Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (former Directive 98/27/EC)

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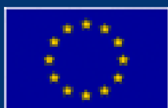

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Abbreviations

‘Injunctions Directive’ or ‘the Directive’	Directive 2009/22/EC on injunctions for the protection of consumers’ interests
CPC-Regulation	Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws
‘Brussels I’-Regulation	Regulation (EC) No. 44/2011 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
‘Rome II’-Regulation	Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations

Instead of a general list of abbreviations, the country reports of this report are followed, where necessary, by a glossary specific to each country.

PREFACE

This study, commissioned by the Directorate-General Health and Consumer Protection of the European Commission (DG SANCO) and coordinated by IBF, deals with the application of the Injunctions Directive 2009/22/EC[1] in a selected number of Member States. It is intended to provide input in preparing the second application report on the Directive, looking in particular at the period since the publication of the first application report in 2008.[2] The study may also be useful for reflections about the role of consumer injunctions given that the European Parliament takes the view that:

"*Injunctive relief plays an important role in safeguarding rights which citizens and companies enjoy under EU law and believes that the mechanisms introduced under […] Directive 2009/22/EC on injunctions for the protection of consumer interests can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations*."[3]

In field studies and desk research, a group of academics and legal practitioners examined practices in nine EU Member States: Austria, Bulgaria, France, Germany, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. Their findings, compiled between July and October 2011, are presented in this final report.

The report deals exclusively with the Injunctions Directive as a stand-alone measure of collective redress and relates to other pieces of legislation only insofar as necessary, namely the CPC-Regulation. It deliberately avoids engaging in the on-going debate on collective redress for consumers in Europe. It is from this confined perspective that the study approaches the task of examining the practices of, and carrying out a reality-check of, consumer injunctions both cross-border and domestically.

The coordinators of the project are very grateful to the interviewees in the countries under scrutiny and all those who have contributed to the collection of data, laws and court cases.

[1] OJ L 110, 1.5.2009, p. 30
[2] Commission Communication COM(2008) 756 final of 18 November 2008
[3] Draft Report of the European Parliament "Towards a Coherent European Approach to Collective Redress" of 15 July 2011 (*Rapporteur* MEP Klaus-Heiner Lehne)

PART I: GENERAL

1. FINDINGS IN SUMMARY

- Cross-border injunctions as designed by the Injunctions Directive are a rarity. They are considered to be difficult to stage and expensive to pursue by those entitled to use them. Few consumer advocates have experience with them, many shy away from the challenge, and most have not seen the need to apply them in their practice.
- No cross-border injunction cases as designed by the Directive can be reported from Bulgaria, Portugal, Spain and Sweden. A few attempts can be reported from Austria, France and Germany. Having once been the precursor in the use of cross-border injunctions, the UK has no more cases to report since the CPC-Regulation became effective (The Netherlands having been at the receiving end of one of these procedures).
- In some Member States and in particular in Austria and Germany, consumer law infringements with cross-border elements are pursued before the home judiciary with considerable frequency and success. Qualified entities[4] take advantage as far as they can of the possibilities of suing traders from other Member States within their (the qualified entities') jurisdiction. This also makes it possible to seek injunctive relief against traders in third countries (non-EU/EEA).
- Domestic injunctions are quite frequently used. However, not in the form provided by the Directive's transposition, especially where they were embedded in an already developed system of *actions en justice des associations* (for instance France, Germany, The Netherlands, Portugal). This is in particular true for unfair term control where the use of injunctions is widespread.
- Injunctions are a successful tool for policing markets, especially for ensuring balanced contract terms. In this they have brought substantial benefits to consumers collectively. However, in most

[4] Commission communication of 27 May 2011 concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive (OJ C 158 of 27.5.2011).

countries, their impact is more projected to the future when market conditions improve rather than for rectifying damages for the past. For instance, with the length of an injunction procedure against an unfair term often amounting to years, the individual consumer, because of the elapse of time, may be prevent from relying on a ruling in his favour. Austria alone seems to provide an exception to this rule.

- Injunctions need to be used continuously to pursue infringements of ever shifting consumer markets. The role of qualified entities is perpetually the one of the hare, the role of traders testing the limits of consumer law the one of the hedgehog, in the Grimm's tale.
- Although court fees in most countries are comparably cheap (or calculated in a way which reduces them by courts inclined to facilitate consumer injunction proceedings) and lawyers are not exorbitantly expensive in all countries, the cost risk remains a major deterrent. 'The loser pays principle' makes an unsuccessful lawsuit a financially daunting experience for a qualified entity. In order to limit the risk of paying for the opposing party's fees and costs, only 'sure to be won' cases are taken to court. Better-funded qualified entities, however, are occasionally prepared to take a case to higher courts which bears the risk of loosing when a matter of principle is at stake.
- Most (but not all) interlocutors believe that the Directive is a straightforward piece of legislation. Its ideas are simple and relatively simple to implement ('making free movement of injunctions possible'). Nothing's fundamentally wrong, therefore, with the law.
- Whether injunctions are used in practice also depends on the knowledge and capabilities of the legal staff entitled to apply them. In cases where qualified entities are staffed with able lawyers with a keen interest in exploring the full range of legal tools available (ideally combined with linguistic skills), injunctions may very well be applied. Where they are not sufficiently known or not mastered, they are not used. If confirmed as a finding, this would suggest that coaching qualified entities in the use of injunctions would be a measure for consideration.
- Since the CPC-Regulation's mechanism of public enforcement cooperation became available, cross-border injunctions have ceased to be applied in the UK, and were never used in Sweden. In Austria, France, Germany, Portugal and Spain, injunctions and CPC-cooperation coexist without apparent connection. In these countries, the CPC-mechanism is irrelevant for injunctions and the lack of use of cross-border injunctions (and therefore a measurable impact on the marketplace) seem to have

nothing to do with CPC. In the Netherlands, the CPC-Regulation led to the creation of a public enforcement authority that is also competent in domestic cases. The existence of the new authority contributes to the limited number of (domestic) injunctions procedures.

- With the list of Directives annexed to the Injunctions Directives and the list of 'laws that protect consumers' of the CPC-Regulation ever more varied after recent amendments,[5] there is a need to commonly define the scope of 'EU consumer law' for both instruments.
- With a view to consumer protection and new media, laws on the protection of privacy and personal data are increasingly considered to be 'consumer laws'.
- The Injunctions Directive offers no solutions for consumer law infringements committed by traders established overseas which are, however, a growing phenomenon.
- A very clear conclusion is that injunctions work only with market players who respect the law. Against rogue traders and criminal actors they are no appropriate means to stop illicit practices.
- Most problems relate to the procedural difficulties and differences between national proceedings.

[5] Regulation (EU) Nr. 954/2011 (OJ L 259, 4.10.2011, p. 1)

2. OBJECTIVE OF THE STUDY AND METHODOLOGY APPLIED

The study's aim is to measure the impact of the Injunctions Directive on consumers, consumer markets and consumer governance in Europe. 'Impact' in this context translates as 'use made of' as well as 'benefits drawn from'. 'Use' meaning not only by individual consumers, but mainly by those entitled to stand up in court for their collective interests (recognised 'qualified entities'); 'benefit' meaning the advantage for individual consumers, consumers generally, qualified entities and, as the overall objective, markets' respect for consumer laws.

Use by qualified entities	Benefit for qualified entities	Benefit for consumers generally	Benefit for individual consumers	Markets enhanced respect for consumer laws
e.g. legal action and threat of legal action	e.g. legal standing in foreign courts and gain in international experience	e.g. injunction against unfair term recommended by trade association	e.g. injunction against unfair term used in consumer lawsuit	e.g. deterrent against cross-border consumer scams

What did the qualified entities make of their newly acquired powers? How did the Directive help, or not help, to address disadvantages to consumers and led to tangible improvements? These were the main questions put at the beginning of the research leading to this study, the results of which are submitted here as findings.

PART II: OVERVIEW

The study examined nine selected countries, not the entirety of 27 Member States. The view it takes is therefore selective and does not pretend to capture the reality of the whole EU. Still, it aims to provide the knowledge base for further reflections on injunctions in Europe. The findings that are provided in detail in Part III of this report are summarised in the following paragraphs, as an overview.

1. Empirical findings

Injunction proceedings are court proceedings. Under the Directive, they permit qualified entities in one Member State to apply to the courts or administrative authorities in other Member States for measures that include an order to require the cessation or prohibition of any infringement of the collective interests of consumers in the first Member State under specific European consumer protection measures[6] (that is, consumer directives listed in the Directive's annex).

Court cases inform the reader about the procedure applied, the subject-matter of litigation and its outcome in the form of a judgment or settlement. Counting and studying cases, however, does not in itself enable us to measure the use of a procedural tool for consumer law enforcement. As much as injunctions do not, as such, provide a remedy for claiming past damages, the possibility of using injunctions can be of value in itself. As a governance tool, they can be used as a deterrent without being applied in court. Injunction proceedings therefore complement the arsenal of legal tools available to those who are entrusted with the role of market surveillance.

The study is therefore empirical in two ways. It looks at cases and the lessons that can be drawn from their conduct and results. It also looks at the consumer governance structures it helps to shape.

The study also looks forward in gauging the potential of injunctions for consumer law enforcement in the future. In that it looks in particular at the list of the consumer Directives in its Annex I in comparison to both the amended list of "laws that protect consumers" of Annex I of the CPC-Regulation and the transposition of the Member States, often extending the scope of laws that permit designated bodies legal intervention in the form of injunction in pursuance of their defence. Purely technical as lists of consumer laws may be, they

[6] Christopher Hodges (2008), The reform of class and representative actions in European legal systems

provide insights into the growing scope of protection that consumer law is offering European citizens in line with the integration requirement of Article 12 TFEU.

In order to properly assess the use made of consumer injunctions in the EU, the concept of cross-border litigation needs to be specified. It appears that intra-Community injunctions, that is, injunction proceedings including an element of cross-border B2C trade, can appear in different forms.

Qualified entity sues abroad for cross-border infringement	Qualified entity sues at home for cross-border infringement	Qualified entity sues at home for domestic infringement
The Directive's model	National law, helped by EU-PIL	National law
Rarely used and recently not at all	Used in a number of Member States	Commonly used in nearly all Member States

While cases in the first column are regulated at EU level by the Injunctions Directive, cases in the third column are subject to national law. Cases in the second column are to a considerable extent regulated by EU law as far as private international law and international law on civil procedure are concerned, which is, however, not specifically tailored to make them easier to pursue. But in terms of providing benefits for consumers in the internal market, these cases appear to be most significant and have the biggest potential to grow in importance.

1.1. Cross-border injunctions proceedings (Directive's model)

The Directive was crafted to permit qualified entities of Member State A to go after business operators in Member State B if the latter, in trading with consumers in Member State A, were breaching consumer laws. In order to make this possible, qualified entities were vested with legal standing in foreign courts. The court in Member State B, seized with the request to issue a cease-and-desist order against the trader established within its jurisdiction, would hear and decide the case without questioning the legal standing of the qualified entity of Member State A and its claim to speak for the interests of consumers in its country. The qualified entity could sue in a foreign court in this way, at least in theory, without further ado. Pursuing intra-Community infringements, it would be the consumers' advocates would who cross the border.

One of the main findings of this study, however, is that the Directive's design of 'cross-border cases' is only one of two possible forms of injunction proceedings with an intra-Community dimension. It is also the one that is rarely used.

1.2. Cross-border injunctions proceedings (from home base)

The second, more common form of 'cross-border case' arises from the same scenario of trade from Member State B into Member State A. Different from what the drafters of the Directive had in mind, however, a lawsuit is brought by a qualified entity in Member State A before a court in Member State A. The trader, although established abroad, is sued in the country to which he was directing his commercial activity. Operating this way has the advantage for a qualified entity of filing a case in its own familiar jurisdiction that applies the procedural law it probably knows best. If the applicable law is then also the law of Member State A (here, the *lex loci damni* principle of Article 6 and recital 21 of 'Rome II'[7] is of crucial importance because only Directive 2000/31/EC[8] and Directive 2010/13/EC[9] provide for the country of origin principle in e-commerce and audiovisual services respectively) and the problem of the service abroad of judicial documents can be resolved (for which Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)[10] is helpful), this second possibility against intra-Community infringement is the easier option to choose. Pursuing intra-Community infringements, consumers' advocates stay at home and it is the trader-defendant who crosses the border.

1.3. Domestic injunctions proceedings

A third variety of injunction proceedings are purely domestic. For these, the law derived from the Directive is influential, in particular in those countries that did not include injunctions proceedings in their legal systems before the transposition of the Directive.

[7] "Country where the market is (most) affected". Recital 21 of the preamble to Regulation 864/2007 ('Rome II'), explaining Article 6: "In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives."

[8] The E-Commerce Directive

[9] The Audiovisual Media Services Directive

[10] Look at the „European Judicial Atlas in Civil Matters" (http://ec.europa.eu/justice_home/judicialatlascivil) which omits listing the Injunctions Directive among the available tools.

2. Success and failure: the Injunctions Directive's impact on consumer markets

If success is measured in terms of the number of lawsuits based on it, the Injunctions Directive, with few cross-border cases on record, has fallen short of expectations. If, however, success can also regarded as a valuable contribution to European consumer governance, the image is more positive as the Directive represents the second leg in a two-pronged approach of public and private enforcement of consumer law. If, then, success can be assessed by looking at the three kinds of impact injunctions can have, the result is also rather positive if the core function of consumer injunctions – that is, the improvement of market conditions for the future – is taken as a gauge.

a. Detriment to consumers rectified (e.g. unfair terms removed)

As measures projected to make improvements in the future, injunctions are indispensible to rectify detriment to consumers. It is not quite conceivable, for instance, how unfair term control under Directive 93/13/EEC would function with its procedural provision Article 7 alone. The Member States' internal law duly provides a variety of tools - often predating the Directive - authorising qualified entities to sue for, and judges to grant, cessation orders. In this context an impact on consumer markets can be felt and sometimes even calculated where for instance pricing clauses have been found unfair.

b. Compensation claimed and obtained (e.g. injunctions as test cases)

In the wake of successful injunctions proceedings, consumers have successfully obtained compensation where pricing clauses were regarded unfair. Depending on the context of national law, injunctions can be referenced in individual consumer cases and can to that extent serve the function of test cases. However, no automatic connection exists that would conclude the later (compensation) from the earlier (injunction). It would therefore be inappropriate to present the Directive's impact on consumer markets as a tool for claiming damages.

In countries such as the Netherlands where the range of actions that can be claimed in a collective procedure is broader than the Directive and includes the possibility to ask the court for a declaration on the wrongfulness of the behaviour, the outcome of such collective proceedings has been used in a later individual claim for damages or in a collective settlement for damages.

c. Dissuasive effect felt (e.g. the 'big stick' of qualified entities)

The power of dissuasion, stemming from the fact that those in charge of looking after the collective interest of consumers are better equipped, is limited. In Member States where public enforcement is the method of choice, injunctions are of limited relevance. And in Member States where private enforcement is used in preference, the procedural devices were already at hand when the Directive added to the toolbox. In Sweden, which relies on public enforcement through the Consumer Ombudsman, injunctions were likewise a well-established instrument of enforcement well before the Directive. It cannot be certified to any measurable degree that market players have been impressed and deterred by the newly available possibility of cross-border injunctions (while rogue traders are immune to the discipline that can be imposed by injunctions that work with law-abiding traders).

3. National schemes compensating for consumer detriment

a. Overview of national procedures and cases

Part III of this study will give examples of national law helping consumers to obtain compensation for breaches of consumer law ascertained by injunctions.

b. Influence of Injunctions Directive over national procedures

Naturally, a Member State's national law could not provide a procedural tool permitting its qualified entities access to foreign courts. As an instrument of cross-border litigation, the Injunctions Directive was novel. But it included no provision requiring national law to evolve beyond its scope. The Directive's transposition therefore mostly came as an addition to the existing law. Nevertheless it served in instances as a catalyst of change and helped to bring about new tools like skimming-of-profits provisions, as well as the clarification and consolidation of national laws.

c. Lessons to be learnt

The study does not offer advice as to the value of introducing compensation schemes. What needs to be understood, however, is that the effect of injunctions is meant to project into the future, not the past. The Injunctions Directive would be the wrong place to base attempts to win consumer compensation through summary procedures.

4. What it takes to stage an injunctions procedure: inside qualified entities (QE)

The notary function of the European Commission in the assembly and publication of qualified entities pre-empts sifting at European level between those entities that have the capabilities to assume cross-border

cases in the pursuance of the collective interests of consumers and those who were included in the list for other reasons. The national selections process, as far as it could be determined in this study, is guided by Article 3 of the Directive which leaves a large say to the Member States.

a. Structural strength and deficits within qualified entities

When presenting qualified entities (QE) in reports on different countries, this study makes a distinction between qualified entities generally and so called 'initiative takers'. Initiative takers are those QE that, despite the obstacles and difficulties named, have given proof of their capabilities as litigants. That can have to do with their well-established character and size and even more with their financial resources and staff. While pursuing an injunction often represents a massive investment for a starved-of-funds consumer organisation, the qualification and commitment of those charged with the legal work is equally important. Indeed, here as elsewhere, 'people matter'.

No standard model or recommended structure for a QE emerged from the study. Rather the simple observation has been made that QE could perhaps be encouraged to make more frequent use of cross-border injunctions by amending the law (which is cumbersome as all legislation) and providing additional funding (which is expensive), but also by assisting its staff to deal better with the tools available (inexpensive and not burdened with legislative procedure).

b. Coaching QE in the art of injunctions: the possible use of a handbook

One finding of the study is that the general awareness of cross-border injunctions is low. Experience with its procedures is even more limited. It could make sense, therefore, to help QE in the 'arts of injunctions' by drawing up a practitioner's guide. The assistance this would provide might not be limited to the Injunctions Directive but to cross-border consumer law enforcement generally for parties other than public enforcers. The value of such a guide was emphasised in the study on several occasions.

5. In summary: the added value of having consumer injunctions

At the time the Injunctions Directive was conceived (between 1993 and 1995), only private enforcement was seen as a tool for cross-border consumer enforcement (cf. excerpt from the 1993 Green Paper on consumer access to justice in the Annex to this study). This significantly changed with the appearance on the scene of the CPC-Regulation in 2006, a tool of public enforcement. The first years of coexistence of both private enforcement and a public enforcement tools seem to suggest that the pendulum has swung firmly in the direction of public enforcement as the tool of choice in European consumer governance. For the time being, cross-border injunctions of the kind made possible by the Directive are hardly used at all. Only CPC-requests – or so it seems – address problems arising due to the integrated character of today's European consumer market.

Be that as it may, it is submitted that it is inappropriate to declare the Directive's model of cross-border injunction as a well-intended but now redundant *cul-de-sac* of EU consumer policy. As the national reports will demonstrate, the Directive has not fallen into abeyance to the degree of becoming obsolete. Rather it can be portrayed as an instrument having the dormant potential of consumer law enforcement whose time may still be to come. Cross-border injunctions are more straightforward to pursue where consumer law are not subject to approximation (as via the Directive) but identical (via Regulations) and where borders represent no filter whatsoever to cross-border commercial activity (like in e-commerce). New areas of law such as data protection might be declared of relevance to consumers and therefore fall into the ambit of injunctions. These developments might not just give a lease of life to a neglected area of EU consumer law, but lead to a future where cross-border consumer law enforcement is developed in a variety of forms to serve as the corollary to the integration of consumer markets.

The point of this study therefore is to sketch the private law element of the parallel public and private tracks in consumer law enforcement. While cross-border public enforcement is embodied in the CPC-mechanism, private law enforcement can take a variety of forms for which 'consumer injunctions' is only the overarching generic description. The real contribution of the Injunctions Directive to consumer law and policy is to stimulate and inspire the development of private enforcement.

6. Suggestions for adaptations of the Directive: a wish list

The Commission's first application report advised a 'wait and see' policy. The European Parliament, currently seeking a coherent approach towards collective redress,[11] might make suggestions regarding amendments to the Injunctions Directive (and the CPC-Regulation). As far as is known, no Member State has shown an interest in developing the Directive further. However, while policymakers reflect, those practitioners who contributed to the study have floated a number of ideas. In reverse order from the boldest (and perhaps less realistic) demands to the more moderate (and possibly feasible) suggestions, these ideas can be summarised as follows.

a. Adding damages claims

The Injunctions Directive serves to improve matters for the future, it does not, as such, rectify the past. Depending on the national context, a court's ruling issuing an injunction can be used as a reference in

[11] Footnote 3 above

support of consumers' claims in ensuing individual cases. There is no overall scheme, however, that would create a formal link between a cease-and-desist order stopping a practice and, for instance, damages claims. Some see this as a shortcoming that requires the attention of the EU legislator. Others would contest that there should be any connection at all.

In the larger context of the debate about collective redress schemes for consumers[12] (which is not the subject of this study), demand is expressed for the creation of an EU-wide scheme that would also address this alleged shortcoming. It is, however, questionable that the Injunctions Directive would be the right vehicle for developing such a scheme (if this were desired). Plainly, it would change the nature of the procedural tool provided by the 'Injunctions' Directive fundamentally. Nevertheless, a significant number of consumer law practitioners observe a gap here in the legal framework provided by Union law and wish for change in this direction.

b. Procedural law

The Injunctions Directive paves the way for qualified entities to take legal action abroad, it does not answer questions surrounding private international law (PIL) and the international law of civil procedure. The difficulties at the start and at the end of a cross-border consumer case give testimony for the procedural issues that can arise: obviously it can be difficult to identify the wrongdoer in another Member State and to serve the court documents for commencing a lawsuit, and it can be difficult to execute a court decision favourable to consumers in another jurisdiction. The existing instruments of the PIL *acquis* and of the Hague Conference are not tailor-made for cross-border injunctions. Here too, a need is observed to reflect on appropriate solutions in future amendments to Union law.

c. Amending the Annex

The Injunctions Directive defines its scope by an enumerated list of consumer directives (subject to extension by Member States by virtue of minimum harmonisation); it does not provide, even with the amended CPC-Regulation, an authoritative notion of what constitutes "EU consumer law". The evolution of both lists (the list of Directives annexed to the Injunctions Directive and the list of 'laws that protect consumers' of the CPC-Regulation) shows a not as yet organised but clearly perceivable trend towards the

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[12] http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

extension of consumer law, particularly towards traveller and passenger rights and user rights in general. But the development is uncoordinated and is not apparently a conscious choice. The synopsis provided in the Annex of this study ('Laws protecting consumers') compares both lists as they stand today. These lists should be similar or, faithful to a concept of a two-tiered approach of private/public enforcement of consumer laws, be identical.

A useful debate could follow that would, using the Injunctions Directive's annex as a vehicle, ask the rather fundamental question of what constitutes EU consumer law. The rise of user rights, visible in the CPC-Regulation, would suggest extension ratio personae to other groups of people than just consumers focused on private purposes. The rise of Regulations instead of Directives shaping laws that protect consumers would suggest that the Injunctions Directive should include for instance the travel law *acquis*. The first extension would be one of scope in the sense of the (natural) persons it would take under its wing. The second extension would represent a broadening of fully harmonised law in the area of law where collective interests could be pursued. Given that the black letter of the law – the law of the statute book – is identical where Regulations are used for harmonisation, the usefulness of cross-border injunctions could be enhanced considerably.

In any event it appears worthwhile having a debate on what 'laws that protect consumers' constitute and worth comparing the Annexes of the Injunctions Directive and the CPC-Regulation for cross-fertilisation.

d. Coaching qualified entities

The Injunctions Directive provides legal, not practical, tools for the pursuance of cross-border infringements. Staging cross-border injunctions requires qualified personnel, trained not just in law but also in languages and the logistical skills needed for international commercial litigation. The 'initiative takers' among the qualified entities already employ staff that rise to the challenge. However, more could be done to encourage them to make use of the whole arsenal of tools available to them. During the study, it became obvious that even among the privileged parties some were unaware and others only shallowly informed about the potential of cross-border injunctions. Measures assisting them to seize the opportunities provided could help to make the Directive a more frequently used tool.

e. Funding

It is almost banal to observe that money matters. Litigation is costly and cross-border litigation even more so. Qualified entities would pursue cross-border injunctions more often, if the risk of litigation were less great and funding available to stage it in the first place.

PART III: NATIONAL REPORTS

1. AUSTRIA

Key findings

No cross-border case corresponding the mechanism of Directive 2009/22/EC – not considered necessary to sue traders in an other Member State

Cross-border cases against traders abroad but before domestic courts

Broader scope of application for actions for injunction (Act on care homes)

No collective redress mechanism explicitly provided for by law, but makeshift: Austrian-style group action

Injunctions are often used to make collective settlement of damages possible

Without funding no litigation by consumer NGOs

Preference for private enforcement - compared to administrative proceeding, injunctive actions are perceived as more flexible and faster

Injunctions seen as a strong instrument with deterrent effect on traders

Urge for criminal law measures against rogue traders, who usually act cross-border

Injunctive actions already existed before the implementation of the Injunctions Directive, but Directive extended the scope

Injunctions against unfair terms can have financial effects on consumers, actions against unfair practices/infringements of other laws less

1.1 The setting for injunctions

1.1.1 The law – legal environment for injunctions

Consumer Protection Act

The possibility for consumer organisations to bring representative actions for injunction against unfair contract terms (UCT) has been introduced into Austrian law in 1979 with the adoption of the Konsumentenschutzgesetz-KSchG (Austrian Consumer Protection Act). The most important legal basis for bringing representative actions for injunctions are sec 28-30 KSchG. Similar to Germany, the KSchG differentiates between injunctions against unfair contract terms (sec 28 KSchG) and injunctions against practices infringing any legal rule or interdiction in context of the Directives listed in the annex of Directive 2009/22/EC, namely, of doorstep-selling, consumer credit, package travel, timeshare, distance selling contracts, conclusions of UCT, liability or guarantee for the purchase or the production of goods or in connection with information society services (in particular electronic commerce), and, beyond the scope of the injunctions Directive, but transposing other EU Directives, also in connection with investment services[13], investment management services[14], payment services[15], and issuing electronic money[16], that way impairing collective consumer interests (sec 28a KSchG).

Outside the scope of EU law sec 28a Abs 1a KSchG allows certain qualified entities to sue against traders infringing legal orders or interdictions in connection with the Heimvertragsgesetz (Act on Care Homes)[17].

Other laws

Sec 14 Gesetz gegen Unlauteren Wettbewerb-UWG (Act against Unfair Competition)[18] grants qualified entities, as well as competitors, the right to bring action for injunction. Legal standing for qualified entities is

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[13] Dir 2004/39/EC on markets in financial instruments.
[14] Dir 2009/65/EC UCITS.
[15] Dir 2007/64/EC on payment services.
[16] Dir 2009/110/EC E-Money-Directive.
[17] sec 27b-27i Consumer Protection Act.
[18] Implementing Dir 2005(29/EC on unfair commercial practices.

also granted by sec 85a Arzneimittelgesetz (Act on Pharmaceuticals)[19] against advertising of pharmaceuticals, and sec 115a Luftfahrtgesetz (Aviation Act)[20] against violations of air passenger rights.

Impact of the Injunctions Directive

The implementation of the Directive in 2001 considerably extended the legal standing of Austria's main consumer organisation VKI. When before 2001 it was restricted to actions against unfair contract terms, it can now pursue breaches of all of the above-mentioned (mostly transposition) acts. Not much did change for other qualified entities like the Arbeiterkammer (Chamber of Labour) whose legitimation to bring action for injunction had been much wider already before 2001, for example according to sec 14 UWG.[21]

Preliminary procedures

The Austrian legislator did not introduce any obligatory preliminary procedure. Still such a procedure is used when starting injunction proceedings against UCT.

Skimming off profits

Skimming off profits is a mechanism not provided for in the UWG or in KSchG. Still, sec 111 Telekommunikationsgesetz-TKG (Telecommunications Act) provides for skimming off, but only in case of infringements within the Telecommunication sector. This provision grants the regulator the possibility to request the skimming off profits from the Kartellgericht (antitrust court). The amount depends on the profit made, the court can determine up to 10% of the turnover of the preceding year. The skimmed-off profit can be left to the regulator. This instrument has not been used so far.

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[19] Implementing Dir 92/28/EC on advertising of medicinal products for human use.
[20] Regulation 261/2004 on air passenger rights
[21] Whereas other qualified entities could bring action against any breach of the law via the general clause in the UWG (sec 1 UWG), VKI´s legitimation was (and still is) restricted to challenge misleading – and after the 2007 implementation of Directive 2005/29 on Unfair Commercial Practices (UCP-Directive) - aggressive advertising.

Consumer Authority Cooperation Act

Implementing the CPC-Regulation the Verbraucherbehördenkooperationsgesetz–VBKG (Consumer Authority Cooperation Act)[22] provides the executive legal framework for injunctions. It introduces a special procedure for injunctions brought by an authority. Whereas in injunction proceedings instituted by privately organised qualified entities the rules of the Zivilprozessordnung-ZPO (Civil procedural Act) apply, the VBKG states that in proceedings brought by a public authority under the VBKG, the rules of the Außerstreitgesetz (Act on non-contentious proceedings) shall apply. One difference is that in a proceeding under the ZPO, the principle of party disposition prevails, while in the proceedings according to the Außerstreitgesetz the ex officio disposition principle applies.

1.1.2 Qualified entities

The KSchG differentiates between national and cross-border infringement cases. Only qualified entities (the bodies on the Commission's list) are entitled to pursue cross-border cases (sec 29 Abs. 2 KSchG). In a national context, legal standing is granted to the "social partner" organisations, i.e., trade unions, chambers of trade and commerce as well as the VKI and an organisation of retired people.[23] In sec 14 UWG standing (beside to competitors) is granted to trade associations like the Schutzverband gegen Unlauteren Wettbewerb (Association for the Protection against Unfair Competition) the before mentioned "social partners", as well as the Bundeswettbewerbsbehörde (Federal Competition Authority). In cases of misleading and aggressive commercial practices, VKI is granted standing.

Austria has currently[24] notified eight qualified entities to the Commission. The list is composed by the Federal Ministry of Economy, Family and Youth. There are no criteria for admission to the list. The usual approach is to grant an entity standing in a national act of law and then notify the extension of the list of qualified entities. Interviewees´ opinions on the lack of procedural rules were deviating. For staff of ministries and "social partner" organisation the status quo works satisfactorily, and no need for setting up

[22] BGBl. I Nr. 148/2006
[23] Information about social partnership in Austria:
http://www.sozialpartner.at/sozialpartner/Sozialpartnerschaft_mission_en.pdf
[24] September 2011

criteria or a special procedure was identified. NGO representatives, on the other hand, would welcome legal criteria and a special procedure, because they assume this would on the long term increase consumer protection. Furthermore, it is questionable if the absence of a formal procedure to achieve legal standing meets standards of the rule of law-principle and the constitutional principle of equal treatment.

Still, there was consensus, that if there was a formal procedure, the legislator should formulate criteria for qualified entities, and that the applicant should substantiate their application for the list.

1.1.3 Initiative takers

However, only a faction of the bodies listed on the Community list engage in court proceedings. These are Verein für Konsumenteninformation (VKI), founded 1961, Bundesarbeitskammer (BAK), and Schutzverband gegen Unlauteren Wettbewerb, founded 1954.[25]

The Schutzverband, since it represents businesses, does not bring injunctions for the collective interests of consumers, but it does play an important role in ensuring fair competition. Many of the cases only affect business and SMEs in particular, e.g. misleading advertising for registers of companies, fax spam, etc. Other cases do affect consumers´ interests directly. The Schutzverband might be compared to German Wettbewerbszentrale[26] – WZ (Centre for Protection against Unfair Competition).

Bundesarbeitskammer: In accordance with Austria's federal structure, there is a separate Chamber of Labour in each of the nine Federal Provinces. The Vienna Chamber of Labour also functions as the administrative body of the Federal Chamber of Labour, which is the umbrella organisation of the nine regional Chambers. The Federal Chamber of Labour is in charge of all tasks of relevance to all of Austria, or to several Provinces. Both the regional Chambers and the Federal Chamber of Labour are self-governing public corporations.

Under the CPC- regulation the active players are the Federal Cartel Prosecutor (Bundeskartellanwalt) and the Federal Competition Authority (Bundeswettbewerbsbehörde-BWB).

Depending on the subject matter the relations between the different organisations are cooperative, but can also be described as competitive in certain cases.

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[25] www.schutzverband.at
[26] http://www.wettbewerbszentrale.de

1.1.4 Resources (manpower & finance)

Organisations and public authorities seem rather reluctant to hand out data on their resources, especially when budget for litigation is concerned.

Verein für Konsumenteninformation (VKI)

The main consumer initiative taker VKI is 75% self-financed and 25% funded by social partners and the state. Of its 99 staff, only nine legal experts work on lawsuits. Litigation is mainly funded by special contracts for work and services with the Consumer Protection Ministry.

Schutzverband gegen Unlauteren Wettbewerb

The main business initiative taker Schutzverband is 100% self-financed through member fees. It has a staff of four including two lawyers.

Bundesarbeitskammer (AK)

Bundesarbeitskammer is by law the obligatory representation of employees and workers, and is financed through members' fees. It represents 3,25 Mio members. It has roughly 2,400 persons staff, which provide the services, both technical and administrative, which the Chambers require to fulfil their statutory functions. Of these, one-fourth work for the Vienna Chamber, whose office also serves the Federal Chamber of Labour. Since 2001, BAK has increased the budget and activities in the field of consumer protection.

Federal Competition authority

Of 33 total staff, three experts within the Federal Competition authority are dealing with issues concerning the CPC regulation. Total budget of the competition authority amounted to 2, 4 Mio Euro in 2010 (2/3 of this personnel costs).

1.2 Application of Directive 2009/22/EC in practice

1.2.1 Use of the Directive by qualified entities

1.2.1.1 Overall impact on consumer governance

All interviewees qualify the injunctions directive as a huge success and as a very useful tool for reducing consumer detriment and ensure fair competition. Still, effectiveness can be rated higher regarding injunction proceedings against unfair contract terms, where a number of success stories can be told. Injunctions very often lead to a direct improvement for consumers, e.g. when traders have to adapt their SCT.

On the other hand, injunction proceedings against unfair commercial practices are described as valuable tool to correct market failure, but with potential for improvement. QE keep running behind traders´ unfair practices. One reason for that might lie in the unfair competition act itself – general clauses need to be specified by the courts on a case-to-case basis. Traders can rely on court proceedings taking their time; campaigns are long finished before the final court decision is published. The need for skimming-off procedure is stated.

Official statistics about injunctions proceedings do not exist. Qualified entities and nationally designated bodies gather data about their own activities[27], but knowledge remains patchy due to the regrettable lack of official track keeping.

Although a common database of the enforcement bodies (consumer organisations) has been under discussion repeatedly, such a database has not been set up until now.

Qualified entities actively bringing injunctions usually do not distinguish between domestic and cross border cases in their statistics.

[27] Cf. annual reports of VKI www.konsument.at and AK www.arbeiterkammer.at

1.2.1.2 Business sectors affected

Proceedings do affect all business sectors, although qualified entities might set priorities, which can differ from time to time. Apart from a lack of resources which forces to bundle efforts on certain fields considered as important (due to the number of affected consumers, or the economic impact of infringements), reasons can also be the need to further develop consumer law.

Focus of injunctions against UCT and UCP brought by VKI lies on financial services, insurances, and telecommunication. Focus of BAK – according to the data submitted, which do not include injunctions against UCT seems to lie on distance selling, telecommunication, package travel and scams.

Schutzverband, which is only entitled to bring actions against infringements of the Act against Unfair Competition, explained that filtering sector specific data had been given up some years ago, because no conclusions could be drawn out of these numbers. If in a certain year a number of proceedings happened to be directed against traders of the same sector, this would not necessarily mean there was a sector specific problem although statistics might have led to that impression. Generally, scam cases account for a big percentage of Schutzverband´s cases.

None of the interviewees highlighted a certain sector as especially inclined to infringements; on the other hand, a particular voluntary compliance with the law in certain sectors is not perceived either.

Statistics

VKI manages[28] around 120 actions for injunction and 120 test cases per year, estimated success/failure ratio of injunctions: 95% of the proceeding end successful.

[28] Managing proceedings either started in the respective year or the years before. Therefore, the number of managed cases is higher than the number of cases started in a certain period.

Court proceedings against UCT are always preceded by an out-of-court preliminary proceeding (letter of notification with the invitation to sign a cease-and desist declaration).

	2008	2009	2010
Unfair contract terms	78	70	72
UCP	35	25	33
Infringements of Directives in the Annex	14	11	7
Test cases	152	135	140

BAK manages around 20 actions for injunctions against UCP per year.

	2008	2009	2010
Unfair contract terms	n/a	64	n/a
UCP	25	20	18
Infringements of Directives in the Annex	n/a	n/a	n/a
Test cases	n/a	100	n/a

Schutzverband, which is active only in the field of unfair competition and which represents mainly SMEs, sends 1.400 letters for notification and manages 40-50 court proceedings per year. More detailed statistics are not available.

Success rate of all mentioned qualified entities usually is high, and estimated with 90-95%. Actions against UCT tend to have a higher success rate, because these actions usually comprise not just one but a certain number of terms considered as unfair. In case courts decide that, e.g. 2 terms correspond with the law, but the other 18 terms do not, the action is assessed as successful (according to the rules on reimbursement of

costs in the Civil Procedural Act)[29]. In contrast, actions against unfair commercial practices or infringements of consumer laws usually comprise just one claim; therefore the cost risk is higher.

It is seen as a task of consumer associations to also bring actions with a higher risk, e.g. to achieve court decisions reflecting a new legal situation.

1.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

No cross-border injunctions as described in the injunctions Directive can be reported. Interviewees perceive no need for such a mechanism.

Reasons given are:

- language barrier
- need to employ foreign barristers
- reluctance of Austrian witnesses to travel to another Member State
- travel costs (lawyers, witnesses)
- differences in procedural laws

Example: one interviewee involved in an injunction proceeding before a Spanish court reported, that every document had to be submitted in original version, whereas the Austrian justice has been fully computerised.

- Length of proceedings
- Translation costs, etc.

Example: Schutzverband reports one case comparable to the mechanism provided for by the Injunctions Directive: it sued a Spanish trader which directed SMEs with misleading advertising for a business register. Businesses receive a fax that appears to be from an official sender and informs that in order to stay in the yellow pages; the addressee has to return the signed fax. Many businesses miss the hidden information that

[29] sec 43 ff. ZPO

with their signature they agreed to join the private business register and to pay a certain membership fee. Schutzverband brought action for injunction against the Spanish trader in front of the Viennese Commercial Court. It turned out to be a problem to deliver the application and the judgement in absence via the Spanish courts. In parallel, the Spanish trader had sued some of the members of Schutzverband for payment of the membership fee in front of a Spanish court (in contrast to consumers, who can only be sued in their domicile state[30] traders do not enjoy this privilege). Delivery of the application by the Austrian courts worked well. Schutzverband assisted its members and engaged in the proceeding[31].

1.2.1.4 Cross-border litigation (bringing cross-border infringements before domestic courts)

Most of the cross-border cases reported to consumer organisations regard Internet scams (prize draws, promotional trips, lottery services, etc.), distance selling contracts and – if not to be listed under "scam" also package travel contracts.

Cross-border infringements in the reporting period[32] originated from Germany (24), Switzerland (3), Czech Republic (1), Liechtenstein (1), and United Arab Emirates (1). If classified according to law infringements, mainly the provisions on distance selling, unfair contract terms and unfair commercial practices (misleading advertising, i.e. misleading price or service itself is misleading) were infringed.

Example: VKI started an out-of court proceeding against unfair contract terms in contracts of the German email provider GMX. GMX signed a declaration to cease-and-desist with a contractual fine, but continued to infringe the law. VKI tried to enforce the contractual fine, but failed due to differences in procedural rules (Exekutionsordnung).

Schutzverband reports that only few of its court proceedings had a cross-border dimension. Out of 40-50 actions/year brought to court, only 1 might be against a trader abroad. Reasons given were the higher cost risk and the lacking prospect to actually cease the infringement.

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[30] Art. 16(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ L 12, 1, 16.1.2001 (‚Brussels I' Regulation)
[31] The proceeding is still pending.
[32] According to AK and VKI data.

Problems of service of the writ were reported by several interviewees, i.e. regarding Spain, United Kingdom and Ireland.

Most of the mentioned cases can be considered as fraudulent and in some cases QE file criminal charges. It was reported, that criminal proceedings are rarely instituted (by the state defendant).

1.2.1.5 Domestic use

A large number of domestic injunction proceedings can be reported, mainly regarding unfair commercial practices und unfair contract terms. Consumer protection bodies as VKI and AK have started over 400 injunction proceedings against unfair commercial practices since 2001, and over one thousand injunctions against unfair contract terms. An average injunction against UCT comprises between 10-20 terms.

A preliminary procedure is not obligatory, but always made use of in cases against UCT.

As stated, domestic injunctions were not new to Austrian law and legal practice when the Directive was adopted.

Of the two procedures available under the Consumer Protection Act (unfair terms / infringement of other consumer laws; see above) injunctions against unfair terms (sec 28 KSchG) are often filed, while injunctions against other consumer laws (sec 28a KSchG) are filed to a much lesser extent.

A large number of injunction cases on first sight appear not to be covered by the scope of the Directive (sec 28a KschG), like telecom, energy or insurances. In fact, most of these injunction cases are either based on the UCT-Directive or the UCP-Directive. Then, certain qualified entity can bring action for injunction based on the Act on UCP - because of breach of (any) law (the breach of law having a noticeable impact on competition).

If an infringement does not affect neither contract terms nor unfair practices, the other annex directives are consulted and an injunction proceeding can be based on the respective transposition laws.

These cases are very rare, though. *Injunctions and collective redress (Austrian style)*

Instituting proceedings in the form of "collective redress action under Austrian law", VKI and also BAK have already been able to win several mass cases, be it:

Tourists' compensation claims against a tour operator after an outbreak of severe gastrointestinal disorders in an all-inclusive holiday club; claims against banks for the refund of excessive interest charged on variable-interest-rate consumer loans; compensation claims against banks involved in investment scandals or compensation for incorrect investment advice.

In practice, it showed that a combination of all instruments available (test case, representative action, collective action) – be it just the threat or the actual filing of lawsuits – often leads to quick and efficient case resolution.

Injunctive actions are often used to clarify the legal situation in a first step.

Example: If a court declares a certain contract term as null and void, consumers might be in the situation to claim back their money paid on basis of this contract term. Austrian law does not only interdict the use of UCT but also the referral on this term. If the consumer demands payment of the illegally charged sum the trader cannot refuse to refund the money referring to the now illegal term. Interviewees do see a problem, if the trader would not react – it is questionable if courts would qualify silence as “referring to a term”. Therefore, the consumer in the end would have to sue the trader, although with considerably increased chances of success.

Therefore, in a second step, consumers can be supported by qualified entities to get compensated by way of test action or by way of “class action Austrian style”. Even if the respective consumer NGO decides not to start such proceedings (e.g. due to lack of resources), the risk for consumers who wish to take action on their own, is reduced.

As a consequence, actions for injunctions, that do not have the primary aim of individual compensation, can lead to collective redress. A collective redress instrument cannot be replaced by an “improved” injunctive action, though. Even if a qualified entity could claim compensation for consumers in the course of an injunction proceeding, not all cases where consumers suffer a loss can be tackled with an injunctive action[33].

Interviewees therefore do see a link between injunctive action and collective redress, still the collective redress mechanism in Austria just acts as a makeshift and injunctive action does have its limits.

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[33] Examples: cases of miscounseling (investment), plane or bus accidents, etc.

Scope of action of individual and collective redress

The implementation laws to the injunctions directive do not provide any instruments for neither individual nor collective redress.

In individual cases, the possibility of test cases is widely used by consumer organisations.

Individual consumers transfer their claims to a consumer organisation, which brings the action to court on behalf of the consumers. This facilitates decisions by the Supreme Court. Normally, the amount of a consumer claim is too little to exceed the limits for remedies to the Supreme Court (5.000 Euro) as fixed in the Civil procedural code.[34] An exemption is made for claims transferred to qualified entities pursuant sec 29 KschG. [35]

There is no legal act explicitly providing for group actions in Austria. In 2001 VKI developed a specific form of collective redress action based on Austrian law, whereby a large group of claimants assign their claims to an association that is entitled to bring representative actions to court. The claims are assigned to the association for collection or, failing that, litigation, and the association may then – in its own name – sue the author of the damage through "joinder of causes of action". Austria's Supreme Court has ruled that such proceedings are admissible if the claims as well as the material and legal issues involved are substantially similar.

Neither of the two instruments is used in cross-border cases, i.e. when the trader is domiciled abroad. This is due to the decision of the ECJ in its decision C-89/91 Shearson Hutton/TVB[36] stating that in case of a transferral of claims of the consumer, the privilege of special jurisdiction in consumer matters as provided for in Art 13-15 of the Brussels Convention does not apply. In its decision C-167/00 Verein für Konsumenteninformation/Henkel the ECJ stated that, this "*interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of*

[34] Sec 502 ZPO
[35] Sec 502 para 5.3 ZPO
[36] C-89/91 of 19.1.1993, Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH

consumers."[37] The Austrian Supreme Court followed the ECJ, when denying jurisdiction in cases of transferred claims of consumers in a collective lawsuit against a travel operator.[38]

Test cases/group action Austrian style therefore would need to be brought before a foreign court, with all the implications of such a cross-border proceeding. The privilege to achieve a Supreme Court decision even in case of a small claim, as it is stated by the Civil Procedural Code for national claims transferred to qualified entities, would be lost either.

1.2.1.6 Example cases

Schutzverband gegen unlauteren Wettbewerb

Case 1

Austrian telecommunication companies advertised a "free" net book together with a certain tariff plan with a flat rate of 29, 90 Euro/month. The same tariff plan without net book cost 19, 90 Euro/month. As a result, the net book had not been "free" at all, but customers had to finance it by way of a monthly rate of 10 Euro. Schutzverband sued a series of telecom providers and obtained injunction orders.[39]

Federal competition authority

Case 1

Two injunction proceedings were installed against Vienna based companies under the brand "Friedrich Müller" which has been active for years. Complaints were received from Germany, France and the UK and concerned misleading prize drawls. The outcome of the injunctive action was positive, but all companies declared bankruptcy. Costs of the proceeding therefore are not compensated. The authority representative pointed out that it can yet be a challenge to examine the complaint: when in the case in question the prize

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[37] C-167/00 1.10.2002, Ground 33: "As the Court held in Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers."

[38] OGH, 4.3.2005, 9 Nc 4/05w. Austrian consumers had booked with the Swiss branch of the tour operator. Legal basis was Art 14 Lugano Convention, which corresponds with Art 15 of Regulation 44/2001.

[39] OLG Wien, 1 R 178/10v (pending); OGH 4 Ob 144/09v

drawl originating from an "old acquaintance" was easy to examine, different languages could become a barrier in other cases – the same prize drawl in Finnish would have cost even more time.

Duration of the proceeding against “Friedrich Müller” was over two years. Authorities as well as consumer NGOs consider the CPC procedure as too slow and inflexible to fight rogue traders.

AK

Case 1

An Austrian bank advertised certificates an affiliated company had issued as lucrative and secure investment possibility to small investors. Due to the financial crisis investors made losses with that investment. AK sued the bank for misleading statements in the prospectus, which had only highlighted the advantages of the investment without adequately mentioning its risks. The Supreme Court decided in favour of AK and qualified a series of statements in the prospectus as misleading, e.g. the statement that the investment was equal to an investment into real estate. According to the court, the defendant misled investors by suggesting there was a difference between the advertised certificates and other types of investment depending on the stock markets.

The decision did not have any direct impact on individual consumers. Since a series of proceedings was pending based on contestation of mistake, the Supreme Court decision had solved an important preliminary question, namely, that the prospectus was misleading.

Case 2

AK sued one of the many rogue traders active in the field of internet scams. Websites like songtext-today.com, tattoo-today.com, zodiac-today.com and the like are presented in a way consumers think the services provided for are for free. In fact, if they register, they agree to conclude a two- service contract with monthly rates of 8 Euro. Most of the consumers are not aware that they concluded such a contract. After the withdrawal period has expired, they receive bills, reminders and letters from German lawyers threatening with court actions. In fact, no case has been known in Austria, where such action was filed. Between 2008 and 2010 AK counted about 150.000 complaints about one trader domiciled in Germany and Switzerland. AK brought action for injunction based on the distance selling provisions. Courts shall clarify in which form the information on the withdrawal right has to be provided for. The case is still pending and was transferred for preliminary ruling to the ECJ.

Case 3

A telecommunication provider infringed the Act on Telecommunication which bans cold calling. AK had received over 800 consumer complaints in this context.

Case 4

Many Austrian companies charge a certain amount of money for payment with payment form. A major insurance company charges consumers 2, 50 Euro per payment form. Section 27 Payment Services Act (implementing the Payment Services Directive) bans charges for the use of certain payment instruments. AK brought action for injunction and won the case in first instance (not binding).[40]

VKI

Case 1

VKI brought injunctive actions against comparable infringements of the Payment Services Act, for example in spring 2011 against another live insurance company and won the case in first instance[41] - not legally binding yet.

In addition to this, VKI filed actions for injunction against several Austrian Mobile phone providers for using unfair contract terms infringing section 27 of the Payment Services Act, by charging the use of payment forms. A series of positive first and second instance decisions could be achieved (not binding).[42]

If the Supreme Court confirms these decisions, traders will not be allowed to charge consumers who choose paying by payment forms. Generally, an injunction order only affects the respective defendant. In case of the payment forms, a series SCT of various traders is challenged. In fact, many businesses (internet providers, mobile phone providers, energy suppliers, insurance companies etc.) use a term providing for an extra charge for payment forms, the amount varies from 1-10 Euro. VKI estimates that approximately 7 Mio consumers are affected by the term.

Case 2

VKI brought action for injunction against unfair terms in banking contracts of an Austrian bank. In August 2009 the bank informed their customers on the account statement, that prices for current accounts were to

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[40] HG Wien 1.6.2011, 18 Cg 6/11p
[41] HG Wien 20.1.2011, 18 Cg 152/10g
[42] OLG Wien 25.1.2011, 4 R 209/10z

be increased as from first of October according to the increase of the consumer-price index in the year 2008, amounting to an increase of 3,2%. The bank referred to the index-clause in the SCT, allowing the bank to increase prices for continuing obligations once a year automatically, according to the movements of the consumer-price index (or a comparable index).

This was qualified as an infringement of section 29 of the Act on Payment Services, which implemented Art 44 of Directive 2007/64/EC Payment Services directive, which entered into force on first of November 2009. The Supreme Court followed VKI´s legal assessment and stated that according to the Act on Payment Services such an automatic and unilateral price increase contradicted the Act on Payment Services Only interest rates and exchange rates can be altered, if agreed upon in the contract. According to the Supreme Court, the term in question contradicted Art 44 Payment Services Directive.

This action on injunction had a significant impact on consumers, because in spring 2011 most of the other bank institutes, having used according terms, abstained from the automatic price increase. The bank has 1, 6 Mio customers, its daughter Easybank 300.000 accounts.[43] Competitor Bank Austria has 1, 75 Mio customers, 18% market share with private customers.[44]

Case 3

Life Insurance Company /intransparent terms regarding withdrawal benefit

In Austria, 2 Mio new life insurance contracts are concluded every year. Consumers, who want to terminate the contract within the first years very often experience a negative surprise, because they receive if anything at all, just a small part of the premiums paid in, the so called “withdrawal benefit”. Insurers deduct commissions and discounts.

Many old insurance contracts (concluded before 2007) contained unfair and intransparent contract terms, e.g.:

“*The withdrawal benefit does not correspond with the sum of paid in premiums. Due to the necessary insurance protection it is calculated by taking into consideration a deduction of the premium reserve and the costs incurred, according to standard rate principles*.”

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[43]http://www.bawagpsk-annualreport.com/media/file_de/22_BAWAG_PSK_KonzernGB10_dt_web.pdf
[44] http://www.bankaustria.at/informationspdfs/D_GB2010_final.pdf

The term does not inform the consumer properly about how much money he will receive in case of early termination of contract, and was considered as intransparent and thus not part of the contract. VKI started injunction proceedings against the unfair contract terms of 19 insurance companies (all using similar standard contract terms). Three companies signed out-of-court declarations of cessation, all other companies were sued. The Supreme Court declared the terms as null and void.[45]

Parallel to the court proceedings, VKI conducted a "collective intervention". During this campaign, approximately 1.400 consumers reported their claims, which were collected and claimed from the insurer by VKI on behalf of individual consumers. In 43 cases VKI brought test cases on behalf of individual consumers to court, most of them ended with a positive result. Except for one case, the insurers agreed to settle soon after the action had been filed. Only one case was decided by a court.

Experts estimate that approximately 3 Mio consumers were affected by the unfair contract term[46]. The action for injunction has an effect on all contracts containing such unfair term, whereas the "collective intervention" was only offered for consumers who had reported back.

The average damage for the individual consumer is estimated with a few thousands Euro (amounts between 25 Euro and 16.000 Euro).

Case 4

It is common practice that insurance companies conclude long term contracts with their customers, e.g. for 10 years. In exchange for the long binding the companies grant discounts or fidelity bonuses. According to the Austrian Act on insurance contracts[47] consumers have to have the possibility to terminate long term insurance contracts after a period of three years. The law allows companies to claim any discounts back in case of early termination, as long as this had been conceded in a contract term. Two insurance companies among many others used such terms with the following content:

"*The annual premium includes taxes and a 20% discount for a contract period of 10 years. In case of early termination the insurer can claim back the 20% discount*."

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[45] E.g. OGH 17.1.2007 7 Ob 140/06y, OGH 17.1.2007 7 Ob 131/06z, OGH 17.1.2007 7 Ob 173/06a, OGH 9.5.2007 7 Ob 233/06z, etc.

[46] This number is estimated on the basis of information of life insurers regarding new business: www.vvo.at.

[47] sec 8 Versicherungsvertragsgesetz (VersVG)

"Calculating the annual premium a 20 % discount for long contract period has been taken into account (yearly xxx Euro for a annual premium of xxx Euro), which can be claimed back in case of premature termination of the contract."

For consumers, this meant that they had to pay back the more money; the longer they had stayed in the contract. In case of termination of the contract after three years, one had to pay the yearly discount for three years. After nine years, consumers had to pay nine times the yearly discount. The result was that a termination after such a long period turned out more expensive than keeping the insurance contract, which as a consequence undermined the legal right to terminate the insurance contract after three years.

VKI brought actions for injunction against unfair contract terms and achieved positive court decisions in 2010. After the Supreme Court had declared the terms in question as void[48], VKI supported consumers claiming back excessively paid sums, providing a web-portal for consumers concerned, by providing model letters on its website and by conducting test cases. These were also instituted to clarify the admissibility of the new terms concluded by the insurers, which finally were also qualified as null and void.

The average value of consumers´ claims lay between 200 and 300 Euro. Mainly concerned sectors of insurances were privately owned home insurance, household insurance; indemnity insurance, accident and legal insurances.

VKI´s actions for injunctions led to the effect, that most of the insurers – among these also companies that had not been sued- changed their contracts and are using more consumer friendly terms now. The main part of insurers renounced to claim back the long-term discount in existing insurance contracts due to the court decisions.

The impact on consumers can be regarded as very high, because of the size and relevance of the insurance market. Total premium income in 2010 amounted to 16,748 billion Euro[49].

[48] OGH 21.4.2010, 7 Ob 266/09g

[49] Premium volume life insurance 2010: 7,552 billion Euro; private health: 1,638 billion Euro, damage/accident: 7,558 billion Euro. Compare Annual report 2010 of the Austrian Insurance Association (VVO): http://www.vvo.at/die-osterreichische-versicherungswirtschaft-auf-erfolgskurs-auch-im-jahr-2010-4.html

1.3 Economic impact and effect on markets

1.3.1 Benefits for qualified entities

It was pointed out that the possibility to bring injunctive action serves as a very strong instrument. Compared to an administrative procedure, the costs a trader has to face are much higher in a court proceeding. Furthermore perception was that a court decision gains more respect than an administrative decision.

If a consumer organisation reports an infringement to an administrative body, there is no demand against the authority to institute an administrative proceeding. Furthermore, the public authority usually does not inform about the outcome of a proceeding.

When installing an injunction proceeding, private enforcers have it in their grip how to proceed.

1.3.2 Benefits for consumers generally

Consumers generally benefit from a well-functioning system of consumer market surveillance of which the Directive’s transposition is part.

Experience has shown, that infringements can only be properly challenged, when traders expect a sanction. It was explained above, that out-of court interventions without the threat to institute a court proceeding does not lead to a better compliance with the law.

1.3.3 Benefits for individual consumers

It should be distinguished between actions against unfair terms and against other breaches of law/unfair commercial practices.

Whereas the latter do have long-term effects on consumers because of their implication to competition, they tend to have hardly any direct effects on individual consumers.

In contrast, actions against unfair contract terms can have immense effects on consumers, because usually they are used in contracts about a continuing obligation (see exemplary cases).

Individual consumer benefited from the use of injunctions in the following instances:

- When a court declares contract terms null and void, the trader loses the possibility to refer to that term. This benefits consumer particularly when the term regulates price increases or other financial effects.
- When in an injunction proceeding, a court declares a contract term as null and void, this decision affects all contracts of the same trader containing the term in question. Consumers benefit from the injunction order, because they do not have to fight about the term in an individual proceeding. This also facilitates pursuing their individual claims against the trader.
- Injunctions brought by qualified entities do have another weight before court than individual claims.

1.3.4 Effects on the markets

The pattern of (private) enforcement of consumer laws is well established and may serve in its mere existence as a deterrent against unlawful practices. Seen, however, that statistical data are poor it is not possible to gauge the depth of this impact.

Despite to a general lack of impact assessment, all interviewees describe injunctions as a very useful tool to correct market failure and to contribute to a fair competition.

The act against unfair competition grants competitors[50] legal standing for injunctive actions, if they are touched by an unfair practice. Traders do make use of this instrument, but no data on the total number of such proceedings are available.

Some practices that infringe the law seem widespread within certain sectors, e.g. the telecommunication sector.

Example: All providers using an SCT clearly infringing the Act on payment services; all providers promoting tariff plans including unlimited minutes for a certain flat rate, when in fact they foresee a fix limit. In such

[50] Sec 14 UWG

cases, there is strong suspicion, that providers do not bring actions against their competitors. The more needed are injunctive actions by qualified entities in such cases.

It has become clear, however, that injunctions only work where traders are perceptible to the intervention of the law and of courts. Experience shows that rouge traders are unimpressed by injunctions even when addressed against themselves. The more shades of grey are getting darker, the less injunctions seem to have any effect at all. For fraudulent scams cross-border, criminal law sanctions are considered to be the most suitable instrument.

1.3.5 Relationship with CPC-mechanism

Interviewees – staff of consumer NGOs as well as public authorities – assess the CPC regulation as a complimentary tool for cross-border infringements, but usually too slow and less flexible as to effectively fight consumer detriment. CPC authorities seem to share some of the problems private claimants (see above) face when instituting proceedings cross-border. Authority representatives report that the CPC-Regulation works satisfactorily when a reputable trader breaches the law and is contacted under the CPC procedure. In contrast they report it does not work too well if complaints regard "black sheep".

Incoming requests for enforcement measures: In 2009, two enforcement requests against Austrian traders from the Hungarian consumer authority led to an out-of-court intervention of the Bundeskartellanwalt. Both cases were solved satisfactorily.51

Two court cases where instituted by the Competition authority following incoming requests for enforcement measures against a prize draw (see exemplary cases).

Actions on injunctions brought by the CPC authorities, represented by the Finanzprokuratur (attorney general) do not follow general rules of civil procedure (Zivilprozessordnung-ZPO), but of the Außerstreitgesetz. One of the main differences regard rules on costs (no loser pays-principle) and the principle that the court collects evidence (Offizialmaxime), whereas under ZPO only evidence delivered by the parties is taken into consideration.

[51] Arbeiterkammer (2010), Wettbewerbsbericht,217.

Still, the same judges, who in other cases deal with injunctions applying ZPO rules, have to apply mentioned special procedure rules here. Perception was that courts were rather reluctant in trying to find evidence and the proceedings did not deviate from proceedings under ZPO.

Outgoing requests for enforcement measures: The Bundeskartellanwalt requested enforcement measures against a German agency because of misleading practices when offering flight travels to consumers. A proceeding in Germany was already pending and Austrian complaints were added. Another case in 2009 concerned a German trader offering ringtones. Enforcement measures were requested and the German authority instituted an injunction proceeding.

When submitting outgoing complaints, it was reported that in some cases the contacted authority in the other MS did not answer in due time.

Nevertheless, consumer NGOs pin their hopes in the CPC regulation in cross-border scam cases, where the wider competences of an authority are regarded as helpful.

Still, the preparation of the cases ties up resources of consumer NGOs, costs are not covered, it is unclear, if a proceeding is started at all.

1.3.6 Problems

It emerged from the interviews that a whole range of problems stand between the use of cross-border injunctions in theory and their application in practice.

Procedural problems

As one of the main barriers for litigation against a trader seated abroad problems of delivery of the statement of claim and other documents is mentioned. The necessity of translating the written submissions is qualified as another barrier.

Enforcing court decision in another Member State

Problems arise when trying to enforce an injunction order cross-border, mainly due to the above mentioned practical barriers and barriers in procedural law.

AK and VKI experienced problems of enforcing the injunction order in Germany. In Austria, the fine which is imposed in case of non-compliance with the injunction order is not part of the injunction order, but fixed in way of the enforcement proceeding.[52]

In Germany, by contrast, the fine for non-compliance is already included into the injunction order. In practice this leads to the effect that if enforcement is not possible in Austria (e.g. if there is no branch of the trader, no assets in Austria), it has to be applied for enforcement in Germany. Austrian NGOs made the experience, that German courts denied enforcement because the fine had not been fixed already in the injunction title.[53]

Rogue traders

It seems that rogue traders are as unimpressed by measures provided for by the CPC regulation as they are by injunctive actions. In Austria, the legislator adopted a provision targeting price draws in section 5j Consumer Protection Act – if the addressee is made believe that he/she won a prize, the sender is obliged to pay that price. Consumer organisations led test cases based on this provision and in some cases, the traders had to pay the promised prizes. At the same time, VKI filed a criminal complaint against the physical persons behind “Friedrich Müller”. The case has been investigated but is still pending. “Friedrich Müller” is targeting consumers in other Member states. Two court proceedings were instituted by the Competition authority, which turned out successful. Unfortunately, the defendants declared bankruptcy, which makes it impossible to execute the injunction order.

This shows too well, that a cross-border cooperation of law enforcement authorities is needed if rogue traders are to be targeted effectively.

Criminal proceedings against scams are rarely instituted by the state defendant.

It was also mentioned that sanctions that can be imposed under the injunctions directive, but also under the CPC regulation do not have any deterrent effect in case of scam.

[52] Exekutionsordnung-EO (enforcement of civil judgements act)
[53] The AK case concerned a distance seller, in VKI´s case concerned the email provider GMX.

Funding

Experience in Austria shows that to grant standing to bring injunctive actions alone does not lead to any effective enforcement activity, if the necessary budget is not provided for.

Cost risk of litigation

Cost risk is a major problem for private enforcers, especially if they cannot rely that even in case of success the defendant compensates costs.

Cost risk of litigation cross-border

The factual risk of having to pay the costs of the proceeding (court fees and fees of the lawyers) without enough prospect to cease the infringement in case of cross-border cases leads to a reduction of cross-border litigation.

Cost risk in context of domestic injunctions

Interviewees state, that since the court fees are being increased by the legislator on a regular basis, it gets more difficult to institute litigation for private enforcers. Problem is not so much the risk of losing a proceeding, but the risk of not getting cost compensation in case of winning the case, because the defendant is not able to pay the costs. This might lead to a reduced access to justice.

1.3.7 Suggestions for improvement

- Given that consumers often cannot take advantage of a successful injunction because time has elapsed for them to claim, for instance, damages claims should be subject to suspension of limitation.
- Skimming-off procedure
- Scope of the directive - Annex

A broader scope of the Directive (annex) would be welcomed – either by replacing the legislation in the annex with a definition of “EU consumer law” or by adding EU legislation currently not covered, like in the telecommunication sector, energy sector, regarding passenger rights or anti discrimination rules (access to goods and services). On the other hand, a general definition of the scope could lead to a reduction of

consumer protection, because traders might start to argue that a practice in question is not covered by "EU consumer law". The signalling effect of explicitly mentioning certain consumer legislation should also not be underestimated.

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1.3.9 Glossary

Abmahnschreiben	letter of notification/letter of caution
AMG	*Arzneimittelgesetz* – Act on Pharmaceuticals
AK	*Arbeiterkammer* – Chamber of Labour
Außerstreitgesetz	Act on non-contentious proceedings
BAK	*Bundesarbeitskammer* – Federal Chamber of Labour
BMASK	*Bundesministerium für Arbeit, Soziales und Konsumentenschutz* –Federal Ministry for Labour, Social Affairs and Consumer Protection
BMJ	*Bundesministerium für Justiz* – Federal Ministry for Justice
BMVIT	*Bundesministerium für Verkehr, Innovation und Technologie-* Federal Ministry for Traffic, Innovation and Technology
KommAustria	Kommunikationsbehörde Austria – Austrian Communication Authority
KschG	*Konsumentenschutzgesetz*-Consumer Protection Act
Landarbeiterkammertag	Association of Chambers of the Austrian farm workers
LWK	Präsidentenkonferenz der Landwirtschaftskammern
Österreichs	Standing Committee of Presidents of the Chambers of Agriculture
Österreichischer Gewerkschaftsbund	Austrian Trade Union Federation
Schutzverband	*Schutzverband gegen Unlauteren Wettbewerb* – Association for the Protection against Unfair Competition
Social partners	consists of the following chambers: BAK, WKO, LWK and ÖGB
UWG	*Gesetz gegen Unlauteren Wettbewerb* – Act against unfair Competition
Unterlassungserklärung	Declaration to cease-and-desist commitment

Verbraucherbehördenkooperationsgesetz–Act on the Cooperation of Consumer Authorities

VKI	*Verein für Konsumenteninformation* – Association for Consumer Information
WKO	Wirtschaftskammer Österreich- Chamber of Commerce
ZPO	*Zivilprozessordnung* - Civil procedural Act

2. BULGARIA

Key findings

Legal standing to bring injunctive relief actions is granted both to non-governmental consumer organisations and to the State body in charge of consumer protection;

Since the entry into force of the Law on Consumer Protection in 2007, Bulgarian qualified entities have not brought any action for injunction to cease cross-border infringements of the legislation (bringing cross-border infringements before foreign courts or before domestic courts), neither outbound, nor inbound;

Provisions of Article 6 'Rome II'-Regulation 864/2007/EC have not been used;

Very large scope of the Bulgarian law on injunctions: Provisions of the Law on Consumer Protection grant a general right to bring an injunction action, covering infringements of collective interests of consumers protected by any legislation; it covers any legislation that protect directly or indirectly the interests of consumers;

Complexity of the procedure involved in filing an action for injunction;

Consumer organisations may also seek compensation for the collective damages caused to consumers

No actions for injunction which have helped consumers to obtain damages.

2.1.1 The law – legal environment for injunctions

Provisions of Directive 98/27/EC on injunctions for the protection of consumers' interests have been implemented into the Law on Consumer Protection (LCP), promulgated in State Gazette No. 99 of 9 December of 2005, in force since 10 June 2006, last amended in March 2011. This horizontal piece of legislation proclaims the fundamental consumer rights, including the right of consumers to have access to judicial and out-of-court procedures for the settlement of consumer disputes. Chapter IX, Section III of the LCP is devoted to collective redress, including to actions for injunction.

The amendment of the LCP, (State Gazette No. 99 of 9 December of 2005), promulgated in State Gazette No. 53 from 2006, effective as of 01.01.2007 was an important step in the implementation of Directive 98/27/EC

of the European Parliament and of the Council on 19 May 1998 on injunctions for the protection of consumers' interests. Under this amendment of the LCP the following new provisions have been added aiming at the implementation of the Directive 98/27/EC into Bulgarian legal rules:

- Article 164 paragraph 1, point 7, paragraphs 2 and 3; (setting up of a list of 'qualified entities' and on the adoption of a regulation on the criteria to be met by the qualified entities);
- new paragraph 3 has been added to Article 186, granting legal standing to the Commission for Consumer Protection (CCP) to initiate actions for injunction.

The provision of Article 186a of the LCP granted legal standing to bring actions for injunction to Community enforcers (qualified entities of other Member States).

In 2006, a special Regulation of the minister of Economy and Energy has been adopted setting up the criteria which have to meet the 'qualified entities' for bringing an action for injunction for the protection of the collective interests of consumers.[54]

Further amendments to the Chapter IX, Section III of the LCP '*Collective redress Actions for injunctions'* have been introduced by the new Code of Civil Procedure[55] (CCP) which concern mainly procedural rules for bringing collective actions, including actions for injunction.

Scope of the action for injunction

Provisions of Article 186 of the LCP grant a general right to bring an injunction action, covering infringements of collective interests of consumers protected by any legislation[56]. Consumer organizations which satisfy the requirement for being recognized as a 'qualified entity' and the Governmental body in charge for the enforcement of the consumer protection legislation (Commission for Consumer Protection) may initiate an action for injunction in all the areas, included into the annex of Directive 2009/22/EC. They can also bring an action for injunction for violation of other laws having impact on consumer protection.

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[54] Regulation №1 of the Minister of Economy and Energy on the criteria which shall meet the qualified entities, having legal interest to bring actions for the protection of collective interests of consumers, promulgated in State Gazette No 89, of 3.11.2006, in force as of 1.1.2007

[55] Code of Civil Procedure, promulgated in State Gazette, issue 59/20.07.2007q effective as of 1.3.2008

[56] Law on Consumer Protection, promulgated in State Gazette No 99 of 9 December 2005, last amended in State Gazette, issue 18 of March 1, 2011

2.1.2 Qualified entities

a. Consumer organisations

The following consumer organizations were notified to the European Commission as qualified entities within the meaning of Directive 2009/22/EC:

- ‘Federation of consumers in Bulgaria’;
- ‘Bulgarian National Association - Active Consumers’;
- ‘Consumer centre for information and research’;
- ‘Union of Insured persons in Bulgaria’;
- ‘Regional union of Consumers - 98 – Vidin’;
- ‘National League - consumers of services’;
- Association ‘Consumer’s help’;

b. Commission for Consumer Protection

The Commission for Consumer Protection is also entitled to bring actions to court to cease cross-border and/or domestic infringements. In pursuance of the Regulation №1 on the criteria which shall meet the ‘qualified entities’, having legal interest to bring actions for the protection of collective interests of consumers, the Commission for Consumer Protection is recognized ex officio as a ‘qualified entity’ within the meaning of Directive 98/27/EC.

c. ‘Qualified entities’ of other Member States

‘Qualified entities’ of other Member States, included into the list of ‘qualified entities’, published in the Official Journal of the European Union are entitled in all cases where a Community infringement is identified to bring proceedings for injunction before a Bulgarian court (regional court). This option concerning intra-community infringements has not been used as of yet.

2.1.3 Initiative takers

The following organizations have played an active role in stopping domestic infringements of consumer legislation:

- Commission for Consumer Protection

- 'Union of Insured persons in Bulgaria'
- 'Federation of consumers in Bulgaria'

2.1.4 Resources (manpower & finance)

To be qualified to bring the injunction action to cease *cross-border, or national* infringements consumer organizations have to meet the following requirements[57]:

- to have as objective the protection of the collective interests of consumers;
- to be registered by the Ministry of Justice as not-for-profit organizations;
- to be independent from producers, importers, traders and supplier of services;
- to be independent from political parties;
- not to disseminate, or distribute in any form advertising messages which might jeopardy the independence of the organization.

Consumer organisations have to act exclusively on behalf and in the best interest of consumers[58]. They have to be registered with the Ministry of Justice as non-economic and not-for-profit organisations.

'Qualified entities' (consumer organisations) should be free of adversaries. Consumer organisations shall be economically independent from producers, importers, traders and from distributors. They shall not be connected with any political party. All 'qualified entities' have in their statutes the protection of collective interests of consumers.

There is no special funding for the cross-border or domestic actions for injunction of consumer organisations. Consumer organisations receive financial support for their activity from the State. The financing is provided to consumer organisations depending on their activity in favour of consumers in the previous year. One of the criteria, among others, used for the allocation of the State subsidy assigned to consumer organisations is the number of actions for injunction brought in court for the previous year.

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[57] Regulation N 1 of the minister of Economy and Energy on the criteria which shall meet the qualified bodies, having legal interest to bring actions for the protection of collective interests of consumers, promulgated in State Gazette, issue 89, dated of 3.11.2006

[58] Article 168 (1) of the Law on Consumer Protection, promulgated in State Gazette, issue 99 of 9 December 2005, last amended in State Gazette, issue 18 of March 1, 2011;

2.1.5 Alternative procedures /procedures allowing claiming compensation

Provisions of Chapter XXXIII of the Code of Civil Procedure, effective of 1.03.2008 are applicable to any case of damaged collective interests, and not only for the protection of consumers' collective interests. They introduce four types of collective actions:

- collective (group) action for declaration of the infringement of the law and the fault of the infringer (Article 379(2) CCP;
- collective (group) action for cessation of the violation (Article 379(3) CCP;
- collective action for repair of the consequences of the infringement of the harmed collective interest (Article 379(3) CCP;
- collective action for damages caused to the damaged collective interest (Article 379(3) CCP.

Provisions of the Law on Consumer Protection contain the following collective actions:

1. **Collective interest action** under Article 188 (1) and (5) of the LCP for the protection of collective interests of all consumers. Consumer's organisations have the right to claim damages, caused to the collective interests of consumers. The compensation received may be used only for the protection of consumers' interests.

2. Representative action under Article 189 (1) of the LCP. Where two or more consumers have suffered damages, consumer organizations may bring an action in court on their behalf for compensation of damages suffered by them. The decision of the court on the action for injunction has effect in respect of the infringer, the person who has brought the action, as well as in respect of those persons who claim that they are harmed by the illegal practice or unfair terms and who have declared that hey wish to pursue a remedy independently in a separate proceedings.

2.1.6 Application of Directive 2009/22/EC in practice

2.1.6.1 Use of the Directive by qualified entities

Since the entry into force of the LCP in 2007, the qualified entities, including the Commission for Consumer Protection have not brought any action for injunction to cease cross-border infringements of the consumer

protection legislation included in the Annex of Directive 2009/22/EC. The statistics below concern domestic injunctions.

2.1.6.2 Overall impact on consumer governance

Number of injunctions per 'qualified entity', for the period January 2007 -August 2011: 52 actions for injunctions have been filed by the 'qualified entities' for the period above.

Actions for injunction brought by the Commission for Consumer Protection (CCP): The total number of actions for injunction introduced by the Commission for Consumer Protection from January 2007 up to August 2011 under Article 186 of the LCP is 21 (2 in 2007, 3 in 2008, 5 in 2009, 9 in 2010 and 2 in 2011) which represents 40% of the total number of injunctions for the same period.

Actions for injunction brought by the 'Union of insured persons in Bulgaria': In 2007, it filed 19 actions for injunction seeking to stop violation of provisions of Article 52 of the LCP on distance selling.

Actions for injunction brought by the 'National League - consumers of services': In 2007, this organisation, filed 10 actions for injunctions seeking to stop violations of the LCP regulating distance selling.

Actions for injunction brought by the 'Federation of Consumers in Bulgaria': In 2009, the(FCB) filed one action for injunction for violation the provisions of the Law on Energy seeking to: stop violation of the provisions of Article 79 of the Law of Energy; to ensure continuity of the central heating supply; to stop the violation of the Law on Energy consisting in calculation of energy bills for central heating consumption on the base of the prognostic consumption and to calculate bills on the basis of the actual consumption of individual consumers. The FCB filed also an action for compensation of damages to the collective interests of consumers under Article 188 of the LCP. The FCB filed also a representative action under Art.189 (1) of the LCP for damages of 1136 individual consumers who joined the action.

Actions for injunction brought by the 'Consumer's help': In 2009, this organisation filed one action for injunction concerning violation the provisions of the Law on Consumer Protection on unfair contract terms against the largest telecom operator in Bulgaria. The subject matter of the claim concerned 17 clauses included into the general terms of the operator.

2.1.6.3 Business sectors affected

The sectors in which domestic injunctions are mostly used are: retail trade, direct selling, non-food consumer goods, telecommunications, and energy (electricity and central heating supply).

2.1.6.4 Cross-border litigation (bringing cross-border infringements before foreign courts)

Bulgarian 'qualified entities' have not experienced up to now any cross border actions for injunction, neither outbound, nor inbound. Since the entry into force of the LCP in 2007, 'qualified entities' have not brought any action for injunction to cease cross-border infringements of the legislation included in the Annex of Directive 2009/22/EC.

2.1.6.5 Cross-border litigation (bringing cross-border infringements before domestic courts)

Bulgarian 'qualified entities' have not brought any action for injunction before domestic courts to cease cross border infringement of consumer protection legislation included in the Annex of Directive 2009/22/EC.

2.1.6.6 Domestic use

Number of injunctions per subject matter for the period January 2007 – August 2011

Unfair contract terms: 16 actions for injunction were introduced to stop the use of unfair contract terms.

Unfair commercial practices: 5 injunctive redress actions were filed to stop or to prohibit the future use of unfair commercial practices.

Distance selling: 28 injunctive redress actions were filed by two consumer organisations to prohibit violations of the LCP concerning distance selling.

Advertising: 2 injunctive redress actions were brought to prohibit violation of tobacco advertising and advertising of consumer credit;

Insurance: 1 action was filed to prohibit the use of unfair marketing practices.

Overall performance results for the period January 2007 – August 2011: 15 actions for injunction out of 52 brought by 'qualified entities' are still pending in court, which represents 29% of the total of the filed actions;

10 actions for injunction out of 52 were won by 'qualified entities', which represents 19% out of the total of the filed actions. In 1 action for injunction an agreement was found out of the court with the defendant.

26 actions for injunction were dismissed by the courts and failed which represents 50% of the total of the filed actions.

2.1.6.7 Economic impact and effect on markets

2.1.6.7.1 Benefits for qualified entities

All interviewees estimated that the setting up of the list of 'qualified entities' was useful.

2.1.6.7.2 Benefits for consumers generally

The Directive has had direct qualitative benefits for consumers which however, could not necessarily be expressed in monetary terms. It is true that actions for injunctions for the removal of unfair contract terms not related to the price of the service supplied reduce future harm to other consumers but it is not possible to measure this in monetary terms.

Most of the interviewees consider the mechanism created by the Directive to correct market failures by allowing qualified entities to stop certain illegal practices which are contrary to standards of consumer protection and to prohibit their use in the future (for example unfair commercial practices, unfair contract terms) as useful.

2.1.6.7.3 Benefits for individual consumers

The Directive had some direct benefits for individual consumers mainly in combating unfair contract terms and unfair marketing practices. For the period January 2008 - August 2011, only 9 injunctive redress actions were successful. They concerned two injunctive orders for cessation and prohibition of some clauses contained in contracts for the supply of electricity and six orders for cessation and prohibition of practices consisting of non-provision of information in contracts concluded at distance. Furthermore, an agreement was reached in one case for removal by the trader of some unfair terms contained in the contract offered to

consumers. For the cases above it was not possible for the plaintiff to identify the exact number of consumers, potentially suffering damage. Our tentative conclusion is that the directive has led to a reduction of consumer detriment, but we cannot state that the directive has led to a tangible reduction of consumer detriment in Bulgaria.

2.1.6.7.4 Effects on markets

Injunctive redress actions have been filed mainly in the following sectors of the economy: direct selling (28 actions); energy (7 actions) and telecommunications (6 actions). The main reasons for bringing actions for injunction in the field of energy and telecommunications were the large number of consumer complaints in both sectors. As most of the cases are still pending in court, it is not possible to state the impact of the Directive on these sectors.

Due to the small number of successful cases, it is difficult to state that the directive has enhanced compliance with consumer law among economic players to a measurable degree. Such an effect, to ensure compliance with consumer law among economic players to a measurable degree is generally considered unlikely by the interviewees. This is particularly valid for the sectors of telecommunications, and energy, (especially central heating supply), in which 'qualified entities' have received a large number of complaints.

In view of the very small number of successful injunctive actions, it is not possible to assert that the enforcement of the Directive has had tangible effects on the national markets.

The implementation of the directive so far by the qualified entities and by the courts is not giving a good reason to believe that it works as a deterrent to discipline markets. On the other hand, some of the interviewees mentioned that the very possibility of being able to bring injunctive redress action has an inherent deterrent effect in negotiation with infringers of legislation. In general all interviewees tend to agree that the implementation of the Directive has had positive effects in the sense of enhancing competition on the following markets:

- the market of electricity supply, where injunctive actions were filed against all biggest companies for electricity supply;
- the market of direct selling (teleshopping), where 28 injunctive actions were filed against traders selling at distance. 70% of the actions filed in this sector were against the same trader.

2.1.6.7.5 Relationship with CPC-mechanism

The Commission for Consumer Protection is a qualified entity under the injunctions directive and a competent authority under the CPC Regulation. It is the only governmental body authorized to initiate actions for injunction in court to bring a cease-and-desist order in national proceedings and to cease cross-border infringement of consumer protection legislation, listed in the Annex of Directive 98/27/EC, codified by Directive 2009/22/EC. The other competent authorities under the CPC - Regulation are not authorised to bring injunctive redress actions in court.

For the period January 2007 - August 2011 there have not been any injunction proceedings brought under the CPC-Regulation by the CCP.

During the period 2007 - 2010, the Commission for Consumer Protection has received the following requests under the CPC Regulation: 2 requests for providing information and 55 enforcement requests in 2007; 63 requests in 2008[59]; 34 requests for undertaking action and 3 requests for information in 2009[60]; 16 requests in 2010. For the same period the CCP has sent 4 information requests and 8 enforcement requests in 2007; 2 enforcement requests in 2008 and 4 requests in 2010.

2.1.6.7.6 Relationship with alternative procedures / procedures allowing to claim compensation

There is a link between the collective interest action under Article 188 of the Law on Consumer Protection and the representative action under Article 189(1) of the LCP, on the one hand and the action for injunction. If the action for injunction is successful, the individual consumers or group of consumers can bring an action for compensation. In this court action, they will not have to prove the violation of legislation; they will have to prove the amount of damage suffered. Before the court, individual consumers, consumer organizations or ‘qualified entities’ may invoke an enforceable court decision on an action for injunction. It is possible to join for examination in the same proceedings the action for injunction and the action for compensation of collective interests of consumers, or the representative action under Article 189 of the LCP. Quite often courts divide both actions in separate proceedings.

[59] Report from the Commission to the European Parliament and Council on the application of Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws;
[60] Annual report of the Commission for Consumer Protection for 2009 and 2010

2.1.6.8 Problems

It emerged from the interviews that the following problems may be formulated with regard to domestic injunctions.

Procedural problems:

Length of the procedure:

The length of the procedure is considered as a major problem reducing the effectiveness of the actions for injunction. Furthermore, the requirement for announcing the actions for injunction is causing additional financial burden for 'qualified entities', as they have to comply with orders of the court to make a number of announcements in media on the action and on the possibility for any person who wish either to join the action, either to declare that he/she will bring an individual claim. The existence of additional criteria laid down on the Code of Civil Procedure with regard the admissibility of claims, i.e. 'qualified entities' have to prove their capacity to incur the charges related to the conduct of the case, including costs is considered as an additional difficulty for bringing actions in court.

Costs:

Consumer organisations do not receive any subsidy for court actions; they have to finance court actions themselves. Third party financing is not developed in Bulgaria.

Cost risk of litigation:

There is a financial risk associated with the bringing of actions for injunction, stemming from the rule that the plaintiff, in the event of losing the case, bear the entire costs of litigation, including those of the successful party. In this case, in addition to the costs for bringing the action, the plaintiff will have to pay the lawyer's fees of the adverse party. The cost risk of litigation could be considered as an important problem for bringing actions for injunction.

Scope of action (substantive law):

The scope of the action for injunction of Bulgarian law covers much more than the legislation implementing the Directives listed in Annex to Directive 2009/22/EC; it aims at every legislation that protect directly or indirectly the interests of consumers.

Private international law:

Provisions of Article 6 of the Rome II – Regulation 864/2007/EC have not been used.

2.1.6.9 Suggestions for improvement

According to the interviews conducted, the scope of the directive on actions for injunction could cover also issues relating to the health and safety of consumers, as well as labelling, presentation and advertising of foodstuffs, services of general interests: water, gas, electricity, central heating, telephone; financial services; misleading advertising.

It will be useful to consider the synchronisation of the scope of Directive 2009/22/EC with that of Regulation (EC) № 2006/2004/EC on cooperation between national authorities responsible for the enforcement of consumer protection laws. This will require the Annex to Directive 2009//22/EC to be aligned with the Annex to Regulation (EC) № 2006/2004/EC. Others propose the current Annex to Directive to be repealed which will considerably broaden the Directive's scope.

All interviewees consider it very important to envisage an accelerated procedure for the actions for injunctions in all cases and not only 'where appropriate', as provided for by Article 2 letter "a" of Directive 98/27/EC.

A provision requiring the mandatory use of an accelerated procedure for all actions for injunction would help greatly making the Directive more effective. The directive could contain some requirements with regard to the accelerated procedure, namely with regard to deadlines for rendering the court's decision on the injunction. It is hoped that such a measure would increase the effectiveness of the Directive.

Some of the interviewees mentioned that provision could be made in the Directive for a degree of harmonisation between procedures for filing injunctive actions, including the time limits for introducing the action, the deadline for rendering a court decision and the costs associated with the bringing of actions for injunction.

With regard to litigation costs the interviewees put forward the following suggestions:

- Ensuring that procedure-related costs do not prevent the bringing of the action for injunction;
- Envisaging a possibility to pay lower court's fees, if the plaintiff is a qualified entity in an action for injunction or;

- Exemption of the qualified entities from the payment of court fees on bringing an action.

2.1.6.10 Sources

1. Sylvie Chernev, article “Procedure of collective actions in court”, in “Commercial and competition law” (Търговско и конкурентно право), vol. 8 of 2008, (Trud and Pravo ed, Bulgaria);

2. Methody Markov, article “Collective actions” in “Law and Society Revue” (Общество и право), vol. 9 of 2007, Bulgaria;

3. Zlatka Sukareva (ed. Feneja, Bulgaria in 2001): “Civil law means of consumer protection (Гражданско правна защита на потребителя)”;

4. Tchoudomir Goleminov (ed. Ciela, Bulgaria in 2001), “Legal protection of consumers” (Правна защита на потребителите);

5. Opinion of the Economic and Social Council of Republic of Bulgaria on the measures to improve legal protection of consumers, 16 April, 2007

6. C.E. Cote, Judith Fazekash, Judith Peter and Klaus Vitannen: “Access to Justice and alternative dispute resolution systems in Central and Eastern Europe” published by the Consumer Institutions and Consumer Policy Programme (CICPP №16), funded by Phare Programme, European Commission;

7. Jean-Paul Prichard (ed. in 2001), “Consumer Protection in Bulgaria”, final report not published of the Consumer Institutions and Consumer Policy Programme (CICPP), funded by Phare Programme, European Commission;

8. Anne Salaun (ed), “Access to justice for consumers in Central and Eastern European countries”, published by the Consumer Institutions and Consumer Policy Programme (CICPP № 8), funded by Phare Programme, European Commission.

2.1.6.11 Glossary

LCP	Law on Consumer Protection
CCP	Code of Civil Procedure
CCP	Commission for Consumer Protection
CPC	Consumer Protection Cooperation under Regulation 2006/2004/EC
FCB	Federation of Consumers in Bulgaria

3. FRANCE

Before the Injunctions Directive was conceived, France took the lead in creating *Actions en justice des associations*, just as consumer law and consumer governance generally has traditionally been very developed in this Member State. The practical use of the various instruments is marked by parallelism between civil action, criminal law and administrative enforcement, where criminal law forms the basis for policing consumer markets.

Key findings

Minimal transposition embedded in existing system of representative action

Strong tradition of representative action by consumer organisations

Practically no cross-border cases of the Injunctions Directive's design

Numerous national cases

Private international law still considered as a problem (jurisdiction, applicable law and recognition of foreign body to speak in the interest of consumers)

3.1The setting for injunctions

3.1.1 The law – legal environment for injunctions

The transposition of the Injunctions Directive was minimal. *Ordonnance 2001-741* amended Art. L. 421-6 C.Cons. added the *Action en cessation de pratiques illicites* in a single provision to the already existing instruments of the *Actions en justice des associations* (*Action civile* – Art. L. 421-1 C.Cons., *Action en représentation conjointe* – Art. L. 422-1 C.Cons. and *Action en suppression de clauses abusives* – Art. L. 421-6 C.Cons.). Injunction procedures of this kind can be carried out by consumer *associations agréées*. These are also entitled to obtain order to stop illicit conduct (art. L 421-2 C.Cons.). Such an application can be made in civil actions carried out in the collective interest of consumers. Consumer organisations are therefore – in a sense – spoiled for choice, having four procedural tools at their disposal. The new powers given to qualified entities are, however, not limited to intra-Community infringements but extended to national infringements as well.

3.1.2 Qualified entities

France notified eighteen consumer organisations as qualified entities on the basis of Art. L. 421-6 C.Cons. to the Commission. In order to apply the powers of *Actions en justice des associations*, consumer organisations need to be admitted (*agrément*) under the conditions spelled out in Art. R. 411-1 C.Cons. However, most of them do not pursue court actions (« ce n'est pas dans la culture de certaines organisations ») and only two can be described as initiative takers which also have the capabilities of pursuing actions across intra-Community borders.

Recently, the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* (DGCCRF)[61] was also included in France's notification. It too was given authority to take legal action for injunctions to stop illicit activities and to remove unfair terms. The DGCCRF is a public enforcer and is also single liaison office (*bureau de liaison unique*) for the CPC-mechanism.[62] Its powers are extended by virtue of Art. 141-1 VI C.Cons. Its inclusion in the Commission's list was said to be due to the tendency to shift consumer law enforcement away from criminal law (« essaie de dépénalisation ») and towards other means of enforcement. Instead of bringing criminal charges against offenders against consumer law, the authority now uses an alternative tool that allows negotiations and compromise with business operators.

3.1.3 Initiative takers

Only two organisations routinely engage in procedures by civil actions in the collective interest of consumers to produce injunctions, and are also considered capable of staging cross-border litigation:

- UFC-Que Choisir[63]
- Consommation Logement et Cadre de Vie – CLCV[64]

When engaging in litigation, initiative takers seem to share the same external legal advice when pursuing infringement cases. The practical role of the DGCCRF, because of its recent introduction, is as yet to be defined. So far the DGCCRF has filed 13 cases one of which is of inter-Community nature.

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[61] http://www.economie.gouv.fr/dgccrf
[62] OJ C 260, 2.9.2011, p. 1
[63] http://www.quechoisir.org
[64] http://www.clcv.org

3.1.4 Resources

By law, a French consumer organisation operating at national level needs to have a significant membership base (10,000 persons according to Art. R 411 C.Cons.) which also forms the basis for its revenues. Further criteria for an association *agréé* entitled to take action are stated in Articles L 411-1 and R 411-1 C.Cons.

3.1.5 Alternative procedures / procedures allowing to claim compensation

There are no direct benefits a consumer can receive from successful injunctions. Injunctions have a « rôle officiel » and are not seen as a means to help individual claims.

3.2 Application of Directive 2009/22/EC in practice

3.2.1 Use of the Directive by qualified entities

3.2.1.1 Overall impact on consumer governance

Interviewees welcome the Directive’s transposition as a completion of the consumer associations’ legal toolbox. Official statistics are lacking but the overall impact of the procedure introduced by the Injunctions Directive was estimated to be low. The available data for cases since 2008 shows the following picture:

	Undefined	Domestic	Cross-border
DGCCRF		12	1
UFC-Que Choisir	15	n/a	n/a
CLCV	6	n/a	n/a
Others			1

3.2.1.2 Business sectors affected

The business sectors most prone to injunctions proceedings (DGCCRF, UFC, CLCV each naming different areas most affected) were:

- Banking services
- Real-estate

- On-line hotel reservations
- Transport
- Telecommunications (pre-paid cards)
- Health claims
- Non-food consumer goods
- Lotteries
- Household improvement (fitted baths & kitchens)
- Business directories[65]

3.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

Of the type of cross-border cases envisaged by the Injunctions Directive, very few have been reported. The DGCCRF reports that it has taken action against a French web-site operator upon the request of a number of consumer authorities for infringing a number of EU consumer rules. The case was pending before the *Tribunal de grande instance de Paris*. In another case UFC attempted to bring a cross-border injunction in a French-Swiss case. The *Tribunal de Commerce d'Avignon*, however, in its decision of 29.1.2010, denied having international jurisdiction for the case which abrogated the procedure.

3.2.1.4 Cross-border litigation (bringing cross-border infringements before foreign courts)

UFC-Que Choisir acted with DECO (Portugal) and Test-Achats (Belgium) against unfair terms and for fare transparency of air carriers. This form of coordinated action is unique and represents a *sui generis* form of cross-border cooperation although not formally qualifying as cross-border litigation.

While cases were brought against traders from other Member States who targeted French consumers but did not respect their rights, and the French judiciary showed itself prepared to deal with them, the enforcement of the ensuing judgments proved to be difficult in practice (« *quoi faire avec un injunction français ?* »). Without naming figures or quoting cases, it was stated that the execution of judgments was a major obstacle to translating a hard-won success before the home judiciary into results abroad.

3.2.1.5 Domestic use

At national level, initiative takers report that they have brought about 20 cases (the figures mentioned by

[65] Part of France's policy for the protection of SMEs

UFC-Que Choisir and CLCV were identical with those cited in their answers to the Commission's questionnaire).

Online research yielded a total number of 41 cases of *action en cessation de pratiques illicites* since 2008 – a significant number given that the procedure was receiving little attention in consumer governance, and legal writing on the subject was sparse.

3.3 Economic impact and effect on markets

3.3.1 Benefits for qualified entities

The availability of an additional procedural tool was considered to be useful. In legal terms it is important to note that designated bodies do not only possess the capability to request to have practices ceased, but also to pursue damages claims in the form of the *intérêt collectif des consommateurs* (which do not, however, lead to compensation of individual consumers).

3.3.2 Benefits for consumers generally

No particular advantage was reported due to the accrued powers of qualified entities apart form a dissuasive effect generally flowing from their mere existence.

3.3.3 Benefits for individual consumers

Due also to the lack of available statistical data, no particular incidents were reported where consumers benefited indirectly from an *action en cessation de pratiques illicites*. Direct advantages in the sense of claiming compensation for harm suffered are not possible as French law does not permit individual restitution of damage by way of *actions en justice des associations*. Neither has the *action en representation conjointe* (Art. R 422-1 C.Cons.), which gives consumer associations the opportunity to sue for reparations in the name of consumers ceding their claims to the association, helped to generate significant benefits for consumers who are victims of consumer law infringements.

3.3.4 Effects on markets

Measuring the real-life effect of the transposition of the Directive, a distinction has to be made between the intra-Community impact and the impact at national, even regional level.

As a tool for cross-border litigation the impact appears to be very limited. This might quickly change once cross-border cases are successfully pursued. For the moment, interlocutors do not see much potential for this to become widespread, although they admit that e-commerce, especially when communicated in French, has the potential to produce cases that could become powerful for consumer law and thus injunctive relief.

As a tool of national litigation it was welcomed as a "completion of the toolbox." Otherwise the injunctions mechanism as developed by the Directive had little impact because, in France, all economic players have been used for a considerable time already to a whole variety of fairly developed procedural tools that can be used by consumer associations (*Actions en justice des associations* – Art. L 421-1 *et seq*. C.Cons.). The thought was expressed that the effect might be more felt in a Member State without such a lengthy experience of consumer litigation as France (that is, the new Member States).

The existence of injunctions may have a disciplinary effect on the telecoms sector and the banking sector particularly where contract clauses may relatively often become subject to criticism. Other sectors may not fear the instrument simply they do not know about it.

Otherwise, mediation is used in France more then elsewhere to resolve issues (« un litige est un échec ») which further limits the use of injunctions.

One voice was heard saying: "Where a tool is not used, it is not useful."

3.3.5 Relationship with the CPC-mechanism

The CPC-mechanism and cross-border injunctions proceedings are seen to be unrelated (although the one cross-border case reported by the DGCCRF appears to have its origin in requests for assistance from other Member States).

3.3.6 Relationship with alternative procedures / procedures allowing to claim compensation

Injunctions, having an official function in market surveillance, are largely seen as disconnected to individual claims. Formal relations do not exist that would help consumer to pursue claims based on injunctions. Recent changes to the law aiming at making the pursuance of small claims easier have not brought the desired effect. The same is true for the *Action en représentation conjointe* (loi n° 92-60 du 18 janvier 1992)

allowing consumer organisation to take action, *en reparation*, in the name of consumers.

3.3.7 Problems

Despite the straightforward rule introduced by the Injunctions Directive that qualified entities are entitled, without further justification, to stand up in foreign courts for the interests of consumers in their country of origin, challenges to this claim seem to persist. Also mentioned as problems were:

- Determining the responsible forum for international injunctions proceedings ('Brussels I'-Regulation)
- Determining the applicable law on the case ('Rome II'-Regulation)
- Requirement and cost of hiring external help for the level of *Tribunal de grande instance* (attorney's support)[66]
- Requirement and cost of translating official documents for court use

Injunctions at national level also face difficulties when pursued in the judiciary. Here the issues named were:

- Length of proceedings generally
- Collection of evidence
- Lack of traders' funds, after a successful lawsuit, for compensation and recovery of costs
- Interpretation of Art. L 421-6 C.Cons. making lawsuits against unfair terms obsolete when disputed contract terms are no longer proposed by the trader to the consumer (judgment of *Cour de Cassation* of 1.2.2005; now planned to be reversed by draft law).

3.3.8 Suggestions for improvement

The Injunctions Directive was considered to be well crafted. It establishes rights for qualified entities to be used in foreign courts. The idea is straightforward and so is its implementation by the Directive. There is, therefore, no imminent need to amend it. In any event exhaustive studies would have to be carried out before considering amending the Directive in any way.

The failure to file a lawsuit with the *Tribunal de Commerce d'Avignon* shows, however, that in cross-border

[66] Court fees are not relevant

cases, questions of jurisdiction can lead to the rejection of a case. Here it was the case that of the issues addressed by private international law, the question of the applicable law was not the problem (which Article 6 of the 'Rome II'-Regulation should resolve), but the question of the competent court, that is, issues addressed by the 'Brussels I'-Regulation.

It was stated by consumer advocates that the scope of injunctions could be extended to cover all kinds of infringements of consumer rights and user rights.

Consumer advocates also stated that sanctions could be complemented by fines and compulsory publication of judgments, partly to inform consumers.

What could be improved is the level of knowledge about injunctions. The regional differences between the use and non-use of injunctions may be determined by the fact that in some regional offices of qualified entities legal officers know about injunctions and their use and application, whereas in others they do not or not to a sufficient degree. Considering that the procedure is relatively straightforward (the gathering of evidence may not be, but this may be secondary in principle).

Government interlocutors, however, take a very cautious approach towards possible amendments of the law. They do expressly object, for instance, against the idea of empowering courts to not only order the cessation of practices but obliging parties to act in certain ways. No individuals should be given the possibility to bring injunctions. Accelerated procedures would be misplaced in injunctions proceedings. Injunctions should stay within their national jurisdictions, rejecting the idea of a cross-border effect given to them. They should also strictly remain applicable between the parties only. Finally, Union law should not interfere in any way in how court fees are structured.

3.3.9 Glossary

C.Cons. — Code de la consommation

CLCV — Consommation Logement et Cadre de Vie (consumer organisation)

DGCCRF — Direction générale de la concurrence, de la consommation et de la répression des fraudes

UFC-Que Choisir — Union fédérale des consommateurs

3.3.10 Addendum

A draft law will be discussed before the *Assemblée nationale* in the autumn of 2011 that intends to improve the rights, protection and the information of consumers in various sectors (*Projet de loi renforçant les droits, la protection et l'information des consommateurs*[67]). Article 10 of the bill aims, among other things, at reinforcing the actions for cessation of the use of unfair contract terms ("clauses abusives" and "clauses illicites") in consumer contracts.

Article L. 421-6 of the French Consumer Code foresees that, upon request by a qualified consumer organisation, a civil judge may order "*the deletion of an illicit or abusive clause in any contract or standard contract offered to, or intended for, the consumer*", i.e. in *future* contracts. Article 10 of the bill would add to that a provision whereby, in particular, the judge may also order that the illicit or abusive clause referred to be left unapplied in all future *and existing* identical contracts. In other words, Article 10 would, if adopted as proposed, change the situation whereby a ruling only applies to the particular consumer whose contract is subject to the lawsuit (*inter partes* effect); instead, a ruling would apply in favour of all consumers having signed the same contract with this business operator (*erga omnes* effect). By virtue of this bill, the current practice would change. Indeed, according to the case law of the *Cour de cassation* (rulings dated 1 February 2005), the subject-matter of a consumer organisation's lawsuit against a contractual unfair term is deemed non-existent (*sans objet*) where the term is no longer used in B2C contracts. In their answers to the Commission, UFC and CLCV (two French consumer organisations) complained that such case law imperils the efficiency of litigation against unfair terms.

[67] http://www.assemblee-nationale.fr/13/dossiers/protection_information_consommateurs.asp

4. GERMANY

… is an example of a country where market surveillance, and injunctions as tools to impose respect for consumer law, are put firmly in the hands of private enforcers. It is also an example of a Member State where cases with cross-border elements are tackled domestically.

Key findings

Transposition of Directive brought clarification of domestic consumer law and a new cross-border procedure that is not used

Private enforcement of consumer law is the bedrock of enforcement. Injunctions are of crucial importance

If tackled by injunctions, cross-border issues are addressed by lawsuits brought before domestic courts, not in a foreign jurisdiction

4.1The setting for injunctions

4.1.1 The Law – Legal environment for injunctions

In Germany, policing consumer markets is traditionally done by **private enforcement**. *Verbraucherverbandsklagen* (Corporate Consumer Actions) have existed since the 1960s and are very commonly used, amounting to hundreds of cases annually, thousands of out-of-court *Abmahnungen* (Letters of Caution) are included in this calculation. *Unterlassungsklagen* (cease-and-desist orders) in the consumers' interest were introduced in 1965 in the *Gesetz gegen den unlauteren Wettbewerb* – **UWG** (Act Against Unfair Competition) as a tool against consumer law infringements amounting to an unlawful competitive advantage for the trader. Cease-and-desist orders against unfair contract terms have been based on the *Gesetz über Allgemeine Geschäftsbedingungen* – AGB-Gesetz (Act on General Contract Terms) since 1977. The transposition of the Injunctions Directive first came as an amendment to the AGB-Gesetz in 2000 and as an addition to this already developed system. Since 2002 injunctions following the Directive (including

injunctions against unfair terms) have been subject to a separate Act, the *Unterlassungsklagengesetz* – **UKlaG** (Act on Cease-And-Desist Orders). Both instruments – the UKlaG and the UWG – are used in a complementary way to ensure fair business practices and supervise consumer markets. They give designated bodies the opportunity of suing in court for infringements of laws protecting consumers. Three forms of procedure need to be distinguished:

In the UKlaG, a distinction is made between **injunctions against unfair contract terms** (§ 1 UKlaG) [Injunction Action No. 1] and **injunctions against practices infringing laws that protect consumers** (§ 2 UKlaG) [Injunction Action No. 2]. **Injunctions for pursuing illicit market practices** are also possible under § 4 Nr. 11 UWG [Injunction Action No. 3] Injunctions Actions No. 2 and No. 3 are not identical but overlap in scope and are used in a complementary fashion. But differences remain. The skimming of profits is possible only under the UWG (§ 10 UWG). Under both acts, before a court is seized, the defendant trader must be given the opportunity to declare the cessation of the practice in question after a Letter of Caution (*Unterlassungserklärung*). Under the UKlaG, a qualified entity can choose to which court it wishes to appeal (thus allowing a form of forum shopping) while under the UWG the case must be brought before the court where the defendant party is resident.

A generous application of the **notion of 'consumer laws'** entitles designated bodies entitled to pursue a wide range of infringements. With regard to the scope of the UKlaG, the German legislator has decided to make use of the flexibility provided by the minimum harmonisation character of the Injunctions Directive (Art. 7) by notably:

- permitting (nationally) injunctions against infringements of 'provisions for the protection of consumers' (and not just infringements of the consumer directives listed in the Directive's annex) (§ 2 Abs. 1 UKlaG);
- permitting (cross-border) cease-and desist orders against intra-Community infringements of the laws listed in Annex I of the CPC-Regulation (§ 4a UKlaG).

Because of these extensions in scope, injunctions have notably been issued in favour of certain **groups of users**, namely

- customers of utilities (notably in the energy sector)
- users of telecom services (infringements of cold calling bans under Directive 2002/58/EC)
- users of transport services (passenger rights)

Other features of the UKlaG and the UWG are referred to where relevant elsewhere.

With regard to the CPC-Regulation, the *Verbraucherschutzdurchsetzungsgesetz* – VSchDG (Consumer Protection Enforcement Act) provides the executive legal framework.

4.1.2 Qualified entities

The UKlaG differentiates between national and cross-border infringement cases. Only qualified entities (the bodies on the Commission's list) are entitled to pursue cross-border cases (§ 3 Abs. 1 Nr.1 and § 4 UKlaG). Criteria for admission are laid down in § 4 Abs. 2 UKlaG. Consumer organisations are listed exclusively (§ 4 Abs. 2 UKlaG). The activities of trade associations (namely the *Wettbewerbszentrale*[68] – Centre for Protection against Unfair Competition) and chambers of commerce and associations of craftsmen (§ 3 Abs. 1 Nr. 2 and 3 UKlaG) are therefore limited to litigation in their home jurisdiction.

With 77 qualified entities (§ 4 UKlaG) notified to the recent Commission's list, Germany is the Member State with the highest number of bodies formally entitled to pursue cross-border infringements. Since 2007, the list has been composed by the *Bundesamt für Justiz*[69] (Federal Justice Office) which seems to apply stricter criteria then the previously responsible *Bundesverwaltungsamt*[70] (Federal Administration Office), which was previously responsible, with just four admissions since it took over.[71]

4.1.3 Initiative takers

Only a fraction of the bodies listed on the Community list, however, engage in court proceedings. A number of regional *Verbraucherzentralen* (Consumer Centres) are active litigants in injunctions proceedings (namely Nordrhein-Westfalen, Hamburg and Baden-Württemberg). Their capabilities for mounting an injunction procedure seem to depend on the skill and abilities of individual members of their staff as well as their financial resources. The lion's share of cases, however, is taken up at federal level by the *Verbraucherzentrale Bundesverband* – VZBV[72] (Federal Association of Consumer Associations).

On the business-side the *Wettbewerbszentrale* stands out as the most significant advocate for the respect of consumer laws in the name of ensuring fair competition. The WZ is, however, not classified as a qualified

[68] http://www.wettbewerbszentrale.de
[69] http://www.bundesjustizamt.de
[70] http://www.bva.bund.de
[71] Meller-Hannich/Höland study, pp 130 et seq. (http://download.ble.de/09HS011.pdf)
[72] http://www.vzbv.de

entity. With a focus on functioning markets about two-thirds of court cases begun by the WZ deal with consumer protection issues.

Relations between the bodies are cordial. Indeed, a state-sponsored division of labour coordinates the efforts of the VZBV and the WZ (below).

4.1.4 Resources (manpower & finance)

The main consumer initiative taker VZBV is about 90% state-funded and 10% self-financed. Of its 70+ staff only a small number work on lawsuits. Consumer centres are mainly financed by the *Länder* and project-funded by the Federal government. The main business initiative taker WZ is 100% self-financed. It has a staff of about twenty lawyers.

4.2 Application of Directive 2009/22/EC in practice

4.2.1 Use of the Directive by qualified entities

4.2.1.1 Overall impact on consumer governance

In Germany the introduction of the possibility to enforce cease-and-desist orders abroad was a much a novelty as everywhere else. But overall, the Directive's transposition exerted **a rather limited effect on established patterns of consumer law enforcement**, especially in the first transposition (2000-2002). The second transposition in the form of the UKlaG is said to have brought some **clarifications** (on the notion of 'consumer law' for instance) and also **innovations**. One innovation advertised as particularly useful is the possibility to request telecom operators to disclose the identity and the address of traders using telecom services to approach consumers where no other means exists to verify their identity and whereabouts (§ 13 UKlaG).

Therefore, the benefit brought by the Directive is that of a "useful complementary tool". Its transposition has brought "clarification" in particular concerning the control of unfair terms where the UKlaG is regularly used.

The impact on court practices is difficult to measure. Official statistics about injunction proceedings do not

exist. Qualified entities and nationally designated bodies gather data about their own activities[73], but knowledge remains patchy due to the regrettable lack of official record keeping.

4.2.1.2 Cross-border litigation (bringing cross-border infringements before foreign courts)

Under the CPC-Regulation, six enforcement requests have been brought, according to the statistics kept by the *Bundesamt für Verbraucherschutz* – BVL[74] (Federal Consumer Office) (see below).

4.2.1.3 Cross-border litigation (bringing cross-border infringements before domestic courts)

Challenged by traders with disrespect of consumer law originating from abroad, German qualified entities have developed a preference for **bringing injunction procedures before courts in their own country**. With about 20 cross-border court cases of this kind, the VZBV has gathered considerable experience. With injunctions aimed at Liechtenstein (as an EEA member State obliged to transpose most of the consumer *acquis*) and Switzerland (a European country outside the EU/EEA context) and the U.S.A. (distance selling) and the United Emirates (call centres) as countries overseas, extraterritorial injunction cases have become part of the repertoire of consumer enforcement.

In number of cases, however, the *Wettbewerbszentrale* was most active. Between 2008 and 2010, it dealt with numerous cross-border complaints where the rights of German consumers were not respected:

	2008	2009	2010
Cross-border complaints against foreign traders	180[75]	120[76]	190[77]
(non-EU cross-border complaints)	52	36	99
Cessation of practices claimed	66	65	96
Injunction suits before German courts	2	n/a	0

[73] Cf. annual reports of the VZBV and the *Wettbewerbszentrale*
[74] http://www.bvl.bund.de
[75] Mainly from GB, AT, CH, NL, USA
[76] Mainly from GB, FR, AT, CH, ES
[77] Mainly from AT, CH, NL, GB

In the same period, the *Wettbewerbszentrale* intervened in several instances against German traders in the interests of non-German consumers:

	2008	2009	2010
Cross-border complaints against German traders	20	15	28
Injunction suits before German courts	2	3	0

4.2.1.4 Domestic use

As stated, domestic injunctions were by no means new to German law and legal practice when the Directive was adopted. Accordingly there are many domestic cases. Of the two UKlaG procedures available (unfair terms / infringement of other consumer laws; see above) infringements against unfair terms are often used while infringements against other consumer laws are more often pursued by the parallel UWG-procedure rather than the UKlaG procedure. Preliminary Letters of Caution and court cases are applied in a 10:1 ratio.

The business sectors/practices most prone to infringements were:

- financial services (bank & insurance)
- travel services
- distance selling
- unsolicited commercial communications
- unclear price indication
- illicit prize draws

The UKlaG also seems to play an increasing role in supervising particular product markets like pharmaceuticals, medicinal products and foodstuffs with health claims.

The VZBV provides the following overwiew:

Sector	**2008**	**2009**	**2010**	**By Sept. 2011**			
Banking	21	13	23	70			
Insurance	5	14	14	10			
Telecommunications	48	16	12	11			
Package travel	-	7	8	12			
Passenger transport (air, rail, sea, coach)	19	32	16	12			
Car transport (car sales, car rentals, parking)	-	5	6	7			
Scam (prize draws, city guides)	-	10	5	4			
Postal services	1	-	-	2			
Non-food consumer goods	Not registered						
Housing (contracts of sale, tenant contracts, real estate agents)	-	-	1	-			
Timeshare	-	-	-	-			
Energy and other utilities	7	33	9	6			
Miscellaneous like advertising with product test results, climate related advertising, distance selling, building	101/-/7/-	102/26/11/4	100/19/5/2	69/-/2/2			

The VZBV further reports that about 80% of court proceedings are successful in full or partly. On average 50% of injunctions cases can be settled out of court by cease-and-desist declarations. Still, pursuing court cases is costly depending on the value and the outcome of the proceedings and amount to up to 15,000

Euro after court of first instance and two appeal courts. The length of proceedings can vary as much as between six months to five years.

While, on e another account, the VZBV and the VZ have taken up injunctions actions 871 times since 2008, the *Wettbewerbszentrale* took traders to court 788 times in the same period.

	2008	2009	2010
Letters of caution (all)	7,494	7,070	6,258
Injunction suits (all)	202	315	271
Letters of caution with consumer relevance	5,396	5,232	4,819
Injunction suits with consumer relevance	165	225	209

4.3 Economic impact and effect on markets

4.3.1 Benefits for qualified entities

In the wake of the Directive's transposition, a number of amendments were made to the law relevant to the wider context of consumer law enforcement.

Since 2004, the UWG has permitted the skimming of profits (*Gewinnabschöpfung*) in § 11 UWG. Practice shows, however, that this provision is very difficult to implement. While it is possible to have promising cases financed by third parties having a commercial interest in the success of the consumer organisation, the profit skimmed would not go to the winning party but the Federal budget which limits the attractiveness of the procedure. So far the procedure has been applied only twice successfully.

The *Rechtsberatungsgesetz* (Art. 1 § 3 Nr. 8 RBerG) makes it possible for consumer organisations to legally pursue the claims of individual consumers ceded to them, offering the possibility of representative actions (*Musterklage*) and group actions (*Sammelklage*).

Often a qualified entity has the choice to rely its case on either § 2 UKlaG or § 4 Nr. 11 UWG (see above). In bringing the case under the UKlaG, the qualified entity can choose to which court it wishes to appeal (thus

allowing a form of forum shopping) while under the UWG the case must be brought before the court where the defendant party is resident. This has been described as a welcome measure of flexibility.

4.3.2 Benefits for consumers generally

Consumers generally benefit from a well-functioning system of consumer market surveillance of which the Directive's transposition is part.

4.3.3 Benefits for individual consumers

Individual consumer benefited from the use of UKlaG where a contract term was declared unfair. Consumers were enabled to invoke injunction rulings for their individual subsequent lawsuit as a court decision declaring a contract term null and void is binding for subsequent cases where the convicted trader continues to use the term or refers to it (§ 11 UKlaG). This, however, appears to be the only example for direct benefit. Under German law, there are no direct claims of individual consumers where there has been a successful cease-and-desist order.

4.3.4 Effects on markets

The pattern of (private) enforcement of consumer law is well established and may serve merely by existing as a deterrent against unlawful practices. Given, however, that statistical data is poor, it is not possible to gauge the depth of this impact.

It has become clear, however, that injunctions only work where traders are susceptible to the intervention of the law and of courts. Experience shows that rogue traders are unimpressed by injunctions even when addressed against them directly. The more the shades of grey get darker, the fewer injunctions seem to have any effect at all. For fraudulent scams cross-border, the CPC-mechanism is considered to be the more suitable instrument.

4.3.5 Relationship with CPC-mechanism

Public enforcement in Germany is a recent invention made in the wake of the CPC-Regulation's implementation. The *Bundesamt für Verbraucherschutz* – BVL[78] (Federal Consumer Office) is Germany's Single Liaison Office. Government bodies are therefore not entitled to initiate an injunction action and cases are referred to private enforcers. For the purposes of the CPC-Regulation, in a framework agreement between the BVL with the *VZBV* and the *Wettbewerbszentrale*,[79] the two bodies are charged with pursuing consumer law infringements (§ 7 VSchDG).[80] From the BVL's regular reports,[81] the following activities can be reported:

	2008	2009	2010
Letters of Caution	6	11	3
Declarations of cessation	3	8	3
Injunctions suits or other measures	1	5	0
Closed cases / closed files	5	2	5

4.3.6 Relationship with alternative procedures / procedures allowing compensation claims

Even after successful injunctions consumers need to sue individually to take advantage. There is for instance no direct obligation of the losing party in a case on the use of unfair terms to compensate consumers who paid due to the unfair term. Not reimbursing consumers is no breach of the injunction order. Neither are there accompanying measures that would help consumers to obtain damages. The only procedure available is the skimming of profits under § 10 UWG which, however, even when successful, goes to the benefit of the public purse and not the consumer.

4.3.7 Problems

It emerged from the interviews that of the range of problems standing between the use of cross-border injunctions in theory and their application in practice, the problem of litigation costs is paramount. Should the qualified entity lose the lawsuit, the financial consequences could be grave indeed. The opposing party

[78] http://www.bvl.bund.de
[79] The *Wettbewerbszentrale* is no qualified entity but a recognised body under the CPC-Regulation.
[80] Bundesanzeiger Ausgabe Nr. 90 vom 19.06.2008, S. 2145
[81] The latest report dates from 1 February 2011 for the years 2009/2010

could recover the costs of the litigation and, should preliminary relief have been granted, claim damages (§ 945 ZPO). Given the considerable financial loss a lost lawsuit can represent for a qualified entity, actions are limited to 'sure winners'. An 80 to 90 % success rate for cases begun under these circumstances is the consequence. Still, some associations stress the importance of having the opportunity to take a measured risk in pursuing cases with an as yet uncertain outcome. It should be possible, they argue, to fight a lawsuit through the judiciary up to the national level or even the ECJ to clarify a point of concern.

In purely procedural terms, translation costs are considered an obstacle.

Foreign traders can be moving targets for enforcement measures. Identifying a foreign trader and finding his address for sending Letters of Caution or filing a lawsuit can therefore prove exceedingly difficult. If traders change to third countries, all efforts to pursue them could be thwarted.

Judgments have effect only *inter partes*. Third parties (consumers) may rely on an injunction against unfair terms (§ 11 UKlaG); this provision is, however, largely deprived of effect given that consumer claims will usually be forfeited once the (often lengthy) injunctions procedures come to a conclusion.

It has not been possible as yet to ascertain whether it was due to lack of knowledge, inexperience or genuine weakness of the law that uncertainty about the rules of private international law (PIL) was mentioned as an obstacle against cross-border cases. Questions about jurisdiction ('Brussels I') and the applicable law (mainly Article 6 'Rome II') may be at first complex to answer, however, the interviews revealed that qualified entities are not or are only shallowly informed about PIL and seem not be prepared to venture into a field of law that is unfamiliar.

A problem repeatedly mentioned was that of the difficulty of proper service of documents, that is, filing lawsuits and the necessary legal correspondence in a foreign jurisdiction.

4.3.8 Suggestions for improvement

- Information about the civil procedure of Member States should be available on-line on the EU's server to make application of these rules easily accessible and practicable.
- Service of documents abroad needs to be facilitated. Currently it can take prohibitively long to send Letters of Caution.

- Given that consumer interests also need to be safeguarded in social networks, the Data Protecting Directive should be included in the notion of "laws that protect consumers".
- Given that consumers often cannot take advantage of a successful injunction because time has elapsed for them to claim, for instance, damages, ensuing individual consumer claims should be subject to suspension of the limitation period.

4.3.9 Sources

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4.3.10 Glossary

BVL Federal Office for Consumers

BMELV Federal Ministry for Food, Agriculture and Consumers

UKlaG Act on Cease-and-Desist Orders

UWG Act on Unfair Competition

VSchDG *Verbraucherschutzdurchsetzungsgesetz* – Consumer Protection Enforcement Act

VZBV Central Association of Consumer Associations

5. THE NETHERLANDS

… is a Member State where actions for injunctions are not the main tool to ensure consumer protection legislation is complied with. Public enforcement was only recently introduced but plays an increasingly important role, mainly through administrative decisions and fines. Private enforcement remains important but consumer organizations see themselves obliged, due to financial restraints and the absence of the possibility to claim damages in collective proceedings, to revert to cheaper solutions such as decisions of self-regulatory bodies. Dutch law allows for other claims than mere actions for injunction to be brought in a collective procedure (including rescission, declaratory decisions, annulment), but the exclusion of actions for monetary compensation is considered to be an important gap by consumer representatives.

Key findings

Implementation of the Directive did not bring about major changes as collective actions (with a broad scope of application) already existed before the implementation of the Directive

One cross-border case in the sense the directive brought in the Netherlands (OFT v Best Sales), no cases abroad

Broad scope of application for actions for injunction; not limited to matters listed in the annex to the directive

Broad range of actions can be brought in collective proceedings (all actions, but for compensation)

Collective proceedings – especially declaratory decisions – sometimes used to make collective damages settlement possible; collective proceedings sometimes used in follow-on individual claims for damages

Limited number of collective actions (for lack of funding; absence of possibility to claim damages; length of procedure; lack of deterrent effect); recourse to administrative enforcement / enforcement through self regulatory bodies or out of court settlements as an alternative; also in cases with cross-border elements

Administrative enforcement is considered to be swifter and fines are considered to have a more important deterrent effect; self-regulation in advertising is swifter and cheaper for consumer organizations

5.1The setting for injunctions

5.1.1 The law – legal environment for injunctions

The Injunctions Directive was implemented in 2002 but **did not imply revolutionary changes** to the Dutch legal system.[82] Collective actions had been possible since 1994. Before the implementation of the directive, the procedure of Article 3: 305 a and b Civil Code already allowed organizations to bring actions in the collective interest.[83] Not only actions for injunction can be brought, but all kinds of actions (such as actions for annulment, rescission, declaratory decisions etc), except for actions for monetary compensation. Of course, on condition that the action is brought to protect similar interests of other persons. Article 3: 305a Civil Code allows with (private) foundations or associations to bring such actions; Article 3: 305b Civil Code allows public legal persons entrusted to protect specific interests to bring claims to protect similar interests of other persons.

The directive nevertheless implied the following changes to the Dutch legislation:

A new article 3: 305c was introduced in the Civil Code, allowing qualified entities (organizations or public bodies) established outside the Netherlands to bring actions in the Netherlands. Any action that aims to protect the similar interests of other persons that have their normal residence in the country where the organization or public entity is established can be brought, in as far as the organization furthers these interests according to its articles of association or the entity is entrusted with the protection of these interest. Actions for monetary compensation cannot be brought. The article also sets out the procedure for a Dutch entity to be included on the list of qualified entities. A foundation or association with full legal personality and seat of establishment in the Netherlands that defends consumer interests can request the Minister of Justice to notify the Commission that it may bring a claim.[84] The possibility that public entities could bring a cross border action was not considered as, at the time of implementation of the directive, no

[82] Act of 25 April 2002 amending Books 3 and 6 of the Civil Code.
[83] Described as 'actions to protect the similar interests of other persons, in so far as the organization has the protection of these interests as its statutory aim'
[84] Art. 305c 3 Civil Code.

public authority existed that enforced consumer law. At this point in time, only the consumer organization 'Consumentenbond' has made such request and is a qualified entity.

Dutch law goes further than the directive in two aspects:[85]

- The kind of actions qualified entities can bring go beyond mere actions for an injunction. All kinds of actions are possible (declaratory decisions; performance; rescission and restitution; annulment; compensation other than in money) with the exception of actions for monetary compensation. This is both so for domestic entities bringing actions but also for foreign qualified entities bringing an action in the Netherlands.

- The actions that can be brought are not limited to infringements of legislation mentioned in the annex to the directive. Actions can also be brought by entities defending consumer interests when other consumer protection legislation is infringed.

Furthermore the procedure dealing with prior negotiation was slightly amended (article 3: 305 a, para 2 Civil Code). Such an obligation of prior negotiations already existed before the implementation of the directive. The directive allowed to maintain that procedure, but the period of time had to be reduced to two weeks. If insufficient attempts have been made to reach a settlement over a claim through negotiations with the defendant, the claim is inadmissible. A period of two weeks is now in any event sufficient to this end. Opinions differ as to whether this is an improvement. For an infringement of open norms and in complicated cases, two weeks was mentioned to be too short. Others estimate that the two weeks period provides legal certainty and avoids an unnecessary lengthening of the procedure.

5.1.2 Qualified entities

The Consumentenbond is the only qualified entity. The Consumentenbond exists since 1953 and has approximately 480.000 members. Its aim is, according to its articles of association: [86] "to further the

[85] Memorie van Toelichting, bij het voorstel van wet houdende aanpassing van de boeken 3 en 6 van het Burgerlijk Wetboek aan de richtlijn betreffende het doen staken van inbreuken in het raam van de bescherming van consumentenbelangen, tweede kamer, vergaderjaar 1998-99, nr. 3.

[86] Article 3 http://www.consumentenbond.nl/over/statuten_en_reglementen/Statuten_Consumentenbond.

interests of consumers in general and of its members in particular as an independent organization, in the Netherlands – and as far as possible and necessary outside the Netherlands.”

On 1 January 2011, the Consumentenbond employed 213 FTE.[87] The Consumentenbond is financed through the subscription fees of its members. As membership is decreasing yearly, financing is problematic and the Consumentenbond is looking for alternative ways to finance its activities. The Consumentenbond carries out research and tests and gives information and advice to consumers on best buys; it has its own magazines and books and organizes public campaigns. These campaigns may include (collective) legal actions. However, there is a considerable restraint to start legal actions, given the costs these actions entail and the limited budget available. Also, the absence of the possibility to claim damages in collective proceedings is considered is a very important gap in the protection of consumers by the Consumentenbond.

5.1.3 Resources (manpower & finance)

The legal service of the Consumentenbond has been reduced over the last years. At the moment, a team of three persons is responsible for legal campaigns and actions, that may include collective actions. However, such action needs justification as the Consumentenbond is paid from the subscription fees of its members and these actions often only benefit part of its members and also benefits non members. There is no specific budget nor specific subsidies for collective actions. The Ministry of Justice is currently considering the possibility to allow organizations defending collective interests to apply for a subsidy in the general legal aid system as it can be more efficient to have collective judicial procedures rather than individual judicial proceedings. At the moment, such entities are excluded from such financial aid for judicial proceedings.

5.1.4 Alternative procedures / procedures allowing to claim compensation

Self regulation: Stichting Reclame Code

Self regulation was reported to play an important role in combating misleading advertising or other forms of unfair advertising. The Stichting Reclame Code (‘Advertising Code Foundation’ - SRC) is a self-regulatory body that is responsible for the Dutch Code or Advertising (Nederlandse Reclame Code – NRC) and for the Reclame Code Commissie (RCC).

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[87] Source: annual report 2010.

Complaints can be filed with the RCC, an independent organization that provides for a declaration of conformity of advertising with the Dutch Code of Advertising. The procedure is very swift. The advertiser has fourteen days to react to a complaint, and if the case is urgent, the president of the commission can ask the commission to take a decision within fourteen days. When advertising is considered to be contrary to the NRC, the RCC issues a recommendation to no longer use the advertising. Appeal against such a decision is possible with the College van Beroep (Appeal Board). When the circumstances so demand, the RCC can ask the secretariat to publish the decision as an alert. A press release with the decision is then issued. All decisions are in any event publicly available on the website. The Media Act obliges all media that use advertising to join the SRC. This implies an obligation to no longer distribute advertising that was judged contrary to the NRC by the RCC.

Wcam

Collective settlements of mass damages

The Collective Settlements of Mass Damages Act 2005 (Wcam – Wet collectieve afwikkeling massaschade) entered into force on 27 July 2005. It provides for the possibility for the Amsterdam court of appeal to make a settlement on mass damages between an entity representing collective interests and the person(s) causing the damages binding for all class members. The procedure complements the procedure of article 3:305a Civil Code. In the process of the adoption of the Wcam, the possibility was considered to abolish the exception that excludes a collective claim for damages from the range of actions under article 3: 305a Civil Code, but it was discarded. The American example was considered were many mass tort class actions end up in a settlement. Allowing mass damages claims to be brought in court, was considered problematic as many individual aspects, such as questions of causality, amount of damages, own fault, etc play a role. Instead, the Wcam was adopted, that is based on settlements. The relevant articles can be retrieved in art. 7: 907-910 Civil Code. Point of departure is an agreement that aims to compensate collective damages. The parties that reached the agreement issue a joint request to the Amsterdam court to declare the agreement binding.

Below is a brief overview of the most important features of the procedure. Crucial in the Wcam is that the entire group of victims is bound by the settlement agreement once the court has declared the agreement

binding.[88] It is no longer be possible for the victim to bring an individual action for damages. However, there is a possibility to 'opt-out'. Victims will only be bound if they have not withdrawn from being bound within a specific period.[89]

The agreement can be reached between the party causing the damage and a foundation or association with full legal competence that represents the interests of the parties who have been adversely affected. For such an agreement to be declared binding by the court, several conditions have to be met.[90] The agreement must at the minimum describe the group of persons on whose behalf the agreement was concluded; indicate the number of persons; the compensation that will be awarded; the conditions the persons must meet to qualify for compensation; the procedure to establish and obtain compensation etc. The court will i.a. reject the request if the agreement does not contain these minimum provisions; if the amount of compensation is not reasonable; if insufficient security is provided for the payment of the claims; if there is no independent determination of the compensation to be paid; if the foundation or association is not sufficiently representative etc.

This procedure can of course only work when a settlement has been reached. This can be difficult if there are discussions on certain questions of law. The collective procedure of article 3.305a Civil Code is reported to play a role here as an interest group can ask the court, by way of a collective action to rule on a matter of law. The Act has been evaluated and at this point in time, there are two proposals pending that should make it easier for parties to reach an agreement. Both proposed amendments strive to make it easier to reach a settlement agreement. One concerns the pre-procedural appearance of the parties; the other the possibility to submit issues of law to the highest court (Hoge Raad) through a procedure of preliminary references, thus allowing parties to obtain certainty on disputed issues of law.

There are, however, limitations to the procedure as it only works when there is a settlement, which requires the consent of the business. In large-scale low-value cases where individuals would not sue in court, a settlement may not be reached as there is no incentive to settle, absent the threat of individual litigation.[91]

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[88] Article 7:907, para 1 Civil Code.
[89] Article 7:908, para 2 Civil Code.
[90] Article 7:907 para 2 Civil Code sets out the minimum provisions the agreement must include; article 7: 907 para 3 sets out when the court has to reject the request.
[91] Civic consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union,* 89.

Relations between initiative takers

Consumentenbond – Consumer Authority

The cooperation between the Consumer Authority and the Consumentenbond appears to work satisfactorily. There is a regular exchange of information. The Consumentenbond often asks the Consumer Authority to take enforcement measures, rather than to bring an action in court itself. The relationship is legally formalized. According to article 7.2 Wet handhaving consumentenbescherming (Whc), consumer organizations have the status of 'interested party' in decisions taken on the basis of that act. The Algemene wet bestuursrecht (general act on administrative law) sets out the rights of 'interested parties', such as a right to be heard when a decision is taken after objection etc. The Voorzieningenrechter interpreted the role of 'interested party' restrictively in a decision of 11 November 2008 in the sense that interested parties can only be involved after a decision has been taken and not beforehand. The cooperation was formalized in a 'cooperation protocol' (samenwerkingsprotocol).[92] The protocol deals with the confidentiality of information, the regular exchange of information, the possibility to take joint actions and external communication. The protocol also states that before the Consumentenbond asks the Consumer Authority to take a decision, it will first contact the Consumer Authority. The Consumentenbond appreciates the fact that is was explicitly given the position of interested party in the Whc, however, it considers its position still weak in the sense that it cannot demand from the CA that it takes a position on whether a practice is illegal or not. The CA can choose its own priorities and if it does not want to investigate the case, there is nothing the CB can do.

Consumentenbond – Stichting Reclame Code

The Consumentenbond is a member of the Stichting Reclame Code, the self regulatory advertising body. The Reclame Code Commissie functions within the SRC as an independent body. The Consumentenbond often files a complaint with the RCC to obtain a decision on the conformity of advertising with the Dutch Code on Advertising. The Consumentenbond often uses this procedure rather than judicial procedures as it is swift and cheap. There are no costs involved for the Consumentenbond (or for individual consumers) to file a complaint.[93] Some examples of cases are mentioned below.

[92] See www.consumentenautoriteit.nl for the full text of the protocol.
[93] www.reclamecode.nl.

Consumentenautoriteit – Stichting Reclame Code

This cooperation is also formalized in a cooperation protocol (Samenwerkingsprotocol).[94] The Stichting Reclame Code has been designated as a body having a legitimate interest in the cessation or prohibition of intra-Community infringements within the meaning of article 4, para 2 Regulation 2006/2004.[95] This makes it possible for the SRC to be involved in case of requests for assistance under regulation 2006/2004 concerning misleading and aggressive advertising.[96] The cooperation between the Consumer Authority and the SCR is however not limited to cross-border infringements. Both for national and cross-border cases of misleading and aggressive advertising, the cooperation agreement essentially implies that cases of misleading and aggressive advertising are dealt with by the SCR. To that effect, information is exchanged with regard to the enforcement practices of both bodies. At least once every three months, there is a consultation on the cooperation between both bodies.[97] In case a trader does not comply with the recommendation of the Reclame Code Commissie, the case can be transmitted to the Consumer Authority.

ConsuWijzer

ConsuWijzer is also an important source of information for enforcement authorities. Consuwijzer is an initiative of the government that was created as a consequence of the cooperation between three public enforcement bodies, the Consumer Authority, the NMa[98] and the OPTA.[99] ConsuWijzer allows consumers to obtain free advice. Consumer can notify problems with certain companies through Consuwijzer that gives advice on how to solve them. Complaints through Consuwijzer have lead to several actions and enforcement measures by the different (public) enforcement authorities over the past years.[100]

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[94] Samenwerkingsprotocol (Cooperation Protocol) Consumentenautoriteit – Stichting Reclame Code, http://www.consumentenautoriteit.nl/sites/default/files/redactie/Samenwerkingsovereenkomst%20Consumentenautoriteit-Stichting%20Reclame%20Code.pdf.

[95] Besluit van 14 mei 2007 tot aanwijzing van instanties met een rechtmatig belang in het kader van Verordening 2006/2004, Stb. 2007, nr. 186.

[96] Samenwerkingsprotocol (Cooperation Protocol) Consumentenautoriteit – Stichting Reclame Code, http://www.consumentenautoriteit.nl/sites/default/files/redactie/Samenwerkingsovereenkomst%20Consumentenautoriteit-Stichting%20Reclame%20Code.pdf.

[97] Articles II and IV of the Samenwerkingsprotocol (Cooperation Protocol).

[98] Nederlandse Mededingingsautoriteit – Dutch Competition Authority.

[99] Onafhankelijke Post en Telecommunicatie Autoriteit – Independent Post and Telecommunications Authority.

[100] www.consuwijzer.nl.

5.2 Application of Directive 2009/22/EC in the Netherlands

5.2.1 Use of the Directive by qualified entities

5.2.1.1 Overall impact on consumer governance

The implementation of the directive had a rather limited effect on established patterns of consumer law enforcement. The possibility to bring actions for injunction abroad was of course a novelty, but it has not been used by Dutch qualified entities. Domestic collective actions (broader than injunctions) continued to be used, as before the implementation of the directive. The impact of the CPC Regulation has been more revolutionary, as it implied the creation of a public enforcement authority that was previously inexistent.

5.2.1.2 Business sectors affected

(compare exemplary cases reported)

5.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

Only one cross-border case has been brought in the Netherlands on the basis of Directive 98/27/EC: OFT v Best Sales.[101] The OFT had received complaints from UK consumers and brought an action against the Dutch company Best Sales B.V. before the Dutch courts. The company sent unsolicited mail to UK consumers giving them the impression that they had won a prize. The mail stated that in order to receive a more valuable prize or to receive this prize more rapidly, the consumers needed to order articles from the catalogue. The Dutch courts considered in a ruling of 9 July 2008 that the advertising was misleading and ordered the company to stop sending the advertising.

5.2.1.4 Cross-border litigation (bringing cross-border infringement before domestic courts)

No cases were reported of collective actions brought against foreign companies. There have however been some cases that were settled out of court with international aspects (see below, the 'power balance' case) and some cases where administrative measures were taken by the Consumer Authority (see below ITC reizen and Celldorado).

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[101] For an English translation of the judgment, see http://www.oft.gov.uk/shared_oft/press_release_attachments/bestsalesjudgment.pdf.

5.2.1.5 Domestic use

There are no conclusive statistics available of the number of national actions for injunction brought. Below, some exemplary cases are reported.

5.2.1.6 Exemplary cases

Consumentenbond

Since 2008, less than 10 actions in the collective interest have been brought on the basis of article 3: 305a Civil Code by the Consomentenbond; most cases were not strictly speaking actions for injunction, as the order asked for went beyond a mere 'stop now' order.

Case 1

Health insurance – change of conditions: In 2007, the Consumentenbond filed an action on the basis of article 3: 305a Civil Code for an order against an health insurance company that changed its conditions on what was covered in the middle of the year (in one year contracts). The court ordered the company to perform its contracts without changes until the end of the contract term of one year.[102] The Consumentenbond had received complaints from hundreds of insurance takers.

Case 2

Royal Beach Concert: A concert was planned on 4 June 2011 on Scheveningen beach, but cancelled shortly beforehand. A new concert would be planned, but after weeks neither dates nor groups had been determined. The Consumentenbond started an action on behalf of all consumers who bought tickets and it also presented a number of individual consumers. The Rechtbank sector Kanton denied competence for the collective claim brought on the basis of article 3: 305a Civil Code but ordered a refund for the nine individual consumers.[103] A new collective procedure has been started before the Voorzieningenrechter, but the company went bankrupt before a judgement was pronounced.[104] The case potentially concerned more than 15.000 consumers, that bought tickets with pricing varying between 58, 50 EUR and 125 EUR and would have been interesting because the collective procedure was used to ask for an order to reimburse consumers.

[102] Voorzieningenrechtbank Utrecht 8 June 2007 LJN BA 6717.
[103] LJN: BR4955,Sector kanton Rechtbank Rotterdam , 1259909, www.rechtspraak.nl.
[104] http://www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht-2011/rechtszaak-royal-beach-concert-geschorst.

Case 3

SMS – telecom: Consumentenbond brought a collective action against a number of telephone operators, who has used a system of reverse billing for (unsolicited) premium SMS services. Consumentenbond asked inter alia – in summary proceedings - for an order obliging the telecom operators to stop using the reverse billing system (unless certain conditions would be met) and for an order to reimburse the consumer who had been charged for unsolicited premium SMS services. The Consumentenbond here used the procedure to ask for restitution to consumers. As this is not an action for monetary compensation, article 3: 305a Civil Code is broad enough to encompass this kind of action, although this is sometimes disputed. The mobile operators argued that such an order could not be asked for in a collective procedure, as it was an action for damages. The court did not pronounce itself on the matter, but decided that restraint was appropriate in summary proceedings involving monetary claims and that the claim had to be dismissed as it was not sufficiently substantiated.[105]

Case 4

Westfriese Flora - Legionella case (started prior to 2008): In 1999, 242 people got ill because of a legionella-contamination on the Westfriese Flora in Bovenkarspel. In the next weeks 32 people died because of the direct consequences of the contamination. Consumentenbond obtained a declaration of responsibility through a collective action on the basis of article 3:305a Civil Code. The case was started in 2000, in 2002 a first instance decision was obtained declaring the wrongfulness of the behaviour of two of the exhibitioners,[106] it took until 2007 for the court of appeal to confirm that finding. Damages could not be claimed in these procedures, but only through a settlement or individual procedures. The victims only obtained a partial payment in 2010 (see below for details). The lawyers' costs for the Consumentenbond amounted to 300.000 €. The case illustrates that the procedure can be lengthy and costly.

[105] LJN: BL1615, Rechtbank 's-Gravenhage 2 February 2010, 353986 / KG ZA 09-1974.

[106] LJN: AF1817, Rechtbank Alkmaar , 44810/HA ZA 00-191.

Consumer authority

Travel industry: The Consumer Authority has brought 14 actions for injunction based on article 3: 305d Civil Code over the past years, in 13 cases a decision has been taken. They all concerned travel organizers that were operating without having taken the necessary steps to ensure the refund of money paid over in the event of insolvency contrary to article 7: 512 Civil Code (implementation of the package travel directive). All cases in which a decision was obtained have so far been successful.

5.3 Economic impact and effects on the Market

Of the Directive

In the absence of cases brought abroad and in the absence of actions for injunction brought in the Netherlands against foreign traders, the impact of the directive on cross-border infringements is difficult to measure.

For domestic cases, the existence of a collective judicial procedure is important. Such system already existed before the adoption of the directive and is considered useful. Its effect cannot only be measured in terms of cases brought to court, it is also a possibility that can be used in order to convince companies to stop infringements voluntarily. The wide scope of actions (all actions but for monetary compensation) is considered to be an advantage compared to the more limited scope of the directive. In most cases, the claim is not limited to a mere stop now order. Especially declaratory decisions on e.g. the wrongfulness of the behaviour have played a role in later individual proceedings or collective settlement proceedings for damages (Wcam), especially in the financial sector.

Of the CPC Regulation and other consumer redress mechanisms

The impact of the CPC Regulation has been quite far reaching as it has lead to the creation of a new public enforcement authority with extensive enforcement powers, also in domestic cases. Especially the administrative enforcement tools (including high fines) are considered to be quite effective. The deterrent effect is considered to be higher than for actions for injunction that do not sanction past illegal behaviour.[107]

[107] Confirmed by the stakeholders in the recent evaluation study: Eindrapport. Evaluatie Consumentenautoriteit op grond van de Whc, 8 July 2011, 73 p.

The lack of judicial proceedings started can partially be explained by the possibility for the consumer organizations to ask the Consumer Authority to take enforcement action. The Consumentenbond has been granted the position of 'interested party' when the Consumer Authority takes decisions.

Self-regulation also plays a role in combating misleading and unfair advertising.

5.3.1 Relationship with CPC-mechanism

Implementation of Regulation 2006/2004

In order to comply with the obligations of Regulation 2006/2004, the Consumer Authority has been created. No public enforcement authority existed beforehand in the Netherlands. The Consumer Authority is the Single Liaison Office and it is also acting as competent authority with enforcement powers. A specific feature of Dutch law is that, depending on the type of infringement, the Consumer Authority either has to follow the path of administrative enforcement or it must follow the civil law enforcement path.

Civil law enforcement implies that the Consumer Authority sends a written warning asking to stop the infringement and imposes a certain time limit to do so. If the infringement continues an action for injunction can be filed with the Gerechtshof The Hague. Appeal is possible with the Hoge Raad. This new entity can thus also bring actions for injunction but this has not been done on a major scale. **Administrative enforcement** implies that the Consumer Authority can order companies to stop certain infringements under payment of a lump sum or impose fines (of up to 450.000 €). A strict procedure with the necessary checks and balances and possibilities of appeal was of course installed.[108] An evaluation report of this dual system of enforcement (through civil procedure and through administrative procedure) was made public in November 2011.[109] The Consumer Authority can also conclude an agreement in the framework of the Wcam. This power has not been used so far. Apart from the Consumer Authority, other competent

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[108] Administrative enforcement involves the redaction of a report by the Enforcement Section of the Consumer Authority. This report is submitted to the Legal Service that gives an advice on whether to impose a sanction in the form of a fine or an order for payments of the decision is not complies with. If the infringer does not agree with the decision of the Consumer Authority, he can object. The objection is dealt with by the *Bezwaar Adviescommissie* (Advisory Commission on Objections), that gives an advice, and the Consumer Authority then takes a decision after objection. Appeal against the latter decision is possible with the Rechtbank Rotterdam. That decision can be appealed before the College van Beroep voor het Bedrijfsleven (College of Appeal in Business affairs).

[109] Eindrapport. Evaluatie Consumentenautoriteit op grond van de Whc, 8 July 2011, 90 p.

authorities have been appointed and have enforcement powers for intra-community infringements in specific areas, such as financial services, pharmaceuticals, televisionbroadcasting ... A merger of the Consumer Authority, the NMa (Dutch Competition Authority) and the OPTA (Independent Post and Telecommuncations Authority) is planned.

Actions for injunction

The Dutch Consumer Authority annually receives several requests for enforcement and information (in 2008 (enforcement and information): 36 and 27; in 2009: 28 and 20; in 2010: 21 and 16). No cases were reported where the measures taken included actions for injunction. The cases reported where the Consumer Authority filed an action for injunction were domestic cases.

Administrative enforcement

The dual system of enforcement (civil law / administrative law depending on the kind of infringement) was set out above.

Administrative measures (fines or an order with a obligation to pay a sum in case it is not complied with) have been taken in several **cases with cross-border aspects**. However, in investigations they start of their own motion, the authorities mostly limit themselves to national cases. One example of a case with international aspects is the SMS services case, Celldorado.[110] The Consumer Authority did receive complaints and enforcement requests from a number of foreign authorities.[111] A fine was imposed on the company for i.a. for misleading information and misleading omissions.

Administrative measures imposed on foreign companies are rare. There is one such case, the ITC case, that lead to a decision of 7 April 2011, whereby a fine of 300.000 € was imposed on the German company Goltex Vertrieb GmbH & Co. Kommanditgesellschaft, for misleading and aggressive practices.[112]

[110] http://www.consumentenautoriteit.nl/sites/default/files/redactie/sanctiebesluit-celldorado.pdf
[111] Press release consumentenautoriteit (press release 14 July 2010)
[112] CA/NB/529/100

5.3.2 Problems with actions for injunctions

The **length of the procedure** is considered to be problematic. On the basis of the cases reported, it easily takes several months to obtain an injunction or similar first instance court decision in an action in the collective interest. In some of the reported cases, it took several years to obtain a first instance court decision. In the civil procedures brought by the Consumer Authority, it took on average five months to obtain a court decision after the filing of the claim. However, a period of 15 months (investigation and warning) on average preceded the filing of such claim, bringing the total of the procedure to 20 months.[113] To compare: it took the Consumer Authority on average 15 months since the start of the procedure to come to an administrative decision imposing a sanction.[114]

Financing of the procedure is problematic. It has been mentioned that the Consumentenbond is self-financed. When a case is lost, there is the danger of being condemned to a payment of the costs of the procedure. This includes the court fees, costs of a writ of summons and lawyers' fees (up to a certain amount). On the other hand, if the case is won, the other party will have to pay (part) the costs. There is thus only a partial shifting of costs.[115]

It is sometimes considered as a shortcoming of the system of collective actions that there is no exception to the general principle that a judgment is **only binding between parties**. This is especially relevant for declaratory decisions establishing the wrongfulness of the behaviour.

Difficulties were reported to **monitor enforcement** of court orders in the travel industry. As companies often operate online, it has proved difficult for the Consumer Authority to find out exactly which company is responsible for which website. Also, the use of a different legal person has been reported to avoid the consequence of a court decision. For rogue traders, actions for injunction do not have a deterrent effect.

It emerged from the interviews that actions for injunction are not the preferred way to enforce consumer law. Administrative measures (imposing fines or an order for payment of a lump sum in case the decision is

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[113] Eindrapport. Evaluatie Consumentenautoriteit op grond van de Whc, 8 July 2011, p. 70

[114] Eindrapport. Evaluatie Consumentenautoriteit op grond van de Whc, 8 July 2011, p. 70. Whereby it should be mentioned that appeals are possible that lengthen the process.

[115] For an illustration - LJN: BL1615, Rechtbank 's-Gravenhage 2 February 2010, 353986 / KG ZA 09-1974: in the mentioned SMS case lost by the Consumentenbond, it was ordered to pay a sum of 3045, 89 € as costs.

not complied with) are considered to be swifter, more effective and efficient than a court procedure to obtain a court order. The **deterrent effect** of fines is considered to be higher than that of actions for injunction that do not deal with past illegal behaviour. At the moment, not all infringements can be sanctioned administratively. An evaluation is ongoing, but enlarging the list of infringements that can be sanctioned administratively is being considered.

One of the reasons for the lack of injunctions, also in domestic cases, is that the Consumentenbond sees itself obliged to ask the Consumer Authority to take enforcement measures rather than starting expensive and slow court proceedings. The **absence of the possibility to claim damages** was also mentioned as an important reason not to start collective court proceedings. The Consumer Authority was established as a consequence of Regulation 2006/2004, but its enforcement powers are not limited to cross-border cases. The Consumentenbond both contacts the Consumer Authority in domestic and cross-border cases. Filing complaints with the self-regulatory body for advertising is also more often used than actions for injunction.

5.3.3 Suggestions for improvement

Scope of actions

Dutch law allows organizations to bring a wide range of actions in a collective procedure (all actions but for monetary compensation) and this is considered to be an advantage in comparison to the system of the directive. Consumer organizations however consider it an important gap, that there is no possibility to claim damages in a collective procedure.

The actions that can be brought are not limited to infringements of legislation mentioned in the annex to the directive; actions can also be brought by entities defending consumer interests when other consumer protection legislation is infringed. This is again considered to be an advantage Dutch law has in comparison to the directive.

Procedure and costs

More guidance on applicable law and competent courts in cross-border cases is considered to be welcome.

Funding remains problematic and is one of the major reasons for the lack of cases brought by consumer organizations.

5.3.4 (Relation with) Alternative procedures / procedures allowing for compensation

Individual compensation

A collective action can later help consumers to obtain damages in an individual procedure. Such procedures are however rarely introduced for low value claims. There have been examples of such cases, such as the Westfriese flora – legionella contamination case (described above). Two important principles were established by the court in a later individual action for damages.[116] First, the **binding force of the declaration obtained in the collective procedure**. The court stated that the decision in the collective procedure is only binding between the parties in that procedure. However, given the content of the declaration obtained, the court accepted that the wrongfulness of the behaviour of the company was also established with regard to the individual claimant in as far as he belonged to the group mentioned in the declaration. The collective procedure thus helped an individual claimant to establish the wrongfulness of the behaviour of the defendant. Strictly speaking the court in an individual procedure is not bound by the outcome of the collective procedure in an individual procedure, but the Hoge Raad accepted that it is 'reasonable' to take the judgment of the wrongfulness of the behaviour in a collective proceeding as a starting point in a later follow on action.[117] Good arguments will needed to be invoked for the court in a later individual procedure not to follow the outcome of the collective procedure. **Second, a collective procedure bars the prescription period of individual actions.** The legislation does not deal with the influence of a collective procedure on individual actions, but the court deduced the principle from the preparatory works. An individual action has to be introduced within a reasonable period of time after the collective action.[118]

Collective compensation

Wcam

A collective action on the basis of article 3:305a Civil Code sometimes precedes a successful Wcam settlement. Especially the possibility to ask the court for a declaratory decision eg on the wrongfulness of the behavior of a party has proved helpful (especially in the financial sector). Such a decision can help to provide an incentive to come to a settlement agreement. There have been a number of cases in which the

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[116] LJN: BI1927, Rechtbank Alkmaar , 99655 / HA ZA 08-22.
[117] HR 27 November 2009, LJN: BH 2162 (VEB / World Online), para 4.8.2.
[118] LJN: BI1927, Rechtbank Alkmaar , 99655 / HA ZA 08-22.

Wcam procedure was used to declare a settlement agreement binding and important amounts of damages have been paid to the victims.[119] In some of these cases, a collective procedure of article 3: 305a Civil Code preceded the settlement under the Wcam. However, even a decision establishing the wrongfulness of the behavior on the basis of article 3:305a Civil Code is not always sufficient to ensure a settlement is reached. In the Westfriese Flora case, the Consumentenbond could not come to an agreement with the wrongdoers, which illustrates the limitations of the Wcam procedures in combination with the collective procedure under 3: 305a Civil Code. If the business refuses to settle, there are no possibilities to claim damages collectively.

Self regulation

The Consumentenbond uses actions for injunction as a last resort and sees itself compelled to revert to swifter and cheaper solutions, such as obtaining a ruling from the Reclame Code Commissie, a self regulatory body, sometimes followed by a settlement (outside of the Wcam procedure). An example of such a recent action is the 'power balance case'.[120] Following a complaint by the Consumentenbond, the Reclame Code Commissie judged that the advertising on the Dutch powerbalance website was misleading. It stated that wearing the power balance bracelet improved force, power, and suppleness. The hologram with electromagnetic frequencies would react positively with the energy lanes of the body. As the advertiser could not sustain these statements by any scientific or other publications, the information was considered incorrect and of a nature to affect the average consumer's ability to take a transactional decision. The Commission advised to no longer use this advertising. Following the ruling, an agreement was reached between the Consumentenbond and the Dutch distributor of the bracelets, who agreed to reimburse consumers that returned their bracelets and that bought their bracelets in a certain time period.

[119] These cases include: the DES case (first case for which the procedure was actually developed), approx. 34 000 victims involved, settled at € 38 million; Dexia (2007); 300 000 victims, settled at € 1 billion; Vie d'Or (2009): 11 000 victims; settled at € 45 million; Shell (2009) 500 000 victims; settled at $ 352.6 million; Vedior (2009) 2 000 victims, settled at € 4.25 million.

[120] See the decision of 6 September 2010 of the Reclame code commissie, Dossiernr: 2010/00535; and the press release of the Consumentenbond following the settlement , http://www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht-2011/geld-terug-voor-power-balance-polsbandjes

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5.3.6 Glossary

CA	*Consumentenautoriteit* – Consumer Authority
CB	*Consumentenbond*
Hoge Raad	Supreme Court of the Netherlands
NMa	*Nederlandse Mededingingsautoriteit* – Dutch Competition Authority
NRC	*Nederlands Reclame Code* – Dutch Code of Advertising
OPTA	*Onafhankelijke Post- en Telecommunicatie Autoriteit* – Independent Post and Telecommunications Authority
RCC	*Reclame Code Commissie* – Advertising Code Commission
SCR	*Stichting Reclame Code* – Advertising Code Foundation
Wcam	*Wet collectieve afwikkeling massaschade* – Collective Settlement of Damages Act

6. PORTUGAL

… has some 20 years' experience in court actions taken by consumer associations. These actions, however, are injunction actions of a home-grown variety which are practically uninfluenced by the transposition of the Injunctions Directive (injunctions "the Portuguese way").

Key findings

Domestic injunctions are an indispensable tool for consumer law enforcement, in particular for unfair term control.

Injunctions are common, even if at times cumbersome to pursue, for Portugal's domestic market.

Awareness of the possibility of pursuing cross-border injunctions is limited among consumer activists. This contrasts with a keen interest and participation in the debate on collective redress.

6.1 The setting for injunctions

6.1.1 The law – legal environment for injunctions

Lei n.° 29/81, de 22 de Agosto – the first, now abrogated, Portuguese Consumer Law of 1981 – permitted the *Ministério Público*[121] to pursue civil actions in the collective interest of consumers. While this opportunity was never taken in practice, the *Decreto-Lei n.° 446/85, de 25 Outubro* of 1985 on unfair contractual terms (*Cláusulas Contratuais Gerais*) introduced a cease-and-desist procedure which, for the last twenty years, has generated a considerable body of case law. Since 1989, Article 52 of the Portuguese constitution requires the introduction of an *acção popular* (inaptly translated as 'public action') for the defence of diffuse interests (as opposed to collective interests). The *acção popular* was put in practice by *Lei n.° 83/95, de 31 de Agosto, Direito de participação procedimental e de acção popular*. Its procedure can be

[121] The *Ministério Público* represents the Portuguese State in litigation proceedings. It plays no role in the CPC-mechanism.

used to stop unlawful practices but also to recompense consumers pursuing damages claims.

Succeeding the Consumer Code of 1981, the *Lei n.° 24/96 de 31 de Julho, estabelece o regime legal aplicável à defesa dos consumidores* – today's Portuguese Consumer Law – provided for *acçãos inibitórias*, that is, cease-and-desist orders against consumer law infringements generally.

Given this existing framework, when the transposition of the Injunctions Directive (belatedly) came in 2004, it was duly embedded in the two already-existing procedures of *acção inibitória* and *acção popular*: both Art. 10 of Law 24/96 on cease-and-desist orders (*acção inibitória)* and Art. 12 No. 2 on public actions (*acção popular*) are rendered applicable by the actual act of implementation, which is the ***Lei n.° 25/2004 de 8 de Julho****, Transpõe para a ordem jurídica nacional a Directiva n.° 98/27/CE, do Parlamento Europeu e do Conselho, de 19 de Maio, relativa às acções inibitórias em matéria de protecção dos interesses dos consumidore*. Its scope is, however, limited to the consumer directives listed in Annex I of the Injunctions Directive. The innovation brought by virtue of Law 25/2004 is therefore essentially limited to the granting of legal standing for qualified entities.

6.1.2 Qualified entities

The government monitoring body for consumer affairs is the Directorate-General for Consumer Affairs (*Direcção-Geral do Consumidor - DGC*[122]) created by *Decreto Regulamentar n.° 57/2007 de 27 de Abril*.[123] The *DGC* is Portugal's Single Liaison Office under the CPC-Regulation.[124] It replaces the former *Instituto do Consumidor* that was given the role of listing the Portuguese qualified entities (Article 4 of Law 25/2004) and thus acts as the notary for the Commission's list. For admission the *DGC* would look at the statutes of the applicant organisation and verify if the statutory objective of the organisation is the protection of consumers' interest.

[122] http://www.consumidor.pt
[123] Diário da República, 1.a série — n.° 82 — 27 de Abril de 2007, p. 2686
[124] OJ C 260, 2.9.2011, p. 1

Otherwise the bodies designated to pursue the collective interest of consumers vary between the laws:

Act of Portuguese law	Designated body
Decree-Law 446/85 of 25 October 1985	Consumer organisations, trade unions, trade associations and *Ministério Público*
Law 24/95 of 31 July 1995	Consumer organisations and public prosecutors
Law 83/95 of 31 August 1995	Individual consumers (citizens) and consumer associations
Law 25/2004 of 8 July 2004	Qualified entities on the Commission's list and those entities granted standing by the court

6.1.3 Initiative takers

Currently, only four organisations appear on the Commission's list. Only two of them are considered to have the capabilities of staging cross-border injunctions:

- Associação Portuguesa para a Defesa do Consumidor – DECO[125] (Portuguese Association for the Defence of Consumers)
- Associação de Consumidores de Portugal – ACOP [126] (Consumer Association of Portugal)

For an unspecified bureaucratic reason, DECO did not appear in the first Portuguese notifications to the Commission. Other bodies like the *União Geral de Consumidores*[127] seem to have been unaware of the existence of the Commission's list and will apply for inclusion.

This picture contrasts with the large number of consumer organisations active at national level.

[125] http://www.deco.proteste.pt
[126] http://acop.planetaclix.pt
[127] http://www.ugc.pt

Of the Portuguese consumer organisations, DECO seems to take a lead role on the European and international stage, being a member at BEUC[128] and Consumers' International.[129]

6.1.4 Resources (manpower & finance)

Portuguese consumer organisations are mainly financed by collecting membership fees. DECO, for instance, has a membership of more than 200,000 persons and receives most of its revenue from their contributions. It also carries out government-funded projects on consumer affairs. For injunction litigation it employs the services of external lawyers.

The *Fundo para a Promoção dos Direitos dos Consumidores*, created by Article 6-B of Decree-Law 100/2007 of 2 April 2007 might become a quite extraordinary source of financial support for consumer litigation. It disposes of 14 millions euro and is developed by *Portaria n.° 1340/2008 de 26 de Novembro*.[130] The money is collected through a fee on water and electricity supplies. Its use still needs to be determined.

6.1.5 Alternative procedures / procedures allowing to claim compensation

Successful injunctions allow consumers to be compensated for losses incurred if they make separate claims, and can give proof of, the value of damage. But there is not direct link between injunctions and instruments of Portuguese law on collective redress.

6.2 Application of Directive 2009/22/EC in practice

The Portuguese government keeps no statistics on injunctions procedures. Data has been gathered from interviews and written sources.

[128] http://www.beuc.eu
[129] http://www.consumersinternational.org
[130] Diário da República, 1.a série— n.° 230—26 de Novembro de 2008

6.2.1 Use of the Directive by qualified entities

6.2.1.1 Overall impact on consumer governance

There is a general lack of awareness of the very existence of the possibility of cross-border injunction procedures. This includes the 'initiative takers' that have not even insisted until recently on being included in the Commission's list as the precondition of taking cases abroad. Unnoticed on the Portuguese consumer landscape, it appears to have had near to no impact.

6.2.1.2 Cross-border litigation (bringing cross-border infringements before foreign courts)

So far, no qualified entity in Portugal has ventured to apply the cross-border injunctions procedure of the Directive and no attempt has been made to pursue one. Reasons for this reluctance were cited as being the costs of an action of this nature and the lack of technical resources available to the qualified entities. Neither has a business operator in Portugal been targeted with a cease-and desist order.

6.2.1.3 Cross-border litigation (bringing cross-border infringements before domestic courts)

An enforcement action of a particular kind was started in May 2009 by DECO in cooperation with France's UFC-Que Choisir and Belgium's Test-Achats. The "coordinated action" concerned general conditions of carriage (Directive 93/13/EEC) of airlines (both legacy carriers and low-cost carriers) and their web-sites' transparency (Regulation 1008/2008). A judgment has been rendered for Belgium.[131] DECO is about to sue Portugal's national carrier and a low-cost airline. Each step of the consumer organisations was coordinated, including the accompanying PR-measures, like press releases etc.

6.2.1.4 Domestic use

The designated bodies for consumer protection used the procedural tools at their disposal (in the practice of consumer litigation, the distinction between *acção inibitória* and *acção popular* sometimes seems blurred and of little practical importance) successfully in a domestic context, namely to improve the situation in relation to contract terms. Unfair contractual terms previously used in financial services (banks and insurances) were targeted in particular. Unfair terms are said to be comparatively easy to tackle in terms of gathering evidence ("pick up the contract and check its terms"). Advances are partly stifled, however, by an

[131] In its decisions of 10 March 2010 and 29 September 2010, the Commercial Court of Namur ordered Brussels Airlines, Ryanair and EasyJet to stop applying a substantive number of clauses in their general terms and conditions.

alleged lack of coordination which has led to the duplication of cases (several court procedures to tackle same contract clause). Jurisprudence on unfair terms has sometimes also been lacking in cohesion. In areas other than unfair term control, DECO has acquired some experience in pursuing unlawful practices in the travel and tourism sector.

With relatively few cases brought to court before 2000, domestic injunctive actions have gained in importance in the last decade. Although cumbersome to put together and slowed by an overburdened judiciary, a number of significant cases have been fought and won by consumer advocates. At times, injunction procedures have been started as a bargaining chip: going to court gives consumer organisations additional leverage to negotiate with business operators on the cessation of questionable practices.

In order to save costs, consumer organisations refer cases to the *Ministério Público* that is exempted from the (recently significantly increased) court fees and operates with in-house lawyers saving costs of external counsel.

6.3 Economic impact and effect on markets

6.3.1 Benefits for qualified entities

There is no measurable benefit to the qualified entities on the Commission's list by the Directive's transposition apart from the symbolic status (now also sought by a number of other bodies) to be elevated to the status of a (potentially) international litigant. Still, a sort of "psychological comfort" was noted.

6.3.2 Benefits for consumer generally

In the context of consumer collective redress, the Telecom case[132] is often referred to as a successful example of where a successful damages claim was distributed to consumers.

[132] DECO v. Portugal Telecom
http://www.clef-project.eu/media/d_DECOvsPortugalTelecomLuisSilviera_69658.pdf

6.3.3 Benefits for individual consumers

(see above)

6.3.4 Effects on markets

National (not cross-border) injunctions have found their place within the fabric of Portuguese consumer governance.

6.3.5 Relationship with CPC-mechanism

Because of the sharp divide between public enforcement (the *DGC* but also bodies like the *Autoridade de Segurança Alimentar e Económica - ASAE*[133] are not complemented by any consumer organisations for the CPC-network), none of the interviewees sees any relationship between cross-border injunctions and the CPC-mechanism. Given that the Injunctions Directive's transposition dates from as late as 2004 and thus from only a few years before the CPC-Regulation became effective, the impact of both instruments (if any) might have been almost parallel. A practice has been established where cross-border issues are therefore fed directly into the CPC-mechanism.

6.3.6 Problems

Knowledge about the very existence of cross-border injunctions is essentially limited to only the key players of consumer governance. Those who are informed about EU injunctions proceedings mention as the major obstacles against their use the high costs involved, including both court fees and expenses for hiring (external) lawyers. Also mentioned was that in the legal profession, lawyers are not actively seeking out opportunities for litigation. Occurrences that would justify injunctions proceedings would therefore often not be recognised as suitable cases for injunctions.

Where, domestically, injunctions are used, the machinery of the judicial system would hamper the speedy treatment of cases. Accelerated procedures do exist and are applied, but the accelerated effect in the

[133] http://www.asae.pt

exchange between the litigants' lawyers is lost in the slow-moving court practice.

6.3.7 Suggestions for improvement

For an instrument that is little known and even less used, the obvious choice would be to make it better known among those entitled to use it. Advertisement to remedy the lack of awareness, however, has to avoid appearing to incite litigation. The measures proposed include therefore:

Make injunction judgments better known, both nationally and at European level: An example for this would be the former CLAB database on unfair terms.

Consider the possibility for judgments to be applicable *inter omnes*, even at European level: as the example of financial services shows, where banks need to be sued collectively in order to remove an unfair term from standard contracts used in the sector, some sort of facilitation is needed.

More convergence in injunction proceedings: Common procedures for cross-border injunctions should be contemplated.

It has also been proposed to revive the Consumer Law Enforcement Forum.[134]

6.3.8 Sources

Maria Cristina Portugal, (2011), Actes du Colloque sur l'action de groupe "L'union fait l'action : d'une action de groupe théorique à sa mise en pratique", Créteil (France) 19 mars 2011, édition du Syndicat des Avocats de France

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[134] http://www.clef-project.eu

7. SPAIN

KEY FINDINGS

- ✓ No cross border actions in Spain but a long list of national cases, in particular on unfair clauses, interruption of services and advertising. Banking and telecommunications are the two main sectors affected by cessation actions.
- ✓ There are also some cases out of the scope of the consumer law directives (travel, utilities interruption of services).
- ✓ Almost 100% of actions were initiated by private consumers associations. Public bodies only initiated two actions despite the long established legal standing provided by law.
- ✓ Some consumer associations very active in the national injunctions are not included on the list of qualified entities (there are some court cases concerning the criteria for inclusion)
- ✓ The main obstacles are on the procedural questions (standing, kind of procedure, compensation and damages, etc) and the cost and length of the procedures.
- ✓ Biggest obstacle is the enforcement of the decisions. In general, the plaintiff has a successful outcome but not in practice due to enforcement problems or significantly delayed.
- ✓ Due to the results obtained consumers are not that interested in participating in the collective procedure (as shown by the small number of consumers appearing in Court after a public call or announcement of the action). It is more interesting for the consumers to use individual actions.
- ✓ Despite the large number of judgments in this area a decrease in the number of class actions initiated in recent years is shown (compare to 1999-2007). The current resolutions correspond to cases brought in the past decade and many of those cases are now starting with the enforcement of the decisions.
- ✓ All interviewees agree collective mechanisms can be very important and useful but need to be clarified in a procedural way to be faster and more straightforward.
- ✓ No compilation of statistics or national cases by any public authority. Referred cases are based on the information of the interviewees or personal knowledge and research.

7.1The setting for injunctions

7.1.1 The law - Legal environment for injunctions

The constitutional requirement of Spanish law obliging public authorities to enact a consumer protection policy was already yielding collective redress mechanisms before the transposition of the Unfair Terms Directive by Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (Standard contract terms Act). The ensuing proliferation of sectoral redress schemes was partly replaced by a more cohesive regime introduced by the Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias – Spain's consumer law codification. Relevant for injunctions proceedings as civil proceedings also is Ley 1/2000, Ley de Enjuiciamiento Civil (Civil Procedure Code), which, however, does not provide for tailor-made rules for injunctions and has therefore been named as the source of inconsistencies in the handling of injunction cases.

The laws transposing the Injunctions Directive into Spanish law are:

- Ley 39/2002, de 28 octubre, de transposición al Ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios (BOE nº 259 de 29 de octubre de 2002).
- Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (art 53-55).
- Ley 7/1998, de 13 de abril, de condiciones generales de la contratación. (Art. 12 a 22) [Dir 93/13]
- Ley Enjuiciamiento Civil (Art 6, 11, 13, 15, 52, 221, 249, 250, 256, 711 y 728)
- Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico (BOE nº 166 de 12 de julio 2002) For the area of e-commerce. (art. 30 y 31) [Dir 2000/31]
- Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios. (For the unfair competition and advertising) [Dir 84/450]

- Ley 16/2011, de 24 de junio, de contratos de crédito al consumo (art. 36). (Consumer credit Act) [Dir 87/102 y Dir 98/7]
- Ley 22/1999, de 7 de junio, de Modificación de la Ley 25/1994, de 12 de julio, por la que se incorpora al ordenamiento jurídico español la Directiva 89/552/CEE, sobre la coordinación de disposiciones legales, reglamentarias y administrativas de los Estados miembros, relativas al ejercicio de actividades de radiodifusión televisiva. (Comprobar) [Dir 89/552 y 97/36]
- Real Decreto 1416/1994, de 25 de junio, por el que se regula la publicidad de los medicamentos de uso humano. Vigente. Comprobar lo que tiene de acción colectiva.
- Ley 47/2002, de 19 de diciembre, de reforma de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista, para la transposición al ordenamiento jurídico español de la Directiva 97/7/CE, en materia de contratos a distancia, y para la adaptación de la Ley a diversas Directivas comunitarias. (Art. 48)
- Ley 22/2007, de 11 de julio, sobre comercialización a distancia de servicios financieros destinados a los consumidores. (Art. 15) [Dir 2002/65]
- Ley 42/1998, de 15 de diciembre, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias (art. 16 bis) [Dir 94/47]

7.1.2 Qualified entities

The criteria used by the Spanish national authorities to incorporate organizations as qualified entities are relatively controversial. Regarding section 55.2 of RDLCyU *“The consumer and user associations on the Council of Consumers and Users may bring actions for injunctions in other Member States of the European Union when they are included in the list published in the Official Journal of the European Union. They must apply to the National Consumer Institute for addition to the list”*.

Participation on this Council as a requirement was discussed in Court. It was considered a limitation to consumers’ access to justice and to the capacities and competences of the consumer associations since not all the representative associations can become members of this Council due to the maximum number of

members and as it seems to award a wide margin of discretion to the administration who decides the composition of the Council that can be used arbitrarily.

7.1.3 Initiative takers

None of the organisations listed have as yet staged cross-border injunction proceedings. Some of them are in litigation domestically. Domestic cases are, however, also brought by organisations not appearing on the Commission list.

A lack of coordination is perceived between the various players. None of the organisations appear to have coordinated their efforts in a joint court case, while there are cases reported where two or more organisations filed suits in the same court on the same subject using different and sometimes even contradictory arguments to support their respective cause.

Of Spain's long list of qualified entities, it was the consumer associations (namely just three or four) who assumed injunction proceedings as their task. On only one occasion did the *Ministerio Fiscal* (Public Prosecutor) and the *Ayuntamiento de Córdoba* (Cordoba City Council) initiate a cessation procedure together for the use of unfair terms (Case: Gas Natural de Andalucía, S.A.). Recently the Ministerio Fiscal decided to take a more active position in the procedures (See *Circular* 2/2010 in www.fiscal.es).

In another case the *Ministerio de Sanidad y Consumo* (Health and Consumer Ministry) initiated a cessation action for the use of the rounding up clause by Car Park companies. The former judgements on the rounding up clause in mortgage collected by a consumers association were very relevant and helped to achive a successful conclusion to the procedure.

7.1.4 Resources (manpower & finance)

The lack of accessible data does not allow for general observations about the funding and the human resources of qualified entities to be provided. A general approach reflects organisations that receive very little funding and others that are highly dependent on public money. The level of public money received is not directly related to the degree of active involvement in collective processes.

7.2 Application of Directive 2009/22/EC in practice

7.2.1 Use of the Directive by qualified entities

7.2.1.1 Overall impact on consumer governance

Statistics

Sector	2008	2009	2010	2011	National	Cross border	Total
Banking	5	7	7	4	23	0	23
Insurance	0	0	1	0	1	0	1
Telecommunications	0	2		0	2	0	2
Package travel	0	0	0	0	0	0	0
Passenger transport (air, rail, sea, coach)	1	0	0	0	1	0	1
Car transport (car sales, car rentals, parking)	0	1	1	1	3	0	3
Scams (prize draws, city guides)	0	0	0	0	0	0	0
Postal services	0	0	0	0	0	0	0
Non-food consumer goods	0	0	0	0	0	0	0
Housing (contracts of sale, tenant contracts, real estate agents)	0	0	0	0	0	0	0
Timeshares	0	0	0	0	0	0	0
Energy and other utilities	0	0	0	0	0	0	0
Miscellaneous (please specify) Education	2	2	1	3	8	0	8
TOTAL	**8**	**12**	**10**	**8**	**38**	**0**	**38**

Subject matter	2008	2009	2010	2011	National	Cross border	Total
Doorstep selling (Dir 85/577)	0	0	0	0	0	0	0
Consumer credit (Dir 2008/48)	2	2	1	3	8	0	8
Television advertisements/Teleshopping (Dir 2010/13)	0	0	0	0	0	0	0
Package travel (Dir 90/314) and other tourism services (other than passenger transport)	0	0	0	0	0	0	0
Unfair terms (Dir 93/13)	6	8	8	4	26	0	26
Distance selling (Dir 97/7) and distance marketing financial services (Dir 2002/65)	0	0	0	0	0	0	0
Sale of goods (Dir 99/44)	0	0	0	0	0	0	0
E-commerce (Dir 2000/31)	0	0	0	0	0	0	0
Advertisement of medical drugs (Dir 2001/83)	0	0	0	0	0	0	0
Unfair commercial practices (Dir 2009/29)	0	0	0	0	0	0	0
Misleading and comparative advertisements (Dir 2006/114)	0	0	0	0	0	0	0
Services generally (Dir 2006/123)	0	0	0	0	0	0	0
Timeshares (Dir 2008/122)	0	0	0	0	0	0	0
Passenger transport (outside travel packages)	0	0	0	0	0	0	0
Accommodation services	0	0	0	0	0	0	0
Interruption of services	0	1	1	1	3	0	3
Other	0	1	0	0	1	0	1
TOTAL	8	12	10	8	38	0	38

N.B.: The tables above include every judicial decision adopted on the indicated year on a concrete case although the case was started time ago.

7.2.1.2 Business sectors affected

Sector: In terms of affected sectors, most of cases are related to finance, telecommunications and utilities. Tourism is another sector affected by the cessation action, but not as much as required in a tourism-focused country such as Spain. Subject matter: Most Spanish cases related to unfair contract terms, mainly in financial services, utilities and telecommunications.

Other group of cessation actions started in the 2003-2005 period were cases on Consumer Credit Directive application (namely English language schools and package holidays). The third largest matter affected by cessation action is the interruption of services (highways, phone, electricity). Last, but not least, a group of actions are those related to advertising, namely on the banking and investment sector.

7.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

No cross-border cases reported.

7.2.1.4 Cross-border litigation (bringing cross-border infringements before domestic courts)

No cross-border cases reported.

7.2.1.5 Domestic use

Cessation actions are the judicial mechanism under the Spanish law. The LEC has not created a specific procedure for the protection of consumer’s collective and diffuse interests.

Most cases finished with a positive outcome for the consumers. In general there were no negligence claims and most actions concluded in a cessation order against the defendant. Those cases that had a negative outcome for consumers were usually due to procedural obstacles, not to the main substantive discussion.

The most frequent solution is a final judgement in Court. Only in a small amount of cases was a settlement concluded in Court or before the start of proceedings. In general administrative measures are related to the investigation and sanction area with no direct consequences for harmed consumers. In some cases the collective Court resolutions were the starting point for a legislative change or more active administrative supervision in a particular sector.

The main remedy is to stop consumer rights infringements and prohibit it in the future.

Usually the initiating party demands the remedy and damages for consumers harmed by the infringement, but due to procedural difficulties it is not always possible to obtain a positive solution in this regard. Frequently only through enforcement procedures can damages be obtained due to the particular mechanisms established in section 519 LEC (see enforcement paragraph). Other important obstacles to improving the results of these collective actions include difficulties in calculating damages .

Courts usually order the publication of the decision in a general newspaper (national or regional, depending of the scope of the action) and sometimes in particular a newspaper for specific cases, for example in a financial newspaper and the voided term is also included in the *Registro de Condiciones Generales de la Contratación* (Spanish Standard Terms Register). Other kinds of communications such a personal notification to every affected consumer by the company or the publication in the offices of the company are also well-known remedies.

The publication of the Court decision is a usual part of the judgment. Nevertheless many discussions happen in courts regarding the publication of the judgment in newspapers or the size of this publication.

7.2.2 Benefits for qualified entities

It is very difficult to evaluate the impact on society of the consequences of the list of qualified entities since this list and its meaning is not really understood by most consumers. There has not been a significant impact on the perception of each entity by other entities because there is no direct relation between the organisations named on the list and the most active organisations in the collective field. The biggest impact on the standing and perception of the organisations is obtained by means of the media coverage with regard to prominent cases, regardless of whether these organisations are included on the qualified entities list or not.

There are no experiences in Spain of cooperation with the peer group of consumer organisations included on the list in other European countries.

7.2.3 Benefits for consumers generally

Prohibiting the offending company from repeating the same infringement of consumer law in the future helps to ensure that every future consumer avoids the same problem. Such a preventive effect is very welcome.

Even though there are difficulties inherent to cessation actions, the cases withthe greatest impact have helped to enhance knowledge of consumer rights, to change important consumer legislation and to rid the market of some illegal practices and clauses in breach of consumer rights. A multiplication of these positive effects could be easily reached through improving the collective redress mechanism.

One of the biggest impacts of the Directive in Spain has been to contribute to a broad discussion on the consumer association constitution and requirements.

7.2.4 Benefits for individual consumers

By using collective mechanisms, the benefits of consumer protection legal actions can be multiplied. There is an opportunity for the consumers affected to obtain a direct solution to their problem (i.e. with the unfair clause elimination).

In monetary terms, many consumers have reduced future payments to poor or illegal services as a direct consequence of some of the leading collective cases. For instance, the rounding up cases in Spain have definitely brought about the prohibition of new illegal charges in different sectors (banking, telecommunications, parking) and a general prohibition for every economy sector, although as an indirect consequence in some sectors (namely parking) prices are higher now than before the Court cases because the companies concerned have eliminated the illegal clause but have noticeably increased the prices too, paying even more than with the illegal clause.

7.2.5 Effects on markets

The effects of collective actions are a good reason for other competitor companies to respect consumer rights. This dissuasive effect is highly appreciated. Nevertheless, since decisions on these actions in Spain are not dissuasive enough, now the offending companies and their competitors are tempted to repeat the same consumer's rights infringements. Only in the case of really tough decisions in courts will offending companies and their competitors be persuaded of the importance of respecting consumer rights because of the consequences of the consumer law infringements.

The actual situation in Spain is as follows. An offending company decides, for example, to use an unfair term which causes clients to pay twice for a service. The company knows it will be a very long and difficult process for the actor and the clients to obtain a solution to the problem and is ready to make the procedure as long and complicated as possible. The court procedure starts. At that moment only a small minority of the clients are represented in the case (i.e. 5%, usually even less). After some years of discussion in court (let's say 3-5 years), there will probably be an injunction issued on the illegal practice. Finally the company should stop the illegal practice but there are no results of the cessation action in terms of compensation because one of the procedural obstacles described earlier. It is at this moment that clients start compensation actions (best case scenario is enforcement of the previous decision or worst case scenario is a new procedure). During this process many clients never appear in the proceedings, many others decide to leave the process after becoming tired of litigation. Only a small proportion of clients affected will conclude the complete process to obtain compensation for damages (i.e. 2%). The conclusion for the company is clear: after 6-8 years it only has to pay back the money illegally received to 2% of affected clients who persist in the long and difficult process. Usually the money back will be uplifted with the legal price evolution but this is clearly not enough.
As a conclusion, in the worst scenario for them, the offending companies would have to pay back as redress updated money received illegally many years ago but only to a small percentage of their clients and perhaps they will also pay the legal fees. Usually they will not be condemned to pay any compensation or sanction for their infringements. In a market economy that means companies find it economically advantageous to repeat the illegal practice. Conversely companies respecting consumer rights will not obtain these extra benefits and will be tempted to break the law too. The final and undesirable effect of this chain would be to reduce competition and decrease respect for consumer rights.

In conclusion, the use of the collective redress mechanism leads to the opportunity to reduce the consumer infringements in Spain but this opportunity so far is very far away from the best possible result that can be only obtained when court decisions include sanctions and compensation for affected clients. Paradoxically stronger court decisions would be the best way to eliminate the judicialization of consumer problems, incrementing the preventive and dissuasive effect of previous cases. Being afraid of the class action industry, as the means for larger compensation amounts may have the unintended effect of protecting those companies infringing consumer rights.

In general the 2009/22/EC Directive is perceived as a very useful mechanism and where it is used well positive results will be possible; it is considered both useful and not very useful at the moment, depending

on the personal experience of the person asked; and a failure in the case that the barriers to achieving the best results are not removed.

7.2.6 Relationship with CPC-mechanism

The Biannual report published by the European Commission on 2 June 2009 refers to 0 cases in 2007 and 8 cases in 2008 of mutual assistance requests issued by Spain using the CPC system. However a high level of mutual assistance requests were received in Spain: 72 in 2007 and 98 in 2008. No information is available for 2009 and later.

The main cases referred related to airlines, package holidays, electronic commerce and broadcasting television. Publicised cases were also referred out of the CPC scope, for example criminal cases such as fraud or scams.

Results seem to be not very positive since the national report refers to long delays or no answer from companies in some cases.. In many other cases linguistic or technical obstacles prevent a better result. Once the CPC network is properly working better results on the most recent cases are expected although the difficulties in a highly decentralised country such as Spain are fairly extreme.

With regard to the application of the CPC-Regulation, Spanish authorities must apply the administrative procedure with inspection and sanction protocols. There are no court cases in CPC-Regulation application. The main obstacle in the CPC procedure is length of the procedure and linguistic misunderstanding.

Some collaboration cases with other national authorities (Bulgaria, Norway, France) were referred to in the national report. Those activities related to research or training campaigns rather than concrete case solutions. No cases with stop infringements were compiled.

7.2.7 Problems

7.2.7.1 Multi party actions, group actions and collective actions - differences and consequences

In the case of the collective mechanism, Spanish legislation has defined two different kinds of actions:

- Group actions: To sue in court will require that the group is formed of at least more than a half of those affected, using the same representation. In this case there are no rules of limitation to the legal standing.

- Collective actions: when the legal standing is reserved to certain kind of consumer body and institution. No minimum of affected consumers is required to start proceedings. It is even possible to start proceedings without any affected consumer.

Within the collective actions depending on the specific interests at stake, the subjects entitled to file a suit in defence of rights and interests of consumers are different:

- When victims are a group of consumers with individualised or easily individualised members, the Consumer Associations, the legally constituted entities created to consumer protection and the groups of victims will be entitled to introduce this collective action.
- When victims are not individualised or easily individualised, the diffuse interests' suit, in the name of consumers, will correspond exclusively to consumer associations that are representative according to the law and to other consumer authorities under the terms of section 11 LEC. Some laws recognise other entities standing in particular cases.

The distinction between the collective mechanism and a multi-party procedure is very important. A multi-party procedure is a normal procedure which accumulates the actions of many affected consumers (but less than a half of the total group). In a multi-party procedure every single consumer should proove the damages suffered and the decision will be not extended to other consumers with the same problem that have not been party to the case. However in collective mechanisms (group actions or collective actions) the decision can affect consumers that have not been party to the proceedings. Likewise in collective actions the direct participation of the consumers affected in the proceedings is not required and it is not necessary to prove and examine each individual damage suffered by every single consumer (at least at the declarative stage of the procedure).

If the court with jurisdiction wishes to convert the cessation act (collective action) into a case with an accumulation of representations (multi-party action) and the cost of the collective process is more expensive than in an individual or multi-party case (i.e. because of the public calls required) the answer to consumers is even more complicated. There are no benefits to consumers using this procedure. The risk of this chain is to attempt cessation actions in a futile action compared to the "normal" proceedings. Only when a cessation action is driven by courts as a real collective mechanism that is faster, simpler and cheaper but with similar results to an individual action (including remedies and compensation damages) but for every consumer affected will the cessation action be considered a useful mechanism for consumers.

7.2.7.2 Length of proceedings

The length of proceedings is one of the most criticised aspects of the collective mechanism. In general terms these procedures on average at First Instance level take almost 11 months and another 11 months to Second Instance. The Supreme Court does not always participate but in those cases that are referred the average length is around 52 months (2 years and 4 months). However, this average at the Supreme Court is not representative because many of the decisions considered are preliminary decisions to refuse appeals and to declare the judgment as a final judgment. In the cases in which the Supreme Court really makes its decision average length is around 5 years.

A good example is the procedures against *Opening* (English language school), started on 2002 with a first instance decision on the final days of 2006, and second instance decision in 2010. Another "exemplary" case of this excess length in the proceedings is the rounding up clause procedure against *Caja Madrid*. The proceedings started in 2000 and only finished this year because of the defendant's conformity with claims after more than 10 years of discussion in the Spanish courts and a preliminary reference to the ECJ.

7.2.7.3 Financing and distribution of proceeds

In Spain, legal costs include expenses that result from the proceedings: lawyers and solicitors fees when their participation is compulsory; the publication of announcements or edicts that must be mandatorily published in certain collective proceedings; expert's fees; copies, certificates, etc requested from public registers apart those that are requested by court because in this case they will be free of charge; notaries' fees. Those costs are very high and make it very complicated for consumers association to start a procedure due the difficulties in financing such private consumer entities.

The party whose claims have been rejected will pay the costs, as per ordinary judicial proceedings (loser pay rule). In particularly difficult cases the court can decide not apply the loser pay rule. If the claim is accepted partially, each party will bear its own costs and half of the shared costs, except those parties that acted negligently.

7.2.7.4 Enforcement

The essence of collective actions is the possible benefit to all affected consumers, not only those who have been parties to the proceeding. Rules on effects of the judgment are found in section 221 LEC. Section 223.3 states the rules of *res iudicata* of judgments. The non-litigant but affected consumers referred to in the sections below should appear on the procedure at the enforcement stage of the procedure following section 519 LEC provisions.

Spanish cases are good examples of procedures in which much time is invested in the declarative stage and positive resolutions have usually been achieved for consumers but the practical results of which in the implementation phase are far from being as positive as expected.

Some judgments forget to include the necessary data required by section 221 LEC, others include data insufficient in the implementation phase and ultimately the implementation phase takes too long.

One of the biggest problems in the Spanish cases is the moment in which the enforcement can be requested. Although the law provides as a general rule the provisional execution of any sentence and there are no special rules for collective actions that contradict this general rule, it is certain that in the prominent cases in Spain, the courts have decided not to allow execution due to the provisional nature of these pronouncements, waiting until the final decision instead. This is delaying the process of effective recovery of damages for years.

Another problematic question is the legal standing rule on the enforcement of the decision. In general terms Spanish courts demand every single affected consumer to appear in the proceedings to obtain the enforcement of the decision. This is a controversial decision because it seems to go against the nature of collective processes and also against the rule under section 221.1.1 final LEC permitting the execution of the request by the applicant association.

7.2.8 Suggestions for improvement

7.2.8.1 In terms of scope of actions

The definition of infringement of consumer law can be to do something wrong (i.e. to charge twice for the same service) and then the injunction order will require the infringement to be ceased; or the infringement can also be to avoid any of the consumer rights, for example, the obligation to provide consumers with information or documents under the terms of the Annex 1 Directives. In this case the injunction order can order the infringing party to comply with the consumer rights ordering a party to do something (i.e. to provide documents or information under the terms provided by one of the Annex 1 Directives).

Cases such as the interruption of services or utilities in Spain are a very good example of this kind of injunction of ordering to do something; in this case to restore the service and pay legal compensation for the interruption where these requests for compensation are included in the consumer/clients rights legislation.

A better definition of what is intended by cessation actions regulation will be welcomed. Or the cessation action is merely considered an interim measure to stop the infringements with no further consequences for consumers (without remedy or compensation) or the cessation action is a complete redress mechanism with a summary procedure to obtain complete restitution of consumers rights in case of collective harm. If the EU idea is the first possibility, then most of countries already had a better system for that, which is simpler and faster than the cessation actions system. If second possibility is pursued, it is absolutely necessary to clarify the express extent of the definition and to impose an improvement on the procedure rules of application in MS regulations.

In both cases an accelerated procedure is a minimum requirement which is one of the largest failures in current procedures in many countries, namely Spain.

7.2.8.2 Wider legal standing

In some areas the legal standing is extended to different bodies other than consumers' organisations and public bodies. For example on adhesion contracts, section 16 of the LCGC provides legal standing to: *"1. Associations or corporations of entrepreneurs, professionals and farmers statutorily entrusted with the defence of the interests of its members. 2. Chambers of Commerce, Industry and Navigation. 5. Professional associations legally constituted".* This is entirely consistent with the fact this law is applicable to every client, consumer or otherwise. Consequently, if those kinds of legal standing are allowed in national legislation, it would be consistent to include, at least in those areas, the same organisations of other Member States, included on the list of qualified entities.

The possible extension of the legal standing on cessation actions to individual consumers could be considered as an method of encouraging consumers to access justice and a possible solution to the problem on the legal standing discussion within the consumer associations requirements, that are too extensive in Spain.

7.2.8.3 Preliminary procedure

The introduction of a preliminary procedure does not seem to be the best idea. In cases in which such a preliminary procedure is possible, no positive results could be obtained. A good example is section 13 of LCGC, providing a voluntary preliminary conciliation, with no binding results and with no positive results in any case.

The introduction of a compulsory system or a binding result does not seem to be appreciated by the consumers and consumer bodies concerned who prefer the improvement of the judicial system rather than the introduction of a new mechanism on consumer protection to add to the big list of current systems that do not always function well.

7.2.8.4 Erga omnes and res iudicata effects

Another interesting question is the possibility of extending the injunction effects *erga omnes* in two ways: to the beneficiaries of the resolution and to competitor companies affected by the decision.

Regarding the first question, the extension of the effects of the decision to other consumers that have not been part of the proceedings, is provided in section 221 LEC.

Regarding the second question of extending the effects of the resolution to other companies other than the defendants but with the same infringement, there are no rules in Spain apart from the second paragraph of the section 221 LEC. In fact this second paragraph refers to the effects not limited to those who have been a party to the proceedings without any limitation to the consumers and consequently, the effects could be extended to other companies. This is the interpretation adopted in unfair contract terms in the insurance companies' case. The discussion here concerns the possible helplessness that companies affected by the resolution, which have not been involved in the process, could suffer. However, the possibility of participating in the process voluntarily after public appeals, as consumers do, defeats this argument.

7.2.8.5 Cross-border rules

No cross-border collective cases in Spain established to date. Rules of international insolvency proceedings can be used as an example of solutions on collective consumer cross-border cases in the future (Council Regulation on insolvency proceedings 1346/2000).

The article 6 of the Rome II Regulation 864/2007 is clearly not enough due to the restricted scope of application of the section. It will be only applicable in cases of *"non contractual obligations arising out of an act of unfair competition"*. Many cases arise out of other kinds of non-contractual obligations not related to unfair competition.

In any case the Rome II regulation only provides a specific solution to the applicable law to this question but there still remains a lack of specific rules on the international jurisdiction problem in case the general rules of the 'Brussels I'-Regulation were not well adapted.

On the other hand, one of the most positive effects of the decision on consumer' injunctions is possibly extending the effects to people that have not been party to the proceedings. If this effect is very welcome on national cases, it will be even more useful on cross-border cases. Possibilities as the mutual recognition of decisions in consumer collective mechanisms as well as the option of creating a European enforcement order seem to be not too far away from reality.

7.2.8.6 Litigation costs

The cost of procedures is one of the biggest obstacles to using cessation actions. If the Directive were to address litigation costs it would provide a very welcome reduction in the costs to be paid by the consumer body acting on behalf of consumers. For example a prepayment of public calls or notification by defendants only to be recovered in case of rejection of the action or the payment of these costs from the common funding provided by compensation not requested by the clients concerned in previous litigations could be options to be explored by the EU and the MS.

In terms of a possible award of costs on the consumers' part, the risk should be reserved for the negligence, bad faith or abuse of law cases.

7.2.8.7 Damages

Another problem refers to the moment and way in which the repayment and damages can be obtained. Spanish Courts understand that every single consumer should come to the process, either during the declarative stage of the process or during the enforcement of the decision (by way of section 519 LEC). Then, only consumers participating in the process can obtain complete satisfaction of their rights. This is a typical rule in individual mechanisms but not adequate for a collective mechanism. A collective mechanism should provide all consumers (be they party or not in the process) with the total restitution of their rights. The infringing company should repay all money illegally obtained (otherwise an illegal benefit should be permitted). This should be deposited into a fund for all affected consumers. The consumers could then appear to collect their share or choose not withdraw it and leave it in that fund to be used for consumer activities, for example to cover legal costs of new collective processes or campaigns for consumers' rights.
Difficulties in calculating the exact amount of damages for every consumer could be solved with an average amount per consumer calculated during the procedure. In case a consumer considers his/her damages to be higher and is able to prove it, he/she can reserve the action and opt out of the collective procedure. For this option in consumer collective actions an opt-out system may be required.

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7.2.10 Glossary

INC	Instituto Nacional de Consumo (Consumer National Institute)
IPL	International Private Law
LCGC	Ley de Condiciones Generales de la Contratación. Unfair Contract Terms Act.
LEC	Ley de Enjuiciamiento Civil. Civil Procedure Act.
RDLCyU	Real Decreto Legislativo de Consumidores y usuarios. Consumers and Users codification law

8. SWEDEN

Key findings

Injunctions are an established and regularly used remedy for enforcing consumer protection laws in Sweden.

The Injunctions Directive did not bring substantial changes to the regulatory environment apart from opening the possibility for foreign qualified entities to bring injunction proceedings before Swedish courts.

The only Swedish qualified entity on the list of qualified entities pursuant to the Directive is the Swedish Consumer Agency with the Consumer Ombudsman, but it has so far not used the possibility for initiating cross-border proceedings.

There are no cases of foreign qualified entities initiating injunction proceedings before Swedish courts either.

The CPC-Regulation is generally seen as a more cost-efficient mechanism for cross-border enforcement of consumer law and for protection of collective consumer interests.

8.1The setting for injunctions

8.1.1 The law – legal environment for injunctions

The Injunctions Directive was transposed into Swedish law through the Act on Right of Action for Certain Foreign Consumer Authorities and Consumer Organisations (Lag om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer, hereinafter TRKL or Right of Action Act).[135] The approach taken by the lawmaker has been a minimalist one. The Act tackles exclusively the position of foreign 'qualified entities' before Swedish courts and has not exercised noticeable impact on internal legal and institutional arrangements.

[135] See SFS 2000:1175, see also the Governmental Bill, Prop. 2000/2001:34 and Ds. 2000:32.

a. Domestic injunctions

Injunctions are a well-established remedy in Swedish consumer law. Already in the 1970s with the entry into force of the first Swedish consumer protection statutes – the Marketing Practices Act of 1970[136], and thereafter the Act on Unfair Terms in Consumer Contracts of 1971,[137] a right of action for injunction was envisaged as a main remedy against infringements of these acts and for protection of collective consumer interests. Apart from injunction to cease an infringement (”negative injunction”), a so called ”positive injunction” was introduced, i.e. imposing an obligation on a trader to provide relevant information to consumers on the basis of legally stipulated information duties. A specialised judicial body, the Market Court (Marknadsdomstolen) was set up with competence to hear cases concerning the collective consumer interests as well as competition law cases.[138] Against this background, the Injunctions Directive did not bring about any novelty in domestic law.

The main entity responsible for the enforcement of the consumer laws protecting collective consumer interests is the Consumer Ombudsman (Konsumentombudsmannen, KO).[139] The Ombudsman is a public official of high repute who is also the head of the Swedish Consumer Agency (Konsumentverket, KOV). The Ombudsman acts as a representative of the collective consumer interest and normally tries to achieve voluntary compliance by the infringing trader. In cases of minor importance, the KO is authorised to issue prohibition or information disclosure orders if an agreement with the respective trader is successfully negotiated (consent orders, cf. § 7 AVKL; § 28 MFL). Once such an order is approved by the trader it has the binding effect of a judicial decision.

In cases of greater significance, or where voluntary compliance cannot be achieved, the Ombudsman can file an action for injunction before the specialised Market Court (see § 23 MFL; § 4 AVKL). Depending on the violation, KO can seek an injunction to cease an infringement (§ 23 MFL and § 3 AVL) or a positive injunction, i.e. a court decision ordering information disclosure (§ 24 MFL). Injunctions are issued under penalty of a

[136] See Lag om otillbörlig marknadsföring (SFS 1970:412), nowadays the Marketing Act of 2005 (Marknadsföringslagen, MFL, SFS 2008:486). The Act implements the Unfair Commercial Practices Directive.
[137] SFS 1971:112. This Act was replaced by the present Act on Unfair Terms in Consumer Contracts (Lag om avtalsvillkor I konsumentförhållanden, AVKL, SFS 1994:1512).
[138] Market Court Act, Lag om marknadsdomstolen, MDL (SFS 1970:417).
[139] See § 11 MDL.

fine upon non-compliance (§ 26 MFL; § 3 st 4 AVKL). Importantly, there is a possibility to seek preliminary injunction (§ 27 MFL; § 6 AVKL).

Apart from KO an injunction before the Court can also be brought by consumer and wage-earners' organizations, by business associations and by individual competitors (the latter only under MFL). Individual consumers have no right of injunctive action.

For infringments of the MFL the KO (and in a subsidiary manner affected competitors and business associations, cf § 48 MFL) can ask the court to impose a specific pecuniary sanction on the infringing trader, so called ”market disturbance fee”. The size of the fee can be from 5000 to 5 mln Swedish crowns, but not higher than 10 percent of the perpetrator's annual turn-over (§ 29 MFL).

Individual traders and consumers can also claim compensation for damages caused by infringement of the Marketing Act. Since 2002 there is a possibility to claim compensation for damages in group proceedings under the Group Proceedings Act (see below).

b. Legal basis

The relevant statutes that provide legal basis for injunctive action are the Marketing Act (2008:486) and the Unfair Contract Terms Act (1994:1512). However, on the basis of the so called "illegality principle" (lagstridighetsprincipen) and express reference in the MFL, violations of other consumer-oriented statutes can be enjoined as being contrary to good marketing practice (cf. § 1 MFL). In this way the Marketing Act acquires an important "spring-board" function and the KO is indirectly empowered to monitor a broad array of markets and to file injunctions for violations of a number of statutes that aim at protection of collective consumer interests. The relevant statutes are listed in § 1 MFL as follows:

- Act on Package Tours (lagen (1992:1672) om paketresor),
- Tobacco Act (tobakslagen (1993:581)),
- Act on Deposit Guarantees (lagen (1995:1571) om insättningsgaranti),
- Act on obligation to notify concerning certain financial activities (lagen (1996:1006) om anmälningsplikt avseende viss finansiell verksamhet),
- Act on marketing of cristal glas (lagen (1996:1118) om marknadsföring av kristallglas)
- Time-sharing Act (lagen (1997:218) om konsumentskydd vid avtal om tidsdelat boende),
- Act on payment transfers in the EEA (lagen (1999:268) om betalningsöverföringar inom Europeiska ekonomiska samarbetsområdet)

- Act on investment protection (lagen (1999:158) om investerarskydd),
- Act on electronic commerce and other information society services (lagen (2002:562) om elektronisk handel och andra informationssamhällets tjänster),
- Act on loans (lagen (2004:299) om inlåningsverksamhet),
- Price Information Act (prisinformationslagen (2004:347)),
- Distance Selling and Doorstep Selling Act (distans- och hemförsäljningslagen (2005:59)),
- Insurance Act (försäkringsavtalslagen (2005:104)),
- Act on Insurance Mediation (lagen (2005:405) om försäkringsförmedling),
- Act on Information Obligations of Franchisors (lagen (2006:484) om franchisegivares informationsskyldighet),
- Air Transport Act (lagen (2010:510) om lufttransporter),
- Radio and Television Act (radio- och tv-lagen (2010:696)),
- Alcohol Act (alkohollagen (2010:1622) and
- Consumer Credit Act (konsumentkreditlagen (2010:1846)).

c. Legal situation of foreign qualified entities

Following the implementation of the Injunctions Directive foreign qualified entities can bring action for injunction for infringements of any Swedish act implementing an EU Directive listed in the annex to the Injunctions Directive (cf. § 1 TRKL). The qualified entities can seek not only injunctions to stop an infringement (cf. § 3 TRKL with reference to § 23 MFL and § 3 AVKL) but also – and beyond the scope of the Injunctions Directive – "positive" injunction to order information disclosure (cf. § 3 TRKL in conjunction with § 24 MFL). They can also seek imposing a penalty of a fine for contravention of the injunction as well as preliminary injunction (cf. § 3 TRKL in conjunction with §§ 26 and 27 MFL and § 6 AVKL). Finally, such bodies can seek an injunction to pay to the Swedish State a special fee for violation of certain provisions of the Radio and Television Act (2010:696). 'Qualified entities' from other Member States were however not given the right to claim market disturbance penalties before the Market Court.

On the basis of Article 5 of the Injunctions Directive Sweden introduced a mandatory consultation procedure between foreign qualified entities seeking injunction and the defendant; i.e. the injunction can be brought only if the party seeking injunction has asked the defendant to terminate the infringement and the defendant has not ceased the infringement within two weeks of receiving the notification (cf. § 4 TRKL).

Such consultation requirement does not formally exist for domestic injunction proceedings, but is part of the established practice of the KO.

The competent court for injunctions brought by foreign qualified entities under the Marketing Act and the Unfair Terms in Consumer Contracts Act is the Market Court. For actions concerning imposing of penalty under the Radio and Television Act, the competent court is Stockholm Administrative Court. Actions for imposing penalty for contravention of a final injunction have to be lodged before the district courts following general rules of jurisdiction under the Swedish Court of Judicial Procedure or before Stockholm City Court (see § 5 TRKL).

8.1.2 Qualified entities

a. Domestic injunctions

As mentioned above the main body instituting injunction proceedings for the protection of collective consumer interests is the Consumer Agency through the Consumer Ombudsman. The Consumer Agency is entrusted with monitoring the market and with ensuring compliance on the part of traders with their main obligations under consumer law statutes. Investigations are normally initiated as a follow-up on consumer or competitor complaints, upon notification by public authorities, consumer organisations or *ex officio* by the KO. The Consumer Agency may conduct negotiations with industry and with individual traders, and can elaborate guidelines for market behaviour in particular industry sectors or for types of practices in cooperation with the relevant industry.

Apart from the Ombudsman, consumer organisations, together with wage-earners organisations, have since 1970 enjoyed *locus standi* to bring injunction proceedings for violation of the Marketing Act and the Unfair Consumer Contract Terms Act. For unfair contract terms the standing of consumer organisations is subsidiary to that of the Consumer Ombudsman. In other words, consumer associations can only institute proceedings if the Consumer Ombudsman decides not to do so (see § 4 AVKL). The same subsidiarity arrangement was initially valid for actions based on the Marketing Act, but was abolished in 1995.

Despite this emancipation consumer and labour organisation have hardly ever used their procedural rights. The central position of the KO in the Swedish system of consumer enforcement has remained unchallenged. This can be explained by the fact that Sweden, despite its high reputation in the area of consumer law and policy, does not have a strong grass-root consumer movement. The early building up of an extensive system

of public bodies in the consumer domain has probably had the effect of pre-empting the emergence of a broad decentralised consumer movement.

The main Swedish consumer organization, the Organisation of Swedish Consumers, Sveriges konsumenter, (originally called Swedish Consumer Council, Sveriges Konsumentråd) was founded in 1992 as an umbrella organization for a dozen of associations involved in consumer issues in one way or another. Among the founding members were the Swedish Cooperative Association (Konsumentföreningen, KF) and the main trade unions, LO and TCO. At present there are 27 member organisations, including women and pensioners organizations, local consumer associations, youth organisations etc. No individual members are reported. [140]

In 1994 an alternative consumer organization, the Swedish Consumer Coalition (Sveriges Konsumenter i Samverkan, SKiS) was founded, which declared itself to be free of trade, producer or political influence. The organization had a profile in ecological consumption with member organizations active in health-related, environmental, animal protection and ethical issues of consumption. The organisation purported to be financed to a large extent by individual contributions, but also used to receive public funding. This organisation seems to have lost on importance. The chairperson of the organisation still maintains an active website where the lack of funding and support on the part of the government is deplored. Attempts to get in contact with representatives of the organisation have been unsuccessful.

A number of other organisations have objectives that are related to consumer protection, but do not define themselves as consumer organisations with horisontal tasks across the field of consumer policy. These are environmental organisations, centers for fair trade and ecological consumption, automobile organisations and associations for animal protection etc.[141]

Individual traders and business associations also have standing to institute injunction proceedings before the Market Court if their interests are impaired by an infringement of the Marketing Practices Act. Concerning unfair contract terms, business associations, but not individual traders, have standing to claim injunctions, and then in a subsidiary manner vis-à-vis the Consumer Ombudsman (see § 4 AVKL). Even if these injunctive actions are prompted by private business interests, they often have an indirect impact on collective consumer interests.

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[140] In 1995/96 the Swedish Parliament (Riksdag) approved for the first time direct financial allocation amounting to around 2 mln. Swedish crowns to the Swedish Consumer Council (now Swedish Consumers), see prop. 1994/95:100.
[141] See Swedish Consumer Agency, Annual reports 2008, Annex 3; 2009, Annex 4; 2010, Annex 4 .

b. Swedish qualified entities under the Directive

The question of which Swedish public bodies and/or organisations shall be elicited as 'qualified entities' to have the right to defend the collective interests of Swedish consumers in other Member States did not receive much attention at the time of implementation of the Directive. It was left to the government to draw up the list of bodies, fulfilling the criteria in Art. 4 of the Directive.[142] Eventually, the only body that is included in this list is the Swedish Consumer Agency with the Consumer Ombudsman.[143] None of the consumer organisations in Sweden has been included in the list and there seems to be limited interest among these organisations to use the opportunities opened by the Directive.

8.1.3 Initiative takers

The most frequent initiative-takers of injunction actions before the Market Court are indvidual competitors on the basis foremost of the Marketing Act. Indeed, nowadays the majority of cases of the Market Court (between 15 and 25 per year) stems from disputes between commercial actors. Business associations also appear occasionally, but infrequently, on the litigation stage.

By contrast, consumer organisations have not filed a single case of injunction in defence of the collective consumer interests. The main initiative taker with a focus on consumer interests is the Consumer Ombudsman.

The Consumer Agency deals with hundreds of files of alleged infringements per year. For 2009 for instance the overall number of oversight files was approx. 720, of which 380 were closed with informal agreement of voluntary compliance.[144]

For **2010** the Agency reports 14 consent injunctive orders, and 4 information disclosure orders. For **2009** the respective number is 13 injunctive orders and 2 information disclosure orders. For **2008** the number of approved orders is respectively 17 injunctive orders and 1 information disclosure order.

[142] Prop. 2000/2001:34, 31 ff.
[143] See the first Commission communication concerning Art. 4(3) of Directive 98/27/EC OJ 2003 C 159/2, cf. the most recent Commission Communications concerning Art. 4(3) Directive 2009/22/EC, OJ.
[144] See Consumer Agency, Annual Report for 2009, p. 21.

The statistics on the number of instituted proceedings by the KO before courts is as follows: 11 in **2010**; 18 in **2009** and 14 in **2008**. These include injunction proceedings before the Market Court, but also proceedings for imposing a penalty for non-compliance with final injunctions as well as proceedings before the district courts for imposing of market disturbance fee.[145]

The number of judicial decisions in injunction proceedings initiated by the KO is respectively: 6 from the Market Court and 4 from the general courts in **2010**; 15 from the Market Court and 6 from the general courts in **2009** and 4 from the Market Court and 3 from the general courts in **2008**.

Proceedings before the general courts are normally actions for imposing a penalty of a fine for non-compliance with already issued injunctions. The lower number of decisions in 2008 can be explained by the considerable slowing down in the activity of the Consumer Agency in the period of 2006-2007 following the relocation of the Agency from Stockholm to Karlstad and the ensuing loss of personnel and resources.

8.1.4 Resources (manpower and finance)

a. Consumer Agency with the Consumer Ombudsman

The Consumer Agency, which (with the Consumer Ombudsman) is the only Swedish qualified entity under the Injunctions Directive, is an independent public agency funded through the state budget. A special unit of legal officers supports the Consumer Ombudsman in carrying out its enforcement policy and litigation activity. The annual funding is determined in the state budget. The decision on funding is accompanied by a Governmental instruction (regleringsbrev) as to the main priority areas and policy instruments to be employed when using the allocated public resources.[146]

For **2010** the overall contribution from the public purse for the activities of the Consumer Agency amounted to ca 107,4 mln Swedish crowns[147]; for **2009** – to 109,6 mln and for **2008** – to 111,2 mln. Obviously these resources are adequate but not unlimited. Partly due to scarce resources, there is a conscious strategy to

[145] See Consumer Agency, Annual Report for 2010, p. 19. The Agency notes that the proceedings before the district courts take an exceedingly long time which diminishes the effect of the remedy.
[146] See Regleringsbrev, 2009; 2010; 2011.
[147] The sums are given in Swedish crowns for exactness. The exchange rate between the Swedish crown and the Euro is approximately 10:1.

pursue voluntary compliance on the part of traders and to have recourse to judicial proceedings only in exceptional cases, where compliance cannot be expected or when the outcome would have an important precedent-setting effect.

In the annual reports of the Agency the annual expenses for regulatory oversight, including legal measures and enforcement, are stated to be as follows: 34,1 mln Swedish crowns for **2010**; 31,5 mln – for **2009** and 26,4 mln – for **2008**. Only a limited part of the annual budgetary funds, i.e. a standard sum of 200.000 crowns, is ear-marked for covering litigation costs for judicial proceedings within the Agency's area of supervision. This includes litigation costs for representing individual consumers in court pursuant to the Act on certain consumer disputes.[148] There are no special funds for cross-border enforcement and for cross-border injunction proceedings.

b. Consumer organisations

Since 2007 the distribution of public funding to consumer organisations is governed by the Ordinance on public support for organisations in the consumer area (SFS 2007:954). The Ordinance introduced a new way of allocating public funds to consumer organisations, which according to representatives of the Ministry of Justice was not isolated for the consumer policy area, but reflected a general change in approach of the Swedish government to its relations with non-governmental organisations. Whereas previously the allocation was carried out by the Ministry responsible for consumer affairs, this task is now delegated to the Consumer Agency. Moreover consumer organisations are not allocated a lump annual sum for their activities but have to apply separately for different types of funding. The Ordinance defines three categories of public support: so called organisation support, activity support and project support.

During the last three years the Consumer Agency has allocated an average of around 12 mln Swedish crowns annually to a variety of consumer and consumer-related organisations on the basis of the Ordinance. The support is divided into: general support for organisations and their activities, as well as support for specific projects.[149] The umbrella organisation Swedish Consumers has been a major recipient of funding, receiving annually approx. 4 mln Swedish crowns for general activity support and additional support for selected projects. But there are also other organisations specialised in selected areas of consumer goods and

[148] See Regleringsbrev, 2009, 2010, 2011.
[149] See Swedish Consumer Agency, Annual report 2008, Annex 3, pp. 73 ff; Annual report 2009, Annex 4, pp. 98 ff; Annual report 2010, Annex 4, pp. 88 ff.

services (e.g. the Swedish automobile association; the handicapped people's association, animal protection associations etc.) or in types of consumption (e.g. Associations for ethical consumption, Fair Trade Centre, associations for ecological consumption, etc) that have garnered financial support.

Generally consumer organisations consider the allocation procedure to be relatively smooth and fair. However, certain frustration exists about the increased transaction costs associated with more formalised application procedures. Moreover, within certain activity areas, the consumer organisations and the Consumer Agency can be considered to be in a relationship of competition for consumers' attention as well as for funding and therefore the neutrality of the process cannot be fully guaranteed.

None of the financial support that has been granted so far is ear-marked for legal enforcement of consumer rights on a collective or individual basis. Representatives of the consumer associations consider their funding as being too limited to allow them to develop any trustworthy ambitions in this domain. Therefore they rely entirely on the Consumer Ombudsman and the Consumer Agency to take care of the enforcement of consumer interests. The procedural activity of the KO is seen as generally efficient and satisfactory. Given the authority of the institution of the Ombudsman, businessmen are more readily inclined to commit to voluntary compliance. The preventive effect is assessed as substantial. The consumer organisations see their resources to be more efficiently used for awareness-raising, consumer information, consultation and most importantly, for representation of Swedish consumers on the European arena.

c. Relationship between the Consumer Agency and consumer organisations

The consumer organisations have good working relationships with the Consumer Agency and the Consumer Ombudsman. Representatives of the main umbrella consumer organisation Swedish Consumers sit on the Supervisory Board of the Consumer Agency as well as on the Supervisory Board of the National Board of Consumer Complaints (a public body for alternative dispute resolution) where they can express their views on and influence the priorities of market monitoring and enforcement. Consumer organisations are also free to notify the Consumer Agency about infringements of relevant consumer law statutes.

8.1.5 Procedure

Injunction proceedings are instituted at the Market Court as a court of first and last instance (with only a limited possibility for review by the Supreme Court in exceptional cases) (§ 47 MFL, § 4 AVKL). However, if injunction is sought in conjunction with damage compensation or market disturbance fee it has to be filed with the competent general court (Stockholm City Court being always competent).

The Market Court was founded in 1971 simultaneously with the Office of the Consumer Ombudsman. The Court has a mixed composition: the chairman, vice-chairman and one of the members have to be lawyers qualified for the bench, whereas the remaining four members are economic experts (cf. §§ 3, 4 Market Court Act, Lag om marknadsdomstolen).

Proceedings before the MD are initiated upon written application. The parties are given an opportunity to present their case in a hearing. For most procedural issues such as rules on challenge, motivation of judgments, and collection of evidence, etc., the general rules of judicial procedure for civil law cases apply (§ 59 MFL).

The existence of a special court dealing predominantly with injunction proceedings for protection of collective consumer interests guarantees a relatively speedy procedure in these cases. Still the average length of proceedings before the Market Court is at present around 11-12 months.[150]

For proceedings under MFL the general rules on litigation costs for civil law disputes amenable to settlement apply (cf. § 64 MFL). The costs are as a rule borne by the losing party, 18 kap. RB (the English rule). Despite being a public agency KO is subject to the same rule and has to compensate the winning party for its litigation costs. However, the court has certain discretion in proceedings for injunction (§ 64 in conjunction with §§ 23 and 24 MFL) to order that each party bears its own expenses as incurred. This possibility was seen as necessary in order not to overly impede KO in performing its important precedent-setting function.

Injunctions, but also consent injunctive orders approved by the trader, are usually issued under penalty of a fine (§ 26 MFL). The size of the penalty is nowadays conventionally around 1.000.000 Swedish crowns, but may differ depending on the type of violation. The fine is imposed through a decision of the competent district court following court proceedings initiated by the plaintiff (usually the Consumer Ombudsman or a competitor). Such proceedings can always be filed at Stockholm City Court (§ 49 MFL).

[150] Market Court Annual Report (Årsredovisning) for 2010, p. 6.

8.1.6 Alternative remedies

a. Individual redress

As mentioned above individual consumers have a right of action for damages under the Marketing Act. This right has, however, never been exercised in practice. The reason must be sought in the lack of incentive for consumers to undertake a complex and expensive legal procedure when the expected benefit is relatively small. Redress is more frequently sought on the basis of contract law.

b. Collective redress

Sweden is one of the first European countries to introduce a possibility for group proceedings for compensation of damages, of the sort comparable to, but considerably different from, the American class action institute. The Group Proceedings Act was adopted in 2002 (Lag 2002:599 om grupprättegång). The Act provides a possibility of bringing group proceedings when a plurality of claims against the same defendant are based on the same circumstances (commonality) and when the claims can not be better pursued through other procedural forms (superiority). There are three types of group actions. Group proceedings can be instituted (i) by an individual member of the group, that can in itself be a natural person or a legal entity (private group action), (ii) by an association of consumers or wage-earners (organizational group action) and (iii) by a designated public authority (public group action). For consumer disputes the Government has designated the Consumer Ombudsman as the appropriate public authority.

The Group Proceedings Act is based on the so-called "opt-in" procedure. The members of the group have to undertake at least one active step (notify their desire to be included in the group) in order to be covered by the group proceedings and by the res judicata of the decision. No particular concessions have been made in the Act on the issue of litigation costs. The general rules of civil procedure apply (i.e. the loser pays principle). Among the few exceptions is the possibility for the plaintiff to enter a so called "risk agreement" with an attorney (to be endorsed by the court), whereby the attorney would be paid a reduced fee upon loss of the suit and an increased (premium) fee in case of success.

As a general feature, the court is given a broad discretion to steer the group proceedings, from deciding whether a dispute is suitable for such proceedings to whether to endorse a risk agreement. The Group

Proceedings Act has so far been employed in only a limited number of cases. The procedure is overall perceived as rather lengthy and cumbersome.[151]

Given the right of individual consumers to claim damages under the MFL, the Group Proceedings Act makes it theoretically possible for KO and for consumer organisations to file a group action for damages on behalf of a plurality of consumers in injunction proceedings under the MFL. An example can be misleading information in prospectus or in other marketing of financial services which incurs small-size damages on a large group of consumers. Through the group action, infringements on such diffuse consumer interests can probably find a more efficient protection. The Consumer Ombudsman has used the right of group proceedings only in a handful of cases.

c. Collective redress through an out-of-court procedure

The Consumer Ombudsman has also the right to bring group action before the Public Board of Consumer Complaints, which is a public scheme for alternative dispute resolution. The KO can bring proceedings on behalf of a group of consumers seeking settlement of a series of individual claims stemming from the same circumstances (commonality). In the case that the KO decides not to pursue a case, group proceedings before the ARN can be initiated by a consumer or wage-earners organization. This specific form of out-of-court group action was first introduced on a temporary basis as an experiment, but is now firmly integrated in the system.[152]

8.2 Application of Directive 2009/22/EC in practice

8.2.1 Use of Directive 2009/22/EC in practice

8.2.1.1 Use of the Directive by qualified entities

The Directive has not brought to any increase of cross border litigation in Sweden or by Swedish qualified entities in other Member States. At the same time, the general use of injunctions as a remedy for protection of collective consumer interests has remained frequent and stable.

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[151] National Report Sweden, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union (2008).

[152] cf. § 3 Förordning (2007:1041) med instruktion för Allmänna reklamationsnämnden (Standing Instruction for the Public Board of Consumer Complaints); § 5 Förordning (2009:607) med instruktion för Konsumentverket (Standing Instruction for the Consumer Agency).

8.2.1.2 Overall impact on consumer governance

Despite the availability of alternative remedies like collective redress in court and out-of-court procedures, or administrative penalties (the market disturbance fee) the injunction continues to be the central remedy in the Swedish system of consumer governance. The Directive has not changed much in this respect.

8.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

Within the time-span examined, i.e. 2008-2011, there are no cases of cross-border injunctions in the sense of Swedish qualified entities bringing injunctions before a foreign court or administrative authority.

8.2.1.4 Cross-border litigation (bringing cross-border infringements before national court

The review of the relevant case law from the same time period does not reveal examples of cross-border litigation in the sense of bringing an action for injunction before a Swedish Court against traders established in another Member States either.

Still, it should be noted that in marketing practices law the so-called doctrine of the 'country of effect' (*effektlandsprincipen*) applies. Following this doctrine it is considered that Swedish courts have jurisdiction even if a marketing act is undertaken from a different country (the trader has its place of establishment in another Member States), provided that the act has an appreciable effect on the Swedish public (MD 1989:6 Scanorama). The doctrine is based on the understanding that Swedish marketing practices law, in view of the system of public enforcement and the availability of administrative law sanctions (market disturbance fee), is predominantly of a public law character. Consequently, cross border infringements of collective consumer interests are seen to raise questions about the territorial scope of public law statutes, rather than issues of private international law (jurisdiction and applicable law).[153]

In a number of earlier cases about marketing activities in cross-border broadcasting or on the Internet, the defendants raised objections that they had their establishment in a foreign country and that the Market

[153] See Bogdan (2000).

Court lacked jurisdiction. The Court however disregarded such arguments and assumed jurisdiction applying the Swedish Marketing Act.[154]

8.2.1.5 Domestic use

In contrast to cross-border situations, injunctions are regularly used in domestic proceedings. There is an average of 6 to 10 actions for injunction annually that are brought by the Consumer Ombudsman before the Market Court on the basis of the Marketing Act and the Unfair Contract Terms Act.

During the last three years the figures are as follows:
Of a total of 24 cases before the Market Court for the first 9 months of **2011**, 2 are under the Competition Act. Of the remaining 22 cases, **3** are initiated by the Consumer Ombudsman (Moderna Försäkringar – about unfair terms in consumer contracts; Mercedes – about use of ecological arguments in marketing of cars; and Spendrups – about marketing of alcoholic beverages). The rest of the cases are initiated by competitors, in 2 cases – by business associations of SMEs.

Of a total of 31 cases before the Market Court for **2010** , 2 are under the Competition Act. Of the remaining 29 cases **6** are initiated by the Consumer Ombudsman (against Tangelin Asset Management – advertising of investment funds; Northmill about marketing of quick loans over the Internet; L´Òreal – marketing of cosmetics; TeliaSonera – marketing of "firm price"; Scanska Nya Hem – unfair terms in consumer contracts; Kuoni Scandinavia – unfair terms in marketing of package tours). The remaining proceedings are initiated by competitors.

Of a total of 41 cases before the Market Court for **2009**, 3 are under the Competition Act. Of the remaining 38, **14** are initiated by the Consumer Ombudsman (against G.H. and G.H. for marketing of health products; against IKANO bank – for marketing of consumer credits; Bahnhof – for contract terms in contracts for broad band services; Ferratum – unfair contract terms in consumer credit contracts; ebookers Scandinavia – pre-checked boxes in marketing of travel; Canal Digital – unfair terms where automatical extesion of contract terms was not found to be unfair; Expert – information in marketing of consumer credits; GAR-BO

[154] See MD 1998:17 KO v. De Agostini; MD 2000:4 KO v TV-Shop; see MD 2001:10 STOP - Scandinavian TV Organisations against Piracy - Sweden v Goldside Electronics LLC and NN; MD 2001:19 STOP v Elinge Electronica Lda and NN; MD 2000:8 KO v Bodion (millennium package). See critically Bodgan (2000).

Försäkringar – unfair contract terms in contracts of construction; Casa Nordica – marketing of package tours without the necessary guarantee; Vin& Sprit Aktiebolag – marketing of alcohol; Svenska Postkodföreningen – marketing of lotteries; Bank2 Bankaktiebolag – marketing of consumer credits; Fordronsvärderingen Skåne – marketing of distance services; Abitur – marketing of package tours without the necessary guarantee).

Of a total of **28** cases before the Market Court for **2008**, 1 is under the Competition Act. Of the remaining 27 cases, 4 were initiated by the Consumer Ombudsman (against Brigante – marketing of package tours without the necessary guarantee; Brandwork Scandinavia – marketing of tobacco products; Prima Travel – marketing of package tours without guarantee; Mobillån – charging unfair fees for consumer credits against the Consumer Credit Act, constituting infringement of the Unfair Contract Terms Act).

The most well represented type of subject matter is misleading advertising and marketing under the Marketing Act, in the form of both misleading actions and misleading omissions (§§ 5 and 6 MFL). Additional legal basis for injunctions forms the Unfair Terms in Consumer Contracts Act (§ 3 AVKL). More recently proceedings have also been based on the Consumer Credit Act. As a general observation, one can note certain tendency of clustering of cases within certain time periods with similar subject matter and within the same industry sector. The reason for this is the conscious strategy of the Consumer Agency of selecting focus areas for monitoring and enforcement under certain time periods, on the basis of consumer complaints and market analysis.

The predominant subject matter for injunctions sought by traders against competitors is misleading advertising, confusing imitations and unpermitted comparative advertising, all under the Marketing Act.

The success rate for the injunctions sought by the Consumer Ombudsman is quite high –
2,5 out of 3 in **2011**; 5 out of 6 in **2010**; 10 out of 14 in **2009**; 3 out of 4 in **2008**.

8.2.1.6 Business sectors affected

The sectors in which injunctions are most frequently issued are telecommunications, financial services (insurances, consumer credits), health-related products (cosmetics), high-value consumer goods (cars, housing) and services (package tours, construction). Particular for Sweden is also a focus on enforcement of the restrictions on marketing of alcohol and tobacco products.

8.3 Economic impact and effect on market

The Injunctions Directive has not as such had noticeable economic effect on the Swedish market and for Swedish consumers since the possibility for injunctions already existed before the transposition of the Directive. The possibility for cross-border litigation opened by the Directive and by its Swedish counterpart, the TRKL, has not been used by foreign consumer organisations and public bodies, meaning that the Directive has not contributed substantially to clearing the Swedish market from infringements by Swedish traders against collective consumer interests in other Member States. Likewise, the Swedish qualified entity, the Consumer Ombudsman, has not used the Directive for bringing injunctions before courts and administrative authorities in other Member States.

At the same time, it should be stressed that the long-term experience of the instrument of injunction in Swedish market law is evaluated as overwhelmingly positive. Admittedly, the injunction has been criticized of being too soft and absolving sanction of the sort "go, and sin no more". However, interlocutors confirm the reputational effect of injunctions. Already when the Consumer Agency and the Consumer Ombudsman announce on their webpage that they undertake action against certain trader, this may negatively impact the trader's position on the market and there is a substantial pressure for compliance.

The effect of injunctions appears to be particularly powerful when the actors in the respective market sector are serious traders who rely on repeat purchases and care about their goodwill and reputation and have stable intent to stay on the market. In this connection, markets with oligopolistic structure, where competition is fierce between a few established actors, who carefully observe each other's actions and where there is high awareness of the regulative environment, appear to be most conducive for injunctions (e.g. financial services, telecommunications). In such market constellations the Swedish practice of flexible and informal negotiations with traders and the instrument of consent orders approved by traders have been particularly successful. Certainly, the threat of court proceedings increases traders' willingness to negotiate and to commit to voluntary compliance.

Less effective is the injunction in markets of "fly-by-night" traders, who often change location and identity and do not care about reputation. Examples include sellers of weight-loss products, Internet services, operators of pyramid schemes and the like. Serious infringements of collective consumer interests in such markets are probably better remedied by criminal and administrative sanctions like penalties and imposing specific restrictions on carrying on business activity.

8.3.1 Relationship with CPC-mechanism

Following § 3.4 of the Standing Instructions for the Consumer Agency, the Agency is together with the Swedish Financial Supervision Agency and the Swedish Drug Agency a contact authority under the CPC-Regulation and also the central contact point under the Regulation.

During the first three years of application of the CPC the Consumer Agency has received an annual number of 41 (in **2009**), 81 (in **2008**) and 66 (in **2007**) requests for undertaking some action under the CPC. In the majority of case it has been a question of information exchange. In 5 cases per year the Agency has been approached with a request for exercising regulative oversight.[155] The Agency has itself requested action by contact authorities of other Member States as follows: in 11 cases for **2009**; 34 – for **2008** and 6 – for **2007**. Of these requests 7, 8 and 4 cases respectively have concerned requests for undertaking a regulative oversight by the foreign contact entity.[156]
The Consumer Agency has identified the work under the CPC-Regulation as a priority area and has targeted special resources for this activity. One official at the Agency has overarching responsibility for the Regulation and a number of other officials are being trained to work with the system.[157]

Swedish interlocutors, especially representatives of the Consumer Agency and the government, evaluate their experience from the CPC-Regulation as overall positive. Certainly, they acknowledge that the mechanism can be improved in terms of efficiency, speed and transparency.[158] One main obstacle is the divergence in regulative traditions, in particular concerning the structure, working methods and institutional modalities of the respective national contact entities. There is still uncertainty as to what can be expected by the counterparts of the Swedish Consumer Agency in other Member States. The information exchange is not functioning perfectly.

Nevertheless, despite the relatively short period of working with the CPC the system is evaluated as having produced positive results and having great potential. The general idea of establishing a network for cooperation between authorities with similar tasks and scope of competence is welcomed as offering an appropriate way for curb cross-border infringements of consumer interests. Instead of trying to solve

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[155] See Swedish Consumer Agency, Annual Report 2009, p. 27.
[156] Ibid.
[157] See Swedish Consumer Agency, Biannual report on the basis of Article 21 Regulation 2006/2004, p. 2.
[158] See also Swedish Consumer Agency, Biannual report on the basis of Article 21 Regulation 2006/2004.

complex issues of foreign substantive law, procedure, representation in court, jurisdiction and applicable law, the system allows a quick and informal way contact the authority having the greatest capacity to achieve effective enforcement. The regular meetings of the network in Brussels and the possibility for consultation on the interpretation of the European consumer *acquis* and on best practices in enforcement are highly appreciated. The database is a useful tool. The joint sweeps are seen as a particularly efficient way of coping with cross-border infringements of collective consumer interests with given added value to any attempt to achieve market monitoring and clearance by single national authorities with isolated efforts and limited resources.

Interlocutors note that the whole idea on which the CPC-Regulation builds is very close to the traditional Swedish system of public enforcement of collective consumer rights. Therefore the scheme does not involve high adaptation costs and the positive evaluation is probably not surprising.

8.3.2 Problems

The non-use of the Injunctions Directive is explained chiefly by barriers such as language, need to get orientation in foreign procedural and substantive rules, need to commission foreign lawyers, considerable costs in terms of time and resources, uncertainty about the outcome, slowness of procedure. In addition, the Directive does not solve the sometimes complex issues with jurisdiction and applicable law.

8.3.3 Suggestions for improvement

Given the non-use of the Injunctions Directive, interlocutors were unable to come with specific suggestions for improvement. The factors that were indicated as constituting barriers for bringing cross-border injunctions are of a more general and fundamental nature (language, uncertainty, time, cost) and would hardly be overcome by adjustments in the scope, or by introducing rules on terms of procedure or litigation costs in the Directive.

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[159] http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf
[160] http://www.konsumentverket.se/omkonsumentverket/Myndighets--och-styrdokument
[161] http://www.marknadsdomstolen.se/arsredovisning/MDsArsredov2010.pdf

8.3.5 Glossary

ARN Allmänna reklamtionsnämden - Swedish Public Board of Consumer Complaints

KO Konsumentombudsmannen - Consumer Ombudsman

KOV Konsumentverket - Swedish Consumer Agency

LO Landsorganisationen i Sverige - Swedish Trade Union Confederation

MFL Marknadsföringslagen - Marketing Prcatices Act

MD Marknadsdomstolen - Market Court

Prop. Proposition – Governmental Bill

SFS Svensk författningssamling – Swedish Code of Statutes

TCO Tjänstemännens Centralorganisation - Confederation of Professional Employees

TRKL Lag om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer - Act on Right of Action for Certain Foreign Consumer Authorities and Consumer Organisations

[162] http://www.marknadsdomstolen.se

9. UNITED KINGDOM

The UK, as reported in the 2008 Commission Communication, was the only Member State from where cross-border infringement procedures originated, however this way only *before* the CPC-Regulation became effective. Ever since, the practice of pursuing intra-Community infringements through injunctions has practically ceased. Where the need arises for cross-border action, public authorities prefer applying the CPC-mechanism of public enforcement, while the only consumer organisation entitled to pursue injunctions seems disinclined to use its powers.

Key findings

Once the forerunner in the use of cross-border injunctions, the UK's qualified entities stopped using injunctions once the CPC-mechanism became available

Cross-border injunctions are seen as a safety net for the eventuality that the CPC-mechanism does not work in a particular case

Public enforcers tend to use administrative powers when available, limiting the potential of private enforcement injunctions becoming a tool in the hands of consumer organisations

9.1 The setting for injunctions

9.1.1 The law – Legal environment for injunctions

The UK has applied a system of consumer law enforcement since the 1970s. Designated public enforcement bodies were vested with powers to apply to courts to stop traders infringing consumer law in the Fair Trading Act 1973.

Today's transposition of the Injunctions Directive can be found in **Part 8 (s. 210 *et seq*.) of the Enterprise Act 2002** (replacing the Stop Now Order (EC Directive) Regulations 2001 and Part 3 of the Fair Trading Act 1973). Under the Enterprise Act (EA), designated consumer bodies can apply to courts for Enforcement Orders (s. 217 EA) in order to stop traders infringing consumer laws.

The Enterprise Act distinguishes between **domestic infringements** (s. 211 EA) (where a sufficient level of

enforcement by UK based designated bodies is the focus) and **Community infringements** (s. 212 EA) (for which cross-border enforcement is created). The former includes actions against traders established outside the UK as long as consumers with the UK are also affected. The latter also covers domestic action by UK enforcers in respect of breaches of the UK legislation implementing the Directives covered by the Injunctions Directive. Community infringements are limited to breaches of the Directives listed in the Annex of the Injunctions Directive, while domestic infringements cover breaches of a wide range of laws protecting consumers.

The Enterprise Act thus distinguishes between different situations: enforcement in the UK, or into the UK, or out of the UK:

UK enforcement against UK-established traders active in UK consumer market	UK enforcement against foreign-based traders targeting UK consumer market	Cross border enforcement against UK–based traders targeting non-UK consumers
1. Domestic infringement, s.211 **2.Community infringement, s.212**	**1. Domestic infringement, s.211** **2.Community infringement, s.212**	**Community infringement, s.212**
1. For breaches of certain UK laws protecting consumers **2.** For breaches of consumer Directives listed in Annex of Injunctions Directive (s. 212 EA)	**1. For breaches of certain UK laws protecting consumers** **2.** For breaches of consumer Directives listed in Annex of Injunctions Directive (s. 212 EA)	Only for breaches of consumer Directives listed in Annex of Injunctions Directive (s. 212 EA)
1. Wide notion of consumer (s. 210(2)-(4) EA) 2. Narrow notion of consumer of EU law (s. 210(6) EA)	1. Wide notion of consumer (s. 210(2)-(4) EA) 2. Narrow notion of consumer of EU law (s. 210(6) EA)	Narrow notion of consumer of EU law (s. 210 EA)

It also distinguishes between sectors, since different public authorities have enforcement powers. Overarching these sectoral competences are general enforcers (s. 213 EA).

Before asking for an Enforcement Order, prior consultation is mandatory (s. 214 EA). The procedures are detailed in The Enterprise Act 2002 (Part 8 Request for Consultation) Order 2003[163] (s. 214(5) EA).

9.1.2 Qualified entities

The UK traditionally relies on public enforcement of consumer law. This tradition is reflected in its notification of qualified entities to the Commission.

Eleven bodies were awarded the status of qualified entities. Under s. 213 EA they can be categorised as general enforcers, sectoral regulators and consumer associations.

General enforcers are the Office of Fair Trading (OFT[164]) and the Trading Standards Institute (TSI[165]). The OFT is given the role of principal enforcer with national responsibilities while the trading standards departments are active locally.

Sectoral regulators have national responsibilities within their designated scope of activity. They include the Civil Aviation Authority, the Director General of Electricity Supply for Northern Ireland, the Director General of Gas for Northern Ireland, Ofcom, the Water Services Regulation Authority, the Gas and Electricity Markets Authority (GEMA/Ofgem), the Information Commissioner, the Office of Rail Regulation and the Financial Services Authority.

The only private sector body that applied to the Secretary of State for recognition[166] and was included in the UK's list is *Which?*,[167] the former 'Consumers' Association' (CA).

9.1.3 Initiative takers

The OFT as a general enforcer with national reach is by far the most active of enforcement bodies. It is also one of the few bodies with first-hand experience in commencing and pursuing cross-border infringement procedures.

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[163] S.I. 2003, 1375
[164] http://www.oft.gov.uk
[165] http://www.tradingstandards.gov.uk
[166] DTI document: Designation as an Enforcer for Part 8 of the Enterprise Act 2002: Guidance for Private Bodies Seeking a Designation under Section 213
[167] http://www.which.co.uk

The Trading Standards Institute (TSI)[168] – or rather the roughly 200 local trading standards departments – operate at another level to the OFT. They are policing local markets ("regional scam busters") and in doing so apply criminal law more than the EA. By punishing wrongdoings, they rectify matters from the past (while the OFT, so to speak, monitors markets to improve matters for the future). Nevertheless, the use of injunctions by trading standards departments is on the rise, especially in the last three years. Local authorities however are mostly not structured to take on the risk of litigation. Their reticence to use court procedures also stems from the fact that their lean structures are not designed to grapple with the uncertainties of interpretation of consumer laws.

Consumer organisations gained the power to go to court as late as 1999[169] and only under the pressure of EU law.[170] The recognised organisation (*Which?*) seems, however, still inhibited with what has been called "a cultural inhibition" against becoming a litigant. It is known to have referred unfair contract terms cases to the OFT but has not taken enforcement proceedings itself.[171]

The UK system is heavily leaning towards public enforcement while within these injunctive powers have been monopolised by the OFT. It has far-reaching powers and may, for instance, direct that if an application to the court in respect of a particular infringement is to be made, it must be made only by the OFT or such other enforcer as the OFT directs (s. 216 EA), although this does not prevent an application for an enforcement order being made by a 'Community enforcer'.

9.1.4 Resources (manpower & finance)

The OFT is financed by the public purse and has about 50 staff to deal with consumer law. Sectoral regulators are financed by the member companies of the sector. The trading standards departments have more than 1,000 staff, few of whom, however, are dealing with consumer law specifically. *Which?* is financed by membership fees and the sale of its publication.

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[168] http://www.tradingstandards.gov.uk
[169] Representation of consumers in court by private organisations was an alien concept to the doctrine of privity of contract and only introduced into UK law in 1999.
[170] Case C-82/96, R v. Secretary for Trade and Industry, ex parte CA/Which?
[171] It has commenced a competition case claiming collective damage, which, however, failed (football T-Shirts case). Ever since, the organisation seems not to be disposed to attempt a further case.

9.1.5 Alternative procedures / procedures allowing to claim compensation

(see below)

9.2 Application of Directive 2009/22/EC in practice

9.2.1 Use of the Directive by qualified entities

9.2.1.1 Overall impact on consumer governance

The Injunctions Directive's transposition has not triggered, but facilitated the evolution of consumer law enforcement in the UK, giving a more important role to consumer associations. This remains, however, more of a symbolic change as the focus on public enforcement has not changed and the use made by public enforcers of cross-border injunctions appears to mark the interlude before the advent of the CPC-mechanism.

9.2.1.2 Business sectors affected

Enforcers are kept busy by scams distributed by mail order and fraudulent prize draws which appear to dominate. Timeshare and consumer credit also account for a number of cases.

9.2.1.3 Cross-border litigation (bringing cross-border infringements before foreign courts)

In the period up to first application report of the Commission, the OFT, being one of the few qualified entities to have made use of the availability of cross-border injunctions has generated a number of cases that were both successful and unsuccessful. The following proceedings in relation to cross-border infringements were all commenced and concluded before the Commission's first application report on the Injunctions Directive was published at the end of 2008 and reported therein. These were:

- 2002 – OFT action against Royal Consulting, a Dutch company which was sending unsolicited first aid kits to UK residents accompanied by demands for payment (see chapter on The Netherlands)
- 2004 – OFT action against Belgian company D Duchesne SA trading as TV Direct Distribution and Just 4 You
- 2005 – OFT secured binding undertakings preventing D.C. Direct Communications Venk BV, a Dutch marketing company from publishing and distributing misleading mailings to UK residents (see chapter on The Netherlands)

- 2005 – OFT action against Fitanova BV, a Dutch company selling health-related products and sending misleading mailings to UK residents (see chapter on The Netherlands)

- 2006 – OFT action against Best Sales B.V., a Dutch mail order company trading as 'Best Of' and 'Oliveal', which was stopped from sending misleading prize draw mailings to UK consumers. The judgment, which ruled in favour of the OFT and granted an injunction against the company, was handed down by the Dutch Court on 9 July 2008 (see chapter on The Netherlands)

However, the OFT stopped initiating cross-border injunctions proceedings when the CPC-mechanism became available as a tool for cross-border enforcement. As an enforcement tool for public enforcers, the CPC-mechanism was considered to be more closely aligned with the traditional concept of market surveillance in the UK.

Cross-border injunctions are, however, not discarded as an optional instrument for enforcement action. Considering particularly that the application of the consumer directives listed in the Injunctions Directive's annex varies and different interpretations of the law can lead to complications in the efficacy of the CPC-mechanism, injunctions are seen as a fallback procedure. Not depended on the uncertain cooperation of a foreign enforcement body, injunctions can be used at the discretion of the qualified entity convinced that it is compelled to take legal action against infringements coming from abroad. A continued need for cross-border enforcement actions is seen in this context, particularly in the areas of timeshare and other holiday products, cross-border lottery scams, false prize draws and consumer credit.

9.2.1.4 Cross-border litigation (bringing cross-border infringements before domestic courts)

As stated above, UK enforcement against foreign-based traders targeting the UK consumer market is possible under the Enterprise Act (cf. table on UK law above). While concrete cases were not reported, the need for this possibility has been underlined.

9.2.1.5 Domestic use

Injunctive relief sought in the domestic context (Enforcement Orders) are common. UK enforcement bodies, mainly the general enforcers, remain very active in pursuing cases against infringements of consumer laws with nearly 1,000 investigations and court cases reported since 2008. A number of cases are documented

on-line.[172] Of these the *Foxtons* case on unfair contract terms stands out.[173] *Foxtons* is exceptional in that the consumer benefit flowing from the successful proceedings has been computed in monetary terms. According to the OFT, consumer benefit amounts to £4.4 million (involving, at the same time, about £500,000 costs of the OFT). One interviewee stated that the positive effect might be determined several times higher. Another recent case on unfair contract terms was the *Ashbourne* investigation[174] where, however, no figure of financial advantage to consumers has been stated. The *Purely Creative* case concerns prize draws in relation to the Directive on unfair commercial practices. It has recently been referred to the ECJ.[175]

9.3 Economic impact and effects on markets

9.3.1 Benefits for qualified entities

The obvious benefit for consumer organisations in the UK is the possibility to become a qualified entity adding legal standing in court to their powers. Public enforcers have added a private law enforcement tool to their traditional public law powers. The latter having become available cross-border with the CPC-Regulation, they have swung back to use these rather than pursuing the more cumbersome path of cross-border litigation.

The advantages brought by the Directive's transposition have been summarised as including:

- legal clarification
- administrative consolidation
- the possibility of using injunctions as a threat

[172] http://www.oft.gov.uk/OFTwork/consumer-enforcement
[173] http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons
[174] http://oft.gov.uk/news-and-updates/press/2011/60-11
[175] Case C-428/11, Purely Creative Ltd and others v Office of Fair Trading – pending

9.3.2 Benefits for consumers generally

Consumers benefit collaterally from injunctions as they make consumer markets work better.

9.3.3 Benefits for individual consumers

Without a redress mechanism, consumers do not regularly benefit directly from successful injunctions, the *Foxtons* case being a notable exception.

9.3.4 Effects on markets

Judging from the repeated need to tackle cross-border scams, traders seem unimpressed by injunctions.

9.3.5 Relationship with the CPC-mechanism

Although the CPC-mechanism is given limited credit and experiences are mixed ("fragmented enforcement landscape"; "sectoral legislation is missing"), there is a clear tendency for public enforcement to be given priority over private enforcement. The first choice of CPC bodies would therefore be to use the CPC-mechanism and injunctions proceedings would be only the second choice. This is because public enforcement is free while private litigation involves costs. At the end of the day it is the private enforcers that need injunctions, not the public enforcers.

A recent example for the use made of the CPC-mechanisms is the *Friedrich Müller* case.[176]

While cross-border injunctions have no longer been commenced in the UK since the CPC-mechanisms became available, injunctions have become the fall-back scheme or "reserve power" in case (which has not yet occurred) the CPC systems fail to deliver results, for instance because the requested authority remains inactive.

One interviewed person stated that CPC-processes suffered from a frustrating shortage of resources and for that reason would have difficulty gaining in profile. Not all people formally engaged in CPC both in the UK and other Member States would be sufficiently skilled do deal with complaints effectively. Among them, one can observe more interest in pursuing scams and taking part in web-sweeps, rather than efforts to make the system work.

[176] http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/euro-prize-draw

9.3.6 Relationship with alternative procedures / procedures allowing to claim compensation

Under the Enterprise Act there is no automatic link between a successful injunction and compensation for harm suffered. There are some provisions for violation of the Competition Act prohibitions, but not specifically in the context of consumer injunctions. The possibility exists, where criminal sanctions are imposed, for a court to award compensation, but this power has not been exercised in the context of consumer law.

Concerning collective redress, UK law includes the possibility of a “representative action” in that a single case or a small number of cases will be taken as a model, but the eventual judgment will benefit all the claimants who are party to the action. These are more complex rules for Group Litigation Orders. This is used for multiple claims with common legal or factual issues. A “group register” is established which contains all the claims covered by the GLO as well as the issues to be resolved. Once the GLO is issued, further claimants may join the group. Any decisions are binding in respect of all claims on the register, unless ordered otherwise by the court. The court may also order to what extent other claims may still be added to the register after judgment, although such additions have no right of appeal against the judgment. The main effect seems to have been limited to high value cases, such as pharmaceutical litigation, rather than large numbers of low-value consumer claims. However, there is no link with these procedures and the Injunctions Directive.

9.3.7 Problems

It has been observed that some of the qualified entities listed in the Official Journal would hardly be aware that they are on that list, and that there is a certain “lack of focus” that has befallen consumer enforcement in the UK. This may be a single voice, but the problems most often named as inhibiting the use of cross-border injunctions were:

Time and money

Injunction proceedings are cumbersome and therefore time-consuming to prepare. They are therefore already costly for this reason. Moreover in bringing injunction actions qualified entities have to bear the same court fees as all other plaintiffs. Combined with the ‘the loser pays’ principle on liability for the costs of the defendant (subject to a margin of discretion of the court), the financial risk represents a major deterrent against the use of injunctions. These problems are aggravated in a cross-border scenario.

Access to information and evidence

In cross-border cases, it is very difficult to request information and evidence from a trader established in another Member State. This goes hand in hand with general lack of knowledge about the legal system of another country.

Rogue traders

Injunctions are sought in court proceedings and court proceedings require a minimum of cooperation of the defendant party. If this cooperation is lacking, as in the case of rogue traders and outright criminals, injunctions are futile.

Procrastination tactics

Defendants may decide to exploit the factors of distance and the language barriers by becoming uncooperative and drawing out lengthy negotiations. Legal questions over jurisdiction and applicable laws create more scope for arguments and appeals over technicalities. The relative simplicity of the Injunctions Directive's underlying mechanism (giving qualified entities the possibility to sue in foreign courts) is thwarted by the intricacies of private international law.

Traders overseas

Injunctions are limited to the EU/EEA and have no effect against traders established overseas. Even if a court seized within the Union was to hear the case ('Brussels I') and the applicable law was EU consumer law (Art. 6 'Rome I' and Art. 6 'Rome II'), a ruling would often be not enforceable.

Deadlines

Giving qualified entities legal standing in foreign courts subjects them, as any other plaintiff, to the tight deadlines for the preparation and submission of court documents.

9.3.8 Suggestions for improvement

The OFT, in its response to the Commission Questionnaire, made detailed proposals for improvements that are reiterated below:

"The **scope of an injunction** is not pan-European, meaning a rogue trader can move from Member State to Member State repeating its activities. Enforcers therefore need to either seek orders in each Member State

or register existing orders obtained elsewhere making enforcement time consuming and less effective as consumer detriment is allowed to continue in the meantime.

In many jurisdictions **orders** cannot be made **against individuals**. Local Member State practices vary in regard to taking action against the principles of businesses such as Directors as well as the corporate entity. In the UK, the OFT can take action for misleading advertising against "any person" involved in the dissemination of an advertisement. We have used this successfully in the past to obtain orders against company directors and CEOs (see above reference on the recent High Court ruling in the Purely Creative case).

When seeking to enforce the consumer directives in other Member States, the OFT has discovered significant **divergence in the way the directives have been interpreted**. In some cases the provisions of the directives have been implemented in different civil codes resulting in actions needing to be heard in different courts making it difficult for a foreign qualified entity to initiate a single 'Injunctions Directive' action against a trader and the principles where this is a possibility.

In addition, the Injunctions Directive is **not linked to any mechanism to effect redress for the consumer**. That is unfair on both the consumer and fair trading competitors.

The OFT would be interested in discussing the scope of the injunctions directive, especially to consider extending it to explicitly cover situations where:

- The consumer is seeking to become a trader but is not trading yet. This issue is particularly interesting since the Injunctions Directive does not of itself define "consumer" leaving this to the underlying directives. The issue therefore is the extent to which the underlying directives apply to prospective business persons.
- There is no product at all.
- The transaction is mixed-use e.g. the product is for both business and non-business use."

In the interviews the point was repeatedly raised that it would constitute a significant improvement if individual consumers could take advantage of injunctions in a way that would allow them to obtain damages for wrongdoings of traders.

A statement of vision included the call for a “European Office of Fair Trading” as a nucleus governance structure for facilitating cross-border injunctions but also for gathering for instance information about consumer contract terms ruled as unfair.

9.3.9 Sources

Christopher Hodges (2008), The Reform of Class and Representative Actions in European Legal Systems

Ulrike Docekal / Peter Kolba / Hans Micklitz / Peter Rott (2005), The Implementation of Directive 98/27/EC in the Member States

Geraint Howells / Stephen Weatherill (2005), Consumer Protection Law

EC Consumer Law Compendium[177]

9.3.10 Glossary

OFT	Office of Fair Trading
TSI	Trading Standards Institute

[177] http://www.eu-consumer-law.org/directives_en.cfm

PART IV: ANNEXES

Questionnaire

Part I – Legal situation in your Member State

A. Overview of the implementing measures and alternative / related procedures to be drafted by the interviewer and to be submitted to the interviewee to double check completeness and correct understanding of state of play.

B. The domestic qualified entities' legal environment in your Member State

a. Organisation and resources of qualified entities

i. Who are the qualified entities to cease *cross-border* infringements? (By bringing actions to court/prior consultation proceedings/executive measures) Please name all (OJ C 158, 27.5.2011, p. 1) and underline the ones playing an important role in stopping infringements.

ii. Which criteria are used by the national authorities to incorporate the organisations as qualified entities?

iii. Do these entities differ from entities that have standing to bring a cease-and-desist order in national proceedings?

iv. What is the relation between the different organisations (also among each other) and authorities, **in particular CPC competent authorities**, like? (Example: Cooperation, division of labour (regionally*, according to subject matter); competition; one coordinating authority, etc.)*

v. If the competent qualified entities are organisations, could you please indicate:

1. What requirements must the organisations meet: special authorisation? If so, who would give the authorisation?

2. Is the organisation based on members, and if so, who are these members? (*Example: individual consumers or traders or other organisations)* Please do specify for each of the above-mentioned organisations!

3. How is it ensured that the organisation/s is/are legitimately representing your Member States' consumers or traders?

4. Do statutory requirements for the constitution of these organisations exist, e.g. a minimum number of members or the dedication to a special purpose, or countrywide representation of the organisation?

5. Are the organisations free of adversaries (i.e. no traders in consumer organisations and vice versa)?

6. Could you please explain the major purpose, which ties the organisation together, along the lines of its statute?

7. Must the defence of consumer interest be its sole aim?

8. Which government bodies are entitled to initiate an injunction action?

9. To what extent can individual consumers or consumer organisations influence the policies of these bodies?

vi. How do your Member States' organisations finance their activities? (Are they self-financed; do they get funds from the state or funds from third parties, do they have a mixed funding, or any other? If they are state-funded, on what basis are the funds assigned to and distributed among individual organisations (membership; activity; projects etc.)? If there is a mixed funding, could you please estimate the shares? (*Example: Organisation 1 - self financed: 10%, state funding: 60%, third parties 30%. Organisation 2 – self financed: 20% state funding: 80%.)*

vii. Could you please indicate the manpower and financial resources that are available in your Member State to enforce Directive 2009/22/EC, is it organisations and/or public entities? Please feel free to estimate the figure, which is realistically available to deal

with enforcement matters under Directive 2009/22/EC. If so please do also mention some grounds for your estimate.

viii. Scope of Action

Is the right to initiate a collective interest action restricted to some areas (unfair contracts terms, unfair commercial practices, package travel…. i.e. annex of Directive 2009/22/EC) or is it a general right?

b. If available, please attach the annual reports of the qualified entities in your Member state.

Part II Application of Directive 2009/22/EC in your Member State

A. Cases

a. Number:

i. How many actions for injunction have been brought in your Member State since 2008? How many on average per year since the implementation of the Directive? Please distinguish between:

1. Cross-border cases
2. National cases

ii. If available in your Member State: how often have alternative measures been used to cease infringements since 2008 (e.g. voluntary agreements before court proceedings / authority measures). Please distinguish between:

1. Cross-border cases
2. National cases

iii. Sector: If there were injunction procedures, please indicate the number of injunctions per sector since 2008. Please distinguish between cross-border and national cases.

Sector	2008	2009	2010	2011
Banking				
Insurance				
Telecommunications				
Package travel				
Passenger transport (air, rail, sea, coach)				
Car transport (car sales, car rentals, parking)				
Scam (prize draws, city guides)				
Postal services				
Non-food consumer goods				
Housing (contracts of sale, tenant contracts, real estate agents)				
Timeshare				
Energy and other utilities				
Miscellaneous (please specify)				

iv. Subject matter: If there were injunction procedures, please indicate the number of injunctions per subject matter since 2008. Please distinguish between cross-border and national cases.

Subject matter	2008	2009	2010	2011
Doorstep selling (Dir 85/577)				
Consumer credit (Dir 2008/48)				
Television advertisement / Teleshopping (Dir 2010/13)				
Package travel (Dir 90/314) and other tourism services (other than passenger transport)				
Unfair terms (Dir 93/13)				
Distance selling (Dir 97/7) and distance marketing financial services (Dir 2002/65)				
Sale of goods (Dir 99/44)				
E-commerce (Dir 2000/31)				
Advertisement medical drugs (Dir 2001/83)				
Unfair commercial practices (Dir 2009/29)				
Misleading and comparative advertisement (Dir 2006/114)				
Services generally (Dir 2006/123)				
Timeshare (Dir 2008/122)				
Passenger transport (outside travel packages)				
Accommodation services				

b. Outcome.
    i. Please indicate the success / failure rate (distinguish between cross-border and national cases):
        1. Overall (*example 120/10*)
        2. Per subject matter
        3. How many cases had a partly negative outcome (from the perspective of the enforcer) (*example: due to settlement in court, a compromise had to be found)*
    ii. Please indicate how many cases were concluded (distinguish between cross-border and national cases):
        1. By way of a mechanism set up to come to some sort of a bilateral agreement outside the court and/or the administration?
        2. By way of regulatory action of the authority respectively by way of court decision?
        3. By way of a settlement in the courts?

c. Sanction for non-compliance
    i. Please indicate what is the sanction envisaged by national law for non-compliance with the injunction order (for instance penalty of a fine for each day of non-compliance)?
    ii. Who has the right/power to require the sanction to be imposed?
    iii. Before what court/body and in what kind of proceedings?
    iv. Does national law envisage publication of the court decision or a corrective statement where appropriate?
    v. Are injunctive decisions published in practice and in what form?

d. Initiative taker: Please estimate the percentage of action of injunctions brought by (distinguish between cross-border and national cases):
    i. CPC authority
    ii. Consumer organisations
    iii. Business organisation (if possible)
    iv. Competitor (if possible)

v. Consumers (if possible)

vi. Others

e. Procedural questions and possible barriers (distinguish between cross-border and national cases):

i. Who has jurisdiction to deal with actions for injunction (court, administrative authority);

ii. Please describe the procedure to be followed;

iii. Competent court;

iv. Please estimate the cost of an injunction proceeding in your country (*including court fees, lawyer's costs, estimated costs for staff, service of documents, public appeals/calls)*

v. Please indicate the way of calculating court fees and lawyer's costs (for instance in civil proceedings how is the value of the claim established in actions for injunction; are court fees and lawyer's costs dependent on the value of the claim etc.)

vi. Please estimate the cost risk of an injunction procedure (how much would the loser have to pay; what is the chance of winning but not getting costs refunded because the trade disappears or goes bankrupt etc.)

vii. Are there specific criteria your entity uses to decide whether or not to initiate an action (*example: number of consumers harmed, amount of damage sustained,)*

viii. What is the average length of an injunction procedure?

ix. Do you see any (other) procedural barriers? (*Example: refusal by an authority to give access to relevant information; courts that refuse to grant legal standing; data protection)*

x. *What is the percentage of voluntary compliance with court decisions?*

xi. *Are there possibilities of provisional enforcement of court decisions? What are the challenges for the real application of the judicial decisions?*

xii. For cross-border cases: Is it clear which court is competent? Is it clear which law should be applied? What is the practice?

xiii. Do you see any barriers in substantive law? (*Example – consumer problems arise in areas not covered by the Directive)*

f. Case studies: Could you please provide us with case studies (if not available you could also mention expert articles in legal reviews concerning interesting cases) where the legal mechanism set up under Directive 2009/22/EC worked satisfactorily on
   i. Unfair terms
   ii. Unfair and/or misleading advertising
   iii. Any other subject matter enlisted in Annex I of Directive 2009/22/EC

   Preferably from 2008 onwards. If interesting cases exist prior to 2008, please do mention them.

Part III Relation with and functioning of CPC-Regulation (mainly for CPC's)

A. Cases
   a. Number: please indicate the number of injunction proceedings that have been brought under the CPC-Regulation in your Member State (against traders established in your Member State).
   b. Please indicate - if available in your Member State: how often have alternative measures been used to cease infringements (e.g. voluntary agreements before court proceedings / authority measures).
   c. Please indicate the sectors and subject matter of the injunction proceedings in your Member State
   d. Please indicate the success / failure rate

B. Procedure and possible obstacles
   a. Please explain the relationship with (other) qualified entities in the framework of the CPC-Regulation.
   b. Please indicate whether it is clear which court is competent and which law applies in the framework of the CPC-Regulation.
   c. Please indicate the average length of an injunction procedure
   d. Please indicate whether it has been possible to stop infringements by foreign traders harming national consumers under the CPC-Regulation
   e. Please indicate which obstacles you face when trying to stop infringements under the CPC-Regulation
   f. Please indicate how is the cooperation with CPC's in other member states is experienced

g. Do you see any need to go to court in another Member State to prosecute a cross-border infringement?

Part IV (Relation with) Alternative procedures / procedures allowing for compensation

A. Individual redress

a. When an action for injunction is successful, can consumers who have been harmed by the illegal practice obtain compensation for the harm suffered?
b. Has the existence of Directive 2009/22/EC helped consumers to obtain damages? (*Example: A trader has been sued because of using an unfair price raising term - court obliged him to not use this term in consumer contracts any more - this might result in a direct obligation to pay back the money consumers already had to pay due to the unfair term, otherwise the trader would breach the injunction order*)
c. Same question for the CPC-Regulation.
d. Has the use of the Directive together with accompanying measures (criminal law, etc.) helped consumers to get obtain damages?
e. Same question for the CPC-Regulation.

B. Collective redress

a. If a procedure for collective redress (allowing to obtain compensation) exists in your country, please explain the link between this procedure and the Directive
b. Same question for the CPC-Regulation

Part V Economic impact and effect

A. Of the Directive

a. In your perception, to what degree did the Directive lead to a tangible reduction of consumer detriment in your Member State? Please explain your answer.
b. In your perception, did the Directive enhance compliance with consumer law among economic players to a measurable degree?
c. In your perception, has the Directive had tangible effects on the markets (for instance in the sense of enhancing competition)?
d. In your perception, did the Directive work in cases as a deterrent to discipline markets?

e. In your perception, have there been notable differences in the impact of the Directive depending on economic sectors? If yes, what may in your opinion be the probable reasons for these differences (for instance, market structure, number of traders, high percentage of fly-by-night businesses, importance of repeat purchases and reputation, other)?

f. How would you estimate the benefit of the Directive in monetary terms?

g. Has the Directive helped to rectify problems in other areas of law than the law derived from the Directives listed in Annex I to the Directive?

h. As a mechanism to correct market failures, would you say Directive 2009/22/EC is very useful, useful, not very useful or a failure?

i. Has inclusion in the list of 'qualified entities' resulted in enhancing the standing of the organisations named therein? Have the lists led to a selection of 'quality schemes' among enforcers of consumer law?

j. Has the list of 'qualified entities' created a peer group of consumer organisations in Europe?

k. Has the use of the Directive helped to clarify legal questions in consumer law in your country?

Please give examples.

B. Of the CPC Regulation (same questions)

Part VI Suggestions for improvement

1. Injunctions according to the Directive are cease-and-desist orders (i.e. ordering a party to stop a certain practice). Would it be helpful to have injunctions ordering a party to act in a certain way (i.e. to do something)?

2. For cross-border injunctions for determining the applicable law, has Article 6 of the 'Rome II'-Regulation 864/2007 been useful?

3. Would you deem it a useful measure to grant individual consumers / competitors legal standing for bringing injunctions?

4. Do you think that the list of Directives in Annex I to the Directive is sufficiently wide to pursue infringements to the detriment of the consumer? If not, how should the ambit of 'consumer law' be defined to determine the scope of the Directive?

5. Should Member States be permitted to include commercial and trade associations in their notification of 'qualified entities' as the Commission proposal for the Directive of 1995 originally suggested?

6. Would an accelerated procedure for injunctions (as usual in actions for interim measures) help making the Directive more effective?

7. Has the requirement of a preliminary procedure, where existent, hampered the effectiveness of the Directive?

8. Would it be useful to have the possibility to issue injunctions that would be applicable across the whole of the EU and not just one Member State? Who should be competent to do so?

9. Would it be useful to extend injunctions *inter omnes*, i.e. making them generally applicable?

10. If the Directive were to address litigation costs, what you would expect the law to state?

11. Should additional tools be made available for qualified entities (naming and shaming / possibility to obtain damages...)?

Part VII Studies and statistics

Are there any reports or studies available in your Member State regarding the application of?

- Directive 2009/22/EC
- The CPC-Regulation
- Linked procedures that allow obtaining compensation?

Please attach if available.

Synopsis of 'laws protecting consumers'

"Union consumer law" – Synopsis of the annexes of Injunctions Directive and CPC-Regulation (as amended) compared

Annex I of Directive 2009/22/EC, as amended by Directive 2011/../EU ***(abrogating Directives 85/577/EEC and 97/7/EC)***	Annex I of Regulation (EC) No. 2006/2004, as amended by Regulation (EU) No. 954/2011
LIST OF DIRECTIVES REFERRED TO IN ARTICLE 1 [1] **1. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).** **2. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) [2].** **3. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23).** **4. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).** **5. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).** **6. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).** **7. Directive 1999/44/EC of the European**	DIRECTIVES AND REGULATIONS COVERED BY ARTICLE 3(a) [1] 1. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21): Article 1, Article 2(c) and Articles 4 to 8. 2. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31) 3. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66). 4. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1): Articles 9, 10, 11 and Articles 19 to 26. 5. Council Directive 90/314/EEC of 13 June 1990 o package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59). 6. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). 7. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of

Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12). **8. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).** **9. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67).** **10. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (OJ L 271, 9.10.2002, p. 16).** **11. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22).** **12. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).** **13. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10).** **[1] The Directives referred to in points 5, 6, 9 and 11 contain specific provisions concerning injunctions.** **[2] The said Directive was repealed and**	certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10). 8. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19). Directive as amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p. 16). 9. *(deleted).* 10. Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27). 11. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12). 12. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000 p. 1). 13. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67). Directive as last amended by Directive 2004/27/EC (OJ L 136, 30.4.2004, p. 34). 14. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services. 15. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (OJ L 46, 17.2.2004, p. 1). 16. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005

replaced, with effect from 12 May 2010, by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (OJ L 133, 22.5.2008, p. 66).	concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22). 17. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications): Article 13 (OJ L 201, 31.7.2002, p. 37). 18. Regulation 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway (OJ L 334, 17.12.2010, p. 1). 19. Regulation 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport (OJ L 55, 28.2.2011, p. 1). [1] Directives Nos 6, 8 and 13 contain specific provisions.

Excerpt from the 1993 Green Paper 'Consumer access to justice'

The case for the Injunctions Directive when it was conceived:

Commission Green Paper 'Access of consumers to justice and the settlement of consumer disputes in the single market' (COM(93) 576 final of 16 November 1993[178] – Excerpt (pp. 64-67)

(…)

III.B Protection of collective interests

III.B.1 The existing procedures

The relatively new notion of collective interest was introduced into national legislations in the course of the last century. Member States have adopted a variety of measures for its legal protection.

All the national legislations examined now recognise the existence of a category of interests whose scope is:

- wider than that of individual interests (which are defended via the right of individual action) but
- more limited than that of the general interest (whose defence lies with the Ministry of Public Order).

The unprecedented nature of the interest protected by the legislators (substantive law) made it necessary to adapt existing legal procedures or to create new ones.

To accommodate the collective interests of consumers, statutory amendments to the relevant procedural rules were introduced in all the Member States of the Community in recent years.

The most significant difference in legislative technique does not concern the existence of a "representative action" as such (which makes it possible to invoke the protected interest before the courts) but rather the criteria defining who is entitled to bring an action: in certain Member States, protection of collective interests has been accorded to the social groups (organisations of consumers and firms), whereas in other Member States it is the task of a public authority. The survey of national legislations may be summarised as follows:

In three Member States, the protection of collective interests has been confided to an autonomous or independent administrative authority (Director General of Fair Trading in the United Kingdom, Fair Trading Act, 1973; Consumer Ombudsman in Denmark, Marketing Practices Act 1975; Director of Consumer Affairs in Ireland, Consumer Information Act, 1978).

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[178] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF

In eight Member States consumer organisations have been recognised as having a *locus standi* (Germany: Gesetz gegen den unlauteren Wettbewerb 1909, amended in 1965 and the Act of 9 December 1976 concerning unfair terms; Greece: Act No 2000 of 24 December 1991; Spain: Act No 3 of 10 January 1991; France: Act No 14 of 5 January 1988 and Act No 60 of 18 January 1992; Italy: Act No 287 of 10 October 1990 and Legislative Decree No 74 of 25 January 1992; Luxembourg, the Acts of 21 August 1983 and 27 November 1986; Netherlands: Articles 6/196 and 6/240 of the new Civil Code; Portugal: Act No 29 of 22 August 1981).

In one country, legal protection of collective interests may be undertaken both by consumer organisations and by an administrative authority (Belgium: Act of 14 July 1991 on commercial practices, Articles 95 and 98 and Act of 12 June 1991 on consumer credit).

As regards the object of the action *(petitum),* all the Member States allow organisations or the competent authority to obtain an injunction or prohibition order in respect of forbidden or unfair commercial practices (irrespective of the civil, penal or administrative nature of the infringement).

As regards the definition of a commercial practice as "unlawful" or "unfair" *(causa petendi),* certain countries have introduced a "general clause" (normally accompanied by an indicative list) whereas others have opted for an exhaustive "inventory" (examples: misleading advertising, unfair terms, abuse of a dominant position).

But the point to note is that *actions for an injunction* are provided for in all the Member States, in respect of certain commercial practices which can "prejudice" the good functioning of the market. This is a "regulator" which enables both consumers and business competitors to prevent - rather than cure - the consequences of certain abuses.

The preventive function of the action for an injunction is assured through specific procedural rules: the action is prepared and introduced in the form of summary jurisdiction (accelerated procedure) and the judgment is normally enforced on a provisional basis.

Unfortunately, this *"regulatory mechanism"* was conceived by each Member State from its own national perspective.

In the Single Market, while commercial practices may move freely, the rules of procedure stop at the frontiers, which (still) correspond to the limits of jurisdiction of each state - the *lex fori.*

Difficulties in applying the existing procedures in the case of transfrontier commercial practices

Pursuant to the Fair Trading Act (sections 35 and 38) the Director General of Fair Trading exercises his powers in respect of any practice "which is detrimental to the interests of consumers in the United Kingdom".

- If Danish consumers get mailshot "solicitations" from an English firm and this solicitation is considered "unfair" both under the Fair Trading Act and Danish law, the Director of Fair Trading will not be able to exercise his powers (since to do so would put him *ultra vires)* and it will be very difficult for the Danish Consumer Ombudsman to exercise his (unless

he orders the opening of all mail coming from the United Kingdom - which might clash with other legal provisions).

- If English consumers are victims of timeshare scams in Spain or frauds connected with the purchase of alcoholic beverages in Calais, all the Director of Fair Trading can do about it is contact his Spanish or French equivalent (if there is one) or address consumer organisations in these countries; however, the latter will not be able to demonstrate an "interest in bringing an action" before the national courts.

- If French consumers, having borrowed money from an English bank, are victims of an infringement of the 1974 Consumer Credit Act, there is nothing either French or English organisations can do for them (in the United Kingdom the *locus standi* lies only with the Director of Fair Trading).

The representative actions provided for in Luxembourg legislation can only be brought by an "association of consumers represented at the price commission" of the Grand Duchy (and in effect there is only one consumer organisation represented at this commission).

- If a misleading television advertisement broadcast from Luxembourg is addressed (solely) to Belgian viewers, associations in neither Belgium nor Luxembourg can demand the discontinuation of this advertising. Belgian associations cannot do so because they are not represented at the Grand Duchy's price commission, whereas the Luxembourg association does not have any "interest in bringing an action" in the legal sense.

- If the general contractual conditions applied by Luxembourg banks contain unfair terms, German savers with current accounts in Luxembourg can only turn to the above-mentioned Luxembourg association (since German associations are not represented at the Luxembourg price commission) and if certain terms apply only to "foreign" clients, this association will not have an interest in bringing an action (in the legal sense of course).

- If French consumers are victims of an unlawful commercial practice (both under Luxembourg law and French law) emanating from Luxembourg, their organisations will not be able to bring an action before the tribunals of the Grand Duchy, while the Luxembourg association will not be able to justify an interest in bringing an action in accordance with the *lex fori.*

The representative actions provided for in French legislation are reserved for *"registered associations provided they have been approved to this end".* However, this approval, required for bringing an action, is reserved for French associations (Decree No 88-586 of 6 May 1988).

- If German consumers are harmed by a commercial practice which is unlawful (according to French law) and has taken place in France, the German consumer organisation will not be able to refer the matter to the French courts; if the commercial practice (for example distance selling by a French firm) took place in Germany and is illegal according to German law, the organisation would be able to sue before a German court and consequently demand enforcement of the judgment in France, but the “accelerated” nature of the procedure would be completely frustrated.

- If Italian consumers have been victims of the same commercial practice in Italy, they will not even have this option: Italian law does not provide for collective action except in cases of misleading advertising.

These examples could be multiplied.

And yet, an action for an injunction often makes it possible to avoid a multiplicity of (individual) actions with a view to obtaining damages: it plays both a "preventive" role and is a source of considerable "savings" in the administration of justice.

In a Single Market, where goods and services circulate freely, the principle of "free movement" should also apply to legal instruments designed to ensure the discontinuation of unlawful practices.

Article 24 of the Brussels Convention provides that "application may be made to the courts of a contracting state for such provisional, including protective, measures as may be available under the law of that state, even if, under this Convention, the courts of another contracting state have jurisdiction as to the substance of the matter".

Hence, in urgent cases the appellant may in principle address himself to the court of the place where the measure is to be enforced; this principle (of proximity and effectiveness) might be a formidable instrument if the "court of the place where the measure was to be enforced" could be seized by the organisations (or authority) of the place where the damage has occurred.[179]

At present, we are faced with the following paradox:

- the organisations/authorities of the place where the harm occurs do not have the capacity to act (the *locus standi* being reserved under the *lex fori* to the "national" organisations);
- the organisations/authorities of the place where the measure is to be enforced do not have an interest (in the legal sense) in bringing an action (the interests of "national" consumers are not affected by a practice addressed to "foreign" consumers).

Rebus sic stantibus, it is enough to shift the locus of unlawful practices beyond the border represented by the *lex fori,* to be virtually out of reach of any action for an injunction. The purpose of the Brussels Convention (Article 24) is perverted and the principle of non- discrimination (Article 7 of the Treaty) would appear to be jeopardised, in so far as

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[179] The Commission has received a total of 42 complaints concerning misleading advertising addressed by a German firm (Homevertrieb) to clients domiciled exclusively outside of Germany (mainly in France). Several decisions were handed down in 1989 by the French courts condemning this firm, but to date it has not been possible to enforce any of them. A request deposited on 29 January was rejected by the clerk of the competent German court, on the grounds that the defence had changed address and could not be contacted. In the meantime a firm called “Chance Vertrieb” (which uses the same post office box as “Homevertrieb”) took its turn to address to French consumers advertising which was very similar to that already condemned by the French courts.

the *lex*

fori reserves the right of action to "national" organisations.

At any rate it is hard to see how the Single Market can work properly in these circumstances.

Experts working on this study

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