

# The legal standing of qualified entities in the context of the recent Representative Actions Directive

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## I. Introduction

Individuals are sometimes not on an equal footing with powerful companies when it comes to the question of enforcing their rights and interests. This is due to fewer resources and legal support available at their end, as well as to their economically disadvantaged position.<sup>1</sup> The risks associated with litigation overshadow potential rewards, which prevent many claimants from filing an individual civil lawsuit for compensation. In light of this, there has been a need for suitable mechanisms for individuals to whom the legal injury is caused, to come together and file representative actions. If consumer associations, non-profit organisations, or public bodies represent such individuals, there can be equality of legal arms and interests. Under the European Law, a consumer is treated as a weaker party to a proceeding. However, in the context of consumer redress, consumers becomes stronger collectively. Collective actions are usually based on a group of consumers, on the one hand, and the powerful trader,<sup>2</sup> on the other. In the absence of a coherent system of protecting

<sup>1</sup> Willem van Boom and Marco Loos, 'Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention' 1.

<sup>2</sup> Under Article 3 of the Directive 'consumer' means any natural person who acts for purposes

the collective interests of the public, it is necessary to liberalise the rule of the standing of such groups/associations and allow these organisations to file claims on behalf of aggrieved claimants even though there may not be a direct injury to their own interests.

The EU Commission has made attempts to achieve a coherent system of collective redress in the past. In 2013, the Commission issued a recommendation setting out a series of non-binding principles of national collective redress mechanisms.<sup>3</sup> The Commission report of January 2018 showed that the Recommendation of 2013 was not successful in establishing a consistent mechanism of collective redress in the Member States and a harmonised approach to collective redress did not exist.<sup>4</sup> The 2018 proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (hereinafter referred to as 'the 2018 proposal') was published as a part of the 'New Deal for Consumers' package.<sup>5</sup>

The 2018 proposal was updated and modified by the recent Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (hereinafter referred to as the Directive). The new Directive was published on 4 December 2020 in the Official Journal of the European Union. It has entered into force on the twentieth day of its publication, i.e. 25 December 2020. The Member States will have to transpose the provisions of the Directive into their national legal system by 25 December 2022. The national measures will start applying from 25 June 2023.

The Directive has enabled consumer associations, public bodies, or other non-profit organisations to file representative actions to seek an injunction or redress

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which are outside that person's trade, business, craft or profession; and 'trader' means any natural person, or any legal person irrespective of whether privately or publicly owned, that acts, including through another person acting in that person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession.

<sup>3</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

<sup>4</sup> EU Commission, Report on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, COM(2018) 40 final, January 25, 2018, available at <[www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=49502](http://www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49502)> accessed on 25 January 2020.

<sup>5</sup> 2018/0089 (COD) Proposal for a Directive of the European Parliament and of the Council on Representative Actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

(Article 1, 3(10)).<sup>6</sup> Redress can consist of compensation, repair, replacement, price reduction, contract termination, or reimbursement. A consumer organisation or public body representing consumers' interest and designated by a Member State as qualified to bring a representative action under the Directive shall be referred to as a 'qualified entity' (Article 3(4)).

The first part of this paper describes the procedural rules under the new Directive for recognition of qualified entities as representative entities in a domestic and a cross-border representative action. With the advent of globalisation, a large number of business activities are of a cross-border nature. This automatically suggests that mass harm may be caused to several individuals or businesses located in different countries. Such a situation becomes difficult for a consumer due to a number of reasons. First, they would have to decide whether to file a claim individually or collectively. Second, it is difficult to ascertain where to file the claim after careful observation of different countries' procedural complications. Events such as the '*Dieseltgate scandal*'<sup>7</sup> are clear examples of a situation which has affected a cross-border group of consumers. The scandal has led to a plethora of both individual and collective actions running in parallel in different Member States (for example Germany and the UK).<sup>8</sup> The drafting of the Directive was majorly driven by such scandals. Also, another reason which became a driving force behind the Directive is the expense involved in court proceedings and time consumed discourages a consumer to pursue an action against a powerful trader.

While the Directive aims at making cross-border representative action possible by giving qualified entities, preferably consumer organisations, including those that represent members from more than one Member State, to represent consumers in cross-border actions, its success depends on mutual recognition of qualified entities. Enhancement of mutual recognition of qualified entities, the judicial decisions and judgements would facilitate co-operation between authorities and the judicial protection of individual rights. Mutual recognition principle requires compliance with minimum standard requirement to be enforced outside country of origin of such requirements. When qualified entities start operating outside their country of origin, it will be inevitable that they will need to cooperate with other qualified entities

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<sup>6</sup> Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC was published on 4 December 2020. Representative actions can be filed in the field of consumer protection, data protection, financial services, travel and tourism, energy, telecommunications (Recital 13).

<sup>7</sup> BGH, Urteil vom 25.5.2020 – VI ZR 252/19, NJW 2020, 1962. See also, *Anthony Joseph Champion Crossley & Ors vs Volkswagen Aktiengesellschaft & Ors* [2019] EWHC 783(QB).

<sup>8</sup> *Ibid.*

based in the countries where the former aim to operate. Only when there will be cooperation between qualified entities, it will be easier for consumers to organise themselves cross-border. This cooperation will ultimately enable smooth functioning of the internal market of the EU. Therefore, the rationale for mutual recognition will be examined. In the second part, the paper will draw upon examples of currently existing legal standing provisions in different Member States to examine how the Directive may be implemented in the Member States. The paper will provide a specific example from the German and French rules on the standing of qualified entities to provide an outlook as to how the national legal systems are divergent. The challenges will be placed in the way of the Member States while implementing this Directive due to the divergent regimes. The Member States are bound to implement the minimum standards prescribed by the Directive. It must be noted that the aim of this study is to provide an insight into how the implementation of the Directive provisions will interact with the already existing regime of collective redress in Member States.

## II. Mutual recognition as a concept

Mutual recognition is a concept which initially developed in the context of the internal market freedoms and is inherent to judicial cooperation in civil matters. It is based on mutual trust between the Member States in order to achieve the objective set for the European Union to become an area of freedom, security and justice.<sup>9</sup> The mutual recognition mechanism amounts to a duty to recognise the other Member State's regulations, thereby explaining the mainly regulatory nature of the object of the mutual recognition mechanism. The aim of mutual recognition is to make the laws of different Member States coherent and comparable to the host state by bringing in equivalence.<sup>10</sup> The principle essentially requires, particularly with regard to the area of freedom, security and justice, that Member States recognise that the laws of other Member States are compliant with EU law. This is, therefore, the cornerstone of judicial cooperation between EU Member States' authorities. Mutual trust and judicial cooperation between the Member States cannot be achieved insofar

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<sup>9</sup> Opinion of the Advocate General Szpunar in Case C-327/18 PPU *Minister for Justice and Equality v R O* ECLI:EU:C:2018:644. Please note that even though the facts of the case relate to criminal procedure, this case has been referred only to study the core concept or ideals on which the principle of mutual recognition is based.

<sup>10</sup> Christine Janssens, 'The Mutual Recognition Mechanism: Object, Actors, Mechanism, and Characteristics,' *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2014) 282.

as due consideration is not given to Member States' divergent regimes. The divergent regimes are based on the characteristic diversity of each Member State. It cannot be denied that Member States' diversity can pose serious challenges for the operation of qualified entities in a cross-border context.<sup>11</sup> The coordination of EU Member States with one another creates transnational problems of conflict between laws. Therefore, diversity has to be managed effectively by means of harmonisation.<sup>12</sup> The management of diversity can be achieved by way of reinforcing mutual trust among the Member States. Mutual trust in the laws and regulations imposed by the Member States is the first step in this direction. Moreover, mutual recognition of qualified entities will ultimately ensure the smooth functioning of the internal market, which is the objective of the said Directive.

### III. Recognition of the standing of qualified entities under the new Directive

Legal standing is a distinct procedural requirement needed to bring a claim in the Member States of the EU.<sup>13</sup> Therefore, before going into the merits of a claim, the courts of the EU always review whether the claimant has fulfilled the requirements for legal standing. The predecessor, the Injunctions Directive,<sup>14</sup> allowed consumer representative bodies or independent public bodies known as qualified entities from a Member State, to seek an injunction in a court or administrative authority of another Member State on behalf of consumers. However, it did not sufficiently address the complicated cross-border enforcement issues. Thus, it failed to harmonise the Member States' legal regimes concerning the minimum qualifying criteria of such qualified entities. Then came the 2013 recommendation, which, due to its non-binding nature did not secure a coherent framework for collective redress across the EU, as the Member States did not implement the recommendations. Thereafter, in April 2018, the Commission presented new measures for supporting collective redress, which has culminated in the recent Representative Actions Directive.

<sup>11</sup> Burkhard Hess, 'A Coherent Approach to European Collective Redress', in: Fairgrieve/Lein (ed.), *Extraterritoriality and Collective Redress* (2012), Oxford University Press, 6.01–6.30.

<sup>12</sup> Burkhard Hess, 'European Perspectives on Collective Litigation' in: Cornelis Hendrik van Rhee and Harsági Viktória (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (2014), pp. 3–13, 53.

<sup>13</sup> Mariolina Eliantonio, Chr Backes, C. H. van Rhee, Anna Berlee, Taru Spronken, 'Standing Up for Your Right(s) in Europe – A Comparative Study on Legal Standing (*Locus Standi*) before the EU and Member States' Courts' (2013), p. 18.

<sup>14</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

The Directive creates provisions for qualified representative entities, which may be private or public, to lodge cross-border claims (Recital 24 and 25).<sup>15</sup>

According to the Directive, three types of representative entities shall have the standing to file representative actions on behalf of consumers. These are private representative entities designated in advance by the Member States and placed in a publicly available list, representative bodies designated on an ad hoc basis for a specific action or particular consumer organisation, and independent public bodies (Article 4). Qualified entities are defined as any association, organisation, or a public body whose objective is to protect consumers' interests. In order to be qualified as 'qualified entity' private entities must fulfil six criteria as set out by the Directive in Article 4(3). However, public bodies designated by the Member States for filing representative actions and public bodies which have been already designated as per the earlier Injunctions Directive shall not be required to fulfil the following criteria as set out by Article 4(3) and Article 4(4) for private entities (Article 4(7)).

The Directive differentiates between domestic and cross-border representative actions based on the designation of qualified entities. A qualified entity will have to fulfil the minimum standards prescribed under Article 4(3) of the Directive in a cross-border representative action. The Directive allows 'qualified entities' to file actions against traders' infringement before the competent court or administrative bodies in the other Member States. This means that 'qualified entities' have standing before the competent courts or other administrative bodies in all Member States to file a representative action. In other words, Member States are bound to accept the legal standing of foreign 'qualified entities' who fulfil the requirements established by their national laws in order to take action, in case an infringement of the collective interests of consumers has a cross-border dimension.<sup>16</sup> The Directive states that cross-border cases can be brought by entities that comply with the following criteria. It must at least have 12 months of activity in protecting consumer's interests, and it must be of a non-profit character. Further, its statutory purpose must demonstrate that it has a legitimate interest in protecting consumer interests. The statutory purpose of protecting consumer interests automatically suggests that the interests of the qualified entities must not be guided by the interests of the third parties funding them. It is incumbent on the qualified entities to be independent of third-party interests and to not be subject to an insolvency procedure or declared insolvent.

<sup>15</sup> Rita Simon and Hana Müllerová, 'Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?' (2019) <[https://www.ilaw.cas.cz/upload/web/files/books/Visegrad\\_Manuscript.pdf](https://www.ilaw.cas.cz/upload/web/files/books/Visegrad_Manuscript.pdf)> accessed November 14, 2020.

<sup>16</sup> Csongor István Nagy, *Collective Actions in Europe* (1st edn, Springer International Publishing 2019) <<http://link.springer.com/10.1007/978-3-030-24222-0>> accessed February 9, 2020.

It must make public disclosure of the information demonstrating compliance of the above (Article 4(3)).<sup>17</sup> The last three criteria did not exist in the 2018 proposal and have only been added under the current Directive.

For domestic actions, Member States have to set out proper criteria consistent with the objectives of the Directive. Accordingly, all entities complying with the requirements of the Directive would have the right to benefit from its regime.<sup>18</sup> The Member States shall only set out criteria consistent with the Directive's objectives (Article 4(4)). They are free to make use of the criteria specified in Article 4(3) of the Directive, but they are not obliged to do so (Article 4(5)). The EU legislator offers some flexibility to the Member States not only with regard to implementation of the criteria specified by the Directive but also regarding the possibility to designate entities on an ad hoc basis for filing specific domestic representative actions at its request and if it complies with criteria for domestic recognition (Article 4(6)).

The main innovation of the Directive is the distinction between the domestic and cross-border representative action. The place where the qualified entities have been designated plays a major role in the said distinction. If a qualified entity files a representative action in the Member State of its designation, then it is domestic representative action whereas if it is in another Member State, it is a cross-border representative action. Therefore, the mutual recognition of the standing of such qualified entities is very important for the Directive to be successful. With that having been said, cooperation between these qualified entities may become inevitable in future, to ensure the smooth functioning of the mutual recognition mechanism, and thus the smooth functioning of the internal market of the EU. However, what is lacking is a tailored mechanism in which these entities can co-operate effectively in a cross-border setting.

#### **IV. Mutual recognition of standing under the Directive**

A gradual shift of attention can be discerned on the part of the legislature towards cross-border cooperation in EU consumer law.<sup>19</sup> The Directive attempts to implement mutual recognition of standing of qualified entities in cross-border cases. In

<sup>17</sup> The information and monitoring obligations on the qualified entities are listed in Article 5 and Article 13 of the Directive.

<sup>18</sup> Csongor, *supra* note 10.

<sup>19</sup> A recent example is the Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, which aims to facilitate cooperation between the national authorities that are responsible for the enforcement of cross-border consumer protection laws.

this context, the mutual recognition principle means that the Courts or administrative authorities of Member States would recognise the standing of qualified entities designated for the purpose of filing representative actions in another Member State. Qualified entities will be able to file cross-border representative actions before such Courts or administrative authorities. The Member States shall communicate the names of designated qualified entities capable of bringing a cross border action to the Commission, who will then compile a list and make it publicly available (Article 5(1)). Inclusion on the list serves as proof of the legal standing of the qualified entity for filing the representative action (Article 6).

While dealing with transnational activities, the principle of mutual recognition will help to reduce the double burden on economic actors such as consumer protection associations as well as traders in transnational activities.<sup>20</sup> This is essential to avoid obstacles while dealing with other Member States' regulations and allow free and uninterrupted operation of qualified entities in another Member State, even though the national technical rules differ from the state where such an entity was designated. In the case of qualified entities, the specific criteria for being designated as a qualified entity varies among the Member States. Moreover, the general requirement of assignment of cases by the consumers to such qualified entities or requirement of having suffered direct harm by such entities also varies from one Member State to another. The principle of mutual recognition is not yet applicable. However, it will be effective, insofar as it is implemented by the Member States into their legal systems or the Court of Justice of the European Union (CJEU) clearly establishes this.

Additionally, qualified entities from different Member States can also join forces to file a claim before a single court having jurisdiction under relevant EU or national law.<sup>21</sup> It is important to mention here that the requirements of the Directive entail that the statutory purpose of qualified entities demonstrates that they have a legitimate interest in protecting consumer interests (Article 4(3)). They must demonstrate that they have been functioning in the field of protection of consumer interests for only about one year. At the same time, they must be able to bear the costs of the representative proceedings on their own and disclose that they are capable of doing so. The Member States, which designate qualified entities, must verify whether they continue to fulfil these criteria every five years. If they fail to comply

<sup>20</sup> Marc Fallon and Johan Meeusen, 'Private International law in the European Union and the Exception of Mutual Recognition' in: Petar Sarcevic and Paul Volken, 'Yearbook of Private International Law' Vol IV, 2002, p. 45.

<sup>21</sup> Alexia Pato, 'Collective Redress Mechanisms in the EU', *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective* (Bloomsbury Publishing plc 2019) 84.

with these criteria, the Member States have the power to revoke their designation. Thus, the standard for determining the capacity of the qualified entity is now the 'economic capability' and not based on the litigant's rights or moral agency.<sup>22</sup> Therefore, the qualified entities may be more inclined to pursue collective redress only to continuously thrive in the field of consumer protection. However, it cannot be denied here that there may be other means for qualified entities survive and remain on the market, but they will have to continue working in the field of consumer protection so as to be compliant with the minimum requirement of the Directive.

## V. How does standing under the Directive 'fit' with existing rules of national law?

The Directive does not aim to replace the existing national procedural mechanisms in relation to collective redress in the Member States but rather to supplement them. Regarding their existing legal traditions, Member States are free to decide how to implement the Directive into their national system of collective redress, provided that at least one national procedural mechanism for representative actions complies with this Directive. It can either be integrated into existing instruments for collective redress, applied parallel with them or be implemented as a distinct procedural mechanism. By virtue of the cross-border representative action provisions, the qualified entities designated in one Member State based on specific domestic representative standing criteria may have the standing to file cross-border representative action in another Member State. However, a similar qualified entity complying with the same criteria in that another Member State may not be recognized in that Member States to file domestic representative actions due to more restrictive criteria in that Member State.

The Member States are also free to have more restrictive criteria for legal standing or may have more relaxed conditions for legal standing for domestic qualified entities. The Directive has provided sufficient liberty to the Member States insofar, as they are consistent with the objectives of the Directive. In view of the above, Member States have ample implementation latitude in terms of qualified entities' standing for entities at a domestic level. Inevitably, there will be different standards regulating the legal standing of qualified entities designated in Member States because of the implementation latitude. The different standing criteria at the domestic

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<sup>22</sup> Rebecca Money-Kyrle, 'Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?' in: Burkhard Hess, Maria Bergström and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (1st edn, Hart Publishing 2015).

level will lead to problems of mutual recognition at a cross-border level. The following examples of the compatibility of legal standing in Germany and France will better illustrate this situation.

## 1. Germany

In Germany, a new law relating to collective redress on a so-called Model Declaratory Action (Musterfeststellungsklage) was introduced in 2018. Under the Model Declaratory Action Act, qualified organisations may file a model declaratory action to protect consumer interests.<sup>23</sup> The said Model Declaratory Action Act creates certain criteria for standing of qualified entities, which can file an action on behalf of consumers. The qualified institution must be composed of at least ten other consumer protection associations or at least 350 natural persons. In addition, it must be listed as a qualified institution under § 4 of the German Act on Injunctive Relief (UKlaG)<sup>24</sup> or be listed as a qualified institution with the European Commission under Article 2 of Directive 2009/22/EC on injunctions for the protection of consumers' interests for at least four years. Further, it should be a non-profit organisation working in the field of consumer protection, and not more than 5% of its funding should come from businesses.<sup>25</sup> If these requirements are fulfilled, the associations are granted standing irrespective of individual grievance.

The above criteria for recognition of standing of qualified entities under the Model Declaratory Action Act are stricter than the criteria for recognition of legal standing of qualified entities as set out by the Directive. The Directive does not mention any requirement of a minimum number of members for a qualified entity to be designated as a qualified entity. By virtue of the cross-border recognition of standing, those qualified entities that are based on specific domestic representative standing criteria, may have the standing to file cross-border representative action in another Member State. Therefore, a qualified entity of another Member State

<sup>23</sup> Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage (MuFKlaG k.a.Abk.). Law to introduce a civil procedural model declaratory action.

<sup>24</sup> Gesetz gegen den unlauteren Wettbewerb (UWG) i.e. Law against Unfair Competition and Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG) i.e. Law on Injunctions for Consumer Rights and Other Violations. According to Section 4 (2) Injunctions Act (UKlaG), legally competent associations are entered into the list whose statutory duties include protecting the interests of consumers through non-commercial information and advice, if 1. they have at least three associations that are active in the same area of responsibility or at least 75 natural persons as members, 2. they have existed for at least a year and 3. based on their previous activities, it appears certain that they will continue to fulfil their statutory duties effectively and properly in the future.

<sup>25</sup> Gesetz gegen den unlauteren Wettbewerb (UWG); Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG).

complying with the minimum standards of the Directive, which are actually lower than the relevant German law requirements can file a representative action in Germany. Such a representative action may be concerning primarily German consumers and against a German company. However, a German qualified entity complying with the same requirements may not be able to file a domestic representative action due to Germany's restrictive standing requirements.

It is important to mention here that if the German legislator decides to have a national system which includes already existing standing criteria under national law and those specified under the Directive in Germany, the associations will have to comply with a large number of criteria to file a representative action. The outcome of this situation may be that, ultimately, fewer associations or public bodies will be qualified as 'qualified entities'.

## 2. France

In the French national legal system, Act no. 2014-344 of 17 March 2014 on Consumer Protection (also called 'Loi Hamon') introduced a class action mechanism for consumer and competition law matters. Association can file a representative action for compensation and individual harm suffered by consumers. The associations must fulfil the following criteria to gain standing. It must be representative at national level, have at least one year of existence<sup>26</sup>, show evidence of effective and public activity with a view to the protection of consumer interests.<sup>27</sup> These are the requirements at national level. Whereas, at the cross-border level, the Directive requires that the qualified entity must demonstrate 12 months of public activity in the field of consumer protection (Article 4(3)(a)). If the French legislator were to keep this requirement for entities to be designated as qualified for bringing domestic and cross-border representative actions as compared to the criteria specified in the Directive, then major changes would not be required.

However, it is important to note that, as mutual recognition of the legal standing of qualified entities designated for the purpose of cross-border representative

<sup>26</sup> Alexandre Biard & Rafael Amaro, 'Resolving Mass Claims in France: Toolbox & Experience' (2016) Report for the Conference Empirical Evidence on Collective Redress, Wolfson College, Oxford University, p. 7. The said report also clarified that in France class action in data protection and discriminatory law can be filed only by associations that have been exercising their statutory activities in the field of privacy and data protection or in the fields of disability or fight against discriminations, respectively for at least five years. This may entail another set of complications seeing that data protection has also been added into the scope of the Directive. However, this remains a question to be addressed in another paper.

<sup>27</sup> Articles L421-1 to L423-26) and Articles L.623-1 et seq and R.623-1 et seq of the French Consumer Code (Code de la Consommation).

actions is to be ensured under the Directive, a qualified entity of France complying with the minimum requirements under the concerned French system can bring a cross-border representative action in Germany. The German courts will be bound to recognise the standing of such an entity. However, the standing of an entity designated at the domestic level in Germany itself, complying with the requirements as those complied by the qualified entity of France, will not be recognized in Germany.

In light of this, it is doubtful if the German legislator will take this as an opportunity to introduce less stringent requirements for qualified entities in Germany for cross-border representative actions, in order to avoid forum shopping of consumer protection associations. It is also doubtful if the French legislator will introduce stricter requirements for qualified entities designated for cross-border representative actions. The flexibility or the latitude for implementation provided to the legislator by the Directive to the Member States creates scope for the introduction of additional requirements which are suitable to the functioning of their respective legal systems. Thus, there are bound to be avenues for forum shopping. This is because many companies having their subsidiaries or branches may intend to pursue a representative action in a Member State with less stringent requirements. Currently, legal standing is different from one Member State to another. If this continues to be the case, upon implementation of the Directive, it remains to be seen what purpose the Directive will serve concerning the application of rules on private international law. The Directive specifies that it “should not affect the application of nor establish rules on private international law regarding jurisdiction, the recognition and enforcement of judgments or applicable law. The existing Union law instruments apply to the representative actions set out by this Directive’ (Recital (21)).

## VI. Some comments on special requirements for standing

### 1. Requirement of personal interest

The general requirement for a qualified entity to bring an action, as mentioned earlier, is that it must either represent the interests of a certain, well-defined group of individuals who have assigned their claims to such an organisation or it has to prove that its own interests are affected. There have been instances where a consumer organisation or public body already were allowed to file claims without establishing their own interest in bringing proceedings.<sup>28</sup> In the case of *Belgische Staat v. Movic*

<sup>28</sup> ECJ, 16/07/2020 Case C73/19 *Belgische Staat, and the Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie, v Movic BV, Events Belgium BV, Leisure Tickets & Activities International BV*, ECLI:EU:C:2020:568.

*BV*,<sup>29</sup> a State authority acting in the exercise of its public powers, in the interest of the public against an events ticket selling company for unlawful commercial practices followed by the company. The question referred for a preliminary ruling was that which court has jurisdiction to deal with actions filed by authorities of a Member State against companies in another Member State against alleged unlawful commercial practices of that company against consumers in the former Member State. In this case, a public authority commencing an action for a finding that the relevant national legislation has been infringed was comparable to a consumer protection association. The Court was of the opinion that it does not matter if the public authority cannot demonstrate an interest of its own. It was held that, first of all, the national law of Belgium does not require personal interest, and secondly, in this general interest must not be confused with the public interest. According to Article XVII.7 of the Code of Economic Law in Belgium, which implements Directive 2005/29, a consumer protection association is empowered to bring a cessation action even though it is not acting in its own interest.

In yet another judgment, it was possible for a consumer protection organisation to file a claim against a trader without having personally sustained any damage. Even though a consumer association has not suffered harm itself, and there is no contractual relationship with the trader, the said association can file an action on behalf of the consumers. It was pointed out in the said judgment that a consumer organisation such as *Verein für Konsumenteninformation* (VKI), takes on the task of ensuring the protection of the entire class of consumers, in the public interest. The right of such an organisation to file proceedings against unlawful behaviour by traders stems from statute, independent of any private law relationship arising out of a contract between a professional and a private individual.<sup>30</sup> In such situations, an action brought by a consumer association to establish the liability of the trader for using unfair contract terms with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>31</sup> In this case, “a place where the harmful event occurred” under Article 5(3) of the 1968 Brussels Convention corresponds to Article 5(3) of the Brussels I Regulation of 2001. The rationale of Article 5(3) of the Convention is to

<sup>29</sup> Opinion of Advocate General Szpunar delivered on 23/04/2020 (1) Case C73/19 *Belgische Staat, and the Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie, v Movic BV, Events Belgium BV, Leisure Tickets & Activities International BV*, ECLI:EU:C:2020:297.

<sup>30</sup> ECG, 01/10/2002, Case C-167/00 *Verein für Konsumenteninformation vs Karl Heinz Henkel*, ECLI:EU:C:2002:555.

<sup>31</sup> OJ 1972 L 299, p. 32; Bundesgesetzblatt 1972 II, 774.

enable the claimant to easily identify the court in which he may sue and the defendant to foresee in which court he may be sued. It is easier to have a court that is close to the harmful event or damage for evidential purpose. The Brussels Convention 1968 was replaced by Brussels I Regulation of 2001 and subsequently replaced by a Brussels Ibis regulation, which is currently in place.<sup>32</sup> The corresponding provision in Brussels Ibis Regulation falls under its Article 7(2) wherein a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

This term covers both the place where the damage occurred and the place giving rise to it. The wide scope of a 'place where the harmful event occurred', specifically with regard to consumer protection, not only covers situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of consumer protection associations such as the VKI to prevent.<sup>33</sup> It is clear from this analysis that the courts have to deal proactively with the challenges posed by private international law in the context of cross-border representative action even though the Brussels Ibis Regulation is not tailored to deal with collective redress. It is essential, mainly for the purpose fulfilling the aim of the Directive to improve consumers' access to justice and for success of mutual recognition mechanism.

It follows from the above analysis that there have been instances where a consumer association or a public body of one Member State has filed claims in other Member States and also those where an existing regulation has facilitated an unimpeded circulation of judicial decisions within the EU and, thereby, defined the international jurisdiction of the Member States in the judicial domain. The core idea behind creating the above mentioned regulations is to avoid having a situation leading to a multiplicity of proceedings. The goal of Article 8(1) of Brussels Ibis Regulation is to avoid parallel proceedings by facilitating coordination of collective actions at a defendant's domicile if there are a number of defendants. Thus, to have qualified entities suing in another MS than the one they are qualified in or to coordinate with other qualified entity, to avoid irreconcilable judgments.

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<sup>32</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>33</sup> ECG, 30/11/1976, Case 21/76, *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A.*; ECG, 05/02/2004, Case C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*, ECLI:EU:C:2004:74.

This issue of jurisdiction has been arising and are bound to arise in the future in cases involving cross-border implications of collective redress.<sup>34</sup> This issue has been highlighted in the case of *Verein für Konsumenteninformation v Volkswagen AG* which involved producing a defective car in one Member State and selling it in another Member State. The CJEU has held that ‘the place where the event giving rise to the damage’ was the place where the vehicles were unlawfully equipped with software that manipulates data relating to exhaust gas emissions which was in Germany whereas the ‘place where the harmful event occurred’ was where the vehicles were sold from a third party in another Member State, namely Austria.<sup>35</sup> The ‘place where the harmful event occurred’ is where the adverse effects of an event actually manifest themselves. Here, since the basis for the claim is a tortious, delictual or quasi-delictual act, it is also possible for that person to be sued in another Member State under Article 7(2) Brussels Ibis Regulation. In light of this, the CJEU held that the place where the competitive relations or collective interests of consumers are affected, or are likely to be, is where the damage occurs in cases involving an act of unfair competition. In light of this, ‘place where the harmful event occurred’ could be any Member State where the defective product is purchased.

There may be different mechanisms to file collective redress claims throughout the EU, but it is important that the aim of such mechanisms must be that they help to address the issues of State suppression, lawlessness, deviation from duties of administrative agencies, and exploitation of disadvantaged groups and denial of their rights. This will only be possible if the rules of the standing of qualified entities and their eligibility to invoke the jurisdiction of courts in any Member State are relaxed, and they are able to do so without having suffered any personal harm.

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<sup>34</sup> See, the opinion of the Advocate General in In ECJ 17 December 2020 Case C-709/19 *Vereniging van Effectenbezitters v BP plc* ECLI:EU:C:2020:1056, The interpretation of Article 7(2) of Brussels Ibis Regulation has led to preliminary reference involving a question whether Netherlands can be considered as a place where the damage occurred if damage to an investment account in the Netherlands or to an investment account of a bank and/or investment firm established in the Netherlands, is caused due to investment decisions influenced by globally distributed but incorrect, incomplete and misleading information from an international listed company and whether this constitutes a sufficient connecting factor for the international jurisdiction of the Netherlands courts. The Advocate General Campos Sánchez-Bordona is of the opinion that the location of an investment account can contribute to the objective proximity between the dispute and the court with jurisdiction, but its importance must not be overstated in the sense that, if the value of assets in that account fall, it is not sufficient to be the causal link between the event and the harm, or the extent of the resulting damage. The judgment in the case is yet to be published.

<sup>35</sup> ECJ 09/07/2020, Case C-343/19 *Verein für Konsumenteninformation v Volkswagen AG* ECLI:EU:C:2020:534.

## 2. Requirement of 'Disclosure of 'Funding'

The Member States shall ensure that, if a representative action is funded by a third party, insofar as allowed in accordance with national law, it must not be in conflict with the interests of the consumers. The qualified entities' decisions must not be influenced by the third-party funder (Article 10)). The Directive in its recital 52 specifies that the qualified entities must disclose their source of funding, for the courts or administrative authorities to decide whether any third-party funding allowed in the context of any national law is compliant with the objectives of the Directive. If there is a conflict of interest between the third-party funder and the qualified entity, then there is a risk of abusive litigation. The prime responsibility of the qualified entity is to protect the interests of the consumers, as stated by the Directive in Article 4(3)(b).

As per Article 10, the third-party funder must not be a competitor or dependant on the trader against whom a representative action is filed. This is because the third party might have an economic interest in pursuing the claim. The Member States' courts or administrative authorities may direct an examination of the source of funding of the qualified entity if doubts arise. On examination, it can be seen that a third-party unduly influences the decisions of such qualified entity, the courts or administrative authorities may direct the qualified entity to refuse such funding, or they may reject the legal standing of the qualified entity (Article 10 (4)).

This provision on funding raises two concerns. First, this provision empowers a court or administrative authority of one Member State to reject the legal standing of a qualified entity designated in another Member State. This provision of the Directive might again become a source of transnational confusion as there might be disagreement between the Member States regarding the influence of the third-party funds provider.<sup>36</sup> Second, if the third-party funding is rejected, the qualified entities willing to represent consumers might have to meet their funding requirements on their own, assuming that there is no alternative source of funding<sup>37</sup> or third-party

<sup>36</sup> Member State may designate a qualified entity if it complies, among others, the following criteria...*'it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the filing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers'* – Article 4(3)(e) of the Directive.

<sup>37</sup> Article 20(2) creates provision for assistance to qualified entities in the form of public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid and Article 20 (3) creates provision for entry fee paid in the form of modest charges by the consumers.

funding. In this case, for the qualified entity, the risk might outweigh the rewards, since the cost of the legal proceedings, including hiring of lawyers, paying professional fees, service, translation, information to consumers and other, might have to be incurred by the qualified entities. On the other hand, the relief claimed in damages, compensation, or reimbursement may not be equivalent to costs incurred. In view of which, pragmatically, such entities tend to refrain from bringing a claim which involves a small number of individuals.

At the same time, if the case involves consumers spread across the Member States and even beyond the Member States,<sup>38</sup> it may be even more expensive than bringing a claim in one's own Member State. Dealing with consumers based outside domestic borders might be cumbersome. The additional expenses can arise due to the need to identify class members who may be residents outside their jurisdiction and the risk of inconsistent judgments arising out of parallel proceedings.<sup>39</sup> All of the above will have to be incurred, in addition to the cost of proceedings which includes a lawyer's fee, translation and service cost. It does not include costs incurred unnecessarily which need to be paid by the losing party (Recital 38). It will not be out of place to mention here that under Article 15 of the proposal, costs incurred by the qualified entities to inform consumers concerned about the ongoing representative action fell on the trader. On the contrary, the Directive does not have such burden on traders (Article 20).

At this point, it will not be out of place to mention that providing standing to lawyers and legal counsels to represent a group of consumers might on the face of it seem to produce an unaccommodating legal approach or lead to abusive litigation. Lawyers may not just be better informed about where to initiate an action, but they also know how to avoid unnecessary transaction costs. If they are successful

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<sup>38</sup> ECJ, 25/01/2018, Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37. The paragraph 16 of the judgment, 'Mr Schrems claims to have *locus standi* on the basis of both his own rights and similar rights which seven other contractual partners of the defendant in the main proceedings, who are, according to the applicant, also consumers and residing in Austria, Germany or in India, have assigned to the applicant for the purposes of his action against Facebook Ireland.' The main aim of the author here is to only point out the factual situation of the case, for the purpose of setting the stage for identification of the problems associated with filing claims involving claimants spread across borders.

<sup>39</sup> Rafael Amaro and others, 'Collective Redress in the Member States of the European Union' (2018), A study of the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, available at: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL\\_STU\(2018\)608829\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf)> accessed on 11 November 2020.

in doing so, there is no harm in having litigation driven by lawyers who, in the end, will deserve the fees which they receive. Nevertheless, there are also risks involved when the group size is bigger. For instance, in the case of opt-out claims, which has not been foreseen by the Directive in a cross-border setting,<sup>40</sup> there are higher risks involved, such as the cost of certification and the cost of distributing the compensation. Further, there is lesser monitoring of the conduct of the lead plaintiff.

## VII. Conclusion

The Representative Actions Directive is a remarkable attempt to secure consumer access to justice. It will allow qualified entities across the EU to collectively claim compensation in mass harm situations. In this regard, it should, in any case, be noted that the qualified entities must be approachable by the consumers whose rights have been violated. The violation of rights can be in the area of consumer protection, data protection, financial services, travel and tourism, energy, telecommunications, which has been made possible by the said Directive. It does not intend to replace or modify the already existing mechanisms of collective redress in Member States of the EU, at a national level but rather supplement it.

Nevertheless, it is not clear how the Member States will refine the already existing system of representative actions in conformity with the principles set out by the Directive. There are three suitable possibilities for the Member States. The Member States may adopt the new Directive in a new regime of representative action; they will modify the already existing regime of representative action to be in conformity with the Directive or the provisions of the Directive may be integrated into the already existing provisions of standing.

The text of the Directive has significantly changed since the 2018 Proposal. However, given that the new Directive does not clarify the rules of private international law applicable to cross-border collective redress action, it is still complicated when it comes to dealing with cross-border cases, given that Brussels Ibis

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<sup>40</sup> In its Recital 45, the Directive only mentions that in order to ensure sound administration of justice and for avoiding irreconcilable judgment, an opt-in mechanism should be required regarding representative actions for redress measures where the consumers affected by the infringement do not habitually reside in the Member State of the court or administrative authority before which the representative action is brought. This entails that consumers residing in other Member States except those in Member State of the court or administrative authority before which the representative action is brought must opt-in to be represented by a qualified entity. The opt-out mechanism in cases involving consumers from across borders has not been mentioned in the Directive.

Regulation does not cover collective proceedings. For example, the initial proposal did not distinguish between domestic and cross-border representative actions based on the designation of qualified entities. However, the new Directive has created the said distinction, and it creates confusion in relation to the application of the mutual recognition principle. The Member States have not been inclined to have cross border collective actions.

The current state of the bundling of claims is as complicated as it is cumbersome for a representative entity to gain the status of a qualified representative entity in different Member States due to a lack of uniform criteria for standing. There is also uncertainty regarding the representation of a group of individuals who have not mandated the qualified entities and whether a qualified entity will work with a mandate by the individual claimants or without, especially if they reside in different Member States. Finally, the consolidation of claims at one place may foster mutual recognition. The risk of parallel proceedings should thereby be avoided, preventing the circulation of incompatible decisions. Therefore, a reform at this point is desirable to enable qualified entities to cooperate with each other and cross-border. Even though the Directive does not achieve complete harmonisation, it is adopted to bring about a consistent and coherent framework for collective redress. However, there is still scope of improvement in the said Directive as it is far from achieving certainty for the qualified entities when it comes to those hoping to bring an action in a country where they are not designated. There are several factors which need a better clarification as to how these entities will operate in a foreign country, such as the identification of class members spread across a wide expanse of region, the establishment of personal harm, the role of public bodies acting in the exercise of their public powers and so on.

## Summary

This article aims to provide a snapshot of the current collective redress framework in the European Union, especially in light of the recent Directive on representative actions. The criteria for recognising representative entities, which are consumer associations, non-governmental organisations or public bodies, vary across the Member States. In the case of cross-border trader violations, a question is bound to arise as to whether the different criteria will enable the smooth functioning of these qualified entities. The divergences in the cross-border legal standing provisions of qualified entities may lead to disputes of jurisdiction, choice of applicable law, recognition and enforcement of judgments or inequalities in the representative entities. Even though the Court of Justice of the European Union seems to be proactive in

dealing with cross-border cases while interpreting the Brussels Ibis regulation provisions, its provisions do not seem easily adaptable to the collective phenomenon. The present research is not confined to the area of private international law but draws on examples of different standing provisions of Member States to assess the implementation of the new Directive and thereby its impact on access to justice and the functioning of the internal market.

**Key words:** Representative Actions Directive, qualified entities, legal standing, mutual recognition, collective redress, cross-border action, Brussels Ibis Regulation

## Status prawny „upoważnionych podmiotów” w świetle najnowszej Dyrektywy w sprawie powództw przedstawicielskich

### Streszczenie

Artykuł ma na celu przedstawienie obrazu aktualnych ram prawnych dla roszczeń zbiorowych w Unii Europejskiej, szczególnie w świetle najnowszej Dyrektywy w sprawie powództw przedstawicielskich. Kryteria uznawania „upoważnionych podmiotów”, którymi są stowarzyszenia konsumentów, organizacje pozarządowe lub organy publiczne, różnią się w poszczególnych państwach członkowskich. W przypadku naruszeń o charakterze transgranicznym nasuwa się pytanie, czy różnie sformułowane kryteria umożliwią sprawne funkcjonowanie tych „upoważnionych podmiotów”. Rozbieżności w przepisach dotyczących transgranicznego stanu prawnego „upoważnionych podmiotów” mogą prowadzić do sporów jurysdykcyjnych, trudności ze wskazaniem prawa właściwego oraz skutkować potrzebą uznawania i wykonywania orzeczeń, a także odmiennym traktowaniem różnych „upoważnionych podmiotów”. Choć Trybunał Sprawiedliwości Unii Europejskiej skutecznie działa w celu wypracowania jednolitych rozwiązań w sprawach transgranicznych, to jednak przepisy Rozporządzenia Bruksela I bis wydają się trudne do stosowania w przypadku roszczeń zbiorowych. Niniejszy artykuł nie ogranicza się do analizy na gruncie prawa prywatnego międzynarodowego, ale opiera się także na przykładach różnych przepisów prawa państw członkowskich, dokonując przy tym oceny wdrażania do nich nowej dyrektywy, a tym samym jej wpływu na dostęp do wymiaru sprawiedliwości i funkcjonowanie rynku wewnętrznego.

**Słowa kluczowe:** Dyrektywa w sprawie powództw przedstawicielskich, „podmioty uprzywilejowane”, status prawny, wzajemne uznawanie, roszczenia zbiorowe, postępowanie transgraniczne, Rozporządzenie Bruksela I bis