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La ripartizione dei compiti di vigilanza prudenziale
ai sensi dell'art. 70 del Regolamento UE n. 1024/2013

Matteo Ortino

Abstract

Lo scritto esamina le questioni connesse ai compiti di vigilanza prudenziale attribuiti alla Banca centrale europea, alla luce di una causa attualmente pendente avanti alla Corte di giustizia (causa C-450/17 P, *Landeskreditbank Baden-Württemberg* c. *BCE*).

La ripartizione dei compiti di vigilanza prudenziale ai sensi dell'art. 70 del Regolamento UE n. 1024/2013

Matteo Ortino*

SOMMARIO: 1. Le competenze di vigilanza prudenziale della BCE. – 2. Il principio di sussidiarietà e di proporzionalità. – 3. Appropriatezza e necessità della vigilanza diretta della BCE.

1. Le competenze di vigilanza prudenziale della BCE.

Sulla base dell'art. 127, par. 6, TFUE, e mediante il Regolamento (UE) n. 1024/2013 del 15 ottobre 2013, il Consiglio ha attribuito alla Banca centrale europea (BCE) «compiti specifici in merito alle politiche in materia di vigilanza prudenziale degli enti creditizi». Tale Regolamento costituisce la fonte primaria del Meccanismo di vigilanza unico sulle banche in materia prudenziale (MVU), composto dalla BCE e dalle autorità nazionali competenti in materia di vigilanza prudenziale (ANC) degli Stati membri partecipanti. Nel quadro di tale Meccanismo un altro fondamentale atto è il Regolamento (UE) n. 468/2014 adottato dalla BCE, che istituisce il quadro di cooperazione tra la BCE e le ANC e le autorità nazionali designate (Regolamento quadro).

La Corte di Giustizia dell'UE (Corte) a breve si pronuncerà su alcune questioni di diritto costituzionale UE connesse al Meccanismo. In particolare, i giudici dovranno pronunciarsi sull'impugnazione da parte di una banca pubblica tedesca, la *Landeskreditbank Baden-Württemberg – Förderbank* (la banca), della sentenza del Tribunale dell'UE del 16 maggio 2017, *Landeskreditbank Baden-Württemberg* c. *BCE* (sentenza *Landeskreditbank*)[1]. In merito a tale impugnazione, il 5 dicembre 2018 sono state presentate le conclusioni dell'avvocato generale Gerard Hogan (causa C-450/17 P)[2].

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[1] Tribunale UE, 16 maggio 2017, causa T-122/15, *Landeskreditbank Baden-Württemberg - Förderbank* c. *Banca centrale europea*, ECLI:EU:T:2017:337. La pronuncia è stata oggetto di numerosi commenti. V., ad esempio, R. D'AMBROSIO, M. LAMANDINI, *La "prima volta" del Tribunale dell'Unione europea in materia di Meccanismo di Viglanza Unico*, in *Giur. comm.*, 2017, p. 594-II ss.; T.H. TRÖGER, *How Not to Do Banking Law in the 21st Century – The Judgment of the European General Court (EGC) in the Case T-122/15 – Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB)*, in *Oxford Business Law Blog*, 16 giugno 2017; F. ANNUNZIATA, *Chi ha paura della Banca Centrale Europea? Riflessioni a margine del caso Landesbank c. BCE*, in *Giur. comm.*, 2017, p. 918-II ss.

[2] Conclusioni avv. gen. Hogan, 5 dicembre 2018, causa C-450/17 P, *Landeskreditbank Baden-Württemberg*, ECLI:EU:C:2018:982.

Con la suddetta sentenza il Tribunale ha respinto il ricorso della banca tedesca diretto all'annullamento della decisione ECB/SSM/15/1 della BCE del 5 gennaio 2015, con la quale l'istituzione UE di Francoforte aveva rifiutato di riconoscere la ricorrente come «soggetto meno significativo» ai sensi dell'art. 6, par. 4, c. 2, del Regolamento MVU e dell'art. 70, par. 1, Regolamento quadro.

La classificazione della ricorrente come «soggetto significativo» al posto di quella di «soggetto meno significativo» ha determinato la vigilanza prudenziale diretta di tale soggetto da parte della BCE, e non delle autorità tedesche competenti. Davanti al Tribunale la ricorrente ha sostenuto l'illegittimità di tale classificazione, in considerazione dell'esistenza di «circostanze particolari» che, ai sensi dell'art. 6, par. 4, del Regolamento MVU e dell'art. 70 del Regolamento quadro, determinano la classificazione di un soggetto vigilato come meno significativo.

Ai sensi dell'art. 70, par. 1, del Regolamento quadro «[r]icorrono circostanze particolari, ai sensi dell'art. 6, par. 4, secondo e quinto comma, del regolamento sull'MVU […], quando sussistono circostanze specifiche e fattuali che rendono inappropriata la classificazione di un soggetto come significativo, tenuto conto degli obiettivi e dei principi del regolamento sull'MVU e, in particolare, della necessità di garantire l'applicazione coerente di standard di vigilanza elevati». Inoltre, ai sensi del par. 2, «[i]l termine 'circostanze particolari' è interpretato in modo restrittivo», e ai sensi del successivo art. 71, par. 1, la sussistenza delle circostanze particolari deve essere determinata «caso per caso e in modo specifico per il soggetto o gruppo vigilato in questione, e non per categorie di soggetti vigilati».

La banca ha sostenuto davanti sia alla BCE (incluso la commissione amministrativa del riesame istituita prima della decisione finale della BCE), sia al Tribunale, che sussistevano le «circostanze particolari» di cui all'art. 70 del Regolamento quadro. Davanti al Tribunale, in particolare, la banca ha sostenuto che la BCE avrebbe dovuto dare applicazione dell'art. 70 del Regolamento quadro in conformità al principio di sussidiarietà e a quello di proporzionalità di cui all'art. 5 TUE.

Il principio di sussidiarietà impone all'UE di intervenire nei settori che non sono di sua competenza esclusiva soltanto se e in quanto gli obiettivi dell'azione prevista non possono essere conseguiti in misura sufficiente dagli Stati membri, né a livello centrale né a livello regionale e locale, ma possono, a motivo della portata o degli effetti dell'azione in questione, essere conseguiti meglio a livello di Unione. In base al principio di proporzionalità, invece, il contenuto e la forma dell'azione dell'UE deve limitarsi a quanto necessario per il conseguimento degli obiettivi dei Trattati. Entrambi i principi generali del diritto costituzionale UE quindi prevedono una valutazione di necessità. Quest'ultima può riguardare, non solo nel principio di sussidiarietà, ma anche in quello di proporzionalità, il rapporto tra l'UE e gli Stati membri, nel senso che l'UE può intervenire al posto delle autorità nazionali solo se è necessario in quanto gli obiettivi perseguiti «non possono essere conseguiti in maniera sufficiente dagli Stati membri» (sussidiarietà), e in quanto non vi sono alternative all'azione UE che siano meno restrittive per le competenze nazionali (proporzionalità), quali per esempio le competenze di dare attuazione al diritto UE che generalmente spettano a quest'ultimi, come esplicitato all'art. 291 TFUE.

Secondo l'interpretazione sostenuta dalla ricorrente, quindi, le «circostanze particolari» che rendono inappropriata la vigilanza diretta da parte della BCE al posto della vigilanza da parte di autorità nazionali, dovrebbero essere determinate anche in base alle valutazioni di necessità discendenti dai suddetti principi UE.

Il Tribunale ha rigettato tale interpretazione.

2. Il principio di sussidiarietà e di proporzionalità.

Per quanto riguarda il principio di sussidiarietà, il Tribunale nega l'applicabilità stessa al caso in esame e più in generale ai compiti attribuiti alla BCE all'art. 4 del Regolamento MVU. Secondo i giudici UE le competenze esercitate dalla BCE per effetto dell'istituzione del Meccanismo di vigilanza unico devono essere considerate come competenze esclusive dell'UE, costituenti quindi un ambito in cui tale principio non trova applicazione (art. 5 TUE).[3] Questo aspetto della pronuncia della sentenza desta alcuni dubbi, in quanto con tale interpretazione si riconosce al legislatore UE – in questo caso, al Consiglio – il potere di scegliere se una certa competenza UE possa avere natura di competenza esclusiva o non esclusiva; natura che, invece, secondo una diversa e più convincente interpretazione, può essere tassativamente decisa solo a livello costituzionale UE. In altre parole, secondo questa seconda lettura costituzionale, alla luce dei Trattati UE e in particolare dell'elenco dei "settori" (art. 5 TUE) di competenza esclusiva dell'UE di cui all'art. 3 TFUE («L'Unione ha competenza esclusiva nei seguenti settori»: unione dogale, regole di concorrenza, politica monetaria, conservazione delle risorse biologiche e politica commerciale comune), la vigilanza prudenziale della BCE non può essere considerata come competenza esclusiva.

Merita chiarire che in questione non è la legittimità costituzionale del Meccanismo e quindi dell'attribuzione di compiti effettuata dal Consiglio alla BCE e della specificazione normativa di tali compiti da parte della BCE nel Regolamento quadro. La ricorrente non contesta la conformità ai principi di sussidiarietà e di proporzionalità del Regolamenti MVU e del Regolamento quadro. La contestazione riguarda invece la conformità a tali principi dell'interpretazione e applicazione di tali Regolamenti da parte della BCE[4]. Parimenti, in merito al principio di sussidiarietà, la questione controversa di diritto costituzionale UE sopra evidenziata non è l'applicabilità di tale principio all'esercizio del potere del Consiglio *ex* art. 127, par. 6, TFUE. Infatti, lo stesso Regolamento MVU fa esplicito riferimento al principio di sussidiarietà nel considerando 87, sostenendone l'osservanza, visto che, secondo il Consiglio, gli obiettivi perseguiti dal Regolamento non possono essere conseguiti in misura sufficiente dagli Stati

[3] Sentenza *Landeskreditbank*, cit., punto 65.
[4] Sentenza *Landeskreditbank*, cit., punto 38.

membri e conseguiti meglio a livello dell'Unione. La questione controversa è invece la possibilità che il Consiglio attribuisca compiti alla BCE riconducendoli alla categoria delle competenze esclusive dell'UE, escludendo così automaticamente l'operato della BCE dall'ambito applicativo del principio di sussidiarietà *ex* art. 5 TUE.

In merito al principio di sussidiarietà, la soluzione interpretativa del Tribunale non è a nostro avviso convincente. Permettere che si possa estendere per via legislativa (e non tramite riforma dei Trattati) il novero di settori in cui l'Unione ha competenza esclusiva, ci sembra una forzatura del dettato costituzionale. Oltre all'art. 3 TFUE, a supporto dell'interpretazione da noi sostenuta, vi è l'art. 2, par. 1, TFUE, dal quale si deduce che sono i Trattati, e non le istituzioni, ad attribuire o no una competenza esclusiva. Inoltre, la forzatura ci sembra anche inutile ai fini della soluzione del caso specifico in questione e della funzionalità del Meccanismo.

A nostro avviso, la «competenza esclusiva» della BCE ai sensi dell'art. 4, par. 1, del Regolamento MVU non deve essere intesa nel senso di «competenza esclusiva» dell'Unione, ai sensi dell'art. 3 TFUE. La BCE ha la competenza esclusiva nell'assolvimento dei compiti di cui all'art. 4 del Regolamento MVU, nel senso che essa ha la responsabilità ultima dell'esercizio di tali compiti. Tale responsabilità si concretizza sia nell'esercizio diretto degli stessi, sia nella «vigilanza»[5] del loro esercizio da parte delle ANC. In altre parole, attribuire alla BCE la competenza esclusiva di cui all'art. 4, par. 1, Regolamento MVU significa attribuirle il controllo ultimo, o il che è lo stesso, la titolarità ultima, dell'esercizio di tali compiti. Infatti, ai sensi dell'art. 6 Regolamento MVU «[l]a BCE è responsabile del funzionamento efficace e coerente dell'MVU». Per assicurare tale funzionamento, la BCE svolge una serie di compiti: si deve occupare dell'esercizio diretto di certi compiti di vigilanza prudenziale e di certe banche, quelle c.d. significative (art. 4, par. 1, lett. a) e c), e art 6, par. 4, c. 2, Regolamento MVU) e della regolazione e supervisione delle ANC nell'esercizio dei compiti loro 'delegati' in relazione alle banche meno significative. Infatti, oltre alla già citata «vigilanza» sul funzionamento del sistema, la BCE emana regolamenti, orientamenti o istruzioni generali rivolti alle autorità nazionali competenti (art. 6, par. 5, Regolamento MVU). Inoltre, «allorché necessario per garantire l'applicazione coerente di standard di vigilanza elevati, la BCE può decidere in qualsiasi momento, di propria iniziativa dopo essersi consultata con le autorità nazionali competenti o su richiesta di un'autorità nazionale competente di esercitare direttamente tutti i pertinenti poteri» anche per uno o più delle banche meno significative di cui al par. 4 dell'art. 6, c. 1, Regolamento MVU (art. 6, par. 5, lett. b, Regolamento MVU).

Nel diritto costituzionale UE, la vigilanza prudenziale bancaria rientra tra i settori in cui le competenze UE sono concorrenti con quelle degli Stati membri. In tali settori, sia l'Unione che gli Stati membri possono «legiferare e adottare atti giuridicamente vincolanti». «Gli Stati membri esercitano la loro

[5] Art. 6, par. 5, lett. c), Regolamento MVU.

competenza nella misura in cui l'Unione non ha esercitato la propria» (art. 2, par. 2, TFUE). Nel campo della vigilanza prudenziale l'UE ha esercitato la propria competenza affidando alla BCE specifici compiti, nel senso suddetto, esercitati direttamente e mediante le ANC. Dal canto loro, gli Stati membri mantengono quelle competenze di vigilanza prudenziale che non sono state attribuite alla BCE, ossia i compiti e i relativi poteri che fuoriescono dall'ambito di applicazione del Regolamento MVU (art. 1, c. 5, Regolamento MVU).

Essendo quella attribuita alla BCE dal Regolamento MVU una competenza concorrente, essa – a differenza di quanto ha sostenuto il Tribunale – è soggetta in linea di principio al principio di sussidiarietà (art. 5, par. 3, TUE), e al relativo test di necessità.

Tuttavia, la BCE può, e deve, applicare caso per caso il principio di sussidiarietà se, e nella misura, in cui il mandato ad essa attribuito dal Consiglio e le norme da essa stessa adottate per specificare tale mandato, glielo consentono. Prima di precisare quanto appena detto, e cioè in che modo il mandato della BCE, costituito dai regolamenti MVU e quadro, limitino l'applicabilità del principio di sussidiarietà all'esercizio dei compiti di vigilanza da parte della BCE, occorre includere nell'analisi il principio di proporzionalità.

Quest'ultimo, a differenza del principio di sussidiarietà, è sicuramente applicabile – almeno in linea di principio – alle competenze della BCE; giacché i Trattati UE ne prevedono l'applicabilità a tutte le competenze dell'UE, anche quelle esclusive. Il Tribunale non poteva quindi che entrare nel 'merito' della contestazione della ricorrente, ossia valutare se il principio di proporzionalità imponga alla BCE di interpretare e applicare l'art. 70, par. 1, in conformità al requisito di necessità derivante da tale principio e quindi se tale istituzione fosse obbligata a classificare un soggetto come 'meno significativo', ove, in relazione ad esso e alla tutela della stabilità finanziaria, la vigilanza prudenziale nazionale fosse valutata come ugualmente efficace a quella della BCE.

3. Appropriatezza e necessità della vigilanza diretta della BCE.

Quindi, ritornando al cuore della questione giuridica sollevata nella sentenza *Landeskreditbank*, si tratta di precisare se e come l'esigenza di necessità della vigilanza diretta della BCE, derivante dall'applicazione del principio di proporzionalità – e in base all'interpretazione da noi sostenuta, anche da quella del principio di sussidiarietà –, vada in concreto a configurare la valutazione che la BCE deve compiere in base all'art. 70, par. 1, Regolamento quadro. In sostanza si tratta di stabilire il rapporto tra il requisito di «necessità» della vigilanza diretta della BCE (derivante dal diritto costituzionale UE) e il requisito di «non appropriatezza» della vigilanza diretta della BCE (derivante dall'art. 70, par. 1, Regolamento quadro). Più precisamente, visto che la ricorrente, come già sottolineato, non contesta la legittimità del requisito di cui all'art. 70, ma la sua interpretazione e applicazione concreta da parte della

BCE, la questione è se e come il requisito della «necessità» debba configurare l'interpretazione e l'applicazione del requisito della «non appropriatezza».

Il requisito in sé della non appropriatezza, così come la stessa previsione di 'riclassificazione' in «circostanze particolari», non meglio definite, di cui all'art. 70, par. 1, Regolamento quadro, riflettono l'oggettiva difficoltà di suddividere i compiti della vigilanza prudenziale tra la BCE e le ANC. A sua volta tale difficoltà ha varie cause, le principali delle quali sono la necessità, nell'esercizio della vigilanza prudenziale e quindi nella suddivisione dei relativi compiti, di soddisfare contestualmente più esigenze, anche contrastanti, e la necessità di tenere conto di un panorama eterogeneo, e continuamente mutevole, di banche, economie e di rischi di natura economica, finanziaria e politica di instabilità bancaria.

Per semplificazione espositiva, è possibile raggruppare in tre gruppi i principali fattori che rendono difficile e complessa la suddivisione dei compiti di vigilanza tra BCE e ANC. Tali fattori sono: la pluralità degli obiettivi perseguiti dal Meccanismo, le norme costituzionali che tale Meccanismo deve osservare, e infine la complessità intrinseca dell'attività di vigilanza prudenziale.

In primo luogo, la ripartizione dei compiti tra BCE e ANC deve tenere conto anzitutto di una pluralità di obiettivi che il Meccanismo intende perseguire. Centralizzare o meno la vigilanza quindi non è funzionale a un unico obiettivi, ma a diversi obiettivi, tra i quali vi è quello di realizzare un quadro efficiente ed efficace per l'esercizio di compiti specifici di vigilanza bancaria da parte della BCE e garantire l'applicazione uniforme delle norme bancarie UE alle banche (considerando 87, Regolamento MVU). Tali obiettivi possono in qualche misura spingere contestualmente in direzioni opposte, verso la centralizzazione e verso il decentramento della vigilanza bancaria. Per esempio, per considerazioni di efficienza e di efficacia la vigilanza della BCE non potrebbe essere esercitata direttamente nei confronti di tutte le banche operanti nella zona euro. D'altro canto, l'applicazione uniforme delle medesime regole bancarie supporta la centralizzazione della vigilanza a livello UE. A fronte di tali spinte, almeno in parte divergenti, non si può non cercare di trovare un bilanciamento, un equilibrio in grado di realizzare la migliore composizione possibile tra i diversi obiettivi. È una esigenza anzitutto operativa, necessaria alla effettiva realizzazione degli obiettivi stessi.

In secondo luogo, l'esigenza di trovare l'equilibrio è anche di natura strettamente normativa, derivante dall'ordinamento costituzionale UE. Ecco che oltre agli obiettivi propri del Meccanismo, la suddivisione dei compiti tra BCE e ANC deve essere configurata anche sulla base di elementi di natura giuridica. Lo stesso Tribunale, nella sentenza in esame, fa riferimento alla necessità derivante dall'art. 291, par. 1, TFUE, di conciliare gli obiettivi del Meccanismo con le competenze costituzionalmente tutelate degli Stati membri di dare attuazione del diritto UE. La struttura composita del Meccanismo e la ripartizione dei compiti tra BCE e ANC riflette, sempre secondo il Tribunale, proprio la necessità di realizzare tale conciliazione. Il Tribunale fa menzione del solo art. 291, par. 1 TFUE, ma è anche il principio di proporzionalità (e quello di sussidiarietà, se si accoglie la tesi da noi sostenuta), di cui all'art.

5 TUE, ad imporre al legislatore UE la ricerca di un 'giusto' equilibrio tra centralizzazione e decentramento.

Quindi, il 'giusto' equilibrio, anche quello richiesto dal diritto costituzionale, è determinato principalmente da considerazioni di carattere, di nuovo, operative, ossia da considerazioni di efficacia e di efficienza, in termini sia di buon funzionamento del sistema di vigilanza, sia di uniforme applicazione delle regole prudenziali. Esigenze di centralizzare ed esigenze di decentrare sono perciò allo stesso tempo esigenze operative e normative.

In terzo luogo, la ripartizione dei compiti di vigilanza prudenziale tra centro e periferia è difficile per la natura complessa di tale attività. La complessità della vigilanza prudenziale, diretta a gestire il rischio di instabilità bancaria e sistemica, deriva anzitutto dal forte grado di eterogeneità e diversità che contraddistingue le banche, le economie nazionali e i sistemi di vigilanza nazionali in seno all'UE. Più in profondità, la complessità deriva sostanzialmente dall'incertezza di fondo, diffusa e mai risolta, circa la 'localizzazione' precisa delle minacce alla stabilità finanziaria. Le cause della complessità, in termini di eterogeneità, diversità e incertezza, trovano espressione nella normativa disciplinante il Meccanismo. Possiamo evidenziare almeno quattro esempi.

Per quanto riguarda il primo esempio, il legislatore UE prevede l'obbligo in capo alla BCE di tenere «in debita considerazione le diverse tipologie, i modelli societari e le dimensioni degli enti creditizi» nell'assolvere i compiti attribuitile dal Regolamento MVU (art. 1, c. 3, Regolamento MVU).

Per quanto riguarda il secondo esempio, gli stessi criteri previsti per la classificazione di una banca come «significativa» o «meno significativa» fanno perno su elementi di natura diversa, quali le dimensioni della banca, la sua importanza per l'economia dell'Unione o per l'economia di uno degli Stati membri partecipanti, le sue attività e passività transfrontaliere, il valore delle sue attività, il rapporto tra le sue attività totali e il PIL dello Stato membro in cui è stabilita, il suo stato patrimoniale, l'aver stabilito filiazioni in più Stati membri partecipanti, l'aver ricevuto assistenza finanziaria pubblica dal FESF o dal MES, essere tra i tre enti creditizi 'più significativi' di uno Stato. È evidente che le considerazioni che determinano quale autorità (BCE o ANC) debba svolgere la vigilanza diretta su una specifica banca sono molteplici, corrispondenti alla molteplicità di minacce al raggiungimento degli obiettivi perseguiti con la costituzione del Meccanismo. Minacce che possono avere origini diverse, riconducibili, per esempio, alla dimensione della banca, all'incapacità delle autorità nazionali di vigilare l'attività bancaria a carattere transnazionale, e/o ai rapporti 'politici' troppo stretti tra autorità nazionale e le banche più grandi di tale Paese.

Ai fini della nostra analisi è importante sottolineare che alla luce più ampiamente della ripartizione dei compiti di vigilanza tra la BCE e le ANC, i fattori decisivi per stabilire quale autorità di vigilanza è competente a vigilare una determinata banca, sono vari. Possono essere caratteristiche 'interne' della singola banca (es. il totale delle sue attività superiore a 30 miliardi di euro), oppure può essere il rapporto tra la banca e il contesto economico (nazionale o europeo) in cui la singola banca si trova ad operare (es. rapporto tra le attività totali della banca e il PIL dello Stato membro), oppure ancora può essere il rapporto tra la banca e le altre banche dello stesso Stato membro (es. le tre banche comunque più significative di ogni paese ricadono nella vigilanza diretta della BCE). Inoltre, un fattore decisivo può la stessa autorità nazionale di vigilanza (es. se essa è giudicata incapace di garantire l'applicazione coerente di standard di vigilanza elevati) [6]. In sintesi quindi una banca può essere soggetta alla vigilanza BCE o a quella nazionale più in conseguenza del contesto generale entro il quale essa opera, piuttosto che in base a caratteristiche 'interne' specifiche della singola banca. Questa considerazione è ben esplicativa del grado di complessità che le decisioni di vigilanza finanziaria, a partire da quella che suddivide i relativi compiti tra istituzioni diverse, comportano.

Il terzo esempio di norme che esprimono la complessità della vigilanza prudenziale riguarda l'incertezza di dove e quando una minaccia alla stabilità finanziaria può concretizzarsi. Al considerando 16 del Regolamento MVU, dopo aver sottolineato la necessità di fare particolarmente attenzione alle banche di grandi dimensioni (e questa necessità si riflette in molti dei criteri di ripartizione dei compiti previsti all'art. 6, Regolamento MVU) in quanto la loro «sicurezza e stabilità sono essenziali per assicurare la stabilità del sistema finanziario», il legislatore UE mette in evidenzia che «d'esperienza recente insegna che anche enti creditizi più piccoli possono minacciare la stabilità finanziaria», e che per questo è «opportuno che la BCE possa esercitare i compiti di vigilanza su tutti gli enti creditizi autorizzati negli Stati membri partecipanti e le succursali ivi stabilite».

Anche il quarto esempio concerne l'incertezza delle minacce alla stabilità finanziaria; ed è un esempio strettamente legato alla questione giuridica principale sollevata nella sentenza *Landeskreditbank*. Si tratta della previsione, di cui all'art. 6, par. 5, lett. b), Regolamento MVU, della possibilità che la BCE possa decidere in qualsiasi momento, di propria iniziativa dopo essersi consultata con le autorità competenti o su richiesta di un'autorità nazionale competente, di esercitare direttamente tutti i pertinenti poteri per uno o più enti creditizi di cui al par. 4. Tale potere discrezionale è esercitabile «allorché necessario per garantire l'applicazione coerente di standard di vigilanza elevata».

Così come quelle previste dal medesimo articolo, al par. 4, c. 2 e 5, in caso rispettivamente di «particolari circostanze da specificare» e di «circostanze particolari», anche quella di cui al suddetto par. 5 è una 'clausola di elasticità' pensata per accrescere il grado di articolazione e quindi di elasticità possibile del Meccanismo. Mediante tale clausola si vuole dotare il Meccanismo di un sistema di allocazione dei compiti tra BCE e ANC che sia capace di adeguarsi ad un contesto per definizione mutevole ed eterogeneo, così da poter gestire l'imprevedibilità, l'incertezza, e più ampiamente la difficoltà della vigilanza bancaria, a essa connaturale, ma ancora maggiore in un sistema di controllo basato su due livelli,

[6] Art. 6, par. 5, lett. b), Regolamento MVU.

UE e nazionale. Merita evidenziare che l'elasticità discende in gran parte dagli spazi di discrezionalità attribuiti alla BCE dalla clausola. Nella clausola di cui al par. 5 suddetto, è infatti rimessa alla BCE la responsabilità e il potere, una volta verificata la sussistenza del requisito di necessità, e di decidere se avocare o no a sé la vigilanza diretta sulla banca meno significativa.

Come accennato, è una 'clausola di elasticità' anche la norma di cui all'art. 6, par. 4, c. 2 e 5, Regolamento MVU. Siamo così giunti a collegare l'analisi della difficoltà e complessità della vigilanza finanziaria e quindi della ripartizione dei compiti di vigilanza tra BCE e ANC al tema principale affrontato nella sentenza *Landeskreditbank*. Crediamo, infatti, che solo nella cornice di tale analisi, la questione interpretativa delle «circostanze particolari» e della «non appropriatezza» di cui all'art. 70, par. 1, Regolamento quadro, può essere correttamente affrontata.

La disposizione di cui all'art. 6, par. 4, c. 2, Regolamento MVU, prevede che la clausola di elasticità delle «circostanze particolari» sia specificata. L'art. 70, par. 1, Regolamento quadro contiene tale specificazione. Il Tribunale nella sentenza in questione è stato chiamato a chiarire proprio il significato di tale specificazione. A differenza di quanto previsto dalla clausola di elasticità di cui all'art. 6, par. 5, lett. b), Regolamento MVU, la BCE non ha la libertà di decidere se esercitare o meno il potere di riclassificare una banca. Vi è quindi un'unica condizione: la non appropriatezza della vigilanza della BCE su tale banca specifica, a causa di circostanze particolari. In presenza di tale condizione, la BCE è obbligata a classificare la banca come non significativa. In questo caso, l'elasticità della clausola, e quindi del sistema di ripartizione dei compiti, discende interamente dalla condizione di «appropriatezza» o «non appropriatezza» della qualificazione di un soggetto come significativo, e di conseguenza della vigilanza diretta della BCE.

Merita evidenziare che sebbene imperniata su un'unica condizione, la clausola di elasticità in questione riflette bene le difficoltà e le complessità sopra già accennate. La valutazione di «non appropriatezza», infatti, non può essere effettuata facendo ricorso ad un unico parametro. La norma obbliga a tenere conto di una pluralità di elementi, e cioè «degli obiettivi e dei principi del regolamento sull'MVU, e in particolare, della necessità di garantire l'applicazione coerente di standard di vigilanza elevati». La norma è sufficientemente ampia da rendere possibile, almeno in linea di principio, una molteplicità di applicazioni, accrescendo così la capacità del Meccanismo di adeguarsi alle variabili intrinseche nella vigilanza prudenziale.

Non ci sembra tuttavia che, in riferimento al caso *Landeskreditbank*, né l'interpretazione sostenuta dalla ricorrente, né quella sostenuta dalla BCE e dal Tribunale, siano tra quelle legittimamente deducibili dal testo della norma e dal contesto normativo del Meccanismo. Per i motivi che spiegheremo, inoltre nessuna delle due interpretazioni va nel senso di contribuire a salvaguardare il buon funzionamento del sistema di ripartizione dei compiti in seno al Meccanismo.

L'interpretazione sostenuta dalla *Landeskreditbank* fa coincidere il requisito di «appropriatezza» con quello di «necessità» (di cui al principio di proporzionalità e a quello di sussidiarietà). Tuttavia, come ha condivisibilmente argomentato il Tribunale, non è possibile obbligare la qualificazione di «meno significativo» ad una banca quando la vigilanza diretta della BCE non è necessaria in quanto esercitabile altrettanto efficacemente dalle autorità nazionali. L'art. 70 Regolamento quadro non può essere interpretato nel senso che la BCE possa vigilare direttamente le banche che soddisfano i criteri di cui all'art. 6, par. 4, Regolamento MVU, solo nel caso in cui l'obiettivo della stabilità finanziaria non possa essere conseguito in misura sufficiente anche dalle autorità nazionali (sussidiarietà), facendo così rimanere l'azione della BCE nei limiti di quanto necessario al perseguimento degli obiettivi perseguiti (proporzionalità). Per stabilire se non classificare un soggetto come significativo, il Regolamento quadro infatti prevede una disciplina differente, e in particolare un criterio giuridico differente rispetto a quello di necessità derivante dai principi di sussidiarietà e di proporzionalità.

Come correttamente rilevato dal Tribunale (in riferimento al principio di proporzionalità, ma secondo noi pertinente anche in relazione al principio di sussidiarietà), l'art. 70, par. 1, Regolamento quadro non prevede il criterio della «non necessità», ma quello della «non appropriatezza», in funzione degli obiettivi e dei principi del regolamento MVU e, in particolare, della necessità di garantire l'applicazione coerente di standard di vigilanza elevati.

È soprattutto da un'interpretazione sistematica della norma che riteniamo che si debba escludere il criterio di necessità (derivante dalla proporzionalità e dalla sussidiarietà) dalla valutazione delle «circostanze particolari» di cui al citato art. 70, par. 1. L'ipotesi di cui all'art. 70 Regolamento quadro costituisce uno dei tasselli di cui è composto il funzionamento del Meccanismo di vigilanza unico. Nella costruzione di tale Meccanismo, il Consiglio (Regolamento MVU) – coadiuvato dalla BCE (Regolamento quadro) – già tiene conto dell'obbligo di osservare le esigenze di necessità di cui ai suddetti principi costituzionali. Il bilanciamento tra il perseguimento della stabilità finanziaria con l'esigenza di non eccedere i limiti di quanto necessario per raggiungere tale obiettivo (es. in termini di compressione delle competenze nazionali in materia di vigilanza prudenziale), è già stato affrontato a livello normativo, e non può essere rimesso in discussione caso per caso dalla BCE nell'esercizio dei suoi poteri di vigilanza. Come già riportato, il Tribunale parla a questo proposito di «equilibrio» raggiunto nel Regolamento MVU tra l'efficacia del Meccanismo e il mantenimento di un certo ruolo degli Stati membri nell'attuazione del diritto UE ai sensi dell'art. 291 TFUE[7].

Tale equilibrio è basato, in primo luogo, sulla previsione di precisi criteri alternativi (art. 6, par. 4, Regolamento MVU) che determinano la qualificazione di un ente creditizio come «significativo». È un equilibrio che si fonda, come precisato dall'avvocato generale nelle sue conclusioni[8], sulla presunzione

[7] Sentenza *Landeskreditbank*, cit., punto 75.
[8] Sentenza *Landeskreditbank*, cit., punto 36.

che qualsiasi ente bancario che soddisfa uno qualsiasi dei requisiti di cui all'art. 6, par. 4, c. 2, Regolamento MVU, è considerato come «significativo», rendendo così appropriata la vigilanza diretta della BCE.

L'equilibrio è basato, in secondo luogo, sullo spazio lasciato comunque alle autorità nazionali nel quadro del Meccanismo. Da un lato la competenza esclusiva (nel senso, come detto, di responsabilità complessiva e controllo ultimo della vigilanza) è attribuita alla BCE perché quanto costituisce l'istituzione più adatta, in quanto banca centrale della zona euro, dotata di ampie competenze in materia macroeconomica e di stabilità finanziaria[9]. Dall'altro lato, il regolamento MVU, lungi dall'escludere gli Stati membri dallo svolgimento di compiti attribuiti alla BCE, il associa ad essi permettendo, nell'ambito del MVU e mediante il suo art. 6, par. 4 e 6, che la maggior parte dei compiti di cui all'art. 4, par. 1, siano attuati su base decentrata, nei confronti dei soggetti meno significativi[10].

Il cuore dell'argomento teso a escludere la legittimità dell'interpretazione della ricorrente è il seguente. Quello sopra delineato, sarebbe un equilibrio virtuale se si dovesse in realtà mettere in discussione ogni volta la ripartizione dei compiti e i requisiti di cui all'art. 5, par. 4, c. 2, Regolamento MVU, obbligando la BCE, malgrado la soddisfazione di uno di stessi da parte del singolo ente creditizio, a verificare caso per caso la minore efficacia della vigilanza nazionale. Secondo il Tribunale, ciò contrasterebbe con il principio secondo cui i soggetti significativi sono sottoposti alla sola supervisione della BCE, e con la previsione dei suddetti criteri ex art. 6, par. 4, Regolamento MVU[11]. Come osservato dall'avvocato generale, si pregiudicherebbe l'effetto utile della impostazione normativa adottata dal legislatore UE mediante il ricorso ai criteri suddetti[12].

L'art. 70, par. 1, Regolamento quadro, prevede indubbiamente che l'equilibrio possa essere modificato caso per caso, e quindi che la presunzione dell'appropriatezza della qualificazione possa essere ribaltata. Ma ciò, e per le ragioni appena esposte, solo in ipotesi più circoscritte rispetto a quella avanzata dalla ricorrente.

A questo proposito, però, riteniamo che l'interpretazione adottata dal Tribunale sia a sua volta troppo restrittiva. Il Tribunale, in base ad una interpretazione letterale e sistematica della norma, arriva a stabilire che la condizione di «non appropriatezza» della qualificazione è soddisfatta esclusivamente se si dimostra la maggiore efficacia della vigilanza nazionale rispetto a quella della BCE.

In primo luogo, il Tribunale fa ricorso alla giurisprudenza per chiarire il diverso significato letterale del termine «appropriato», distinguendolo da quello di necessità: «[m]entre, in linea generale, l'esame del carattere appropriato di un atto dell'Unione riguarda la sua capacità di realizzare i legittimi obiettivi perseguiti dalla normativa in questione, la valutazione del suo carattere necessario consiste nel

9 Sentenza *Landeskreditbank*, cit., punto 78 e considerando 13 del Regolamento MVU.
10 Sentenza *Landeskreditbank*, cit., punto 79.
11 Sentenza *Landeskreditbank*, cit., punto 76.
12 Conclusioni avv. gen. Hogan, *Landeskreditbank*, cit., punto 62.

verificare se esso non ecceda i limiti di quanto è necessario per raggiungere tali obiettivi […]»[13]. La BCE deve decidere se la sua vigilanza diretta è 'inappropriata', ossia incapace di realizzare tali obiettivi. Non può, invece, decidere sulla base di una valutazione di necessità della vigilanza della BCE, ossia se la vigilanza nazionale sarebbe sufficiente. Per il Tribunale, quindi, l'ipotesi della riclassificazione da soggetto significativo a soggetto meno significativo è solo una, quella della minore capacità della BCE rispetto alla vigilanza nazionale. Quindi, l'art. 70, par. 1, Regolamento quadro deve essere interpretato nel senso che le «circostanze particolari» sussistono solo ove la vigilanza prudenziale diretta da parte della BCE sarebbe «meno in grado di conseguire gli obiettivi del [Regolamento MVU] rispetto all'esercizio di una vigilanza diretta […] da parte delle autorità nazionali»[14]. Il Tribunale continua sostenendo che un'interpretazione letterale della medesima disposizione non permette una lettura diversa, che cioè includa la riclassificazione nelle «circostanze particolari» anche nell'ipotesi di non stretta necessità della vigilanza della BCE, ossia ove «una vigilanza diretta da parte delle autorità nazionali nell'ambito del MVU sarebbe in grado di realizzare gli obiettivi del Regolamento MVU allo stesso modo di una vigilanza esercitata dalla sola BCE»[15].

Come già accennato, riteniamo troppo restrittiva l'interpretazione del Tribunale. In particolare non ci sembra conforme alla complessità di cui l'art. 70, par. 1, Regolamento quadro, richiede che si tenga conto, includendo un'ulteriore clausola di elasticità nel sistema di ripartizione dei compiti di vigilanza prudenziale. La condizione imposta dal Tribunale di dimostrare che l'ANC di riferimento è più efficace della BCE nel vigilare una determinata banca altrimenti qualificabile come «significativa», ci sembra realisticamente molto difficile da soddisfare. Basti pensare all'obiettivo messo in evidenza dalla stessa norma, ossia quello di «garantire l'applicazione coerente di standard di vigilanza elevati». Riferito all'esigenza che le norme bancarie UE siano uniformemente applicate in tutti gli Stati membri, ci è difficile immaginare un'ipotesi in cui la BCE sia meno capace dell'autorità nazionale di garantire un *level playing field* normativo tra banche di diversi Paesi. Di conseguenza, quindi, anche l'interpretazione del Tribunale rischia di privare di ogni effetto utile la clausola di elasticità di cui all'art. 70, par. 1, Regolamento quadro.

[13] Sentenza *Landeskreditbank*, cit., punto 45, citando Corte giust., 16 giugno 2015, causa C-62/14, *Peter Gauweiler e a.* c. *Deutscher Bundestag*, ECLI:EU:C:2015:400, punto 67 e giurisprudenza ivi citata.

[14] Sentenza *Landeskreditbank*, cit., punto 46.

[15] Sentenza *Landeskreditbank*, cit., punto 46.

Cross-border Collective Redress and the Jurisdictional Regime: Horizontal vs Sectoral Approach

Cinzia Peraro

Abstract

In the context of private enforcement, collective redress is assuming an important role at European Union level as a procedural means to protect collective interests. Legislative developments show a twofold approach: a horizontal framework with common principles has been proposed, though with non-binding nature, and sector-specific legislation has introduced collective redress procedures mainly for consumers. However, also in other fields it shall be a viable procedural remedy, such as in the employment context. Rarely, the Court of Justice addressed collective proceedings and private international law issues, mainly related to the jurisdictional regime. Cross-border situations are not specifically addressed in the relevant Regulations, neither among the common principles or in the specific legislation. An exception is the reference to the extension of the application of the existing Regulations included in the Proposal on representative actions for consumer protection. The horizontal and sectoral approaches, including the applicability of the existing private international law rules, particularly on jurisdiction, are thus debated.

Key words

Cross-border collective redress, horizontal approach, sectoral approach, jurisdiction

Cross-border Collective Redress and the Jurisdictional Regime: Horizontal vs Sectoral Approach*

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SUMMARY: 1. Introduction. - 2. The horizontal approach: common principles for collective redress. - 3. The sectoral approach: specific rules for collective redress in specific policies. - 4. The jurisdictional regime for cross-border collective redress. - 5. Concluding remarks.

1. Introduction.

The issue of collective redress in cross-border context is topical given the political debates, legislative developments and the controversial (few) case law of the Court of Justice, mainly about the consumer protection, where it assessed the existence of collective proceedings under national law and the applicability of the Brussels I or I *bis* Regulation[1] over such collective proceedings.

Member States' procedural laws present divergences on collective mechanisms and the absence of European rules on collective redress in general or in specific sectors requires solutions, also under a private international law perspective, whenever transnational elements characterise the dispute.

At European Union level the Commission attempted to provide a horizontal framework by establishing common principles on collective redress contained in the 2013 Recommendation[2], aimed at ensuring that collective redress and minimum procedural requirements are granted in all

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[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, now Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[2] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under EU law (2013/396/EU) [2013] OJ L201 (from now onwards: 'Recommendation on common principles').

Member States in mass harm situations[3] occurring in various sectors specifically but not exclusively dealing with the infringement of consumer rights[4].

In certain fields collective mechanisms have been introduced, such as in competition and consumer protection, where private means of enforcement to protect collective interests are regulated[5]. The sector-specific approach may however be implemented also with regard to other fields taking into account the respective specificities and with a view to offering effective means of protection to weaker parties. This could be the case of employees. Indeed, forms of collective action should be ensured in national legal orders in light of the recognition of the fundamental right to collective action (Article 28 of the Charter), implemented in general provisions in the relevant legislation on the protection of workers. Trade unions' actions may be qualified as collective redress mechanism according to the definition adopted by the Commission that determines it as a representative action.

The arising necessity to establish a European framework on collective redress as a means for an effective and efficient enforcement of rights granted under Union law stems from the mass harm situations that occurred in the last decades and are increasing in transnational context due to different factors, such as the use of internet and the free movement that facilitate trade across Europe. Consumers are mainly involved, for instance in the case of car emissions, passenger rights, financial services. However, mass cases may also regard environmental issues, antidiscrimination law, or employment matters.

The practical relevance of collective mechanisms meets the need to enhance effective protection when low value claims are hardly brought before the courts, and to reduce costs, length and complexity of cross-border litigation. Judicial collective redress does also ensure legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims.

Differences among national collective procedural mechanisms that are mostly made available to consumers[6] have a negative impact on cross-border litigation because of the divergent criteria to admissibility, legal standing, funding, fees.

[3] *Ibid*, para 1.

[4] *Ibid*, Recitals 4 and 7.

[5] See *infra* paragraph 3.

[6] See the outcomes of the 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law - Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, National Reports - Consumer Protection Strand and Strand 2 - Procedural Protection of Consumers', June 2017 and May 2018, all available at *http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847*.

A European Union action in the procedural field is thus welcome whenever it may better pursue the objectives of justice efficiency and effectiveness in order to protect rights granted under EU law across Member States. In compliance with the principle of subsidiarity, such an action must respect national legal traditions and procedural autonomy[7]. In this context, two perspectives may be identified: on the one side, the protection of national prerogatives and legal orders and, on the other side, the protection of individual rights granted under Union law.

The Commission's activities related to collective redress matters started early in the 90s aimed at understanding and assessing the national systems and the opportunity for an EU action. The documents and proposals adopted in this field can be considered in two categories based on a horizontal and sectoral approach. The two-fold approach may reflect the uncertainty in the determination of a European procedural framework, thus resulting inconsistent, as observed by stakeholders within the 2011 public consultation on a coherent European framework for collective redress[8]. In the 2013 Communication the Commission admitted that 'it adopted a balanced approach by issuing in 2013 a horizontal Recommendation and a proposal for antitrust damages actions[9] and, on the other, committed itself to take a horizontal approach on collective redress that is necessary to increase policy coherence'. In this last regard, it recognised the need to shape a European framework on collective procedural mechanism based on a horizontal approach 'in order to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules, in the interest of the functioning of the internal market'[10].

The scope of the present paper is thus to evaluate the horizontal and sectoral approaches on collective redress procedures, and the private international law issues, in particular with regard to the jurisdictional regime.

2. The horizontal approach: common principles for collective redress.

[7] On national procedural autonomy, see Maria Caterina Baruffi, 'Art. 4 TUE', in Fausto Pocar, Maria Caterina Baruffi (eds.), *Commentario breve ai Trattati dell'Unione europea* (Padova 2014), 13-24; Chiara Favilli, 'I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale' (2014) 3 Il Diritto dell'Unione europea 439, 440 f.; Burkhard Hess, 'A coherent approach to European collective redress', in Duncan Fairgrieve, Eva Lein (eds), *Extraterritoriality and collective redress* (Oxford University Press 2012) 107, 110; Giuseppe Tesauro, *Diritto dell'Unione europea* (Padova 2012), 112; Diana Urania Galetta, *L' autonomia procedurale degli stati membri dell'Unione Europea: «Paradise Lost?»* (Giappichelli 2009).

[8] 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 of 11 June 2013 (from now onwards: 'Commission Communication'), 5.

[9] *Ibid*, 4, fn. 10.

[10] *Ibid*, 16, para 4.

Collective redress, as a procedural mechanism that facilitates access to justice, improves justice efficiency and strengthens the power to act, has been addressed in certain legislative acts related to antitrust and consumer law and, lately, as a general procedural means of private enforcement in non-legislative initiatives to be applied in any areas where collective claims in case of violations of the rights granted under Union law would be relevant[11]. These initiatives rely on the horizontal approach adopted by the Commission with a view to establishing a coherent framework applicable in various sectors.

Based on the Information Note of 2010 on the need for a coherent European approach to collective redress[12], the Commission promoted a series of initiatives aimed at assessing the opportunity to submit a legislative proposal on collective redress in the EU.

In 2011 the Commission carried out a public consultation 'Towards a coherent European approach to collective redress' with the purpose of identifying common legal principles on collective redress and evaluating the fields in which the different forms of collective redress could have an added value for better protecting the rights of EU citizens and businesses, and for improving the enforcement of EU law.

The European Parliament contributed to the debate by adopting the 2012 Resolution based on a comprehensive own-initiative report on collective redress[13]. It determined various aspects of collective redress and specified that such 'legally binding horizontal framework must cover the core aspects of obtaining damages collectively', and that 'procedural and international private law issues must apply to collective actions in general irrespective of the sector concerned'[14]. It clearly recognised that 'in the European area of justice, citizens and companies must not only enjoy rights, but must also be able to enforce those rights effectively and efficiently'[15].

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[11] Recommendation on common principles cit., Recital 7.

[12] Towards a Coherent European Approach to Collective Redress: Next Steps, Joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, SEC(2010)1192 of 5 October 2010.

[13] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI) (from now onwards: 'European Parliament resolution'). It called the Commission to propose legislation on a harmonised system of collective redress for EU consumers also in the Recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP), P8_TA(2017)0100).

[14] *Ibid*, point 17, where it added that 'while a limited number of rules relevant to consumer protection or competition law, dealing with matters such as the potential binding effect of decisions adopted by national competition authorities, could be laid down, for instance, in separate articles or chapters of the horizontal instrument itself or in separate legal instruments in parallel or subsequent to the adoption of the horizontal instrument'.

[15] *Ibid*, letter A.

Effectiveness was then emphasised in the 2013 Communication of the Commission, which reported the main findings of the public consultation launched in 2011 and addressed some central issues regarding collective redress[16].

Taking into account common features of national collective systems, it first defined the collective redress as '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'[17].

To this effect, the Commission called upon the Member States to follow its 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under EU law[18]. This was based on the consideration that collective redress is aimed 'to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend 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 abuse'[19]. Indeed, thanks to a horizontal approach the alignment of national systems on some central issues regarding collective redress may be better achieved. Such principles should be common across the EU in order to 'ensure that fundamental procedural rights of the parties are preserved and to prevent abuse through appropriate safeguards'[20].

Briefly, the Recommendation lays down principles common to injunctive and compensatory collective redress, followed by more principles specifically applicable to each individual category[21]. These principles are supposed to represent the 'minimum standards' that

[16] Commission Communication (n 8).

[17] *Ibid*, 4.

[18] Recommendation on common principles cit. In the present analysis attention is paid only to the concept of collective redress as a procedural means for the protection of rights in court proceedings, therefore no reference is made to collective out-of-court settlements, that are even covered by the Recommendation. On the policy process that led to the Recommendation, see Alexandre Biard, 'Collective redress in the EU: a rainbow behind the clouds?' (2018) ERA Forum; Christopher Hodges, Stefan Voet, *Delivering Collective Redress. New Technologies* (Hart Publishing 2018) 20 ff.

[19] Recommendation on common principles cit., Recital 10.

[20] *Ibid*, Recital 13.

[21] The first set of common principles applicable to injunctive and compensatory collective redress deals with issues such as standing, the admissibility of actions, adequate information for potential claimants, funding of collective actions, and the application of the 'loser pays' principle to the costs of lawsuits (paragraphs 4 to 18). In relation to the injunctive procedure, it is recommended that the Member States

Member States are encouraged to apply in the national legislation governing collective procedures. In the Commission's opinion, compliance with these standards would improve the judicial protection offered to group rights by means of procedures that are 'fair, equitable, timely, and not prohibitively expensive'[22].

In the Recommendation, under paragraph 3, collective redress is defined as '(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)'. Then, in paragraph 4, collective redress is conceived as a representative action, because standing to sue is granted only to the representative entities identified in advance by Member States or to the public authorities: both shall act on behalf of a group of individuals (or legal persons) equally affected by unlawful acts performed by the same defendant.

Collective redress is thus considered as an instrumental means of furthering economic and social objectives[23]. It constitutes a procedural tool that encourages injured individuals to claim the respect of their rights and ensures that courts will be able to manage mass actions effectively and in a reasonable timeframe. Among national systems, the terminology[24] may vary and the definition offered by the Commission clarifies the nature and the aims of this procedural mechanism to be commonly accepted.

Focusing on the Recommendation, the fact that it is a non-binding act based on Article 292 TFEU, containing common principles and guidelines for injunctive and compensatory collective mechanisms, has been criticised[25] due to its limited practical influence in improving

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ensure expedient procedures and appropriate sanctions (paragraphs 19-20). For compensatory redress, other features are proposed, such as the constitution of the claimant party on the basis of express consent (opt-in principle), the recourse to alternative dispute resolution and settlements, limits on lawyers' fees, the prohibition of overcompensation and punitive damages, and the coordination with public enforcement proceedings (paragraphs 21 to 34).

[22] Recommendation on common principles cit., paragraph 2.

[23] Rebecca Money-Kyrle, 'Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?', in Burkhard Hess, Maria Bergström, Eva Storskrubb (eds.), *EU Civil Justice. Current issues and Future Outlook* (Hart Publishing 2016) 223, 231.

[24] For comments on the terminology, see Favilli (n 7) 448 f.; Rebecca Money-Kyrle, Christopher Hodges, 'European Collective Action: Towards Coherence?' (2012) 19, 4 Maastricht Journal of European and Comparative Law 477, 479 ff.

[25] See Burkhard Hess, 'The Role of Procedural Law in the Governance of Enforcement in Europe', in Hans-Wolfgang Micklitz, Andrea Wechsler (eds), *The Transformation of Enforcement. European Economic Law in Global Perspective* (Hart Publishing 2016) 343, 350, where the Author commented: 'Neither minimum procedural standards of collective actions, nor a maximum harmonisation have been proposed. The

effectiveness[26] and thus concretely interfering with national justice systems. The Commission clearly affirmed and repeated throughout the Recommendation that the legal systems and traditions of the Member States must be respected[27] and that the common principles should be integrated in the existing national legal systems. In any case, the flexibility of the principles and the discretion upon Member States to provide exceptions may increase the heterogeneity across national mechanisms[28]. Even if the Recommendation is not legislative, on the one hand, it is a first (welcome) initiative suggesting a horizontal harmonisation of a selected area of civil procedure, i.e. collective mechanisms, for private enforcement in various EU fields. On the other hand, however, in case Member States do not provide for effective remedies, they may violate other duties enshrined in the Treaties, such as under Article 19 TEU and Article 47 of the Charter, which require them to provide access to justice[29].

Collective procedures are deemed to be a viable means of protection favouring (mostly) the weaker parties, although no express reference (to categories of weaker parties, except for consumers) is made in the Communication or in the Recommendation of the Commission. The scope of application of the common principles enshrined in the Recommendation is determined in its Recital 7, according to which 'amongst [the] areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection'. Nonetheless, the horizontal application of the common principles may cover 'any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant'[30]. Cases involving differences between the victims and the actor, such as a violation of human rights[31] or employment terms and conditions may thus be governed. Such finding also follows from paragraph 1, that refers generally to 'mass harm situations caused by violations of rights granted under Union law'.

Recommendation and the Communication of the Commission appear as a kind of 'position paper' in an on-going political discussion'.

26 Iris Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) 41, 3 Legal Issues of Economic Integration 243, 252 ff.

27 Cf. Recommendation on common principles cit., Recitals 10 and 13, para 2, as already claimed by the European Parliament Resolution cit. (point 16).

28 Biard (n 18) para 1.1.

29 Favilli (n 7) 453 f.

30 See also Xandra E. Kramer, 'Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure' (2011) 2 International Journal of Procedural Law 202, 228, where the Author noted that 'The recent legislative action in the area of collective redress may also offer a valuable contribution to a uniform recovery of (probably both domestic and cross-border) claims'.

31 Favilli (n 7) 446. On business-related human rights abuse, see EU Agency for Fundamental Rights, *Improving access to remedy in the area of business and human rights at the EU level*, Opinion of 10 April 2017, available at *http://fra.europa.eu/en/opinion/2017/business-human-rights*.

This formula reflects the commitment of the Commission to rely on a horizontal approach in establishing a common European framework on collective redress with a broad scope.

In case of transnational implications, two paragraphs (17 and 18) of the Recommendation concern cross-border situations by proposing the mutual recognition of representative entities officially designated in the Member States, i.e. the *lex fori* may not limit the power conferred to the representative entity under its *lex causae*. This principle is meant to assure the possibility of the representative entity to act across border; however, the Recommendation does not provide sufficient clarifications on private international law issues to solve transnational cases[32].

Overall, the principles do not attempt to affect the national procedural autonomy and pursue the objective of offering a (first) solution to the divergences among Member States' systems. The reason to invite Member States to adopt common principles governing collective mechanisms consists in the need to align their procedural systems so that thanks to similar requirements access to justice and enforcement of EU law would be improved.

As envisaged under paragraph 41 of the Recommendation, the Commission published on 25 January 2018 the Report on its implementation[33]. According to the outcomes of the questionnaire and the assessment studies[34], the impact of the Recommendation has been limited and the legislative activities promoted in few Member States mostly related only to consumer matters. Divergences still remain in terms of the availability of collective redress procedures and of their nature (injunctive or compensatory) and, where such means exist, difficulties are linked to the complexity and length of the proceedings and the restrictive criteria on admissibility[35]. Certainly, national political realities and policy-making have influenced the legislative development.

The adoption of common principles may indeed facilitate the alignment of national systems governing collective procedures, and thus have positive outcomes, while respecting the national procedural autonomy. The EU may intervene in the civil procedure field whenever a European action may better pursue the objectives of justice efficiency and effectiveness in order to protect rights granted under EU law. Similar to the legal basis of the existing sector-specific acts, the adoption of a legislative framework providing for a horizontal approach may be based on

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32 Biard (n 18) para 1.1. See *infra*, paragraph 4.

33 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation 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), COM(2018)40 final of 25 January 2018 (from now onwards: 'Report on the implementation of the common principles').

34 State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation, JUST/2016/JCOO/FW/CIVI/0099, prepared by The British Institute of International and Comparative Law, November 2017, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847; and 'An evaluation study' (n 6).

35 Report on the implementation of the common principles cit., 3-4.

Article 114 TFEU aimed at approximating the national provisions on collective procedures, which allows, on the one hand, to safeguarding national priorities and sovereignty and, on the other, harmonising the different legal systems[36].

However, another remark on the Recommendation concerns its doubtful applicability to transnational disputes. In other words, the Commission invited Member States to implement these principles in their legal order; whereas no reference is made to cross-border-related issues, apart from the two paragraphs on the mutual recognition of foreign representative entities. Even if uniformity will be achieved with the implementation of common procedural principles, private international law issues still remain in the absence of European rules.

In the optimistic scenario where all Member States did fully implement the Recommendation, it could have been asserted that having similar conditions on collective mechanisms, their harmonisation would have been facilitated, especially the circulation of decisions. However, in the negative reality, according to the 2018 Report on the implementation of the 2013 Recommendation, not so many legislative developments have been enacted and only few progresses have been registered. This demonstrates that the harmonisation has not yet been achieved.

All these findings may be considered by the Commission with a view to developing further initiatives. On the one side, difficulties and inactive behaviours of some Member States may not be basically justified because the proposed principles summarised the existing national legal traditions by identifying common minimum procedural guarantees. Therefore, such principles could result in an added value to the national systems, granting similar standards across all EU Member States and facilitating litigation when moving across border. On the other side, the Recommendation consisted in a first step towards the adoption of legislative proposals and thus a motion for raising awareness at national level about the need to comply with certain standards in collective proceedings.

The horizontal approach adopted by the Commission with the abovementioned initiatives is certainly welcome because it pursued the objective of effectively providing common requirements for collective mechanisms as a transversal instrument irrespective of the sector concerned. It is nevertheless true that having regard to the majority of the national legal orders such collective systems are (at the moment) made available for specific fields, such as consumer protection and antitrust law, also because the respective legislation transpose EU directives. This

[36] See Hess (n 7) 111; Gerhard Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives', in Xandra E. Kramer, C.H. van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 93, 107.

is linked to the fact that it is more likely in these sectors that mass harm situations occur, and individuals are able to act collectively, mainly through representative actions.

In light of the above, the adoption of a horizontal European framework on collective redress may meet the need to provide similar minimum requirements and avoid procedural difficulties in collective litigation. However, the peculiarities that characterise certain sectors may be undermined, and specific rules should be introduced in the respective legislation.

3. The sectoral approach: specific rules for collective redress in specific policies.

Provisions on collective redress as a private enforcement means are included in certain legislative acts concerning antitrust law and consumer protection, whose adoption was promoted by the Commission with the aim of ensuring access to justice to protect collective interests.

A series of initiatives of the Commission has addressed the need to provide consumers with effective remedies since 1993 with the publication of the Green Paper on access of consumers to justice, in which national systems for the protection of collective interests and the related difficulties were assessed[37]. After the entry into force of the Treaty of Amsterdam, binding measures to promote access to justice were enacted, including the first Injunctions Directive of 1998[38], which was aimed at the approximation of national laws by establishing a common procedure to allow qualified entities to bring injunctive actions in order to stop unlawful practices that harm collective interests of consumers anywhere in the EU. The debate on effective protection and collective redress mechanisms has intensified since the adoption of the Consumer Policy Strategy for 2007-2013[39]. In November 2008, the Commission published the Green Paper on Consumer Collective Redress[40], where it proposed possible future actions on collective procedures to be undertaken with a view to providing concrete and effective solution at EU level for the protection of collective interests, including injunctive as well as compensatory measures. The proposal was welcomed by the European Parliament[41], which deemed that collective redress, as a means to facilitate access to justice, is also an important deterrent to unlawful practices[42]. Then,

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[37] Green Paper Access of consumers to justice and the settlement of consumer disputes in the Single Market, COM(93)576 final of 16 November 1993.

[38] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, in *OJ* L 166 of 11 June 1998, pp. 51-55. See Benöhr (n 26) 248 ff.

[39] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013, Empowering consumers, enhancing their welfare, effectively protecting them*, COM(2007)99 final of 13 March 2007.

[40] Green Paper on Consumer Collective Redress, COM(2008)794 final of 27 November 2008.

[41] European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), P6_TA(2009)0187, spec. point 4.

[42] *Ibid.*

the Directive on injunctions adopted in 2009, replacing the former, still does not allow collective redress for damages, which would compensate consumers for the harm or loss they have suffered[43].

The institutions have engaged in many reflections about the legal context of collective actions in the EU, where the need of claimants to access to justice and the risk of litigation abuse must be balanced[44]. The common starting point is the need to protect the fundamental rights, which is an objective that the EU law must pursue.

Similarly, remedies in antitrust law were addressed by the Commission starting with the Green Paper of 2005, in which it identified the obstacles to a more efficient system for bringing claims and proposed options for problem solving to benefit consumers, as well as to improve the enforcement of antitrust law[45]. The Commission indeed recognised that it was unlikely that small claims by consumers or purchasers would be initiated, and that collective actions consolidating a large number of smaller claims into one action, thereby saving time and money, could better protect their interests[46]. As a follow up[47], the European Parliament, assuming private actions to be complementary to and compatible with public enforcement[48], stressed that 'in the interests of justice and for reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organisations whose statutes have this as their object'[49].

The findings in the 2005 Green Paper demonstrated that the obstacles to enforcement arose from the various legal and procedural rules of the Member States governing actions for antitrust damages before the national courts. The main problem was legal uncertainty. Thus, in the following White Paper of 2008 on damages actions for breach of the EU antitrust rules, the

[43] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L110/30.

[44] On the relevant developments see, *inter alia*, Thijs Bosters, *Collective Redress and Private International Law in the EU* (T.M.C. Asser Press 2017), 241 ff.; Favilli (n 7) 443 ff.; Lukasz Gorywoda, 'The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and its Main Features', in Arnaud Nuyts, Nikitas E. Hatzimihail (eds.), *Cross-border Class Actions: the European Way* (Sellier European Law Publishers 2014) 59; Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A new Framework for Collective Redress in Europe* (Hart Publishing 2008) 102; and Commission Communication cit., spec. para 1.3 ff.

[45] Green Paper Damages actions for breach of the EC antitrust rules, COM(2005)672 final of 19 December 2005, accompanied by SEC(2005)1732.

[46] *Ibid*, para 2.5.

[47] European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), P6_TA(2007)0152.

[48] *Ibid*, point 6.

[49] *Ibid*, point 21.

Commission went further[50]. It proposed two collective redress mechanisms that shall be complementary, which are (i) representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; and (ii) opt-in collective actions, in which the victims expressly decide to combine their individual claims for the harm they suffered into one single action[51]. The outcomes of the consultation launched with this White Paper were considered for the development of the proposal on remedies for violations of antitrust law.

The following Directive 2014/104 on antitrust damages actions[52] provides that any natural or legal person who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm[53] through individual or collective (representative) actions[54]. However, it does not regulate procedural conditions concerning the admissibility of collective redress. Moreover, this Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU[55].

In relation to the EU competence in the field of procedural law, it must be noted that the sector-specific legislation was adopted on the basis of Article 114 TFEU, with the aim of achieving the approximation of national laws and a high level of protection of rights granted under Union law to contribute to the proper functioning of the internal market.

Against this context, the Commission has promoted studies and initiatives concerning in general the procedural means of collective redress, as the Communication and the Recommendation of 2013 described above under the horizontal approach analysis[56]. It appears that the Commission tried, in those fields where legislation on collective actions already exist, to further develop the procedural mechanisms, also in light of the evolving scenario of the internal market due to the increasing transnational commercial activities, and, at the same time, to propose

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50 White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 final of 2 April 2008, accompanied by SEC(2008)404, SEC(2008)405, SEC(2008)406. See also the impact assessment of group litigation in Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report, 21 December 2007, p. 268 ff., available at *http://ec.europa.eu*; Tiffany Chieu, 'Class Actions in the European Union?: Importing Lessons Learned from The United States' experience into European Community Competition Law' (2010) 18 Cardozo Journal of International & Comparative Law 123, 143 ff.

51 White Paper cit., section 'Standing: indirect purchasers and collective redress'.

52 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1.

53 *Ibid*, Article 1.

54 *Ibid*, Article 2(4).

55 *Ibid*, Recital 13.

56 See *supra* paragraph 2.

general principles on procedural requirements for collective redress that would facilitate and improve access to justice in different sectors.

On the basis of the outcomes of the 2018 Report on the implementation of the said Recommendation and as a follow-up to the REFIT Fitness Check of EU consumer and marketing law[57], in April 2018 the Commission submitted the Proposal for a Directive on representative actions for the protection of the collective interests of consumers[58] in the context of its 'New deal for consumers'[59]. This Proposal is aimed at defining at Union level a common framework for representative actions to ensure effective and efficient treatment of infringements of Union law arising from domestic or cross-border transactions in a variety of sectors, such as data protection, financial services, energy, telecommunications, health and the environment[60]. Contrary to the common principles set forth in the 2013 Recommendation, this Proposal only regulates certain procedural aspects of mechanisms for the protection of consumers interests[61]. Moreover, the proposed framework is not meant to replace the national systems for collective redress, but Member States are required to design the representative action set out by the Proposal as an alternative procedure or to integrate their national provisions[62].

The described legislation on procedural means aimed at ensuring effective consumer protection relies on a sectoral approach, which takes into account the peculiarities of the category and the existing legal traditions of the Member States, whose majority already provides for collective procedures in this field. Focusing on the specificities of certain policies may better pursue the assessment of the opportunity to establish collective procedures, rather than applying horizontal principles with a broad scope. Nevertheless, if this sector-specific approach is to be welcomed, on the basis of the developments in the legislative and jurisprudential context related to consumer protection, a European collective redress procedure would prove to be useful in other sensitive policy fields, as mentioned above, which could be the case of human rights violations or employment law. In respect of the latter, similar to consumer actions, collective proceedings

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57 See the Report SWD(2017)209 final of 25 May 2017.

58 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018)184 final of 11 April 2018 (from now onwards: 'Proposal on representative actions').

59 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *A New Deal for Consumers*, COM(2018)183 final of 11 April 2018, which also includes the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018)185 final.

60 Proposal on representative actions cit., Recital 6.

61 *Ibid*, 4.

62 *Ibid*, Recital 24.

involving workers usually take the form of representative actions, promoted by trade unions acting on their behalf. It is thus significant to evaluate in the context of the protection of workers' rights the application of common principles or the inclusion of specific provisions on collective redress system.

As a preliminary consideration, it must be noted that in the relevant legislation on workers there are no clear provisions on procedural means of private enforcement, but Member States are required to provide for effective remedies to seek respect for the rights granted under Union or national law, among which collective procedures may be included.

A second issue concerns the fact that workers' rights are connected to the freedom of movement of persons and the free provision of services across the EU. This connection entails a twofold consideration: on the one side, workers enjoy rights under Union law because of their freedom to move and work across border, they are entitled to claim the protection of such rights and thus, according to the relevant legislation, to bring actions, also collectively, as granted under Article 28 of the Charter; on the other side, the protection of workers' rights and their exercise may be subject to the balancing test with the economic freedoms, and as such to the primary principles governing the European integration process, where for instance the exercise of the right to collective action has been undermined vis-à-vis the freedom of establishment or to provide service[63]. Thus, in the law-making process, attention shall be paid to the need to protect the weaker parties, on the one side, and businesses' interests, on the other side.

In the EU legislation on the protection of workers, the right to collective action is stated in Directive 2014/54[64], which was adopted in the framework of the free movement for workers[65] and requires national authorities to ensure that judicial procedures are available for all EU workers in cases of discrimination or violations of EU or national law, provided that collective actions comply with national laws and practice[66]. In addition, organisations, associations, trade unions or

[63] Cf. Court of Justice (Grand Chamber), judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnad-sarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809; Court of Justice (Grand Chamber), judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

[64] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/8.

[65] The relevant rules are contained in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1, that updates (and codifies) earlier legislation on the freedom to move and work of EU citizens in another EU country.

[66] Directive 2014/54/EU cit., Article 3, paras 2-4.

other entities may represent or support EU workers and their families[67]. No specific procedural requirements are established, but only a generic clause on the respect of the right to take action is included. It is worth noting that under Recital 15 of Directive 2014/54 Member States are invited 'to examine the implementation of common principles for injunctive and compensatory collective redress mechanisms, with a view of ensuring effective legal protection, and without prejudice to the existing collective defence mechanisms available to the social partners and to national law or practice'. Such a statement is not mentioned in the Directive on antitrust damages actions, of nearly the same period, nor in the consumer legislation cited above.

The latter consideration is significant in so far as it highlights the different approaches (horizontal or sectoral) adopted by the European legislator when dealing with collective means of protection. A clear reference to the common principles set out by the 2013 Recommendation is added only in Directive 2014/54 on employment matters. For the purpose of the present analysis, it is indeed relevant that even if the employment field was not mentioned in the said Recommendation, the reference to common principles included in the respective legislation assumes that workers' collective actions may be covered by the future European collective redress framework.

Provisions on the right to collective action can then be found in the legislation concerning posted workers, that includes Directive 96/71 (amended by Directive 2018/957)[68] and the Enforcement Directive 2014/67, which complements the former with control mechanisms[69]. Collective actions are envisaged as remedies for workers that may be undertaken in judicial or extra-judicial proceedings by trade unions acting on behalf of them. In any case, except for the obligation upon Member States to ensure effective remedies, collective redress is not outlined with procedural requirements that are accordingly governed by national legislation.

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67 See Directive 2014/54/EU, Recitals Nos. 15 and 29 that ensure the possibility for entities to represent workers and the respect for the right to collective action; and Article 3 on the defence of rights.

68 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18, cf. Recital 22 and Article 1a, introduced by Directive 2018/957/EU [2018] OJ L173/16.

69 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/11, cf. Article 11: 'Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down under national law, a legitimate interest in ensuring that this Directive and Directive 96/71/EC are complied with, may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings with the objective of implementing this Directive and Directive 96/71/EC and/or enforcing the obligations under this Directive and Directive 96/71/EC'.

In conclusion, in case the sectoral approach will be further developed, the opportunity to establish a collective redress procedure for workers shall also be evaluated taking into account the peculiarities of the employment field, especially those related to the increasing labour mobility and the phenomenon of posting, and specific provisions shall be included in the relevant legislation.

4. The jurisdictional regime for cross-border collective redress.

Collective redress in transnational context are not sufficiently or completely addressed both under the horizontal approach, including the 2013 Recommendation on common principles and the existing private international law Regulations, as well as in the sectoral legislation.

As to the Regulations, it can be noted that the collective dimension of the disputes was not new and subject to discussion within the review process of the Brussels I Regulation. According to the Explanatory Statement accompanying the Proposal for the recast of the Brussels I Regulation[70], the Commission acknowledged that within the preliminary public consultation specific concerns were expressed with respect to the abolition of *exequatur*, not only in defamation cases but also in collective redress proceedings[71]. It then clarified that the Proposal abolishes the *exequatur* procedure for all judgments covered by the Regulation with the exception of judgments in defamation and compensatory collective redress cases[72]. In particular, the *exequatur* procedure is maintained for judgments issued in collective 'proceedings brought by a group of claimants, a representative entity or a body acting in the public interest and which concern the compensation of harm caused by unlawful business practices to a multitude of claimants'[73]. Having ascertained the differences among Member States as to the collective mechanisms established in various areas with diverse requirements, the Commission asserted that 'the required level of trust cannot be presumed at this stage' and reported that the issue of collective redress was under discussion[74]. Finally, in the present text of the Brussels I Recast Regulation there are no provision on the recognition and enforcement of collective judgments, that are thus subject to the general principles, including the public policy exception.

As reported by the Commission in its 2013 Communication, within the 2011 public consultation on a coherent approach to collective redress in the EU, stakeholders highlighted the

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70 Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2010)748 final of 14 December 2010.

71 *Ibid*, para 2.

72 *Ibid*, para 3.1.

73 *Ibid*, para 3.1.1.

74 *Ibid*, where it recalled the initiative on a European approach to collective redress to identify which forms of collective redress could fit into the EU legal system and into the legal orders of the EU Member States.

need of European provisions tackling cross-border issues with regard to the jurisdictional rules. They suggested different solutions: the introduction of specific connecting criteria, which are the domicile of the majority of parties who claim to have been injured or the domicile of the defendant because it is easy to identify; the extension of the jurisdiction for consumer contracts to representative entities; the creation of a special panel for cross-border collective actions with the Court of Justice[75]. Such proposals however have not been included in the initiatives of the Commission.

The crucial issues about jurisdiction and applicable law were pointed out by the European Parliament in its 2012 Resolution[76]. As to the first aspect, it stressed that the horizontal framework should have laid down rules to prevent a rush to the courts (*forum* shopping) and that rules for determining jurisdiction should have taken into account the provisions of the Brussels I Regulation in order to assure a coherent European approach[77]. Finally, no response was found in the Commission's text.

In the 2013 Recommendation on common principles, paragraphs 17 and 18 concern cross-border cases by proposing the mutual recognition of representative entities officially designated in the Member States by affirming the principle of non-discrimination in the context of civil proceedings. However, the application of this (common) principle in all national legal orders does not seem to sufficiently ensure coherence and certainty in transnational litigation, because it only relates to admissibility and legal standing of the entities. There may be the case of a conflict of laws applicable to the constitution of the collective redress and to the merits, given that the competent court should assess different laws, whether on contractual or extra-contractual obligations, or the issue of *forum* shopping may be faced, which is more relevant for the purposes of the present analysis. The latter means that representative entities may look for the most suitable court to promote a collective redress, because of the procedural requirements, other than the ones implementing the 2013 European common principles, that may be more favourable. Such rush to the courts however will not comply with the respect of procedural guarantees recognised at European and national level as general principles, including the right to defence, and in contrast with the principle of legal certainty.

In particular, the mutual recognition of foreign groups and representative entities is outlined in paragraph 17, where the Commission called upon the Member States to ensure that

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[75] Commission Communication cit., 13.

[76] European Parliament resolution cit.

[77] *Ibid*, para 26. It then suggested the application of the law of the place where the majority of the victims are domiciled, without prejudice to individual claims (para 27).

foreign claimants are not excluded by the national rules on admissibility or standing[78]. These cases may occur when claimants are from several Member States, or foreign groups of claimants or representative entities originate from other national legal systems. In other words, the courts shall recognise procedural standing of foreign groups or entities granted them by the law of their State of origin. This rule is consistent with the fact that, otherwise, due to restrictive criteria provided by the legislation on *locus standi* in the State where the claim is initiated, representative organisations may be prevented from bringing actions[79]. When a diversity of requirements occurs, the public policy exception may also be invoked against the recognition of decisions issued within a collective procedure.

Under the following paragraph 18, the Commission required that any officially designated representative entity shall be permitted to seise the court in the Member State having jurisdiction to consider the mass harm situation. This complements the principle under paragraph 17 stating that the procedural requirements set forth in the *lex fori* cannot limit the power of a foreign representative entity to act before the courts of a different Member State.

In general, the principles at stake do not sufficiently address the implications under the private international law perspective because they merely relate to admissibility and legal standing of representative entities. With regard to the jurisdictional regime, the Commission affirmed that the (then) existing Brussels I Regulation 'should be fully exploited' (even though it covers individual disputes) and thus postponed the assessment of the need to introduce specific rules in light of the further experience involving cross-border cases[80].

According to the 2018 Report on the implementation of the common principles, Member States do not have general obstacles or limitations to the participation of foreign persons in group actions before their courts[81], even if the principle of the mutual recognition of the *status* of foreign representative entities is not expressly included in some legal orders, except for the provisions implementing the Injunctions Directive[82]. As marginally noted, two respondents criticised the lack of any provision regarding the applicability of the protective consumer jurisdiction rule to representative entities[83]. Such consideration is now (apparently) overcome by the 2018 proposal on representative actions for consumers.

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[78] On this issue see Bosters (n 44) 244 ff.; Astrid Stadler, 'The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues', in Eva Lein, Duncan Fairgrieve, Marta Otero Crespo, Vincent Smith (eds), *Collective Redress in Europe: Why and How?* (The British Institute of International and Comparative Law 2015) 235.

[79] Money-Kyrle (n 23) 240.

[80] Commission Communication cit., 13.

[81] Report on the implementation of the common principles cit., 10.

[82] *Ibid*, 11.

[83] *Ibid*, 11, fn. 31.

The lack of any specific provisions included in the 2013 Recommendation on jurisdiction on collective disputes with cross-border implications gives raise to difficulties, because the mutual recognition of foreign entities as a common principle does not solve the question of which is the competent court to hear the case. In addition, the existing uniform private international law rules of the relevant Regulations are not suitable for collective redress procedures. The general principles of private international law aimed at ensuring proper coordination of national systems shall be fulfilled by introducing (in the Regulations or in a European comprehensive framework) provisions that take into account the peculiarities of transnational collective proceedings.

As to the sectoral legislative framework analysed with regard to antitrust law, consumer protection, and workers, no precise provisions on jurisdiction, neither on the law applicable to the merits or on the recognition and enforcement of collective judgments are included.

Rarely, did the Court of Justice address the issue of collective redress, the jurisdictional regime and the applicability of the Brussels I Regulation with regard to consumers. In its judgment delivered in the *Schrems* case[84], the Court preliminarily assessed whether the proceedings were to be defined as a collective redress according to the national law or they consisted in other forms such as an assignment of claims or joined claims[85]. It then analysed the applicability of the protective rules on jurisdiction under the (then) Brussels I Regulation. Indeed, this Regulation (as well as Brussels I *bis*) does not contain specific rules concerning jurisdiction over cross-border collective redress in general[86] or for specific matters. This absence may thus require (i) the extension of the application of the existing grounds where similar claims should be treated in the same way as the actions falling within the scope of the Regulation, or (ii) the introduction of

[84] Court of Justice, judgment of 25 January 2018, Case C-498/16, *Maximilian Schrems* v *Facebook Ireland Limited*, EU:C:2018:37.

[85] See also Report on the implementation of the common principles cit., p. 2.

[86] Peter Mankowski, Peter Arnt Nielsen, 'Introduction to Articles 17-19', in Ulrich Magnus, Peter Mankowski (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation* (Sellier European Law Publishers, Ottoschmidt 2016) 450; on private international law issues, mainly with regard to consumers' protection, see Stefania Bariatti, 'Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale' (2011) 1 Rivista di diritto internazionale privato e processuale 19; Laura Carballo Piñeiro, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en europa* (Universidad de Santiago de Compostela 2009) 105 ff. European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), P7_TA(2010)0304, point 32, stressed that 'the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions'. Collective redress proceedings were taken into account within the Proposal for a Regulation, COM(2010)748 final, cit., mainly with regard to recognition and enforcement aspects.

specific connecting factors considering the peculiar features characterising collective proceedings[87].

Among the case law, already in the *Henkel* judgment of 2002[88], the Court clarified, in relation to the assignment of claims, that 'a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that Convention'. It also added that 'that interpretation must also apply in respect of a consumer protection organisation (…) which has brought an action as an association on behalf of consumers'[89]. An action to fall within the scope of application of the Brussels system must be of contractual nature, therefore a contractual relationship must exist between the parties of a dispute[90], and in case a consumer protection organisation acts on behalf of individuals this contractual link does not exist. It follows that consumers' special rules of jurisdiction may not be invoked by the representative organisation, or the assignee. However, the specific case regarded a non-contractual situation. The Court ruled that the preventive action submitted by the organisation in the main proceedings was covered by Article 5(3) of the Brussels Convention on jurisdiction over tort disputes because that action was aimed at preventing a trader from using terms considered unfair being it a matter related to torts and according to a broad interpretation of that Article not only damages in individual situations are included, but also 'the undermining of legal stability by the use of unfair terms which it is the task of associations (…) to prevent'[91].

The finding on the extension of the scope of the Brussels I Regulation was upheld by Advocate General Bobek in the *Schrems* case[92]. In his opinion, he addressed the question of whether the *forum actoris* of the consumer under Article 16 of the Brussels I Regulation is applicable to assignees of consumer claims that are not themselves parties to a contract[93]. First, he defined the main proceedings not to be a collective redress as alleged by the claimant, but as an assignment of claims according to the *lex fori* (Austrian law). The exclusion of the applicability of the Brussels jurisdictional rules is based on the following arguments. The wording of Articles 15 and 16 thereof

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[87] Mihail Danov, 'The Brussels I Regulation: cross-border collective redress proceedings and judgments' (2010) 6, 2 Journal of Private International Law 359, 364 ff.

[88] Court of Justice, judgment of 1 October 2002, Case C-167/00, *Verein für Konsumenteninformation* v *Karl Heinz Henkel*, EU:C:2002:555.

[89] *Ibid*, para. 33.

[90] *Ibid.*, para. 38.

[91] *Henkel*, para. 42.

[92] Opinion of Advocate General Bobek delivered on 14 November 2017, Case C-498/16, *Maximilian Schrems* v *Facebook Ireland Limited*, EU:C:2017:863.

[93] *Ibid.*, para. 77 ff.

clearly refers to the other party to a contract, and thus the special *forum* is always limited to the concrete and specific parties to the contract[94]. Interpreting Article 16 as including claims made by a consumer-assignee on the basis of consumer contracts concluded by other consumers would weaken the link between the consumer *status* and a given contract, thus producing a paradoxical result[95], and enlarge the scope of the special head of jurisdiction beyond the cases explicitly provided for by those Articles[96]. The aim of the jurisdictional rules relating to consumers is to protect a person in his capacity as a consumer to a given contract. Then, since Articles 15 and 16 are derogations from the general rule and the special rules for contracts, their interpretation must be narrow and should not be extended to include other situations[97].

The Advocate General recalled the abovementioned *Henkel* judgment and the former *Shearson Lehman Hutton* judgment[98] on the non-applicability of the special consumer jurisdiction to legal persons acting as assignees of the rights of a consumer because those legal persons (a private company and a consumers' association) were not weaker parties and were not themselves parties to the contract[99]. Furthermore, he referred to the ruling in the *CDC Hydrogen Peroxide* case of 2015[100], according to which the Court declared that in relation to Article 5, point 3 of Regulation No. 44/2001 'the transfer of claims by the initial creditor cannot, by itself, have an impact on the determination of the court having jurisdiction. As a consequence, (…) the requirement for the application of that head of jurisdiction (the location of the harmful event) must be assessed for each claim for damages independently of any subsequent assignment or consolidation'[101]. With regard to the *Schrems* case, he then argued that in the absence of any contractual relationship between the assignee and the other party to the original contract, the special consumer *fora* could not be invoked, nor could the creation of a new *forum* for the assignee-consumer be sought[102]. Contrary to what the Commission argued in its opinion with a view to protecting consumers residing within the same State, the Advocate General held that the local (internal) jurisdiction under Regulation No. 44/2001 (the competent courts are those of the place where the consumer

[94] *Ibid.*, para. 82.

[95] *Ibid.*, para. 86.

[96] *Ibid.*, para. 85.

[97] *Ibid.*, para. 88.

[98] Court of Justice, judgment of 19 January 1993, Case C-89/91, *Shearson Lehmann Hutton Inc.* v *TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, EU:C:1993:15. See also Biard (n 18) para 1.2.

[99] Opinion of Advocate General Bobek, *Schrems* (n 92), para 96.

[100] Court of Justice, judgment of 21 May 2015, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* v *Evonik Degussa GmbH and Others*, EU:C:2015:335.

[101] Opinion of Advocate General Bobek, *Schrems* (n 92), para 109.

[102] *Ibid*, para 110.

is domiciled) may not be disregarded[103] and that it even excludes the consolidation of claims of other consumers domiciled in the same country. Notwithstanding, a new special jurisdiction may be internally provided for by the national law[104]. It was then recognised that the Brussels I Regulation does not provide for specific provisions on the assignment of claims or collective redress procedures[105].

The Court delivered its judgment on 25 January 2018[106] and upheld the findings of the Advocate General. First, it agreed with the interpretation given to the notion of consumer for the purposes of social media platforms[107]. Consequently, it acknowledged the derogative nature of the special provisions related to individual contracts of employment, that must be interpreted narrowly[108] and that the necessary existence of a contractual link between the parties in the disputes serves to ensure the predictability of the *forum actoris*[109]. Second, as to the assignment of claims, in line with its previous case law, the Court held that the consumer cannot bring the assigned claims within the jurisdiction of the courts of the place of his domicile. Situations other than those provided by the Regulation cannot be included in its scope of application. Thus, 'an assignment of claims cannot provide the basis for a new specific *forum* for a consumer to whom those claims have been assigned'[110], regardless to whether the other consumers are domiciled in the same Member State, in another EU Member State or in a third country[111]. Finally, the Court did not refer to any possible *forum* for assigned claims that may be established under national law and that may nevertheless be in compliance with the objectives of the Regulation. It might have assumed that it is for the national procedural law of the courts having jurisdiction on the basis of a general (defendant's domicile) or special (consumer's domicile) ground to allow the consolidation of claims or the establishment of a collective redress procedure. From a first appraisal, the European judges seem to have limited their ruling to the referred questions by strictly interpreting the Brussels provisions, without addressing the issue of collective litigation, in particular the cross-border collective redress procedure and the related jurisdictional aspects. This presumably relies on the

[103] *Ibid*, paras 115-116.

[104] *Ibid*, para 117.

[105] *Ibid*, para 119, where the Advocate General affirmed that 'judicial legislation would be inappropriate' and, in para 123, 'the issue is too delicate and complex. It is in need of comprehensive legislation, not an isolated judicial intervention within a related but somewhat remote legislative instrument that is clearly unfit for that purpose'.

[106] Court of Justice, judgment of 25 January 2018, Case C-498/16, *Maximilian Schrems* v *Facebook Ireland Limited*, EU:C:2018:37.

[107] *Ibid*, paras 25-41.

[108] *Ibid*, para 43.

[109] *Ibid*, paras 44-46.

[110] *Ibid*, para 48.

[111] *Ibid*, para 49.

fact that, in accordance with the *lex fori*, the case in the main proceedings was not regarded as a collective redress, but as an assignment of claims, which has already been defined by the Court.

In conclusion, according to the case law, the Brussels system is not applicable in case of collective disputes, whether in the form of collective redress or assignment of claims, because the instrument is not fit for purpose.

Against this background, in the recent legislative developments related to consumers, the objective of establishing mechanisms for the protection of collective interests, and related provisions aimed at handling transnational litigation, appears to have been achieved by introducing other forms of collective proceedings, such as a collective action based on a mandate.

The case of a party acting on behalf of a number of individuals on the basis of a mandate is considered in Regulation No. 2016/679 on consumer data protection, which provides for the right to bring an action of organisations or other similar entities (not-for-profit) on behalf of other members when it is based on the data subject's mandate[112]. The wording of Article 80 may lead to consider the mandate-based action like a representative action, thus be qualified as a collective redress, even if the determination of such an action is left to national law (without recognising it as a European collective action)[113]. In particular, pursuant to said Article the representative organisation may exercise the actions set forth in Articles 77 to 79, where also specific *fora* are established. These grounds for jurisdiction prevail over the general rules contained in the Brussels Regulation pursuant to Recital 147. Accordingly, the application of the specific grounds for jurisdiction available to data subjects (individually) is extended to the actions of the representative organisation, thus resulting in a collective redress procedure as conceived in the former initiatives of the Commission, where only designated entities should have the right to act on behalf of a group of consumers.

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112 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, in particular see Recital No. 142 and Article 80. Heads of jurisdiction are provided for in Articles 77-79. See Biard (n 18) para 2.3. The question on whether Article 22 on the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question (jointly with Articles 23 and 24) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, allows public-service associations to take action against the infringer in the event of an infringement in order to safeguard the interests of consumers has been referred to the Court of Justice: see Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 26 January 2017, Case C-40/17, *Fashion ID GmbH & Co.KG* v *Verbraucherzentrale NRW eV*.

113 Rafael Amaro,Maria José Azar-Baud, Sabine Corneloup, Bénédicte Fauvarque-Cosson, *Fabienne Jault-Seseke, Collective Redress in the Member States of the European Union*, Study PE 608.829, 2018, available at *www.europarl.europa.eu/supporting-analyses*, 44.

As a concrete progress in the field of collective redress, the 2018 Proposal for a Directive on consumer representative actions represents a step forward. According to this, qualified entities are empowered to act in defence of the collective interests of consumers. This Directive introduces procedural requirements for such actions. As to cross-border cases, Article 16 affirms the mutual recognition of the *status* of the foreign representative entities, as originally proposed in the 2013 Recommendation, and, what is more significant, it clearly states the application of the existing private international law rules (on jurisdiction, recognition and enforcement of judgments and applicable law) to such representative actions, although this statement is contained in Recital 9 and not in a binding article. However, at the interpretative level, it follows that representative entities may enjoy the protective criteria established in favour of the consumers.

Finally, from a practical and the individuals' perspective, it appears that a general clause on the extension of the application of the existing private international law rules to representative entities does not enough satisfy the need of legal certainty still being unsolved the questions on jurisdiction, as well as recognition and enforcement of judgments and applicable law.

As far as the jurisdictional regime is concerned, the extension of the scope of application of the Brussels Regulation to cover collective redress is allowed when the collective disputes in the form of representative actions regard matters that fall within its scope of application. At the moment, this finding is only referred to consumers; nevertheless, it is arguable whether such a principle may be also applied analogically to other matters covered by the Regulation, relying on the fact that similar provisions thereof pursue the protection of the weaker parties, such as those on employment. Indeed, in this context, it is common to some Member States' legal orders that trade unions as representative entities acting on behalf or in support of workers are empowered to bring judicial actions[114].

Few cases involving trade unions have been addressed by the Court of Justice, mainly those concerning the exercise of the right to collective action vis-à-vis the economic freedoms or the protection of posted workers' rights. In these decisions, no question regarded the problems related to cross-border collective redress involving workers, except for the *Sähköalojen ammattiliitto* (a

[114] See Report on the implementation of the common principles cit. On trade union functions in national context see Rebecca Zahn, *New Labour Laws in Old Member States. Trade Union Responses to European Enlargement* (Cambridge University Press 2017) 17 ff.; D. Schiek, L. Oliver, C. Forde, G. Alberti, *EU Social and Labour Rights and EU Internal Market Law*, PE 563.457, September 2015, spec. p. 30 ff., available at *www.europarl.europa.eu/supporting-analyses*, noted that 'effective collective industrial action is a precondition of a functioning system of collective bargaining. However, generally wage levels and levels of employment protection are more favourable for workers where trade union representation is effective, which again depends on the scope for collective industrial action'; Jan Cremers, Martin Bulla, *Collective redress and workers' rights in the EU*, AIAS Working Paper 118, March 2012, 19 f., available at www.uva-aias.net.

Finnish trade union) case of 2015[115], where the Court was requested to determine the law applicable to the constitution and admissibility of the trade union's action in so far as it included also posted workers. The case concerned a Polish undertaking that was sued before a Finnish court by the Finnish trade union, which claimed the minimum pay in accordance with the Finnish collective agreement and with the Directive 96/71 on the posting of workers, because that collective agreement provided for more favourable conditions than those under Polish law. The dispute focused on the legal standing of the Finnish trade union and its power to represent posted (Polish) workers. In this regard, the Polish undertaking claimed the application of the law of the State of origin of the posting undertaking (Polish law), which required different conditions for the trade unions' legal standing (in particular, it prohibits the assignment of claims arising from an employment relationship), and asked for the dismissal of the action. The Court did not uphold this argument and applied the *lex fori* (Finnish law), as it was a matter for the national legislation of the court seised. Indeed, in light of Directive 96/71 and Article 47 of the Charter, the law of the State of the posting undertaking must not prevent a trade union of a different State from bringing an action before the courts of its State of origin, in which the workers are posted, in order to recover pay claims that relate to the minimum wage and have been assigned to the trade union in accordance with the law of that second State[116].

In this case the Court did not address the issue of jurisdiction because, according to the Directive on posting of workers (Article 6) and the Enforcement Directive (Article 11), the courts of the State where the workers are posted shall be competent. In particular, Article 11, paragraph 3 states the right of trade unions to lodge complaints on behalf of posted workers and, even if it is not clearly expressed, the ground of jurisdiction laid down in paragraph 1 shall also be referred to the collective proceedings on the basis of a systematic interpretation of the provisions thereof.

According to the sector-specific legislative framework and the case law of the Court of Justice, the differences in the national laws on collective redress procedures may cause difficulties in initiating proceedings, and in general in granting access to justice and effective remedies in situations with cross-border implications. The determination of the courts having jurisdiction may thus be solved by introducing provisions that (i) affirm the extension of the application of the existing rules of private international law or (ii) establish tailored connecting criteria for collective procedure. A clear rule is thus needed, whether stating a general principle or specific criteria. In

[115] Court of Justice, judgment of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spolka Akcyjna*, EU:C:2015:86.

[116] *Ibid.*, para 26. See Massimo Roccella, Tiziano Treu, *Diritto del lavoro dell'Unione europea* (Wolters Kluwer CEDAM 2016) 448 f.; Alberto Mattei, 'La Direttiva Enforcement n. 2014/67/UE e il recepimento nell'ordinamento italiano' (2017) 1, I Rivista giuridica del lavoro e della previdenza sociale 147, 156 f.

comparison with the horizontal approach analysis, new provisions shall be identified according to the specific sector, and not *in abstracto* having regard to the collective dimension of the dispute.

In respect of the latter option (rules applicable in general to collective redress irrespectively of the subject matter), as registered within the 2011 public consultation, a new (general) factor has been proposed by stakeholders that could suit for the determination of the competent court to hear the case, which is the domicile of the majority of the claimants. This may be valid whenever no representative entities act before the courts and a group of individuals wish to bring an action, that does not constitute a representative action. Nevertheless, problems may be faced as to the right to defence of the residual part of the group or are related to the possibility to have the decision recognised and enforced in their own Member States. However, in line with the Commission's arguments, in the European context representative actions may better pursue the objective of improving access to justice and offering guarantees in collective redress procedures, thus avoiding the risk of abusive litigation.

5. Concluding remarks.

The path towards the creation of a European framework on collective redress demonstrates that the harmonisation among national legal orders as far as procedural remedies are concerned requires efforts from both the European legislator and the Member States to combine principles of procedural law and national legal traditions. Although a consensus on the need to grant effective remedies and to protect individuals' rights can be stated, difficulties in developing and implementing minimum (and common) procedural requirements still remain.

The inconsistency of the approaches adopted by the Commission in providing a horizontal framework or solutions in specific sectors can be justified on the fact that the EU does not retain exclusive competence in the procedural field and the approximation of laws shall respect national legal traditions, whose divergencies represent an obstacle to achieve a high-level of uniformity.

A positive outcome in this evolving scenario on collective redress is that, as a benchmark in the relevant legislation and in the two different approaches, this procedural remedy has been conceived as a representative action, being the form that most complies with the procedural guarantees needed in judicial litigation and is present both in the 2013 Recommendation on common principles and in the recent 2018 Proposal.

On the one hand, the horizontal approach seems to be too far reaching because of the limited implementation in the national legal orders, whose divergences may still hamper an effective judicial protection. On the other hand, the sectoral approach seems to be the most feasible solution in practice that may be adopted in specific legislation and thus shaped accordingly as in the majority of Member States mechanisms of collective redress already exist in the field of consumer protection and to whose development European directives have contributed. However, as demonstrated above, collective redress should be made available in other sectors, such as in the employment context where collective litigation is not new because of the right of trade unions or other representative organisation to take collective action recognised under Union law.

As to the jurisdictional regime, in the legislation and other soft-law initiatives, no provisions tackle the issue of which court shall be competent for cross-border collective redress procedure. The application of the existing private international law rules to representative actions at the moment introduced with the 2018 Proposal implies an extension of the scope of application of the Regulations concerned. In the absence of specific provisions, such principle may also be applied analogically to collective redress relating to other fields where weaker parties are involved and may be a viable means for the protection of collective interests and enforcement of rights EU-wide.

Moreover, it can be noted that the proposed extension of the application of the existing private international law rules somehow differs from the findings in the abovementioned case law concerning consumers and assignment of claims allegedly qualified as collective action. This extension included in the 2018 Proposal could be considered as a follow-up to the few judicial interventions that dealt with issues related to collective redress. In those cases, a restrictive interpretation of the Brussels rules has been implemented due to their derogative nature from the general rule of jurisdiction. As observed by Advocate General Bobek, the issue of collective redress is 'too delicate and complex', and it calls for a comprehensive legislation, moreover an 'isolated judicial intervention' that interprets a 'remote legislative instrument that is clearly unfit for that purpose' would be inappropriate[117].

These considerations may be regarded as a motion for legislative intervention, even more needed because of the unfit existing instruments and the increasing mass situations across Europe. Future developments are then expected in relation to the legislative process regarding the 2018 Proposal on consumers representative actions as well as, at jurisdictional level, with regard to the *Fashion ID* case on data protection[118].

In conclusion, the issue of collective redress appears to be at the crossroads between a horizontal and sectoral approach, where, regardless of the adopted form, clear provisions on private international law issues to avoid risk of different and incoherent interpretations should be included.

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117 Opinion of Advocate General Bobek, *Schrems* (n 92), para 119 ff., spec. 123.

118 Case C-40/17, *Fashion ID* (n 112).