Comments
on the proposal for a
directive on representative actions for the protection of the collective interests of consumers

I. Introduction
On April 11, 2018, the European Commission presented the “New Deal for Consumers”,¹ a proposal for legislative changes which aims at the modernization of European consumer law as well as a strengthening of enforcement procedures. The New Deal for Consumers comes after the findings of the European Commission’s “Fitness-Check”² showed that one of the main shortcomings of European consumer law is its lack of enforcement mechanisms.

While all of the presented legislative changes deserve some thought, the following comments will focus on what formally constitutes the second of the two proposals for a directive, the “Proposal for a directive on representative actions for the protection of the collective interests of consumers”.³ Nevertheless, it is important to note – and briefly outline – two of the changes advanced in what is formally the first proposal⁴ as these changes would also have a huge impact on enforcement if enacted as suggested by the New Deal.

Firstly, Article 11a of the (first) proposal introduces an individual remedy for consumers who are harmed by a breach of the Unfair Commercial Practices Directive (UCPD).⁵ Under the current legal framework, the UCPD allows for such individual remedies but it does not oblige

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Member States to introduce them. So far, only very few Member States provide remedies for individual consumers. In cases like the VW-Dieselgate emission scandal, such a remedy would be rather beneficial for consumers as it is easier to prove a breach of the UCPD than, for example, that the preconditions of warranty law are met, a fact that has been clearly pointed out by the European Commission.

Secondly, the (first) proposal concretizes the sanctions provided for by the UCPD as well as by 98/6/EG, 2011/83/EU and 93/13/EWG, thereby aiming for a harmonization of the sanctions in the named directives. Although it is well known that directives in the area of consumer law provide that Member States have to introduce penalties that “should be effective, proportionate and dissuasive”, the details of the sanctions are left to the determination of the individual Member States. And in this regard it is well established and has been confirmed by the Fitness-Check that enforcement, or rather the lack of it, constitutes a weakness of European consumer law. Accordingly, the New Deal provides for a two dimensional enforcement system, introducing a collective action – the focus of this short paper – as well as a more efficient administrative system by harmonizing the sanctions for violating certain consumer law directives.

Article 13(1) of the amended UCPD (with similar provisions having been proposed for the other three named directives) merely states the need for “effective, proportionate and dissuasive” penalties. Subsection 2 leg cit, however, specifies criteria which administrative authorities or courts are to consider when deciding on whether to impose a penalty and, if so, the level of this penalty. The criteria include inter alia “the nature, gravity and duration or temporal effects of the infringement” (lit a); “any previous infringements by the trader;” (lit e) and “the financial benefits gained or losses avoided by the trader due to the infringement;” (lit f).

Article 13(3) of the amended UCPD states “Where the penalty to be imposed is a fine, the infringing trader’s annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.” As the proposed Article 13 sees fines as only one form of penalty, the question arises as to what other penalties are available to courts and administrative authorities. Examples would be a skimming of profits procedure or measures eliminating the

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continuing effects of the infringement. Hence, there exist overlaps between the suggested representative action and the new law on penalties.

II. The proposal for a directive on representative actions for the protection of the collective interests of consumers

The proposal for the representative actions directive is a welcome step forward by the European Commission. While the introduction of representative actions has been discussed on a European level at least since the Courage decision issued by the ECJ in 2001, the discussion never led to any actual proposal, only to a White Paper and a Green Paper and a recommendation in 2013. At the point the New Deal was presented, only nineteen out of twenty-eight Member States had introduced some form of representative action. While the existing national representative actions all vary in form, it is fair to state that none of them seems to produce efficient results. It is also worth noting that Germany – after the New Deal was published – adopted the Musterfeststellungsverfahren, a test-case procedure. This procedure should be seen by the European Commission as fair warning of what not to do if the goal is to ensure efficient compensation for consumers and to create incentives for businesses to obey the law.

1) Scope of application

The proposed directive is applicable to an infringement of any of the directives and regulations listed in Annex I of the proposal. Annex I includes fifty-nine legislative acts, ranging from the Consumer Sales Directive and the UCPD to the GDPR and the Air Passenger Rights Directive. This broad approach is laudable and is preferable to the currently rather narrow approach in the existing Injunctions Directive. It might be even more preferable to establish Annex I as providing solely a list of examples and thereby regulate an even broader approach.

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10 Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU.
The other shortcoming of the proposal is the limitation to B2C relationships. This is of course a manifestation of the limited power of the EU. However, at least on a national level, Member States should aim also for the introduction of representative actions for B2B relationships. The VW scandal clearly shows that SMEs as well can be in need of representative actions.

As with regard to the number of consumers who have to be harmed by a certain infringement in order to commence a representative action, Article 3(3) of the proposal states only that “‘collective interests of consumers’ means the interests of a number of consumers”. The proposal does not clarify what “a number of consumers” means. This is regrettable as Member States may define this term differently.

2) The nature of the claim

The biggest change in the proposal compared to the Injunctions Directive is the fact that the proposal allows qualified entities not only to bring a claim for an injunction but also to seek compensation for the consumers harmed. The proposal notes that punitive damages cannot be awarded. This statement is in fact superfluous given that no Member State’s legal order allows for punitive damages anyway.

While the proposal’s direction is commendable, there is unfortunately much ambiguity, which can only be touched upon in this short comment:

The first point of concern is Article 6(1) of the proposal, which states that by “derogation to paragraph 1, Member States may empower a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law listed in Annex I, in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex.” It is regrettable that consumers will not obtain immediate compensation when a case is complex, and in such cases it will be particularly difficult for consumers to sue for compensation on an individual basis. It is also unclear when exactly a case is “complex”.
Also, Article 6(2) lit a establishes a counter-exemption when “consumers concerned by the infringement are identifiable and have suffered comparable harm caused by the same practice in relation to a period of time or a purchase.” The relation to subsection 1 leg cit is not especially obvious. Further, Article 6(2) lit b states that in such cases a mandate from the consumers concerned is not required. The same is true for small claims under Article 6(2) lit b, where the “redress shall be directed to a public purpose serving the collective interests of consumers.” Article 6(2) of the proposal, hence, establishes the presumption that for other claims the mandate of the individual is required. However, this theory finds its limits in Article 10 of the proposal, which establishes the effects of the decision for all consumers harmed.

Finally, Article 6(4) of the proposal creates further difficulties: “Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case.”

This provision fits together with the prohibition of double punishment only if it refers to claims based on other legal grounds. In the case of Article 6(2) it will be difficult to prove which consumers are part of the class. At least with regard to lit a leg cit, the business will have data to show which consumers were already compensated.

3) Qualified entities

The proposal – as its title already indicates – provides only for representative actions. Hence, consumers as a group cannot bring a claim. This is definitely a disadvantage of the proposal compared to US-style class actions. This limitation is also not justified as the negatives of the American system are not a result of the class action as such but rather a function of the American legal system as a whole (with its punitive damages, pre-trial discovery and contingency fees). The definition of qualified entities fits the known definition of the Injunctions Directive. What is new is the lack of a list of qualified entities managed by the European Commission. Rather, each Member State has to certify a list of qualified entities. What is also new and of great importance is the possibility for Member States to approve entities ad hoc, as long as they fulfill the requirements set out by Article 4(1) of the proposal. Consumer organizations will have standing ex officio under Article 4(3) of the proposal. Government agencies can be qualified
entities as well, which is a preferable alternative given the fact that the European Commission aims for a dual system of public and private enforcement.

What is, however, a disadvantage of the proposal is Article 4(4), which allows Member States to limit the standing of some qualified entities in respect of injunction claims. The example of Germany, which under the *Musterfeststellungsklage* has defined qualified entities in such a narrow way that basically only the federal consumer organization can bring a claim, shows that it is easy for Member States to exclude certain stakeholders from the enforcement process without any proper justification. Hence, it would be preferable to delete Article 4(4) or to at least specify the conditions under which a Member State can limit the standing of a qualified entity.

4) Funding

Article 15(1) of the proposal states that “Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively exercise the right to seek the measures referred to in Articles 5 and 6, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or by providing them with public funding for this purpose.” While the content of this provision is desirable, it is regrettably too vague as to establish any binding rules upon Member States.

What is surprising – as such a rule is unheard of in the law of civil procedure – is Article 7(1) of the proposal, which forces qualified entities “to declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.” The defendant, on the other hand, is not required to prove its ability to compensate the harmed consumers.

Article 7 allows qualified entities to use third party funding, as long as certain pre-conditions are met. In practice, it seems unlikely that third parties would have any desire to fund a representative action as all damages have to be used to compensate the harmed consumers (with the exception of the small claim procedure under Article 6(3) lit b). The only approach, which
could work in practice, would be to purchase the claims of consumers before the claim is brought. It is questionable, however, if in such a case the directive would still be applicable.

5) Informing consumers

Article 9 of the proposal regulates how consumers are to learn about judgments in their favour: It obliges national courts and administrative authorities to “require the infringing trader to inform affected consumers at its expense about the final decisions providing for measures referred to in Articles 5 and 6, and the approved settlements referred to in Article 8”. The duty to inform consumers, however, is not absolute. The information has to be provided “by means appropriate to the circumstance of the case and within specified time limits, including, where appropriate, through notifying all consumers concerned individually.” “This provision, once again, leaves considerable leeway to Member States at the expense of legal certainty. Yet it is worthwhile noting that Article 9 also states that informing consumers individually might be required under some circumstances. is an option. Given the fact that a business functions under the cheapest cost avoider principle, such a duty makes sense, especially in cases under Article 6(2) where the mandate of the individual consumer is not required: In such situations, business will know which consumers suffered from the infringement, while the suing the qualified entity will not necessarily poses that informatin.

6) Effects of the decision

According to Article 10(1) of the proposal, a final decision of an administrative authority or a court, including a final injunction order referred to in Article 5(2)(b), is deemed “as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement.” Pursuant to Article 10(2), the same is true for final declaratory decisions referred to in Article 6(2). In such circumstances “Member States shall ensure that such actions for redress brought individually by consumers are available through expedient and simplified procedures.” It is worth noting that, contrary to the German test-case procedure, the judgment only has binding effects if it is in favour of the consumer. That might be seen as serious disadvantage for businesses.

Under Article 10(3), judgments taken in another Member State establishing an infringement are considered as creating only a rebuttable presumption of such infringement having occurred.
This provision resembles Article 9(2) of the Directive on Damages for antitrust violations, which states that final decisions made in another Member State have to be considered as “prima facie evidence that an infringement of competition law has occurred”. It would be preferable, for the sake of harmonizing the law, if decisions issued in another Member State had the same effect as national decisions. It is also surprising that final declaratory decisions made in another Member State have no effect at all. The argument that “national rules regarding liability may significantly vary across the EU” is simply not convincing.

7) Suspension of limitation period

Pursuant to Article 11, “Member States shall ensure that the submission of a representative action as referred to in Articles 5 and 6 shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned, if the relevant rights are subject to a limitation period under Union or national law.” This provision is preferable to § 204 Para. 1 No. 1a BGB (entering into force on November 1, 2018), which states that the limitation period is suspended only for consumers who have actively enrolled in the test-case procedure.

III. Summary

The proposal is an important step forward, especially as it generally introduces representative actions in the form of a one-step-procedure providing for compensation of consumers, contrary to the new German test-case procedure for example. This is laudable as the rational disinterest of consumers will in most cases prevent them from bringing a follow-on claim.

However, the proposal is too vague and leaves Member States too much leeway in many of its provisions. For example, it remains unclear how many consumers have to be harmed in order to establish “collective interests”; also uncertain is just how consumers are to be adequately informed about a court decision.

From a structural point of view, it is a disadvantage of the proposal that it is not consumers as a group but only qualified entities that can bring an action. It is also objectionable that Member

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States have the power to limit the standing of certain qualified entities to bring injunction proceedings. Generally, the EC should rethink Article 5 and Article 6 and abandon the idea of having proceedings that end with a declaratory decision only. The other main flaw of the proposal concerns the interplay between individual claims and representative reprehensive actions.