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

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THEMATIC DEBATE ON CONSUMER INFORMATION, PARTICIPATION IN ACTIONS AND REDRESS DISTRIBUTION

Brussels 26 November 2021

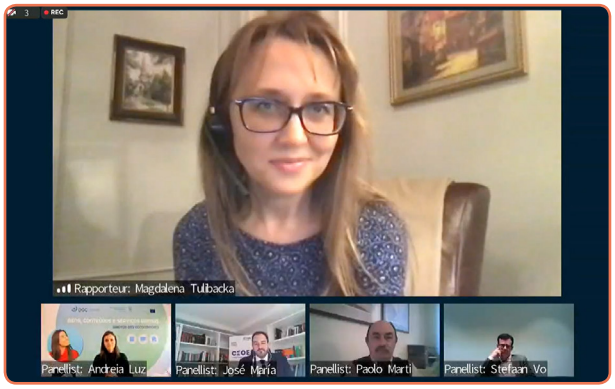
This report should be read together with the discussion paper
https://prod5.assets-cdn.io/event/7409/assets/8362336543-5f96b5a715.pdf
prepared by the European Commission, DG Justice and Consumers, Directorate Consumers

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

Rapporteur:
Prof. Dr Magdalena Tulibacka, Emory University School of Law, Atlanta, Emory University School of Law, U.S.

Panellists:
Andreia Luz, Legal Adviser, Consumer Law Service, Ministry of Economy and Digital Transition, Portugal;
Paolo Martinello, President of Altroconsumo Foundation, Italy;
José María Campos Gorriño, Legal Director, CEOE, the Spanish Confederation of Business Organizations, Spain;
Prof. Dr Stefaan Voet, Associate Professor of Civil Procedure, Faculty of Law, Leuven Centre for Public Law, Belgium.

Detailed report:



- The rapporteur, *Prof. Dr Magdalena Tulibacka, Emory University School of Law, Atlanta, United States* welcomed the panellists and participants and opened the thematic debate. She reminded the **chronology of the debate**. She welcomed the fact that **participants brought many perspectives,** representing (as confirmed by a poll run among the participants to the debate) the EU Member States 23%, consumers associations (33%), business associations (9%), academia (23%), EU institutions (7%), and other categories of participants (5%). She went on to introduce an informative video concerning the topic of the debate.

  She explained the **objectives of the debate**, namely to draw a clear picture of the concrete measures that would serve an effective fulfilment of the obligations imposed on EU Member States and other actors involved in the implementation of the Directive and support efficient implementation of the regulatory options offered by the Directive. She reminded that panellists are supposed to respond to questions identified by the **discussion paper** prepared by the European Commission, DG JUST that can be consulted on the Workshop website.

The rapporteur **summarized the scope of the discussion in three words: information, participation and compensation. These three words denote some of the fundamental aspects of the representative procedure that the new Directive set out to establish.**

- **Information**: without it, there will be no participation or compensation, so it is only right that it comes first. **The Directive requires that consumers should be informed about representative actions at three stages of proceedings**: (i) At the time when a qualified entity is planning to bring an action, so that consumers can realize that what happened to them potentially happened to many others, that it is potentially illegal, and that they can act; (ii) At the time when a qualified entity already brought the action, so the action is ongoing. This in order to give the consumers an opportunity to, depending on the type of action, opt-in or opt-out; (iii) At the time when the action was completed and produced a certain outcome, whether an injunction or a compensatory judgement, a settlement, or, as a case may be, a judgement rejecting the claims. This is done so that the consumers know the outcome of the case concerning them and so they can take further steps to obtain damages (for instance to submit a claim for compensation as a follow-up action or opt-in late (they can do so in France, for example)). If there was a settlement, such information may also be needed to make sure that the consumers have an opportunity to opt-out from it.

  ⇢ The rapporteur underlined that the **exact time of providing this information is crucial. Too early or too late, and it may be ineffective. It is also crucial what means are used.** Inappropriate means lead to ineffective actions. The Directive offers an option of national electronic databases of representative actions, although this is merely a supporting measure, additional to specific information about specific cases provided to consumers who are or may be concerned. Information provided to consumers should be clear, adequate and proportionate to the circumstances of each case. It should explain all so that the consumers can take the right steps. Further, it is of course of fundamental importance

who exactly provides this information. In some cases, the Directive mandates certain solutions, and in others, it leaves the choice to the Member States (and it also makes clear that those Member States may leave the discretion to courts or administrative authorities).

- The **qualified entities** must provide information in all three above-mentioned stages: when they are planning an action, when they have already brought an action, and when the action is completed, including when their claims were rejected or the case was dismissed. The information should be provided in particular on their website.
- **Traders** who are defendants in such actions may be required by national laws of Member States to provide information about on-going actions. They will also be required by the court or the administrative authority to provide consumers with information about final outcomes of actions. However, the Directive provides that this information requirement may not bind traders if consumers were already informed about the outcome of the action by another entity. The rapporteur put forward the question if the traders are not usually in the best position to provide the information as they know who the consumers are and how to reach them. Courts or administrative authorities before whom the action was brought also may, under national law, inform consumers of ongoing and concluded actions. The rapporteur put general questions on how to provide a system where the information is provided efficiently and effectively and on how should these provisions of information be coordinated.

- **Participation**: the systemic design questions concerning how **consumers are expected to participate in the actions** have significant implications for our constitutional, fundamental legal principles of access to justice and due process. They are also instrumental to the life of the new procedural mechanism set out by the Directive. It is vital to ensure that the mechanism offered to consumers can actually be used by them. For some Member States, an **opt-out** collective action for compensation is not new. For most, however, it will be. The Directive leaves discretion to all Member States whether and to what extent they allow for opt-out actions. Some important questions that need to be answered are: should opt-out actions be allowed at all? If a mixed solution is adopted, allowing both, **opt-in** and **opt-out**, should it be the law itself that pre-determines a specific type of approach for specific actions? Could the solution be to impose opt-out only for misleading commercial practices cases, but opt-in only for product liability cases? Or should the bodies deciding this take into account nature of the claims, their value, their complexity? Perhaps the qualified entity ought to be able to decide what mechanism should be applied, subject to approval by the court or administrative authority? Last but not least, if consumers are meant to opt in or out, when can they do so?

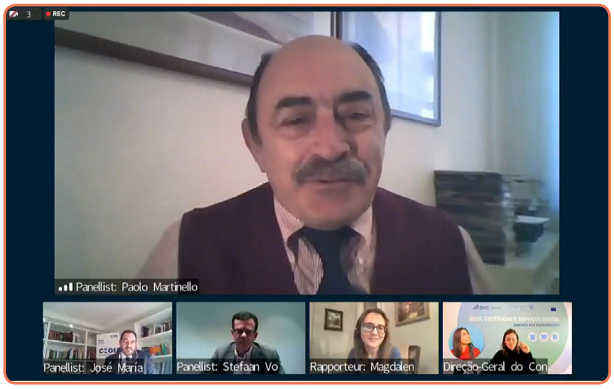
- **Compensation**: **this Directive is revolutionary because it introduces a pan-European opportunity for groups of European consumers to claim compensation**. The issue of compensation is central to the success of the Directive. Compensation is not only financial, the Directive provides a non-exhaustive list of remedies including, in addition to money payment, repair, replacement or price reduction. However, the most important systemic design questions and potential problems concern money. **Quantification of damages** in opt-in actions is relatively easier because all those seeking compensation would have joined. However, even in such cases there could be options provided by law allowing the court to assess the damages in groups or sub-groups. Polish class actions law, in fact, goes even further by requiring each class member to join one or another sub-group at the start of the proceedings. **Assessing damages** in opt-out cases is much more difficult, and here it needs to be decided how, in legal systems that traditionally rely on concepts of full compensation but do not allow over-compensation or, even worse, punitive damages, the courts are allowed to do this. Would they be allowed to use the group or sub-group **aggregate method**?

Would they be allowed to assess an average amount? And, there is the large elephant in the room – what is decided regarding the unclaimed money? Does it go back to the trader? What about the key aim of the Directive – **deterrence**? Does it go to the qualified entity – but then how to avoid criticism that it may encourage spurious claims? Does it go to a *cy-près* entity - a charity? With regard to the latter, there is experience from the United States to be looked at where *cy-près* has flourished. It has also been widely criticised there.

- *Andreia Luz, Legal Adviser, Consumer Law Service, Ministry of Economy and Digital Transition, Portugal,* explained that Consumer Directorate-General in the Portuguese Ministry of Economy and Digital Transition, is **responsible for the transposition of the Directive**, together with Directorate-General for Justice Policy in Ministry of Justice. Several choices to be made by Portugal within the options offered by the Directive are still **pending the political decisions**, therefore the intervention of the panellist focused on the already **existing collective redress mechanism in Portugal.**

  - The panellist underlined that the collective redress mechanism is guaranteed by the **Portuguese Constitution** (Article 52). In addition, Portugal has the Law 83/95 of 1995, which regulates the ***acção popular*** (popular action). There are several types of popular action: preventive popular action, popular action to contest administrative decisions, and popular action for compensation of damages, including collective redress.
  - The popular actions are applicable when the following **interests are involved**: public health, environment, quality of life, protection of consumers, cultural heritage and public domain.
  - **Standing rules** are also considerably broad. Any citizen in the enjoyment of their civil and political rights has standing, as well as associations and foundations that defend the interests referred to above.
  - Portuguese popular action is an **opt-out system** for collective redress. Consumers concerned are informed by public means or though social media, in order to explicitly state that they want to be represented in the action or to explicitly state that they do not want to be represented in the action. Those who have not expressed any wish will be covered by the action. Individual identification of consumers concerned by the action is not required within the information process.
  - The law provides for specific rules on **redress distribution and the role of judges** within this process – the court need to decide on the global amount of compensation to be deposit to the distribution fund and further distributed to consumers. It appoints the fund manager, decides on the amounts to be distributed to all consumers and the specific deadlines for consumers to claim their share of compensation after presenting the necessary evidence as required by the court. The unclaimed amounts revert to the Ministry of Justice to support access to justice objectives.

- *Paolo Martinello, President of Altroconsumo Foundation, Italy,* **agreed that consumers' information is crucial for the success of the representative actions.** He underlined the need for a distinction between (i) the «**technical» information to consumers relating to the action** (how to opt-in or opt-out, status of the action, outcomes, etc). In this regard, the qualified entity website (or other electronic database) may be sufficient. and (ii) the information/ **communication aimed at collecting the group**: mainly in an opt-in system. In this respect, a communication strategy is crucial, and the relevant means may be complex and expensive.



  - To demonstrate the above, the panellist provided for the examples of the following actions:
    - The action brought by Altroconsumo *('AC')* before an Italian court against Volkswagen (so called ***'Diesel gate case'***). Within this action, the information ordered by the court on three national newspapers (charged to AC) appeared expensive and not effective to collect the group despite the press releases and information on AC website provided. The association therefore decided to send **individual letters** to 600.000 car owners (data purchased from the Public Vehicle Register), following to which 75.000 consumers opted in, out of whom 63.000 have been accepted by the court and awarded a compensation of 3.300 Euros each – according to the first instance judgment.
    - The action brought by Altroconsumo before Italian court against local railway company (so called '***Trenord case'***). Within this action the information ordered by the Court - one local newspaper charged to AC, has also appeared ineffective to collect the group. The association therefore decided to organise the '***flash mobs'*** in front of the railway stations. As the result 6.000 consumers opted-in, out of whom 3.000 have been accepted by the court and awarded the compensation of 100 euros each.
  - The panellist also agreed that the choice between the opt-in/opt-out is crucial and admitted that it raises difficult questions. To demonstrate the possible result of these two approaches the panellist provided for the following comparison:
    - in Diesel gate case Italy: there were 600 000 consumers involved out of whom 75 000 opted-in. As the result, 10 – 11 % of the group has been compensated (under first instance sentence).
    - in Diesel gate case in USA in San Francisco, there were 490 000 class members out of whom 3300 opted-out. As the result, 99.3 % of the class member have been compensated (within a collective settlement).

In view of the above experience, the panellist provided for some recommendations on the implementation of the Representative Actions Directive:

- The way to inform consumers should be decided on a **case-by-case** basis; the qualified entity should be free to establish the best communication strategy, **in addition** to the information means decided by the court.
- **Individual information to consumer** could be the best solution in many cases; **traders should disclose the data of the consumers concerned**, when it is in their hands (i.e. a telecommunications company, a bank, a social media platform), under the court's review.

- **Timing of the communication**: the collection of the data on the group of consumers concerned by the infringement must be done promptly, just after the outbreak of the case, i.e. even before the action has been admitted by the Court, to inform consumers about the steps to be taken (safeguarding of evidence, etc.).
- All **costs of information** to consumers aimed at collecting the group should be reimbursed to the qualified entity if it wins the case.
- **Opt-out seems to be concretely more effective then opt-in**; an appropriate solution could also be **the mix of both mechanisms and the choice made by the court case by case,** according to criteria established by the law (value of individual damage, size of the group and other criteria).

Prof. Dr Stefaan Voet, Associate Professor of Civil Procedure, Faculty of Law, Leuven Centre for Public Law, Belgium, underlined that the **discussion regarding the opt-in and opt-out goes to the heart of the representative actions.** The representative action is an action brought by a representative on behalf of a group of unidentifiable, unquantifiable members that will be bound by the outcome of the action, without being a formal party to the proceedings. These members of the group must be informed about the action and afterwards given an opportunity to decide on whether they want to be represented in the action and bound by its outcomes. Against this background and given his research and experience, the panellist provided for the following remarks and recommendations as regards the implementation of the Representative Actions Directive:

- In some countries, for a certain time it was considered that the opt-out mechanism is contrary to Art. 6 of the European Convention of Human Rights. Fortunately, that idea has been abandoned. There is a case law in Netherlands (*Shell and Convertium cases*) and in Belgium *Lernout & Hauspie case* concerning the enforcement of a settlement reached in U.S. clearly stating that **opt-out is not contrary to the ECHR.**
- Pursuant to the Directive, in case of actions seeking injunctions individual consumers should not be required to express their wish to be represented in the action. As regards actions seeking redress, the Directive **leaves a discretion to the Member States on whether to choose opt-in, opt-out or a mix of them.** Opt-in is mandatory for consumers resident in another Member State than the one where the action is brought.
- A solution could be, as it is the case in Belgium to also impose **opt-in in cases concerning individual physical damage.**
- For other cases, the best solution would be - and that exists in Belgium as well – to provide for a **combination of opt-in and opt-out mechanisms**. The **choice to apply one of these techniques should not be made by the law but should be left to the judge/administrative authority dealing with a specific case, as adequate to the circumstances of each case.**
- The reasons for the above proposal are the following: representative actions cover a broad range of issues, there is no one-size solution. On the other hand, we must be realistic as empirical data demonstrate that opt-in does not work in consumer cases. Where the damage is small, consumers do not opt-in.
- The decision on whether to apply opt-in or opt-out in a specific case should be made by **the judge or an administrative authority**. The qualified entities will logically always ask for opt-out whereas the defendants will always ask for opt-in. In this context, judges should have **managerial powers** to effectively run the case, such as ordering the relevant evidence, for instance the list of consumers concerned by the action.

- The Belgian solution for the **timing of opt-in and opt-out** could also be recommended. Consumers are requested to opt-in or opt out after the certification of the case but before a judgment on the merits is issued. There is no second round of opt-in or opt-out.
- The Directive allows for such a **second round after the collective settlement has been reached or the decision on the merits to be taken** (Recital 43), which makes sense. Another solution would be to organise opt-in or opt-out only after the decision on the merits is taken or a settlement agreed, so consumers know on wat they agree (French solution, Recital 47).

José María Campos Gorriño, Legal Director, the Spanish Confederation of Business Organizations, Spain, reminded that the collective redress mechanism have existed in Spain since 2001. The transposition of the Directive will affect only certain aspects of this mechanism. There is also an option to unify the relevant provisions within the new chapter of procedural law. There is a room for the improvement of the mechanism, for instance as regards the certification stage, so to ensure the maximum of legal currently. In his presentation, the panelists concentrated on Spanish provisions on the distribution of damages that in his view meet the Directive's objectives. He underlined that within the Spanish collective redress, **the court decides on the concrete amounts of compensation to be recovered individually by each consumer directly from the defendant trader**. The court precises the **evidence** to be presented by individual consumers to the defendant traders in order to enforce their rights. Therefore, in the panelists' view, there is no problem with the distribution of redress in Spain, **the right to recover it always rely on the consumer** that can enforce the court decision directly in front of the trader. To demonstrate the above, the panelist has provided for concrete examples:

- *Barcelona electricity shutdown* case (redress) that took place in 2017 and concerned 323 000 users. Consumer organisation filled a collective claim within which it appeared impossible to identify individual users. The decision against electricity providers decided that all users were entitled to the compensation from 122 up to 300 Euros depending of the hours of interruption they suffered plus a rebate of 10% of their annual electivity invoice.
- *Burgos Motorway* case (redress) where in 2004 a highway was cut during the night, due to a heavy snowstorm. Under Spanish court decision, the licensee of the highway were obliged to compensate consumers concerned with 150 Euros each plus the price they paid for using the road. Each consumer needed to provide a proof of entering the highway within the specific time.
- *Volkswagen* case (*Diesel gate*, redress) where there is a first instance Spanish court judgement granting 3000 Euros to each buyer under opt-in mechanism, for a total amount of 60 million Euros (pending appeal).
- *Vodafone's unblock fee* case (injunction & redress) where the defendant trader was obliged to stop the practice under 5000 Euros penalty per day in case of non-compliance + compensation of 8 Euros per person plus interests.
- *Injunctions Ryanair* case (injunctions) where recently the Spanish Supreme Court confirmed *Ryanair* general terms and conditions unfair.

The panellist underlined that in Spain the damage need to be determined individually and consumers retain their right to claim it directly from the defendant. Spanish Ministry of Justice is working to transpose the Directive and may improve some of the aspects of Spanish collective proceedings, for example in the area of certification.

Panel discussion

The rapporteur posed some overarching questions to the panellists:

- How to ensure the consistency between the information provided by the qualified entities under Article 13(1) and the information provided under Article 13(2) and (3), and possibly the information provided within the national and EU databases? This consistency is important especially because the information will probably be coming from different sources (court, trader, entity, others).
  - *Paolo Martinello* noted that it is not a problem in the beginning. The more information the consumer has at that stage, the better, even if there may be some competition between different qualified entities in that regard. Afterwards, the court has an important role in the coordination of the information. During the action and after the action is concluded, the coordination or at least the control by the court is not so difficult to reach.
  - *Andreia Luz* believes that one approach could be to celary establish the relevant information to be provided for each stage and for each party (qualified entity and the trader). Another instrument that could be used is the European register. Each Member State could have more than a database, a portal, that the consumers could access (together with the academia and the authorities). Portugal is preparing a similar portal regarding unfair terms right now. It appears a good option to have a single contact point for all actors on all relevant information.
- What are the information measures, communication strategies and IT tools that proved to be most effective and efficient within the existing national collective redress mechanisms?
  - The rapporteur, *Magdalena Tulibacka* noted that she was fascinated by the flash mob idea.
  - *Stefaan Voet* said that in some cases the defendant has a list of all of the consumers. In Belgium, there was a case about decoders and the modems that are used to watch TV and one of the suggestions, was to use the contact information of the consumers concerned and oblige the defendant to individually notify them. It was the same situation in the case of delayed flights and the airline in possession of the contact details. In some cases, such as the Dieselgate case, social media were used. The speaker thinks it needs to be a mix of options and there should be leeway for the judge to have all of the options available. Another important question that is sometimes disregarded is what should be in the notification – its content and structure. In the United States and in Canada there are some researchers dealing only with this issue.
  - *Paolo Martinello* remarked in connection with the obligation of traders to share data that he considers it very important. If they had a collaboration of the traders, they would have a much easier time administering the cases. This cooperation by the trader should not be seen as punitive. The trader should also be interested in the information being delivered in a more targeted way instead of large publicly, which can potentially damage its reputation more. But there needs to be a provision for it because when the consumer organisations ask for it without a legal base, it is problematic. Art. 18 of the Directive on the disclosure of evidence is not enough. It needs to be introduced by the Member States as Art. 13 of the Directive gives them a lot of freedom.
  - *Stefaan Voet* noted that it is already possible according to the general procedural rules in Belgium for a court to ask a party to disclose anything that is relevant to the case, so the Member States should also look at the possibilities they already have in existing rules in that regard.
  - *Paulo Martinello* agreed but pointed out that these provisions are related more to the collection of evidence during the proceedings. The collection of the members of the group is a bit different.
  - *Magdalena Tulibacka* provided a US perspective, where the traders are usually required by the court to contact their customers about a judgment or a settlement available to them.

- Regarding the choice between opt-in and opt-out addressed by some of the panellists, are there any more experiences from other panellists that they want to share?

  - *José María Campos* said that generally speaking, it depends. The main difference is that in opt-out system, the consumer cannot file an individual action, so he/she losses the right to act individually before the court, which means we have to be careful. When is opt-in useful? When we can identify individual consumers, opt-in system works. It also works, when the amounts in question are significant. Taking away the right of the consumer to claim the amount individually would be limiting their access to justice. He recalled Volkswagen case, where 3000 Euros were awarded to each buyer for a total amount of 60 million Euros. Where would opt-out work? When the consumers cannot be easily identified and in small claims. Here, the role of the consumer organisations needs to be underlined. It is very important that they are independent and prove that they are defending the collective interest of the consumers. According to the Directive, opt-in is also the correct solution is the case of consumers who do not habitually reside in the country because the information about the proceeding might not reach them and they would have their right to initiate their individual proceeding taken away from them.
  - *Stefaan Voet* agreed with the criteria presented by Mr. Campos. However, the question is whether these should be laid down in law and he does not think so. We should leave this to the judges and let them consider the individual circumstances. They made this choice in Belgium and it had some critics, but the practice showed that the justifications of the judges for their respective choices make sense. What must be underlined, sometimes even of the certification decision is appealed in a given case, but then the decision of the judge to impose opt-in or opt-out is not contested because it made sense.

- Should EU Member States provide for specific rules on available remedies to adapt them to the collective nature of the representative actions (for example, to allow total assessment of damages, average damages)? Do the Member States need to amend their substantive laws concerning redress/compensation distribution to ensure that the money derived from the wrongdoing (if unclaimed by consumers) does not remain with the trader? How do we confront any constitutional and other problems any newly designed system may give rise to?

  - *Magdalena Tulibacka* mentioned that there was a case against Facebook, where it was sued in a class action for a violation of privacy rights and there was a settlement. Facebook offered many millions of dollars in terms of compensation, and the undistributed funds were supposed to go to a charitable organisation that dealt with privacy. However, the issue was that the people behind the organisation were actually the same people as in the management of Facebook. There are many questions regarding the conflict of interest, even the judge's interest because in one case, the defendants apparently indicated that they might be willing to support the judge's *alma mater. Cy-près* is a good way to ensure that the deterrence works and the money does not go back to the trader, but it goes to some worthwhile cause. But we need to ensure that there are some checks on where the money goes and the question remains what kinds of checks are appropriate.
  - *José María Campos* said that he considers as the most important aspect of distribution (and also the way it is done in Spain) that the consumers are entitled to a compensation individually stated in the decision. The consumer can go directly to the defendant and claim the money according to the judgment. He heard about the cases (for example in Portugal) where the class is entitled to the money and it decides on how to distribute it, you are losing control. The consumer is losing his entitlement to enforce the decision, to claim his money directly from the defendant. With regard to distribution to third parties, which have not suffered damage, that goes against civil law principles on compensation, it goes against our tradition.

But it may be understandable that you cannot allow someone who infringed a law to profit out of it. That is why in Europe, generally speaking, we have public enforcement. On the other hand, in the United States, they punish the defendant through the class action. The EU legislators should not cherry-pick some aspects of the US system, but not others.

- *Stefaan Voet* pointed out that the legislators should look at their own procedural law to see if there is a need for further adjustments. We do not have punitive damages in Belgium, it would not be right to introduce those using representative actions. But we need to find pragmatic solutions as regards distribution of redress. There are many possible techniques, which have not been yet used in Belgium. For example, the court appoints a judicial administrator that distributes the redress. If there is an issue with distribution, the court can resolve it. Consumers need to have certain credentials and be registered on a list drawn up by the court. As regards the left over money not claimed by consumers from redress awarded, the Belgian law originally provided that it would go back to the trader. Now, the laws says the court decides on the destination of this amount and one of the options is to put it to a fund or to give it to the consumers who did show up as a bonus. In the latter case, the question arises indeed, if it is compatible with the substantive law. Issues related to the distribution of redress are often overlooked by the law.
- *Paolo Martinello* said he realised the power of collective proceedings when a friend of his living in Italy but coming from the US showed him a bank statement in which there was a USD 1.000 payment from a class action that he had never heard about. The first goal should be that there is no advance of compensation. One technique to do it to have the trader execute the payments directly to the consumer's banking account. When it is possible to do that, it is the best solution. In principle, the right of the consumer to receive a payment from the trader is individualized, so we do not have to think about a global amount. But in some cases, it is also possible that a part of the global amount is not collected by consumers. Then, there should be some fund. He mentioned the Yellow cab case, in which the compensation did not go to the individual consumers, actual passengers, but the taxi drivers were obliged to reduce their prices for one month. Somehow, the entire class concerned by the breach has been compensated.
- Ms Tulibacka agreed that the trader needs to be involved because very often it is the best person to be involved in the distribution of damages.

- How important is the judges' role within the context of the issues we are discussing here?
  - *Magdalena Tulibacka* stated that quite often, the success of the law depends on the approach of the judges. How managerial they can or should be.
  - *Stefaan Voet* agreed that the role of the judges is essential. It is important to look at the managerial tools that the judges have at their disposal because these cases ask for a lot of creativity. He said it would not be good to put the rules into a statute because these cases ask for a lot of creativity. It is important to exchange information about the best practices, for example at the level of the European Networks of Judiciary.

The Q&A session with the audience

Malgorzata Posnow-Wurm from the European Commission, DG JUST, presented written questions from the audience put in '*chat*':

- A participant emphasized how difficult it is to collect information about the consumers concerned by the action and inform them.

- A participant mentioned that there was an issue regarding the available data since the public registers delete the data after certain time and that there should be some safeguard there.

  ⇢ *Malgorzata Posnow-Wurm* mentioned that this might be due to the requirements laid down in the GDPR. She pointed out that the interplay of the Directive and the GDPR will be subject to further assessment by the Commission services. She further mentioned that this ties in with the remarks of panellist that the disclosure of evidence is crucial. In her view, Article 18 of the Directive may be interpreted largely and may also apply to the information about the consumers concerned by the action, not only the justification of damage. There is also some indication in the Recitals to this end.

- Several participants asked about the European register and the national registers. The question was what was their role both in terms of general awareness raising and in connection with a specific action.

  ⇢ *Malgorzata Posnow-Wurm* mentioned that the European Commission is creating an IT tool that will call on cooperation of certain actors involved in the implementation of the Directive. It is not foreseen by the Directive that it would serve for the participation of consumers, but it may be the case in the future.

- A participant asked if the collection of information for the participation and the distribution of the redress could be joined thanks to the IT tools. There was no clear answer to this question.

- A participant made the following remark: Further to Mr Voet's presentation - opt-out as the only route in consumer matters - If there is no public funding or a consumer association with the means to pursue litigation TPLF providers require a return on its investment and this is often contingent on damages awarded. This requires a critical mass (% of a small amount only works if there is mass). This is easier to achieve in case of (international) opt out. I can imagine that cases are ultimately only pursued in larger jurisdictions, especially since it has become more difficult to pursue matters for an international group of affected individuals. However, if you want collective interests being pursued in smaller jurisdictions (small classes) while no public funding is available, a European Register is needed.

  ⇢ *Malgorzata Posnow-Wurm* noted that some of the Member States consider providing for a solution within which the cost of third party funding would be considered a procedural cost to be covered by the losing defendant, not a% of the redress awarded.

- A participant noted with regard to the issue of unclaimed funds that an elegant way to solve it might be to have the qualified entities claim remedies that would benefit public interest. The participant provided an example of suing for diesel emissions damages, reverting funds could be used for compensating the excessive emissions. This leads to a mixture of interests, I am aware, but it may be an elegant solution. Another participant also asked about the possibility under the Directive to use a representative action to this end.

- *Malgorzata Posnow-Wurm* said that the Directive allows for it, even if the Directive does not regulate substantive law, but only provides for procedural rules. It is purposeful that the Directive does not refers only to consumers' individual interests, but also to the collective interests of consumers. The representative actions concern both types of interests. There is a possibility for the Member States to interpret it broadly and allow for the collective consumers' interest to be compensated. Importantly, the Directive allows Member States to use the representative actions for the protection of other interests, also public interests, going beyond consumer interests.
- *Stefaan Voet* noted that one of the issues with regard to the quantification of damages is the lack of collectivized substantive law. Instead, in all of the European jurisdictions, this is individualised. A 'holy principle' is individual, full compensation. It is very difficult to reconcile these issues. The policymakers should take this into account and discuss possible amendments of substantive law as well. The role of the judge is of course crucial. They would need to be open minded, creative, pragmatic and use the existing rules for effective solutions in specific cases.
- Ms *Posnow-Wurm* replied that she believes that both Mr *Gorriño* and Ms *Luz* mentioned that there are already some opportunities for the Spanish and Portuguese judges to award global damages. She asked about the *Barcelona electricity shutdown* case and asked Mr *Gorriño* if he could elaborate on it. On how were the consumers informed by the electricity provider and how many ultimately got compensation awarded.
- *José María Campos* replied that in Spain, it is exactly the opposite. The redress is and must be individualised. In electricity case the court said to the consumers that they have to prove that they were users of electricity at that time and then they would each get 150 Euros. They were informed by the consumer organisation and it was also discussed in the newspapers. He further pointed out to the differences between the US system and the European system displayed in the example of the consumer being compensated without his knowledge mentioned by Mr *Martinello*. He said that in order to be compensated in Europe, you have to do something to receive the compensation.
- Mr *Voet* said that the background of the instrument is compensation, not punishment. He agreed with Mr *Gorriño* that for punishment, we have public enforcement. Another question is if we should allow public enforcers to step into the arena of redress, but that is a discussion for another day. When you take the money from the company and distribute them to the individual consumers, the national substantive rules apply, and it can be problematic in some countries. Lawmakers should think about the influence of representative actions on civil procedure rules and on existing rules regarding substantive law and individual compensation.
- The rapporteur, *Magdalena Tulibacka* replied that it is true that representative actions play a compensatory law, and should not replace public enforcement. We should be aware that by introducing the representative actions, we are giving them a sort of enforcing role as well. Practically, in some cases the qualified entities will be the only ones who will deal with a given infringement. In some opt-out actions, it will be very difficult to assess the damage that occurred to each individual. The mechanism requires us to be flexible and open-minded. Perhaps, there will be a need to amend our substantive law, even if just in the context of this procedure. Again, judges will need to be the most flexible in order to make this mechanism work.
- *Andreia Luz* said that in Portugal, judges will fix the amount of compensation globally when each individual consumer cannot be identified. But when it can be done, it is the role of the court to decide on the amount that is to be paid to each individual consumer indetified. With regard to the difference between Europe and the US pointed out by Mr *Gorriño*, in Portugal there are no punitive damages. Public enforcement is meant to sanction the trader when it misbehaves and the collective redress is meant for compensation of each

consumer. A consumer association *Ius Omnibus* was recently established in Portugal and it has a recently decided case, in which the court fixated the amount, decided who would be entitled to what and the proof the consumers need to bring to receive individual amounts. The court decided as well that that the association together with the trader will be responsible for assessing the documentation demonstrating that the individual consumers are entitled to amounts awarded, and for paying consumers. The money is in a fund. Whatever amount remains, meaning will not be recovered by consumers, it will then go to the Ministry of Justice, so it will not go back to the trader.

- A participant *Paolo Fiorio from Italy, representing a consumer organisation,* made the following remarks: He thinks that the obligation of the defendant to disclose the list of consumers affected by the action is a necessity, especially when the mechanism is opt-in. In Italy, the courts obliged the defendants to send a notice to all of the people involved in a claim that they have a right to ask for compensation in a lot of injunctive actions. He thinks that this is crucial in the transposition of the Directive. With regard to participation, it depends on the characteristics of the case. Three elements must be considered in choosing between opt-in, opt-out, or a mix of both: (i) if the damage is the equal for all class members or easy to calculate; (ii) if the class members are known to the trader; (iii) what is the amount of the damage. When many consumers do not opt-in, then the main collective interest of the consumers, which is deterrence of dishonest traders, is not ensured. In certain cases, in particular law value cases, the law should provide the consumers with an opt-out system, not the judge. Also, with regard to the unclaimed funds, these should be used to fund other representative actions.

- A participant asked what an example of a good late opt-in would look like.

  - A participant *Maria José Azar-Baud* said with regard to the French example of late opt-in that it shows how interconnected the information, notification and compensation are. The problem in the French system is that cases really need an early notification, which is not currently required. This is connected with the absence of a tool such as a register. The participant created an observatory in France to try and inform about the actions in place. She said that the late opt-in is really not suited for low value consumer cases. This leads to discouraging the qualified entities, who are the only ones who can initiate collective proceedings in France. It is also not efficient because: (i) it does not lead to global peace (since *res iudicata* binds only those who were really compensated; (ii) it does not even lead to French peace, since the previous comment applies to both French and non-French consumers; and (iii) the system is not efficient neither in terms of compensation, access to justice, nor procedural economy. The participant mentioned that it might prove useful in the discrimination cases, but not in the consumer cases. She wanted to warn against late opt-in, which may be of relevance for cases related to moral or physical prejudices, sometimes for discrimination cases, but is not at all efficient for typical consumer cases.
  - *Paolo Martinello* said that Italy has also introduced the late opt-in solution very recently. It was not yet used in practice. The panellist would not be so negative as regards late opt-in. However, it is clear that it might look better on the paper than in reality. It does not solve the problem of collecting the class. The late opt-in can be done very late, maybe after 3, 4 or 5 years after the decision of the court. For example, in the Daniel's case from the video, the late opt-in would not really change the situation. There was a Daniel's case in Italy that has been closed since it became clear that it will be very difficult to collect from consumers evidence of the purchase. However, in a case like Volkswagen case, thousands of consumers came to them after the first decision. But when the group is difficult to identify, opt-out should be used.

- A participant *Anežka Janoušková* from the Czech Ministry of Justice made the following remarks: She is in charge of the transposition of the Directive and everything that has been said is very relevant for her. Regarding the role of the judge in choosing between opt-in and opt-out, there was a discussion on the national level and the Minister of Justice thought it would be best to leave it to the judge to decide as there would be a combination of opt-in and opt-out. However, there was a very strong opposition from both the judges and the practitioners. In the end, Czechia decided to put a concrete boundary in the bill. It says that the small claims up to around EUR 100 should be dealt with by opt-out and higher claims by opt-in. With regard to the discussion about the individual claim versus collective claim, the Czech substantive law allows only for full compensation and not over-compensation or punitive damages. She added that the discussions about the possibility of changing the substantive law were seen as too radical. Still, she thinks that the Czech law will have to be changed at some point later on because it is not very suitable (especially) for opt-out. The participant asked a question about Art. 13(3) of the Directive that says that the trader is obliged to inform the consumers if it loses the case. But it also says that it shall not apply if the consumers are informed in another manner. Due to Art. 13(1), consumers will be always informed by the qualified entity, which has the duty to inform in any case. The Czech Republic is also preparing an electronic database, which will serve as additional source of information for the consumers. From her point of view, there is no place for application of Art. 13(3) of the Directive as the information will always be given to consumers also in another manner.
    - *Magdalena Tulibacka* said that she had the same question and addressed it to Ms *Posnow-Wurm*.
    - *Malgorzata Posnow-Wurm* replied that with regard to the judges' approach, it would be helpful to organise trainings on a national level, as it appears that judges can have an impact on the specific procedural modalities already at the stage of the transposition of the Directive. On the European level, BEUC will be charged to train judges already next years. The possibility to share best practices across borders will be very relevant for the functioning of the mechanism. With regard to the question on Art. 13(3) of the Directive, she expressed her personal view that each paragraph of Art. 13 is independent. Therefore qualified entities will always be required to inform about the upcoming, ongoing and closed actions under first paragraph of Art. 13 in a general way. This will come in addition, on the top, to the information requirements foreseen by second and third paragraphs of Art.13 that should be seen as providing for a separate, additional information requirements that would need to be decided by the law or by the courts. The information to be provided by the qualified entities under first paragraph of Art.13 will have only a general character (that may remedy to some extend the previously mentioned issue of the too late information within the mechanism of late opt-in). The more specific information will still be needed on ongoing and closed actions. The question remains whether the general information will only be made available on the qualified entities' websites (which still has internal costs in terms of necessary time and resources) and where the qualified entities will find money for informing consumers. There is a safeguard for them in the Directive that the costs of informing could be recovered from the defendant if the case is won (but that can take a long time). She mentioned that the use of the IT tools and social media is crucial and called on the present experts to think about how to optimize it in the context of representative actions.

The rapporteur, *Prof. Dr Magdalena Tulibacka* made a final reflection that the speakers and the participants gathered virtually because they are all interested in introducing a procedural mechanism in Europe that is quite new and requires us to be flexible and open-minded, but we are doing it with the purpose of giving consumers a voice, an avenue of redress, and making them another arm of law enforcement in a way. These are all good and valuable purposes. In a society that is based on rule of law, an access to justice is a worthy pursuit. These mechanisms can work and we should make them work.

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