

Effective redress? Reflections on the new Directive on representative actions¹ The European Rechtsakademie (ERA) 1–2 June 2021

After more than 30 years of works on the legislative framework on collective redress in the European Union, the Directive (EU) 2020/1828 on representative actions (hereinafter referred to as the “Directive”) was finally adopted at the end of 2020. This Directive allows qualified entities to seek remedy against trader violations in areas such as financial and investment services, data protection, travel and tourism, energy, telecommunications, environment, digital services and health. The recent adoption of this act brought international leading scholars, representatives of the EU institutions, consumer associations and practitioners together virtually to Trier (Germany) to give an in-depth analysis of the Directive. The conference was held 1-2 June 2021 and it was organized by the European Rechtsakademie (ERA).

The conference served as a platform for exchanging views on some of the key issues of the Directive. Opinions as regards the effectiveness of the new legal instrument presented during the conference sessions were very diverse. Blanca Rodriguez Gallindo (European Commission) believed that after decades of discussions and hesitations, the Directive is an important step forward towards the protection of the interests of consumers and beginning of the process in the change of the culture of collective redress in the EU. Some more critical view about the Directive was voiced by Georg Kodek (Vienna University of Economics and Business) who presented some critical remarks regarding both conceptual and technical defects of the act in hand. In terms of the first group, Kodek raised question as regards the form of the act adopted. He believed that the regulation could have cleared its path through the chaos imposed by the EU private international law. Another point of criticisms related to the very cautious approach adopted in the Directive which favors an opt-in model, prohibits punitive damages and is very restrictive as regards the standing of the qualified entities, their funding and the remedies available. All of these features makes that the Directive can be read like an instrument designed to protect the European business from the US-style class action. As regards to technical defects, from the perspective of experienced trial lawyer and judge, Kodek concluded that many criteria set in the Directive create the potential for objections and delay. The wording used in the Directive also raises a question regarding the effect of final decisions, which may be used as an evidence (amongst other evidences) and not as a proof (having binding effect) in the context of any other actions before national court against the same trader for the same practice.

Within the next panel session some major issues when implementing the new Directive were discussed. From the consumer-oriented perspective Ursula Pahl (BEUC) presented conditions for qualified entities for domestic and cross-border cases underlying that too restrictive requirements

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may hinder consumer access to justice. The practical relevance of cross border cases was then highlighted by the recent example of representative claims brought against Volkswagen in different Member States. Having scrutinized the criteria for cross-border cases Ursula Pachtl concluded that most consumer associations which are BEUC members already comply with the criteria specified in the Directive. She also highlighted that there is no harmonization for domestic representative actions although so far consumer organizations have mostly brought this type of cases. Stefan Voet (KU Leuven) discussed the opt-in and opt-out models of participation in the group and the concerns regarding their compatibility with Article 6 of the European Convention of Human Rights. In terms of compensatory class actions he stated that notification rules are key safeguard for the functioning of these procedures. Voet also raised that the choice between opt in and opt out model has a repercussion in international private law perspective. It remains questionable whether the decision or settlement issued in the Member States which has an opt-out model can be recognized and enforced in other (also non-EU) countries in which prefers opt-in model and state that opt-out is incompatible with Article 6 of the European Convention on Human Rights and public policy. Further, Flip Wijers discussed the rules relating to disclosure of evidence provided by the Directive against the background of the concept of evidence gathering in the continental Europe.

The most controversial panel related to the issue of litigation funding and financing was chaired by Ianika Tzankowa (University of Tilburg). The discussion was opened by Paulien van der Grinten (Dutch Ministry of Justice and Security) who was involved on behalf of Netherlands as a delegate for negotiations on Directive on representative actions and almost parallel involved in the national discussion on the collective redress (WAMCA). She presented some insights of the institutional heated debates on the final shape of Article 10 of the Directive which concerns restrictive approach to third-party litigation funding of representative actions. As a result of its final wording, qualified entities are left very few options to fund their actions which are inherently expensive as exemplified recently in Belgium where the consumer organization was forced to settle the case early due to lack of funds. Further, point of view of consumer organizations on funding was presented by Augusta Maciuleviciute (BEUC). She presented a general position of BEUC members that commercial third party funding should only be a last resort and it would be much better if the court costs were amended in a way to reflect the public nature of consumer class actions. Maciuleviciute provided some examples from the Member States where consumer associations do not pay administrative court fees for launching claims or only pay a fix amount rather than percentage of the aggregate amount of the claim. Considering that the consumer class actions are very expensive, those Member States that are against third-party funding might need to foresee other options for the financing of actions such as special foundations or state support. From the perspective of comparative scholar and keen observer of the US law, Magdalena Tulibacka (Emory University School of Law) discussed the complex market of third party litigation in the US and compared it with Europe. She believes that we need to combine principle-based general approach and case-by-case approach to funding of representative actions in the European Union that the Directive provides such opportunity. The discussion was closed by practical remarks of Christopher Rother who highlighted that the third party litigation is essential for access to justice. Against the backgrounds of the German law he presented very interesting observations as regards the possibility of bringing class actions against the state by consumer organizations financed by

public funds. On the example of Volkswagen case he also revealed the disproportion between the actual costs of the class action and the maximum lawyer's fees set forth in German law and thus he highlighted the need of third party funding.

Last part of the conference was devoted to cross-border mass claims. Henrik Saugmandsgaard Øe (Advocate General, former Danish Consumer Ombudsman) explained the recent case law of the Court of Justice of European Union (CJEU) on mass claims with focus on jurisdiction in data protection, contracts and consumer matters. As regards the new legislation at hand, the Advocate General expressed the belief that the Directive will not have a great impact on cross border representative actions. He recalled that mechanism for cross-border cases from the Injunction Directive (2009), upheld in the current Directive, was in practice used only two times. From his practical experience as a consumer ombudsman, Henrik Saugmandsgaard Øe stated that it is extremely expensive to bring cross border representative actions and it is much more effective to ask the local authority to bring an action instead. Further in this conference panel, Astrid Stadler (University of Constance) analyzed recent CJEU case law on cross-border mass tort claims, including extensive case law on pure financial damage. She presented some observations as regards the high-profile case C-343/19 VKW v. Volkswagen and a recent judgement C-709/19 VEB v. BP. Then, Alexia Pato and Burkhard Hess (Max Planck Institute Luxembourg) discussed the instruments of European private international law relevant for collective actions and collective settlements. They demonstrated the practical importance of Article 8 par. 1 of Brussels I bis Regulation which relates to co-defendants in cross-border mass claims. Subsequently, Ianika Tzankowa (University of Tilburg) focused on parallel actions in the EU Member States. She explained the relevant rules of Brussels I bis Regulation and the key legal terms in articles 29 and 30 that are difficult to interpret. By use of some examples Ianika Tzankowa illustrated the challenges in determining who the 'parties' are and when 'a court is first seized' in parallel actions. Further, Marta Pertegás (Maastricht University) shown the interplay between private international law and Directive on representative actions. With focus on applicable law issues she presented some illustrations such as breach of data protection, cross-broader environmental pollution, breach of competition law and financial damage resulted from failed investments. The final topic discussed during the conference was the problem of forum shopping in international mass claims. John Sorabji (University College London) and Cathalijne van der Plas (University of Amsterdam) explained that the Directive promotes forum shopping since it sets minimum standards only and is an incomplete procedural complete code dependent upon national procedural law. They argued that Member States can have more than one collective action regime and Member States will thus devise different collective action schemes. Moreover, qualified entities can bring claim in home Member State and another Member States. Sorabji and van der Plas discussed how to reduce forum shopping in the EU based on example of territorial admissibility requirement used in the Netherlands and based on the US multi-district approach.

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