

The Consumer Voice in Europe

INJUNCTIONS – MAKING THEM FIT

BEUC position paper



Contact: Augusta Maciuleviciuté – consumer-redress@beuc.eu

BUREAU EUROPEEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
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Why it matters to consumers

It is very important that consumer organisations have legal means to stop various commercial practices that do not comply with consumer law. This possibility (called 'an injunction') exists nationally and for cross-border cases, and is successfully used. However, to make it more efficient and more useful for consumers, the procedure needs to be improved. It would be particularly beneficial for consumers if the procedure to stop the commercial practice could make it simpler for the people who have already been victims to this practice to obtain compensation due to them.

Summary

The Commission is reviewing the Injunctions directive¹ as part of its 'Fitness check of EU consumer law'. This opportunity should indeed be used for consumer benefit, addressing the main shortcomings of the Directive and improving it further:

Adding the link to redress possibilities, for instance:

1. To complement injunctions with the obligation of the trader to remove the consequences of the breach, for example: inform the affected consumers; repay them the unduly paid amounts, issue corrective statements to the public;
2. Consumers, affected by the term or practice that was prohibited by the injunction, must be able to rely on the judgement in their individual or collective redress proceedings, without having to once again prove the infringement;
3. The limitation period for claims by consumers affected by the infringement needs to be suspended during the injunction proceedings.

Ensuring that the costs of the procedure do not prohibit taking of actions:

1. To limit court fees and lawyers' fees for consumer organisations, both for domestic and cross-border cases;
2. In cross-border cases, to oblige the losing defendant to cover the costs of translating the decision into the national language(s) of the Member State in which the infringement occurred.

¹ Directive 1998/27 on injunctions for the protection of consumers' interests, codified by Directive 2009/22 (OJ L 110, 1.5.2009).

Allowing accelerated procedures for urgent cases;

Extending the scope of the Directive to all consumer law;

Ensuring effective enforcement and deterrence, for instance:

1. The injunction decision should also have binding effect on other traders using identical terms or practices (provided those traders have enough safeguards to object or appeal);
2. Binding force of the judgement should at the minimum be extended to linked companies and successor companies on the side of the defendant;
3. To make the possibility of cross-border injunctions more visible, a registry could be created containing all judgements in cross-border cases;
4. The trader should be obliged to publish the decision (for instance, on their website);
5. The sanctions for not respecting injunction judgement should be mandatory and deterrent;
6. In order to encourage consumer organisations or other entities to monitor if the result of a successful injunction is respected, the costs of the subsequent taking the same case to court (in case injunction judgement is not complied with) should be refundable to the claimant;
7. The fines or a defined part of them should go to consumer organization that filed for an injunction², or at least for consumer related purposes or projects.

1. Background

Since the Injunctions directive was adopted and transposed in the Member States, a number of consumer organisations have successfully sought injunctions (mostly domestically, not cross-border) in order to stop illegal practices relating to matters such as unfair contract terms, door-step selling, distance selling or timeshare scams. So, we consider it an important tool that consumer organisations have at their disposal in order to fight against illegal practices.

It has to be noted that in two Member States³ consumer organisations have a special task, mandated by their governments, to bring injunction cases.

Some examples:

In Germany, *vzbv* and its regional member organisations initiate about 1000 injunction proceedings annually, approximately 25% are taken to court. *Vzbv* was successful in proceedings against Apple, Google, WhatsApp and *Teekanne* (important decision of the European Court of Justice on misleading labelling of foodstuffs⁴).

² Our UK member Which? is not a signatory to this particular suggestion.

³ Germany and Austria.

⁴ Case C-195/14.

In Italy, our member Altroconsumo has successfully used injunctions procedure for multiple cases. Recent examples include:

- the action against an unfair term in the contract for long-term credit index-linked to the Swiss franc by Barclays in cases where the loan is settled early⁵;
- the action against Groupon for the unfair contract terms in the conditions and terms of the sales of the coupons⁶.

Altroconsumo has successfully used the injunctions not only for unfair contract terms but also with regard to product safety. For instance, in Piaggio Gilera Runner case (the product posed fire risks in case of an accident) following Altroconsumo's action the company was obliged by the court order to inform the owners and to carry out a recall campaign of vehicles already placed on the market.

The injunctions procedure also has important shortcomings, both if used domestically, and even more burdens to use it across borders. In the paper, we outline BEUC suggestions for improvement.

2. Link with redress

The greatest shortcoming of the injunctions procedure is its **lack of link to redress** possibilities.

Injunctive actions can put an end to a fraudulent practice, but consumers are not compensated for the harm suffered. The situation is aggravated further by the fact that in most countries the injunction decision has only *inter partes* effect and cannot be relied upon in follow-on actions for compensation. It means that if, after there has been a decision on injunction, an individual consumer would want to go to court and claim for compensation, the consumer would once again have to prove the infringement. Therefore, in most cases consumers remain empty-handed, demonstrating limited benefit of injunction actions.

Some examples:

In the A1 Mobilkom Austria case of 2007, initiated by our member organization VKI, the court prohibited as unfair term and unfair practice the intransparent 'activation fee' of 49,90 €. No compensation was obtained for consumers who paid this fee and thus suffered the damage before the judgement of the court.

In Germany, the Higher Regional Court of Stuttgart ruled that the injunction does not include an obligation to inform the customers affected by the wrong calculation of life insurances.⁷

In some countries, however, injunctions can be linked with the compensation of harmed consumers, or such link is being debated.

⁵ More information here: <https://www.altroconsumo.it/soldi/mutui/news/mutuo-franchi-svizzeri-barclays>

⁶ More information about this case: <https://www.altroconsumo.it/hi-tech/internet-telefono/news/groupon-segnalata>

⁷ [Verbraucherzentrale Hamburg vs. Allianz: OLG Stuttgart Urteil vom 7.8.2015, 2 U 107/14 \(219\)](#).

Belgium

In Belgium, consumers can rely on the decision of an injunction action to get compensation afterwards, in the sense that injunction decision constitutes a proof of the infringement by a certain company.

The UK

The UK Consumer Rights Act 2015 introduced Enhanced Consumer Measures (ECMs), which allow to seek court orders aimed at achieving redress for consumers, remedies from traders who have breached consumer law and remedies to give consumers more information.

Besides the protection of collective interests of consumers through injunctions which stop unfair commercial practices, consumers need to also be enabled to successfully obtain redress where traders act contrary to their obligations and the injunction was successful.

It needs to be noted that even if the link with redress will be established, this **cannot be seen as a replacement of the need for collective redress procedures in Europe**. First and foremost, injunctions cannot be obtained for the infringements that have already ceased. This would leave out a major part of the mass claims, for instance, in such cases as Dieselgate, or scams and unfair commercial practices that do not last long. Secondly, injunctions are often imposed by administrative authorities (e.g., national consumer authorities or other regulators) that would not be able or willing to deal with compensation claims. Thirdly, in a number of countries (e.g. Denmark, Estonia, Ireland, Latvia, Lithuania, Finland and Sweden) consumer associations do not have standing to bring injunction claims and so would be excluded for helping consumers to receive redress.

BEUC demands:

1. To complement injunctions with the obligation of the trader to remove the consequences of the breach, for example: inform the affected consumers; repay them the unduly paid amounts, issue corrective statements to the public. So as not to prolong injunction procedure too much by having the judge look at compensation amounts etc., this could take the form of a simple declaration of the judge that the company is obliged to repay the consumers affected;
2. Consumers, affected by the term or practice that was prohibited by the injunction, must be able to invoke injunction orders in their individual or collective redress proceedings, without having to once again prove the infringement;
3. The limitation period for claims by consumers affected by the infringement needs to be suspended during the injunction proceedings (currently the case in the Netherlands, as established by court practice, and in France).

3. Further need for improvement

Even if there has been a fair number of domestic injunctions actions in some countries taken by consumer organisations, a number of obstacles continue to exist both with regard to domestic, and especially to cross-border injunctions. We outline our proposals regarding those obstacles below.

3.1. Adaptation of costs

The high costs involved in court actions (and especially cross-border actions) are a major hindrance. Costs are much higher in cross-border cases than in national cases, so “pleading abroad” is often unaffordable for consumer organisations. In addition, there is a risk of not being reimbursed proceeding costs even if one wins the case, because the question of the extent to which a court’s ruling on costs will suffice to cover the lawyer’s fees is not determined finally, not even in countries where the losing party has to pay all the costs. In consequence, consumer associations often face risky financing gaps (see example in the box below), which need to be bridged by way of additional resources, which the organisation cannot get back even if they win the case.

In many countries, even where a consumer organisation brings an important injunction action in the public interest, if the case is lost for any reason (including on a technicality) the consumer organisation will have to pay the trader’s costs, which could run into hundreds of thousands of euros.

On the other hand, in some other countries consumer organisations already benefit from the exemption of administrative court fees or caps on defendant’s lawyer’s fees (in Poland for when consumer organisation represents individual consumers in court, in Malta and Portugal in collective redress cases), so this could be extended to injunction cases.

We suggest that the claimant should not be required to pay the trader’s costs even where an action is unsuccessful – in recognition of the public interest function of the proceedings – so long as the claimant does not act unreasonably.

Such rules will also allow consumer organisations to take less straightforward cases that will contribute to the interpretation of consumer law by courts.

In addition, in cross-border cases, the offender should also be sentenced to pay the costs of translating the decision into the national language(s) of the Member State in which the infringement occurred⁸.

BEUC demands:

1. Exemption or limitation of court fees and lawyers’ fees for consumer organisations, both for domestic and cross-border cases;
2. In addition, in cross-border cases, the losing defendant should be obliged to cover the costs of translating the decision into the national language(s) of the Member State in which the infringement occurred.

⁸ This was applied for by the British Office of Fair Trading in the proceedings against the Belgian Duchesne SA, because a judgement by a Belgian court in the French language was not much use to British consumers

3.2. Speedy procedures

Court procedures (and especially cross-border) often can be very slow, so ideally the Directive should allow for more speedy procedures. In fact, in many cases before an injunction can be sought, the trader has already disappeared or has gone to bankruptcy.

Taken that the Directive only establishes that qualified entities shall be able to seek an injunction order with all due expediency, where appropriate by way of summary procedure, but being up to member States to determine what in fact is a summary procedure, there could be very different realities among Member States. For instance, in Portugal, there is currently only one form of process (though with specific features), and the summary procedure is no longer available.

Even nationally, it is not always possible to use fast-track procedures because of procedural risks or burdens. In Germany and Austria, if an injunction granted under summary procedure is overruled in the appeals procedure, the defendant is granted a no-fault claim to damages against the plaintiff. This risk is a huge burden to initiate summary procedures and needs to be addressed.

We want to emphasise that in the Recommendation on common principles for injunctive and compensatory collective redress mechanisms⁹, which also applies to injunctions, the Commission has chosen to include a specific point (see p.19) concerning the need for expedient procedures.

BEUC demands:

- Accelerated procedures must be available for urgent cases, especially where consumers face economic harm (e.g. online scams where people are sold products or services that finally never arrive, or trapped into expensive subscriptions and the like). These procedures should not create higher financial risks than ordinary procedures.

3.3. Scope of application

The question of the limited scope of the Injunctions directive deserves some attention too. We think that there is no valid reason to restrict the impact of the directive to “classic” consumer protection measures, listed in the annex. For instance, areas such as product safety, data protection, transport or financial services, could be also covered by the directive. Indeed, a number of Member States¹⁰ have already done so.

In addition, it is not logical that the cross-border injunctions, covered by this Directive, could be applied in less areas than the cross-border cooperation of public consumer authorities, governed by the CPC Regulation¹¹.

A positive example of an open approach is the German Injunction Proceedings Act (Unterlassungsklagengesetz). It covers all kind of consumer protection legislation (§ 2.1). This flexible approach is specified by a not exhaustive positive list of mandatorily covered legislation including horizontal consumer rights, financial services, energy-supply and data protection (§ 2.2).

⁹ Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States (OJ L 201, 26.7.2013)

¹⁰ Germany, Portugal, etc.

¹¹ Regulation (EC) 2006/2004 on consumer protection cooperation (OJ L 364, 9.12.2004, p. 1)

BEUC demands:

- To extend the application of injunctions directive, so that at least it covers all the same legislation as the CPC Regulation.

3.4. Enforcement and deterrence

Even if the injunction claim is successful its enforcement can become a major problem. Often the firm that has been condemned immediately removes its registration or goes into bankruptcy. Eventually nothing prevents the condemned firm from targeting consumers in another country. The problems outlined have already arisen not only on national level, but also in the case of a cross-border complaint.

A trader Duchesne SA (Belgium), sent unsolicited mail order catalogues to UK residents together with notification of a prize win, usually £10,000. Consumers believed that they had only to make a purchase in order to secure a prize (it was not the case) and it was reported that the company was receiving about 4000 orders per day. Many consumers complained. The British Office of Fair Trading sued Duchesne SA in Belgium and the Belgian court banned the practice. However, after some time, the same prize notifications re-appeared, sent not from Belgium but by other companies from other Member States.

The strict *inter partes* effect, where the injunction judgement only applies to the company that has been sued, and not to other traders that apply identical terms or practices, greatly limits the usefulness and impact of the injunctions procedure. It does not only regard rogue traders as in the above example, because it could often happen that certain practice is spread throughout the whole sector in question. For instance, so called 'floor clauses' in mortgage contracts (where consumer cannot benefit from the interest rate going below a certain limit, but there is no capping of the upper limit of the interest rate), recognized as unfair by a number of national courts or authorities, were not only widely spread nationally, but also common in different EU countries.

In Germany, the Federal High Court (BGH) decided that in case of a stolen or lost bank-card a bank must not charge customers with an extra fee for the replacement card.¹² Other banks ignore this ruling persistently and without financial risk because of the *inter partes* effect. For vzbv this requires to repeat the same legal proceedings against each individual bank.

Therefore, the injunction decision, at least domestically, should also have binding effect (meaning that they cannot use the same term or practice) on other traders using identical terms or practices (provided there is a public register of such terms and those traders have enough safeguards to object or to appeal). It is important to take note that the CJEU recently confirmed that such wider effect is not precluded by the Charter of Fundamental Rights of the European Union and by the Injunctions Directive¹³. According to the Court of Justice, the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms can be regarded as an unlawful act **also in relation to a seller or supplier which was not a party to the proceedings** (provided that trader has an effective judicial remedy against the decision which finds that contested terms are equivalent).

¹² [vzbv against Postbank: Bundesgerichtshof, Urteil vom 20. 10.2015, Az.: XI ZR 166/14.](#)

¹³ Judgement of 21 December 2016 in C-119/15.

In addition, the authority of a court to issue injunctions can be effective only if there are penalties in place for failure to respect them. This is provided as a possibility in Art. 2.1 b) of the Directive, but should be elevated to an obligation.

Here it must be noted that firstly, the sanctions must have a real deterrent effect, for instance, be based on the annual turnover of the company in question.

Secondly, there must be likelihood of the discovery of further infringements, meaning that if consumer organisations discover that the injunction order has not been complied with, the fine for non-compliance should go to that consumer organisation, or at least the costs of the further pursuit of the case should be refundable.

Thirdly, the fines or a defined part of them should go for consumer related purposes or projects, as it is the case in Portugal and Italy¹⁴.

In addition, for more transparency and deterrence, the trader, against whose practice or term the injunction was issued, should be obliged to publish the decision (for instance, on their website).

We also advocate for the registries of all final decisions to be created (both nationally and for cross-border cases). From the experience of our members, it does not so much serve as information to consumers, so it would not duplicate the obligation to publish the injunction on the trader's website. The registry rather serves as information to professionals, consumer associations and traders. Information on trader's website regarding the use of unfair contract terms and information regarding a decision under such terms may, on the other hand, be a determining factor not to conclude a contract with such company, and for that, have a more deterrent effect.

BEUC demands:

1. The injunction decision should also have binding effect on other traders using identical terms or practices (provided those traders have enough safeguards to object or appeal);
2. Binding force of the judgement should at the minimum be extended to linked companies and successor companies on the side of the defendant;
3. To make the possibility of cross-border injunctions more visible, a registry could be created containing all final judgements on injunctions in cross-border cases, along with national registries;
4. The trader should be obliged to publish the decision (for instance, on their website);
5. The sanctions for not respecting injunction judgement should be mandatory and deterrent, for instance, based on the annual turnover of the company in question;
6. In order to encourage consumer organisations or other entities to monitor if the result of a successful injunction is respected, the costs of the subsequent taking the same case to court (in case injunction judgement is not complied with) should be refundable to the claimant;

¹⁴ Please see detailed examples in BEUC position paper "Re-directing justice" X2012-069, available [here](http://www.beuc.eu) on www.beuc.eu

7. The fines or a defined part of them should go to consumer organization that filed for an injunction¹⁵, or at least for consumer related purposes or projects.

END



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