Thematic debate on the criteria for designation of qualified entities and admissibility of representative actions

This discussion paper outlines the issues related to the criteria for designation of qualified entities enabled to bring representative actions and for the admissibility of these actions, as provided for by the Directive on Representative Actions [1] (hereinafter "the Directive").

The paper identifies the main obligations for the Member States and the regulatory choices (options) the Directive provides in order to fulfil these obligations. It also proposes concrete questions to which the rapporteur and the other members of the panel will aim to respond to. All participants to the debate will be able to express their views and ask further questions during the *"Questions & Answers"* session.

The objective of the thematic debate is to discuss in a concrete manner the various legislative options, their advantages and disadvantages as well as ways for a most effective implementation by the Member States.

1. Designation of the qualified entities

The Directive provides that qualified entities will be enabled to bring representative actions for the protection of the collective interests of consumers in the EU. The qualified entities will have the rights and obligations of a claimant party in the proceedings. Individual consumers concerned by a representative action will be entitled to benefit from the actions brought by the qualified entities although they will not be parties in the proceedings.

1.1. Actors eligible to apply for the status of qualified entities

Obligations:

Pursuant to Article 3(4), qualified entities are organisations or public bodies representing consumers' interests which have been designated by a Member State as qualified to bring representative actions in accordance with the Directive.

Member States shall ensure that entities, in particular consumer organisations, including consumer organisations that represent members from more than one Member State, are eligible to be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both (Article 4 (2)).

This provision underlines the important role of consumer organisations within the new mechanism of protection of the collective interest of consumers. As explained in Recital 24 of the Directive, all consumer organisations (including the European "chapeau" consumer organisations) should be considered well placed to apply for the status of qualified entity in accordance with national law.

1/ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) *OJ L 409, 4.12. 2020, p. 1–27* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG

Depending on national legal traditions, public bodies could also play an active role in ensuring that relevant provisions of Union law are complied with by bringing representative actions as provided for in this Directive. Member States may provide that public bodies already designated as qualified entities within the meaning of Article 3 of Directive 2009/22/EC are to remain designated as qualified entities for the purposes of this Directive. (Article 4 (7)).

Options:

Member States have the discretion of allowing entities, in particular consumer organisations, but also public bodies to bring an action under the directive.

The choice of the type of qualified entities will depend on the legal tradition and the existing enforcement framework of each Member State. It will also depend on the choice of whether the representative action will take the form of judicial or administrative proceedings (or both). Importantly, the Directive allows for various configurations, with always the same objective: to render the mechanism effective.

Under Article 4(6), Member States may also designate an entity as a qualified entity on an ad hoc basis for the purpose of bringing a particular domestic representative action, at the request of that entity, if it complies with the criteria for designation as a qualified entity as provided for in national law. Such a designation can be made by the court or administrative authority seised, including by way of acceptance, where applicable.

Questions for discussion:

What are, in your view, the advantages and the disadvantages of:

- *designating other entities, besides consumer organisations and public bodies, as qualified entities;*
- *designating ad hoc qualified entities next to or alternatively to the qualified entities designated in advance for the purposes of domestic representative actions;*
- *designating public bodies or other entities only in certain areas of law or specific economic sectors?*

1.2. Criteria for designating qualified entities

Obligations:

Member States have to designate qualified entities for both domestic and cross-border actions. Domestic representative actions are those brought by a qualified entity in the Member State in which the qualified entity was designated (Article 3 (6)). Cross-border representative actions are those brought in a Member State other than that in which the qualified entity was designated (Article 3(7)). The distinction between these two types of actions depends, therefore, on the place of the designation and the place of the action of the qualified entity. It is independent of any other cross-border element, such as the place of residence of the consumers represented in the action or the location of the trader. In other words, it may be a cross-border case within the meaning of private international law, but still be considered a domestic representative action for the purpose of the Directive.

The Directive does not, as such, set the criteria for the designation of qualified entities for the purpose of domestic actions. It however fully harmonizes the criteria for the designation of qualified entities enabled to bring cross-border actions. Pursuant to Article 4(3), in order to be able to qualify for bringing a cross-border representative action, the entity:

a. has to be a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation;

b. has a statutory purpose has to showing that the entity has a legitimate interest in protecting consumer interests as provided for in the Union law referred to in Annex I;

c. has a non-profit-making character;

d. should not be the subject of insolvency proceedings and is not declared insolvent;

e. should be independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers;

f. should make publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria for designation as a qualified entity and general information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities. (Recital 25 and Article 4(3))

Options:

The Directive leaves to the Member States discretion as regards the criteria for the designation of qualified entities enabled to bring domestic actions, as far as these criteria are consistent with the objectives of the Directive in order to make the functioning of such representative actions effective and efficient (Article 4(5), and Recital 27).

Under Article 4(5), Member States may decide that the criteria laid down in Article 4(3) for the designation of qualified entities for cross-border actions also apply to the designation of qualified entities for the purpose of bringing domestic representative actions.

Questions for discussion:

- *What are the advantages/disadvantages of applying the same criteria for designating the qualified entities for both cross-border and domestic representative actions?*
- *What would be the most effective way for the entity to demonstrate that it fulfils each of the designation criteria provided for by the Directive (legal personality, proof of legitimate interest, non-profit character, not subject of insolvency proceedings, independence, and transparency)?*
- *How should the process of designating the qualified entities be organised so that it is most effective?*

1.3. Consequences of the designation of the qualified entities

Obligations:

The Directive lays down the principle of mutual recognition of qualified entities enabled to bring cross-border representative actions. To this end, Member States shall ensure that qualified entities designated in advance in another Member State for cross-border representative actions can bring such representative actions before their courts or administrative authorities (Article 6(1)). Furthermore, qualified entities from different Member States should be able to join forces within a single representative action in a single forum, subject to the relevant rules on jurisdiction (Recital 31 and Article 6 (2)). The way in which the qualified entities will be able to "join forces" would depend of the national legislation, e.g. act together as a single claimant, or one qualified entity representing others within the action.

The identity of the qualified entities enabled to bring cross-border actions should be communicated to the Commission, and the Commission should compile a list of those qualified entities and make it publicly available (Article 5(1)).

Inclusion on the list should serve as proof of the legal standing of the qualified entity bringing the representative action, without prejudice to the right of the court or administrative authority seised to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case (Recital 32 and Article 6(3)).

Member States should assess whether qualified entities continue to comply with the criteria for designation, at least every five years. If concerns arise as to whether a qualified entity complies with the criteria for designation, the Member State that designated that qualified entity should investigate the concerns. If appropriate, Member States shall revoke the designation of that qualified entity if it no longer complies with one or more of those criteria (Article 5(4)).

Questions for discussion:

- *What would be the most effective way for the qualified entities to "join forces" within a single representative action in a single forum?*
- *How should the monitoring of the compliance with the designation criteria be organised at national level to make it most effective?*

2. Admissibility

Obligations:

The courts or administrative authorities have to assess the admissibility of a specific representative action in accordance with the Directive and national law. To this end, and in line with the principle of procedural autonomy, the Member States should lay down rules on admissibility.

The meaning of the admissibility of the action is not specifically defined by the Directive. In accordance with the principle of non-discrimination, the admissibility requirements applicable to specific cross-border representative actions should not differ from those applied to specific domestic representative actions. A decision to declare a representative action inadmissible should not affect the rights of the consumers concerned by the action (Recital 12).

In order to avoid abusive litigation, Member States should adopt new rules or apply existing rules under national law so that the court or administrative authority can decide to dismiss manifestly unfounded cases as soon as the court or administrative authority has received the necessary information in order to justify

the decision. Member States should not be obliged to introduce special rules that apply to representative actions and should be able to apply general procedural rules, where those rules meet the objective of avoiding abusive litigation (Recital 39 and Article 7(7)).

Options:

Member States have discretion as regards the admissibility criteria as far as the national rules do not hamper the effective functioning of the procedural mechanism for representative actions required by the Directive (Recital 12). Member States may decide on whether to provide for a separate admissibility stage of the proceedings with separate decisions of the court or administrative authority .

The Directive addresses several elements relevant for the stage of the admissibility assessment.

First, courts or administrative authorities should verify at the earliest possible stage of the proceedings whether the case is suitable to be brought as a representative action for redress measures, given the nature of the infringement and characteristics of the harm suffered by the consumers affected. The information supporting a redress action should include a description of the group of consumers affected by the infringement and the questions of fact and law to be dealt with in that representative action. Importantly, the qualified entity should not be required to individually identify every consumer concerned by the representative action in order to initiate the representative action (Recital 49).

In this context, the Member States may decide on the required degree of similarity of individual claims or the minimum number of consumers concerned by a representative action for redress measures in order for the case to be admitted to be heard as a representative action (Recital 12).

Second, as explained in Recital 34, the information provided by the qualified entity at the start of the action should allow the court or administrative authority to determine whether it has jurisdiction and to determine the applicable law. In a case related to tort, this obligation would involve informing the court or administrative authority of the place where the harmful event affecting the consumers occurred or may occur. The level of detail of the information required could differ depending on the measure that the qualified entity is seeking and whether an opt-in or an opt-out mechanism applies (see also Recital 43).

Third, in the context of third party funding, the courts or administrative authorities of the Member States should be empowered to take appropriate measures to prevent conflict of interests, such as declaring a specific representative action for redress measures inadmissible. Such a declaration should not affect the rights of the consumers concerned by the representative action (Recital 52).

Finally, as explained in Recital 31, the principle of mutual recognition of qualified entities and the possibility to bring a single action by several qualified entities should be without prejudice to the right of the court or administrative authority seised to examine whether the representative action is suitable to be heard as a single representative action.

Questions for discussion:

- *Which admissibility rules may enhance or hamper an effective functioning of representative actions?*
- *Which is the threshold required in your view, in line with the right to an effective remedy, in order to establish that a case is manifestly unfounded?*
- *What would be the most effective way to implement the options concerning: (i) the "required degree of similarity of individual claims' and (ii) the minimum number of consumers concerned by a representative action in order for the case to be admitted to be heard as a representative action?*