The Consumer Voice in Europe

'A New Deal for Consumers – revision of the Injunctions Directive'

BEUC additional comments to the Inception impact assessment

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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

BEUC strongly supports the need to improve existing injunction procedures and to add a compensation element that is currently lacking. There are a lot of mass harm situations in Europe with huge damages to consumers.

The injunctions procedures need to be strengthened:

- The scope of application needs to be expanded both materially (to apply to all areas of consumer harm, not limited to a rigid list of legislation) and to be applied to the ongoing effects of the infringement;
- Consumer associations need to be among the entities being able to initiate injunctions and redress procedures, both nationally and cross-border. They should be allowed to use various sources of funding;
- The obligation for a trader to publicize the injunction decision (especially on the trader's own website) and to inform harmed consumers about it should be obligatory for all injunctions;
- Member States' national procedures or instruments that may turn out to add valuable experiences and results should not be negatively affected.

The need to strengthen private enforcement

We strongly support the need to improve existing injunction procedures and to step up private enforcement. Multiple examples have shown that public authorities often do not act. Only if the European enforcement system integrates both public and private enforcement, it will be effective and will bring justice and benefits for European consumers and businesses alike.

In the Member States where injunction procedures function well and consumer organisations are mandated to take them, our members very actively use injunctions. For example, in Germany, our member vzbv and their members initiate around 800 injunctions per year. In Austria, our member Verein für Konsumenteninformation initiates around 100 injunction cases per year and have developed a specific collective compensation procedure. Between 2011 and 2014 Verein für Konsumenteninformation secured a total amount of more than 55 million Euros in compensation and settlement payments[1].

There are a lot of mass harm situations in Europe with huge damages to consumers. Please see below some illustrative examples of the important recent cases in various Member States.

In the **Netherlands**, one of the huge cases or member Consumentenbond is now in court with concerns numerous toxic financial products with high hidden costs sold by big insurance companies. The estimation of the total amount of damage in these cases rises up to EUR 20 – 30 billion.

In **Ireland**, some 160,000 people were miss-sold a credit card protection policy, with the total damage equivalent to between EUR 15 - 30 million. However, there is no collective redress system in Ireland those consumers could use.

In **France**, after the unfair invoicing of payment notices for their rent, 318,000 consumers were left with EUR 44 million overall damage. Our member UFC-Que Choisir has sued the company using a group action procedure. The case is pending since 2014.

In **Germany**, in 2012 the Federal Court of Justice decided that certain contract clauses regarding life insurance's surrender value were invalid. This could have been the basis for recovery claims for millions of consumers. The Consumer Association of Hamburg took action against Allianz Lebensversicherungs AG at Stuttgart District Court. According to the Consumer Association's estimate, claims against Allianz added up to EUR 1.3 to 4 billion. 80 consumers had ceded their claims to the Consumer Association. In the end the 80 consumers involved were refunded € 114,000. However, as the recovery claims procedure used in this case is too complex to be used for large numbers of consumers, and a suitable collective redress mechanism is not available in Germany, millions of consumers were left behind without any compensation.

Also in **Germany**, one of the last year's cases regarded the fee charged by the Deutsche Bank for the overdrafts. Even if the fee was indeed declared unfair by the court, consumers did not get their money back.

[1] VKI-Erfolgsbilanz: 55 Millionen Euro für Sie, 24.03.2015, available on https://www.konsument.at/55-millionen-fuer-konsumenten

In **Latvia**, a large consumer credit company, BigBank has been deemed to be misleading consumers with respect to interest rates in credit cards for a period of approximately two and a half years. As a result of this unfair commercial practice, many consumers have suffered damages up to €10,000 per person. Even though the total amount of damages is not easy to be measured, it is safe to assume that several thousands of Latvian consumers have been victims of this practice. As collective compensatory relief is not available, they have not been compensated.

A recent predatory lending case in **Slovenia** involved the collaboration of Czech and Slovenian companies that were not permitted to lend money, as they were not registered as required under the Slovenian law. The Slovenian consumers' association managed to get court rulings rendering the loan contracts concluded void. However, they are now struggling along with individual consumers to seek compensation through separate claims, covering damages of €1,000 to €2,500 per case.

Option 4 of the Inception impact assessment on the review of the injunctions directive (A targeted revision of the Injunctions Directive + consumer collective redress)

Adding a possibility of consumer collective redress to the injunction procedures would make a major positive impact on the current situation. At present, in mass harm situations the injunctions do not provide a satisfactory solution, as consumers are not able to obtain redress.

We strongly support the creation of a one stop shop procedure and obliging all Member States to have collective compensatory redress procedures.

The current discrimination of consumers with regard to access to redress depending on which EU country they live in will be significantly reduced. The deterrence to infringe consumer laws would significantly increase, at the same time increasing the level playing field among businesses operating in the EU. The levels of un-reclaimed damages and non-addressed consumer harm in the EU will go down.

Standing of consumer associations

Consumer associations need to be among the entities being able to initiate injunctions and redress procedures, both nationally and cross-border. 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.

In line with the Commission Recommendation 2013/396/EU on collective redress[2], eligibility criteria could be set for ex ante approval. However, the criterion of sufficient human and financial resources is very problematic, as the costs of different legal actions vary and it would be impossible to make an objective evaluation of what the sufficient financial resources are before concrete cases have been initiated. On top of that, many consumer associations (especially in the Eastern countries) rely on the work of volunteers, which would then exclude them altogether.

[2] 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.

The scope

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 *Dieselgate* 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 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' 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.

The Volkswagen *Dieselgate* 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.[6] 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

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

what are the boundaries of these? In particular, many Volkswagen buyers are suing not only their Volkswagen dealer – who was probably unaware of the *Dieselgate* 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.

The examples show 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. 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 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'[7] 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. 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.

Likewise, the Commission Recommendation 2013/396/EU on collective redress has abandoned the 'closed list' approach. It applies to 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.' This list is not conclusive, but only serves to provide examples or areas of particular importance for supplementary private enforcement.

The recommendation not to limit the scope to a closed list of legislation is also included in the Lot 1 study of the Fitness Check report[8].

We ask the European Commission for the review of the Injunctions directive to introduce 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 (a similar solution as the German system provides, which has been highly successful).

[7] 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.
[8] It recommends, as the preferred solution, that both instruments (referring to the Injunctions directive and the Consumer Protection Cooperation regulation) cover consumer law in general and include a non-exclusive list of pieces of legislation falling into that category.

The advantages of such an open system would clearly outweigh the aspect of legal uncertainty and would be essential in achieving the objective of the legislation in the most effective way.

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. 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. 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.

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:

> *Qualified entities may bring actions according to this [Directive] 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.*

One of the shortcomings of the current injunction procedures is that the injunction order can be issued only with respect to ***ongoing infringements***. This leaves multiple situations without any proper resolution. Especially with the view of removing the harm of the infringement, it should be possible to use the procedure against ongoing effects of the infringement.

Costs and financial risks

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.[9] 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.

[9] Civic Consulting, Study for the Fitness Check of EU consumer and marketing law – Final report Part 1 (May 2017), at 115.

Costs and financial risks often prevent consumer associations from taking even the best-grounded cases. 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 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.

The issue of financing for qualified entities is a delicate and complex one that depends on many factors of the legal end 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.

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 (for example, such as a fund to be filled with fines paid by the traders when they infringe consumer law, which then could be accessed by qualified entities under defined circumstances to finance litigation).

We strongly support the idea that the underfunded qualified entities are exempted from court fees (as is the case in Hungary, Slovakia and Spain[10]). In addition, 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. This is a case already now in Portugal and Malta in collective redress cases.

In the human rights area, it has been recognized that national rules placing an excessive financial burden on individuals who wish to obtain redress might be considered to interfere with their right to an effective remedy. Similarly, the court fees that are payable in advance of instituting proceedings should not prove such financial burden as to prevent or to deter applicants from exercising their right to remedy[11].

With respect to funding of actions, and especially ***third-party funding***, we believe this source opens up financing for meritorious cases where the funder sees significant chances of recovery. Therefore, such funding should be available. It is important to note that third party funding can be of various forms – for instance, government funding or funding through various projects that aim to increase consumer law enforcement strictly speaking is also third-party funding. As to the fears that the third-party funders may try to intervene into the management of cases, the procedural rules in most Member States already contain general safeguards against any kind of abuse in the civil actions. In addition, the possibility to have funding through a dedicated fund (as suggested above) or to be exempted from costs might allow the claimants to rely less on any external funding.

[10] Civic Consulting, Study for the Fitness Check of EU consumer and marketing law – Final report Part 1 (May 2017), at 115.
[11] ECtHR, Scordino v. Italy, No.36813/97, 29 March2006, paragraph 201.

Publication of injunctions

We strongly support the possibility to make the trader, against whom the injunction was issued, to ***publicize the injunction decision (especially on the trader's own website)*** and to inform harmed consumers about it. This should be obligatory for all injunctions.

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. 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.

More widely than in a specific case, the obligation to provide the information about the injunction will potentially allow consumers to recognize other similar problems and will also be a strong deterrent for companies to infringe the law.

Other procedural issues

Another important point relates to ***the length of the procedures***. It is not enough that the speedier procedures are merely made available or the deadlines set up, if other procedural rules then impede the use of those accelerated procedures. For example, in Austria and Germany, 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 too high even for strong organisations.

Once the injunction orders have been considered only binding on the specific trader, there is a clear problem of effectiveness and a multiplication of judicial proceedings ***involving similar standard contract terms***. A register of unlawful acts prohibited by injunction orders and the possibility to sanction traders committing the same acts should be considered so as to address this problem.

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.

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