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German companies' demands for the trilogue negotiations on the “Directive on representative actions for the protection of the collective interests of consumers”

With regard to the trilogue negotiations, the following issues are of particular relevance to German businesses:

- No European “class actions” for redress
- High uniform requirements for qualified entities, with no distinction being made between domestic and cross-border representative actions
- No actions brought by qualified entities designated on an ad hoc basis
- Compliance with safeguards when it comes to actions to enforce redress measures (e.g. claims for compensation)
- Application of the “opt-in” principle
- Application of the “loser pays” principle
- Appropriate rules for third-party funding
- Ban on the payment of contingency fees
- Ban on punitive damages
- No disclosure of evidence
- No expansion of the scope of the Directive

German companies welcome all appropriate efforts by the European legislator to strengthen consumer protection. However, they believe that some crucial safeguards have not been adequately addressed by the Commission's, the Parliament's and the Council's proposals. The failure to provide respective safeguards might result in massive perverse incentives and abusive litigation, which would have significant negative impacts on the economies throughout the European Union. The safeguards established by the Commission in 2013 should therefore, at a minimum, serve as minimum standard for all collective actions to enforce redress measures (e.g. claims for compensation).

Requirements for qualified entities

- **High uniform requirements for qualified entities, with no distinction being made between domestic and cross-border representative actions**

The distinction drawn by the Council according to whether a qualified entity brings a domestic action or a cross-border action will result in a lack of effective protection of businesses against abusive litigation. The absence of respective provisions on domestic actions, in particular, will result in different national litigation mechanisms, which would lead to forum shopping due to the EU-wide enforceability. The provisions suggested by the Commission and the Parliament, which provide for equal treatment of all kinds of representative actions, should be preferred.

Should the European legislator not opt in favour of an equal treatment of all kinds of collective actions, recital 10a of the Council's proposal should definitely be maintained. According to recital 10a, Member States should be able to determine that the criteria for qualified entities which bring cross-border actions shall also apply to domestic actions.

Even though the Commission and the Parliament provide for uniform criteria, these criteria are not sufficient to successfully prevent abusive litigation. With regard to actions to enforce redress measures (e.g. claims for compensation), the criteria which the Council has determined for qualified entities regarding cross-border actions (Article 4a(3)) should therefore apply to all qualified entities irrespective of whether they bring domestic or cross-border representative actions. The existing provisions should be amended for these cases by a specification of the minimum number of members which the qualified entity should have.

- **No actions brought by qualified entities designated on an ad hoc basis**

Representative actions brought by qualified entities which have been established on an ad hoc basis should not be permitted. The criteria for qualified entities, which prevent abusive litigation, should apply to all actions. This would not be ensured in case of qualified entities established on an ad hoc basis. Deletion of Article 4(2) of the Commission's draft by the Parliament is therefore appreciated.

Should Article 4(2) not be deleted, the Council's considerations laid out in recital 11a, which says that qualified entities established on an ad hoc basis should not be allowed to bring cross-border representative actions, are appropriate. Indeed, this principle should also be applied to domestic actions

since there is also a need to protect defendant undertakings against abusive litigation or potential threats of bringing actions.

- **Different criteria for actions for injunction measures or redress measures**

According to the definition by the Council (Article 3(4a)), a domestic action is an action brought by a qualified entity in the Member State in which the qualified entity is designated. However, there is the potential risk that qualified entities may bring actions for redress against companies from other Member States in the States in which they are designated even though there is no sufficient national reference. By way of derogation from the definition under Article 3(4a) of the Council's proposal, the defendant's place of business should also be taken into account to prevent abusive litigation in the context of actions for redress. In addition, it should be clarified under Article 5b that an action for redress shall only be considered a domestic action if the defendant's place of business is also in this State.

Furthermore, a distinction should be made between actions for injunction and actions for redress when it comes to the criteria for a qualified entity as well as to the procedural requirements for bringing an action. The current provisions on qualified entities, which have been stipulated in the current Directive on Injunctions and which have been implemented in the German Act on Injunctive Relief (UKlaG), should continue to apply to actions for injunction. Should the safeguards demanded with regard to actions for redress also be adopted with regard to actions which seek injunctive relief in the European Directive, the German Act on Injunctive Relief (UKlaG) will have to be adjusted accordingly. The German private law enforcement regime could no longer work actively and would be impeded significantly.

Objective of the action

There will be serious interferences in the codes of procedures of almost every Member State if seeking redress, such as compensation for damages, is established as the objective of the action. Germany for instance, has effective collective means of redress in the form of model declaratory actions in place, which correspond to the purpose of the Directive, i.e. to provide compensation for damages to consumers. The EU Commission has rightly addressed these concerns and has therefore allowed for declaratory actions in complex cases. The respective provision proposed by the Commission under Article 6(2) should therefore be preferred.

Should the European legislator not opt in favour of this exemption for complex cases, Member States should at least be given the opportunity, within the scope of a saving clause, to provide for such an exemption according to their civil process particularities.

Compliance with safeguards when it comes to actions to enforce redress measures (e.g. compensation for damages)

- **Opt-in principle**

It is unfortunate that the European institutions have not explicitly expressed their support for requiring consumers to opt in to a representative action. Representative actions based on the opt-out principle violate procedural principles, such as observance of the right to be heard, and should therefore not be allowed in domestic and cross-border procedures respectively.

At least the proposal laid out by the Council under Article 5b(3) should be adopted. According to Article 5b(3), at least when consumers from other Member States want to participate in a representative action, they should be required to explicitly express their will to participate in that action.

- **“Loser pays” principle**

The clear statement of the Parliament (Article 7a) that the party that loses a collective action shall have to bear the costs should be supported to prevent abusive litigation. Such a basic provision should not be left to the discretion of the Member States.

- **Appropriate rules for third-party funding**

It is necessary to prevent undue external influence on the qualified entity to effectively eliminate the risk of abusive litigation. According to the Council's proposal, the national legislator shall not be required to lay down any rules on the admissibility of third-party funding. Article 7 of the Parliament's proposal should therefore be supported since it lays out respective provisions.

- **Ban on the payment of contingency fees**

The European legislator should explicitly express its support of a ban on the payment of contingency fees to satisfy the need to protect the defendant undertakings. The respective proposal made by the Parliament under Article 15a should therefore be adopted.

- **Ban on punitive damages**

Punitive damages have been rejected by all institutions in their comments, which we explicitly welcome. The provisions proposed by the Parliament under Article 6(4b) provide the most reliable protection and should therefore be implemented.

German companies believe that the EU does not have the authority to outline the provisions of substantive and procedural civil law. The authorisation to take respective measures, which is stipulated under Article 114 of the TFEU (internal market), is based on the existence of any problems in the internal market, for which no evidence has been provided with regard to representative actions so far. The difference between national civil law regimes alone does not empower the EU to take respective measures in terms of consumer law either. Introducing purely national actions based on an EU regulation, which is likely to only result in forum shopping between the different national jurisdictions, will miss the point of (minimum) harmonisation of civil procedure rules.

Should the EU adopt respective provisions nonetheless, binding protection standards that also comply with uniform European legal traditions must be adopted, including a ban on punitive damages.

- **No “redress” for low-value claims based on mass harm situations benefiting third parties**

Directing the redress for low value claims to third parties, as proposed by the Commission (Article 6(3b)), should be rejected. The aim of respective representative actions can only be to provide effective redress for damages that have occurred, but not to consider other interests such as the indirect financing of the associations that bring the action. Furthermore, ultimately, such an approach would not be much different from punitive damages.

No disclosure of evidence

In civil procedures, each party is responsible for presenting necessary evidence to provide reasoning for the claims made. There is no reliable justification for breaking with this European legal tradition, which might only be imaginable for cases in which there are compelling reasons for why it is impossible to provide evidence. An obligation to disclose evidence should therefore not be adopted. An expansion of the obligation to disclose evidence which lies in the control of a third party should be rejected all the more because it goes too far.

Should the European legislator decide to adopt the proposed obligation to disclose evidence, the Council's proposal (Article 13) should be endorsed. The Council calls for “equality of arms” and regulates the obligation to disclose evidence for the claimant as well as for the defendant.

Scope of the Directive

The list of Directives and Regulations to which the collective remedies shall be applied in case of an infringement should be shortened. Directives and Regulations which include an independent enforcement regime should be deleted from the Annex to prevent parallel procedures. This applies to the GDPR in particular, but also to individual industry-related Directives such as the Audiovisual Media Services Directive.

The already excessively broad scope of the Directive, given the often vague standard obligations of the Directives referenced in the Annex, would be further expanded through recital 6a of the Council's proposal. The Member States' authority to apply the Directive to areas which are not within the scope of this Directive should therefore be rejected.

Transitional provisions

An expansion of the scope of the Directive, as laid out by the Council's proposal under Article 20(2), should not be endorsed, since it would result in an unlawful retrospective effect.