WORKSHOP ON THE IMPLEMENTATION OF THE REPRESENTATIVE ACTIONS DIRECTIVE (EU) 2020/1828

1

THEMATIC DEBATE ON THE CRITERIA FOR DESIGNATION OF QUALIFIED ENTITIES AND ADMISSIBILITY OF REPRESENTATIVE ACTIONS

Brussels 26 November 2021

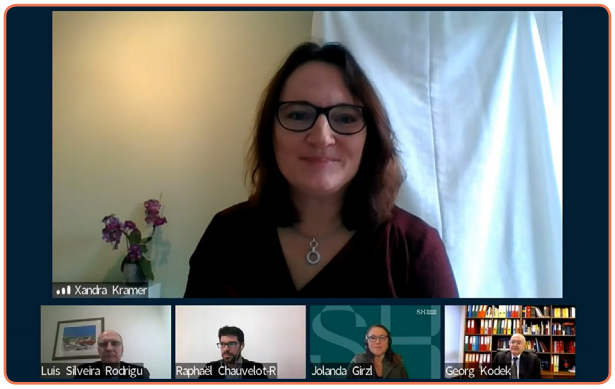
This report should be read together with the discussion paper
https://prod5.assets-cdn.io/event/7409/assets/8362336583-8a80ec41d4.pdf
prepared by the European Commission, DG Justice and Consumers, Directorate Consumers

The debate consisted on the presentation of the video explaining in plain language the topic of the debate, 10 minutes introduction by the rapporteur, 5 min presentation by each of the panellists, 25 minutes panel discussion as well as one-hour Q&A session with the audience.

Rapporteur:
Prof. Dr Xandra Kramer, Erasmus University Rotterdam and Utrecht University, Netherlands.

Panellists:
Raphaël Chauvelot-Rattier, Policy Officer, Ministry of Economy and Finance, DGCCRF, France;
Luis Silveira Rodrigues, Vice-President, DECO, the Portuguese Association for Consumer Protection, Portugal;
Jolanda Girzl, Vice Chair of Consumer Working Group, Business Europe;
Prof. Dr Georg Kodek, LLM, Judge at the Austrian Supreme Court, Professor at Vienna University of Business and Economics, Austria.

Detailed report:



- The rapporteur, *Prof. Dr Xandra Kramer (Erasmus University Rotterdam and Utrecht University, Netherlands),* welcomed the panellists and participants and opened the thematic debate, noting the importance of the topic of designation of qualified entities and admissibility of actions and welcoming the Commission's initiative to organise the event. She continued by proposing a poll that would give an overview of the sectors the participants in the thematic debate represent. The answers confirmed the online presence of Member States representatives, consumers, business and industry, academics, practitioners and European Commission officials. No funders were present, understandably given the fact that there was a parallel thematic debate on the issue of funding. Finally, the rapporteur introduced the short video focusing on the criteria of designating qualified entities, observing that such videos may facilitate the access by consumers (non-experts) to rather complex topics.

- Furthermore, the rapporteur:
  - Introduced the topic on the basis of the Discussion paper which identifies the obligations of the Member States, their regulatory choices and options as set by the Directive.
  - Underlined the need for a critical debate since the Directive, as any other legislative instrument, may have its shortcomings (such as, the one already mentioned in the plenary session which refers to not covering rules on Private International Law).
  - Underlined that the objective of the debate was mainly to explore ways of implementing the Directive in the most effective way. She invited the participants to share their insights, comments and experiences. She also had a word of warning- namely that participants' views are often influenced by their national background and what works in one Member State may not work or may not be that effective in another.

The rapporteur also mentioned that the Netherlands has been considered a frontrunner in developing collective redress, but that not everybody applauds the system. One of the focal points of the criticism is that it operates on an opt-out basis. The activity of ad-hoc entities or special purpose vehicles has also been criticised. However, in the Netherlands there is a strict regulation of admissibility and judicial overview. Also, there are no real signs of abuse in practice. This often changes the more negative views with respect to the ad-hoc entities.

The rapporteur continued by saying that while the criteria for qualified entities have been harmonised for cross border actions, national adaptations for domestic actions may still be necessary.

At the same time, Recital 27 of the Directive states that the (domestic) criteria for qualified entities should not hamper the effective functioning of the representative actions. It is within these parameters of effectiveness and awareness of the national context that we should conduct these discussions and learn from each other.

In the Discussion paper, two main issues are on the table: (i) designation of qualified entities, (ii) admissibility of the representative actions.

The designation criteria are key in the process of implementing the Directive but also later on for its success.

The qualified entities are not a completely new instrument. They were already introduced by the Injunctions Directive 2009/22/EC. The current Directive goes a step further in obliging Member States to designate them in line with specific criteria. In Art. 3(4) of the Directive, qualified entities are defined as 'any organisation or public body representing consumers interest, which have been designated by a Member State as being qualified to bring representative actions on the basis of this Directive'.

The difference between domestic and cross border representative actions is important. The Directive has defined narrowly (at least from a Private International Law perspective) the cross border representative actions. These are actions, which are brought by a qualified entity in a Member State other than that in which the qualified entity was designated. Therefore, other cross border elements including the domicile of the perpetrator or of the consumers involved are not relevant for this definition (though, of course, they can raise questions of Private International Law).

Zooming in on the actors that can apply for the status of qualified entity, it is the obligation of the Member States to ensure that entities and, in particular, consumer organisations are eligible to be designated as such. That can be for cross border actions, domestic actions, or for both (Art. 4(2) of the Directive). A lot of emphasis in the entire Directive is placed on the consumer organisations, both the national ones and the umbrella organisations and these are generally considered well placed to become qualified entities. Contrary to earlier policy, the role of public bodies seems to be less emphasised in the Directive, though they are eligible on equal footing (Art. 4(7) of the Directive).

A possible third category are ad-hoc organisations. The Directive still allows these, although they have been debated. These are however only allowed for the domestic representative actions, as can be seen in Art. 4(6) of the Directive.

The Directive leaves choices for the Member States and relies on their existing organisational structures. For instance, in the Netherlands, private enforcement by a particular consumer organisation plays a very important role in enforcing consumer law, along with public regulation. And this consumer organisation was already designated under the 2009 Injunctions Directive as a qualified entity.

For public bodies that are active in other countries, it is also the question, whether they want and are able to expand their activities, especially in relation to cross border actions.

The third category of ad-hoc organisations also play an important role in the Netherlands, and the rules on their admissibility have been made more strict to avoid abuse. An important advantage of the ad-hoc entities is that they can be more focused on specific issues and take on some of the burden from the longstanding consumer organisations, which always have to pick their battles for financial reasons.

With regard to the cross border actions, the criteria for designating qualified entities have been fully harmonised in Art. 4(3) of the Directive. Importantly, these entities should be able to demonstrate at least 12 months of prior public activity, which naturally rules out the ad-hoc organisations. They should also have a non-profit character, a clearly legitimate interest in protecting consumer interest and be fully independent.

For the domestic cases, which are (so far) more important in practice, these criteria do not apply. However, the Directive points out that such criteria should be consistent with the objectives of the Directive. This raises several questions, for example, whether the designation criteria should be the same for domestic and cross-border actions. The advantage would be that this would guarantee the quality of entities in the domestic cases. On the other hand, it might be a big burden, especially for the smaller organisations active on the domestic level.

The question then also is how one can most effectively designate the qualified entities and how can these entities most effectively demonstrate their compliance with these criteria.

If we turn to the consequences of designation, publicity is very important, especially for the qualified entities that can be active in cross border cases, where it is for the Commission to publish the information and make them known. For these cross border actions, mutual recognition is also essential. If you want these actions to be effective, especially in big cases like the Dieselgate scandal, then the cooperation between the qualified entities is essential.

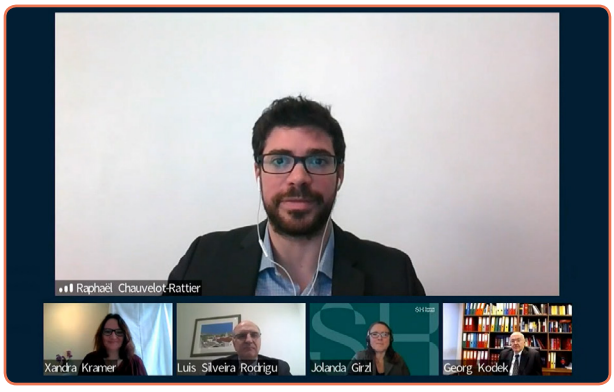
This also brings us to the question of how these qualified entities can effectively join forces. Cross border cooperation between consumer organisations is increasing, but the question is how the consumer organisations experience it and whether they see it as feasible. There is also the issue of how to ensure continued monitoring of whether the qualified entities meet the criteria.

The last question on the table is the admissibility of the actions. With this topic, we shift from the responsibility of the governments to the execution of the rules by courts and other competent authorities. The Directive does not define what admissibility is for its purpose, but it is clear that the admissibility rules have to be developed on the basis of non-discrimination principle between domestic and cross border actions. Two points are worth underlying: (i) the rights of consumers should not be adversely affected by narrow rules on admissibility, and (ii) abusive litigation should be avoided.

The rapporteur is not concerned of abusive litigation. The main reasons are because: (i) there are clear designation criteria (even if these do not strictly apply to the domestic cases, they are a warranty) and (ii) the practice in the Member States so far does not show signs of abuse, including in the Netherlands, where collective redress is more frequent and established.

Questions on the admissibility include: (i) how can we make the rules on admissibility most effective and (ii) which system of early dismissal can be put in place to ensure that the clearly unmeritorious litigation cannot go forward, so that there is a balanced system.

- *Raphaël Chauvelot-Rattier (Policy Officer, Ministry of Economy and Finance, DGCCRF, France)* gave his keynote speech on designation issues, the procedural aspects and the principle of non-discrimination.



  - What are the advantages or disadvantages of designating public bodies or entities other than consumer associations? It depends on the organisations in each Member State, especially in terms of civil society landscape. There are already about 15 national associations recognised in France. They expect these associations to take advantage of the new Directive.
  - By way of example, the Directorate for Consumer Protection of the French Ministry of Economy (DGCCRF), which ensures that companies respect the consumer protection rules, also has the legal capacity to act before the courts and it is used as a last resort, when administrative procedural steps fail. However, France does not intend to give DGCCRF the power to claim for collective redress under the Directive.
  - With regard to the designation criteria, the procedure is already a two-tiered system. First, there is an approval procedure, which is a ministerial decision called *agrément*. Second, the bigger consumer associations have to participate in what is called *Conseil national de la consummation*, which is a consultation assembly. Adding a third step in the procedure for designating entities entitled to file cross border actions would probably add procedural burden. This has to be kept in mind in the transposition process.

- There is also a question of procedural rules as provided by national law, and, in particular, if consumer associations or qualified entities sue for injunction or redress in the same action or different ones. Currently, under the French procedural law, those are two different actions. That can be burdensome for the qualified entity. France is currently trying to reduce this burden as much as possible.
- In terms of non-discrimination, this is very clearly provided for in the Directive, in Recital 12. The criteria for admissibility should be the same whether the action was filed by a domestic association or a foreign one. Also, we need to keep in mind that the Directive provides for respect of the national law. This has practical consequences. For example, with regard to funding, an action could be filed before a court in a Member State that forbids third party funding in its national law. The lack of third party funding can be one of the admissibility criteria because the national association, in a domestic action, already abides by this rule.

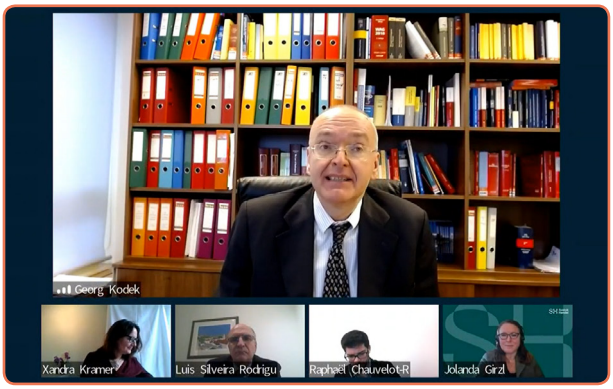
Luis Silveira Rodrigues (Vice-President, DECO, the Portuguese Association for Consumer Protection, Portugal)

- With regard to the designation of the qualified entities, the current situation in Portugal is that anyone, even a single citizen can initiate a collective action before a court. This approach can be summarized as 'the more, the merrier'.
- The representative actions instrument needs to be effective and function as a deterrent of unfair practices by traders. It also needs to be easy to use.
- The speaker appreciated the remark of the rapporteur about the lack of evidence of abuse in the EU and confirmed that the same holds true for Portugal where there is also an opt-out system and where the eligibility criteria are very broad. Of course, abuses need to be prevented. The main point should be the credibility and the representativeness of the qualified entities.
- Non-consumer organisations and public bodies could also play a role given their specific expertise that a general consumer organisation might lack or if there is no general consumer organisation working on a specific topic. In this respect, the ad-hoc organisations can also play a role because it is in the interest of consumers. However, it should be done with caution and the criteria for ad-hoc qualified entities should probably be more stringent than for the longstanding organisations and public bodies.
- The admissibility criteria should be simple because one of the key elements for the effectiveness of these actions is the ability to act quickly. There are many situations where companies try to delay the procedure. If there is a separate admissibility procedure and the list of criteria is too long, it leaves room for extensive appeal procedures without tackling the merits. Therefore, the admissibility criteria should be simple and not take much time so that the procedure can go smoothly.
- With regard to the criterion of similarity of the claims, this should be interpreted as broadly as possible- the same practice or same type of practice should allow for collective redress. Differences in contractual terms should not prevent the collective action. In the Dieselgate case, the harm is different from consumer to consumer, the contractual situation of each individual consumer is different, but what is important is that the origin of the harm is the same.

- *Jolanda Girzl (Vice Chair of Consumer Working Group, Business Europe)*

  - The business wants a fair, effective civil justice system where the consumers with a legitimate claim are compensated.
  - It is important to have well designed collective redress systems because otherwise, it can go to a wrong direction, resulting in lack of access to justice and delays in procedure.
  - The most important thing is the harmonisation between the national systems. The speaker pointed out to fears of cherry picking and forum shopping, especially talking about the ad-hoc entities, which are possible in some Member States. Some things are unclear and guidelines provided by the Commission would be welcomed. For example, in Sweden for national cases ad-hoc reviews can be done by the organisations and they have a Group Proceeding Act from 2002, so the system is very old. The criteria for ad-hoc are not the same as the criteria for cross border. The big differences are the lack of requirements of 12 months of operation, detailed requirements on independence and publication of information about the organization.
  - It would be of concern, if an entity that ceases to fulfil the criteria as a longstanding qualified entity would be admitted as an ad-hoc entity. Covering such loop-holes is important.
  - Regarding entities other than consumer organisations or public bodies, there are already trustworthy and well-known entities such as the consumer ombudsman. Should other entities be considered as potential qualified entities, trust is an important aspect, especially since the proceedings can be stressful.
  - Concerning the question of how entities demonstrate compliance with the applicable criteria, it is important that that is easy to demonstrate. Minimum certification standards, check lists that makes it easy are among the ideas. Harmonisation among member States would also be welcomed.
  - Monitoring that the criteria are fulfilled is important. There is an information system, we have the tools and it is important to use them. The time limit of 5 years should be shortened because many things can happen during that time.

- *Prof. Dr Georg Kodek, LLM (Judge at the Austrian Supreme Court, Professor at Vienna University of Business and Economics, Austria)*



  - The speaker gave his keynote speech on admissibility.
  - In all procedural systems that have some sort of collective proceedings, there is some stage in which the court decides on admissibility, which can have different names such as certification (as in the United States) or admissibility. However, the purpose is always to have the court examine whether or not the action is allowed to go on. The reason is obvious and twofold: (i) we want to protect the defendant from unmeritorious litigation and (ii) we want to protect procedural economy. Otherwise, if these issues are not assessed upfront, there would be a Damocles sword hanging above the proceedings or a time bomb that may explode at some point.
  - The concerns of abuse stem from the experience from the United States. The experience in Europe is different, mainly because of the different rules on costs. We have a loser pays rule, which makes the applicant think twice about the chances of success before filing a lawsuit, and it also prevents litigation for blackmailing purposes. Ironically, the text of the Directive does not mention the early decision on admissibility. We find that in the Recital 49. However, it makes sense since this is clearly a matter for domestic law.
  - The rules on admissibility have to be simple. Whenever something can be litigated or disputed, you can bet the defendant will make use of that opportunity. A few years ago, in the United States, an action was filed for discrimination of 1,5 million female employees of Walmart when it comes to promotion, career perspectives and pay. The case went all the way up to the US Supreme Court, which said it needs to examine the discrimination on individual level since it is tied too closely to the merits of the case.
  - In Austria, a few years ago the Supreme Court has laid down the rule that the case has to involve 'essentially' the same course of action and 'essentially' the same question of law or facts. It does not need to be exactly the same but essentially the same. That was designed to make it easier for the actions to go forward, but in reality defendants often still disputed the similarity.
  - The speaker referred to the video from the beginning of the session, which concerned a consumer buying a phone advertised as 'underwater phone' and then suffering from water damage. Is it a similar if we have different models? Do we think about the different manufacturing dates? Do we form sub-groups? These questions have to be decided very early on in the proceedings.
  - The rapporteur pointed out to the fact that sometimes the Netherlands system is compared to the United States system, but it is completely different because of the procedural context, notably in the context of costs.

The Q&A:

- The rapporteur gave the speakers the opportunity to respond to one point that their colleague has made in their presentation.
  - *Mr Chauvelot-Rattier* recalled a point of Mr *Silveira Rodrigues* about designating other bodies than public bodies or consumer associations. He noted that in France, they only designate not-for-profit organisations, which therefore mostly have an associative format. They do not contemplate designating other entities and wonder what criteria other such entities would need to fulfil. It should also be considered that the criteria for designation of entities for cross-border actions should be the same.
  - Mr *Silveira Rodrigues* clarified that he mainly had in mind ad-hoc entities. For example, those appointed for a specific topic. In addition, there may be organisations that may indirectly tackle consumer interest but it is not their main purpose (e.g. environmental organisations). There may be stricter criteria to see if those (ad-hoc) organisations comply with the criteria of independence, not-for-profit character and transparency.
  - Mr *Silveira Rodrigues* further believes that if we look at consumer organisations all over Europe, almost all of them would meet the criteria of the Directive. However, other organisations that are not so well-established might require a closer look.
  - *Ms Jolanda Girzl* stated that she had the same question as Mr *Chauvelot-Rattier.* It is important that the criteria are the same. Otherwise, there will be a patchwork in the EU.
  - *Prof. Dr Georg Kodek* picked up on the phrase 'the more, the merrier'. He likes it very much because the consumer organisations will inevitably face a lack of resources, so sometimes, certain sectors and scenarios might be addressed by specialist organisations (not necessarily involved in the consumer protection) or by true ad-hoc entities. There have been some successful cases in Austria brought by associations or even limited liability companies, which were truly ad-hoc and that supplemented consumer organisations. Obviously, if we allow that, we have to look more closely to their purpose and certainly into the ability of that organisation to pay the cost if unsuccessful. He would not call it a 'patchwork system', but instead a 'mosaic, which provides a nice picture'.
  - The rapporteur, *Prof. Dr Kramer* stated that looking to the Dutch experience, the ad-hoc organisations also play an important role there. Sometimes, they can be very useful. If we have cross border and domestic and we know that ad-hoc cannot operate in the cross border within the restrictive meaning of the Directive, then you might have different criteria for cross border and domestic and then also for domestic depending whether it was initiated by a consumer association, public body or an ad-hoc entity?
  - Ms *Girzl* thinks it is important for the quality issues to have the same criteria for both national and cross border. For example, the Swedish consumer association said that they see no issues with applying the cross border criteria also to national actions because they see them as a sign of quality.
  - Prof. Dr *Kramer* sees that as limiting and against the spirit of 'the more, the merrier' because only few organisations would be able to fulfil those criteria. Whereas for some issues, ad-hoc entities that do not aim to do these cross border actions can be useful.
  - Ms *Girzl* suggested that this might also concern the issue of public assistance by the government to those small consumer associations that are trustworthy but do not have sufficient resources.
  - Mr *Chauvelot-Rattier* remarked that designated ad-hoc entities is not possible under French law and would be subject to the willingness of the Member States to allow for it. The cross border criteria have

been calibrated to be as effective and fluid as possible. There are bigger challenges in terms of Private International Law when representing consumers from other Member States. For instance, the 12-month period has probably been selected to give enough fluidity to the designation. An ad-hoc entity could probably be set up and then apply for the legal capacity to act after 12 months, which should leave enough time before the limitations runs out. Maybe one of the questions is how the Member States will interpret these criteria. For instance, and in reply to one of the questions addressed in the chat, the independence criterion is not so easy to define and apply to associations which would represent different interests.

- Prof. Dr *Kodek* stated that the Directive allows for the possibility to have ad-hoc actions on a national level and it should be for the Member States to decide whether that is a good idea or not. In some countries, there is not much experience with collective redress and time will tell if allowing for ad-hoc entities works or not. He does not consider that ad-hoc entities bring a particular danger but of course, their financial support will need to be examined. He would be against flatly excluding ad-hoc solutions.
- Mr *Silveira Rodrigues* agrees that 'the more, the merrier' should expand the possibility of the organisations to apply as qualified entities. Otherwise, just few organisations could benefit of the new instrument, which would be ineffective. With regard to the question whether this approach does not lower the quality of the entities, he does not think so because the standard needs to be high and one of the criteria is independence. He agrees with Mr *Chauvelot-Rattier* that the criteria were designed to be fluid but fears that because of the ad-hoc nature, it might be difficult to meet some of them. That is why he thinks there should not be more criteria regarding these entities, but instead, there should be a closer look at some of the criteria. That would be more adequate and allow those entities to use the new instrument.

- With regard to the ad-hoc discussion, there was a comment made by a participant who mentioned that the option of appointing ad-hoc entities is important in Slovenia. That is because the ad-hoc private associations tend to file representative actions for damages. She also clarified that in Slovenia, it is the court, which will assess whether an ad-hoc entity qualifies in a specific case. She asked whether, once the entity is a qualified entity, can it automatically bring an action in every case or would the court be able to assess its suitability to bring it in a specific case?
  - Prof. Dr *Kramer* warned against confusing the criteria for the designation of qualified entities (which is done upfront by the Member State) and criteria for admissibility of an action (undertaken by the national courts). However, she can imagine in the admissibility criteria, the assessment could cover the issue of whether the criteria for designating qualified entities are met or not. Such criteria can cover the independence, or sufficient means. It would be good to address those points at a very early stage of the proceedings. If the organisation was properly designated, then, in principle, there should not be a problem.
  - Mr *Silveira Rodrigues* thinks that court should not check (again) if the designation criteria, unless there is evidence that the designation conditions ceased to be met. For example, if there was a consumer organisation that is no longer a consumer organisation. It would not make sense for the courts to re-assess if the criteria for designation are met since that was precisely the scope of the upfront designation procedure. An exception could be in the case of ad-hoc entities where there was no up-front designation where there is a bit of more of grey area. In such a case, an assessment by the court might be justified.

- Prof. Dr *Kodek* replied that the Directive addresses this in Art. 6(3), which concerns cross border representative actions, and there, it says 'courts shall accept the list referred to in Article 5(1) as proof of the legal standing of the qualified entity to bring a cross-border representative action, without prejudice to the right of the court seised to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case. So, the court can have a look not only at if the entity is qualified, but, for example, whether the statutory purpose of the entity includes the type of action that has been brought. That could also arise in the domestic context but, again, Art. 6(3) only refers to cross border actions. Other provisions are Art. 10(3) and (4), which address the issue of funding and protect the defendants from abusive and unmeritorious actions. There, the court, whenever there are 'justified doubts', can have a look into where the financial resources come from and can even order for changes in respect of the relevant funding. That goes quite far and provides a leverage for the defendants to dispute the legitimacy of the funding. He considers that dangerous and advises the Member States to be aware in the implementation of the Directive not to leave too many angles of possible attack because otherwise, the vehicle will not move forward.
- Mr *Chauvelot-Rattier* says the French system will require changes in their procedural law. The *agrément/approval* procedure (designation of qualified entities) can only be reviewed under administrative law by the administrative court, while most redress actions against traders would be brought in front of commercial (civil) courts. When Art. 10(3) and (4) will need to be implemented, it would probably mean that this court would be able to review these criteria itself and deal with the issue of funding on its own. Otherwise, two different courts would need to deal with these two aspects. This would be a tricky and important part of the implementation.
- Ms *Girzl* stated that it is unclear what happens in case the entity would not be found that it fulfils the criteria as a qualified entity. What would happen to the action and who would bear the cost. This can be very costly and problematic for the defendant.

- A participant asked whether the panellists think the admissibility criteria for a representative action should be different for 'domestic' and'cross-border' (as defined in the Directive) actions?
  - Prof *Kodek* suggested that Member States should have leeway to experiment and gain experience with that matter.
  - Mr *Chauvelot-Rattier* pointed out to Recital 12 of the Directive, which clearly states that the admissibility requirements for the cross-border representative actions should not differ from those for domestic actions in order to respect the principle of non-discrimination. This might be a challenge in the future, depending on how Member States maintain or develop different systems. Looking at French system, which is quite recent and did not produce so many successful actions and the Dutch system, he sees two very different systems, which the Directive allows to maintain as long as the procedure is in line with the Directive.
  - Prof. Dr *Kramer* finds the non-discrimination principle understandable but also a difficult concept. However, a hurdle was passed because the qualified entities are in place, and thus, there is no reason to make hurdles for them in the admissibility stage. She reported that in the Netherlands, there is already a draft act on the implementation of this Directive because the current rules are not fully in compliance with it.

- Prof. Dr *Kodek* pointed out with regard to amending the Dutch national rules that they may wish to retain them and add the Directive's system as another one because the Directive is not intended to supersede all national procedures but to supplement them. He added that Austria also has a working system, which is not completely in line with the Directive, but he would keep that and in addition, enact another procedure according to the Directive. He reported that the Austrian Ministry of Justice is working on that.
- Mr *Silveira Rodrigues* agreed and said that in Portugal, they have a long-lasting procedure that is not perfect, but it works well. Naturally, they want to keep it, also because the consensus on that legislation was found in the 90' and it would not be possible again.
- Prof. Dr *Kramer* remarked that in the Netherlands, it is still being debated, but they already have injunctions, then they added settlements, and also compensations. These form two systems, which have some (legitimate) differences, but it would be difficult to add a third system with different criteria (along the lines of the Directive). Also, following a public consultation, it has been pointed out that they are maybe going a little bit too far since the Dutch system is not only for the consumer actions.
- Ms *Girzl* pointed out that this is an example of how difficult it might be to get an overview because most of the countries would try to keep as much of their old system as possible and harmonise as little as they can to still be compliant with the Directive. She pointed out that some interpretation issues might be a grey area and that she would welcome guidelines from the Commission.

- A participant asked the following question about criteria for designating qualified entities: 'In Germany, there has so far been a statutory regulation according to which predominantly publicly funded consumer associations (Consumer Centers) are qualified in any case (by default). As I understand it, Member States are free to determine the criteria for admitting qualified entities to purely domestic actions. It should then also be possible to continue to apply this statutory rule. Do I see that correctly?'
  - Mr *Chauvelot-Rattier* reminded that the Directive gives a lot of flexibility to the Member States and, in particular, to maintain or develop their own national procedural rules. They can merge their rules or keep them and create a different system that would be compliant. The Directive does not firmly prescribe much aside from the criteria for qualified entities in cross border actions. Private International Law has not been touched by the Directive but nothing prevents assessing whether changes should be made in this respect.
  - Prof. Dr Kodek seconded that. It is entirely for the Member States for the domestic cases to define what organisation are allowed to initiate such actions. There is no right for any organisation to be a designated entity. That is for the Member States.

- Prof. Dr Kodek made reference to a participant question who wonders if a member state could designate only public bodies as qualified entities but no consumer organizations. He considers that a Member State can designate only public bodies and no consumer organisations and vice versa. In the enforcement landscape, we find all sorts of solutions. In some countries, there are public authorities supporting consumer rights, in some, consumer associations or publicly funded private entities, which is a sort of mixed system. All these systems will continue to be allowed to be in place.
  - Mr *Silveira Rodrigues* agreed only to the extent that the question differentiated between private and non-private consumer organisations. Otherwise, he considers that it is not possible to disregard the consumer organisations entirely. It is therefore (as stated in Art. 4(2) of the Directive) not possible to not have consumer organisation as qualified entities.

- Prof. Dr *Kramer* agreed with Mr *Silveira Rodrigues* since the underpinning of the Directive is to allow representative actions to be brought. Making it too narrow (by setting up a system where the consumer organisation may not qualify as qualified entities) may make the system inefficient, as the public bodies may not have the financial means to bring representative actions. That would be going against the Directive's objectives. It is however true that Article 4(2) of the Directive mentions 'in particular' consumer organisations. We nevertheless should read this provision in light of the objective of allowing actions to be brought.
- Mr *Silveira Rodrigues* agreed and said the Directive wants a broader approach on this issue. But when we talk about independence, we should see it in light of the national traditions. In some countries, we see publicly funded entities, which can be completely independent. However, in other countries, the independence would be impossible. There is also a participant's question whether the funding can be provided by a political party. From the Portuguese perspective, political funding is a red line. However, if there are specific traditions in Member States that would safeguard the independence criteria, such a funding may be considered. In any case, in principle, given the broad scope of the Directive, if organisations meet the criteria of independence it does not matter whether the funding is public or private.
- Prof. Dr *Kramer* added that the Directive gives the entities the possibility to apply and if any organisation would meet the criteria of the Directive, she thinks it would be contrary to the Directive to refuse it.
- Prof. Dr *Kodek* underlined that it is for the Member State to define those (domestic) criteria.
- Prof. Dr *Kramer* distinguished between cross border cases for which the criteria are in the Directive and the domestic cases. But then perhaps the domestic criteria could be even stricter and narrower than the cross border ones.
- Prof. Dr *Kodek* considered that on the basis of Art. 4(2) of the Directive, Member States shall ensure that the consumer organisations are eligible to be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both. So, in theory, it can be just one of these and it would be possible to exclude locally consumer organisations and say they are only entitled to bring cross border actions. He personally does not think it would make sense, but the text of the Directive allows it.
- Mr *Chauvelot-Rattier* pointed out that the Directive does not answer to everything, and in particular in terms of procedural rules. Most of them will be provided in national law. With respect to Art. 4(2) of the Directive and the previously mentioned situation of a Member State refusing participation of consumer organisations, we have to remember that the more general EU Law principle also apply. Excluding consumer organisations wold be against the principles of equal treatment and effectiveness of EU Law. He recalled many decisions on unfair terms in consumer contracts, where the same tension between national proceedings and the basic requirements of the Directive can be seen with the Directive prevailing over national proceedings which had to be modified in order to respect the principle of effectiveness of the EU law. He does not think that this provision will pose many issues. The bigger difficulty is in the landscape of civil society in the Member States. Some (like Portugal) have many well-founded and recognised consumer organisations, but others do not. In France, there are many consumer organisations, but their funding and actions may lack recognition by the general public, which might be one of the explanations of the scarcity of collective redress, which has been available since 2014. Maybe in the Member States, where collective redress does not exist yet, consumer organisations can be quite a rarity, which might be a challenge for the implementation of the Directive.

- Mr *Silveira Rodrigues* pointed out that in several Member States, there is no collective redress implemented and the procedural possibilities are very limited. Despite that, he has seen even very small consumer associations based on voluntary work trying every possibility to represent consumers before a court. Therefore, he thinks that the Directive is a huge opportunity especially for them. So even though the Directive does not solve everything, there are legal traditions and sometimes even the national mentality that are going to play a role. For these organisations, it is still a big opportunity. We cannot forget that the Directive is not just for the transnational actions, it is also for the domestic ones, to have a collective redress system in each Member State.
- Prof. Dr *Kramer* agrees with that since the objective of the Directive is to make the representative actions possible and if we look at Art. 4(4), we see that criteria for the domestic cases might be different, but they need to be consistent with the objectives of the Directive. This will be a big challenge for the Member States that have very little experience with collective redress so far.

- A participant asked the following question: 'I have a question for Silveira Rodrigues. Iolanda Girlz showed concern for forum shopping: how likely is it that it will be an issue? Cross-border actions are more expensive (language barriers, maybe foreign law firms to hire) … would consumer associations lightly go for it?'
  - Mr *Silveira Rodrigues* responded that it is likely that the consumer organisation would initiate representative actions because they have fought for an instrument like this for 20 years. He has been working with DECO and BEUC for almost 25 years and he remembers each time they hoped to finally have an instrument for collective redress. They are organised in a way to take advantage of it and use this instrument. In addition, especially in a globalised world, the harm is often present not only in the EU, but all over the world. The companies will not stop only because of one national lawsuit and even if they are convicted in several countries, they would still fight in each of the other countries. An example of this is Dieselgate. If we go to Australia, United States, France, Spain, Switzerland and Canada, there are either final decisions or settlements, but the applicants are still struggling in other countries. So this instrument could be a way, if well used, to have a clear front that can tackle a global problem efficiently, at least in the EU.
  - Ms *Girzl* pointed again to the increased issue of cherry-picking and starting ad-hoc entities in certain countries. There is more law firms coming and she understands that the Swedish consumer organisations are contacted by law firms, asking them to proceed. This is something that we did not have before, it is now on the rise, and should be considered in the risk assessments.

- A participant asked the following question: 'The Dutch WAMCA already said something to prevent forum shopping. What do you think about it prof Kramer?'
  - Prof. Dr *Kramer* confirmed that there was a bit of forum shopping concerning collective settlements. In other countries, there was no suitable mechanism to settle the case, which they wanted to do, so it was also in the interest of the business. They went to the Netherlands and there was an established organisation and an ad-hoc organisation, which concluded the settlement on behalf of the consumers concerned. She further explained that WAMCA concerns redress actions and it contains a territorial restriction. This provision concerns standing/admissibility, and requires a very clear link with the Netherlands. This is a slightly problematic provision because it seems to repeat a little bit the international jurisdiction requirements of Brussels I, but is a bit more restrictive, so there is tension.

- A participant asked the following question: 'How do you think that mutual recognition of legal standing of qualified entities work in practice? Is co-operation of the entities sufficient? (may be with a perspective from of your member states)'
  - → Mr *Chauvelot-Rattier* said that the first question is simple. Mutual recognition of an entity designated by other Member State, with respect to France, would already be provided by law. There was a Directive from 2009 that enabled organisations to sue companies to stop illicit practices and French law already allows those organisations from other Member States to appear before the French courts. With regard to the cooperation and joining the efforts of the organisations, that is a very different question. Would there be one or two claimants, would two organisations or more be recognised by the court or would there be one head organisation and others participating behind it? This depends on how different Member States implement the Directive and on how the consumer organisations will take Directive and the matters into their own hands.
  - → Prof. Dr *Kramer* remarked that, in any case, one of the organisations will be acting as cross border and one as domestic. Looking at the Dieselgate scandal, where there is such fragmentation that can be used by the companies to evade and delay, it would be very useful if the consumer organisations could collaborate.

The rapporteur, *Prof. Dr Kramer* ended the thematic session by thanking everyone for the fruitful discussion.

Please see main report: https://rad-workshop-2021.eu/page-2921