



REFORM OF THE INJUNCTIONS DIRECTIVE AND COMPENSATION FOR CONSUMERS

Study commissioned by BEUC

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1. Object of the study

Within the European Union, minimum standards for injunctions by consumer organisations have been set through the Injunctions Directive of 1998.¹ Such actions have become an important tool for consumer organisations to stop unlawful practices. However, there is currently no link in EU law between an injunction to stop such practices and the issue of compensation for affected consumers who have suffered harm as a consequence of the unlawful practice. As consumers are typically not in the position to individually enforce their rights, this means that the injunction procedure – although in itself an important and useful instrument – leaves an ‘enforcement gap’ that consists of the non-compensated detriment that consumers suffered before the unlawful practice could be stopped. This ‘enforcement gap’ works not only to the detriment of the affected consumers who are not compensated for their losses, but it may also have negative social consequences as the deterrence potential of an injunction procedure is very limited, while in contrast the threat of a possible payment of damages to a large number of affected consumers may serve as a stronger deterrent against unlawful behaviour by businesses.

Accordingly, a recent study in the context of the EU law ‘Fitness Check’ recommends to take new measures to combine the established injunction procedure with some form of compensation for those consumers who have been affected by the relevant infringement.² In the present study, this approach shall be pursued further and elaborated with a view to existing legal instruments and institutions that support the closing of the ‘enforcement gap’, and by analysing possible solutions and options for the European legislator in this regard.

2. Scope of the Injunction Directive

2.1 Introduction

The Injunction Directive 2009/22/EC defines its scope in Article 1(1) in a twofold manner: First, injunctions must be ‘aimed at the protection of the collective interests of consumers’, and secondly, such ‘collective interests of consumers’ are only relevant if they are ‘included’ in the EU legislative acts listed in the directive’s Annex 1 and in their national implementation norms.

This definition of scope is not without problems. First of all, it presupposes a somewhat metaphysical idea of a ‘collective interest’ of consumers that could be read as being distinct from the actual interests of existing consumers. However, this seems to be rather a figure of speech and it seems to be self-evident that whenever a larger number of consumers is affected, the ‘collective interests of consumers’ are also at stake.

The second part of the scope is the reference to certain legal instruments, in this case mostly directives and their transposition into national law, and since 2013 also the ODR Regulation (EU) No. 524/2013. This ‘closed list’ approach is rather inflexible and leads to problems where consumer interests are seriously affected in areas and situations that are not or not adequately covered by the closed list approach. Two examples from Germany illustrate this point: data protection and the Volkswagen *Dieseldgate* scandal.

As many consumers today struggle with the issue of data protection in relation to big data companies and internet services, German consumer associations frequently felt the need to seek injunctions against alleged violations of data protection laws, which are clearly not part of the Annex 1 of the Injunctions Directive. German consumer

¹ Directive 98/27/EC on injunctions for the protection of consumers’ interests, OJ 1998 L 166/51.

² Civic Consulting, Study for the Fitness Check of EU consumer and marketing law – Final report Part 1 (May 2017), at 286.

organisations still tried to bring injunction actions, since the German transposition is broader in scope and provides for associations' injunction actions in all cases where 'consumer protection laws' (*Verbraucherschutzgesetze*) are violated.³ Still, most actions concerning the violation of data protection laws failed, because most German courts took the position that data protection laws protect all people, regardless of the consumer/trader distinction, and that these provisions of data protection law would therefore not constitute 'consumer protection laws'.⁴

In 2016, the German legislator reacted and inserted a new provision into the Injunction Act, explicitly stating that data protection laws, insofar as they affect consumers, are to be regarded as consumer protection laws and thus breaches of data protection law can be the object of an injunction by consumer associations.⁵ This new provision is only part of a long list of provisions that was regularly amended by the German legislator to cover new areas of law where the possibility of an injunction by consumer associations seems to be helpful for the enforcement of the respective law.

This example shows that a closed list approach requires constant monitoring and updating of the list, which is burdensome for the legislator and may be particularly difficult in a complicated legislative process, as it exists in the European Union. It may also lead to a mosaic of parallel but slightly different solutions, such as the addition of the new rule (effective from 25 May 2018) on associations' suits in Article 80 (2) of the EU General Data Protection Regulation (EU) No. 2016/679.⁶ Furthermore, the closed list principle prevents or at least hinders judicial development of case law in view of changing circumstances and economic and social realities.

The Volkswagen *Dieseltgate* scandal provides us with a second example, which shows the problems associated with a closed list approach. In the wake of this scandal, the German Ministry of Justice drafted a law on 'model declaratory proceedings' (*Musterfeststellungsklage*) that was designed to give consumer associations the possibility to have certain questions of law or fact answered by a court with binding force in the interest of all affected consumers.⁷ This law has not yet been discussed by Parliament, due to the unclear political situation in Germany. But the draft already posed a doctrinal problem: the declaratory proceedings were thought to relate to 'consumer law' issues, but what are the boundaries of these? In particular, many Volkswagen buyers are suing not only their Volkswagen dealer – who was probably unaware of the *Dieseltgate* manipulations – under sales law, but raise additional claims against the manufacturer of the cars, Volkswagen AG. These claims cannot be based on contract law, as typically there is no contract between the car buyers and the car producer.

Under a hypothetical model proceedings law designed to enforce 'consumer law', an issue therefore could arise whether general tort law (prohibiting fraud or the intentional infliction of damage *contra bonos mores*) is also 'consumer law' in this sense.⁸ Similarly, one could ask whether the EU environmental regulations that Volkswagen AG allegedly breached are at the same time 'consumer law' or whether they should at least have a protective effect for consumers or – more general – car buyers.⁹ These questions show that it is not easy to circumscribe clearly the area of those legal provisions where an association's action may be of value for consumers but that the necessity and value of such actions depends very much on the specific situation.

In order to explore the problem of scope further, we will consider other EU legal provisions that describe certain areas of the law where special instruments of public or private enforcement may be seen as necessary and useful. We also illustrate the merits of a broader approach with the example of German law.

³ § 2 para. 1 sentence 1 Injunctions Act.

⁴ See OLG Frankfurt a. M., 30/6/2005, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2005, 785; OLG Hamburg, 9/6/2004, Magazindienst 2004, 761; OLG Düsseldorf, 20/2/2004, Recht der Datenverarbeitung (RDV) 2004, 222.

⁵ § 2 para. 2 sentence 1 no. 11 Injunctions Act.

⁶ OJ 2016 L 119/1.

⁷ See, for example, A. Halfmeier, *Musterfeststellungsklage: Nicht gut, aber besser als nichts*, Zeitschrift für Rechtspolitik (ZRP) 2017, 201 ff.

⁸ *ibid.*, at 202.

⁹ See J. Harke, *Herstellerhaftung im Abgasskandal*, VuR 2017, 83 ff., with regard to Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ 2007 L 263/1.

2.2 Comparison with the CPC Regulation

The CPC Regulation (EC) 2006/2004, which is aimed at the public authorities in the Member States, describes as its scope of application in its Article 1 the 'laws that protect consumers' interests'. This wording is much clearer than the wording of 'collective interests of consumers' that we find in the Injunctions Directive since it cannot be misinterpreted: 'Consumers' interests' are plain and simple the interests of actual persons, without any necessity to establish a metaphysical category of 'collective interests'.¹⁰

The laws that protect consumers' interests are then defined in Article 3(a) CPC Regulation as certain Directives as transposed into national laws and certain EU Regulations, the relevant Directives and Regulations being listed in the Annex of the CPC Regulation. Like the Injunctions Directive, this Regulation follows a 'closed list' approach by explicitly enumerating the legal provisions that are to be enforced in this specific manner. Although there is considerable overlap of the list in the CPC Regulation's Annex with the list in Annex 1 of the Injunctions Directive, the list in the CPC Regulation is longer and contains more legal instruments. It is noteworthy that the CPC Regulation's list contains also provisions that protect not only consumers, but all persons regardless of the purpose behind their activity: In particular the passenger rights regulations, such as the Air Passenger Rights Regulation (EC) 261/2004,¹¹ give rights to all persons who use that form of transportation, even if they do that for professional purposes. The E-Privacy Directive 2002/58/EC follows a similarly broad approach and is not restricted to consumer-trader relationships.

Existing EU law thus already acknowledges that consumer protection goals are inherent not only in specific consumer legislation, but also in general laws that apply to everybody.

2.3 Comparison with the General Data Protection Regulation

The new EU General Data Protection Regulation (EU) No. 2016/679 (GDPR) – which will enter into force in May 2018 – does not mention the goal of consumer protection, as it is applicable to 'the protection of natural persons'¹² in general. Although it is clearly possible that a natural person encounters data protection issues regarding that person's professional or entrepreneurial activity, such situations will be rather an exception. Typically, data protection issues arise in the relationship between natural persons and government authorities or between natural persons and businesses in the course of B2C transactions. The latter cases are clearly consumer cases that affect not only the consumers' privacy but also their economic interests. This means that data protection law is, to a large extent, at the same time consumer protection law.

Because of the large overlap between data protection and consumer protection, it is no surprise that Article 80 of the GDPR also contains provisions on associations' actions, as mentioned above. Although Article 80 (2) GDPR does not create obligations for the Member States but instead gives them the possibility to introduce actions by certain associations and institutions, the treatment of associations' actions in the GDPR shows that the EU legislator sees a similar need for collective litigation instruments in the broad field of data protection. In view of these similarities with the Injunctions Directive, it would make sense to allow associations' actions in the EU for a broader scope of matters in order to avoid unnecessary friction and difficulties in demarcation and terminology.

¹⁰ Although it has to be noted that the term 'collective interests of consumers' also appears in Art. 3(a) CPC Regulation to define intra-community infringements.

¹¹ OJ 2004 L 46/1.

¹² As shown by the GDPR's full title: Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

2.4 The Commission Recommendation on Collective Redress

This idea of a general need for collective litigation instruments or other varieties of redress mechanisms is also at the heart of the Commission Recommendation 2013/396/EU on collective redress.¹³ This document acknowledges clearly that the area in which there is a need for ‘supplementary private enforcement of rights’¹⁴ is rather broad: The Recommendation applies to ‘mass harm situations’ which are defined broadly as situations ‘where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons.’¹⁵

The substantive scope of the Recommendation – ‘violation of rights granted under Union Law’ – is further defined as covering ‘all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons’. This covers consumer protection laws, but also other areas that are either subdivisions of consumer protection or at least overlap with consumer protection, namely ‘competition, environment protection, protection of personal data, financial services legislation and investor protection.’¹⁶ This list is not conclusive, but only serves to provide examples or areas of particular importance for supplementary private enforcement.

Thus, the Commission's Recommendation on collective redress has abandoned the ‘closed list’ approach, which specifically enumerates certain legal provisions that are to be enforced by collective means, but instead recommends an ‘open scope’ approach, which focuses on the need for supplementary private enforcement in certain areas and specific situations.

2.5 Broader consumer interests under EU law and policy

EU law protects consumers in many ways. Certainly, the focus of EU consumer contract law and of the legislative acts produced in Annex I of the Injunctions Directive is on market-related protection, and thus on the economic interests of consumers, but even this list is by no means complete (see only *infra*, at II. 6.).

One other area is the protection of health and safety; an area that featured already prominently in the first consumer protection programme of the EEC in 1975.¹⁷ In Annex I of the Injunctions Directive, this area is represented with Articles 86 to 100 of Directive 2001/83/EC on the Community code relating to medicinal products for human use and with Articles 20 and 21 of the Audiovisual Media Services Directive 2010/13/EU¹⁸ that has replaced the Broadcasting Directive 89/552/EEC. Examples for legislative acts of the EU that are dedicated to the protection of health and safety but not listed in Annex I of the Injunctions Directive include the General Product Safety Directive 2001/95/EC,¹⁹ Regulation (EC) No 1924/2006 on nutrition and health claims made on foods²⁰ and Regulation (EU) No 1169/2011 on the provision of food information to consumers.²¹

More broadly, EU law has recognised the consumer interest in the environmental quality of products and also in the environmental and social performance of traders more generally. In Article 3 of Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme,²² one of the means to pursue the aims and objectives as set out in this Programme is to help ensure that individual consumers, enterprises and public bodies in their roles as purchasers, are better informed about the processes and products in terms of their environmental impact with a

¹³ Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013 L 201/60.

¹⁴ *Ibid.*, recital (7).

¹⁵ *Ibid.*, No. 3 (b).

¹⁶ *Ibid.*, recital (7).

¹⁷ Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975 C 92/1.

¹⁸ OJ 2010 L 95/1.

¹⁹ OJ 2002 L 11/4.

²⁰ OJ 2006 L 404/9. This Regulation was accepted as consumer protection law by various German courts, see LG Dortmund, 6/8/2013, *Magazindienst* 2014, 77; LG Hamburg, 13/3/2015, *Lebensmittel und Recht (LMuR)* 2015, 139; LG Munich I, 15/10/2015, *Magazindienst* 2016, 138.

²¹ OJ 2011 L 304/18.

²² OJ 2002 L 242/1.

view to achieving sustainable consumption patterns. This approach finds its expression, among others, in information requirements in sectoral legislation, such as Directive 1999/94/EC on the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars.²³ The broader perspective of the environmental and social performance of companies is taken in recital (3) of the CSR Reporting Directive 2014/95/EU,²⁴ which states the ‘need to provide consumers with easy access to information on the impact of businesses on society’. There is even a link between that broader interest and the economic interest of consumers, as is particularly visible from the *Dieseltgate* scandal, in the aftermath of which the value of Diesel cars has dropped drastically on the market for second-hand cars.

2.6 Illustration with German law

Germany is one of the EU Member States that have extended the scope of application of the injunctions procedure to consumer protection laws in general.²⁵ The relevant § 2 Injunctions Act also explicitly mentions examples of consumer protection laws from EU law but also beyond. As there has been a great amount of litigation in the past, it can serve as an illustrative example of the potential of such a broad scope of application.

Within the list of consumer protection legislation that is explicitly covered by § 2 Injunctions Act, we find the provisions on payment services²⁶ (implementing the Payment Services Directive), provisions of the Security Tradings Act (*Wertpapierhandelsgesetz*) concerning the relationship between traders and customers,²⁷ implementing the MiFiD Directive, and the Payment Accounts Act (*Zahlungskontengesetz*),²⁸ implementing the Payment Accounts Directive 2014/92/EU, as well as further national legislation concerning financial services.²⁹ The LG Munich I accepted Regulation (EC) No 1103/97 on certain provisions relating to the introduction of the euro as consumer protection law in the terms of the Injunctions Act.³⁰ Price indication law, which is also recognised as consumer law within the CPC Regulation, has often been enforced via the injunction procedure.³¹

Further provisions that stem from EU law and have been treated as consumer protection laws in the terms of the Injunctions Act are the customer protection rules of telecommunications law³² and energy law.³³ The same applies to access rights under Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport.³⁴

In the context of environmental law, § 2 para. 2 Injunction Acts contains several provisions of the Renewable Energies Act.³⁵ Courts have regarded the above-mentioned Fuel Emissions Directive 1999/94/EC as consumer protection law.³⁶

In addition to these examples that all concern implemented EU law, courts have regarded numerous national laws as consumer protection laws.³⁷

The general notion of ‘consumer protection law’ has rarely led to problems. Data protection law has been the major example, as mentioned above, because courts had been reluctant to accept data protection to be ‘consumer protection’ but that problem has been solved by the legislator, with an amendment to the Injunctions Act of

²³ OJ 2000 L 12/16.

²⁴ OJ 2014 L 330/1.

²⁵ For other examples, see Civic Consulting (supra n. 2), at 99.

²⁶ § 2 para. 2 sentence 1 no. 1 lit. h) Injunctions Act.

²⁷ § 2 para. 2 sentence 1 no. 7 Injunctions Act.

²⁸ § 2 para. 2 sentence 1 no. 13 Injunctions Act.

²⁹ § 2 para. 2 sentence 1 no. 6 Injunctions Act.

³⁰ LG Munich I, 3/5/2005, MultiMedia und Recht (MMR) 2006, 348.

³¹ See KG, 26/1/2012, MMR 2012, 419; OLG Dresden, 24/9/2013, Magazindienst 2013, 1022; OLG Frankfurt, 14/2/2008, OLG Report-Frankfurt 2008, 640, at 641; LG Bonn, 17/2/2009, BeckRS 2009, 11122; LG Cologne, 6/11/2014, MMR 2015, 259, at 261; LG Rostock, 24/2/2012, Reiserecht aktuell (RRa) 2012, 201, at 202; LG Stuttgart, 22/9/2011, Zeitschrift für Bank- und Kapitalmarktrecht (BKR) 2012, 206.

³² See LG Potsdam, 26/11/2015, Verbraucher und Recht (VuR) 2016, 114.

³³ See OLG Düsseldorf, 20/10/2016, Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungsreport (GRUR-RR) 2017, 111.

³⁴ See LG Kiel, 12/8/2016, Recht der Transportwirtschaft (RdTW) 2016, 466, at 469.

³⁵ § 2 para. 2 sentence 1 no. 9 Injunctions Act.

³⁶ See LG Erfurt, 3/6/2010, BeckRS 2011, 00607; LG Erfurt, 13/1/2011, BeckRS 2011, 10372.

³⁷ For detailed analysis, see H.-W. Micklitz and P. Rott, Unterlassungsklagengesetz, in: Münchener Kommentar zur Zivilprozessordnung, vol. 3 (5th ed. 2017), § 2 UKlaG margin no. 38 ff.

February 2016. It may even serve as an example for the need for flexibility to react to societal, technological and economic development, as it is highly likely that the increasing use of personal data by businesses, for example, to address personal offers to consumers but potentially also to use their knowledge of the preferences of individual consumers for price differentiation or price discrimination.³⁸

A recent debate turns on the question as to whether the provisions relating to the prohibition of discrimination under civil law of the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz; AGG), that require, for example, access of handicapped persons to public transport, constitute consumer law provisions.³⁹

2.7 Possible solutions for the Injunction Directive

With a view to the reform of the Injunction Directive, there are two options.

Option one would be a continuation of the ‘closed list’ approach that is embodied in the current Directive. That list could be expanded piece by piece, to include further EU laws that may be seen as particularly relevant for protecting consumers’ interests through supplementary private enforcement. At the very least, one should then add those instruments that are covered by the CPC Regulation, in particular the passenger rights Regulations. In the area of data protection, one could add the GDPR at least insofar as it relates to typical consumer issues. The advantage of this piece-by-piece approach is the amount of legal certainty, as the EU legislator retains full control over the extent of associations’ actions under EU law. The disadvantage is that there is no room for the courts to develop case law in emerging areas or in specific situations, which do not form part of the closed list, as described with regard to the *Dieselgate* example above.

Option two would be an open provision that may recite certain example areas in which associations’ actions are of particular importance, but which explicitly allows such supplementary private enforcement in general, so that in unforeseen circumstances it would be up to the courts to interpret this open provision. This approach would follow the road taken in the Commission’s 2013 Recommendation on Collective Redress. The example of Germany demonstrates that this can be highly successful.

In our opinion, the advantages of an open provision would outweigh the problem of legal uncertainty. Consumers and businesses today act within a very complex legal and technological environment, in which it is very hard to foresee which specific laws will become relevant for many consumers’ interests under what circumstances. In addition, consumers’ interests today are not restricted to their immediate economic or monetary interests, but consumers also care about the protection of their personal data, about the environmental consequences of production and consumption, about the social conditions of production and many other aspects of our consumer society. These are all legitimate concerns that are – depending on democratic decisions – reflected in legislation that may or may not be adequately enforced. Therefore, consumers have a legitimate interest in the enforcement of various types of legislation that serves to protect their interests in a broad sense.

It is also necessary to point out that the legal uncertainty that is connected with an open scope approach (as used in the Commission’s Recommendation) is an uncertainty only with regard to possible *enforcement* instruments, not with regard to the content of the laws. It does not change anything with regard to the substantive laws of the European Union. Businesses must abide by these laws anyway, so that the question of which association under which circumstances may enforce the laws does not change anything from the perspective of a law-abiding business. To the contrary, uncertainty about the instruments or extent of law enforcement might rather act as an additional deterrent, which would incentivise business to rather play safe than be sorry.

Therefore, we propose an open scope provision for a reformed Injunctions Directive. The wording of such an open provision could be worded along the lines of the Commission’s 2013 Recommendation, for example as follows:

³⁸ See, for example, H. Zander-Hayat, L. A. Reisch and C. Steffen, *Personalisierte Preise – Eine verbraucherpolitische Einordnung*, VuR 2016, 403 ff.

³⁹ See the case of OLG Schleswig, 11/12/2015, VuR 2016, 190. The court did not need to decide the matter, since unfair contract terms law applied.

Qualified entities may bring actions according to this [Directive/Regulation] in order to protect consumers' interests against violations of Union law. Such interests may consist in, but are not limited to, the enforcement of rules of consumer protection, competition, environment protection, protection of personal data, financial services and investor protection.

3. Qualified entities

3.1 Problems under the existing Injunction Directive

Article 3 of the Injunction Directive allows for a broad margin of appreciation on the part of the Member States in what type of entities they deem to be qualified to bring injunctions, and on the requirements those entities have to meet. These could be a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by the national law. In other words, the Member States are not forced to grant consumer organisations legal standing, and if they do so, they appear to be free to define the criteria that consumer organisations must satisfy.

This is reflected in the legislation of the Member States. In Poland, the injunction procedure is an administrative procedure where only one official body may initiate proceedings,⁴⁰ whereas in Spain and Portugal, it seems that any individual consumer may bring an injunction action.⁴¹ In Germany, the legislator has introduced very restrictive rules regarding the admission of qualified entities,⁴² whereas in the Netherlands, any association with legal personality can bring an injunction action as long as this is covered by the scope of the association's internal statutes.⁴³ This makes it rather easy to create special associations that have standing for specific problems. Such an ad-hoc creation of an association with standing is impossible in Germany where consumer organisations that seek registration must have existed for at least one year.⁴⁴

This *status quo* is not satisfactory, as it allows Member States to create too many obstacles for consumer organisations that wish to defend consumer interests in court. Even where public law instruments exist, and where public consumer protection authorities are the main actors in the enforcement of consumer law, there is still a need for complementary rights of private actors, in particular consumer organisations, in cases where the public body decides, for whatever reasons, not to take action. The same would apply, by the way, to collective redress mechanisms, where the EU Commission's Recommendation on Collective Redress also provides the option for Member States to completely replace the designation of qualified private entities by empowering certain 'public authorities' to bring representative actions.⁴⁵

3.2 Possible Solutions

First of all, although Member States should remain allowed to have public authorities as main actors in the field of consumer protection, the EU legislator should make legal standing for consumer organisations that satisfy certain minimum requirements mandatory, so as to close the gap in situations where public authorities do not take action.

One option would consist in creating harmonised rules on legal standing.⁴⁶ However, this may not be easy in view of the very different national approaches. Nevertheless, one could for example use the approach that is found in the EU Commission's Recommendation on Collective Redress. This document deals with representative actions – which in the Recommendation's terminology includes injunctions⁴⁷ – where standing is granted to certain 'representative

⁴⁰ Civic Consulting, Study for the Fitness Check of EU consumer and marketing law – Final report Part 3 (May 2017), at 926.

⁴¹ *Ibid.*, at 969 and 1163.

⁴² See the overview by Civic Consulting (*supra* n. 2), at 384-388.

⁴³ See Art. 3:305a and 305c Dutch Civil Code.

⁴⁴ See § 4 para. 2 sentence 1 no. 2 Injunctions Act.

⁴⁵ No. 7 of the Recommendation on collective redress.

⁴⁶ See also Micklitz and Rott (*supra* n. 37), § 4 margin no. 13.

⁴⁷ See no. 3(a) of the Recommendation on collective redress.

entities'. According to the Recommendation, such entities must fulfil at least three requirements, which could be summarised as being (a) 'non-profit', (b) 'relevant' and (c) 'sufficiently capable'.⁴⁸

The 'non-profit' requirement set out in the Recommendation is rather self-explanatory, and is intended to exclude commercial entities. It can also be found in national legislation, for example, in German law.⁴⁹ Of course, it does not mean that consumer organisations could not offer advice for payment if that is necessary to finance their activities, such as litigation.⁵⁰

The notion of 'relevance' means that there must be a 'direct relationship' between the entity's 'main objectives' and the alleged violations that are attacked with the action. This corresponds, for example, with the Dutch and German rules that the internal by-laws of the association or institution must relate to the objectives of the action⁵¹ – for example, an association that purports to protect small investors' interests cannot bring an action in the interest of environmental protection. In the Injunctions Directive, this criterion is already established, for intra-Union infringements, through Article 4(1), but it is also a common criterion for domestic claims.⁵²

The third requirement aims at the professional capabilities of the association or institution, which must be sufficiently strong in respect of financial and human resources as well as legal expertise. Again, this is a common criterion at the national level.⁵³

In contrast, we recommend not to require consumer organisations to have been in existence for a specific amount of time, as this would make it impossible to set up *ad hoc* organisations in the wake of a specific case. Indeed, the Recommendation contemplates the *ad hoc* certification of representative entities for a specific action, without specifying whether such *ad hoc* certification should use different criteria than those set out above for a general designation of eligible entities.⁵⁴

Thus, with regard to standing of qualified entities, a reformed Injunctions Directive could specify that at least those associations that fulfil the three criteria set out above must be accepted by all Member States as qualified entities. The Member States could then in addition to that give standing to certain public authorities, *ad hoc* associations or even individual persons, but would have to accept as a minimum the entities that fulfil the common criteria.

A second alternative would consist in allowing certain EU-wide organizations to have standing for all injunction actions in all Member States. Currently, this is not possible: Art. 4 of the Injunctions Directive allows qualified entities from other Member States to act only in cross-border cases, and even in such cases, it only refers to qualified entities that are created and registered according to the law of a certain Member State. This currently means that an association from a Member State that does not grant standing for injunctions to private organisations cannot act even in cross-border cases because it cannot be entered into the list according to Article 4(3) Injunctions Directive. This could be changed by establishing a further group of associations that have standing in all cases within the European Union. Such associations could be registered at EU level under certain uniform requirements. For example, one could use the three requirements set out above with a view to their EU-wide application:

The Commission shall provide a list of EU-qualified entities that have standing to bring actions in all Member States within the scope of this [Directive/Regulation] if there is sufficient relationship between the alleged violation and the objectives of the entity. Any legal person may apply to the Commission for inclusion in this list and will be included if it

- has legal personality under the laws of a Member State,
- has a non-profit making character,

⁴⁸ No. 4 of the Recommendation on collective redress.

⁴⁹ § 4 para. 2 sentence 1 Injunctions Act.

⁵⁰ See Micklitz and Rott (supra n. 37), § 4 margin no. 19.

⁵¹ For Germany, see Micklitz and Rott (supra n. 37), § 3 margin no. 38 f.

⁵² On potential limitations as to the geographical scope of the activities, see Part II of this study.

⁵³ For Germany, see § 4 para. 2 sentence 1 no. 3 Injunctions Act.

⁵⁴ See No. 3(d) of the Recommendation on collective redress.

- shows that its articles of association or internal statutes aim at the protection of interests within the scope of this [Directive/Regulation], and
- shows that it has sufficient capacity in terms of members, resources and expertise to protect such interests within the European Union.

The last requirement (d) could be fulfilled either by setting up a centralised organisation that is capable of acting across the European Union, or by reference to a network of member or partner organizations in several Member States that could assist in bringing cases in those Member States.

This latter solution could be an adequate compromise as it would leave national enforcement procedures – e.g. through associations, ombudsmen or administrative authorities – in place as they are, but would add to this an EU-wide enforcement layer that would guarantee at least the possibility of an intervention by such EU-wide entities if the national systems do not provide sufficient enforcement in a particular case.

4. Injunction and compensation as one procedure

4.1 The problem

Experience with the implementation of the Injunction Directive shows a divided picture: On the one hand, the injunction procedure as it is used by consumer associations and other qualified entities has proven to be very successful in protecting consumers' interests. It has ended many unlawful practices and it has had significant impact on contract terms and on commercial practices.⁵⁵ In this regard, the Injunction Directive has been a success story. However, at the same time experience has shown that the injunction tool is lacking significant power with regard to actual consumer redress. As it is primarily directed to the future, it does not help with compensation for past violations. Furthermore, an injunction action often is not a significant threat for rogue businesses, as they may try unlawful practices for profit, risking only an injunction and some associated legal fees. Since the injunction procedure is not connected to any compensation or disgorgement of unlawful profits, it presents only a very limited risk for such businesses.

This limited effect of the injunction procedure is highly problematic with regard to all three commonly accepted goals of collective redress instruments: Compensation, deterrence and judicial efficiency. With respect to compensation, it is clear that the injunction procedure as such does not help individual consumers to be compensated for their losses that they have suffered due to the unlawful behaviour that is the object of the injunction procedure. With respect to deterrence or behaviour modification, it is obvious at least from a theoretical perspective that the possibility of compensation for mass harms or repayment of unlawfully gained profits is a much greater deterrence factor than a pure prohibition order.⁵⁶ Finally, the goal of judicial efficiency is not well served by a pure cessation order. If, for example, the court prohibits the use of certain unfair contract terms – such as unfair price increase clauses – there may be a large number of individual actions to follow which deal with compensation for payments made according to the unfair and thus invalid contract clause. Such mass individual actions may create additional work for the courts and inefficiencies that could be prevented if the injunction action would at the same time address the compensation issues.⁵⁷

The empirical enquiries that have been commissioned by the Commission in the context of the REFIT process also show these problems and have led to the conclusion that a new approach to combine injunctive relief with redress

⁵⁵ See, e.g., for Germany the summary of 50 years of consumer associations' actions in A. Halfmeier, 50 Jahre Verbraucherverbandsklage (2015), at 20 ff.

⁵⁶ For empirical evidence on stronger deterrence through collective damage actions see the experimental study by T. Eisenberg and C. Engel, Assuring Adequate Deterrence in Tort: A Public Good Experiment, 11 Journal of Empirical Legal Studies (2014), 301, at 331.

⁵⁷ See only LG Freiburg, 23/9/2003, NJW 2003, 3424, that suspended the decision of the case at hand arguing that it was a waste of resources that a multitude of instance courts dealt with the same issue and rather decided to wait for clarification by the BGH.

possibilities is necessary.⁵⁸ In the following, such a combined approach shall be discussed and situated in the context of the existing European legal systems.

4.2 The fundamental connection between cessation and redress

As a starting point, it is important to point out that the connection between an action for cessation and redress is deeply rooted in the European legal systems. This shall be illustrated with reference to Roman legal traditions, but also to the modern German, English and French legal systems. The historical and comparative analysis shows that the connection between cessation and restitution or redress is a fundamental principle in Europe that can and should be supported and concretised by European Union law.

4.2.1 Roman law: *interdicta*

The modern variants of injunction proceedings have their roots not only in actions designed to protect the enjoyment of private property (such as the *actio negatoria*), but also in proceedings called *interdicta*.⁵⁹ These proceedings could not only be brought to protect private interests (such as undisturbed possession), but also to protect 'public' interests, for example the undisturbed use of public roads or waterways.⁶⁰ Since all eligible citizens could commence such *interdictum* proceedings, they are called 'popular interdicts' in the historic literature.⁶¹ An *interdictum* could include a prohibition of certain actions (prohibitory interdict) but could also include that the defendant was ordered to restore the original condition of a thing by removing the changes that he had made. This is called a 'restitutory interdict' in the literature.⁶² The Roman sources describe the restitutory character of such an interdict as restoring the untouched status: *Restituere videtur, qui in pristinum statum reducit*.⁶³ In the English translation, the relevant part – specifically dealing with obstructions of public roads – reads:

When the Praetor says, 'you shall restore it to its former condition,' he is understood to mean that it shall be placed in its original state, which is accomplished either by removing what has been built, or by replacing what has been taken away, and this sometimes at his own expense. For if the party who is sued under the interdict did the work, or someone else did it by his order, or he ratified what the latter had done, he must restore everything to its original condition at his own expense [...].⁶⁴

This quote clearly shows that even ancient Roman law was based on the principle that if somebody creates an unlawful situation in the sense of interfering with legally protected interests, the proceedings against that person could include not only the prohibition of such action for the future but also an order to 'restitute', i.e. to restore the original (lawful) condition or – in a more modern English translation of the mentioned text – to 'make good' what has been done.⁶⁵

⁵⁸ See the Commission Report of the Fitness Check, SWD(2017) 209 final, at 105.

⁵⁹ As to connections between *actio negatoria* and *interdicta* see, e. g., B. H. Oppermann, Unterlassungsanspruch und materielle Gerechtigkeit im Wettbewerbsprozess (1993), at 105; on *interdicta* in general E. H. Berger, in: Pauly's Realencyclopädie der classischen Altertumswissenschaft Vol. IX, 2 (1916) at columns 1609-1707.

⁶⁰ Digest 43.8.2.2 and 43.8.2.34, further examples see A. Halfmeier, Popularklagen im Privatrecht (2006), at 31.

⁶¹ See, e.g., Berger (supra n. 59), at 1621.

⁶² Ibid., at 1614.

⁶³ Digest 43.8.2.43.

⁶⁴ Ibid., English translation in S. P. Scott, The Civil Law (1932).

⁶⁵ In the translation edited by A. Watson, The Digest of Justinian, Vol. 4 (1998), the relevant part in Digest 43.8.2.43 reads: 'You are to make good, he says. To make good is to restore to its original condition. This is done by removing what has been constructed or replacing what has been removed, and sometimes at his own expense. For if the person against whom the interdict lies did the work, or ordered it to be done by somebody else, or ratified what someone else did, he must restore it at his own expense.'

4.2.2 United Kingdom

The Roman term *interdict* is today still used in Scottish law as the Scottish legal system is at least in part based on Roman traditions. However, the modern Scottish usage of *interdict* appears to be rather similar to the English concept of injunction.⁶⁶

In England and in other Common Law systems, the injunction is an equity-based remedy 'which may be granted by the court for the purpose of abating unlawful interferences or disturbances in the broadest sense.'⁶⁷ The English law on injunctions also shows a clear connection between the prohibition of unlawful activity and the correction of the situation caused by such behaviour: Not only can the court issue a 'prohibitive' injunction against certain conduct, but the injunction can also be 'mandatory' in the sense that it requires positive action from the defendant to restore the situation.⁶⁸ Nevertheless, the latter kind appears to be rather the exception and requires the showing that imminent danger exists to the detriment of the plaintiff.⁶⁹ Furthermore, the mandatory injunction requires consideration of the costs involved for the defendant to undertake such measures.⁷⁰ This fits with the general approach regarding injunctions as part of *equity*, which means that the granting of an injunction is at the discretion of the court, requiring a balancing of the affected interests in the specific case.⁷¹

The idea of connecting injunction with restitution or even damages has been taken up since 2000 in the area of financial services law, aiming at effective and efficient provision of justice, and gradually expanded to other areas of consumer law in its broad sense, apparently because of its successful use by courts and public authorities.⁷²

With s 382 of the Financial Services and Markets Act 2000 (FSMA 2000), the (then) Financial Services Authority (FSA - now Financial Conduct Authority; FCA), was given the right to apply to the court for a restitution order if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and that profits have accrued to him as a result of the contravention or that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention. The court may then order the person concerned to pay to the FCA such sum as appears to the court to be just having regard (a) to the profits appearing to the court to have accrued; or (b) to the extent of the loss or other adverse effect. The FCA must then distribute the amounts paid to the victims of the unlawful practice, as the court directs.⁷³

Section 384 FSMA 2000 complements this with the power of the FCA to issue restitution orders itself, the difference being that the FCA can order the infringer to pay out directly to the victim of the unlawful practice.⁷⁴ That type of power was, in 2013, also granted to the Office of Gas and Electricity Markets (Ofgem), under the notion of 'consumer redress orders'.⁷⁵

An even more powerful instrument was introduced with the Financial Services Act 2010 that established the FCA's power to order so-called consumer redress schemes as regulated in ss 404 and 404A-G FSMA 2000.⁷⁶ This is a set of rules under which a firm is required to take one or more of the following steps: (1) investigate whether, on or after a specified date, the firm has failed to comply with particular requirements that are applicable to an activity it has been carrying on; (2) determine whether the failure has caused (or may cause) loss or damage to consumers; and (3) if the firm determines that the failure has caused (or may cause) loss or damage to consumers, the firm must: (a) determine what the redress should be in respect of the failure; and (b) make the redress to the consumers.⁷⁷

⁶⁶ H: Stoll, in: A. Tunc (ed.), *International Encyclopedia of Comparative Law*, Vol. XI (Torts) Part 2 (1986), at para. 8-192.

⁶⁷ *Ibid.*, at para. 8-184.

⁶⁸ See, e.g., P. S. Davies and G. Virgo, *Equity & Trusts* (2nd ed. 2016), at 977-980.

⁶⁹ *Redland Bricks Ltd. v. Morris* [1970] AC 652, 665-666 (House of Lords).

⁷⁰ Stoll (supra n. 56), at para. 8-187.

⁷¹ *Ibid.*, at para. 8-189.

⁷² For details see C. Hodges, *Law and Corporate Behaviour* (2015), in particular at 279 ff., 406 ff.; *id.*, *Mass Collective Redress: Consumer ADR and Regulatory Techniques*, *European Review of Private Law* (ERPL) 2015, 829 ff.; P. Rott, *Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA*, in: H. Schulte-Nölke (ed.), *Neue Wege zur Durchsetzung des Verbraucherrechts* (2017), 31, at 47 ff.

⁷³ For details as to the circumstances under which the FCA will use these powers, see the FCA Handbook, *Regulatory Guides*, EG The Enforcement Guide, EG 11 *Restitution and redress*, at EG 11.1. and 11.2.

⁷⁴ For details as to the choice between this instrument and the application for a restitution order under s 382 FSMA 2000, see the FCA Handbook (supra n. 74), at EG 11.3.

⁷⁵ See s 30G ff. Gas Act 1986 and s 27G ff. Electricity Act, as introduced by s 144 with sch. 14 Energy Act 2013. For details, see Hodges, ERPL 2015, 829, at 849 f.

⁷⁶ See also R. Money-Kyrle, *Collective Enforcement of Consumer Rights in the United Kingdom*, in: M. Schmidt-Kessel, C. Strünck and M. Kramme (eds), *Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa* (2015), 45, at 78; Rott (supra n. 72), at 48 f.

⁷⁷ For details, see the FCA Handbook, *Redress*, CONRED Consumer Redress Schemes sourcebook.

Consumer redress schemes have led to the payment of high amounts to consumers. Under the most prominent scheme, related to the payment protection insurance (PPI) scandal, firms have paid out £28.5 billion to consumers between January 2011 and September 2017.⁷⁸

Although the resources of the English regulatory agencies and ‘enforcers’ are of course limited, the development of compensation orders against traders by specifically designated institutions is viewed very positive in academic writing, as it avoids the problem of adjudicating a multitude of individual claims but at the same time provides at least a basic level of redress for consumers.⁷⁹

With the Consumer Rights Act 2015, similar powers have been given to the courts generally in consumer law, under the notion of ‘Enhanced Consumer Measures’ (ECMs). These measures are intended to help enforcers achieve better redress for consumers who have experienced a breach of consumer law. ECMs can fall within three categories: redress measures, which provide for compensation or other redress, such as the right to cancel the contract, in cases where consumers have suffered loss as a result of conduct giving rise to the enforcement action; compliance measures intended to prevent or reduce the risk of future breaches; and choice measures to enable consumers to choose more effectively between suppliers. The principle of proportionality applies, which in particular requires a cost/benefit analysis.⁸⁰

4.2.3 France

French tort law is based on the general provision of art. 1240 Code Civil (which used to be art. 1382 Code Civil until the reform of the French law of obligations in 2016). Traditionally, this basic provision of non-contractual liability is interpreted as including injunctive relief, including any measures needed to stop or prevent the wrongful situation or activity.⁸¹

In the specific area of associations’ actions against violations of consumer law, these associations may not only demand the cessation of unlawful commercial activity, but the defendant trader may also be ordered, for example, to inform affected consumers that certain contract clauses have been declared unlawful and void by the court.⁸² The judge also has the power to order additional measures with the goal of stopping the unlawful activities.⁸³

Furthermore, French law today contains a special form of follow-on action, in which associations can bring a case that may lead to individual compensation by way of a special procedure, the *action en groupe*. This specific type of follow-on procedure is discussed in more detail infra, at V. 3 d).

4.2.4 German law

German law has known the connection between prohibition and restitution for a long time, which shall be illustrated hereinafter. Most recently, in 2016, the legislator expressly introduced it into the Injunctions Act.

a) § 1004 Civil Code

This close connection between prohibition and restitution can be found in the German Civil Code (*Bürgerliches Gesetzbuch*; BGB), where § 1004 BGB provides the model for most types of injunctions. Although § 1004 BGB explicitly deals only with interference with tangible property, it has been extended in more than 100 years of case law by way of analogy to the protection of several other legal positions,⁸⁴ and the German legislator has used the

⁷⁸ See FCA, Monthly PPI refunds and compensation, <https://www.fca.org.uk/consumers/financial-services-products/insurance/payment-protection-insurance/ppi-compensation-refunds>. For further examples, see Hodges, ERPL 2015, 829, at 860.

⁷⁹ See Hodges, ERPL 2015, 829, at 846 ff.

⁸⁰ For more details, see Competition and Markets Authority, Consumer protection: enforcement guidance (2016), available at <https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58>.

⁸¹ W. van Boom, Maastricht J. Europ. Comp. L. 17 (2010), 10, at 20, referring to the seminal work by C. Bloch, La cessation d’illicite (2008). For the broad powers of the French judge in determining the mode of reparation see the examples listed in Dalloz, Code Civil (117th ed. 2017), Art. 1242 annotations 186 ff.

⁸² Art. L 621-2 and L 621-8 Code de la consommation in its new version since 2016.

⁸³ Art. L 621-3 Code de la consommation.

⁸⁴ In particular personality rights, see, e. g., C. Baldus, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 7 (7th ed. 2017), § 1004 margin no. 32.

structure of § 1004 BGB as a model for injunction claims in many specific laws,⁸⁵ for example in the law of unfair competition which will be analysed in this respect further below.

The wording of § 1004 BGB in fact does not start with a claim for prohibition of future behaviour, but the provision in its first sentence creates a claim for *Beseitigung*, which means that the defendant must undo the violation – of property in the specific case of § 1004 BGB, or of other legal positions in the other cases with equivalent structure. The claim for prohibition of certain behaviour (*Unterlassung*) then follows in sentence two of § 1004 BGB only for the special case that further violations appear to be possible. This shows that the cessation of unlawful behaviour and the ‘making good’ or correction of violations caused by such behaviour are two sides of the same coin and typically go together in German case law and doctrine. This is explained in one of the leading commentaries on the German Civil Code as a ‘general commandment of justice’, according to which an ongoing unlawful interference must be removed by the person who caused it, even without fault.⁸⁶

This connection between the cessation of unlawful behaviour and the obligation to ‘make good’ its consequences leads to the question of where the dividing line between such a claim and a claim for damages – normally based on fault – can be drawn. This is considered to be a difficult issue in German legal doctrine.⁸⁷ Some writers try to explain the distinction between abatement (*Beseitigung*) and tort law compensation claims with the term of *actus contrarius*: Abatement in this sense means that the defendant must (only) ‘undo’ his unlawful act by a contrary act, but is not obliged to fully restore the claimant’s position to the *status quo ante*.⁸⁸ In many cases, however, this will be the same: To take the example from the Roman cases of *interdicta*, if one blocks a road by letting a tree fall across the road, abatement certainly means to remove that tree and thus restore the road to its *pristinum statum*.

German case law also admits the difficulty of distinguishing between abatement and compensation, but starts at least in principle from the proposition that abatement means that an imminent and ongoing influence must be stopped and/or corrected, while compensation for past losses can be asked for only according to the requirements of a (fault-based) damage claim.⁸⁹ As a hypothetical example, if somebody throws stones onto someone else’s property, the claim for abatement under § 1004 BGB clearly includes the obligation to remove those stones from the property (and of course the prohibition to throw further stones in the future), but not necessarily the repair of a window that was broken by one of the thrown stones.⁹⁰ One could argue that the stones lying on the property are an ongoing, and still imminent influence, while the destroyed window can be seen as a past loss that is not ‘imminent’ anymore, but completed and thus a matter of tort law compensation. However, this conceptual difference is not very convincing, as the broken window may be the cause of further negative influences – such as rain or cold coming into the house – so that it could also be seen as an ongoing influence that has to be restored as part of the abatement claim.⁹¹

Further examples from the case law show that in practice, there may be a considerable overlap between abatement according to § 1004 BGB and repair of losses under tort law: Where harmful chemicals have flown onto the neighbour’s property, the abatement claim includes the obligation to remove those chemicals even if that can be realised only by removing the contaminated soil altogether.⁹² Where tree roots have grown underneath the neighbour’s property and caused harm to the tennis court situated there, the abatement claim includes not only the removal of the tree roots but also the restoration of the tennis court to its original state.⁹³

b) Unfair commercial practices

In German court practice, injunction claims for abatement and prohibition of unlawful activity are of particular relevance in the area of unfair commercial practices. The relevant provision of § 8 UWG (Unfair Commercial Practices Act) originally contained only a claim for prohibition of unlawful activity (*Unterlassung*). However, it was the common opinion in literature and case law that this claim also includes abatement in the sense of removal of the

⁸⁵ For a list of such provisions see Baldus, *ibid.*, at margin no. 15.

⁸⁶ H. Sprau, in: O. Palandt, BGB (76th ed. 2017), at margin no. 37 before § 823, with reference to BGH, 25/4/1958, Neue Juristische Wochenschrift (NJW) 1958, 1043.

⁸⁷ Baldus (*supra* n. 84), § 1004 margin no. 217: ‘The least solved problem of § 1004 BGB’.

⁸⁸ *Id.* at margin no. 225 with further references to the literature.

⁸⁹ BGH, 12/12/2003, NJW 2004, 1035, 1036.

⁹⁰ This hypothetical is borrowed from BGH, 1/12/1995, NJW 1996, 845, at 846.

⁹¹ T. Pfeiffer, *Beseitigung und Schadensersatz*, in: Karlsruhe Forum 2012 – Beseitigung und Schadensersatz (2012), 7, at 20 f.

⁹² BGH, 1/12/1995, NJW 1996, 845, at 847.

⁹³ BGH, 18/4/1997, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 135, 235, at 238.

consequences of such activity, as both aspects always must go together as it is the case in § 1004 BGB described above; therefore a claim for abatement in unfair competition was accepted as ‘customary’ even without explicit reference in the written laws.⁹⁴ The German legislator has later explicitly introduced abatement (*Beseitigung*) into the wording of § 8 UWG, but stressed that this would not change the law but only to support and codify the existing case law.⁹⁵ The wording is now similar to Austrian law of unfair competition, where prohibition (*Unterlassung*) and abatement (*Beseitigung*) are also mentioned explicitly.⁹⁶

However, the case law of the German Federal Court shows that prohibition and abatement cannot always be divided very clearly, as both are based on the same principle of ‘making good’ unlawful behaviour. In German case law on unfair competition and trademark law, the claim for prohibition has been extended to product recalls as well: Where a judgment orders the defendant to stop distributing a product since the specific product or form of distribution is unlawful, the prohibition judgment includes the defendant’s obligation to recall the product in question from his own customers to whom he has already delivered the product.⁹⁷ The prohibitory claim against unlawful commercial activities can thus include the obligation to act, in particular to ask customers to return or destroy the affected products or to destroy advertising material. This rather broad interpretation of the claim is limited, however, by the principle of adequacy and reasonableness (*Zumutbarkeit*), so that the defendant cannot be asked to undertake unreasonable efforts that are beyond his reach.⁹⁸ The exact determination of what are reasonable measures to be undertaken by the defendant depends on the specific case.⁹⁹

Although this case law is now well established by the German BGH, it has been criticised somewhat by academic commentators who fear that the case law would blur the statutory distinction between *Unterlassung* and *Beseitigung*.¹⁰⁰ However, even those critical authors admit that the case law of the BGH can be supported with the general principle, on which § 1004 BGB is based, namely that the claim for prohibition of future actions is only a subsidiary or specific case within the broader concept of abatement of unlawful activity.¹⁰¹ In particular, this criticism is not directed against the content of the claims for prohibition and abatement, but only at preserving the statutory distinctions between these two goals and the treatment of different applications by the plaintiff within the framework of civil procedure. The authors propose, for example, to distinguish between corrections within the defendant’s own sphere of influence and those outside this sphere. This would mean that the prohibition claim typically includes the defendant’s obligation to correct his own unlawful behaviour by doing everything that he can reasonably do within his own sphere (such as destroying unlawful products in his storage, cancelling unlawful advertisement), but that an additional abatement application shall be necessary with regard to actions which the defendant should take with respect to third parties, such as the recall of already delivered product from his customers.¹⁰²

This case law from general unfair commercial practices law does not specifically deal with consumer associations’ actions for injunction, nor with consumer protection issues. It clearly shows, however, that German case law and doctrine is based on a very close connection between prohibition and abatement in cases of unlawful commercial activity, even if the boundaries between these types of claims and their exact content need to be specified from case to case.

In addition to these general developments, the content of prohibition and abatement claims has become an issue in the specific area of consumer protection and consumer associations’ actions. At least two appeals courts have explicitly decided that a consumer association’s injunction claim against unlawful commercial behaviour is not

⁹⁴ J. Fritzsche, in: Münchener Kommentar zum Lauterkeitsrecht (2nd ed. 2014), § 8 UWG margin no. 147 with further references; in the earlier literature see, e.g., Oppermann (supra n. 59), at 27; W. Erdmann, in: Großkommentar UWG (1st ed. 1991), § 13 UWG (old version) at margin no. 22. See also, in the area of trademark law, BGH, 25/1/2001, Neue Juristische Wochenschrift – Rechtsprechungsreport (NJW-RR) 2001, 1047, at 1049: The action for removal of an unlawful trademark registration can be based on the ‘general claim for abatement in the law of unfair commercial practices’.

⁹⁵ See the parliamentary documents in BT-Drs. 15/1487, at 22; H. Köhler and J. Bornkamm, UWG (35th ed. 2017), § 8 UWG margin no. 1.84.

⁹⁶ See §§ 14 and 15 of the Austrian Unfair Competition Act.

⁹⁷ BGH, 29/9/2016, GRUR 2017, 208 (*Rescue-Tropfen*); BGH, 19/11/2015, GRUR 2016, 720 (*Hot Sox*); the German Federal Court has confirmed this interpretation even in cases where the prohibition was not decided in a judgment but in a voluntary undertaking signed by the defendant: BGH, 4/5/2017, GRUR 2017, 823.

⁹⁸ BGH, 29/9/2016, GRUR 2017, 208, at 210 f.

⁹⁹ For details and examples, see P. Sakowski, *Unterlassen durch Rückruf – „Hot Sox“ und „RESCUE-Produkte“ und die Folgen*, GRUR 2017, 355, at 359.

¹⁰⁰ See, e.g., N. Klute, *Die aktuellen Entwicklungen im Lauterkeitsrecht*, NJW 2017, 1648, at 1653; C. Hermanns, *Der Unterlassungsanspruch als verkappter Rückrufanspruch?*, GRUR 2017, 977.

¹⁰¹ (Collective of authors), *Zwischenruf des Ausschusses für Wettbewerbs- und Markenrecht der GRUR zum Verhältnis von Unterlassung und Beseitigung im gewerblichen Rechtsschutz und insbesondere im Wettbewerbsrecht*, GRUR 2017, 885.

¹⁰² In the latter direction see OLG Frankfurt a.M., 19/9/2016, GRUR 2016, 1319, 1320 (appeal pending at the BGH).

limited to a purely prohibitory cease-and-desist order. In one case from 2004, an organisation of insurance customers won a case against an insurance company. The court ordered the insurance company not only to stop making incorrect legal statements regarding a disputed unilateral change in conditions, but also ordered the company to send information letters to the affected customers in which the correct legal situation was to be explained to the customers.¹⁰³

In a more recent case, an electricity supplier had raised its prices in violation of the applicable legal standards; in litigation brought by a consumer association, the *Kammergericht* (Berlin Court of Appeals) ordered that supplier not only to stop charging the unlawfully increased price, but also to inform affected customers about the fact that they have paid too much in the past and that they may have a claim for reimbursement of the difference.¹⁰⁴

This approach has now been confirmed by the German Federal Court in another insurance law case where a life insurance provider had used unfair and therefore unlawful contract clauses relating to the life insurance's value in the case of termination. The first instance court had ordered the insurance company to inform the affected customers about this, including the fact that they may have a payment claim based on the insurance company's unlawful use of these contract clauses.¹⁰⁵ The Court of Appeal in Stuttgart reversed this decision on appeal, arguing that the statutory language for qualified entities' actions against unfair contract clauses (§ 1 *Unterlassungsklagengesetz*) included only their prohibition, but expressly not any form of abatement.¹⁰⁶ While the Federal Court accepted this argument with regard to that specific statutory provision, it found that nevertheless qualified entities have an abatement claim in unfair terms cases: As the use of unfair terms is at the same time an unfair commercial practice, the abatement claim can be based on unfair commercial practices law, which explicitly includes claims not only for prohibition but also for abatement.¹⁰⁷ Therefore, it is now clearly established in German law that a trader who uses unfair terms can be sued not only for an injunction to stop the use of these terms, but also for abatement in the sense that the trader must inform its customers about the fact that an unfair and thus invalid clause was used.

In these cases, the content of the claim for abatement was limited to an order against the defendant to *inform* affected customers about the fact that the trader acted unlawfully and that they thus may have an individual claim against the trader. However, at least in cases where the existence and the amount of the individual customers' claims is rather clear, one could also think of a more effective solution: The claim for abatement could include an order to fulfil those individual customer claims, that is, to repay to the customers the amounts that are owed to them. This reasoning was used by the LG Leipzig in 2016 in a case where a bank had repeatedly charged amounts of 30 Euros on customers' accounts in connection with account attachments, and it was found that these charges were made in clear breach of the applicable laws. In an action brought by the regional consumer centre, the court not only prohibited this practice, but also ordered the bank to calculate the unlawful charges in relation to the individual customers and repay these amounts to them, as an abatement of the breach committed by the bank.¹⁰⁸

Although this latter case appears to open up a new chapter in the area of consumer protection, it is not completely novel with regard to the interpretation of abatement as potentially including payment obligations. In the area of cartel law, the BGH has repeatedly held that the claim for abatement – which in contrast to a damage claim is not fault based – does include the repayment of money that was unlawfully withheld.¹⁰⁹ Just as in the decisions regarding § 1004 BGB, that we discussed above, the BGH acknowledged also in this area of law that there may be a considerable overlap between abatement and damage claims.¹¹⁰ The larger part of the academic literature concludes from these

¹⁰³ OLG Bamberg, 12/10/2004, file no. 3 U 151/04, BeckRS 2016, 04473 (Bund der Versicherten v. HUK-Coburg Krankenversicherung AG).

¹⁰⁴ KG Berlin, 27/3/2013, file no. 5 U 112/11, BeckRS 2013, 09271 (Verbraucherzentrale Hamburg v. Flexstrom AG).

¹⁰⁵ LG Stuttgart, 7/8/2014, file no. 11 O 298/13, VuR 2015, 30 (Verbraucherzentrale Hamburg v. Allianz Lebensversicherungs AG), with case note P. Rott.

¹⁰⁶ OLG Stuttgart, 7/8/2015, Zeitschrift für Wirtschaftsrecht (ZIP) 2016, 927.

¹⁰⁷ BGH, 14/12/2017, file no. I ZR 184/15, BeckRS 2017, 141115.

¹⁰⁸ LG Leipzig, 10/12/2015, VuR 2016, 109, with case note P. Rott. The case is pending on appeal: OLG Dresden, file no. 14 U 82/16. See also the critical note on this decision by H.-J. Bunte, EWiR 2016, 161, at 162 who claims that the court erred in assuming an unfair commercial practice through the use of unfair contract clauses; which ignores the case law by the BGH that has explicitly held the use of an unfair contract term to be at the same time an unfair commercial practice, see *supra* at note 107 and earlier decisions such as BGH, 31/5/2012, NJW 2012, 3577, at 3580 f.; supporting arguments for this case law by Köhler and Bornkamm (*supra*, n. 25), § 3a UWG margin no. 1.285 with further references.

¹⁰⁹ BGH, 6/10/1992, BGHZ 119, 335, at margin no. 30; BGH, 2/7/1996, NJW 1996, 3005, at 3006; both decisions deal with payments under the rules for electricity supply into monopoly networks.

¹¹⁰ BGH, 2/7/1996, NJW 1996, 3005, at 3006 with explicit reference to O. Mühl, in: H.-T. Soergel (ed.), BGB, vol. 6 Sachenrecht (12th ed. 1990), § 1004 margin no. 113.

and other decisions that in cartel law, the claim for abatement of unlawful activities may in fact include a payment claim against the trader that has breached cartel law.¹¹¹

c) Injunctions Act

In 2016, the German legislator amended § 2 Injunctions Act and explicitly added the abatement claim (*Beseitigung*) to the injunction claim (*Unterlassung*). While the immediate reason was the inclusion of data protection law into the list of consumer protection laws, and the acknowledgement that actions by consumer organisations must include not only the prohibition of further breaches of data protection law but also the deleting of unlawfully acquired data,¹¹² the abatement claim is available for all breaches of consumer law. It may be expected that § 2 Injunctions Act will be applied in the same way as the above described § 8 UWG.¹¹³

d) Conclusion

These developments in the German case law on abatement claims clearly illustrate the close and important connection between prohibitive injunctions and the abatement of unlawful activity. While there is certainly disagreement in detail and on the content of abatement orders in specific circumstances, the general principle has been clearly established by the courts, namely, that abatement may include the restitution or correction of the situation that was caused by the defendant's unlawful activity.

4.2.5 Comparative conclusion

The foregoing brief comparative notes on selected Member States' legal systems show that there is a considerable overlap or common European understanding with respect to the cessation and abatement of unlawful activities. This common understanding relates both to general private law and to the more specific area of enforcement of consumer law. In general private law, there are variations of the Roman theme of *interdictum*, and although the details vary, there is a certain common ground as to the idea that an action against unlawful activities is not restricted to prohibitory measures, but may under certain circumstances and to a certain extent also include positive measures to correct the wrongful situation.

In the more specific area of the enforcement of consumer protection law, this common core can be identified as the idea that enforcement measures – depending on the respective Member State's system through associations (such as in France and Germany) or through regulatory agencies (such as in England) – are also not restricted to a pure prohibition of unlawful commercial activities, but may include orders to inform affected consumers, to set up consumer redress schemes or even to implement direct measures of restitution.

4.3 Possible EU solutions

These deep legal traditions are a good basis on which a EU solution can be build that supports the effective enforcement of consumer protection laws (in the broader sense, see above at II.).

The substantive scope and the questions regarding qualified entities have been discussed already. However, one could argue that a new instrument such as an association's action aimed at an abatement order should be restricted to certain areas in the sense of an experimental approach. For German law, such an action has been proposed

¹¹¹ F. Bien, in: F. Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013), 329, at 337 ff.; similarly even with regard to price fixing W.-H. Roth, in: J. Basedow (ed.), *Private Enforcement of EC Competition Law* (2007), 61, at 78; J. Keßler, *Schadensersatz und Verbandsklagerechte im Deutschen und Europäischen Kartellrecht* (2009), at 93 ff.; J. Bornkamm, in: E. Langen and H.-J. Bunte (eds), *Kartellrecht* (12th ed. 2014), § 33 GWB margin no. 109. For the opposite view, see A. Fritzsche, *Der Beseitigungsanspruch im Kartellrecht nach der 7 GWB-Novelle*, *Wettbewerb in Recht und Praxis* (WRP) 2006, 42, at 51.

¹¹² See A. Halfmeier, *Die neue Datenschutzverbandsklage*, *NJW* 2016, 1126 ff.

¹¹³ See BT-Drs. 18/4631, 21. For details, see P. Rott, *Der Folgenbeseitigungsanspruch der Verbraucherverbände*, *Zeitschrift für Verbraucherrecht* (VbR) 2016, 172 ff.

specifically for the area of unfair contract terms law.¹¹⁴ It is argued that such cases are particularly well-suited for abatement in the form of a restitution order as the affected group of customers will typically be clearly defined and payable amounts clearly calculable.¹¹⁵ This may be true for many cases and it can be expected that unfair terms cases may play a significant role for such a new instrument.

However, it should be noted that a specifically limited scope of cases always entails the problem of defining this scope and thus creates the risk that certain cases are not covered even though they intuitively appear to be clear cases for a restitution order. For example, in the German case described above where a bank had overcharged its customers by 30 Euros in certain cases, this practice was not based on any contract terms, but was simply an unfair practice used by the bank in violation of established case law.¹¹⁶ This means that such a practice would not have fit easily into a category of 'unfair terms law' even though there was a clear need and possibility for redress. Another group of cases is the withholding of due payments to consumers – for example in the area of passenger rights. Where passenger compensation is clearly due under the applicable legal rules but is not paid by the trader, an abatement order should also be possible in the interest of consumers, even though this has nothing to do with the use of unfair contract terms.

Furthermore, there are many other areas in which an abatement order may be appropriate to safeguard consumers' interests distinct from the (re-) payment of specific amounts. For example, in cases of misleading advertisements, abatement in the sense of correcting the consequences of unlawful commercial activity may consist in the publication of true information in order to correct the false impression that the unlawful advertising has caused in public. In addition, there may be cases in which many consumers are harmed by the unlawful activity but their identity and exact claim is not readily ascertainable. In order to at least attempt the correction of the situation created by the respective trader's wrongful behaviour, it may – depending on the circumstances – be necessary to order the trader to create some form of redress scheme under which an attempt is made to redress the harm caused.

These considerations show that it is not adequate to limit an abatement order to a certain area of consumer law (such as unfair terms) but that an abatement order can be a useful and necessary tool in many circumstances. However, the content of the abatement order cannot always consist in a repayment of specified sums to specified consumers, but must be variable according to the circumstances. To illustrate this in more detail, the following section shall outline different variations of abatement orders with examples of their practical use.

4.3.1 Prohibitive order

An injunction in the form of a prohibitive order is already the standard measure under the existing Injunctions Directive and its national implementation regimes. This form of injunction is an established and successful tool that must be preserved and only enhanced in effectiveness by the possibility of further abatement orders. The qualified entities who have the right to sue should have the choice of whether they wish to restrict the action to the prohibitive injunction or whether – possibly in a second step or conditional upon the success of the prohibitive injunction action – they wish to extend the action to further measures of abatement.

4.3.2 Information of customers

Beyond the 'negative' prohibitive injunction, abatement in the sense of requiring positive action by the defendant should first consist of information duties. This is already established in principle in the English, French and German legal systems as discussed above.¹¹⁷ A duty to inform affected consumers is of particular importance because wrongful activity by the affected trader typically is not seen as such, but is disguised as being lawful. For example, traders use unfair terms under the pretension (or at least, in a *bona fide* case, under the misguided idea) that these terms are lawful and thus are binding on the affected consumers. This 'cloak of validity' under which unfair terms

¹¹⁴ A. Stadler, Beseitigungsklagen durch Verbände im AGB-Recht, in: C. Meller-Hannich et al. (eds), *Rechtslage – Rechtserkenntnis – Rechtsdurchsetzung*, Festschrift für Eberhard Schilken zum 70. Geburtstag (2015), 481, at 486.

¹¹⁵ *Ibid.*

¹¹⁶ LG Leipzig (*supra* n. 108).

¹¹⁷ See *supra*, IV. 2.

operate is the main problem in this area of law: Many or even most people will assume that the clause is valid simply because it is written into the contract or into the trader's standard terms. Therefore, information about the fact that certain clauses are invalid is of key importance in this area. This information must be as detailed and focused as possible, because a mere newspaper article or TV news item will usually not enable ordinary people to assess what this means for their specific contractual situation.

The Injunction Directive already provides for orders relating to such 'corrective statements' in Article 2(1)(b), along with the publication of the court decision. The goal of these provisions is explicitly and correctly defined as 'eliminating the continuing effects of the infringements'. In practice, however, this goal clearly cannot be reached by mere publication of the decisions, since consumers normally are not interested in reading court decisions and typically do not have the legal training that would allow them to apply the court decision to their individual situation and draw the legally correct consequences. Therefore, this rule needs to be drafted more precise, requiring effective information for all affected customers of the trader.

With regard to ways of providing effective information to these customers, two situations may be distinguished: Where the trader has the names and addresses of the customers at its disposal, it seems fair and adequate that the trader corrects its mistake by individually informing these customers (normally through an individualised letter) about the trader's wrongful behaviour, the relevant court decision, and the legal consequences for that specific customer.

A different situation arises where the affected customers are not individually known by the trader who has engaged in unlawful commercial activity. This may be the case in anonymous or over-the-counter transactions such as in stores or some transportation services. In these cases, it is certainly more difficult to reach these potentially affected customers and provide them with the necessary information. However, it is not impossible, because they have transacted with that trader and are likely to do so again or at least react to public information regarding that trader. In particular, it can be presumed that those media and communication channels which have been used by the trader to advertise its business and solicit customers are suitable to address the trader's potential or actual customer base, because otherwise the trader would not have used such media or communication channels. This is obvious in a case of unlawful advertising: In order to correct the false impression created by the original advert, it seems necessary to place a correcting advertisement in the same media, with the same size and design. For example, if a car trader had misled consumers with false CO₂ emission statements in TV advertisements, it is necessary to run the correcting advertisements on the same TV channels during the same time slots. This shows that even where affected consumers are not already individually identified, it is possible for the trader to set an *actus contrarius* by which it corrects the wrong information that has been disseminated to the public.

4.3.3 Establishment of an adequate redress scheme

However, such information may lead to a correction of false information in the public, but does not necessarily provide redress for customers who have actually been harmed by wrongful activity in question. In some cases – like the 30 Euro overcharge in the *Dresdner Volksbank* case mentioned above – the individual beneficiaries and the payable amounts will be clearly defined, so that a direct order to make such payments is possible – this will be discussed below in more detail.

However, there are other situations in which either the identity of the affected customers and/or the payable amounts or other forms of redress (such as the possibility to terminate a contract) cannot be established without further investigation. In these cases, a direct order by the court against the defendant to pay specified amounts to specified individuals is not possible. Examples for such a situation include inflated prices by a cartel member where the amount of the overcharge may be ascertainable by economic methods, but the identity of the customers as well as the individual quantities of their purchases is not known to the trader. For example, in the German coffee roasters' cartel,¹¹⁸ it was obvious that many consumers had paid artificially inflated prices for their coffee, but the identity of these customers was – at least as regards distribution to consumers – unknown. An example for the second situation would be the lack of or the unlawful content of information given to bank customers regarding the right to withdraw from a loan contract: In this case, it is up to the customers to decide whether they in fact want to exercise their right

¹¹⁸ See the German Federal Cartel Authority (*Bundeskartellamt*), 8/6/2010, [file no. B 11-19/08](#).

to withdrawal and only if they do, amounts of repayments or other consequences of the withdrawal must be calculated.

In such cases where the identity of the affected customers is unknown or where the consequences of the trader's wrongful behaviour depend on further decisions by the customers, one could argue that adequate information of these customers would be sufficient. Such information, as discussed above, would be designed to reach the affected customers, inform them about the legal situation and about the claims or options they have. Therefore, the information would be sufficient to create a situation in which these consumers could decide on how to proceed, whether to file a claim or not or whether to terminate a contract or exercise other legal options.

However, a realistic view on the situation shows that information typically is not enough. In the academic literature, the phenomenon of 'rational apathy' by consumers has been much discussed.¹¹⁹ It is generally acknowledged that for many consumers and in many circumstances, the costs and efforts of bringing a claim against a trader or even assessing their own legal situation is much higher than the potential individual benefit of such activity.¹²⁰ Therefore the rational consumer will not do anything about such legal problems resulting from past transactions, even if he or she is adequately informed. This typically leads to a situation where none or only very few consumers will calculate their claims or take other action designed to correct the situation in which they have been brought by the defendant trader's wrongful behaviour.

This typical outcome – namely that wrongful behaviour even if it is detected and brought to court will not result in redress of the harm caused by it – is certainly undesirable from a viewpoint of the economy as a whole, because it gives incentives to act unlawfully and channels resources into the hands of traders that breach the law. Furthermore, the situation that unlawful conduct typically is not corrected by redress must be seen as a perpetuation of the situation caused by the defendant's wrongful conduct.

Therefore, if one takes the legal tradition of abatement of the consequences of wrongful behaviour seriously, the mere information of customers regarding their rights is not enough, because it typically does not correct the situation that has been caused by the defendant's behaviour. An effective and realistic correction of the situation typically needs more effort by the defendant than the mere information, it needs positive efforts to facilitate consumer redress. This concept of positive measures to be taken by the defendant to correct the situation which he has caused is particularly prominent in English law which has had positive experiences with orders regarding 'redress schemes' to be set up by the trader, as described above.¹²¹ In the literature on EU law of unfair terms and consumer protection, prominent authors have also argued in favour of abatement orders that include the creation of redress schemes by the defendant, including the possibility of selecting an impartial third party to administer such a redress procedure.¹²²

The details of such an order to establish a consumer redress scheme will depend on the specific case. However, the common denominator of all such measures – including those employed in the relevant procedures under English law – is that the trader is ordered to 'make good' its wrongful behaviour by taking adequate measures and efforts to correct the situation. This may, as a first step, include investigation efforts to identify the extent of the harm caused and the identity of the affected individuals. Furthermore, it will usually be necessary to assist these persons in obtaining redress by setting up some form of redress institution (customer redress center). This institution could be set up as part of the defendant business, just as an insurance trader has a claims center that handles customer claims.

On the other hand, consumers who have been treated wrongfully by the defendant trader may have good reason not to feel confident about such an in-house claims center, as they cannot be sure that their claims will be handled impartially and objectively by a trader that has previously broken the law. This means that at least in more severe

¹¹⁹ See, e.g., the comprehensive study on why people who suffer damages do not sue even in an allegedly claimant-friendly environment such as the United States: D. Engel, *The Myth of the Litigious Society – Why We Don't Sue* (2016).

¹²⁰ The classic case here, in which the US Supreme Court argued in favour of collective proceedings in situations where individual losses are too small to be economically litigated is *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); see also the extensive analysis by W. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 *Univ. of Missouri at Kansas City Law Review* (2006), 709 ff.

¹²¹ See *supra*, IV. 2. c).

¹²² H.-W. Micklitz and N. Reich, *Von der Klausel- zur Marktkontrolle*, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2013, 457, at 460, in the context of contract terms regarding gas prices and the obligation to ensure adequate dispute settlement procedures according to Directive 2009/73/EU, Annex I, 1(f).

cases, there are good reasons to order an impartial third party to either take care of the redress scheme or at least to oversee and monitor the defendant trader's redress efforts.

4.3.4 Order requiring payments to consumers

The example of the *Dresdner Volksbank* case described above shows that there are indeed situations in which an explicit order to make payments to affected consumers is possible and necessary.¹²³ It is therefore recommended that a revised Injunctions Directive should explicitly allow for this possibility as one option within the choice of abatement measures.

However, if one includes such explicit repayment orders in the range of abatement measures, one needs to clarify the relation of such measures with any individual damage claims or other existing claims by the individual consumers. First of all, it needs to be noted that the abatement claim is not identical with such individual claims. The qualified entity has its own procedural right to ask for injunctions and abatement against unlawful commercial activity, which is not dependent on any mandate by individual consumers.¹²⁴ These powers are given to the qualified entities in the interest of enforcing the respective laws. This is in fact in the interest of consumers, but this factual interest does not mean that the qualified entities are 'representing' individual consumers or their claims in a legal sense. As the qualified entities enforce their own rights to ask for injunctions and abatement orders, they do not depend on any consent from individual affected consumers. Consequently, there is no direct influence between the qualified entities' action and individual consumers' actions: Where an individual consumer has brought an action, the qualified entity may also sue for injunction and abatement, and vice versa, without any *lis pendens* effect. As these actions deal with different objects and are between different parties, there is also no *res iudicata* effect between them – whether the consumer should under certain circumstances be able to base his or her individual claim on a judgment in qualified entity's action is a different matter that will be discussed at V. below.

Furthermore, the content of the qualified entity's abatement claim may – depending on the circumstances of the case – overlap with the damage claims by individual consumers, but is not necessarily identical with those damage claims. This is particularly clear where the abatement order concerns only the establishment of a redress scheme by the trader, because such a scheme is only a preparatory and supportive measure designed to fulfil the individual consumers' claims later. But even where the abatement order extends to direct repayment of certain sums to the affected consumers, this will concern only the direct and immediate consequences of the infringement that was committed by the trader, and not more remote or consequential damage. If such consequential harm was inflicted, it must be assessed and claimed at the individual level. Again, this shows that there may be some overlap between an abatement order brought by the association and the affected customers' individual damage claims, but that there is a clear legal distinction between the two.

Notwithstanding this clear legal distinction, there are of course reciprocal influences in fact between the two types of actions: If a consumer has been repaid certain amounts as a consequence of an abatement order, this consumer's claim for damages is obviously reduced by the received amount. Similarly, insofar as a trader has already satisfied all or some affected consumers' claims, there is no more reason for an abatement order, a rule that we find, for example, in the German skimming-off procedure under § 10 UWG.

4.3.5 Adequacy and proportionality

It was already pointed out that national legal systems typically view mandatory injunctions as being governed and limited by the principles of adequacy and proportionality. These principles should therefore also be included in a possible EU law provision. Such principles should ensure that a trader should not automatically be ordered to set up a very large and possibly very costly redress scheme only to address minor harms suffered by very few consumers. However, these principles of adequacy and proportionality also include reference to the trader's prior behaviour. It is an established principle of, for example, the English law of equity, that with regard to injunctive relief, the 'equities' of the case must be balanced. This principle includes the 'clean hands' idea: Whoever argues for an equitable solution

¹²³ See supra, n. 108; see also Stadler (supra n. 114), at 487 who stresses that a repayment order works primarily where defendant can calculate repayments without further assistance.

¹²⁴ In favour of this distinction between individual rights of the consumers and an own, independent claim for the qualified entity see also the legislative proposal for Germany by Stadler (supra n. 114), at 489.

in his or own interest must ‘come to the court with clean hands’.¹²⁵ This means that the prior conduct of the parties does play a significant role in deciding on what is an adequate solution. For example, if a bank deliberately ignores and breaches established case law on the question of what it may charge to its customers’ accounts, it does not have ‘clean hands’ in the sense of the equity principles. Therefore, this bank cannot argue that a redress scheme would be too costly in relation to the amounts to be paid out to the customers concerned. On the other hand, there may be cases where a trader was assuming *bona fide* that a certain practice or contract language was lawful, which then surprisingly, for example through a change in the case law, turned out to be wrongful. In such a case, it would be inadequate to force the trader to engage in very costly redress measures that are out of proportion to the harm suffered by the customers.

These considerations illustrate the relevance of fault in relation to actions for injunction and abatement: In principle, a showing of fault is not required in an action for injunction and/or abatement. The reason for this is that unlawful behaviour should be stopped and the consequences of such unlawful activity should be rectified regardless of whether the actor knew or should have known that he acted unlawfully. Therefore – and this conforms to established practice – an injunction against the use of unfair terms can be sought regardless of whether the defendant trader thought that these terms were legal.

However, the issue of fault does become relevant with regard to the content of abatement orders. It was pointed out above that for the content of such an abatement order, there are always several possibilities and different possible courses of action, that may lead to a smaller or bigger burden on the affected trader. As the fairness principle is at the root of such orders – namely, to ‘make good’ the situation which one has wrongfully caused – this fairness principles requires the court to treat differently those actors who intentionally or recklessly violated the law from other actors who may have breached the law even though they had *bona fide* tried not to.

Under the principles of adequacy and proportionality, there may also be certain situations in which it is either impossible or at least impracticable to effectuate individual redress. For example, where very small harm (such as a few cents or Euros) has been caused to a large number of anonymous consumers, it may sometimes be clearly inefficient to try to determine the exact claims of these individual consumers. Nevertheless, there is an interest in such cases to order some form of abatement in the sense of correcting the situation caused by wrongful behaviour. In such cases, it should be possible for the court to order *cy-près* (next best) remedies,¹²⁶ for example by investing the amount that cannot be individually distributed in a good cause which contributes to the improvement of the relevant situation.

4.3.6 Pure abatement procedures

In many cases, abatement procedures will be combined with injunctive actions. In that context, it should be noted that under German law, it is recognised that the original infringement continues as long as the trader is still defending his practice¹²⁷ and has not credibly promised not to repeat it; and a credible promise is only seen in an undertaking that includes the promise of a penalty for future infringements.¹²⁸ Also, an infringement by way of the use of an unfair contract term continues as long as the trader relies on the unfair term in his dealings with consumers. Thus, even if the trader does not include that term into new contracts with consumers, the infringement continues if he, for example, refuses the reimbursement of a fee that he has charged on the basis of that term,¹²⁹ and even if he agrees to reimburse the fee but charges the consumer for administrative costs related to the reimbursement.¹³⁰

Abatement procedures should however also be available in cases where the original infringement has ended but its consequences are still present. In such a case, an action for injunction might fail because there is no more future risk of consumer harm. In fact, § 2 of the German Injunctions Act allows qualified entities a clam for injunction or abatement, thereby offering qualified entities an action that is only aimed at abatement. And in a historical

¹²⁵ See, e.g., the English case of *D. & C. Builders Ltd. v. Rees* [1966] 2 QB 617.

¹²⁶ For examples from US court practice see, e.g., *State v. Levi Strauss Co.*, 715 P.2d 565 (Cal. 1986), K. Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 *Yale Law Journal* (1987), 1591 ff.

¹²⁷ See LG Stuttgart, 26/4/2011, *VuR* 2011, 269.

¹²⁸ See BGH, 14/11/2012, *Versicherungsrecht (VersR)* 2013, 1116. For more details, see Micklitz and Rott (supra n. 37), § 1 UKlaG margin no. 33.

¹²⁹ Established case law since BGH, 11/2/1981, *NJW* 1981, 1511.

¹³⁰ See LG Berlin, 13/3/1998, file no. 26.O.318/95.

perspective, as pointed out above, that under § 1004 of the German Civil Code, abatement was the primary remedy, whereas injunction was only added in case that further violations appear to be possible (see supra, IV. 2. d).

4.3.7 Legislative proposal

In view of the discussion above, a possible legislative wording for a reformed Article 2 of the Injunctions Directive could read as follows:

Article 2

Actions for injunction and abatement

1. Member States shall designate the courts [or administrative authorities] competent to rule on proceedings commenced by qualified entities [within the meaning of Article 3] seeking:

(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;

(b) and/or appropriate measures designed to eliminate the continuing effect of the infringement, including but not limited to

- direct and comprehensive individual information to the affected persons;
- the publication of corrective statements through appropriate media, in particular through those media where the infringement was committed;
- the establishment of a redress scheme adequately designed to correct the situation caused by the infringement, such scheme must, if the court so orders, include the participation of an independent third party to supervise or administer the redress procedure;
- the payment of money owed to individual persons as a result of the infringement;
- where redress for individual persons is impossible or impractical, payments by the defendant to a suitable fund or charity or other measures designed to effectively reduce the effect of the infringement;

provided that all such measures must be adequate and proportional to the infringement committed by the defendant, taking into account the defendant's prior behaviour;

(c) ... *[no changes to version in force]*

2. *[Para. 2 at the moment contains some language regarding the rules of private international law remaining untouched. This paragraph thus is rather superfluous in view of the Rome Regulations and does not present a solution to the potential problem of applicable law in cross-border associations' actions.]*

5. Compensation as a follow-on action

5.1 The abatement order as the more effective and efficient solution

The abatement measures that have been proposed above as part of a reformed Injunctions Directive may – depending on the specific cases – result in an effective resolution of problems caused by the wrongful behaviour of the defendant trader. They have the advantage that they require only one legal procedure, which is brought by the qualified entity. The individual consumers need not bring a court procedure, so that their ‘rational apathy’ does not hinder the enforcement of the law. Only at a later stage, for example in the execution of a redress scheme, the consumers’ participation may – again, depending on the specific situation – be required. If carried out correctly, the abatement order will lead to the direct repayment of money owed to the consumers or will at least facilitate their redress by creating a redress scheme that avoids mass individual litigation. This means that the proposed abatement options are, in comparison to many individual court actions, more effective and more cost-efficient at the same time: Abatement measures ordered on the initiative of a qualified entity are effective because they do not rely on the unlikely initiative of individual consumers. They are also cost efficient, because they do not require many individual proceedings that would queue up in the Member States’ courts’ dockets.

These advantages are particularly important in cases of scattered harm, that is, where many consumers are harmed with a comparatively low amount each. In such cases, individual litigation is typically neither effective nor efficient: Most individual consumers will not bring their claims to court due to rational apathy, so that there is no effective enforcement of the law. And even if they would bring such claims to the court, it would not be efficient from an economic perspective to spend a lot of resources on parallel litigation in many small cases. The qualified entities’ action for abatement would avoid these problems and provide an option for a superior dispute resolution in many situations.

It is possible, however, that there may be situations in which co-ordination of individual damage claims and an association’s action may also be necessary in the interests of effective and efficient enforcement. This may be the case where an association is only willing or able to ask for a declaratory judgment on which consumers then could build their individual actions in form of ‘follow-on’ actions. Depending on the political developments, one could also see such a co-ordinated system of ‘follow-on-actions’ as an alternative model to the abatement orders described above, even though this would probably be less effective from the perspective of consumer law enforcement and also less efficient from an economic perspective. Nevertheless, we include some remarks on a ‘follow-on’ model here in case it is seen as a viable alternative.

5.2 ‘Follow-on actions’: Concept and principal problems

The term ‘follow-on action’ was coined in the context of cartel damage actions. This area is characterised by a situation in which a public regulator – either the European Commission or the Member States’ competition authorities – investigates cases of misconduct and then formally decides if an infringement of the competition laws has been committed, typically imposing a regulatory fine against the perpetrators. This situation has led to a strategy by cartel victims to use that authority’s decision for their own claims to be brought later against the cartel members. In these ‘follow-on’ proceedings, the defendants then cannot seriously dispute the infringement anymore, as it has already been conclusively established by the relevant competition authority. The main disputes in such proceedings therefore revolve around issues regarding the individual cartel victim’s claim, that is, existence, amount and causation of damage.

The European Union has explicitly supported such ‘follow-on’ actions in the cartel law area through the Directive 2014/104/EU.¹³¹ Among many other rules, this directive supports and enables ‘follow-on actions’ by giving them special privileges: According to Article 9 of the Directive, the competition authority’s decisions are declared to be legally binding for the individual damage actions, so that the claimants may rely on the finding of an infringement, and this finding cannot be contested anymore by the defendant in the damage action. Article 10(3) and (4) of the Directive gives the claimants sufficient time to prepare and bring their ‘follow-on action’: The limitation periods under Member States’ law are set at a minimum of five years, which for example in Germany is considerably longer than the limitation period for ordinary tort claims (three years). Even more importantly, Art. 10(4) of the Directive provides that the limitation period is suspended while the competition authority’s investigation is going on and does not start again until one year after the publication of the final decision of that authority. Furthermore, Article 5 of the Directive gives special rights to ask for disclosure of evidence in cartel damage cases which do not necessarily exist in other civil law cases.¹³² These examples from the Directive on cartel damages show that for claimants in this area, the European Union has set up a very favourable legal environment in order to support private enforcement of the competition laws.

In addition to these legal privileges for cartel victims, there are factual conditions that support ‘follow-on actions’ in the area of cartel damage claims: Competition authorities are typically well staffed and have considerable resources at their disposal to investigate possible violations of the competition laws, including public law powers such as ordering searches and seizures at the suspect companies’ offices or formally interrogating possible witnesses. In addition to that, whistleblower programs have been quite successful in inducing traders to come forward to disclose illegal cartels in return for more lenient treatment by the authorities.¹³³

Furthermore, cartel victims are often large companies that suffer large amounts of damages, so that it is economically viable for them to pursue such claims before the courts, or at least to transfer the claims to other companies that specialise in profitable enforcement of large cartel damage claims.¹³⁴ In consumer cases, it is typically not economically viable to pursue claims, because the individual claim is often too small and even the bundling of claims through a special purpose vehicle is often too burdensome to be economically attractive. This problem is illustrated by the fact that even in cartel cases, it is almost unheard of that consumer damages are successfully liquidated before a civil court. In other areas of consumer law, entrepreneurial companies also try to bundle claims,¹³⁵ but it remains to be seen whether that is economically viable in the long run.

This means that the prospects for ‘follow-on actions’ in consumer cases are rather limited if one considers that a consumer association typically does not have the resources and the legal powers of a competition authority and that the incentives for consumers to ‘follow on’ with their individual claims are often rather small.

5.3 Member States’ solutions

Nevertheless, some EU Member States have created follow-on systems in the area of consumer law or are at least discussing such systems.

¹³¹ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union, OJ 2014 L 349/1.

¹³² In some Member States such as the United Kingdom, these disclosure rights may correspond to disclosure proceedings available in general civil procedure law. In most Member States, however, these disclosure rights are specifically tailored only to cartel damages claims and thus provide a privilege for such claimants over claimants in ordinary civil cases, see, e.g., the German implementation of Directive 2014/104/EU in § 33g *Gesetz gegen Wettbewerbsbeschränkungen* (GWB).

¹³³ See the Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17, and the rules on ‘leniency statements’ in Art. 6(6) of Directive 2014/104/EU.

¹³⁴ See, e.g., the activities of the Belgian company *Cartel Damages Claims* (CDC) that has even featured in the Court of Justice recently, see ECJ, 21/5/2015, Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel et al.*, ECLI:EU:C:2015:335.

¹³⁵ See, e.g., the German group of companies *MyRight*, https://www.myright.de/?gclid=%20CM7ZwbGi3tUCFQfhGwodD_0ONA. See also D. Kranz, *Der Diskussionsentwurf zur Muster-Feststellungsklage – ein stumpfes Schwert?*, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2017, 1099, at 1100.

5.3.1 Greece

In Greece, for example, consumer associations have had the right, since 2007, to bring a declaratory action, the results of which may then be used by individual consumers in individual actions for damages.¹³⁶

5.3.2 United Kingdom

In the UK, a follow-on action has existed under s 47B Competition Act 1998, limited to competition law cases. The only representative that had been granted legal standing is the consumer association Which? The procedure required a decision by the Office of Fair Trading, by the Competition Appeal Tribunal, or by the European Commission that has established a breach of competition law. It thus aimed at compensating the victims of the unlawful behaviour. Consumers had to sign up in order to be included in the proceedings, whereas the judgment had no legal effect beyond those consumers who have signed up. The procedure has apparently only been used once, on reason being that the procedure was very expensive, despite being a follow-on procedure since the suing consumer association had to determine the damage that occurred due to the breach of competition law, which is possible only some way into the trial. Although victims only had to sign up to the litigation, even this limited task appears to be a disincentive in cases in which low-value claims are at stake, as the football shirts case brought by Which? demonstrated.¹³⁷

This is why the Consumer Rights Act 2015 amended the Competition Act 1998, substituting a new section 47B which introduced an opt-out collective action regime for both follow-on competition law claims (i.e. claims based on the defendants' liability as established by an infringement decision by a competition authority); and (ii) stand-alone competition law claims (i.e. claims where there is no infringement decision meaning that the claimants are required to prove that the defendants have breached competition law).

5.3.3 Germany

In Germany, it has already been the law since 1977 that an individual consumer could rely on the finding that a particular contract term was unfair and thus invalid, when a consumer association was successful in an injunction action relating to this contract term and to this specific trader.¹³⁸ However, this provision has almost never been used in practice, due to certain limitations.¹³⁹

In 2017, the German Ministry of Justice published a legislative proposal for a 'model declaratory action' (*Musterfeststellungsklage*) which would allow consumer associations to bring a declaratory action the results of which could then later be used by individual consumers in their individual actions.¹⁴⁰ However, one of many weaknesses of this draft is that – at least if the defendant trader is unwilling to cooperate or settle – it would require individual consumers to all bring individual suits even after the consumer association has succeeded in the declaratory action.¹⁴¹

5.3.4 France

In a comparative perspective, the French *action de groupe* (art. L 623-1 to art. L 623-32 *code de la consommation*) may be one of the most promising examples for a 'follow-on action' system that relies on a consumer association's action. This action is available for certain areas of consumer law as well as (in theory) for cartel damages caused to consumers. Basically, the procedure consist of two parts. As a first step, certain associations can bring an action with the goal of a *jugement sur la responsabilité* (art. L 623-4 et seq. *code de la consommation*). During this part of the procedure, the affected consumers do not need to do anything, thus they can await the outcome of the association's action. The law supports them by suspending the limitation period automatically as soon as the association has filed

¹³⁶ For details, see Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Country Report Greece (2008).

¹³⁷ For more details, see Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Country Report United Kingdom (2008).

¹³⁸ This rule is found today in § 11 Injunctions Act.

¹³⁹ For detailed analysis see Micklitz and Rott (supra n. 37), § 11 UKlaG.

¹⁴⁰ The draft is available at <http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html>.

¹⁴¹ For this and further critique see Halfmeier, ZRP 2017, 201.

the case; the suspension applies to all individual claims that are based on the alleged violation.¹⁴² If the association's claim is rejected, that rejection has no legal influence on the individual consumer's claims.

If the association's action for a *jugement sur la responsabilité* is successful, the French *action de groupe* enters its second stage. The court has to specify the amounts or methods of calculation for the actual payments to individual consumers and to inform them about the judgment and their legal options. The costs of the information are borne by the defendant. The consumers then may join the proceedings in the sense of an opt-in declaration, and participate in a redress scheme that has to be set up by the defendant trader or a specified third party. As discussed above in the abatement context, the content of the judgment depends on the specific situation: If the identity of the customers and the payable amounts are known, the judge may order direct payment of such amounts; this is called the *procédure simplifiée* (art. L 623-14 et seq. *code de la consommation*). In more complex situations, the judge will give instructions on how to implement the consumer redress.

5.3.5 Belgium

In Belgium, the *action en réparation collective* was introduced in 2014.¹⁴³ In sharp contrast to the French *action de groupe*, consumers in the Belgian system cannot await the outcome of the association's case and then decide whether to join in or not. Instead, the Belgian procedure is based on an opt-in or opt-out system, the choice between these systems lies with the judge.¹⁴⁴ The law restricts this choice somewhat by requiring an opt-in-system for foreign group members and for cases where physical or moral damages are claimed.¹⁴⁵ In academic writing, the possibility of an opt-out-system has been supported with the convincing argument that in many consumer disputes, the goals of the procedure are clearly better served by an opt-out-system.¹⁴⁶ This is illustrated by a recent decision of the competent court in Bruxelles which ordered an opt-out-system in the action brought in connection with the Volkswagen *Dieseldgate* scandal.¹⁴⁷

In the Belgian opt-out-system, affected consumers may opt-out within a certain period after the certification decision has been published, and if they do not do so, they are bound by a later decision on the merits or even a later settlement in the collective action. Where the Belgian procedure uses the opt-in-system, such opt-in must also be declared after the certification decision and then remains binding on the consumer.¹⁴⁸ Therefore, the Belgian *action en réparation collective* cannot be called a follow-on-action in the sense that individual claimants would 'follow' with their claim after a substantive decision in a law-suit brought by a consumer associations, but it can rather be described as a class or group action where standing is limited to certain associations.

The Belgian *action en réparation collective* is noteworthy in particular because of its specific focus on enabling settlements. Belgian law even provides for a pre-arranged settlement that can be presented to the court for approval.¹⁴⁹ If there is no prior settlement, the certification decision by the court will be followed by a period of negotiations between the claimant association and the defendant, again with the goal of reaching a settlement. If a settlement is reached, it will be scrutinised and possibly approved by the court according to the requirements set out in Art. XVII.45 Belgian *Code de droit économique*.

If no settlement is reached, the court will continue the proceedings and in the end decide on the merits, but in the same format as if there were a settlement;¹⁵⁰ one can therefore characterise the court decision in this procedure as a 'forced settlement' by the court if the parties are unable or unwilling to negotiate a settlement among themselves.

¹⁴² Art. L 623-27 *code de la consommation*: The association's action suspends the prescription 'des actions individuelles en réparation des préjudices résultant des manquements constatés par le jugement [sur la responsabilité]'.

¹⁴³ Art. XVII.35 to XVII.70 Belgian *Code de droit économique*; a summary of the procedure can be found at http://economie.fgov.be/fr/consommateurs/action_reparation_collective/#.Wlck-ksiHUK.

¹⁴⁴ Art. XVII.43 § 2 no. 3 and Art. XVII.38 § 1 no. 1 (a) and (b): the opt-in-variant is called the *système d'option d'inclusion*, and the opt-out-system is called the *système d'option d'exclusion*.

¹⁴⁵ S. Voet, *Consumer Collective Redress in Belgium: Class Actions to the Rescue?*, *European Business Organization Law Review* (Europ. Bus. Org. L. Rev.) 16 (2015), 121, at 132.

¹⁴⁶ *ibid.*

¹⁴⁷ See <https://www.test-achats.be/mobilite/autos/news/action-collective-dieseldgate-vw>. Note that this decision may be appealed by the defendant companies which may cause a long delay due to the backlog in the docket of the appeals court in Brussels; this problem is criticised as a 'procedural bottleneck' by Voet, *ibid.*, at 140.

¹⁴⁸ Voet, *Europ. Bus. Org. L. Rev.* 16 (2015), 121, at 133: The consumer's 'choice is irrevocable'.

¹⁴⁹ *Ibid.*, at 134.

¹⁵⁰ *Ibid.*, at 136.

For both types of affirmative outcomes of the proceedings – a negotiated and approved settlement as well as a court decision replacing such a settlement – Belgian law stipulates that an administrator (*liquidateur*) is appointed by the court whose task is to enforce and administer the solution found by the parties or the court. The *liquidateur* must then follow a rather strict procedure in order to establish the eligibility of claimants and distribute the allocated funds. Although it is unclear whether the strict time limits foreseen in the law may be followed in practice,¹⁵¹ this Belgian approach is realistic in that it accepts the necessity of a structured distribution process, which needs to be administered by a specific person or institution, instead of relying solely on the initiative of individual consumers.

5.3.6 Italy

The Italian *azione di classe* is somewhat different from the Belgian system in that it provides only for an opt-in procedure.¹⁵² Again, the procedure is an ordinary group action rather than a follow-on-action in the sense that consumers must opt-in before they know the outcome of the decision and are bound by that decision if they have opted in.¹⁵³ One difference to the Belgian system appears to be, however, that a settlement negotiated during the course of the procedure is not automatically binding on all participants in the Italian system.¹⁵⁴

5.4 Possible solution at EU level

Although the French system for ‘follow-on actions’ as well as the Belgian opt-in/opt-out group action appear, at first glance, to be quite sophisticated and well-designed, it is too early to judge their success and efficiency. The same is true for the other national solutions described above. At this point, it is therefore only possible to draw three preliminary conclusions with regard to the possibility of EU legislation on consumer ‘follow-on actions’: As such actions structurally suffer from rational apathy and lack of consumer involvement, they must at least meet the following three requirements: (a) Follow-on actions must allow sufficient time for consumers and consumer associations to prepare and handle such actions; (b) the procedure should not rely on individual court actions to be brought by individual consumers, as experience shows that this is unrealistic in many cases; (c) the claimant group should be constituted early and clearly, (d) settlement should be the preferred outcome and (e) any settlement or decision should set up a professionally administered redress scheme in which the consumer can take part.

5.4.1 Sufficient time

With regard to time, any ‘follow-on’ system under EU law should use the approach that is already employed in the Cartel Damages Directive 2014/104/EU: Prescription periods for individual claims must be sufficiently long, and – even more importantly – they must be automatically suspended as soon as the consumer association files its action. This is already the law in comparative procedures in France (Art. 623-27 *Code de la consommation*), in Belgium¹⁵⁵ and in the Netherlands.¹⁵⁶ Any solution that would require positive action by the affected consumers to avoid the prescription of claims – such as the inscription in a special register, as planned by the German Ministry of Justice in its above mentioned draft – risks failure due to the problem of rational apathy and opens up the possibility for dilatory strategies on the defendant side.

On the other hand, where consumers opt to follow their own route instead of joining the group or association action, the prescription period could start running again. For example, in the Belgian system, if a consumer opts out of the proceedings – or if, in the opt-in variant, the opt-in period with due notice has passed without an opt-in declaration – the prescription period may continue to run for that particular consumer.¹⁵⁷

¹⁵¹ This concern is mentioned by Voet, *ibid.*, at 140.

¹⁵² Art. 140bis Italian codice del consumo; see R. Caponi, Collective Redress in Europe: Current Developments of ‘Class Action’ Suits in Italy, *Zeitschrift für Zivilprozess International (ZZP Int)* 16 (2011), 61; updated by the author in 2016 under the title Italian Class Action Suits in the Field of Consumer Protection: 2016 Update, available at <http://ssrn.com/abstract=2796611>.

¹⁵³ Caponi, 2016 Update, *ibid.*, at 8.

¹⁵⁴ *Ibid.*

¹⁵⁵ Art. XVII.63 § 2 Belgian Code de droit économique.

¹⁵⁶ See Dutch Hoge Raad, 28/3/2014, NJB 2014/737, ECLI:NL:HR:2014:766.

¹⁵⁷ Art. XVII.63 Belgian Code de droit économique.

5.4.2 No individual actions

The problem of rational apathy must also be taken seriously in designing the second stage of the proceedings, which follows the finding of an infringement by the defendant. To require separate individual actions by every single consumer in order to realise his or her claims is not only unrealistic, but also inefficient because it creates a heavy caseload with the courts, if the defendant does not voluntarily comply with the initial judgment. Therefore, one option is to follow the French approach that leaves also the second stage in the hands of the original court and allows a rather simple 'opt-in' by consumers into these proceedings once the association's action has been successful.

5.4.3 Group action leads to more certainty for the trader

Alternatively, one should think of creating a true group action based on the Belgian model described above. The advantage of this system over the French approach is the higher degree of certainty and – at least possibly – finality: If one waits for the substantive decision by the court and then allows consumers to opt-in or not, there is a long period of indecision and uncertainty, in particular from the viewpoint of the trader. Furthermore, settlement talks are not very attractive for the trader as long as it is unclear how many consumers are affected and thus what magnitude a possible payment could have.

A true group action as in Belgium has the advantage of clarifying the scope of the group rather quickly. This is in particular the case for opt-out group actions such as the current action in Belgium in the Volkswagen matter: Assuming that the Brussels court decision will be upheld on appeal, it is now clear that all Belgian VW customers (insofar as they are consumers as the Belgian procedure is limited to these) are affected by the action, so that the defendant does have at least some data to calculate the magnitude of possible damage payments. This is a good basis for settlement negotiations. The fact that opt-outs are still possible does not hinder such negotiations because typically opt-outs will be the exception and the negotiations can be postponed until after the opt-out period has ended so that there is a reliable quantitative basis for the settlement.

An opt-in-system does not serve this goal of finality equally well because in view of the rational apathy problem, an opt-in action will typically leave a large part of the claimant group outside of the procedure, so that it may be an open question of what will happen with these other possible claimants. Nevertheless, an opt-in procedure also has some potential for clearly defining the affected group if one waits until the opt-in period has ended and the prescription period for other claims has run out.

5.4.4 Focus on settlement

One very important aspect that comparative scholarship on collective dispute resolution has shown is that it would be unrealistic to achieve perfect individual justice in every individual case within the framework of a collective action. For detailed individual justice, the existing civil procedure systems in Europe have sufficient individual procedures, rights and safeguards. The whole point of collective litigation instruments is not to replace these individualised systems, but to add an additional layer to them in order to compensate for their social dysfunctions and shortcomings. This social perspective with its focus on efficiency and behaviour modification is more relevant for collective litigation systems than the individual perspective.

This means that the preferred outcome of collective litigation is not to unravel such litigation again into many individual litigations, but rather to create a package deal that provides a collective solution, even if this solution may not be perfect for every individual case. Accordingly, the most successful systems of collective litigation typically lead to settlements: In the US and Canada, almost all class actions end in a settlement, whereas decisions on the merits are rare. In the Netherlands, the famous WCAM system deals (up to now) only with settlements and how they can be approved and enforced. A solution at EU level should follow this path, because only settlements or other large-scale solutions create the efficiency gains and incentives that are the main function of collective litigation instruments.

The Belgian system serves as good role model for this approach: It focuses on how settlements can be supported and approved by the court and gives the parties specific options and modalities that are designed to facilitate settlements. From this point of view, the court decision on the merits does not necessarily reflect the typical or even

desirable outcome, but it serves only as a last resort if the parties are unable to reach an agreement. The court decision thus has a settlement-substituting character. This has important consequences with regard to the content of the decision: The court decision does not aspire to clarify every detail for every individual claim, but rather provides a mechanism or framework for the administration of compensation or other forms of redress.

In this respect, the decision in a group action case becomes very similar to the redress scheme discussed above as a possible court order in the injunctive context: Its content depends very much on the facts of the case. There are certainly cases where individual payments may and must be clearly prescribed, as for example in the *Dresdner Volksbank* case described above, the court decision will clearly order the repayments to the affected customers. In other, more complicated cases, the court may only design a redress scheme under which individual compensation may be calculated and administered in some more detail.

5.4.5 Redress schemes

This leads us back to the goal of avoiding subsequent individual actions after a settlement or decision in the collective case has been found. The document that ends the collective proceedings – regardless of whether it is a settlement agreement created by the parties and approved by the court or whether the court had to create such a document through its own decision – should in most cases include the creation of a redress scheme which facilitates consumer redress, either by action of the defendant trader or, if necessary, with the help of an independent third party (such as the *liquidateur* in Belgian law). Such a scheme must be financed by the defendant trader, which has committed the infringement. It is necessary to establish such a scheme in order to avoid a situation in which the consumers are ‘left to their own devices’ in the sense that they only have the theoretical but unrealistic option of going to court to make their claims against the defendant trader. In contrast, the redress scheme must support and facilitate consumers’ access to redress by providing an accessible procedure and reliable standards according to which their eligibility for redress is determined.

6. Relationship between EU measures and existing national procedures

As the area of collective redress in general is characterised by experimental and innovative approaches which to a considerable extent have not been sufficiently tested in practice, it is important that the European Union supports this process of innovation through its own initiatives, but at the same time takes care not to stifle or stop the process by prohibiting Member States’ national procedures or instruments that may turn out to add valuable experiences and results.

Therefore, a reform of the Injunctions Directive must either be carried out in the form of a minimum harmonisation directive which makes clear that the Member States are free to use additional or more far-reaching instruments than those stipulated in the directive; thus, Art. 7 of the current Injunctions Directive 2009/22/EC needs to be preserved.

Should the European Union opt to issue a Regulation instead of the existing Injunctions Directive, this may have certain advantages in view of a uniform procedure in all Member States and in cross-border cases. However, if such a Regulation was adopted, it should be made clear by a wording similar to the existing Article 7 of Directive 2009/22/EC that the procedure contemplated under the Regulation does not hinder the Member States to maintain or establish additional rights or procedures in this area.

7. Financial aspects

Financial aspects and incentives are extremely important in the field of consumer associations' actions. Under the current system, the REFIT process has shown that financial risks and financial restrictions lead to very limited use of the existing rights for consumer associations.¹⁵⁸ As the European Union now contemplates an increase in associations' rights to bring such actions and a more effective use of such actions, care needs to be taken to create a financial environment that *de facto* allows the qualified entities to make use of their legal rights.

The financial situation of such entities with a view to the use of their legal rights depends mainly on three factors: First, the general funding of the association in question; secondly, the costs and risks associated with bringing specific actions; and thirdly, the flexibility to acquire financial means for specific or general purposes of the association.

7.1 General funding

If the European Union and the Member States see an important function in consumer law enforcement through consumer associations or other qualified entities – as it is documented in the existing Injunctions Directive 2009/22/EC as well as in Recommendation 2013/396/EU on collective redress – then these entities must be financially able to fulfil this function in a satisfactory manner. This means that the EU and/or the Member States must either provide direct funding to these entities, as it is the case in Germany (although project-unrelated funding has decreased over the years) or at least allow them to acquire such funding through their activities. The latter alternative could consist, for example, in directing fines or other payments to these entities, or in establishing a fund to be filled with such payments, which then could be accessed by qualified entities under defined circumstances to finance litigation.

As the Member States' practices and cultures in this regard are very heterogeneous, it seems difficult to create a clear rule on such financing that could be included in a reformed Injunctions Directive. Nevertheless, it is important that the subject of financing is at least treated if not in detail, but at least in principle in a revised Injunctions Directive. The revision could for example include a provision to the effect that the Member States either guarantee a minimum funding for certain qualified entities or set up other mechanisms to allow these entities an adequate level of enforcement activity.

7.2 Costs and risks of specific actions

Mechanisms supporting the qualified entities' activities could also consist in facilitating 'access to justice' in the sense of reducing the costs and risks of court actions. Such costs typically include court fees and lawyers' fees. With regard to court fees, the practice in the Member States is again very heterogeneous. For example, in Hungary, Slovakia and Spain, qualified entities' actions under the Injunctions Directive are explicitly exempted from court fees.¹⁵⁹ In some systems, court fees are calculated on the basis of the value of the claim, so that rules regarding the lowering of this value in litigation brought by consumer associations' serve to reduce the court fees.¹⁶⁰ Notwithstanding different cost rules and cost systems in the Member States, a general principle should be included

¹⁵⁸ See Civic Consulting (supra n. 2), at 115 f.

¹⁵⁹ See Civic Consulting (supra n. 2), at 115.

¹⁶⁰ Such as in Germany in § 12 para. 4 Unfair Commercial Practices Act (Gesetz gegen den unlauteren Wettbewerb; UWG). In litigation under the Injunctions Act, it is the established practice of the courts to attach low value to the claims in the collective interest, with the explicit aim to keep litigation costs at a manageable level; see only BGH, 30/4/1991, NJW-RR 1991, 1074; BGH, 18/7/2000, NJW-RR 2001; BGH, 28/9/2006, NJW-RR 2007, 497; BGH, 17/3/2011, GRUR 2011, 560.

in the Directive, in the sense that since the qualified entities' actions are designed to be in the public interest, this should also be reflected in the cost rules regarding such actions.

With lawyers' fees, the situation is more difficult as there are conflicting goals from the perspective of the qualified entities. On the one hand, it is good to keep lawyers' fees within a sensible range, so that the costs of an action do not rise to unacceptable levels. In systems where lawyers' fees are also calculated on the basis of the value of the claim, as for example in Germany, this goal can also be achieved by reducing this value in litigation brought by consumer associations. On the other hand, care must be taken not to create or perpetuate a 'caste system' within lawyers in the sense that there are low-cost lawyers that represent consumer or other 'public' interests, whereas high-cost but also high-quality lawyers represent the traders' interests.

To a certain extent, this may be unavoidable for non-profit organisations, but the regulatory environment needs to ensure that non-profit is not necessarily equivalent non-professional or low-quality service. For example, where a qualified entity's necessary costs are calculated, one should accept salaries on the level of an experienced professional rather than forcing the entity to employ only at minimum wage level.¹⁶¹ Similarly, the cost rules for lawyers' fees should not lead to a situation where the qualified entities' lawyers receive fees that do not allow professional work with a market-adequate income.

In Europe, the 'loser pays' principle for court and lawyers' fees is widely accepted. This principle has as an important gatekeeper function against unfounded claims. It should therefore be preserved. However, care must be taken that the 'loser pays' principle does not create unmanageable risks for qualified entities. It is important, for example, that the amount that can be recovered for the defendant lawyers' fees is clearly limited, so that the cost risk can be calculated (and possibly insured) in advance.

7.2.1 Flexibility in financing

The foregoing considerations show that the issue of financing for qualified entities is a delicate and complex one that depends on many factors of the legal and economic environment in which they are operating. In view of this complexity, it is of particular importance that the Directive allows consumer organisations sufficient flexibility to finance their work. Sources of financing can be government funding, membership fees, donations, proceeds from consulting and sales activities or project funding. All these sources must be regarded as acceptable as long as the general non-profit character of the entity is untouched. In recent years, third party financing of litigation has also become a relevant source of funding for consumer associations, and it was used particularly successfully in Austria. The Directive should specifically allow this source of funding, as it opens up funding for meritorious cases where the funder sees significant chances of recovery.

¹⁶¹ Compare, for a similar question in the ADR context, the calculation of acceptable ADR fees in the energy sector in Germany: OLG Cologne, 17/2/2016, *Zeitschrift für das gesamte Recht der Energiewirtschaft (EnWZ)* 2016, 180, stating that even a non-profit institution must be able to employ professional staff at adequate wages.



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