide billions in compensation to U.S consumers, whilst in the EU, the company still maintains it hasn’t broken the law.

The European Commission has acknowledged that “collective redress is a procedural tool that can be relevant for EU policies in areas other than competition and consumer protection”.¹ Such other areas, where gross business malpractice can have severe impacts on people and be detrimental to the level playing field for businesses include environmental law, fundamental rights, data protection, or competition law.

However the announced proposal appears to be limited only to the enforcement of consumer law. Such a sectoral approach would depart from the Commission’s pre-existing horizontal approach to granting collective redress in respect of violations of all rights granted under Union law.

This briefing gives legal and practical reasons for re-expanding the collective redress focus to a horizontal approach, which is essential in order to guarantee the effective enforcement of EU law; level the playing field for responsible companies in the Single Market; and protect fundamental rights, which form the foundation of EU law. The final section outlines key principles of a EU collective redress mechanism, so as to ensure its utmost effectiveness.



Collective redress is a term used in the EU for a mechanism allowing group proceedings where parties harmed by unlawful practice can claim injunctions and compensation, equivalent to class action. Unlike in Australia, Canada, and the U.S., this mechanism is either not available, or is subject to restrictive conditions within the EU. The European Commission has been promoting collective redress in the EU for nearly a decade.

The grouping of claims allows claimants to overcome legal costs and financial risks that would otherwise prevent them from defending their rights as individuals. It also contributes to procedural economy and legal certainty. The need for collective redress is particularly strong in cases where there is a significant power imbalance between the parties to the dispute; a situation characteristic of business malpractice cases.

Summary

- Violations of environmental, labour, human rights, data protection, and competition rules, alongside consumer law, represent serious business harm that adversely impacts the functioning of the European Single Market.
- International and European Human Rights bodies recommend the EU provide collective redress in all cases of business-related human rights abuse, in accordance with its UNGP Pillar III commitments on Access to Justice;
- Collective redress is crucial to protecting fundamental rights granted under EU law by giving practical effect to the EU Charter and European Convention rights of access to justice and access to effective remedy;
- The EU competence to harmonize its Member States' approach to collective redress for all rights rests on three EU duties outlined in the Treaties:
 - Promote respect for human rights.
 - Facilitate access to justice and guarantee fundamental rights in order to maintain and develop an area of freedom, security and justice.
 - Ensure fair competition and proper functioning of the internal market by enforcement of rights guaranteed by the EU law, including in the broadest sense the fundamental and human rights that form its foundation.
- Effective conditions for an EU collective redress mechanism include a non-discriminatory approach to legal standing; a national judicial discretion to allow for either opt-in or opt-out procedures; the loser-pays principle as a rule subject to exceptions of fairness and public interest; and the permissibility of contingency fees to help overcome financial barriers to justice and safeguard against unmeritorious litigation by assigning the risks to lawyers.



A horizontal approach

The current proposal follows a 2013 Commission Recommendation on “common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.² The Recommendation encouraged Member States to provide for collective redress means in all areas where a “violation of rights granted under Union” law had occurred, *inter alia* the environment, personal data protection, and financial services.³

As a result of the Recommendation, between 2013 and 2017 many Member States introduced or reformed collective redress laws. These reforms have varied in their scope and effectiveness. By the end of 2017, the European Commission (DG Justice) will provide an evaluation of the Recommendation’s implementation with a specific focus on access to justice and functioning of the internal market.

European and international support

Collective redress has consistently been identified by both international and European human rights institutions and bodies as a key tool for the protection of human (fundamental) rights⁴ in scenarios involving violations by business entities.

In 2011, the UN Human Rights Council unanimously adopted the UN Guiding Principles for Business and Human Rights (UNGPs), which clarified the emerging international consensus on the duties of States to protect human rights, including with respect to ensuring access to judicial remedy for victims. In 2016, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2016)3 addressed to the Member States concerning the implementation of the UNGPs, which was in turn endorsed by the Council of the EU in its conclusions on business and human rights.⁵ The Council also requested the EU Fundamental Rights Agency to develop an Opinion on the “possible avenues to lower barriers for access to remedy at the EU level”.⁶ These documents recommend the EU and its Member States provide for effective collective redress in cases of business-related human rights abuse. A similar conclusion has been reached by the UN High Commissioner for Human Rights in his report to the UN Human Rights Council.⁷ The European Social and Economic Committee has also been calling for an EU-wide collective redress measure to safeguard fundamental rights for over 20 years.⁸

Why we need collective redress to protect human rights

Human rights are universal norms declared through law in the form of Bills of Rights, Charters of Fundamental Rights, or common law. Human or Fundamental Rights are often not directly enforceable on their own, but are implemented and given practical legal effect by States through other, more specific general or sectoral laws.⁹ In disputes between private parties, including those concerning consumers, the party suffering harm typically relies on general civil law to obtain redress for the violation of their rights. EU law provides a clear procedural framework for the resolution of such disputes with cross-border impact in Regulation 864/2007 on the law applicable to non-contractual obligations (the Rome II Regulation).



Procedural rules need to allow for collective redress, as well as representative action in business and human rights-related cases. In this way, victims can join forces to overcome obstacles, or organisations may act on behalf of victims.

Fundamental Rights Agency Opinion (1/2017)



The European Economic and Social Committee has been calling for more than twenty years now for collective legal protection instruments at EU level that would provide effective legal protection in the event of violations of collective rights. Collective redress measures should cover all areas in which EU law protects citizens’ rights (...)

Opinion of the European Economic and Social Committee

The plan of the European Commission for collective redress aims to address situations where mass harm occurs as a result of business malpractice. The proposal focuses on violations of consumer rights, but similar situations with the same effects may occur in areas concerning other types of fundamental rights violations. Harm resulting from non-contractual obligations in the meaning of the Rome II Regulation (including those resulting from the violations of environmental, labour, or fundamental rights, or competition rules) may indeed be even more egregious and have equally disruptive effects on fair market competition. Examples include unlawful pollution,¹⁰ systemic discrimination and abuse of labour rights,^{11,12} or corporate surveillance and digital privacy violations.¹³ Similarly, the costs and challenges associated with the litigation can be far more significant (proving the causal link of harm in environmental cases, for example).

In order to be effective, the legislative approach from the Commission should therefore address mass harm situations caused by business misconduct irrespective of the nature of the relationship between the business actor and the people who have been harmed. Furthermore, a sectoral approach would also bring along the risk of a protracted sector by sector process of legislating this important tool, and fragmentation of procedural rules for different areas of law across the EU.

Collective redress is key to the right of effective remedy

The 2013 Commission Recommendation on collective redress states that the principles contained within “should ensure that fundamental procedural rights of the parties are preserved”.¹⁴ Given the realities of litigation brought against large business entities, collective redress is crucial for the realisation of a fundamental “right to effective remedy” (Art. 47 EU Charter).

The costs and risks of bringing a claim against large business entities can be prohibitive for the average individual. They include hugely expensive expert evidence testimony, prolonged legal fees, as well as the intimidating risk of financial ruin in the event of loss. For those affected by gross business malpractice, gaining access to justice or claiming an effective remedy may indeed literally only be viable when done collectively; when the sharing of risk and the pooling of resources is made possible. Such an interpretation has been made inter alia by the Belgian Parliament, when enacting its own collective redress mechanism, as it specifically emphasised the compatibility of collective redress with the right of access to justice.¹⁵

The European Union’s duty and competence

The protection of human rights is one of the EU’s overarching objectives and has acquired a growing importance over the years. According to Article 2 of the Treaty on the European Union (TEU), “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” The treaties make abundantly clear that the EU has a duty to promote respect for human rights, within its powers and competences, when it adopts and implements EU legislation as well as in its relations to the wider world.¹⁶

Following on from Art. 4 Treaty on the Functioning of the European Union (TFEU), which gives the EU a shared competence in this respect, the EU has set itself the objective of maintaining and developing an area of freedom, security and justice,¹⁷

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Rules of civil procedure [should] provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses.

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UN High Commissioner for Human Rights

Pakistani workers and their families are currently suing the German garment brand KiK for the lack of fire safety measures which, they claim, caused over 280 workers to die when a fire broke out in their factory in 2012.

Due to limited resources, and the inability to join their claims, only four of the over 300 affected claimants will be able to bring a case in German courts.

inter alia, by facilitating access to justice, and ‘Guarenteeing Fundamental Rights’.¹⁸

Specifically with regard to environmental law, the duty of the EU to ensure effective access to justice further stems from the the provisions of Article 9(3), (4) and (5) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘the Aarhus Convention’) of which the EU is a Party since May 2005.¹⁹

The effective protection of fundamental rights in situations involving violations by business entities is necessary for a proper functioning of the EU Single Market. As outlined in the Inception Impact Assessment for the European Commission’s proposal on collective redress, fair competition in the Single Market requires comparable exposure to deterrent (injunction) and corrective (redress) actions in all Member States, based on further harmonised EU rules.²⁰

The EU competence in this respect is provided by the Article 114 TFEU, according to which the EU shall adopt the measures for the approximation of the provisions [...] which have as their object the establishment and functioning of the internal market. This extends to enforcement of the substantive rights guaranteed by the EU law, including in the broadest sense the fundamental and human rights that form its foundation.

Commissioner Vera Jourová recently announced a plan for collective redress for EU consumers harmed by business conduct. The proposal is prompted by the Dieselgate scandal, but civil society groups and some MEPs are wondering “why only consumers”?

Conclusion

Aligning binding legislation on collective redress with the “rights granted under EU law” approach taken in its 2013 Recommendation, would enable the Commission to:

- Facilitate effective access to justice in order to meet the objective of the EU of maintaining and developing an area of freedom, security and justice.
- Prove effective the commitment the EU has made over the past years when declaring itself forthcoming on business and human rights, most notably concerning pillar III of the UNGPs (Access to Remedy for victims of business misconduct). Such action also gives direct effect to the clear and consistent advice coming from business and human rights bodies and fora within Europe and globally, including the Opinion of the Fundamental Rights Agency which was requested by the Council of the EU.
- Ensure fair competition in the European Single Market by providing for a harmonised and effective legal framework for enforcement of rights, rules, and values guaranteed by the EU law in all Member States, including in the area of protection of the environment, personal data, investors’ rights, and fundamental rights.

Conditions for an EU collective redress instrument

Litigation of any kind is open to a risk of abuse or misuse, a reality provoking discussions over litigation ‘safeguards’. It ought to be kept in mind that there is a countervailing risk, which is to say that too many ‘safeguards’ to litigation will succeed in safeguarding not only the courts from abusive litigation, but also corporate defendants from legitimate claims against them. Given the consensus (arising most prominently from the UNGPs Pillar III) that there is an actual contemporary global access to justice deficit as concerns victims of business malpractice, it flows that opening up access to justice must be the current priority

in order to rebalance this equation. States having adopted the UNGPs have in effect committed themselves to this rebalancing task; in favor of victims.

Based on reviews of independent studies of numerous jurisdictions, ECCJ asserts that the following features should form an EU-wide collective redress mechanism.

- Collective redress should be available to all victims of business malpractice, whatever area of law the breach may touch upon. Such an approach enforces EU law by means other than the public authorities and assures rights granted under EU law;
- Given that breaches of law and violations of rights by business entities can harm persons but also result in ill-gotten profits (by way of profiteering or cost-cutting); compensatory collective redress is required in addition to injunction in order to compensate for harm whilst at the same time nullifying illegally-procured financial gain which hinders the proper functioning of the internal market;
- Given the exorbitant costs associated with business mass harm cases, funding is of crucial importance. Current funding dynamics in many jurisdictions mean that only a select few of law firms are even able to bring such cases (at least those of extra- or cross- territorial character). Contingency fees are an effective option to make the bringing of such cases possible, whilst - coupled with loser-pays rules- providing a safeguard against unmeritorious litigation by assigning the risks to lawyers. In such arrangement, lawyers tend to assess better and more effectively the prospects of a case and reject claims of low merit, unlikely to give rise to success.²¹ Absent the allowance of contingency fees, States must provide alternatives to make access to justice reforms effective and financially viable for victims and their lawyers;
- As per the 2013 Commission Recommendation, the loser-pay principle, a staple of European legal traditions, ought to function as the primary safeguard to non-meritorious litigation. The Recommendation also sees the value in affording municipal judges the power to disqualify this principle in select instances in the public interest or in the interests of fairness;
- Discretion should be afforded the national judicial systems to allow for either opt-in or opt-out mechanisms. This comes absent any convincing evidence that opt-out regimes within the EU have lead to high levels of non-meritorious litigation;
- In consumer and environmental cases, legal standing should be given to specialised organisations, but generally, the legal standing should not be limited to organisations sanctioned by the state. Such a scenario would open doors to corruption and undue state interference. The right of claimants to bring collective claims just with lawyers needs to be preserved in line with the separation of powers doctrine;
- Collective redress mechanisms should be also provided for the administrative and judicial review of administrative decisions concerning the environment, for example regarding the spatial planning or environmental permitting and licensing.

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At present, accountability and remedy in such cases is often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions. (...) effective State-based judicial mechanisms are “at the core of ensuring access to remedy””

Report of the United Nations High Commissioner for Human Rights, 2016

1. 11.06.13 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" p. 5. Available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-401-EN-F1-1.Pdf>
2. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>
3. Ibid. Paras (6) and (7).
4. According to the EU Fundamental Rights Agency the term 'fundamental rights' is used to express the concept of 'human rights' within a specific EU internal context. The former pertains to a constitutional setting; the latter to international law, whereas both refer to similar substance as seen when comparing the content in the Charter of Fundamental Rights of the European Union with that of the European Convention on Human Rights.
5. Council of Europe Recommendation CM/Rec(2016)3 available at: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2016\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)
6. Fundamental Rights Agency Opinion (1/2017), "Improving access to remedy in the area of business and human rights at the EU level" available at: <http://fra.europa.eu/en/opinion/2017/business-human-rights>
7. UNHRC, 10 May 2016, "Improving accountability and access to remedy for victims of business-related human rights abuse" pt. 15.3. Available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf
8. European Economic and Social Committee Opinion 2014/C 170/11 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2014.170.01.0068.01.ENG
9. Normally these are specialised sectoral laws such as consumer law provisions (which give effect to right to property in appropriate circumstances as well as to consumer rights per se as defined in Art. 17 and Art. 38 of the Charter of the Fundamental Rights of the European Union (2012/C 326/02); environmental law (which protects right to life in favourable environment, see Art. 2 and Art. 37 of the Charter of the Fundamental Rights of the European Union (2012/C 326/02); Art. 2 of the European Convention on Human Rights; or general civil law regulating commercial and non-contractual obligations (which gives effect to personal rights such as right to liberty and security and the right to property, see Art. 6 and following of the Charter of the Fundamental Rights of the European Union (2012/C 326/02). Criminal law also protect a large array of human rights.
10. A 2001 mass cyanide spill from a private mine in Romania has caused illness amongst inhabitants of the region as well as devastating the region's flora and fauna. <https://www.theguardian.com/world/2000/feb/14/1>
11. Current extraterritorial litigation against the German garment brand KiK has been brought on behalf of just 4 claimants due to limited resources, despite over 300 people having de facto standing (relatives of the 280 deceased workers). The "test case" approach coupled with the statute of limitation has meant only the 4 claimants are likely to be able to bring claims against the company. https://www.echr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html
12. Slavery-like conditions persist within European companies' internal market supply chains, occasioning severe harm and even death to workers. <https://www.business-humanrights.org/en/italy-prosecutor-names-mutti-conserve-italia-as-benefiting-from-exploited-workers-in-supply-chains-incl-company-statements>
13. Legal privacy claims against tech-giants are currently fragmented and potentially ineffective for those harmed. <https://euobserver.com/justice/139872>
14. Para 13.
15. The Belgian Parliament refer to the Art. 6 of the European Convention which mirrors the Art. 47 EU Charter. For further details see, <https://www.lexgo.be/en/papers/judicial-law/civil-procedure/belgian-court-rules-on-recognition-of-u-s-class-action-settlements.113101.html>
16. Articles 2, 3, 5 and 21 of the Treaty of the European Union.
17. Recital 1 of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).
18. As per the Justice and Home Affairs mandate. https://europa.eu/european-union/topics/justice-home-affairs_en
19. Decision 2005/370/EC
20. Ref. Ares(2017)5324969 - 31/10/2017 p 3.
21. Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report, Centre for European Policy Studies, Erasmus University Rotterdam for the European Commission, 21 December 2007, p. 214. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf



ECCJ is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability. This briefing was prepared by Filip Gregor and Christopher Patz with the support of the purpose-driven law firm Frank Bold.

<http://corporatejustice.org>

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