Guest Editorial

One for All and All for One? The Collective Enforcement of EU Law

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The failure of individual and institutional remedies to ensure the effective enforcement of European Union (EU) law has increasingly focused attention on collective routes to ensuring adherance to EU policies and rights. How comprehensive, however, should collective remedies under EU law be? This introductory article – as well as the other articles of this volume – explores the feasibility of a horizontal approach to the collective enforcement of EU law. While the hope for such an approach has been bolstered by the engagement of the EU institutions, the Commission's most recent 2013 Recommendation fails to significantly advance the development of collective remedies at EU level. The article will conclude by exploring some further, non-legislative, alternatives to furthering the collective enforcement of EU law.

Europe's judiciary has often boasted of its efforts to create a gapless or 'complete' system of remedies under EU law.[1] From the European Court of Justice's (ECJ) landmark decision in *Van Gend en Loos*, that system has primarily consisted of the rights of both individuals and institutions to bring possible violations of EU law to the attention of national and European judiciaries. What, however, if this system has more 'gaps' than first thought? The failures of EU equality law to deliver concrete remedies for vulnerable groups – such as the Roma minority, many of whom were deported under questionable circumstances from France from 2010 – led many, including the authors, to question whether individual and institutional

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1 CJEU, Case 294/83, '*Les Verts*' [1986] ECR 1339 para. 23.

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enforcement was sufficient to make the rights established by EU (in this case equality) law practically realizable.[2]

One means of filling this enforcement gap is to reflect on opportunities for the collective enforcement of EU law. What is collective enforcement? In its 2013 Communication 'Towards a European Horizontal Framework for Collective Redress'[3] ('2013 Communication'), the Commission provides a definition of a distinct but related term, collective redress. In the Commission's view:

> Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.[4]

Here, the Commission focuses on the aggregation of legal claims brought by persons actually harmed or on their behalf.[5] While this definition is useful, one can question whether this approach to collective redress may be an overly narrow concept to address the 'gaps' of individual and institutional enforcement outlined above. In many areas of law, such as environmental law, collective judicial action may be needed even in the absence of a specific individual claim. Animals may have a legitimate interest in ensuring that their habitats are protected under EU legislation even if their interests are not reducible to any one, or a series of, individual legal claims.[6] The protection of the general interest of a category of individuals may also warrant protection in the absence of individual (identifiable) persons harmed as acknowledged by the EU legislator in the context of EU

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2 Mark Dawson & Elise Muir, *Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma*, 48 Com. Mkt. L. Rev. 3 (2011). Many further examples are provided in the contributions to this Special Issue in the context of competition, consumer, environmental and social law.

3 COM(2013)401.

4 2013 Communication at point 4.

5 COM(2013)3539 Commission Recommendation 'on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law', points 3(a), (b) and (d).

6 Contrast for instance with the significantly broader wording of Arts 2(5) and 9(2) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (Accessed on 8 Apr. 2014). See further in this Issue Mariolina Eliantonio p. 262.

consumer law[7] and illustrated by cases brought to the attention of the CJEU in the field of anti-discrimination.[8]

While taking the definition of 'collective redress' provided in the 2013 Communication as our starting point, a key question is how horizontal an approach the EU should develop to collective enforcement. It was thus with great interest that we followed the process initiated by the Commission's announcement in 2011 of a public consultation on the development of a 'Coherent European Approach to Collective Redress'.[9] The consultation was designed to test both the political will and the legal feasibility of common European rules on the collective enforcement of EU law.

While the consultation's approach was designed as horizontal, there were already in 2011 significant question marks over how broad its scope really was. The consultation's clear focus was on competition and consumer law (where earlier preliminary works had already been produced)[10] with the question of whether rules on collective redress should extend beyond economic law left open. In this, the Commission seemed to hedge its bets. Was the move towards collective redress an extension of the broader right to effective judicial protection – and thus something equally applicable across all areas of EU law – or was it instead primarily a means to better enforce EU policies (and therefore to be directed first in those policy areas where the EU's policy profile – and concomitant implementation responsibility – was clearest)?

This omission – and ambiguity – inspired the main rationale for the conference on which this special issue is based. To what extent is a horizontal approach to collective enforcement feasible at the European level? To address this question, we invited academics specialized in four selected policy fields as well as a national judge to consider the extent to which the rationale, design, scope and safeguards embedded in collective redress schemes in their respective fields of expertise or national judicial system cohere or differ. The suggested benchmarks are the documents issued by the Commission in the summer of 2013 as the outcome of the consultation process initiated in 2011, as will be explained below.

We deliberately opted for a combination of two economic and two non-economic fields – competition and consumer law, to which the Commission's documents largely refer, and environmental and social law, which are only incidentally targeted. These fields were chosen in order to explore the relevance

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7 See for instance the definition of 'collective interests' in recital (3) of Directive 2009/22 on injunctions for the protection of consumers' interests (OJ L 110, 01/05/2009, pp. 30–36): 'Collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement.' (emphasis added)

8 E.g., Case C-54/07 *Feryn* [2008] ECR I-5187, paras 23–25.

9 SEC(2011)173 final Commission Staff Working Document.

10 As retraced in this Special Issue by Dimitrios Tzakas pp. 232–234 and Iris Benöhr pp. 252–253 respectively.

and feasibility of a coherent European approach to collective redress. In fact, comparative research on collective remedies under EU law is not new. A number of papers and books[11] have attempted to compare systems of collective redress in Europe cross-nationally. What we have not seen, however, is an attempt to consider – from a European law perspective – collective redress across distinctive policy fields. The comparative overview provided by the articles in this issue provides therefore an important foundation – as we will explore – for the question of how 'horizontal' a European approach to collective redress can credibly become.

After an intense period of debate and review, the Commission published its response to the 2011 consultation via a Communication and Recommendation published in June 2013 'Common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law'[12] ('2013 Recommendation'). The Recommendation's stated rationale – '*to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations*'[13] – speaks to all of the special issue's articles. Dimitrios Tzakas and Iris Benöhr's articles illustrate for example the need to provide avenues of collective redress in situations where economic harm is suffered by a large group but its costs are sufficiently dispersed that individual applicants will rarely carry the necessary incentives to litigate. Mariolina Eliantonio's article meanwhile speaks to the difficulties of environmental law, in which international conventions such as the Aarhus Convention have been built to compensate for the lack of individual applicants to bring actions against environmental harm. Kathrin Lukas' article emphasizes the use of collective complaints as a means of pressure to enhance compliance while the article of Graham Jones – outlining the response of a national judge to the 2013 Recommendation – stresses the use of collective redress first and foremost as a means of delivering a basic civil right: access to justice. In this sense, all of our articles identify precisely the serious 'gap' in judicial protection that mechanisms of collective redress were designed to fill.

The articles also, however, point to serious deficiencies in the choice and substance of the instrument chosen by the Commission to fill this gap. While the earlier consultation may have raised hopes that its outcome would lead to binding

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11 Chris Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart 2008); Duncan Fairgreave & Geraint Howells, *Collective Redress Procedures: European Debates*, in *Extraterritoriality and Collective Redress* (Duncan Fairgreave & Eva Lein eds, OUP 2009); Rebecca Money-Kyrle & Chris Hodges, *European Collective Action: Towards Coherence?* 19 Maastricht J. Eur. & Comp. L. 4, 477 (2012).

12 2013 Recommendation, above n. 5.

13 2013 Recommendation, *ibid*., point 1.

law, the final proposal is in the form of a soft law recommendation,[14] which lays out a number of common principles to be applied across the Union. As with other soft law instruments, the ability to transform this recommendation into wider access to collective redress at the national level will depend on the good will of the Member States.[15] One wonders – given the severe differences between national approaches illustrated by the consultation process (with some Member States voicing strong skepticism as to the desirability of an EU framework for collective redress at all) – how 'coherent' the application of these principles will be.

This problem is exacerbated by the nature of the Recommendation. While soft law mechanisms may often be accompanied by procedural obligations (e.g. obligations on the part of the Member States to report on their efforts to meet the norms contained therein), this Recommendation contains no such obligation. At most, the Member States are obliged to provide statistical information on the number of out of court and judicial collective redress procedures conducted in their states in the next three years, with the Commission asked to assess the Recommendation's implementation – and consider whether further measures are needed – after a four-year period.[16] Quantitative data is thus favoured over any qualitative information on the kind of legal framework provided at the domestic level. Given the intense strength of business opposition to the consultation,[17] the 'downgrading' of this proposal to a soft recommendation with such a weak reporting mechanism – and the four year re-assessment period – could be seen as an attempt to 'kick into the long grass' a trying and controversial proposal.

Beyond procedure, the substance of the Recommendation – and its guiding principles – also invites significant controversy. As with any piece of EU law-making, the Commission was forced in its Recommendation to balance different sets of opposed business and consumer interests, as well as the significant divergences in approach between Member States. Our contributors differ in the extent to which they welcome the outcome of that balancing process.For some – such as Graham Jones – the Recommendation is welcome in corresponding closely to reform proposals emerging at the national level and from grassroots

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[14] On the basis of Art. 292 TFEU. The legislator recently agreeing on the Directive on actions for damages in competition law was also careful to explicitly exclude legal obligations on matters of collective redress: Council of the European Union, '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 – Analysis of the final compromise text with a view to agreement' (24 Mar. 2014, available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%208088%202014%20INIT), Recital (11).

[15] See in this Special Issue: Dimitrios Tzakas p. 242, Iris Benöhr sec. 5, pp. 252–253 Mariolina Eliantonio p. 272.

[16] 2013 Recommendation, above n. 5, points 38–41.

[17] 2013 Communication, above n. 3, at point 5.

organizations such as the UK Civil Justice Council.[18] The Recommendation supports a horizontal approach and recognizes the importance of judicial control of collective redress procedures, with judges asked to provide a key role in protecting the interests of the parties involved. While a role is sketched out for public enforcement, e.g. through Ombudsmen or other public agencies, as well as alternative dispute resolution mechanisms (ADR), this is seen as complementary rather than as a substitute for individual access to justice.[19]

Nonetheless, severe deficiencies also abound. Three in particular are identified by our contributors. One relates to the crucial question of whether collective redress is operated on an 'opt-in' (i.e. where parties must specifically consent to their inclusion in a collective claim) or an 'opt-out' basis (i.e. where they tacitly consent provided information about the claim has been broadly disseminated). The Recommendation offers a clear preference for the former model, stating in paragraph 21 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). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

'Opt-in' is seen as the default principle, with 'opt-out' – in spite of its presence in a number of Member States – seen as an exception, that must be duly justified. This normative preference for opt-in models seems, according to our contributors, to conflict with national experiences of the efficacy of various models of collective redress to date as well as the very rationale for their adoption. If the rationale for collective redress in the first place is that individuals may be poorly informed of violations to their legal rights, and even where informed, may lack the necessary incentives to take part in judicial proceedings, opt-in models seem unlikely to amass the necessary number of participants to bring serious violations of EU law to a halt.[20] This fear mimics experience at the national level, where opt-in systems have often failed to attract more than a fraction of the participants harmed by consumer and competition law violations.[21]

The preference for 'opt-in' relates to a second concern. A recommendation that supports opt-in models of collective redress requires an even more effective

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[18] See, e.g., the report, co-authored by Graham Jones, of the UK Civil Justice Council on 'Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions. Final Report, a Series of Recommendations to the Lord Chancellor'. http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Access+to+Justice+through+Collective+Actions.pdf (accessed 8 Apr. 2014).

[19] See in this Special Issue Graham Jones sec. 2, p. 294.

[20] See in this Special Issue Dimitrios Tzakas p. 236, Rachael Mulheron, *The Case for an Opt-out Action for European Member States: A Legal and Empirical Analysis*, 15 Colum. J.Eur.L. 409, 432–434 (2009).

[21] See in this Special Issue Graham Jones sec. 4, pp. 300–301.

system of notification and dissemination to those potentially harmed by breaches of EU law. Here, the Communication accompanying the Recommendation is informative. While it is recognized that '*effective information on collective action is a vital condition*' for ensuring that claimants can learn of the possibility to join a collective action, the Commission also warns that advertising such claims '*may have a negative impact on the reputation of the defendant*',[22] such that rules on provision of information ought to balance these conflicting interests. The danger may be that this '*balance*' is interpreted restrictively – how after all, could consumers or other victims know of violations of their rights without being fully informed of the identity of those against whom a collective claim is being brought?

The greater problem in this regard may lie in the weakness of the notification requirements laid down in the Recommendation.[23] While earlier proposals, such as those discussed by Dimitrios Tsakas in the competition field, attempted to lay out detailed notification rules,[24] including court certification of notification efforts, the Recommendation does not utilize these standards. To this end, it runs the risk of running afoul (particularly in states where 'opt-out' models are adopted) of contravening '*fundamental constitutional and procedural principles such as the principle of party disposition, the right to be heard and the right to a fair trial*'.[25]

The choice in favour of 'opt-in' mechanisms as well as the weak notification requirements have a joint common denominator: the Commission's concern to avoid abusive litigation and thereby harm business interests. Although clearly dismissed by several contributors, the same rationale lies behind the third main point of criticism identified by our contributors. In the views of Iris Benöhr, the combination of strict rules on third party funding and loser pay principles established by the Commission to prevent abuses may unnecessarily restrict the ability of consumers and their representatives to actually take legal action.[26]

To the extent that certain aspects of the recommendation could be seen as lowering the overall level of access to collective remedies in certain Member States where they are already extensively developed, the decision to adopt this proposal under 'soft law' could then perhaps be seen as a blessing rather than a curse. At the same time, the political feasibility of adopting a more ambitious proposal is questionable. As the Communication accompanying the 2013 Recommendation makes clear, the consultation process on collective redress was far from harmonious, with both significant corporate opposition and a number of large Member States lining up against the proposal. So what do these deficiencies in the

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22 2013 Communication, above n. 3, point 3.5.
23 2013 Recommendation, above n. 5, points 10–12.
24 See pre-draft directive Art. 5(3) cited by Dimitrios Tzakas p. 234.
25 See in this Special Issue Dimitrios Tzakas p. 239.
26 See in this Special Issue Iris Benöhr pp. 253–254.

2013 Recommendation tell us about the feasibility of a horizontal approach to collective redress in the EU in the future?

As suggested by Dimitrios Tzakas and Iris Benöhr, it may be that a horizontal approach is limited by the constraints imposed by the specificities of each EU policy field. The observations of Graham Jones as well as the conclusions of the UK Civil Justice Council to the contrary effect, however, indicate that the sectorial argument can only provide a partial explanation.

The genuine challenges for EU decision-makers may lie elsewhere. A first problem is to be found in the very structure of the EU legal order. Resistance to the emergence of an EU remedy is often supported by reference to the principle of national procedural autonomy.[27] Nevertheless, this argument is based on an inadequate reading of the function that this principle performs. Competences are given to the EU to develop specific policy objectives under the assumption that the EU will ensure the efficiency of its policies by recourse to procedural law whenever appropriate.[28] The principle of national procedural autonomy thus does not regulate the allocation nor exercise of EU competences and cannot be used as a valid argument against the adoption of procedural rules to enhance the effectiveness of an EU policy. It is only an expression of the duty of loyal cooperation and is destined to articulate the relationship between EU and national legal orders in the absence of EU procedural rules.[29]

This observation is related to the second – and perhaps greater – challenge faced by attempts at adopting an ambitious binding horizontal instrument on collective redress in the EU: the fragmentation of the relevant legal framework. Precisely because the ability of the EU to enhance access to justice primarily depends on the existence of specific EU policies, a truly horizontal binding instrument would have to be based on a complex set of legal bases – possibly with diverging, if not conflicting, legislative procedures.[30] The diversity of legal bases may result in equally fragmented mindsets among administrators, decision-makers and stakeholders whose expertise is framed in the context of specific EU policies thus making it unlikely that a genuine horizontal approach to a procedural issue would emerge.

In that sense, the Commission's choice of a soft law instrument could well reflect a realization that 'harder' or more ambitious proposals would stand little chance in the legislative process. This conclusion seems bleak for those arguing for

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27 Of which expressions may now be read into Arts 19 TEU and 67(1) TFEU.

28 An example of the far reaching implications of this statement may be found in Case C-176/03 *Commission v. Council* (criminal penalties in the field of EU environmental law) [2005] ECR I-7879 para. 48.

29 Case 33-76 *Rewe* [2005] ECR 1989 para. 5.

30 In particular if such instruments would also be relevant for policies such as anti-discrimination that are not limited to cases with a cross-border dimension.

a more ambitious – and horizontal – EU approach to improving mechanisms of collective enforcement.

Nonetheless, our articles also provide indications of some possible avenues to be explored even in the absence of political gridlock on how a more ambitious EU framework could be developed. One avenue concerns the role of courts. While many of our contributors understandably focus on the legislative route to greater European harmonization of procedural rules, national and EU courts are also important actors in developing a common European procedural law. To this extent, the development of collective remedies could be cast in the future less as an attempt to better 'enforce' particular substantive EU policies than to deliver on a core right protected both under the EU Charter and by general principles of EU law – the right to effective judicial protection.[31]

As Mariolina Eliantonio discusses, the EU's duty to abide by international obligations could act here as a 'catalyst' for change, providing opportunities for the entry of civil society and other collective groups into EU litigation who would otherwise be excluded by restrictive national or European standing rules. The primary example in this regard is the Aarhus Convention, which requires under Articles 9(2) and 9(3) state parties to ensure that members of the public (including non-governmental organizations) who suffer from impairment of a right or have a sufficient interest in the environmental impact of a decision have access to a review procedure to challenge its legality.[32] While the Convention in its entirety has not yet been fully implemented into EU law, as Eliantonio evidences, the CJEU has used its guiding role under the preliminary reference procedure, as well as the duty of consistent interpretation, to nudge national Courts towards more open standing rules for the admissibility of environmental complaints brought by civil society organizations in several Member States.[33] This shows the ability of courts to close 'gaps' in the legislative framework to the advantage of collective actors even in the face of significant legislative inertia.

Another avenue may lie in a broader approach to 'collective redress' beyond the highly court-centric definition of the 2013 proposals. While judicial avenues are important, the enforcement of EU law may not only rely on court-based remedies but also on the use of alternative EU instruments (such as funding mechanisms, agency oversight, or ADR) that seek to complement judicial enforcement. The case of the Roma mentioned above – where initial EU threats of infringement proceedings were quietly dropped in favour of a wider monitoring and funding package – may be a case in point. In discussing EU law's

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31 As protected by 47(1) TFEU. We are grateful to the presentation in our conference of Chris Backes on this issue.

32 See above n. 6.

33 See in this Special Issue Mariolina Eliantonio sec. 3 & 4, pp. 261–267.

collective enforcement, we therefore wish to draw attention to the enforcement of EU rules by collective actors not only in classical court settings but also under non-judicial mechanisms. The article by Karin Lukas on the quasi – (but non-)judicial collective complaint procedure of the European Social Charter makes precisely this point. It illustrates that the effective enforcement of EU law may require a combination of collective judicial remedies with the many other roles – from monitoring to victim support and awareness raising – that collective and civil society actors play in promoting dialogue between stakeholders involved in the enforcement of common European rights or policies.

Both the effects of the Aarhus Convention on EU legislation and case law and the example of the collective complaint mechanism of the European Social Charter illustrate a third point: the potential of international law to create an internal dynamic of reform. Even though Aarhus is restricted to the environmental field, it is likely to have implications beyond it: if greater collective access is needed in environmental disputes, why not in other areas of EU law, given the significant overlaps in the rationale for developing collective remedies across policy fields? It is surely not beyond our legal imaginations to see the fundamental right to effective judicial protection as a potential building block upon which national and European Courts can construct a more complete and horizontal system of collective remedies. Similarly, although the EU is not a party to the European Social Charter, repeated findings of serious violations of this Charter in the context of EU policies may not only call into question the substance of EU policies but also draw attention to the absolute necessity of enhanced access to justice for collective actors. In that sense, international law sources may complement the Recommendation itself, either paving the way for hard law initiatives, or encouraging either institutional or non-governmental actors to lobby for future reform.

While the 2013 Recommendation could be seen as a somewhat disappointing end to one of the EU's first efforts to reflect on new avenues for collective redress, our articles illustrate not only the Recommendation's failings but also its potential – in combination with other instruments – to act as a catalyst for future legal change. In this sense, the debate on EU law's collective enforcement has only just begun.