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A FRAMEWORK FOR COLLECTIVE REDRESS (CLASS ACTIONS) CONCERNING VIOLATIONS OF RIGHTS GRANTED UNDER UNION LAW (2013/396/EU)

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A FRAMEWORK FOR COLLECTIVE REDRESS (CLASS ACTIONS) CONCERNING VIOLATIONS OF RIGHTS GRANTED UNDER UNION LAW (2013/396/EU)

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Abstract

The European Commission has been addressing collective redress issues for almost 20 years, initially in particular in the context of consumer protection and competition policy. On the basis of a broader horizontal approach, the Commission adopted a Recommendation on 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 (‘the Recommendation’) [pp. 60-65]. The Recommendation established principles which should be applicable in relation to violations of rights granted under Union law across all policy fields and in relation to both injunctive and compensatory relief. It follows from the Recommendation that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against potential abuse.

Keywords:

collective redress, directive 2013/396/EU, injunctive and compensatory relief, EU consumer and marketing law, Group/ collective litigation

JEL Classification: H1, K3

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INTRODUCTION

The Commission committed to producing an assessment of the practical implementation of the Recommendation [1] four years after its publication (2017). This issue carries out that assessment and focusses on the developments in the legislation of Member States since the adoption of the Recommendation. Furthermore, it scrutinises whether these developments have led to a more widespread and coherent application of the individual principles set out in the Recommendation.

In doing so, the report also examines the practical experience gathered with the rules on collective redress available at the national level, or in the absence of such rules, how effectively situations of mass harm are addressed. Against that background, the report analyses to what extent the implementation of the Recommendation has contributed to achieve its main aims of facilitating access to justice and preventing abusive litigation. Finally, the report contains concluding remarks on whether there is a need for further action concerning collective redress at European Union level.

PRINCIPLES OF THE RECOMMENDATION

Legislative activities affected by the Recommendation have remained somewhat limited in the Member States. Seven Member States have enacted reforms of their laws on collective redress after its adoption, and, shown in the detailed assessment in this issue, these reforms have not always followed the principles of the Recommendation.³

The Recommendation stresses that all Member States should have collective redress mechanisms at national level, both injunctive and compensatory, available in all cases where rights granted under Union law are, or have been, violated to the detriment of more than one person.⁴

Collective redress in the form of injunctive relief exists in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive⁵. In some Member States collective injunctions are

⁵ The scope of the Injunctions Directive covers infringements of EU consumer laws as enumerated in its Annex I.
available horizontally (BG, DK, LT, NL, SE) or in other specific areas, mainly competition (HU, LU, ES), environment (FR, HU, PT, SI, ES), employment (HU, ES) or antidiscrimination (HR, FR, ES).

Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK) but in over half of them it is limited to specific sectors, mainly to consumer claims. Other sectors in which compensatory relief is typically available are competition, financial services, labour, environment or antidiscrimination. The differences in scope between the Member States which apply a sectoral approach are substantial: for example in Belgium only consumer claims can be pursued collectively while in France it is possible with regard to consumer, competition, health, discrimination and environmental claims. Only 6 Member States (BG, DK, LT, NL, PT and UK) have taken a horizontal approach in their legislation, allowing for collective compensation proceedings across all areas.

In two of them (BG, UK) horizontal mechanisms exist in parallel to sector-specific procedures, which are used more often in practice. In one Member State (AT), despite the lack of legislation on compensatory relief, collective actions are carried out on the basis of the assignment of claims or the joinder of cases. These legal vehicles are also available in other Member States, but the results of the public consultation show that they are used in practice for collective cases only in DE and NL. After adoption of the Recommendation new legislation on compensatory collective redress has been adopted in 4 Member States: in 2 of them (BE, LT) for the first time ever, while in 2 others (FR, UK) important legislative changes have taken place. In SI and NL new bills have been proposed but have not yet been adopted. Except for BE where the legislation concerns only consumer rights, these initiatives have a broad scope. All these findings demonstrate that in spite of the Recommendation several Member States have not introduced collective redress mechanisms in their national system. As a result, a great divergence between the Member States persists in terms of the availability and the nature of collective redress mechanisms.

The replies to the call for evidence show that collective redress, where available, is mainly used in the area of consumer protection and

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6 With the exception of DE, where the only specific compensatory collective redress mechanisms does not apply to consumers, but to investors' claims only.

7 However, in NL collective compensatory relief is currently available only in the form of declaratory judgments, or through special legal vehicles created for the purpose of collecting claims.
related areas such as passenger rights or financial services. Another area where several cases were reported is competition law, especially where alleged cartel victims claim compensation after the decision on an infringement by a competition authority (follow-on actions). The relative absence of recourse to collective redress in other fields is due not only to the fact that in many Member States compensatory or indeed injunctive relief is available only for consumers or in competition law; it also appears to be linked to other factors such as the complexity and length of the proceedings or restrictive rules on admissibility, often related to legal standing. At the same time, in AT, CZ, DE, LU and IE a number of situations were reported, mostly in consumer cases, where no action was taken due to the absence of compensatory relief schemes under national law.

**REPRESENTATIVE ACTIONS AMONG MEMBER STATES**

The Recommendation calls for the designation of entities that have legal standing to bring representative action where the parties directly affected by an infringement are represented by an organisation which alone has the status of claimant in the proceedings. The Recommendation sets out specific minimum criteria for such designation: the non-profit character of the entity, a direct relation between its objectives and the violated rights and a sufficient capacity to represent multiple claimants acting in their best interest. The Recommendation envisages the possibilities of a general designation entailing a general right of an entity to act or of an ad hoc certification only for a particular case but also refers to the empowerment of public authorities in addition or as an alternative.

Collective redress in the form of representative action is present in almost all Member States and dominates in environmental and consumer injunctions, its availability in the latter area being required under the Injunctions Directive. Representative collective actions aimed at obtaining compensation are available in BE, BG, DK, EL, FI, FR, LT IT, HU, PL, RO, ES, SE. In 2 Member States (FI and PL) only public authorities are entitled to bring representative actions, while in some others non-

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8 Paragraphs 4 to 7 of the Commission Recommendation [1].
9 Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of workers (O.J. L 128 p.8 of 30.4.2014) under Article 3(2) requires Member States to ensure that associations, organisations (including social partners) or other entities may represent Union workers in judicial and/or administrative proceedings in order to ensure enforcement of rights.
governmental entities share this competence with public authorities (HU, DK)\(^\text{10}\).

All Member States provide for some conditions with regard to the legal standing to act as representative entities both in injunctive and compensatory collective actions. For consumer injunctions, the Injunctions Directive stipulates that the injunction procedure may be commenced by "qualified entities" that are properly constituted according to the national law, which follow the purpose of the protection of collective consumers' interests.

The Directive leaves other specific criteria to be possibly complied with by the "qualified entities" to the discretion of Member States. \(^{[6]}\) The most common requirements in both compensatory and injunctive action applied by Member States concern the non-profit character of the entity and the relevance of the subject-matter of the case for the aims of the organisation. In line with the minimum nature of the criteria in the Recommendation, some Member States have established additional specific conditions in relation to the expertise, experience and representative nature of the designated entities. For example, in IT consumer associations have to demonstrate 3 years of continuous activity, a minimum number of paying members and presence in 5 different regions. Similar conditions apply in FR where representativeness at national level, one year of existence, evidence of activity in the area of consumer protection as well as a threshold of individual members are required\(^{11}\). Some replies lodged to the call for evidence mentioned the national rules on legal standing, in particular in FR and IT, but also to some extent in DK and RO, as a problem affecting access to justice. In the UK, representative compensatory action in consumer matters is mainly carried out by public authorities although it is possible to designate other entities for whom it is "just and reasonable" to act as a representative of the class; currently, one designated non-public body may act in consumer related cases\(^{12}\). In DK an association, private institution or other organisation may act as representative where the action falls within the framework of the organisation’s objectives.

\(^{10}\) In addition, in DK in private group actions the representative may be appointed from among the class members.

\(^{11}\) Interestingly, in spite of these demanding conditions 18 organisations are currently registered in Italy and 15 in France. However, only a rather limited number of those entities (6 in FR, 3 in IT during the last 4 years) have actually lodged representative actions.

\(^{12}\) In addition, in competition cases in the UK a class member can also represent the class which makes this procedure a group action rather than representative action within the meaning of the Recommendation.
ADMISSIBILITY OF CLAIMS

The Recommendation urges Member States to ensure that admissibility of the claims is verified at the earliest possible stage of litigation and that cases which do not meet the conditions for collective action and manifestly unfounded cases are not continued\textsuperscript{13}.

The examination of the admissibility of collective action in some Member States will result in a specific decision on this matter (BE, FR, PL, UK) while in others procedural decisions are issued only if the action is dismissed as inadmissible. Some Member States require justification that collective action is more efficient than individual litigation (BE, DK, FI, IT, LT)\textsuperscript{14} while others examine the capacity of a representative entity to protect the interest of the affected persons (FI, IT, NL, RO, UK)\textsuperscript{15}. The homogeneous nature (commonality) of the joined individual claims is a condition that applies in all Member States.

The replies to the call for evidence also show the reverse side of the admissibility requirement. While none of the respondents criticised the introduction of this requirement per se, several replies cautioned against the use of this principle as it may make the whole procedure more lengthy and cumbersome, and thereby restrict access to this procedure as a whole. This was highlighted in BE, NL, PL and UK\textsuperscript{16}.

In general, Member States verify admissibility of claims. They have procedural mechanisms to do so which are established on the basis of general and specific rules in place to dismiss manifestly unfounded collective compensation claims. It is worth noting that recent legislation on collective

\textsuperscript{13} Paragraphs 8 and 9 of the Commission Recommendation

\textsuperscript{14} For example in Belgium, the court has to take into account inter alia the potential size of the group of affected consumers, the degree of complexity of the action for collective redress, and the implications for efficient consumer protection as well as the smooth functioning of justice.

\textsuperscript{15} For example in Italy, apart from the question of the standing of the entity the court has to examine if there is a conflict of interest.

\textsuperscript{16} In BE and NL the rules on admissibility were named as being problematic, while the length of that procedure was expressly mentioned for BE and PL. In Demark the rules on admissibility were named as problematic in the context of restrictive rules on legal standing. In PL the requirement that the amounts claimed must be identical at least in several sub-groups may deter potential group members from participating in the action or lead them to reduce their claims to be eligible. Similarly, in the UK the strict interpretation in competition law cases of the requirement that claims should raise the same, similar or related issues of fact or law, as an admissibility requirement, was considered by one respondent to be problematic in the context of gaining access to justice.
action enacted in certain Member States subsequent to the Recommendation addresses admissibility in a manner consistent with the Recommendation (BE, LT, SI). On the other hand, existing divergences in conditions on admissibility may still result in unequal access to justice in compensatory collective actions as overly restrictive rules on admissibility could limit access to this procedure. It should be further noted that, as this is a preliminary phase of the action, expeditious decisions on admissibility are important for the legal certainty of all the parties involved.

COLLECTIVE REDRESS INFORMATION

The Recommendation invites Member States to ensure that the claimant party is able to disseminate information on planned and ongoing collective action. Bearing in mind that information on collective action may have side effects, in particular on the defendant, even before the action is brought to the court, the Recommendation points out that the arrangements for provision of information should be adequate to circumstances of the case and take into account the rights of the parties including the freedom of expression, the right to information and the right to protection of the reputation of the company.[17]

Persons who have claims that could be pursued in collective actions should be able to receive information that enables them to make an informed choice on their participation. As advocated by the Recommendation, this is of particular importance in the "opt-in" type of collective redress mechanisms in order to ensure that those who may be interested in joining are not missing their opportunity due to lack of information. In the case of representative action, the provision of information should be not only the right of the representative entity but also its duty[18][2]. On the other hand, spreading information on (intended) collective action may potentially have an adverse effect on the economic situation of the defendant whose liability has not yet been established. These two interests have to be properly balanced. Although the Recommendation expressly addresses the dissemination of information about the intention to bring collective action, there are no Member States that regulate this issue at

[17] Paragraphs 10 to 12 of the Commission Recommendation
[18] As explained in point 3.5 of the 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/2013/0401 final).
the preparatory stage before court action is brought. Once a case is declared admissible by the court, in particular where compensation is claimed, in many Member States (BE, DK, EE, FI, FR, HU, LT, NL, PL, SE) courts are entrusted with the determination of modalities of spreading information, including the publication method and the period during which information should be accessible. Member States usually leave substantial discretion to the courts to determine the modalities of spreading information, including the publication method and the period during which information should be accessible. Member States usually leave substantial discretion to the courts to do so, referring in their laws to the circumstances of the case to be taken into account but not mentioning the specific factors laid down in the Recommendation. However, 5 Member States (BG, IT, MT, PT, UK) do not regulate provision of information in collective damages actions at all.

Overall, it has to be concluded that the principle concerning provision of information on collective action is not appropriately reflected in the laws of Member States particularly at the pre-litigation stage and for injunctions.

**LOSER HAVE TO PAY**

The party that loses a collective redress action should reimburse necessary legal costs to the winning party, subject to the conditions of the applicable national law. The "loser pays" principle constitutes one of the basic procedural guarantees for both parties of collective actions. On one hand, the risk of the reimbursement of costs to the defendant if the claim is dismissed deters potential claimants from bringing frivolous actions. On the other hand, the fact that a losing defendant will have to cover necessary costs encourages the pursuit of justified collective claims.

The Recommendation leaves flexibility to Member States to apply national rules on reimbursement of costs. All Member States that have collective redress mechanisms, with the exception of LU, follow the "loser pays" principle in their civil procedural laws. The overwhelming majority of the Member States apply exactly the same rules to collective actions as they do to individual civil proceedings; where modalities applicable to collective redress exist, they concern mainly an exemption from court fees for representative entities and public authorities.

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19 Paragraph 13 of the Commission Recommendation
20 In LU the successful party may be awarded a procedural indemnity the amount of which is decided by a judge but this requires a subsequent application to the court and thus additional effort.

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authorities in consumer cases (HR, HU, MT, PL, RO). One Member State (PT) provides for the reimbursement of only 50% of the defendant's costs in case of dismissal of the claim both in group actions and in representative actions, thus limiting the risk for those bringing collective actions.

It can be concluded that Member States largely follow the principle set out in the Recommendation. However, it has to be borne in mind that the rules concerning costs of civil procedure and the manner in which they are reimbursed (as well as the amounts of those costs), vary substantially across Member States. Their application may lead to substantial divergences in the actual reimbursement of costs of the winning party in very similar proceedings, depending on the forum, e.g. as a result of the definition of the reimbursable costs. Therefore, the aim of preventing abusive litigation through the loser pays principle, in reality, is not equally achieved in all Member States.

INJUNCTION PROCEEDINGS

The Recommendation advocates that claims for injunctive orders should be treated expediently, if appropriate through summary proceedings, in order to prevent any further harm.

All Member States provide in their civil procedural laws for a possibility of requesting an order that would compel a defendant to refrain from illegal practices. The possibility of claiming an injunction through collective action exists in all Member States within the scope of Injunctions Directive, i.e. for the infringements of EU consumer law as listed in Annex I to the Directive, as transposed into national legal orders, which harm

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21 Or the absence of fees in consumer injunctive proceedings before administrative authorities (FI, LV). The Injunctions Directive does not regulate the issue of costs related to the injunction procedure. Nevertheless, the financial risk related to injunctions has been identified as the most crucial obstacle to the effective use of injunctions for qualified entities. According to the study supporting the Fitness check the most effective measure would be to include a rule in the Injunctions Directive according to which, in objectively justified cases, qualified entities would not have to pay court or administrative fees.

22 Several respondents to the call for evidence from BE, NL, RO and FI identified this principle as a potential problem as the potential reimbursement of costs is an important risk factor to be taken into account when introducing a claim. This is more so where no compensatory collective redress is available, such as in CZ, and such claims can be lodged only in individual cases.

23 For example, if lawyers' fees are reimbursed at the level of statutory fees which may be exceeded in practice.

24 Paragraph 19 of the Commission Recommendation

collective consumer interests. Some Member States provide for collective injunctions in other specified fields.\(^{25}\)

The enforcement of injunctions is generally carried out through the same measures irrespective of whether the injunctive order was issued in individual or collective proceedings.

The Injunctions Directive requires specific enforcement measures for non-compliance with the injunctive order in consumer matters in the form of payments of a fixed amount for each day of non-compliance or any other amounts to the public purse or other beneficiaries, but only ‘in so far as the legal system of the Member State concerned so permits’\(^{26}\). All Member States have such penalties for non-compliance in place, including those in which non-judicial authorities are competent for injunctions.

**THE PRINCIPLE OF "OPT-IN". COMPENSATION**

The Recommendation urges Member States to introduce in their national collective redress schemes the principle of "opt-in", whereby the natural or legal persons joining the action should do so based on their express consent only. They should be able to join or withdraw from the action until judgment is given or the case is settled. Exceptions to this principle are admissible but should be justified by reasons of sound administration of justice\(^{27}\).

The background to the adoption of this principle is the need to avoid abusive litigation, where parties are involved in litigation without their expressed consent. The application of the opposite principle, the so-called "opt-out", where parties belonging to a certain class/group automatically take part in the litigation/out of court settlement unless they expressively withdraw, could be considered as problematic in certain circumstances, in particular in cross-border cases. This has to do with the fact that parties domiciled in other countries may not know about ongoing litigation and thus may find themselves in a situation where they participate in a pending case without their knowledge. [8]

On the other hand, the "opt-out" principle could be considered a more effective approach and may be justified where the protection of collective interests appears necessary but the explicit consent of affected persons is difficult to obtain, e.g. in domestic consumer cases with low

\(^{25}\) See point 2.1.1 of this Report

\(^{26}\) Article 2(1)(e).

\(^{27}\) Paragraphs 21 to 24 of the Commission Recommendation
individual damages not incentivising the exercise of an "opt-in" but with high accumulated damages\(^{28}\).

There is a diverse application of this principle in the Member States where compensatory collective redress mechanisms are available. There are 13 Member States (AT, FI, FR, DE, EL, HU, IT, LT, MT, PL, RO, ES, SE) that exclusively apply the "opt-in" principle in their national collective redress schemes. There are 4 Member States (BE, BG, DK, UK) that apply both the "opt-in" and the "opt-out" principle, depending on the type of action or the specifics of the case, while 2 Member States (NL and PT) apply only the "opt-out" principle.

Among the Member States who have adopted or amended their legislation after the adoption of the Recommendation, LT and FR have introduced opt-in systems, while BE and the UK have in the newly introduced schemes (e.g. competition cases in the UK) a hybrid system of either opt-in or opt-out, left at the discretion of the court.

In BE the application of either of these principles is assessed on a case-by-case basis with the aim to see how best to protect the interests of the consumers. However, where the claimants are foreign the Belgian system prescribes the "opt-in" principle. The same trend can be seen in the new UK system in competition law cases where the "opt-out" order made by the court will preclude further litigation only for claimants domiciled in the UK.

The new legislative proposal pending in NL continues the status-quo and applies the "opt-out" principle. The proposal in SI introduces the "opt-in" principle, with "opt-out" being made available as an exception where reasons of sound administration of justice justifies it (e.g. low value of the individual claims).

It can be concluded that while the vast majority of Member States apply the opt-in principle in all or in specific types of collective redress actions, the Recommendation has had a limited effect on the laws of the Member States. At the same time, the new legislation in BE and the UK...
shows that even where the opt-out principle is applied there appears to be
the perception of a need to distinguish between purely domestic and cross-
border cases and to rely more on the "opt-in" principle in cross-border
contexts.

**COLLECTIVE OUT-OF-COURT DISPUTE RESOLUTION**

The Recommendation urges Member States to encourage parties to
settle their disputes consensually or out-of-court, before or during the
litigation and to make collective out-of-court dispute resolution mechanisms
available alongside or as a voluntary element of judicial collective redress.
Limitation periods applicable to the claims should be suspended during the
alternative dispute resolution procedure. The binding outcome of a
collective settlement should be controlled by a court.29

Collective out-of-court dispute resolution schemes should take into
account the requirements of Directive 2008/52/EC of the European
Parliament and of the Council of 21 May 2008 on certain aspects of
mediation in civil and commercial matters30 but should also be specifically
tailored for collective actions31.

Introducing such schemes in collective redress mechanisms is an
efficient way of dealing with mass harm situations, with potential positive
effects on the length of the proceedings and on the costs for parties and
judicial systems.

Among the 19 Member States that have compensatory relief
schemes, 11 have introduced specific provisions on collective out-of-court
dispute resolution mechanisms (BE, BG, DK, FR, DE, IT, LT, NL, PL, PT,
UK). This list includes the three Member States that have adopted new
legislation after the adoption of the Recommendation (BE, FR and LT) as
well as the UK which introduced a specific provision on out-of-court
dispute resolution in the competition mechanism. In its legislative proposal,
SI is largely following the Recommendation. The remaining 8 Member
States that have collective redress schemes apply general provisions on out-

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29 Paragraphs 25 to 28 of the Commission Recommendation
30 OJ L 136, 24.5.2008, p. 3
21 May 2013 on alternative dispute resolution for consumer disputes and amending
not regulate collective ADR in the consumer area but is without prejudice to Member States
maintaining or introducing such ADR procedures.
of-court dispute resolution to such situations, for instance as implemented in the national legislation pursuant to Directive 2008/52/EC.

While the availability of ADR schemes under national law is positive per se, provisions designed for collective actions could better take into account certain specificities of such collective actions. For instance, the Recommendation provides that the use of collective out-of-court dispute resolution should depend on the express consent of the parties involved whereas in relation to individual claims it may be mandatory\textsuperscript{32}. In addition, an important element to ensure that the rights of the parties involved are protected is the subsequent control of settlements by courts.

CONCLUSIONS.

As expressed in the Recommendation, appropriately designed and balanced collective redress mechanism contribute to the effective protection and enforcement of rights granted under Union law, since "traditional" remedies are not sufficiently efficient in all situations.

Without a clear, fair, transparent and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often prone to potential abuse negatively affecting both parties to the dispute.

In many instances affected persons who are unable to join forces in order to seek a redress collectively will abandon their justified claims at all, due to excessive burdens of individual proceedings.

The Recommendation created a benchmark comprising the principles of a European model of collective redress. This happened in a situation in which many of its elements were present in the legal systems of a large part of the Member States while in other, albeit smaller group of Member States the very concept of collective redress was not known. Therefore the impact of the Recommendation should be seen and considered in two dimensions: first as a point of reference in discussions on facilitation of access to justice and prevention of abusive litigation, and second as a concrete incentive to adopt legislation complying with these principles in Member States.

\textsuperscript{32} Point 26 of the Recommendation in comparison with Article 1 of Directive 2013/11/EU which stipulates that that Directive is without prejudice to national legislation making participation in ADR procedures mandatory, provided that such legislation does not prevent parties from exercising their right of access to the judicial system.
With regard to the first dimension, the Recommendation has made a valuable contribution in terms of inspiring discussions across the EU. It also provides a basis for further reflection on how some principles such as those concerning the constitution of the claimant party or financing of litigation may best be implemented to guarantee the overall balance between the access to justice and prevention of abuses.

As far as the transition into legislation is concerned, the analysis of the legislative developments in Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation. The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU.

REFERENCES