COLLECTIVE REDRESS IN EUROPE: MOVING FORWARD OR TREADING WATER?

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Abstract The recent Representative Actions Directive 2020/1828/EC is a welcome advance in developing collective redress in Europe. However, this article contends that whilst the Directive is a positive development, shortfalls in its design restrict its potentially transformative impact for consumers. Critical examination is made of the Directive's rules on scope, standing, remedies, alternative dispute resolution (ADR), cross-border claims, funding, awareness and the provision of information. The article further considers whether the Directive will serve to improve co-ordination in civil procedure in this area which has traditionally been very diverse at a Member State level.

Keywords: EU law, Representative Actions Directive, collective redress, consumer redress.

I. INTRODUCTION

The reform of group procedures is a topical issue, with recent developments occuring at both European Union and Member State level. It has featured prominently on the policy agenda across the Member States, reflecting increasing concerns about access to justice and the effectiveness of remedies in cases of mass claims in areas as diverse as consumer protection, the environmental field and data protection. At a national level, many Member States have turned their attention to procedural reforms in order to facilitate group litigation.[1] With many cases now including a pan-European element, an EU instrument in this sphere has been long awaited in this increasingly prominent part of civil procedure. After many years of discussion, such an instrument has now finally been approved, in the shape of the Representative Actions Directive 2020/1828/EC ('the Directive').

This article contends that whilst the Directive is a positive development in European collective redress, it has shortcomings which limit its potentially transformative

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[1] Reference will also be made in this article to both English and Scottish law, as the United Kingdom, whilst no longer part of the EU, still remains highly influenced by European law due to its long membership of the EU, as well as the incorporation of EU law instruments domestically as part of retained EU law. It is to be noted, however, that the UK has not adopted the EU Representative Actions Directive 2020/1828/EC.

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impact for consumers, particularly given the current fragmented approach to collective redress in EU Member States. This article considers the Directive's rules on scope, standing of entities, remedies, ADR, cross-border claims, funding, awareness and the provision of information. It considers whether the Directive will enhance coordination of the traditionally diverse approaches found in domestic civil procedure in this area.

II. BACKGROUND

Historically, the European institutions have had a long-standing interest in group actions,[2] with the first official communications on the issue dating back to the 1980s when an increasing focus on consumer redress first led to a series of measures.[3] In its three-year programme for consumer protection policy (1990–92), the Commission for the first time focused on 'group actions for consumer redress'.[4] This resulted in the enactment of the Injunctions Directive[5] which, though solely regulatory in nature, was nonetheless a significant development as the first example of the EU legislating generally in the sphere of civil procedural law. However, the issue of damages was not broached, and though this question reappeared sporadically, very little progress was made until the mid-2000s when collective redress began to feature prominently on policy agendas, partly due to the development of private actions in the competition sphere,[6] as well as from a consumer protection perspective.[7] Since then, the Commission has become increasingly interested in collective redress,[8] recognising that the substantive measures in the consumer law field[9] needed to be supplemented by measures focusing on enforcement and access to justice,[10] and involving collective as well as individual measures.

[2] For a good overview of the history of EU involvement in collective redress, see Opinion of the European Economic and Social Committee on Defining the collective actions system and its role in the context of Community consumer law [2008] OJ C162/1.

[3] Commission, 'Supplementary Communication from the Commission on Consumer Redress' COM(87) 210 final, 3. See also the European Commission's seminal publication in 1985, *A New Impetus for Consumer Protection Policy*, and the Council of Europe's Recommendation No R (81)2 of 1981 on the legal protection of the collective interest of consumers.

[4] Commission, 'Three Year Action Plan of Consumer Policy' COM(90) 98 final, 15. See also Opinion of the European Economic and Social Committee on access of consumers to justice and the settlement of consumer disputes in the Single Market [1994] OJ C295/1, conclusion (m).

[5] Directive 98/27 of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51.

[6] See eg P Parcu, G Monti and M Botta, *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar 2018).

[7] See eg Commission, 'EU Consumer Policy strategy 2007–2013: Empowering consumers, enhancing their welfare, effectively protecting them' COM(2007) 99 final, point 5.3.

[8] Both DG-SANCO and DG Competition were active in this area, see the following: Commission, 'Green Paper: Damages actions for breach of the EC antitrust rules' COM(2005) 672 final; Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM(2008) 165 final; Commission, 'Green Paper on Consumer Collective Redress' COM(2008) 794 final.

[9] See G Howells and T Wilhelmsson, *EC Consumer Law* (Dartmouth 1997) and S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2005).

[10] Commission, 'EU Consumer Policy Strategy 2007–2013' COM(2007) 99 final.

In June 2013, the Commission finally enacted a legal instrument concerning collective redress in the form of a Recommendation setting out a series of common, non-binding principles.[11] Member States were supposed to implement these principles by July 2015. However, as explored below, very few countries have actually introduced broad collective redress procedures.[12] Indeed, a 2018 Commission Report concluded that there had been only 'limited follow-up to the Recommendation'.[13]

In 2017, a 'New Deal for Consumers' was announced which aimed at strengthening the enforcement of EU consumer law. Research had shown that there was an increasing risk of infringements affecting large numbers of consumers.[14] As part of that package, the Commission published on 11 April 2018 a proposal for a new Directive on collective redress which aimed at allowing consumers across the EU to use representative actions to seek compensation collectively from companies that infringed their rights. After many years of discussion, the new Directive 2020/1828 was finally promulgated in November 2020.[15]

In parallel, there has been a reawakening of interest in collective redress at a Member State level. Whilst there are strikingly different solutions at a national level, it is possible to detect a developing appetite for procedural reform. Whilst injunctive relief has been available to associations following the implementation of Directive 2009/22/EC at a Member State level, compensatory collective redress enabling large groups of victims to claim damages has not been broadly available, and most EU countries still do not have a generic or horizontal mechanism applying across different economic sectors.[16] Some countries do have compensatory collective redress regimes which are applicable in specific sectors and there has been a

[11] 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] OJ L201/60. The Recommendation was accompanied by a Communication on collective redress mechanisms in Member States, setting out the Commission's position on a range of key issues.

[12] E Lein *et al.*, 'State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation' (BIICL 2017).

[13] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee 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 (2013/396/EU)' COM(2018) 40 final.

[14] The Commission published its 'Fitness Check of Consumer and Marketing Law' on 29 May 2017 (SWD(2017) 209 final). The report presented an analysis of EU consumer and marketing rules and identified that enforcement needed to be improved.

[15] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.

[16] An exception is the Netherlands where, under the new Collective Damages Act (*Wet Afwikkeling Massaschade in Collectieve Actie*) (WAMCA), which entered into force in January 2020, there are no restrictions on the subject matter of claims that can be brought or settled collectively. It thereby develops the previous Dutch collective settlement scheme, *Wet Collectieve Afwikkeling Massaschade* (WCAM). See, generally, I Tzankova and X Kramer, 'From Injunction and Settlement to Action: Collective redress and Funding in the Netherlands' in A Uzelac and S Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021).

tendency for the scope of such schemes to be expanded gradually (such as in France,[17] the Netherlands[18] and Belgium[19]).

III. ANALYSIS OF DIRECTIVE 2020/1828

A. Scope

The new Directive on representative actions is broad in scope. It goes beyond the Injunctions Directive[20] which it replaces and modernises, and which was only applicable in cases involving the infringement of a dozen or so Directives. The new Directive applies to infringements by a 'trader' of a series of instruments which harm 'the collective interests of consumers'.[21] The new regime applies to 66 instruments which are listed in the Annex to the Directive, and which include Regulations and Directives in spheres as diverse as product liability and product safety law, data protection, financial services, travel and tourism, and sectors such as chemicals, cosmetics, food, energy, telecommunications, health and the environment. However, whilst it covers a wide sphere of consumer law, it is more modest in scope than the European Recommendation of 2013 which was intended to apply across the entirety of EU law.[22]

The approach of the new Directive replicates that adopted in the individual Member States, where it is rare for collective redress schemes to apply across the board. Indeed, as has been seen, most EU Member States have not introduced generic collective redress mechanisms at all.[23] Instead, they have generally adopted compensatory collective redress regimes in specific, defined, legal spheres, such as consumer law[24] or competition law, though there has been a tendency for the scope of such schemes to be expanded, as noted above.

B. Representative Actions and Standing

Under the Directive, a 'representative action' is defined as an action for the protection of the collective interests of consumers that is brought by a qualified entity on behalf of consumers seeking an injunction or redress.[25] Redress can include 'compensation,

[17] A collective redress procedure for consumer claims was introduced in France in 2014 (*Loi Hamon*) and has since been extended on a number of occasions, so as to encompass claims in the spheres of the environment, pharma, data and discrimination claims.

[18] See (n 16).

[19] The reform of the Belgian Code of Economic Law in 2014 made actions for collective redress available in consumer cases such as product liability, data, financial services, as well as competition law, IP matters and certain regulated industries, such as natural gas and electricity. This was extended in 2019 to the protection of human rights or fundamental freedoms recognised by the Belgian Constitution.

[20] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30.

[21] Directive (EU) 2020/1828 (n 15) art 3.

[22] Recital 7 of Commission Recommendation of 11 June 2013 (n 11).

[23] The main exception being the Dutch scheme: see (n 16).

[24] See (n 17).

[25] Directive (EU) 2020/1828 (n 15) art 3(5). On standing in collective redress generally, see I Tzankova, 'Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution' in A Stadler, E Jeuland and V Smith (eds), *Collective and Mass Litigation in Europe* (Edward Elgar 2020).

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repair, replacement, price reduction, contract termination or reimbursement of the price paid'.[26] Qualified entities do not need to identify individually all affected consumers in order to bring representative actions, but instead set out the alleged infringement and indicate the issues of fact and law to be resolved.

The issue of standing to bring collective redress cases is very important indeed, and has been much discussed in the literature and policy circles.[27] Various approaches are adopted by Member States and the consumer association/non-profit organisation model is commonly used,[28] partly to ensure that there is a public interest dimension and also to help weed out vexatious litigation. The Directive adopts a hybrid approach.

The Directive identifies two types of representative actions: domestic and cross-border. Member States must ensure that there is at least one domestic representative action mechanism which allows qualified entities to seek both injunctive and redress measures which are compliant with the Directive. This does not of course prevent Member States from establishing other types of collective redress mechanisms as well. For domestic actions, Member States are free to decide upon the criteria to be used to determine what amounts to a qualified entity for the purposes of domestic actions, though this broad discretion is limited by the requirement to ensure the criteria are consistent with the objectives of the Directive.[29] There is also a degree of latitude concerning how States implement certain other features of the Directive. This potentially opens the door to a type of forum shopping, in which entities might gravitate—where that is possible under rules of jurisdiction—towards States in which the collective rules are the most favourable, including as to what amounts to a qualified entity.[30] This is illustrated by the ability of entities from several Member States to join forces within a single representative action before one forum,[31] and for this to be considered in respect of the domestic entity as a domestic action, despite the presence of consumers from several Member States.[32] One could quite easily envisage pan-European claims being concentrated in one forum by means of an 'anchor claimant' who is a qualified entity incorporated in that jurisdiction, joined by other qualified entities from outside of it.

In case of cross-border representative actions, the Directive adopts a different approach and harmonises the criteria for designation as a cross-border qualified entity. A cross-border action is one in which the action is brought in a Member State other than that in which the qualified entity is designated.[33] The criteria for these actions are stricter than for domestic actions, and include that the entity must have at least 12 months of 'public activity in the protection of consumer interests',[34] thereby excluding special purpose vehicles set up by consumer organisations. They must also be not-for-profit[35]

[26] Directive (EU) 2020/1828 (n 15) arts 3(10) and 9(1).

[27] See eg D Fairgrieve and G Howells, 'Collective Redress Procedures: European Debates' (2009) 58 ICLQ 379.

[28] See France (n 17) and Belgium (n 19).

[29] Directive (EU) 2020/1828 (n 15) art 4(4).

[30] For a perspective on this, see D Freiin von Enzberg and K Bär, 'The EU Directive on Consumer Representative Actions Enters into Force' (*TaylorWessing*, 29 January 2021) <www.taylorwessing.com/en/insights-and-events/insights/2021/01/the-eu-directive-on-consumer-representative-actions-enters-into-force>.

[31] Directive (EU) 2020/1828 (n 15) Recitals 23 and 31.

[32] ibid Recital 23.

[33] ibid art 3(7).

[34] ibid art 4(3)(a).

[35] ibid art 4(3)(c).

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and be sufficiently independent,[36] in other words, not influenced by third parties who have a financial interest in the outcome of the proceedings.[37] It is up to the Member States to assess and monitor initial eligibility.[38] Member States must also ensure that cross-border actions can be brought in their courts by qualified entities designated by other Member States as being able to do so.[39] The Directive foresees mutual recognition of qualified entities by Member States for the purposes of cross-border representative actions.[40] As has been seen above, when several qualified entities bring a single representative action before a single forum, this seems to be considered in respect of the domestic entity to be a domestic representative action under the Directive.[41] There has been discussion concerning whether the more stringent criteria for qualified entities involved in cross-border representative actions should be applied to domestic actions, although there has been concern that this would disproportionately affect smaller entities focused only on domestic actions.

The question also arises whether qualified entities, which in most cases are likely to be consumer associations, will be sufficiently well resourced, able and willing to bring cross-border claims. Whilst it is true that consumer associations in some countries have been able to take an active role in bringing group legal proceedings, this is very much the exception rather than the rule. It is probable that most such bodies will not have the appetite or funding to bring such claims. In those countries where the consumer association model has been adopted there has been only a modest uptake of claims. Indeed, a recent French parliamentary report concluded that the initial results of the French group procedure have been 'disappointing',[42] partly due to the limitations on who has standing.[43] The report made proposals for liberalisation, which resulted in a Legislative Bill to reform the current procedure.[44] This reluctance to act is unlikely to be assisted by the Directive introducing the 'loser pays' principle,[45] which will be a disincentive for qualified entities on bringing claims due to potential adverse cost exposure. It may well be that domestic claims will prove more attractive, given the more flexible approach to them adopted by the Directive.

More positively, the obligation of Member States to establish Directive-compliant representative action mechanisms may well prompt reform in States where such mechanisms currently do not exist, or are underdeveloped. This may also be the case where existing collective redress mechanisms are not yet optimal. The aforementioned

[36] It is also stipulated that the entities 'should be independent and should not be influenced by persons other than consumers who have an economic interest in the bringing of a representative action, in particular by traders or hedge funds, including in the event of funding by third parties. Qualified entities should have established procedures to prevent such influence as well as to prevent conflicts of interest between themselves, their funding providers and the interests of consumers.' (ibid Recital 25). [37] ibid art 4(3)(e). [38] ibid art 5. [39] ibid art 6(1).

[40] It is, however, possible for a Member State to examine whether the purpose of the qualified entity is justified in specific cases—ibid Recital 32 [41] ibid Recital 23.

[42] P Gosselin and L Vichnievsky, 'Rapport d'Information sur le bilan et les perspectives des actions de groupe' (Registered with the Presidency of the *Assemblée Nationale*, 11 June 2020) 13.

[43] Note that only 30 class actions have been commenced in France since 2014; three have been settled and six others were dismissed at first instance. No company has yet been found liable under the procedure. Generally, see M-J Azar-Baud, '30 : le nombre d'actions de groupe introduites à ce jour en France' (Revue Lamy : Droit civil, October 2021).

[44] Proposition de Loi pour un Nouveau Régime de l'Action de Groupe (15 September 2020).

[45] Directive (EU) 2020/1828 (n 15) art 12(1).

French parliamentary report stated that 'the transposition of the Directive might help in reforming the legal regime of group actions notably by putting in place a common procedural approach for all group actions'.[46] In Germany, commentators have noted that in the light of the new Directive, the model declaratory action introduced in 2018 in response to the Volkswagen diesel claims,[47] 'will lose importance, at least as far as consumer protection rights are concerned'.[48]

C. Remedies and Alternative Dispute Resolution

The Directive requires all Member States to enable qualified entities to seek both injunctive and compensatory remedies.[49]

The Directive generally adopts the same approach to injunctions as was found in the Injunctions Directive which it replaces.[50] Monetary remedies, referred to as 'redress' in the Directive, are described as 'compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid'.[51] Where redress is sought, the Directive requires Member States to ensure that consumers benefit from such measures without the need to bring a separate action.[52] This is a welcome simplification especially from the consumer perspective. Given the underdeveloped nature of compensatory redress across the EU,[53] this is likely to expand the remedial armoury available to consumers in some States whilst also leaving room for Member States to go further in their remedial provision if so desired.

A much remarked upon aspect of the Directive is its approach to the question of whether qualified entities require explicit mandates from individual consumers in order to bring representative actions. The Recitals to the Directive make it clear that when transposing the Directive, Member States are free to choose either an opt-in or opt-out mechanism (or a combination of the two), in line with their own 'legal traditions'.[54] This opt-in/opt-out feature of collective redress is crucial for the success of the regime and it is therefore disappointing that the position of the Directive on this issue differs somewhat depending on the remedy sought. In case of injunctions, there is essentially an opt-out approach.[55] A different approach is taken to redress measures and the drafting of the relevant provisions is unclear, to say the least. Article 9(2) allows consumers to 'explicitly or tacitly express their wish to be represented or not by the qualified entity in that representative action'. Similar wording is used in Article 13(2).

What, exactly, does 'tacitly' mean? It would seem to imply that consent for legal proceedings can be based upon something less than a positive expression of approval. This considerably blurs the boundary between an opt-in and opt-out approach. Commenting on the application of the Directive in France, Azar-Baud

[46] Gosselin and Vichnievsky (n 42) 32.
[47] Section 606ff of the German Code of Civil Procedure (Zivilprozessordnung, ZPO).
[48] Freiin von Enzberg and Bär (n 30).
[49] Directive (EU) 2020/1828 (n 15) art 7(4).
[50] Directive 2009/22/EC (n 20).
[51] Directive (EU) 2020/1828 (n 15) arts 3(10) and 9(1).
[52] ibid art 9(6).
[53] As noted by the Commission, compensatory collective redress is available in only 19 Member States (but in over half of them it is limited to specific sectors, mainly to consumer claims). See COM (2018) 40 final (n 13).
[54] Directive (EU) 2020/1828 (n 15) Recital 43.
[55] ibid art 8(3).

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described this as a 'hidden gem' in the Directive,[56] noting that tacit approval would be an innovation under French law, 'and that its transposition [into French law] could be a tool as powerful and efficient as the opt-out [mechanism]'.[57] However, the Directive is silent on the details of tacit approval, and includes no guidance concerning the threshold that needs to be reached in order to demonstrate tacit acceptance.[58] An additional issue concerns the type of actions covered by this rule: must there be a pre-existing relationship in order for any approval to be tacit or could implied authorisation arise entirely *de novo*? Despite this, the Directive is clear on the treatment of foreign consumers, for whom an explicit opt-in approach is mandatory.[59] This is sensible and in line with the growing consensus on this at a national level.[60]

Unfortunately, the Directive does not retain nor enhance the Recommendation's broad guidance on the use of out-of-court, pre-litigation ADR to resolve collective disputes.[61] Instead, a subtle, nuanced approach is taken. Article 8(4) and Recital 41 encourage (rather than mandate) Member States to require qualified entities to undertake 'consultations' before commencing an injunctive action. Notably, the Directive is silent on the use of pre-litigation ADR in cases where redress is sought. The Directive has weakened the link between settlement and ADR since it is up to Member States to empower courts or administrative bodies to exercise discretion to invite parties to use such measures in cases where redress is sought.[62] Moreover, the Directive does not retain the explicit direction that limitation periods should be suspended from the moment parties agree to engage in out of court ADR processes to resolve their dispute.[63] The consequence is that, unless ADR is built into existing civil procedures,[64] qualified entities with limited financial resources will have to face the risks and costs of bringing claims to protect consumer interests. Given the Directive's passivity and existing variations in the interrelationship between judicial and ADR processes across Member States,[65] one can be sceptical about whether ADR in representative proceedings under the Directive will be a success.

[56] M-J Azar-Baud, 'Allegro ma non troppo (à propos de la transposition en France de la directive sur les actions représentatives en protection des intérêts collectifs des consommateurs)' (2021) 4 Recueil Dalloz 232.

[57] ibid.

[58] Each Member State is left to determine this, which is in line with the Directive's drive for balance between procedural autonomy and harmonisation.

[59] Directive (EU) 2020/1828 (n 15) art 9(3).

[60] See WAMCA (n 16) and art 1018f (1) and (5) DCCP in the Netherlands. This is also the approach in the UK.

[61] Commission Recommendation of 11 June 2013 (n 11) paras 25 and 26.

[62] Directive (EU) 2020/1828 (n 15) Recital 54 and art 11.

[63] Addressed in para 27 of the Commission Recommendation of 11 June 2013 (n 11). Article 16 of the Directive is silent on limitation periods and their applicability to pre-trial ADR.

[64] See eg the WCAM in the Netherlands (n 16) and the collective procedures in France (n 17) and Belgium (n 19).

[65] See eg E Onțanu, 'Court and Out-of-Court Procedures: In Search of a Comprehensive Framework for Consumers' Access to Justice in Cross-Border Litigation' in L Cadiet, B Hess, M Requejo Isidro (eds) *Privatizing Dispute Resolution* (Nomos 2019) 47.

D. Cross-Border Aspects

The Directive seems to create two categories of cross-border cases: 'cross-border infringements' and 'cross-border representative actions'. The latter hinges on the relationship between the Member State in which the qualified entity has been designated vis-à-vis the Member State in which the claim is commenced.[66] The former is of importance for the purposes of the Brussels I*bis* rules. The latter concerns the question of standing, not jurisdiction and is designed to overcome national procedural hurdles and facilitate mutual recognition of a foreign qualified entity's standing to sue in a Member State other than the State of its origin.

Interestingly, Article 6(3) preserves 'the right of the court or administrative authority seised *to examine* whether the statutory purpose of the qualified entity *justifies* its taking action in a specific case'.[67] This permits the court seised to deny standing even if the qualified entity is on the list established under Article 5(1). The wording of Article 6(3) seems to create a two-part suitability test for a qualified entity to be able to act in a specific case—1) the court seised is to review the statutory purpose of the entity and 2) to determine whether that purpose justifies the qualified entity's involvement in the case.

Member States have discretion concerning the standard to be applied in this test, particularly as regards what amounts to a 'justification'. It is likely that the threshold for this will vary across Member States—variations which might undermine the Directive's objective of mutual recognition of standing. It is also unclear what circumstances need to exist in order to trigger such an examination by the court seised. Presumably, one of those circumstances is a defendant raising objections to a qualified entity's standing in a cross-border representative action. In conjunction with Article 5(4), the effect of this part of Article 6(3) is to offer defendants an additional avenue to challenge a qualified entity's ability to act in a particular case.

Defendants are therefore able to challenge a qualified entity's action on a number of grounds—either by questioning whether an entity fulfils the criteria for standing set out in Article 4(3) and/or by asking the court seised to consider whether the qualified entity's 'statutory purpose *justifies its taking action* [emphasis added]'. In effect, a defendant gets two bites of the cherry. The danger of this is demonstrated by the pre-Directive experience of foreign claimants in collective proceedings in Germany. Claimants faced 'bureaucratic hurdles to prove their capacity and standing'[68] where a defendant contested this. Whether this experience would now be tempered by the Directive's overall principle that the functioning of the procedural mechanism for representative actions should not be hampered by national rules[69] remains to be seen.

The Directive is a missed opportunity to rectify, or at least mitigate, the shortcomings of the existing EU private international law instruments for collective redress, particularly relating to jurisdiction.[70] By leaving the existing rules on jurisdiction

[66] Directive (EU) 2020/1828 (n 15) Recitals 20 and 23 and art 3(7).

[67] ibid (emphasis added). See also ibid Recital 32. This power seems analogous to an exequatur for standing.

[68] Lein *et al.*, 'State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation' (n 12) 21.

[69] Directive (EU) 2020/1828 (n 15) Recital 12.

[70] Recital 21 makes clear that the Directive does not affect the application of the rules on private international law. For further discussion, see H Muir Watt, 'The Trouble with Cross-Border Collective Redress: Issues and Difficulties' in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* (Oxford University Press 2012).

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unchanged, the Directive seems to reinforce the position that the domicile of the defendant is the preferred jurisdiction for cross-border claims. The practical difficulties posed by this default position (particularly those encompassing multiple low value claims) are well known and result in complex litigation.[71] In the absence of a novel ground of jurisdiction for collective claims and in light of the Directive's empowerment of qualified entities,[72] a liberal reinterpretation of some of the special jurisdictional rules under Brussels I*bis* is necessary to enable jurisdiction in the courts of the place where a consumer is domiciled.

In contractual consumer disputes, the narrow interpretative approach to Chapter II, Section 4 Brussels I*bis* precludes the use of Article 18 by representative organisations.[73] Use of Section 4 is also precluded where consumers assign their claim to another.[74] In light of these hurdles, representative organisations, in practice, resort to alternative bases of jurisdiction to advance a cross-border claim. In particular, use has been made of the tortious base provided by Article 7(2) Brussels I*bis* to advance indivisible and divisible consumer interest claims.

The underpinning rationale of Article 7(2) is the efficacious conduct of proceedings (eg ease of taking evidence) and the 'sound administration of justice'.[75] This translates to a predilection for proximity when jurisdiction is to be determined. Under the second limb of Article 7(2), localisation of loss is determinative[76] and courts seised under this limb can only rule on the damage arising in the territory where they are based.[77] Accordingly, foreign qualified entities will need to commence separate claims before courts in each territory where damage has been incurred. Arguably, for indivisible interest claims, the Directive's facilitation of mutual recognition of standing under Articles 4(1), 4(2) and 6(1) now enables foreign qualified consumer associations to bring injunctive actions in another Member State for the purpose of protecting the indivisible interest of national consumers in that Member State. However, cross-border representative redress actions under this limb are only viable where the quantum of recoverable damages in a particular territory is sufficiently high for the claims to be cost-effective or where the aggregate of damages from claims

[71] See E Lein, 'Cross-Border Collective Redress and Jurisdiction under Brussels I: A Mismatch' in Fairgrieve and Lein (ibid) 141 and F Rielaender, 'Aligning the Brussels Regime with the Representative Actions Directive' (2021) ICLQ 1.

[72] Article 7(6) of the Directive explicitly refers to the qualified entity as the claimant in proceedings. See also Recital 36.

[73] Article 18 is an explicit *forum actoris* for consumers. On preclusion of representative organisations from utilising this base of jurisdiction: Case C-167/00 *Henkel* EU:C:2002:555, para 33 and Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139. Additionally, a requirement of Section 4 is a contractual relationship between the consumer and the defendant.

[74] See Case C-498/16 *Schrems* EU:C:2018:37, paras 44–45. The CJEU took the view that the consumer is protected by the provisions of Section 4 only in so far as he is, *in his personal capacity*, the plaintiff.

[75] Case C-21/76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 01735. See also Recital 16 of Brussels I*bis*.

[76] See eg Case C-343/19 *Verein für Konsumenteninformation* EU:C:2020:253.

[77] Case C-364/93 *Marinari* EU:C:1995:289. In Case C-68/93 *Shevill* EU:C:1995:61, the rationale for this position is that the court is territorially the best placed to assess the delict committed in that State 'and to determine the extent of the corresponding damage' (para 31). See also A Pato, *Jurisdiction and Cross-Border Collective Redress* (Hart 2019) who argues that Article 7 (2) enables representative entities to bring injunctive actions for the protection of indivisible consumer interests in the State where they are established (at 205).

across multiple territories makes it cost-efficient for the entity to commence actions. This leads to an amalgamation of power in the hands of a select number of entities with the financial and administrative ability to continuously (or simultaneously) commence claims within (and across) multiple Member States for groups of claimants.

In light of Article 7(6) of the Directive, a more liberal interpretation of Article 18 Brussels I*bis* focusing on the mischief (rather than the form of the consumer relationship) should be considered to promote the Directive's policy objective of empowering foreign entities to bring claims.[78] The opening up of Article 18 Brussels I*bis* to qualified entities would create some alignment between the policy objective of a representation mechanism under the Directive and the operation of Brussels I*bis*. Such broadening of approach is appropriate given an entity's status in a dispute. As noted in *Schrems*, Article 18 is inspired by the concern to protect the consumer as the party deemed to be economically weaker. This weaker status will equally apply to qualified entities under the Directive for two reasons. First, as argued below, the qualified entity in some cases will occupy, and give effect to, the agency granted to 'original' consumers (as weaker parties) to enforce their rights. Second, qualified entities will, in most cases, be de facto in an economically weaker position vis-à-vis a defendant trader because of the imposition of a not-for-profit requirement under Article 4 of the Directive.

With regard to assignment cases and Article 18, it is important to look at the end result of the assignment process. In an assignment, the interest assigned can be the right to sue in the name of the assignor (consumer). All other rights may continue to be vested in the assignor (consumer), not the assignee, and the contractual relationship between the assignor and trader may subsist.[79] In this type of assignment, representative organisations will be exercising some procedural control over the personal capacity of the claimant. As such, they will fall within the parameters of the first part of the answer to the second question in *Schrems*. However, it is recognised that this interpretation would only enable assignment of claims by consumers domiciled in the same Member State to ground jurisdiction in that State.

Comparatively, it is noteworthy that the General Data Protection Regulation (GDPR)[80] empowers legal persons[81] and provides a greater jurisdictional advantage for representative organisations. A representative body[82] has a choice of forum—

[78] See P Jiménez Blanco, 'El tratamiento de las acciones colectivas en materia de consumidores en el Convenio de Brusselas' (2003) 5709 Diario La Ley 1574 who advocates for the focus of Article 18 to be on the issue at stake rather than the nature of the relationship between the parties. See an additional argument on the liberalisation of interpretation of Article 18 to enable representative entity use in P Mankowski and P Arnt Nielsen, 'Introduction to Articles 17–19' in U Magnus and P Mankowski (eds), *Brussels Ibis Regulation: Commentary* (Otto Schmidt 2016) 451 and M Danov, 'The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments' (2010) 6(2) JPrivIntL 359, 376.

[79] See M Smith and N Leslie, *The Law of Assignment* (2nd edn, Oxford University Press 2018) Ch 11.

[80] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (GDPR).

[81] ibid art 80.

[82] Article 80(1) sets down the requirements for a representative organisation/body, association to act. As the GDPR is included in Annex 1 of the Directive, it is arguable that the stricter standing requirements in Article 4 of the Directive would apply to representative bodies under the GDPR

either 'where the controller or processor has an establishment … [or] … *where the data subject has his or her habitual residence* '.[83] By using habitual residence, the focus for jurisdiction under the second limb is on localisation of the person, not localisation of the loss or the contractual/delict basis for that loss. It is a more flexible base on which to ground jurisdiction given its dependency on the factual specific circumstances of the data subject. Use of the habitual residence of the data subject also demonstrates that the need for a connection between the place of the harm occurring and the court seised is not as vital as is perceived under Brussels I*bis* and this offers jurisdictional elasticity for entities to operate in GDPR cross-border cases. The reality is that both the GDPR and Directive will operate in tandem within Member States. Without a liberal interpretation of the Brussels I*bis* special rules of jurisdiction mentioned above, the hierarchy of enforcement of collective interests will be further fragmented, with GDPR claims being elevated in that hierarchy.

E. Funding and Costs

The issue of funding for collective redress claims was already covered in the 2013 EU Recommendation and has since then become an increasingly important issue.[84] It is broached in Article 10 of the Directive, which recognises the possibility of third party funding of qualified entities, if this is allowed by the applicable national law and subject to guarantees such as the lack of any conflicts of interest between funder and claimants. Moreover, decisions taken by the qualified entity should not be unduly influenced by the funder.[85] These are sensible constraints which are already encapsulated in industry standards such as the Code of Conduct of the Association of Litigation Funders of England & Wales.[86] This is bolstered by reporting obligations, whereby the qualified entities must provide public information about the sources of their funding in general.[87] Moreover, a court or administrative authority may require qualified entities to disclose the sources of funds used to support a specific representative action.[88]

It remains to be seen, however, whether in practice there will be much appetite on the part of qualified entities to seek external funding; indeed, the not-for-profit nature of these entities makes their seeking external funding somewhat unlikely (and frowned upon in some jurisdictions)[89] and would probably require some elaborate financial engineering to achieve.

bringing a cross-border claim. The organisation may act pursuant to a mandate from the data subject (Article 80 (1)) or based on an empowerment from a Member State to independently act without a data subject's mandate (Article 80 (2)). It is recognised that a limitation on the representative body's ability to claim compensatory damages exists—it would be dependent upon the law of each Member State.

[83] Unless the controller or processor is a public authority acting in the exercise of its public powers (GDPR (n 80) art 79(2) (emphasis added)). Recital 147 of the GDPR confirms that the GDPR provisions are a *lex specialis*, regardless of the jurisdictional rules under Brussels I*bis*.

[84] Commission Recommendation of 11 June 2013 (n 11) arts 14–16.

[85] Directive (EU) 2020/1828 (n 15) art 10, and see also Recital 25.

[86] M Napier *et al.*, 'Code of Conduct for Litigation Funders' (Civil Justice Council, January 2018)

[87] Directive (EU) 2020/1828 (n 15) art 4(3)(f).

[88] ibid art 10(3).

[89] Such as Ireland, due to operation of the maintenance and champerty rules under the Maintenance and Embracery Act (Ireland) 1634.

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The issue of costs is also covered by the Directive, with Article 12 encapsulating the loser pays rule whereby the unsuccessful party in a representative action is required to pay the costs of the proceedings borne by the successful party. The way in which this will be implemented in practice by Member States will no doubt vary considerably,[90] and in certain countries, such as France,[91] the costs award is rarely commensurate with the real costs expended. This will, however, constitute an additional factor of financial risk unwelcome to entities such as consumer associations in jurisdictions where ATE insurance is not as developed as in common law jurisdictions.[92]

F. Awareness and Information

Information has always been a key battleground in collective redress cases, with those bringing such claims keen to disseminate information in order to launch proceedings effectively. Indeed, already in 2013, the Commission Recommendation underlined the importance of claimants being able to 'disseminate information about a claimed violation of rights'.[93] Whilst this was a priority at the European level, it is noteworthy that the EU Commission's Report on the implementation of the Recommendation lamented that: 'the principle concerning provision of information on collective action is not appropriately reflected in the laws of Member States particularly at the pre-litigation stage and for injunctions'.[94]

Unsurprisingly, this issue is again addressed squarely in the Directive, with an entire provision in Article 13 given over to this theme. Information obligations are imposed on both qualified entities and traders. Whilst Member States are given discretion to decide who should be responsible for disseminating information for ongoing representative claims, the Directive steers this obligation towards qualified entities, though traders are explicitly subjected to an obligation to provide information on successful final decisions/settlements.[95] The Directive takes a prescriptive approach to the content of the information to be provided by qualified entities to consumers for ongoing claims. It stipulates the minimum level of information to 'enable consumers to take an informed decision'.[96] Whilst the approach to ongoing actions will bring some reassurance to consumers, the lack of a similar approach to information on final decisions or settlements is of concern. It is, for example, unclear as to who is responsible for providing consumers with information on the steps required to enable them to benefit from a final decision/settlement. Presumably, the intention is the trader, but the absence of explicit direction will practically mean that qualified entities will end up doing so.

[90] The loser pays rule is subject to the provision that it is applied 'in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general' (Directive (EU) 2020/1828 (n 15) art 12(1)).

[91] Under Article 700 of the French Code de Procédure Civile.

[92] It is to be noted that Article 20 obligates Member States to take measures to assist qualified entities in financing the bringing of claims under the Directive, albeit that this is expressed in very general terms.

[93] See Commission Recommendation of 11 June 2013 (n 11) para 10.

[94] COM(2018) 40 final (n 13) para. 2.1.4.

[95] Directive (EU) 2020/1828 (n 15) Recitals 58, 59 and 62.

[96] ibid Recital 58. The Directive accepts that the level of detail of the information required could vary according to the measure being sought and/or whether the mechanism is opt-in or opt-out.

Additionally, the framing of the information obligation on traders limits its deterrence effect. Article 13(3) seems to make this obligation dependent on whether consumers have already been informed of the 'final decision or approved settlement in another manner'. Given the scope of the qualified entity obligations under Article 13(1)(c), it is foreseeable that consumers will receive information on a final decision from the qualified entity. Thus, traders are likely to avoid the obligation. In the event of a successful claim, qualified entities may mitigate the impact of this consequence by passing on the costs to traders. However, in practice, recovery of 100 per cent of costs is not common and so entities may find themselves shouldering some costs of this obligation.

Notwithstanding the difficulties outlined above, the Directive takes a pragmatic approach to the obligations—information 'should be adequate and proportionate to the circumstances of the case'.[97] The inclusion of proportionality is to be welcomed for entities with limited financial and administrative capacity. However, the overall picture remains skewed in favour of the trader, the party likely to have more resources and capacity than a qualified entity.

G. Disclosure of Evidence

The evidential difficulties faced by claimants are recognised in the Directive and it is therefore provided that Member States must grant entities the right to seek an order for the disclosure of relevant evidence from traders.[98] This, however, is subject to pre-existing national disclosure rules, and seems to be limited to the acquisition of *additional* evidence as entities must have 'reasonably available evidence sufficient to support a representative action' before additional disclosure can be sought. Presumably, a rationale for this approach is to avoid the use of disclosure to facilitate a fishing expedition before commencement of a claim, an-oft repeated concern about US-style discovery techniques. The Directive further restricts the usage of Article 18 by requiring that the entity indicates that 'additional evidence lies in the control of' the trader/third party, which implies that the claimant entity knows of the existence of evidence which is under the control of another. This may be challenging given the information asymmetry that invariably exists in collective redress cases. A more proactive, and egalitarian approach would have been to impose an obligation on both trader and claimant entity to declare evidence (adverse or not) which has a bearing on the issues in the claim.

H. Ombudsman

The Directive mandates the Commission to evaluate the use of an Ombudsman in cross-border representative actions by considering the possible establishment of a European Ombudsman for Representative Actions.[99] Whilst it is unclear what exact role the Ombudsman would play, the focus would seem to be on cross-border representative actions at a European Union level.[100] Such an entity might potentially be mandated to

[97] ibid Recital 61.

[98] ibid art 18. Recital 69 also suggests procedural measures for refusal to comply with a disclosure order.

[99] ibid art 23(3) and Recital 73.

[100] An example of an ombudsman-type mechanism at a domestic level is the German *Ombudsstelle* which was created following a settlement between Volkswagen and the

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investigate pan-European representative actions, thereby tying in with the facility for consumers from several Member States to join forces within a single representative action in bringing a claim in one single action before one forum, which is also provided for in the Directive.[101] There will be a myriad of issues to be resolved, such as the status of the decisions of the Ombudsman, as well as its relationship with Member State courts.

IV. CONCLUSION

The Directive can be generally seen as a positive development in improving the approach to collective redress in Europe, attempting to strike a balance between harmonisation and respect for procedural autonomy in Member States.[102] However, the foregoing analysis demonstrates that it does sacrifice some efficiency and functionality in the protection of consumer interests. The risks with such an approach are demonstrated where inefficiencies of judicial procedures exist in some EU Member States.[103] To offset the impact of such inefficiencies, the Directive could, for instance, have stipulated precise time limits for key stages of a representative action (eg challenges to standing, admissibility) as well as time limits for the appellate process in those key stages. This inclusion would have reinforced the Directive's objectives whilst maintaining the respect for Member State procedural autonomy. Additionally, complementary support measures would also be helpful in order to ensure that the desired protection for consumers is attained. This could include guidance from the EU Commission on the Directive's provisions, judicial training to support national judges in exercising the varying levels of discretion inherent in the Directive's provisions, and mechanisms to facilitate the exchange of experience between Member States as to the implementation of the Directive. Without these, further fragmentation and intra-EU jurisdictional competition may result as Member States transpose the Directive in a manner that makes their own jurisdiction appear more attractive for cross-border cases.

Verbraucherzentrale Bundesverband (a consumer organisation) to facilitate the payment of compensation to German consumers following the VW dieselgate scandal: see 'Ombudsstelle für VW-Vergleich' (*Verbraucherzentrale Bundesverband*, 19 March 2020).

[101] Directive (EU) 2020/1828 (n 15) Recital 31.

[102] ibid Recitals 11 and 12.

[103] See eg the Croatian legal system in Lein *et al.*, 'State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation' (n 12).

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