Opinion of the European Economic and Social Committee on 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) 401 final

(2014/C 170/11)

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On 11 June 2013, the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on 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

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The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 13 November 2013.

At its 494th plenary session on 10 and 11 December (meeting of 10 December), the European Economic and Social Committee adopted the following opinion by 161 votes to 2 with 7 abstentions.

1. **Conclusions and recommendations**

1.1 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, while at the same time duly respecting the Member States' different legal traditions.

1.2 The EESC welcomes the fact that the European Commission has finally seized the initiative and called upon the Member States to introduce national collective redress systems underpinned by shared European principles. This initiative was long overdue. Collective legal protection instruments are in the interest of both the Union's citizens and of companies that operate fairly and within the law. They protect industry from unfair competition and strengthen the public's trust in it.

1.3 The Committee regrets that the Commission has not issued a proposal for a directive. A mere communication and recommendation are not enough to ensure the necessary uniform implementation in the Member States. The EESC therefore calls on the Commission to present a proposal for a directive. Collective redress is the only procedure that can ensure a comprehensively effective remedy in the European Union.

1.4 The EESC recognises the efforts the Commission has made to take a balanced approach intended to guarantee the fundamental procedural rights of the parties and prevent abuse. It also endorses the Commission's desire to provide for both injunctive and compensatory collective actions. The possibility of extending the types of action should be examined.

1.5 The EESC welcomes the Commission's rejection of a US-style class action. This is precisely the form that collective redress within European law must not take. The Commission's safeguards to this end are sufficient and appropriate. Contingency fees for lawyers that create an incentive for litigation, as well as punitive damages, are quite rightly rejected. The rules on the certification of claimants and payment of costs must be re-written to accommodate access-to-justice considerations.

1.6 The EESC endorses the Commission's view that individuals should have the right to opt in to a group action. However, the Committee can also envisage circumstances in which an opt-out procedure would have its advantages. Particularly where a large number of injured parties have suffered very minor harm, it might make sense to extend the action to all potential injured parties. It is not clear whether the Commission considers an opt-out procedure in such cases as legally safe. The EESC therefore calls on the Commission to clarify its proposal. The Committee also recommends a central European register of actions to provide information for potential claimants.

1.7 The EESC has always highlighted the potential of out-of-court dispute resolution. For this reason, it welcomes the approach chosen by the Commission of providing for this procedure as a complementary instrument that parties can opt for and of giving the judge a remit to encourage out-of-court settlement.

1.8 The EESC recommends that specific conflict rules be instituted for collective redress actions. The provisions regarding the funding of collective legal protection should be expanded. The financial risk for non-profit organisations must be made clear. There are rules on this in the Member States.

2. **Gist of the Commission communication and recommendation**

2.1 The Commission summarises in its communication the conclusions of the consultation exercise carried out in 2011 entitled 'Towards a coherent European approach to collective redress' ([1]). It also states its case on the central issues in such redress. In the recommendation ([2]) published in tandem, the Commission proposes to the Member States the introduction of national systems for collective redress based on common European principles. Member States are expected to incorporate these principles into their domestic systems within two years. After four years the Commission will weigh up whether further legislation should be proposed.

2.2 National redress procedures should be available in areas in which EU law guarantees the rights of individuals and businesses. The Commission wishes to improve access to justice, but at the same time to prevent, through appropriate measures, improper litigation.

3. **General comments**

3.1 In over twenty years of — at times — very controversial debate, the EESC has championed collective redress instruments at Community level as the only effective guarantee of legal protection for collective rights ([3]). Access to effective judicial protection is a fundamental right and a citizens' right laid down in the European Charter of Fundamental Rights. For EU citizens, though also for SMEs, collective law enforcement procedures are needed where mass and low-value damage occurs in which the cost risk may outweigh the harm suffered. This covers a broad spectrum, including consumer protection, competition, and environmental and data protection. Only in this way can the right enshrined in Article 47(1) of the Charter of Fundamental Rights be enforced.

3.2 In the light of the foregoing, the EESC welcomes the initiative the Commission has now seized, although it would have wished decidedly swifter, earlier and — where the choice of legal instrument is concerned — more targeted action. The matter of collective judicial redress has been under discussion at European level since 1985 and so it was high time decisions were taken ([4]).

3.3 The EESC notes with regret that the Commission has chosen the instrument of a directive only for the sphere of competition law ([5]). The EESC has always maintained that a recommendation is not the right instrument to guarantee the necessary effective and uniform implementation in the Member States ([6]). Given that the procedures in the Member States differ widely, only a directive would ensure a solid core of harmonisation while at the same time giving the Member States enough leeway for accommodating the particularities of their national legal systems. The EESC calls on the Commission to propose a directive as quickly as possible.

3.4 One good point is that the Commission has taken a cross-cutting approach. The EESC has already noted that policy areas such as consumer protection, the single market and competition policy are tightly interwoven ([7]). Initiatives to give easier access to means of redress must be coordinated across a broad spectrum to avoid duplication of legislation. For this reason, the EESC is pleased that the Commission sees the recommendation and the proposal for a directive in the competition law sphere as a single package ([8]).

([1]) COM(2010) 135 final, 31.3.2010.

([2]) Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60.

([3]) See on this: OJ C 162, 25.6.2008, p. 1; OJ C 128, 18.5.2010, p. 97; OJ C 181, 21.6.2012, p. 89, point 3.30.

([4]) See: OJ C 162, 25.6.2008, p. 1, point 3.6 et seq. and point 7 et seq.; OJ C 128 18.5.2010, p. 97.

([5]) COM(2013) 404 final, 11.6.2013.

([6]) OJ C 162, 25.6.2008, p. 1, point 8.1.

([7]) OJ C 228, 22.9.2009, p. 40, point 4.2.1.

([8]) See COM(2013) 401 final, footnote 10.

3.5 The EESC acknowledges the Commission's balanced approach, which, while recognising the different legal traditions, guarantees the fundamental procedural rights of the parties and at the same time prevents improper claims.

3.6 The EESC has always urged effective protection against improper practices. It therefore emphatically welcomes the Commission's rejection of a US-style class action. The Committee has always stressed that a class action in the US manner must not be the form of collective redress adopted on the basis of European law ([9]). For this reason, it has also insisted that contingency fees and provisions that include economic incentives for third parties be avoided ([10]). These calls are incorporated in the recommendations.

3.7 The Commission also quite rightly points out that compensatory collective actions should be geared to compensating for harm demonstrably caused by an infringement of Union law. The punishment and deterrence functions should be exercised by the public authorities.

3.8 The EESC regrets, however, that the Commission has not made any specific proposals regarding jurisdiction and applicable law. In the case of cross-border actions, this could result in courts applying different compensation rules. Overlapping jurisdictions and an attendant danger of forum-shopping are also not excluded.

4. **Specific comments**

4.1 **Injunctive and compensatory redress actions**

4.1.1 The EESC welcomes the fact that the proposals cover both injunctive and compensatory collective actions in mass harm situations. Another positive aspect to highlight in this connection is that the Commission's approach is evidently meant to apply to both small and large amounts.

4.1.2 Irrespective of this, it could also be appropriate from the consumer protection point of view to reconsider the restriction to injunctive and compensatory collective redress. It might make sense to provide for further collective legal protection elements for situations in which two or more persons are affected by one and the same infringement of EU law. This could be relevant, for example, to declaratory relief, avoidance of contracts on the grounds of a mistake, or claims against warranty. The Commission should take this into consideration.

4.2 **The role of the court**

4.2.1 The EESC has already highlighted in earlier opinions the key role of judges in collective legal protection ([11]). Happily, the Commission has taken these calls on board. A timely assessment by the judge of whether an action is patently unfounded is an important element in protecting against the abuse of compensatory collective actions.

4.2.2 In so far as the authorities are empowered to determine an infringement of EU law, it should be possible to initiate a private action before, and not only after, the conclusion of these proceedings. Lengthy proceedings can result in a denial of legal protection. The role of the judge can be reinforced here — if he were empowered, for example, to suspend proceedings.

4.3 **Right to bring an action.** To prevent improper litigation, unequivocal and clear criteria should be set out for the right of representative organisations to bring actions. The EESC also therefore welcomes the minimum requirements laid down by the Commission for entities seeking to represent claimants. It is right that these should be non-profit and that no conflicts of interest arise. It is excessive and unacceptable, however, that these minimum requirements should include sufficient financial and personnel resources and legal expertise, since this raises the question of what standards will actually be used to decide on this matter in individual cases. This needs to be given further thought, with recent legislative procedures in the Member States possibly providing some useful ideas.

([9]) OJ C 162, 25.6.2008, p. 1, point 7.1.2; OJ C 128, 18.5.2010, p. 97, point 5.2.3.
([10]) OJ C 162, 25.6.2008, p. 1, point 7.1.2; OJ C 128, 18.5.2010, p. 97, point 5.2.3.
([11]) OJ C 162, 25.6.2008, p. 1, point 7.3 et seq.; OJ C 128, 18.5.2010, p. 97, point 5.2.3.

4.4 **Effective compensation for damage.** It is of primordial importance that claimants receive full compensation for the harm they have suffered ([12]). The Commission's recommendations embody this principle. It is also to be welcomed here that contingency fees for lawyers paid out of claimants' compensation are not to be permitted ([13]).

4.5 **Opt-in or opt-out procedure**

4.5.1 The EESC exhaustively examined the pros and cons of opt-in and opt-out collective actions in its opinion of 14 February 2008 ([14]). In this and following opinions it upheld the idea of a hybrid system that combined the benefits of both ([15]).

4.5.2 Individuals should have the right to opt in to a collective action rather than simply to assume that they are a party to the action unless they declare otherwise (opt out) ([16]). However, the Committee can also envisage circumstances in which an opt-out procedure would have its advantages. Particularly where a large number of injured parties have suffered very minor harm, it might make sense to extend the action to all potential injured parties ([17]).

4.5.3 In these cases the claimant should be a qualified representative entity as described in the Commission recommendation.

4.5.4 It is not clear whether the Commission considers an opt-out procedure in such cases as legally safe. It restricts itself instead to the blanket statement that any exception to the opt-in principle can (only) be justified on the grounds of sound administration of justice. Unfortunately, it does not explain when such grounds arise. The EESC therefore calls on the Commission to clarify its proposal ([18]).

4.6 **Information on a collective redress action.** The EESC regrets that the recommendation does not provide for an electronic register of actions at European level to inform and include potential claimants. Such a register, which could be consulted by those suffering harm throughout the European Union, would be cheap and efficient to run ([19]) and would help the public and businesses to exercise their rights.

4.7 **Collective alternative dispute resolution.** Collective alternative dispute resolution mechanisms can be a useful adjunct for dispute resolution ([20]). The EESC has always highlighted the potential of such procedures ([21]). Accordingly, it welcomes the approach chosen of providing for this procedure as a complementary instrument that is voluntary for the parties. Moreover, it is essential that limitation or prescription periods do not run while out-of-court dispute resolution procedures are underway. As in the case of collective follow-on actions, this should be clarified by the Commission.

4.8 **Collective follow-on actions.** In areas where public law enforcement is applicable, such as competition law, effective prosecution by the authorities must be guaranteed and at the same time the compensation claims of victims of infringements of Union law must be facilitated ([22]). The Commission's proposal on this is balanced, since any limitation or prescription periods detrimental to those harmed are not to begin to run until official procedures have been concluded.

4.9 **Funding of compensatory collective redress**

4.9.1 Justified compensation actions must be enabled and not deterred by the high costs of going to court. The EESC therefore welcomes the Commission's call to the Member States for collective redress proceedings not to be excessively costly.

([12]) OJ C 128, 18.5.2010, p. 97, point 5.2.3.
([13]) OJ C 228, 22.9.2009, p. 40, point 4.8.4.
([14]) OJ C 162, 25.6.2008, p. 1, point 7.2 et seq.
([15]) OJ C 162, 25.6.2008,p. 1, point 7.2.3.1; OJ C 128, 18.5.2010, p. 97, point 5.2.3; OJ C 228, 22.9.2009, p. 40, points 4.4.1 and 4.4.2.
([16]) OJ C 128, 18.5.2010, p. 97, point 5.2.3.
([17]) OJ C 162, 25.6.2008, p. 1, point 7.2.3.1; OJ C 128, 18.5.2010, p. 97, point 5.2.3; OJ C 228, 22.9.2009, p. 40, points 4.4.1 and 4.4.2.
([18]) The European Commission should also make it clear in this connection when and on what conditions the opt-out procedure is compatible with the right to be heard laid down in Articles 41(2) and 47(2) of the Charter of Fundamental Rights of the European Union. This is also particularly important for those Member States, such as Germany, in which the right to be heard is protected by the Constitution.
([19]) OJ C 228, 22.9.2009, p. 40, p. 4.8.5.
([20]) OJ C 128, 18.5.2010, p. 97, point 5.3.5.
([21]) OJ C 181, 21.6.2012, p. 93.
([22]) OJ C 228, 22.9.2009, p. 40, point 3.6.1.

4.9.2 However, the Commission should further clarify its thinking on this. Court costs and lawyers' fees can be an insurmountable hurdle for non-profit representative bodies, especially if they are to be saddled with crippling expert's fees if they lose. For this reason, consideration should be given — by analogy with the labour and social law provisions in some Member States — to capping legal costs for such non-profit organisations. There is much to be said (where there has been financial gain) for considering using proceeds from a system of profit confiscation for the benefit of non-profit organisations.

4.9.3 The EESC also supports the decision to permit third-party funding under certain conditions. The conditions listed by the Commission, such as transparency in the origin of funds, are appropriate and sufficient to prevent improper litigation.

Brussels, 10 December 2013

The President
of the European Economic and Social Committee
Henri MALOSSE