Directive on consumer representative actions:

a sheep in wolf's clothing?

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The long-awaited EU Directive on representative actions for the protection of the collective interests of consumers is finally here (Directive (EU) 2020/1828). It is, of course, a compromise solution in a continent with a wide discrepancy of approaches to consumer protection and to collective redress. The long legislative procedure led mostly to successes for those who lobbied on behalf of business interests, with the final version being significantly watered down, even by comparison to the already modest Commission proposal.

This was supposed to be the EU legislator's response to an unacceptable *status quo* all over the EU. In the USA, Canada, Australia or Israel, when companies break the law and cause mass damage to consumers, they are frequently forced to compensate all those injured and tend to arrive at settlements. In the EU, consumers are almost never compensated. In the extremely rare exceptions, compensation is paid out only to a very small percentage of injured consumers.

The VW Dieselgate scandal made the contrast painfully obvious. In other jurisdictions, all consumers were compensated through settlements. Almost no consumers were compensated in Europe and only a few settlements were reached for those who sued. Same infringement, same company. The only thing that is different is the law and legal culture.

Let's be clear: in Europe, companies systematically get away with breaking the law and violating consumers' rights. The fact that they sometimes end up paying fines is neither dissuasive nor does it give any redress to their victims.

In recent years, some Member States have revised their collective redress rules to alter this situation. It's too early to tell if it's working. And many of them have done nothing. So the EU decided to step in. But is this Directive an effective solution to the problem?

The Directive requires Member States to introduce or (if needed) revise national rules allowing for at least one type of representative action for the protection of collective interests of consumers. It applies to actions for redress and injunctions (but not to merely declaratory actions).

One would expect such an EU mechanism to protect all rights granted to consumers by the EU legal order. This Directive does not. It applies only to around 60 Directives and Regulations listed in an Annex. Crucially, it does not cover infringements of EU Antitrust Law, arguably one of the areas where consumer redress is most complex and most lacking.

As to who is entitled to bring representative actions, the Directive only defines criteria for designation when it comes to the right to bring cross-border actions, even then leaving a broad discretionary margin for Member States. Even if it imposes, as a matter of principle, an obligation of automatic recognition of qualified entities from other Member States, national courts of other Member States may seemingly

refuse a qualified entity the right to file a cross-border action due to different interpretations of requirements such as independence.

The right to bring a representative action is subject to the condition of providing 'sufficient information on the consumers concerned by the action', which can lead to widely diverging interpretations by legislators and courts, some of which could make it too difficult to represent large groups of consumers.

The light positive references to opt-out in the original proposal have unfortunately been eliminated. The Directive only prohibits opt-in (requiring the consent of individuals) for injunctions, which shows that there was agreement about making it easy to require companies to comply with the law, but not to pay damages. Furthermore, that requirement is arguably redundant, as orders to cease unlawful behaviour would anyway have *de jure* or *de facto erga omnes* effects. Despite academic consensus that effective consumer redress for a smaller amount of damage requires an opt-out, the Directive not only does not require it, but prohibits Member States from allowing consumers from other Member States to benefit from opt-out mechanisms (that is, requires Member States to limit the territorial scope of opt-out solutions to their own territory). In this regard, consumer protection options will be more limited after than before the Directive in some Member States. The Dutch WCAM regime, for example, which allows the approval of EU-wide opt-out settlements, may be argued to be unlawful.

This means an EU-wide consumer rights-infringement will have to be litigated State by State (some of them allowing opt-outs for their own consumers) and/or in an anchor defendant's country (if it's in a Member State) but only with an opt-in for consumers from other States. By itself, this will inevitably lead to much higher costs for consumer protection, asymmetric enforcement, heterogeneity of interpretation of EU Law, and companies getting away with not compensating uninformed and vulnerable consumers in the Member State with no opt-out solutions. One may still hope that the Court will conclude that, in certain cases, this rule of secondary EU Law violates the Treaty and the principles of effectiveness and non-discrimination.

Although the Directive requires Member States to ensure availability of redress measures, the wording is strained: they only need to be included 'as appropriate and as available under Union or national law'. Article 5b, on redress measures, is vague and leaves broad discretion when it comes to awarding rights to claimants. Its main binding contributions are to require a right to seek redress in stand-alone cases and without prior declaratory judgment, and to impose restrictions and safeguards. The provisions on settlements are equally vague and limited.

There is a wide array of strictly worded safeguards against abuses, including that: (i) representatives must have no conflicts of interests, must be non-profit and independent from influence, namely by third party funders, and must disclose their funding; (ii) compliance of representatives with conditions must be periodically assessed by Member States; (iii) there is control by the court of legitimacy of a qualified entity in each case (beyond mere inclusion in the list of a Member State); (iv) concerns are raised by the defendant regarding the compliance by a qualified entity with the criteria laid down by the Directive; (v) there is the right of court to dismiss manifestly unfounded claims at an early stage; (vi) there is an obligation on a representative to pay company costs if the action is unsuccessful; and so on.

There are many issues which could and probably should have been addressed, and were not. For example, there are no provisions:

a) on EU-wide solutions for EU-wide infringements;
b) on jurisdiction (it will not be possible to use a consumer as an anchor claimant, incentivizing companies to be headquartered in Member States with defendant-friendly rules);
c) on coordination or joining of consumer cases referring to the same infringement;
d) on designation of lead plaintiffs;
e) on possibility of fluid recovery (ordering infringers to pay aggregate damages, to be distributed to injured persons, and the undistributed portion to be surrendered to public authorities);
f) on suspension/interruption of limitation periods upon filing of representative actions even prior to confirmation of representative's legitimacy;
g) on the impact of continuous infringements and principle of effectiveness on limitation periods (such as in *Cogeco, C-637/17*).

The Directive requires some online information and centralised databases of qualified entities and concluded cases, increasing transparency, but no provision is made for elimination of language barriers or for a public database of pending cases.

The Directive doesn't try to ensure the economic viability of representative actions, which may be their most decisive obstacle. It doesn't require Member States to allow litigation funding, but imposes safeguards if they do. It doesn't require Member States to change their rules on court costs or adverse costs, speaking vaguely of the need to ensure effectiveness. It doesn't require Member States to provide public funding, nor foresee public funding by the EU.

There is a provision on effects of final administrative or judicial decisions declaring infringements, but it only says that they must be allowed as evidence. It's hard to believe there is a single Member State where that is not already the case. Here, as in other provisions, rather than reproducing the solution of the Antitrust Damages Directive, the legislator chose to include this non-rule.

Other vague non-rules follow, relating to procedural expediency, disclosure of evidence and penalties.

The Commission is required to evaluate if a European collective redress Ombudsman should be established. This assessment, which could lead to a truly impactful reform, is to be carried out in five years, when there won't be sufficient data to assess the impact of the Directive. Why wasn't this assessed now?

As a whole, an unusually high number of this Directive's provisions are mere suggestions and possibilities, turning much of its content into a soft-law document, a 2013 Recommendation version 2.0. And most of the specific obligations which appear to protect consumer rights cover aspects where there was unanimity and which weren't an issue in any Member State.

We also note how far this Directive is from the conclusions and solutions proposed for collective proceedings in the current draft of ELI and UNIDROIT's Model European Rules of Civil Procedure.

We will only know the full impact of this Directive after we see how it will be transposed in all Member States. But it is worrying that, *a priori*, very little seems to have to be changed in any Member State that adopts a minimalist approach.

So what about this Directive is actually novel? Its greatest contributions seem to be:

a) to ensure that at least one mechanism a Member State chooses to allow for consumer protection actions is also available to qualified entities recognised by other Member States (even then, with legal uncertainty and subject to case-by-case control by the courts);
b) to impose safeguards against abuses, especially limitations on third party funding, if Member States choose to allow it.

For a Directive which sets off from the premise that existing solutions were insufficient to ensure consumer protection, and that allowing Member States to decide by themselves wasn't working, it's hard to see this as anything but a disappointing outcome. The winning concern overall was to protect against abuse, rather than to ensure effectiveness of consumer protection.

It now seems clear that effective consumer redress at EU level will not be achieved through legislative reform. It's up to the European Court now. Only through its interpretation of EU rights and the principle of effectiveness and right of access to justice might we achieve the needed solutions which legislators have been unwilling to arrive at.

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