Position Paper (translation)

COM(2018) 184 final, 11.04.2018

“New Deal for Consumers”

Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

Bundesverband der Deutschen Industrie e.V.
Federation of German Industries

01.08.2018

List of contents

Core findings

After years of discussion on the introduction of European collective redress and despite strong reservations among businesses, on 11 April 2018 the European Commission presented a proposal for a directive on representative actions for the protection of the collective interests of consumers in the framework of the so-called "New Deal for Consumers". The Federation of German Industries (BDI) sets out its standpoint on the proposal in the following position paper.

Consumers are the focus of business activity. They decide on the existence and ongoing development of products and services. Accordingly, consumer satisfaction is of primordial interest for industry. And this also clearly includes the possibility to deal effectively with infringements of consumer law and consumers receiving proportionate compensation for damage they have suffered as a result of infringements.

However, the European Commission's proposals for the introduction of collective redress at European level contravene the European Union's **competence rules**, encourage the development of **a European litigation industry** and are **deeply hostile to business**. BDI rejects them in the clearest possible terms.

- The European Commission's competence to regulate must be questioned. The draft directive encroaches deeply into national civil law systems and would also apply for domestic legal disputes. Yet it is the task of the national legislator alone to create the necessary conditions for effective compensation for damage in their civil and procedural law. In recent years many Member States have made improvements in this regard and have also strengthened collective redress. In Germany, the law on introduction of a general model proceeding ("Musterfeststellungsklage") has been adopted recently. In addition, the CPC regulation (2017/2394/EU), which was only recently revised, comes into play in the case of cross-border consumer infringements.

- The draft directive is in clear contradiction with European legal traditions and central procedural fundamental rights and would encourage a European litigation industry. It would enable legal firms or third-party funders to develop a new business model through the creation of associations qualified to bring actions and the strategic choice of claimant-friendly jurisdictions. Essential safeguards such as a binding limitation of the claimant group to consumers who have given their mandate for the case to be brought ("opt-in" principle), strict eligibility criteria for qualified entities or a ban on contingency fees and third-party financing are missing – in contradiction of the European Commission's clear statements in its 2013 recommendation on collective redress. Even if the European Commission has repeatedly underlined that it does not want to introduce a U.S.-style class action: now it is creating a "European class action" whose negative consequences could markedly exceed the U.S. system.

- At no point can the "balance between the collective interests of consumers and the rights of the traders" referred to by the European Commission in the explanatory memorandum of the draft directive be recognised. The procedural level playing field is slanted one-sidedly through claimant-friendly rules on apportionment of costs and disclosure of evidence. Proposals whereby the redress would be directed to a public consumer purpose in the case of low-value awards would lead to a punishment of traders and no longer have anything to do with the proper purpose of the directive – compensation to consumers for damage suffered. In addition, multiple demands on a trader for the same damage are not ruled out.

For the reasons set out, BDI calls for a withdrawal of the European Commission's proposal for a directive. Should the European legislator decide for adoption of the directive despite strong criticism from business, perceptible improvements are necessary.

I. EU's competence to regulate exceeded

The European Commission announced this draft directive as "injunction plus" directive. Yet the scope goes well beyond an injunction and, choosing highly imprecise formulations, establishes a form of collective redress which could be invoked even in purely national cases. This clearly oversteps the European Commission's competence to regulate.

In the first place, the chosen legal basis of article 114 TFEU is questionable. This is insufficiently substantiated and would have to be taken in conjunction with article 169 TFEU if used at all. But it is generally held that the contribution of the Union to the attainment of a high level of consumer protection specified there refers first and foremost to material rights to protection of consumers' economic interests. An EU competence for the planned legislative act on collective redress is not given via these two articles. Both articles also need an impact on the Internal Market. This is the case only if the measure counteracts concrete obstacles to the fundamental freedoms or a significant distortion of competition. The Commission's proposal cannot demonstrate such impediments here. The European Commission justifies its draft directive with the assertion that European consumers are exposed to the risk of mass harm situations which cannot be dealt with because no Europe-wide uniform legal enforcement instrument is available to them. However, different legal enforcement instruments in the Member States for infringements of harmonised EU consumer law do not automatically constitute an obstacle to the harmonised single market. The European Commission fails to demonstrate such an obstacle or a considerable distortion of competition convincingly in the explanatory memorandum of the draft directive. Neither does article 169.1 and 169.2(b) TFEU serve as a legal basis since this provision comes into play only as a support or supplement to Member States' policy. But a new procedure is created with this legislative act which changes Member States' civil procedural law. At best, the only legal basis could be article 81 TFEU – but this merely gives the EU competence to regulate individual aspects of judicial cooperation in cross-border cases. However, the European Commission's proposal for a directive goes well beyond the area of judicial cooperation by providing for far-reaching changes to Member States' national procedural law, even in purely domestic configurations without a cross-border dimension. The European Union's competence for such far-reaching changes to national civil procedural law is therefore doubtful.

It is the task of national legislators alone to create the necessary conditions for effective redress in their civil and procedural law. The principles of subsidiarity and proportionality in accordance with article 5.3 and 5.4 TEU must be taken into account in relation to far-reaching changes to civil procedural law but also in relation to the derived changes to substantive law, principally in Member States' redress law. The Member States bear responsibility for adjusting national procedural law in such a way that the rights of all involved parties can be enforced rapidly. Planned European measures should always be tested against whether cross-border aspects come into play or whether national provisions are available in adequate measure.

Furthermore, the Commission would disregard the redress which can already be obtained in individual Member States if it endeavours to find a pan-European solution. Many Member States have already adopted provisions for collective redress; other Member States are in the process of bringing corresponding initiatives forward. Many of the newly introduced provisions still need to prove their worth in practice. Yet they would now be over-ridden by a new, "top-down" EU-wide system.

The law on introduction of a general model proceeding ("Musterfeststellungsklage") was adopted only recently in Germany and will enter into force in November 2018. The general model proceeding can establish the existence or non-existence of a legal situation with effect for all consumers who have previously joined a litigation register. Subsequently, consumers can assert possible guarantee or redress rights individually. The existing possibilities for collective action in Germany are also adequate elsewhere. The ZPO (Germany's code of civil procedure) recognises a "joinder of parties", a legal principle which enables several parties to bring a court action. This means that several parties can combine their petitions if the court is competent for the claims asserted. In certain cases is even provides that the cases can be decided only in a unitary ruling. These instruments are sufficient and do not need to be reviewed at the present time. The scope of the injunction law was extended most recently by introduction of the data protection collective action. Moreover, ombudsmen and dispute settlement bodies ensure appropriate conflict resolutions in out-of-court situations.

Furthermore, a wide range of measures have been adopted in recent years at European level in addition to the injunctions directive 2009/22/EC which serve for effective legal enforcement of consumer interests and rights. These include:

- Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law of the Member States and of the European Union
- Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending regulation (EU) no 524/2013 on online dispute resolution in consumer matters
- Regulation 2015/2421/EU amending regulation 861/2007/EC establishing a European Small Claims procedure and regulation 1896/2006/EG creating a European payment order procedure
- Revision of the regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC regulation), 2017/2394/EU.

The new CPC regulation in particular already provides sufficient redress possibilities for cross-border or widespread consumer law infringements. Since the CPC regulation in its revised form will only enter into force in December 2019, its effect should first be awaited and assessed before new and extensive provisions are adopted in consumer law.

The European Commission is invited to ensure that the balance of consumer and trader interests is preserved with respect to the whole of substantive and procedural, horizontal and sectoral consumer legislation and is not slanted one-sidedly in order to ensure that European traders do not suffer locational disadvantages as compared with third countries. Apart from that, high costs and long-winded procedures are also part of the nature of collective action mechanisms. They are unavoidable due to a high level of complexity. For this reason, too, existing legal enforcement instruments should be improved where necessary instead of introducing a new EU-wide collective redress system.

To this is added that the Commission's proposal fails in many respects to do justice to the stated objective of ensuring appropriate redress for consumers, but instead creates clear incentives for claimant organisations and third-party funders. The EU should define its objectives and the competences available to it more clearly.

II. Create effective protection against abuse

If the European legislator should decide to adopt the draft directive despite the arguments set out above, clear improvements are needed! It is absolutely essential to ensure that abusive developments in the collective redress system and the introduction of an American-style situation in Europe are avoided. The negative consequences of American class actions are based not only on the interplay between different critical elements of U.S. procedural law. The danger of each individual factor should not be downplayed either.

The European Commission has also recognised this danger and set out very good and decisive criteria in its 2013 recommendation to the Member States on collective redress (COM(2013) 401 final) to prevent abuse of the system and deter the development of a litigation industry. It is all the more regrettable that hardly any of these recommendations has found their way into the current draft directive. It is difficult to understand why the European Commission gives Member States clear indications for the design of collective redress systems yet does not follow them itself when it develops its own system.

We urgently call for the Commission's 2013 recommendations to be integrated in the text of the directive. Without the establishment of binding minimum standards for collective actions applicable across Europe, a patchwork of different national systems can be expected. Whereas some Member States apply the safeguards recommended by the Commission, others would be in favour of a very claimant-friendly system. In combination with the provisions on cross-border actions and on the binding effect of rulings (articles 10 and 16), the possibility of forum shopping for qualified entities is opened up.

To create the essential minimum standards needed to rule out very clearly a drift towards U.S.-style class actions and to guarantee the necessary protection against abuse, the following criteria, which are all contained in the European Commission's 2013 recommendation, must be observed:

- Explicit identification of the claimant group ("**opt-in**" provision) – indication of a claimant group which is merely "identifiable" is not acceptable. An automatic extension of the legal effect would run counter to fundamental principles used in most European legal systems (see also point III.3 below).

- **No discovery rules** – each party must present facts in his own favour. If the claimant no longer had to present and prove his individual case, there would be a completely wrong incentive to initiate futile cases. Protection of business and trade secrets must not be hollowed out (see also point III.9 below).

- **No rejection of loser-pays principle** – the material prospects of an action must be decisive for it to be brought. At the same time, for reasons of level playing field and avoidance of abuse, there should be no facilitations which benefit the claimant exclusively with respect to costs (see also point III.10 below).

- Prevention of a litigation industry through a **cap on lawyers' fees and ban on third-party financing** as well as a clear limitation and **definition of qualified entities** in order to rule out abuse (see also points III.2 and III.4 below).

- **No punitive damages** – this would run counter to the fundamental idea underlying damages in continental Europe whereby the ex-ante situation merely has to be reinstated. The European Commission specifies in recital 4 of the draft directive that punitive damages "should be avoided" to hinder abusive litigation. However, this is not a binding requirement. It would be important to include a clear exclusion of elements of punitive damages in the text of the directive. Neither should provision be made for punitive damages through the back door, for instance through automatic assignment of so-called low-value awards to a public consumer purpose (see also point III.3 below).

- **Protection of the trader's reputation** – In its 2013 recommendation, the Commission expressly provided that the trader's right to protection of the reputation or the company value is one of the elements that should be taken into account when the method for spreading information ahead of the ruling is decided. In this regard, the present draft directive foresees a clear change of direction, because it is stated in recital 31 that consumers also have to be informed about ongoing representative actions and that the reputational risks associated with spreading information about the infringement are important for deterring traders infringing consumer rights. Hence, the reputational loss is not only consciously accepted but even desirable as a deterrent. Since the mere assertion of a large-scale breach of law can considerably damage the reputation of the trader in question and the publicity associated with a collective action can lead to traders often seeking to reach a settlement so that a court ruling is never handed down, it is also important to limit the potential for abuse of the information disseminated to claimants. The damaged image of the trader due

to its public depiction can lead to business downturns and sharp falls on the stock market. Information to claimants must therefore be provided in an appropriate and objective framework – in particular insofar as there is not yet any final decision (see also point III.6 below).

- **Early "class certification":** The Commission's 2013 recommendation on collective redress provides that courts should automatically examine as early as possible in the proceedings whether the conditions for a collective redress procedure are met in the first place and whether the case is not obviously unjustified. Whereas there is a reference in recital 18 of the present directive to a suitability test with respect to the nature of the infringement and characteristics of the damages suffered, more detailed stipulations are lacking. By comparison, the "class certification" conditions provided for in the U.S. system are markedly stricter and more clearly specified. Under the system applicable there, a class action is admissible only if the case meets a whole series of criteria which have to be examined by the judge at an early stage in the proceedings. These criteria relate inter alia to the number of persons represented in the "class", the fact that the dispute is based on facts or legal issues which are shared by the entire "class"; or also proof of a reason for bringing claims as a class action, e.g. the fact that prosecution through different individual cases could lead to inconsistent enforcement of the law (Rules 23(a) and (b) of the Federal Rules of Civil Procedure). Comparable admissibility standards should also be provided before European courts so that obviously unjustified or malicious cases can be thrown out at an early stage.

In its 2 February 2012 resolution "Towards a Coherent European Approach to Collective Redress" (2011/2089(INI)), the European Parliament clearly underlines the importance of adequate protective mechanisms to deter a European litigation industry and respect for European legal traditions. In particular, the Parliament came out in favour of a pure "opt-in" procedure whereby members of the group have to be established before the complaint can be lodged. Further demands related inter alia to application of the loser-pays principle and a ban on financing of litigation by third parties.

III. Detailed comments on the proposal for a directive:

1. Scope (article 2)

The list of legislative acts set out in annex 1 - infringement of which could justify a representative action - is very extensive and also comprises provisions which, on a cursory glance, have little to do with consumer protection. We call on the European legislator to review the list of provisions in detail to ensure that the scope of the directive does not expand in an uncontrolled way. The scope should concentrate purely on consumer protection law.

In particular, legislative acts which already contain a regime for assertion of the collective interests of consumers should be removed from the scope in order to prevent overlaps and contradictions. For example, the general data

protection regulation (2016/679/EU) already provides the possibility for organisations and associations to lodge collective complaints – albeit exclusively on an opt-in basis, i.e. only with the mandate of individual consumers, in cases where compensation is claimed (article 80 GDPR in conjunction with recital 142). There is a clear conflict here with the more far-reaching possibilities for Member States in the framework of the directive that has now been presented.

It should also be borne in mind that assertion of "collective interests" will always be difficult where the object of the complaint revolves largely around individual circumstances as in cases of personal injury. Here, it will likely be impossible to find a satisfactory one-size-fits-all solution for all affected consumers due to the very individual configuration of cases.

2. Qualified entities (article 4)

Under the European Commission's proposal, so-called "qualified entities" are authorised to bring representative actions. In article 4 of the text of the directive, the Commission sets out for the Member States certain criteria which an organisation must demonstrate in order to be recognised as an entity qualified to bring a representative action. In the Commission's view, these criteria constitute an essential protection mechanism against abuse of the collective redress system and prevent the development of a European litigation industry.

The question of who can bring a representative action on behalf of consumers constitutes one of the cornerstones of the system and it is positive that the Commission here at least makes an attempt to avoid U.S.-style situations, for instance by preventing law firms from bringing cases directly. However, the proposed criteria are far from adequate to safeguard this protection and to rule out, with legal certainty, claimant organisations with a clear profit motive being set up. Since it is provided in article 16 of the draft directive that an entity recognised in one Member State is qualified to bring actions in all other Member States, there is a great danger here that entities from EU Member States which place only slack requirements on qualification would bring cases in countries such as Germany or other Member States with stricter requirements. Neither can it be ruled out that law firms in some EU Member States with less stringent requirements on qualification will set up consumer associations in order to be able to bring cases Europe-wide. The absence of a profit motive in the qualified entity currently provided for in article 4.1 does not rule out law firms or third-party funders gaining large profits from collective actions. Because the qualified entity could sanction high fees and charges for lawyers as well as their own staffing and operating costs – even if they have no profit motive themselves. This would be further exacerbated by the absence of a ban on contingency fees.

It is therefore of decisive importance that there are very strict minimum standards which are uniform across the EU regarding the definition of who may be a qualified entity within the meaning of the directive. To this end, it should first be established, on a uniform basis, what type of organisation or

entity can be considered for qualification. The Commission proposes that "in particular" consumer organisations and independent public bodies should be eligible for the status of qualified entity. BDI clearly urges that the term "in particular" should be deleted from the text of the directive since the concept of qualified entity could otherwise be interpreted much too differently in the Member States and open up too broad a scope for qualified entities. With good reason, the European Commission has distanced itself from earlier thinking whereby business associations could also explicitly have been designated as qualified entities. The scope of the directive relates to cases of contractual relations between traders and consumers (B2C). It is not obvious why business associations should have been qualified to represent the interests of consumers, in some cases possibly against their own members.

The uniform minimum requirements of the directive should go further than currently envisaged also in relation to the criteria to be met. The current text of the directive merely states that qualified entities should be properly constituted according to the law of a Member State, have a legitimate interest in ensuring that provisions of Union law covered by the directive are complied with, and should have a non-profit making character. In addition, under article 5.1 of the draft directive, qualified entities may bring representative actions only provided that there is a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought. This clarification is very important since this would prevent claimant associations without any specific consumer protection interest from being founded.

In its 2013 recommendation on collective redress, the Commission identified as an additional criterion the proof that the entity should also have adequate human resources as well as the necessary legal expertise to represent a large number of persons and their interests effectively. This condition should also find its way into the text of the directive. As the text currently stands, the entity must only have adequate financial resources and even that only for certain types of action (see comments on article 7 below).

In Germany, the issue of qualification to bring actions in particular was discussed at length ahead of introduction of the "Musterfeststellungsklage". The German legislator finally decided for very clear rules on the minimum duration of existence and on the minimum number of members of the claimant entity in order to ensure the stability and adequate financial resources of the entity in question. The European legislator should orient itself on this. The following criteria should therefore be included in the text of the directive:

- A minimum number of members of the entity. Otherwise there is a possibility that consumer associations would be founded on a pro forma basis or as a "one-man association" exclusively to drive collective actions forward. In Germany, it is provided that the qualified entity must represent at least ten associations which are active in the same thematic area, or at least 350 natural persons.

- A minimum duration of existence of the entity. For example, it is provided in German law that the qualified entity must have been registered

for at least four years on the list under § 4 of the injunction law or the European Commission's list under article 4 of the injunctions directive prior to bringing the action.

- In any event, the possibility currently envisaged in article 4.2 of the draft directive whereby a qualified entity can be designated ad hoc at its own request for a particular collective action should be deleted. Recognised, stable and adequately supervised entities exclusively should be eligible for qualification in order to guarantee the credibility of the system and effectively prevent abuse.

- To meet the objects specified in their articles of association, qualified entities must represent consumer interests largely through non-profit educational or advisory activities. This is intended to prevent consumer associations from being set up exclusively with the objective of bringing collective actions.

- Qualified entities should not receive more than 5% of their financial resources as contributions from companies – if this is allowed at all, see comments on article 7.

3. Representative actions and redress measures (articles 5 and 6)

Link between injunctions and actions for damages

Articles 5 and 6 of the draft directive regulate the various possibilities that a qualified entity can use to bring an action and therefore constitute the heart of the proposal. Next to collective injunction orders (article 5), which were already regulated in the injunctions directive 2009/22/EC, it is envisaged that qualified entities will also be able to bring representative actions to obtain redress (article 6).

It would be possible to bring representative actions seeking redress measures only on the basis of a declaratory decision, including a declaratory/injunction order in accordance with article 5.2(b) (article 5.3). At the same time, it is stipulated that redress measures can be sought together with an injunction order within a single representative action (article 5.4). The wording of the directive is extremely unclear here. Is it necessary to await the legal effect of the declaratory/injunction order, possibly in a multiple-phase sequence of court proceedings, before it is possible to bring an action for damages? Or can the qualified entity bring an action for declaratory/injunction and redress order simultaneously?

It is clear that the current effectiveness and rapid redress through injunction actions is impeded by linking injunction actions and actions for damages. Traders will have absolutely no interest in settling demands for injunctions rapidly and amicably, for example in the case of misleading advertising, if at the same time they are arguing against a high damages payment. It also remains unclear how linkage between the two types of action would function

if the mandate of the consumers represented may not be sought for the injunction action whereas an "opt-in" procedure is envisaged, depending on the Member State, where consumers have to be identified by name for an action for damages.

Binding establishment of "opt-in" system necessary

The determination of the consumers for which the qualified entity brings a collective action and the question of how any damages awarded should be paid out to individual consumers constitute the decisive elements in a collective redress system. In its 2013 recommendation, the Commission still came out expressly in favour of the so-called "opt-in" procedure whereby the effect of a ruling applies only to claimants who have explicitly declared their participation in the proceedings. Specifically, in point 21 of the recommendation it wrote: "*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice*".

The "opt-in" principle constitutes a central pillar for giving collective actions legal certainty. Because an individual must not be a participant in court proceedings without his knowledge. This would contradict the legal principle that the parties delimit the subject matter of the proceedings and the right to be heard from article 41.2(a) of the Charter of Fundamental Rights of the European Union. An automatic extension of the legal effect would run counter to fundamental principles applicable in most European legal systems. The "opt-out" action, known particularly from the U.S. class action system, whereby the claimant entity is not obliged to identify the victims it represents can easily be misused to damage the reputation of accused traders, do them considerable damage and force them to consent to a settlement thanks to very effective publicity. This also applies for actions in which the claimant group only has to be "identifiable".

Unfortunately, the present text of the directive now no longer clearly establishes the "opt-in" model as the only admissible possibility for bringing an action and the question once more arises as to why the Commission has not kept to its own recommendations.

In article 6.1, it is left up to the Member States to decide whether or not they want to introduce an "opt-in" system for representative actions seeking a redress order. This once more opens up a gateway for highly divergent types of action between the Member States which, in conjunction with articles 10 and 16 of the draft directive, would contribute to the development of forum shopping. Furthermore, the text of the directive refers to various types of action for which an "opt-in" would even be expressly ruled out: this relates to injunction orders in accordance with article 5 as well as actions for damages in the case of low-value awards in accordance with article 6.3(b). For damages actions according to article 6.3(a), in which the consumers are identifiable and have suffered comparable harm, the mandate of the individual consumers would not be a condition for bringing the action as the text of the directive is

currently worded. However, in our understanding of the provision, the requirement to seek a mandate at a later point in the proceedings continues to be possible for the Member States. Nevertheless, the provision is not clearly formulated here. BDI is highly critical of the fact that not even the possibility of an "opt-out" of the individual consumer is envisaged in the above-mentioned cases, i.e. there is no possibility for a consumer expressly to reject his involvement in the representative action. This means that the proposals even go beyond the U.S. system.

A procedure in which the concrete claimants are not known and have not given their express mandate for the action to be brought on their behalf is highly problematic from the angle of traders and consumers alike.

Bringing an action without identified claimants would deprive the defendant of all defence rights, since it could not raise relevant objections about an individual case (such as improvements made). In addition, the defendant must have an overview of the claimant group in order to be able to assess the consequences of the dispute and plan. For instance, it will have to be able to provide for the number of repairs or replacement parts needed and also the level of any damages to be paid and constitute the corresponding reserves. An early ability to calculate possible redress measures is also of great importance for any existing liability insurance policies.

For the consumer, an action brought in his name without his knowledge and consent constitutes a drastic encroachment into his private autonomy, since he is deprived of the decision on assertion of his claims and any damages awarded in his name may possibly not even reach him due to ignorance. To this is added that the envisaged collective actions must not always be claims for financial compensation. Guarantee claims can have highly differing results depending on the consumer, the structure of the concrete contractual relationship and incidence of damage. The decision on repair, replacement part, price reduction or withdrawal from the contract will not be identical in all cases and an association should not be able to take this decision on a one-size-fits-all basis for all consumers.

It remains open in the draft directive as to whether a consumer who had no knowledge of a collective action brought in his name can still assert his claim in a subsequent individual action. In that case, article 6.4 could not apply, since this refers only to "additional" rights. But a double conviction of the trader on the basis of the same claim clearly infringes the legal principle of "ne bis in idem" and should therefore be firmly rejected. Recital 17 rightly points in this direction. Insofar as article 6.4 is intended to address situations where an individual consumer suffered greater damage than was assigned to him under the collective action and he would now like to assert his additional claim in an individual action, this would be highly detrimental for the desired effectiveness and procedural facilitation of the collective action. Instead, the consumer in question should decide in advance whether he would like to pursue individual or collective enforcement of the law.

Without a clear "opt-in" system, a large number of completely unanswered practical and legal questions arise: How should the payment of damages

awarded be organised if the consumers are not known? What happens with the amount of damages which is not claimed by consumers? Would it accrue to the qualified entity? Which consumers are covered by an out-of-court settlement? For which consumers will the limitation period be suspended? For which consumers will a declaratory order have a binding legal effect? Will a consumer who has given his mandate for an action to be brought in a Member State with "opt-in" system also be covered by a further collective action based on the same facts in a Member State with "opt-out" system?

It is astonishing that the European Commission makes such far-reaching proposals but pays absolutely no attention to the concrete design of the system and the outstanding questions. A large number of different national configurations can be expected here.

For the reasons set out above, it is necessary for the express mandate of a consumer to have been given in every case for each type of collective action. Representative actions for damages must always have as a precondition that the consumers are known and have given their consent for the action to be brought. In its position on the proposal for a directive, the German Bundesrat has clearly criticised the fact that the European Commission has not proposed a pure "opt-in" procedure (circular 155/18 adopted on 6 July 2018).

Minimum number of consumers affected

In addition, to avoid cases where collective actions are brought for only a very small number of consumers, a fixed minimum number of consumers affected should be established as an admissibility criterion. For instance, the German "Musterfeststellungsklage" is admissible only if at least 50 consumers have enrolled in the petition register within two months of the action being made public. A comparable provision should also be included in the draft directive. Under the current stipulations, it is conceivable that a qualified entity could also bring an action in cases where just two or three consumers are affected. But this cannot be what is meant by the "collective interests" of consumers as the directive intends.

Declaratory action (article 6.2)

Article 6.2 of the proposal provides particular requirements for cases where the quantification of individual claims is complex. In such cases, a declaratory order should be adopted on the liability of the trader vis-à-vis the consumers who have suffered damage.

Insofar as this would be a clear "opt-in" system with adequate protective mechanisms against abuse, this approach would be comprehensible. As such, it corresponds to the recently adopted German "Musterfeststellungsklage". Due to the complexity and diversity of the individual consumer claims, it makes sense to establish a collective infringement and to negotiate the exact amount of damages later on an individual basis, either in court or out of court. Nevertheless, it is unclear exactly when the Commission deems that "complex" quantification obtains.

However, it is also of decisive importance for adoption of a declaratory order that the consumers who have suffered damage are identified prior to the action. Because it makes a decisive difference whether a trader's liability is established for clearly defined and demonstrable damage suffered by specific consumers, or whether the liability is declared without knowing who the consumers possibly affected are and whether they have actually suffered any damage. The trader's liability does not have to be the same vis-à-vis all consumers affected. Accordingly, it should be clarified in article 10.3 of the draft directive that the envisaged binding effect of the declaratory order for subsequent redress actions applies only for those consumers who were known at the time of the declaratory action and had registered for the collective action.

In addition, article 6.2 should be interpreted such that it can also be decided through a declaratory order that a trader bears no liability.

Redress in the case of low-value awards (article 6.3(b))

Article 6.3 of the draft directive provides that in cases where consumers have suffered only a small amount of loss and it would be disproportionate to distribute the redress to them, it should not be distributed to consumers but "directed to a public purpose which serves the collective interests of consumers". A requirement to seek the mandate of the individual consumers concerned is explicitly ruled out.

From the standpoint of companies, this provision constitutes one of the main problems of the draft directive and is also highly unfriendly to consumers at the same time. The consumer not only does not receive his damages, but he is not even given the choice as to whether his personal claim should be covered by the collective action. No provision is made for an "opt-out" possibility. In most cases, the consumer will probably not even learn about the action being brought, in particular if it is brought in another Member State. This means that the draft directive goes well beyond the controversial U.S. class action system which at least provides an "opt-out" possibility for individual consumers.

That no longer has anything to do with the real objective of the directive, which is more effective enforcement of consumer rights and compensation for damage suffered by the consumer!

To this is added that the concepts in the proposal are nowhere defined. The question of the threshold below which one can assume a low-value award or a small amount of loss is not clarified in the text of the directive, and neither is there an explanation about when a distribution of damages should be seen as disproportionate.

In addition, the question of which public consumer purpose should benefit from the funds received as redress is not satisfactorily answered. Although recital 21 contains indications in this regard, they just raise further questions. Because it is provided that the funds can for example benefit "consumer movements" – i.e. possibly even claimant qualified entities themselves – or can also flow into consumer legal aid funds, thus then enabling new collective

actions. Furthermore, equally deserving of criticism is the proposal in article 14 of the proposal for a directive whereby the "collective interests of consumers" should be taken into account when decisions are taken on allocation of revenues from fines for non-compliance with final decisions. In this way, there are clear financial incentives for qualified entities or their third-party funders to bring new actions. This makes the system more or less self-financing. The consumer is not involved in the process at any point.

As a result of the absence of an "opt-in" (and "opt-out") possibility, it is also highly problematic that it is unclear for which consumers a low-value action is being brought in the first place. For instance, it is conceivable that a qualified entity in Germany brings an action before a German court for low-value redress for all consumers affected across the EU, another qualified entity in Finland does the same before a Finnish court and an Italian entity in Italy also brings a claim for all consumers who have suffered damage. Even if only a small amount may be involved in each individual case, the redress to be paid by the trader can in this way mount up very quickly. Moreover, a multiple claim on the defendant in different Member States is pre-programmed. To this is added that, despite the small amount of redress, some consumers may possibly assert their individual claims anyway, which will be difficult to deny them, if these consumers have not given their mandate for the collective action and were possibly ignorant of it. In these cases, too, a double claim will be made on the trader. It is not only the legal principle of "ne bis in idem" that is infringed here, but it is clearly an element of punitive damages which the Commission still clearly wanted to rule out in its 2013 recommendation. The European Commission writes in recital 4 of the draft directive that elements such as punitive damages should be avoided in order to prevent abuse of representative actions. However, this statement is clearly contradicted by the proposals in article 6.3.

The European legislator should make a sharp distinction between the objective of compensating consumers who have suffered damage and confiscating unlawful profits and/or punishing the trader. The latter is a task for the competent administrative authorities and not for private consumer organisations via civil law actions.

Article 6.3 should be deleted for the reasons set out above.

4. Financing (article 7)

It is essential that the qualified entity has adequate financial strength to conduct a court procedure, also to be able to pay the defendant's costs if it loses the action ("loser pays" principle). The clarification in article 7 that the qualified entity must demonstrate that it has sufficient financial resources is therefore welcome, as is the requirement to declare the source of its funds. It is absolutely essential to clarify in article 7.1 that this information has to be provided not only for the planned action for a redress order in accordance with article 6.1 but for all types of action provided for in the directive, i.e. also for the action possibilities envisaged in article 5 and more particularly in article 6.2 and 6.3.

It is absolutely essential to avoid wrong incentives for lawyers or other third parties. BDI therefore looks with a very critical eye on financing of actions by third parties whenever the third-party funder has a serious financial interest in the outcome of the action. There is a danger here that collective actions will be discovered more strongly than hitherto as a new business model and that a European litigation industry will develop. The amounts awarded as damages would be used to a large extent not to compensate consumers who have suffered damage but would accrue to third parties, namely lawyers for the claimant (e.g. as a success fee calculated as a percentage, which the draft directive fails to prohibit) and administrators of the distribution procedure. The very possibility of third-party financing by a profit-oriented undertaking in itself contributes to the development of a litigation industry.

The European Commission appears to have recognised the potential danger of uncontrolled third-party financing and provides in article 7.2 of the draft directive for two important limitations on third-party financing, namely the ban on influencing decisions of the qualified entity and the ban on third-party financing with the aim of harming a competitor. Courts and administrative authorities should not only be "empowered" but "obliged" to verify compliance with these bans. Nevertheless, it remains unclear how the first aspect in particular should be controlled – for example, if a qualified entity decides against an out-of-court settlement, the court or the administrative authority cannot distinguish whether this is the independent decision of the qualified entity or whether the latter is acting on the advice of the action's financial funder which expects a larger profit margin from a court ruling.

The limitations provided for in article 7.2 are also otherwise insufficient to prevent the development of a litigation industry through the possibility of third-party financing.

There is a danger that professional litigation funders and law firms specialised in collective actions (European or even American) will choose European representative actions as a business model and will in future stand behind just about every European collective action – not with the objective of better enforcement of consumer rights but with a clear profit motive. The ban on pursuit of profit stipulated in article 4 applies exclusively for the qualified entity, not for possible profit-oriented organisations in the background.

Third-party financing of qualified entities should therefore essentially be banned. In our view, financial assistance from state resources, e.g. through legal aid funds, offers the best possibility for supporting claimants with enforcement of their rights and preventing abusive legal cases. In addition, as a rule, the existing system of legal protection insurance offers a more solid means of financing actions. Insurers verify in advance whether the legal prosecution offers sufficient prospect of success and check that the insured party cannot be accused of culpable behaviour. There is no need to fear a financial self-interest among legal protection insurers that can lead to abusive actions.

Should third-party financing be maintained in the directive despite these objections, it is essential that further protective measures are taken. To this end,

the Commission should first of all apply its own 2013 recommendation which, as well as the points envisaged in the draft directive, also requires that:

- there must be no conflict of interests between the third party, the claimant party and its members,
- the third party must have sufficient resources to meet its obligations vis-à-vis the claimant party and in particular
- the third party is not able to charge excessive interest on the funds provided.

In addition, the following points should be regulated:

- Limitation on financial contributions from third parties: qualified entities must not be able to draw more than 5% of their financial resources in the form of contributions from third parties.
- A ban on making the remuneration received by the litigation funder or the interest demanded dependent on the level of the settlement or the awarded redress.
- A ban on third-party funders and law firms setting up qualified entities as well as a ban on law firms owning third-party funders and vice versa.
- Lastly, we are also in favour of an express ban on contingency fees for lawyers.

A possibility for improved control of third-party financing of qualified entities would be the creation of a register for third-party funders and enrolment through a public authority, by analogy with what is the case for qualified entities.

5. Settlements (article 8)

Generally speaking, out-of-court dispute settlement constitutes a more rapid and more cost-efficient variant for clarifying a legal dispute amicably than an unwieldy court procedure. A settlement as provided for in article 8 can therefore contribute to effective legal enforcement and also benefit the accused trader. A precondition is clearly that the trader is not pressured into reaching a settlement due to the high risk of reputational damage and highly claimant-friendly rules, for example on disclosure of proof despite a lack of grounds for the claim. It is positive here that under article 8.4 the court or administrative authority authorising the settlement also verifies the legality and fairness of the settlement, even if it remains unclear how this scrutiny will be exercised.

However, the structure of article 8 leaves doubts as to whether the trader will see any real advantage in reaching a settlement. Very generally, it can be wondered who the settlement is actually reached with if the consumers are not clearly identified through an "opt-in" system. Also unclear is the level at which the settlement should be reached if the precise damage has not been quantified due to a lack of information on exactly which consumers are concerned.

But it is particularly problematic that individual consumers are given the possibility to accept or refuse the settlement. The same possibility does not exist for the trader vis-à-vis specific consumers. But in particular, the trader reaching a settlement has no legal certainty and cannot be certain that some consumers will reject the settlement anyway and bring an action, either as individuals or through a qualified entity. To this is added the complication that article 8.6 provides that the settlement should apply "without prejudice to any additional rights to redress". Insofar as this means that a consumer can take advantage of the settlement and – if his damage is greater than the redress awarded under the settlement – then bring an action for the outstanding amount, there is absolutely no incentive for the trader to seek a settlement. This would result in long procedures and sequences of actions, which cannot be in the interest of justice in the Member States or of consumers. To reach a rapid conclusion of the procedure which is satisfactory for all sides, a settlement which has not been rejected by either side within a fixed period should constitute a conclusive decision.

6. Information on representative actions (article 9)

Article 9 contains an obligation to inform all consumers concerned by a final decision or a settlement by the infringing trader and at the latter's expense.

This is – once again – particularly difficult if the consumers to be informed have not been identified in the absence of an "opt-in" system. Whereas it may still be reasonable to identify potentially harmed consumers, for example by consulting customer lists, in cases covered by article 6.3(a), i.e. identifiable consumers who have suffered comparable damage, this may be extremely problematic in other cases, e.g. those covered by article 6.2. The trader would have to launch information "into space". This can be very unwieldy and costly and also obliges the company to open itself to public criticism. The German Bundesrat also regards the obligation for traders to inform the consumers concerned of final decisions as generally too far-reaching.

It is also unclear which potentially concerned consumers have to be informed – only the consumers in the trader's own Member State or should the obligatory information campaign also be carried out across borders?

It is currently provided that information should be provided about agreed settlements. A settlement can often be seen as a compromise solution between the parties – in this case, it would be appropriate at least to share the costs of information campaigns.

Information by traders should be possible via existing communication channels, for instance via information on the trader's website. "Notifying all consumers concerned individually" as currently provided would be completely disproportionate. In addition, the information obligation should cover only decisions or settlements on redress measures (article 6) but not collective injunction orders (article 5).

We believe that the obligation to provide information to potentially harmed consumers lies more with the qualified entities whose task it is to assert claims for the consumers they represent and to help each consumer affected to assert his rights. Under the current proposal, the proposed information obligations of the trader probably go beyond the information obligations of the qualified entity vis-à-vis its own members, which is inappropriate. Alternatively, state platforms and information portals could report in neutral form on procedures or possible actions. In this regard, it is important that the information is proportionate and objective.

We regard it to be particularly problematic that the information obligation should apply only in the case of a confirmed legal infringement. But what happens if the competent court has ruled that the accused trader has acted legally? In that case, it would be important that consumers are also informed about this ruling in order to prevent the submission of unsubstantiated further complaints.

Alongside the question of who has to inform about a final decision and in what form, it is also important to include provisions on public notification of (planned) actions by the qualified entity in the text of the directive. The mere assertion of a large-scale legal infringement can considerably harm the reputation of the trader in question and the publicity associated with a collective action can lead to traders seeking to reach a settlement, so that there is no judicial clarification. It is therefore important to limit the potential for abuse also with regard to information to the claimant in question. The damaged image of the trader brought about by its public depiction can lead to business downturns and sharp falls on the stock market. Information to claimants must therefore be provided in an appropriate and objective framework – in particular insofar as there is not yet any final decision. Recital 31 whereby a trader's reputational loss is not only accepted but clearly desirable as a deterrent measure should be deleted.

7. Effects of final decisions (article 10)

Article 10 provides that final decisions on a trader's legal infringement have a binding effect for subsequent redress cases. In this connection, a distinction regarding the reach of the binding effect is made between domestic and foreign follow-up cases. This provision is problematic for several reasons.

First of all, it is completely unclear why the binding effect should apply only for rulings against a trader as currently provided. A ruling which establishes that the trader has acted legally should also have an irrefutable binding effect to deter unjustified redress cases. Otherwise, a trader which has already been wrongly accused in one action could then be sued again in further procedures based on the same unjustified claims. The German Bundesrat has also made this criticism. A binding effect only against the trader would breach the principle of a level playing field.

Also problematic is the binding effect in cross-border cases provided for in article 10.2. In conjunction with article 16 and without adequate uniform minimum standards in all Member States, a possibility is opened up here for so-called forum shopping. Following a declaratory decision, a qualified entity – designation of which under the current article 4 is not subject to any particularly difficult conditions – can seek out the Member State which exhibits the most claimant-friendly conditions and then bring a case for damages there. In this way, preferred litigation locations can develop in some Member States and in this connection a new litigation industry, which must be prevented at all costs. Article 10.2 should be deleted for the reasons set out above.

8. Suspension of limitation period (article 11)

Limitation provisions have the character of substantive law. The competence of the Commission to encroach so far into national law must be questioned. Limitation periods should be addressed in accordance with the relevant applicable national law.

If there is to be any limitation regime, its advantages should be deployed only in a clear "opt-in" system as will happen in the future with the German "Musterfeststellungsklage". For consumers who have registered in the framework of a declaratory action, the limitation period is suspended until the submission of an enforcement action. The limitation period could otherwise apply under some circumstances for an incalculable number of consumers and it would be legally uncertain whether and when the limitation period ends for which consumers.

9. Evidence (article 13)

Article 13 of the draft directive provides that the court or administrative authority may, at the request of the qualified entity, order the defendant to present evidence which lies in its control for consideration in the proceedings. Regarding the conditions for this presentation, reference is made to national procedural rules. Among other things, the scale of the evidence to be disclosed is not specified.

It is of decisive importance that the rules for presentation of evidence are structured in accordance with continental European legal traditions to prevent so-called "fishing expeditions". Under this tradition, each party is expected to submit facts in its own favour. Completely wrong incentives would be given to bring cases with no prospect of success if the claimant did not have to justify its requests in detail and the defendant was obliged to submit extensive documents. This would lead to the claimant being released from its obligation to substantiate its requests. That would be a complete departure from the principles of many civil procedural orders and would contradict the right to informational self-determination in accordance with article 8 of the EU Charter of Fundamental Rights. Business is fearful in particular that the protection of business and trade secrets would be hollowed out and principles of

data protection law would be infringed since companies could be forced to disclose sensitive data.

Continental European legal orders already provide sufficient mechanisms for achieving good results without wide-ranging document disclosure orders. For instance, good results are ensured in German law through the legal institutions of secondary burden of proof as well as reversal of the burden of proof. It should also not be forgotten that there are interactions between substantive law and procedural law. The provisions of German substantive law are tailored to reflect the fact that the option of wide-ranging document disclosure is not available in the framework of providing evidence. The provisions on reversal of the burden of proof are built on this, for example. Accordingly, a complete restructuring of the law on evidence would also have a considerable influence on application of the relevant substantive law.

An imbalance of information, to the detriment of the claimant as the Commission obviously sees it, which would justify a departure from general principles cannot be identified. After all, the consumer is not alone in confronting a trader but is represented by a qualified entity – ideally equipped with the necessary financial and human resources – which speaks on behalf of a large number – sometimes a very large number – of consumers.

To secure protection of the procedural level playing field and prevent development of the "pre-trial discovery" known from U.S. law, we are clearly in favour of deletion of article 13 and of application of the general civil procedural principles on providing evidence under the relevant national law.

If the provision should remain in the text of the directive anyway, we call for article 13 to be supplemented with decisive criteria. Article 5 of the antitrust damages actions directive (2014/104/EU) could serve as a model. Inter alia, this provides for the following aspects to be checked before disclosure of evidence can be ordered:

- The claimant must present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.
- The evidence must lie within the defendant's control.
- The specified items of evidence or relevant categories of evidence must be circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.
- There is a proportionality test which takes into account inter alia the scope and cost of disclosure as well as prevention of non-specific searches for information which is unlikely to be of relevance for the parties in the procedure and protection of confidential information.
- Member States must provide effective protection for confidential information.
- Applicable rules on legal professional privilege must be complied with.
- The party from which disclosure is sought must be provided with an opportunity to be heard before the disclosure order is issued.

- The defendant can also request disclosure of relevant evidence by the claimant or a third party.

10. Assistance for qualified entities (article 15)

It is essential to maintain the principle that the losing party must pay the costs ("loser-pays principle"), which is enshrined in Germany in § 91 ZPO. A huge potential for abuse would be created if incentives were given specifically in mass actions such that judicial proceedings could be brought without financial risks. The decisive factor for bringing an action must always be an appropriate assessment of risk and the material prospects of a successful case. This principle exists in almost all Member States and makes sense, since it deters frivolous cases and prevents courts from being inundated with clearly unjustified actions. In addition, incentives to litigate should not be created via fundamental changes to cost allocation rules, as currently provided in article 15.1 – exclusively for the claimant. A limitation on the applicable court costs or administrative fees or the provision of targeted public resources only for the claimant – possibly from "low-value" awards – would infringe the principle of a procedural level playing field and inevitably encourage a litigation industry attracted by rapid settlements without allowing the court to establish whether the action is justified. This is because the claimant benefits from favourable cost allocation rules or has the possibility to neutralise its own cost risk through a contingency fee. These excesses are known from the U.S. litigation system and must under no circumstances be imported into Europe. The instruments which exist for example in Germany for adjustment of dispute awards or legal aid costs offer sufficient possibilities to minimise claimants' cost risk under the strict stipulations of ZPO.

Furthermore, the envisaged facilitations for claimants also contradict the requirement set out in article 7 that the qualified entity must have sufficient financing before bringing an action.

11. Cross-border representative actions (article 16)

Article 16 provides that every entity qualified in one Member State can bring a collective action in another Member State. The action can also be brought to protect the collective interests of consumers from different Member States. In light of the possible development of forum shopping and in the absence of adequate uniform minimum standards to prevent abuse, we are extremely critical of this provision. Because it makes it possible to found consumer associations in Member States with low admissibility conditions and then to bring an action in every other Member State where the association would not be admissible as a qualified entity due to stricter entry requirements. According to article 16.2, actions can also be brought in Member States with particularly claimant-friendly rules.

To protect legal and quality standards in the individual Member States, it should be provided – alongside uniform minimum standards – that associations which want to bring an action in a Member State have to meet all criteria

for a qualified entity in that Member State. Conversely, the provision in article 16.4 is inadequate. Because the criteria currently set out in article 4.1 are much too general and vague to ensure real protection.

Article 16 is also very problematic with regard to possible multiple claims on the accused trader. Because it does not prevent different qualified entities from bringing an action against the same trader on behalf of the same consumers for the same behaviour in several Member States. Insofar as no clear "opt-in" system is established, it cannot be determined which consumers are represented by which entity. There is no provision which regulates the finality of a collective action in a legally secure way – i.e. which prevents parallel or successive cases on the same matter. To this is added that the Member States retain discretion in accordance with article 1.2 of the draft directive to adopt or maintain further collective action mechanisms in parallel to the procedure regulated in the directive. It can be very difficult for national judges – and the consumers represented – to have an overview of all procedures. The Brussels Ia regulation 1215/2012/EU sets out rules for cases where actions regarding the same claim between the same parties can be brought in the courts of different Member States. However, in the absence of an "opt-in" system, it is often not at all clear who the parties to a legal dispute are so that here, too, there is no satisfactory response to possible parallel procedures.

Comparable with the "Musterfeststellungsklage", a provision should be included in the text whereby no collective action can be brought against the defendant from the day on which another collective action becomes "lis pendens" inasmuch as its subject matter relates to the same personal circumstances and the same objectives.

Alternatively, qualified entities from different Member States should at least be obliged to call in a single court in cases relating to consumers from several Member States, represented jointly or by one qualified entity. Article 16.2 hitherto only provides the possibility for qualified entities to proceed in this way.

For the necessary monitoring, a European petition register or clearing point at EU level should be created to which the submission of collective actions is notified and which intervenes in the case of parallel procedures and organises a corresponding pooling of cases.

About BDI

The Federation of German Industries (BDI) transports the interests of German industry to the political leaders. It supports companies in global competition. It has a wide network in Germany and Europe, in all important markets and in international organizations. BDI ensures the political flanking of international market development. And it provides information and economic policy advice for all industry-related topics. BDI is the leading organization of German industry and industry-related service providers. It speaks for 39 industry associations and more than 100,000 companies with around 8 million employees. Membership is voluntary. 15 state representations represent the interests of the economy at regional level.

Contact

Bundesverband der Deutschen Industrie e.V. (BDI)
Federation of German Industries
Breite Straße 29, 10178 Berlin
www.bdi.eu
T: +49 30 2028-0

Nadine Rossmann
Senior Manager
Telephone: +32 2792 1005
n.rossmann@bdi.eu

BDI document number: D 0952

EU transparency register: 1771817758-48