COLLECTIVE REDRESS IN THE EUROPEAN UNION – CURRENT ISSUES AND FUTURE OUTLOOK

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ABSTRACT

The recent initiative of the European Commission (hereinafter: EC) to empower consumer organisations to seek compensation on behalf of a group of consumers that have been harmed by an illegal commercial practice by way of introducing a Proposal of a Directive on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC (hereinafter: the Directive Proposal), if successful, should mark a new era of collective redress at EU level. In the light of these developments, the paper will first present the background of the Proposal, the present state of EU collective redress mechanisms. It will focus on current issues, such as cross-border collective redress litigation in the context of Brussels I (Recast) Regulation. Namely, after the 'Dieselgate' scandal providing for efficient cross-border collective redress mechanisms at EU level has been recognized as one of the main regulatory challenges. Although at this point the outcome of the EC's initiative is uncertain, the central part of the paper will evaluate the crucial aspects of the Proposal. The conclusion will address key findings and emphasize possible effects of the proposed changes on the future redress opportunities for EU consumers.

Keywords: *Collective redress, Brussels I (Recast) Regulation, representative action, compensation, the Directive Proposal*

1. INTRODUCTION

Reasons to modernise and replace Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer's interests[1] (hereinafter: Injunctions Directive) with an advanced piece of legislation are to be found in difficulties in obtaining protection of collective interests in both national and cross-border context. National systems either lack mechanisms for protection of collective interests of consumers and where such mechanisms are in place, they are usually ineffective, undeveloped or infrequently

[1] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer's interests, OJ L 110, 1.5.2009

used.[2] Even if the national mechanism in place has potential to provide for effective and efficient procedure, it is often tailored in such a manner that it hampers its practical use.[3] Regardless of the importance of providing for an adequate mechanisms for stopping cross-border infringements of collective consumer interests (such as in *Dieselgate*[4] and *Verein für Konsumenteninformation v Amazon EU Sàrl* [5] and *Henkel KGaA* [6] case), the Injunctions Directive's potential in this regard has not been fully exploited. A part of the problem can be traced to the diversity and incompatibility of the national provisions, while another part can be attributed to the complexity and particularity of providing cross-border protection of consumer interests and issues attached to it. Rules providing for cross-border protection pertain to the field of private law while collective redress can be placed between the field of private and public law, especially considering the fact that enforcing rights collectively encompasses public interest.[7] Certain specific characteristics of collective redress also hinder application of EU instruments in the area of judicial cooperation in civil matters created for obtaining cross—border protection in individual disputes. More specifically, Regulation (EU) 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[8] (hereinafter: Brussels I bis Regulation) contains rules on jurisdiction, recognition and enforcement of individual judgments and as such its application in regard to the position of the members of the group as plaintiffs, jurisdiction, applicable law, types of measures, decisions delivered in collective redress proceedings (judgments

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2 See Hodges, C., *Collective Redress: A Breakthrough or a Damp Sqibb?* Journal of Consumer Policy, *Vol.* 34, 2014, p. 67–89

3 See Croatian injunctions procedure in *Franak* case. Judgment of the Commercial court in Zagreb, no. 26.P -1401/2012 from 4 July 2013; Judgment of the High Commercial court, no. 43.Pž-7129/13-4; Judgment of the Supreme court of the Republic of Croatia no. Rev 300/13-2 from 17 June 2015. For a detailed explanation of the Croatian injunctions procedure and *Franak* case see Study on the State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation, JUST72016/JCOO/FW/CIVI/0099, 2017 (hereinafter: Study on the State of Collective Redress in the EU)
Available at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847] Accessed 01.03.2019

4 Dieselgate case, consumer organisation Test Aankoop/Test Achats introduced a class action against VW before the Brussels Court in 2017

5 CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612

6 CJEU, Case C-218/01, Henkel KGaA, 12 February 2004, ECLI:EU:C:2004:88

7 For a broader discussion on the balance between public and private enforcement of collective consumer interests see Hodges, C., *Collective Redress in Europe: The New Model*, Civil Justice Quarterly, *Vol.* 29, No. 3, 2010, p. 370.

8 Regulation (EU) 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, **OJ L 351, 20 December 2012.**

and settlements), the *res judicata* effect of the judgments and its recognition and enforcement in other Member States. Due to the complexity and wideness of issues, recognition and enforcement of judgments delivered in third countries in Member States will not be discussed in the paper.

In the light of the above, the paper will analyze novelties introduced by the 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[9] (hereinafter: Directive Proposal). The potential of the Directive Proposal in eliminating obstacles to the effective cross-border protection of collective interests of consumers, especially in regard to the issues such as position of the plaintiff (members of the group), jurisdiction and recognition and enforcement of judgments delivered in other Member States will be discussed. It will conclude with the evaluation of the legislative approach chosen by the European Commission (hereinafter: EC) which failed to address issues of international jurisdiction, applicable law and recognition and enforcement of judgments in other Member States[10], which already provoked resistance and criticism.[11] The significance of providing for such rules was emphasized by the Advocate General Bobek (hereinafter: AG Bobek) in case *Maximilian Schrems v Facebook Ireland Limited*[12], when he indirectly called for clarifications from the policymaker on this aspect and highlighted that 'the issue is too delicate and complex. It is in need of comprehensive legislation, not an isolated judicial intervention within a related but somewhat remote legislative instrument that is clearly unfit for that purpose'.[13] The question whether providing for key procedural elements of the future representative action for injunctive and compensatory relief while leaving much leeway to the national legislator to shape final procedural solutions[14] will result in the intended effect will also be elaborated in detail. The 'procedural autonomy' of the Member States warrants such legislative approach since the authority of the EU to introduce procedural measures stays at the borders of the Mem-

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9 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, COM(2018) 184 final, 11.4.2018.

10 Recital 9 of the Preamble Directive Proposal

11 However, the draft Directive once again fails to clearly solve the issue of private international law rules applicable for the resolution of mass cases, in particular rules concerning jurisdiction, recognition and enforcement of judgements and applicable law. Biard, A., *Collective redress in the EU: a rainbow behind the clouds?* ERA Forum, *Vol.* 19, Issue 2, 2018, p. 189–204, pp. 201

12 CJEU, C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37

13 Opinion of Advocate General Bobek in case C-498/16 Schrems v Facebook Ireland Ltd, 14 November 2016, EU:C:2017:863, para. 123

14 Directive Proposal, Context of the proposal, pp. 4

ber States autonomy to independently shape their procedural law.[15] The Directive Proposal is based on Art 114 TFEU (Lisbon) and is intended to contribute to the establishment and functioning of the single European market by providing for a high level of consumer protection. Since the Proposal is delivered as a Directive and at the same time should provide for national and cross-border dispute resolution schemes[16], the legitimacy and the limits of the authority of the EU can be questioned.[17] Under presumption that it is a minimum harmonisation directive[18], allowing Member States to make the procedure more favourable to consumers and to maintain their own systems, some critics warn that this might lead to significant variation in how the representative action operates in different national systems and at cross-border level.[19] In this sense, attention should be given to concerns that the heterogeneity of national solutions might reduce efficiency of the future Directive in providing protection of collective interests, in both national and cross-border context.[20]

2. THE POSITION OF THE PLAINTIFF

Regulating the position of the plaintiff in collective redress proceedings is complex due to the search for the adequate representative of the interests of the members of the group. The barriers for initiating individual proceedings which cause rational apathy, such as the duration, costs and fear of unequal treatment of the plaintiff were all taken into account by national legislators in designating qualified entities for initiating collective redress proceedings. Along with the open issues attached to the designation of qualified entities in collective redress proceedings, it is neces-

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15 See Poretti, P., *Postulati prava EU u građanskom parničnom postupku – Očekivanja nasuprot realnosti*, Yearbook of the Croatian Academy of Legal Sciences (to be published), pp. 1-2

16 See Recital 8 of the Preamble Directive Proposal

17 See Krans, B., *EU Law and National Civil Procedure*, European Review of Private Law, *Vol.* 4, 2015, p. 567–588, pp. 569-571.; van Duin, A., *Metamorphosis? The role of Article 47 of the EU Charter of Fundamental Rights in cases concerning national remedies and procedures under Directive 93/13/EC*, Amsterdam Law School Legal Studies Research Paper No. 2017-37; p. 1-16; Kruger, T., *The Disorderly Infiltration of EU Law in Civil Procedure*, Neth Int Law Rev, *Vol.* 63, 2016, p. 1–22

18 See wording of Art 1/2 Directive Proposal

19 Class and Group Actions 2019|EU Developments in Relation to Collective Redress [ttps://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/eu-developments-in-relation-to-collective-redressg Accessed 04.03.2019. (hereinafter: Class and Group Actions 2019)

20 See The European Consumer Association for instance views it as 'only a first step but not a fully-fledged collective redress scheme across the EU'. In particular, it feared that 'Member States will be given too much discretion to decide which cases are fit for a collective redress procedure and which are not'. BEUC, New deal for consumers—clear improvement but not the needed quantum leap, 11 April 2018 [http://www.beuc.eu/publications/%E2%80%98new-deal-consumers%E2%80%99-%E2%80%93-clear-improvement-not-needed-quantum-leap/html] Accessed 06.03.2019

sary to also consider the possibilities which such regulation creates for providing adequate protection of collective interests of consumers. The established differentiation of the group and representative action provides for a division between individual plaintiffs (natural persons) who are joined in order to obtain protection of their individual interests and consumer organisations or other entities qualified to represent interests of members of a group of consumers. This is especially obvious in legal system where a redress order is available in collective consumer redress procedures. A group action is brought by an individual plaintiff who represents his own interests as well as interests of the members of the group. In such a case, the plaintiff is identified without difficulty. When a representative action is brought, a qualified entity such as a consumer organization or an independent entity represents interests of members of the group, without their active participation in proceedings. These discrepancies in the rules in collective redress proceedings of different Member States create obstacles in regard to the recognition and enforcement of judgments in the Brussels I bis regime. Alongside relevant legal theory, this view was also confirmed by the CJEU in *Schrems case*.[21] The EC first attempted to resolve these issues by introducing the Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[22] (hereinafter: EC Recommendation). As the Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[23] has shown, Member States failed to make efforts and follow the EC Recommendation regarding removal of the existing obstacles to effective national and cross-border collective redress outside the existing legislation for implementation of the Injunctions Directive. In the context of cross-border or even EU-wide infringements, this could lead to different results depending on the Member State where judgments will be rendered. This situation could incentivise forum shopping, where, in a case of a clear cross-border nature, potential claimants will address their claim where the possibility for success seems higher. In

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21 Fairgrieve, D., *The impact of the Brussels I enforcement and recognition rules on collective actions*, in: Fairgrieve, D.; Lein, E. (eds.), Extraterritoriality and Collective Redress, Oxford University Press, 2012, p. 171-189

22 Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the member States concerning violations of rights granted under Union Law, OJ L 201/60, 26 July 2013

23 Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU 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

addition, other risks were identified, such as the risk of double compensation or, indeed, of conflicting decisions.[24]

It is argued that the Directive Proposal seems to be able to improve the ruling of the legal standing, as it includes *public bodies* and *ad hoc organisations* which are not entitled to bring forth an action in some Member States, like France. [25] The validity of the argument can best be evaluated if provisions of the Proposal are compared to the rules on standing as provided under EC Recommendation and in the national legal systems of Member States. Along with the general requirement that legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities, under the EC Recommendation, the representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner (arg ex Recital 18 of the Preamble). Point 4 of the EC Recommendation specifies that the conditions should include at least the following requirements: (a) the entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

Would introduction of additional criteria such as the organizational capacities of qualified entities or a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought insure a higher level of representativeness of the qualified entities? The results of the research into national legal systems show that in the majority of Member States the only criteria applied are the legitimate interest and the non-profit character of qualified entities (organizations and entities).[26] As it follows from the position of the Member States, the standard of

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[24] Finally, two respondents from AT expressed concern that the protective consumer jurisdiction rule of the Brussels I bis Regulation do not apply to representative entities. *Ibid*, p. 11

[25] Collective redress in the Member States of the European Union, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union PE 608.829, 2018, p. 81. (hereinafter: Collective redress in the Member States of the EU)

[26] In some cases, namely in the Austrian model of group litigation, there are no specific provisions or restrictions as to standing. Hence, the Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the entity and the rights granted under Union law, sufficient capacities) are currently not met. In some other States, legal standing is restricted to a slate of legal persons. Among these, Belgium offers legal standing to private legal persons (such as consumer organisations and associations with a corporate purpose directed at collective damages) and public

representativeness should not be tightened. Namely, none of the Member States decided to introduce in the course of EC Recommendation implementation process. It seems that the EC was guided by the Member States' approach and introduced solely the standards of proper establishment, non-profit character and a legitimate interest in ensuring compliance with the relevant EU law (arg ex Art 4/1 Directive Proposal). Also, concerns have been raised that regardless of the requirement that Member States, on the regular basis, assess whether the qualified entity continues to comply with the minimum criteria, the Directive Proposal is not clear on the implications of a qualified entity losing its designated status during ongoing litigation.[27] If one takes into account that the implications of a party losing its status are usually provided under the civil procedural laws of Member States, it does not seem crucial to include similar provisions in the Directive Proposal.

However, the freedom left to Member States to set rules specifying which qualified entities may seek all of the measures (both injunctive and compensatory redress) and which qualified entities may seek only one or more of these measures might lead to potential problems (arg. *ex* Art 4/4 Directive Proposal). Again, depending on the limits set by the national legislator to certain qualified entities, this might lead to differences in the potential for development of the jurisprudence in Member States. Which qualified entities will be designated to represent collective consumer interests, in which type of procedure and to which extent will depend on the choices of the national legislator. For Croatia, a clarification that Member States should empower public authorities to bring representative actions, in addition, or as an alternative, as provided under EC Recommendation, would be welcome (arg. *ex* p. 7 EC Recommendation). Currently, under the Croatian Consumer Protection Act[28] (hereinafter: CPA) in relation to the Decision on entities and persons entitled to initiate proceedings for collective protection of consumer

persons (the Federal Ombudsman), whereas France limits the legal standing to certified associations, except for health group actions where an *ad hoc* certification can be conferred, and unions amongst other persons having standing to sue, according to the subject-matter. Between the two systems, Bulgaria, in coherence with the horizontal approach recognises standing to any harmed person or organisation established with purpose to defend the interests allegedly infringed. Croatia offers legal standing to (legal) entities and persons with justified interest in consumer collective redress, such as consumer organisations and public authorities (arg. *ex* 107/1 CPA). See Study on the State of Collective Redress in the EU, *op.cit.,* note 3., p. 11-13

27 Class and Group Actions 2019, *op. cit.,* note 19. In comparison, the Directive Proposal in p. 5 sets out a request that the Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met

28 Consumer Protection Act, Official Gazette No. 41/14, 110/15, 14/19

interests[29] (hereinafter: Decision) several ministries (as state bodies) are qualified to initiate consumer collective redress proceedings. In contrast, only two consumer organisation alliances were considered eligible to represent collective consumer interests (arg. ex Art.107/3 CPA). The inaction of ministries as qualified entities, and the questionable level of their independency are often repeated arguments in the discussion on the (in)adequacy of Croatian legislation on collective redress.[30] In this sense, implementation of the EC Recommendation would have brought the desired 'hierarchy' between consumer organisations and ministries as qualified entities, and possibly, even amendments to the current provisions. The Directive Proposal fails to uphold this idea, and requires Member States only to ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entities (arg. ex Art 4/3 Directive Proposal).

Provision of Art 4/3 Directive Proposal is considered as capable of strengthening cross-border protection, as it provides that international consumer organisations are eligible to be qualified by the Member States.[31] Under Croatian law, the availability of cross-border consumer collective redress exists only under provisions of CPA (arg ex Art 107/3-7 CPA). However, there is no record of cross-border collective redress proceedings against traders with a seat in Croatia.[32] The fact that the legal drafting of provisions on cross-border collective redress in the CPA is imperfect and imprecise should be taken into account in the discussion on the possible reasons for the lack of relevant case law.[33] Although the possibility for the Member States to designate consumer organisations that represent members from more

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[29] Decision on entities and persons entitled to initiate proceedings for collective protection of consumer interests, Official Gazette No. 105/14 (Odluka o određivanju tijela i osoba ovlaštenih za pokretanje postupaka za zaštitu kolektivnih interesa potrošača), 29 August, 2014

[30] Uzelac A. *Why no Class Actions in Europe? A View from the Side of Dysfunctional Legal Systems,* in: Harsági, V.; van Rhee, C.H. (eds.), Multi-Party Redress Mechanisms in Europe: Squeking Mice? Cambridge - Antwerp – Portland, Intersentia, 2014, p. 53-74, pp. 59. Study on the State of Collective Redress in the EU, *op. cit.* note 3, p. 472

[31] Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 81

[32] European Commission, Evaluation Study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, JUST/2014/RCON/PR/CIVI/0082, European Union, 2017, p. 461(hereinafter: the Evaluation Study of EU consumer law)

[33] The provision of Art 107/5 CPA is in accordance with the rules on jurisdiction (Art 4, the domicile of the defendant) of the Brussels I bis Regulation, and provides for a possibility for the consumer organisations from other Member States to initiate proceedings against traders in Croatia (as provided in Art 106/1 CPA). At the same time, the possibility provided under Art 107/6 CPA for the proceedings provided under Art 5 to be initiated against a trader with the seat outside Croatia and whose actions infringe Acts provided in Art 106/1 CPA, is not clear. The former provision contains no regulation of proceedings. Additionally, it is uncertain whether the said proceedings could be initiated against a foreign or Croatian trader with a seat outside Croatia and who would be entitled to initiate it

than one Member State as qualified entities is seen as progress towards effective cross-border collective redress, its effect will depend on the will of Member States to include it in their national legislation. This solution has certain resemblance to the BEUC's proposal for strengthening cross-border consumer collective redress according to which 'a further group of associations that have standing in all cases within the European Union could be established. Such associations could be registered at EU level under certain uniform requirements. For example, one could use the three requirements with a view to their EU-wide application:

The Commission shall provide a list of EU-qualified entities that have standing to bring actions in all Member States within the scope of this [Directive/Regulation] if there is sufficient relationship between the alleged violation and the objectives of the entity. Any legal person may apply to the Commission for inclusion in this list and will be included if it has legal personality under the laws of a Member State, and has a non-profit making character.'[34] This proposal provides a more detailed approach in ensuring an EU wide enforcement layer that would guarantee at least the possibility of an intervention by such EU-wide entities, if the national systems do not provide sufficient enforcement in a particular case.[35] It can only be speculated where the EC's reason for not considering this proposal lie and whether its non-acceptance signals that it goes beyond the limits of the EU's authority to impose solutions in the field of procedural law.[36]

3. JURISDICTION

The jurisdiction issue in the context of collective cross-border litigation has been widely discussed in the legal literature.[37] The general view seems to be that the current instruments do not provide for adequate solutions. Although the Injunctions

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34 Rott, P.; Halfmeier, A., *Reform of the Injunctions Directive and compensation for consumers*, Study commissioned by BEUC, Ref: BEUC-X-2018-022 – March 2018, p. 12

35 *Ibid*.

36 A similar view is already expressed in a Study assessing the current state of play of collective redress commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs that procedural law is such a delicate issue, and because it is sphere of competence which Member States are not ready to share with the EU, the instrument should not detail the course of the proceedings. The details of the proceedings should be left for Member States to determine. Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 69

37 See Lein, E., *Cross-border collective redress and jurisdiction under Brussels I: A mismatch*, in: Fairgrieve, D.; Lein, E. (eds.), Extraterritoriality and Collective Redress, Oxford University Press, 2012, p. 129-142; Stadler, A., *Die grenzüberschreitende Durchsetzbarkeit von Gruppenklagen*, in: Casper, M. *et al.* (eds.), Auf dem Weg zu einer europäischen Sammelklage?, Sellier, 2019, pp. 149-168; Stuyck, J., *Class Actions in Europe? To Opt-in or to Opt-out that is the question?*, European Business Law Review, *Vol*. 20, Issue 4, 2009, pp. 483–505

Directive was supposed to enable qualified entities to seek an injunction in front of the court of another Member State, in reality it was applied seldom.[38] Provisions of consumer collective cross-border litigation, which were created in the process of implementation of Injunctions Directive, follow the approach of the most Member States, which do not provide specific provisions on jurisdiction.[39] A sort of an attempt was made by the Croatian legislator to introduce provisions on jurisdiction in collective cross-border litigation (arg. ex Art 110/3 CPA). In consumer collective redress proceedings initiated against a person which does not have general territorial jurisdiction in Croatia, commercial court at the place where provisions of Article 106/1 CPA have been or might have been infringed, that is, commercial court at the place where harmful consequences or damages have occurred has territorial jurisdiction (arg. ex Art 110/3 CPA). This is a problematic provision. There is no general territorial jurisdiction *of a person* under Croatian law, and hence, this is a mistake. Instead of general territorial jurisdiction *of a person* it should be set out that 'in cases in which under the ordinary rules on jurisdiction there is no general territorial jurisdiction *of a Croatian court* over a person'. Croatian legislator departed from the general *actor sequitur forum rei* rule and provided a special jurisdiction ground which not only allows for a possibility of a legally allowed 'forum shopping' but at the same time determines both 'international' and 'territorial' jurisdiction.[40] Namely, as the CJEU concluded in relation to provision 7/2 Brussels I bis Regulation (which corresponds to the provision of Art 110/3 CPA) it is either the place where the harmful event giving rise to the damage occurred or the place where the actual damage occurred[41], and the plaintiff is free to decide between the options. The fact that it aims at establishing jurisdiction of a court which has a particularly close connecting factor or link between the dispute and the court called upon to hear and determine the case[42], can be offered as an argument in favour of the rule. However, the provision of Art 7/2 Brussels I bis Regulation which also gives an option to sue the defendant in the courts for the place where the harmful event occurred, was criticised for its potential to prompt parallel proceedings. Multiple victims with damages in different Member States

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38 Proposal for a Directive on Representative Action, BEUC position paper, Ref: BEUC-X-2018-09423/10/2018, p. 10, [https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf] Accessed 03.03.2019 (hereinafter: BEUC position paper)

39 An exception is the German Capital Market Model Case Act of 2005 which provides for exclusive jurisdiction at the seat of the issuer who disseminated misleading information (§ 32b ZPO). Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 94

40 Dickinson, A.; Lein, E., *The Brussels I Regulation Recast*, Oxford University Press, 2015, p. 132

41 CJEU, C-21/76, *Handelskwekerij G.J. Bier BV v Mines de potasse d' Alsace SA*, ECLI:EU:C:1976:166, 30 November 1976

42 Recital 16 of the Preamble Brussels I bis Regulation. See Bosters, T., *Collective Redress and Private International Law in the EU*, Springer, 2017, p. 229.239.

cannot consolidate their claims before one single court under these provisions. On the contrary, it allows the victims to sue the defendant in parallel proceedings in different Member States and each decision to be rendered will compensate the sole damage suffered locally.[43] As to the place where the harmful event was committed, it coincided in *Mines de potasse d'Alsace* with the defendant's seat, leaving eventually no choice for the plaintiffs. Such an outcome is not exceptional, because in practice the place of the causal event frequently coincides with the domicile of the defendant. Although it allows the consolidation of multiple claims, it does not provide the plaintiffs with any alternative to Art 4.[44] Also, as *eDate Advertising GmbH and Olivier Martinez/Robert Martinez*[45]case revealed, if the criteria of the 'centre of interest' of the group of harmed plaintiffs is invoked, there might be a problem in detecting where this centre lies. The habitual residence of the harmed plaintiffs comes to mind here, but it is questionable whether it would be an optimal choice. As the CJEU underlines, a person may have his centre of interest in the Member States in which he does not habitually reside, in so far as their factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with this State.[46]

Further limitation to initiating collective cross-border proceedings stems from the application of the Brussels I bis Regulation rules on establishing jurisdiction and recognition and enforcement of judgments delivered in Member States. There were certain expectations that in the process of structuring the Recast, specific rules on collective cross-border litigation will be introduced, including rules on jurisdiction. These expectations have not been met.[47] Hence, there is a prevailing view in the legal literature, which is also supported by the research into the relevant case-law, that the application of the rules on jurisdiction of the Brussels I bis Regulation are inadequate and further exacerbate the conduct of these proceedings.[48] The specific characteristics of the collective redress proceedings in which a qualified entity initiates proceedings, representing the interests of the members of the group, allows for limited application of the existing rules of the Brussels I bis Regulation. Upon examination of the applicability of rules provided under Brussels I bis Regulation, it was detected that the general jurisdictional rule

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43 See Danov, M., *The Brussels I Regulation: cross-border collective redress proceedings and judgments,* Journal of Private International Law, *Vol.* 6, 2010, pp. 359-393, p. 368

44 Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 98; Lein, *op. cit.,* note 37, p. 134

45 CJEU, C-509/09 and C-161/10, *eDate Advertising GmbH and Olivier Martinez/Robert Martinez*, ECLI:EU:C:2011:192, 29 March 2011

46 C-509/09 i C-161/10, *eDate Advertising GmbH and Olivier Martinez/Robert Martinez,* p. 49

47 Bosters, *op. cit.,* note 42, p. 3

48 *Ibid*., p. 235-239; Lein, *op. cit.,* note 37, p. 141; Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 97

(domicile of the defendant) laid out in Art 4 Brussels I bis Regulation is still the most appropriate ground for jurisdiction in collective cross-border proceedings. It enables persons domiciled in a Member State, regardless of their nationality, to sue before courts of that particular Member State. Besides the obvious advantage for the defendant, who is considered as a weaker party in individual proceedings, to access court without difficulty, there are certain disadvantages for the consumers as plaintiffs, as actual weaker parties in collective cross-border litigation.[49] Proceedings in a foreign country induce additional costs and risks and can therefore have a deterrent effect on plaintiffs.[50] Due to the existing divergences in the functionality of the national systems, this rule will be adequately applied only in Member States which do provide for effective collective redress mechanisms.[51] Given the above, the fact that the Directive Proposal makes no attempt to introduce specialized solutions of the jurisdictional issue is criticised.[52] It is therefore important to examine the possibilities to bring a representative action in collective cross-border proceedings set out in the Directive Proposal in the jurisdiction established under Brussels I bis Regulation, as provided under Art 2/3 Directive Proposal.

The Directive Proposal might not set out jurisdictional rules, but it does aim at providing for more coherence between the mechanisms of collective redress. In this sense, the concern that the application of Art 4 Brussels I bis Regulation provides a safe-haven in Member States which do not provide for effective collective redress mechanisms might be mitigated if not eliminated completely.[53] Although the provision according to which Member States with the option to designate as qualified entities consumer organisations which represent members from more than one Member State (arg ex Art 4/3 Directive Proposal) was interpreted as an attempt to facilitate cross-border collective redress[54], without eliminating the obstacles created by the application of Brussels I bis Regulation, a significant change cannot be accomplished. The theoretical discussions so far ruled out the possibility to rely on jurisdiction ground other than as provided under Art 4 and 7/2 Brussels I bis Regulation. This was also confirmed by the CJEU. So, in the light of the possibility provided under Proposal Directive for a qualified entity to bring a representative action seeking injunction and/or compensatory redress it is interesting

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49 Usually, the defendant of a collective action is in an economically strong position. Lein, *op. cit.,* note 37, p. 133. See Danov, *op. cit*., note 43, p. 365

50 Collective redress in the Member States of the EU, *op. cit.,* note 25, 97

51 See Nuyts, A., *The Consolidation of Collective Claims Under Brussels I,* in: Nuyts; Hatzimihail (eds.), Cross-Border Class Actions. The European Way, Selp, 2014, p. 69 f. (72)

52 BEUC position paper, *op. cit.,* note 38, p. 10

53 Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 97; Stadler, *op. cit.,* note 37, p.159

54 BEUC position paper, *op. cit.,* note 38, p. 10

to analyse a potential application of Art 18 Brussels I bis Regulation under which the court of the domicile of the consumer has jurisdiction in the matter. There are advantages to this rule, which gives the option to the consumer to either sue in the State in which a defendant is domiciled or in the courts for the place of his own domicile (arg. ex Art 18/1 Brussels I bis Regulation). It ensures *access to justice* for consumers by providing an accessible *forum* to bring proceedings in disputes of (usually) low value, with limited resources. As some authors emphasize, there will probably be no difficulties in recognition and enforcement of the decision reached in the consumer's domicile in the Member State of the trader's domicile. An additional advantage can be seen in the fact that the court of the consumer's domicile will often be in the position to decide the case on the basis of the law of the forum.[55]

However, in its jurisprudence CJEU confirmed that jurisdiction ground provided in Art 16/1 Brussels Regulation (now Art 18/1 Brussels I bis Regulation) cannot be applied in collective redress or injunctive relief proceedings due to the fact that a consumer association or a legal person who acts as an assignee of the right of a consumer cannot be regarded as consumer within the meaning of the Brussels regime. This ground is unavailable even in cases where the consumer organization seeks injunction *in abstracto* (without acting on behalf of identified group of consumers). Hence, it is safe to conclude that in proceedings pursuant to Directive Proposal, where a consumer organization or entity is entitled to initiate proceedings, consumer's domicile would not be an available head of jurisdiction. Even if it were made available, it could not provide a viable solution in situations where claims are non-contractual in nature.

Often, the initiative for the introduction of the Directive Proposal under the *New deal for consumers* package is associated to the ambition of the EC to provide for an effective mechanisms for resolving mass damages cases such as *Dieselgate*[56]. The conducted analysis, however, has shown that in regard to producing an adequate solution for establishing jurisdiction in collective cross-border litigation the (potentially) new piece of legislation will not be able to provide improvement, if in parallel, there is no support for the necessary amendments to the Brussels I bis Regulation.

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55 Dickinson; Lein, *op. cit,* note 40, p. 231

56 For instance, in the *Dieselgate* case, if the consumers bringing an action against the German manufacturer of the defective product purchased their car from an intermediary seller, their claim against the manufacturer is non-contractual. It can only fall under Art 7(2) combined with Art 4 Brussels I bis Regulation (see *Jakob Handte* decision of the CJEU)

4. TYPES OF LEGAL PROTECTION

Although in its first part, in setting out the representative action on injunctions the Directive Proposal relied on the solutions under the Injunctions Directive, it also provides for some novel solutions in regard to the types of legal protection that may be sought. Qualified entities are entitled to seek injunction order establishing that the practice constitutes an infringement of law, and if necessary, stopping the practice, or, if the practice has not yet been carried out, but is imminent, prohibiting the practice (arg ex Art 5/2b). They are also entitled to seek interim measures for stopping the practice, or prohibiting such imminent practice (arg. ex Art 5/2a Directive Proposal). However, qualified entities may also bring representative actions seeking redress order on the basis of any final decision establishing that a practice constitutes an infringement of Union law harming collective interests of consumers, including a final injunction order (arg. ex Art 5/3). By introducing the possibility of seeking a redress order, the Proposal goes beyond merely providing for abstract protection (which is preventive in nature) and ensures the repair of the harm done to individual consumer interests. By way of the redress order consumers may obtain compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (arg ex Art 6/1 Directive Proposal). It is not completely clear how this type of legal protection should be obtained. If in order to seek compensation a qualified entity should submit a final judgment to the court, establishing that a practice constitutes an infringement of Union law, it seems that it will take years before the redress proceedings could be initiated. From the perspective of the desired efficiency of the redress mechanisms provided under the Directive Proposal, it is unclear why the EC opted for this solution. Namely, under Croatian procedural law, when deciding on a (condemnatory judgment) order, the court also issues a declaratory preamble in which it establishes that the rights in respect of which the action is brought have been violated. Hence, there is no need for a separate declaratory judgment establishing violation of the rights. It seems that in the course of the regulatory activity, efforts have been made in order to mitigate the inadequacy of the provided text, and an additional provision has been introduced which allows qualified entities to seek injunction and redress order in a single representative action (arg ex Art 5/4 Directive Proposal). Given that the possibility to seek injunction and compensatory redress in the same proceedings was introduced, it remains to be seen to which extent the previously shaped provisions allowing qualified entities to bring successive actions will be applied.

It is necessary to mention that some authors are of the opinion that the introduction of compensatory redress through a court based model of awarding damages is a completely wrong approach and it might result in even more ineffective collective redress procedures. Instead, regulatory redress and consumer ombudsmen as

ADR entities are suggested as more preferable choices. Although some empirical evidence was offered in support of these ideas, it seems that the EC did not find them convincing.[57]

A possibility for a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law, in cases where the quantification of individual redress would prove to be complex (arg. ex Art 6/2) is problematic. This provision seems to suggest that a kind of a fallback was sought, in order for the EC not to have to rely solely on provisions which set out a mechanism for compensatory redress in regard to which there is still no agreement among Member States. Politically, this comes as no surprise, if one takes into account the persistent resistance of some Member States against introduction of an EU-wide compensatory collective redress mechanism. Also, complexity of providing a mechanism which would reconcile differing characteristics pertaining to national mechanisms of Member States and offer an efficient mechanism for compensatory redress should not be disregarded. Legally, the shift made by the EC is unclear. It not only derogates the significance of other novel solutions provided under the Directive Proposal, but it also allows Member States to keep their existing solutions providing only for an action seeking injunction redress and a follow-on individual action seeking compensation, which did not prove to be efficient in the past.[58] Under such solutions, in a proceedings initiated by a follow-on action consumers have to prove both their individual damage and the link between the illegal behaviour and the damage. Both of those elements are likely to require expensive legal, technical or expert opinions, which are be huge barriers for individuals.[59]

The argumentation of critics who question the complexity referred to in Art 6/2 Directive Proposal seems convincing. It is true that complexity of damage calculation is a regular element of lawsuits, especially in collective redress cases. Also, under this provision an entire range of redress cases, and in particular the ones where collective redress is most needed, such as for instance *Dieselgate*, mis-selling of various financial services or product liability cases would be excluded. Hence, it is possible to agree that the availability of derogation in those cases impedes the entire idea of collective redress.[60] However, due to its (probable) political back-

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57 See Hodges, H.; Voet, S., *Delivering collective redress: Response to the European Commission's Inception Impact Assessment 'A New Deal for Consumers – revision of the Injunctions Directive' Ares(2017)5324969 – 31/10/2017*, [https://www.law.ox.ac.uk/sites/files/oxlaw/1710_policy_on_collective_redress_3.pdf] Accessed 10.03.2019

58 See Study on the State of Collective Redress in the EU, Report Croatia, *op. cit.*, note 3, p. 458-494

59 BEUC, position paper, *op. cit.*, note 38, p. 4

60 *Ibid*.

ground, it seems unlikely that requests for its removal from the Directive Proposal would find approval.[61] A further novelty under the Directive Proposal enables redress in cases of small damages so that where consumers suffered a small amount of loss and it would be disproportionate to distribute the redress to them, the redress sought is directed to a public purpose serving the collective interests of consumers (arg ex Art 6/3b). There is strong support for the introduction of such a possibility in the legal literature (including Croatian)[62], and some Member States already posses similar mechanisms.[63] This probably motivated the EC to include a mechanism enabling qualified entities to claim damages even in a situation of a rational apathy of harmed consumers and to provide for penalisation of the infringer in such a manner.[64] The only objection is that the Directive Proposal is silent on the distribution of the acquired damages, so addressing the issue will be left to Member States.[65]

Some authors call for a more detailed approach which would clarify that this would be an available route in small amount cases only after there was an investigation into whether there is a possibility to direct the redress to individual consumers, while collective redress is a mechanism first and foremost for compensating consumers. In situations where it is too disproportionate or impossible to directly compensate consumers, the judge or the authority should be allowed to estimate the aggregated amount of the compensation/amount of profit from the infringement, as the exact calculation will not always be possible. It should be very clearly defined where to the collected funds go and for what purpose. Even if this type of action should not require a prior mandate from consumers, the court or the authority should nevertheless ensure that there is sufficient information and time for consumers to 'opt out', if they feel they do not want their part of compensation to go to a public purpose or are thinking of pursuing their rights via an individual action.[66] However, such a detailed approach seems to go against the standard approach in the EU legal drafting. So, any issues or legal voids steming from the lack of detailed legal drafting should probably be left for the jurisprudence to resolve.

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61 *Ibid*.

62 See Poretti, P., *Kolektivna pravna zaštita u parničnom postupku*, doctoral thesis, Zagreb, 2014, p. 613

63 See Study on the State of Collective Redress in the EU, for Croatia, *op. cit*., note 3, p. 598-609

64 These situations are known as "low-value cases" or "negative expected value-suits" in the class action's jargon, where consumers have suffered such a *minimal loss* and as such, it would be *disproportionate* to distribute the redress back to them. Collective redress in the Member States of the EU, *op. cit.,* note 25, p.73

65 However, as mass harm situations prevail in B2C litigation, it would, without a doubt, have been preferable to be more explicit when it comes to detailing the options given to the courts when the damages awarded cannot be distributed directly to individual class members. *Ibid*., p. 74

66 BEUC, position paper, *op. cit*., note 38, p. 5

5. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

In regard to efficiency of collective redress proceedings in providing legal protection of the collective interests of consumers, addressing difficulties connected to recognition and enforcement of a judgment in another Member State is equally important for plaintiffs and defendants.[67] The finality (*res judicata*) of the judgment establishing that a practice constitutes an infringement of EU law as well as trader's liability towards the consumers harmed by an infringement for the plaintiff enables the plaintiff to require recognition and enforcement in another Member State. It also guarantees legal certainty to the defendant that an action will not be brought against him in the same matter. Regardless of the expectations that a separate head will be provided for recognition and enforcement[68] of judgments brought in a collective cross-border redress proceedings, under current legislation Art 36 Brussels I bis Regulation applies, which provides for automatic recognition, without any special procedure being required.[69] If grounds for refusal of the recognition of the judgments are satisfied under Art 45, the courts of the Member States will refuse to recognize (or enforce) a Brussels I bis judgment delivered in collective redress proceedings. Two possible grounds for non-recognition have been repeatedly emphasized in the legal literature, the public policy (*ordre public*) ground (arg. ex Art 45/1a) and the default of appearance, but of the plaintiff (*opt-out*), instead of the defendant, which is typical for individual proceedings (arg. ex Art 45/1b).[70] In regard to the public policy, which is to be determined under the law of the Member State within which recognition is sought imposes a very high standard for non-recognition. Thus, recourse to public policy exception is rarely

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67 The issue of recognition and enforcement of judgements rendered in third countries will not be considered. There are no harmonized rules at EU level for recognition and enforcement of judgments given in third States, so each Member State applies its national rules. The judgment given in a third State has to meet the specific (more or less liberal) requirements of all the States in which recognition is sought. This is a major concern especially for US class actions involving claimants from different Member States. Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 104

68 The essential issue is that of recognition rather than enforcement in collective redress proceedings, as the recognition of a judgment confers on it the authority and effectiveness which is possessed in its state of origin. Fairgrieve, *op. cit.,* note 21, p. 172

69 Due to the large differences of collective redress mechanisms in Member States, exequatur was supposed to be retained for judgments in proceedings brought by a group of claimants, a representative entity or a body acting in the public interest and which concern the compensation of harm caused by unlawful business practices to a multitude of claimants. Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final, p. 7

70 Fairgrieve, *op. cit.,* note 21, p. 176-178. Ervo, L., *Opt-In and Opt-Out is In: Dimensions Based on Nordic Options and the Commission's Recommendation,* in: Hess., B.; Bergström, M.; Storskrubb, E. (eds.), EU Civil Justice, Current Issues and Future Outlook, Oxford and Portland, Oregon, 2016, p. 185

successful. As to collective redress proceedings, the prevailing position is that the due process issues (notification, publication) as well as quantification of individual redress are reasons for refusal to recognize foreign judgments based on the public policy ground.[71] As to the procedural guarantee to a fair hearing of the defendant (arg ex Art 45/1b), as confirmed by the CJEU, it ensures that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seized.[72] The provision of Art 45/1b cannot be directly applied to the position of the members of the group as plaintiffs in collective redress proceedings. However, it remains open whether the fact that the members were not participating in the group but might be encompassed automatically (opt-out), could provide a ground for non-recognition.[73] A possible solution, which would allow for such judgments to be recognized in other Member States, can be found in the *Maronier*[74] approach. It would be based on a strong presumption of the recognising court 'that the procedures of other signatories of the Human Rights Convention are compliant with Article 6'.[75]

In the whole, if these obstacles to recognition and enforcement are not adequately addressed, the State of origin may hesitate to certify as members of the group claimants from States in which recognition of the future judgment would be denied.[76]

It seems that legal theorists agree that the Directive on representative action should not contain separate provisions on cross-border issues in collective redress proceedings. This is all the more reason why it should be examined whether the judgment delivered in collective proceedings provided under the Directive Proposal could be recognized and enforced in the current Brussels I bis regime.

In regard to the public policy ground, the most obvious seems to be the objection of non-participation of members of the group as plaintiffs. Here, a differentiation should be made between a representative action seeking protection *in abstracto* (arg ex Art 5/2) and a representative action seeking a redress order (arg ex Art 6/1). In the first case, there should be no obstacles to recognition, since Art 5/2 sets out that a qualified entity shall not have to obtain the mandate of the indi-

71 Fairgrieve, *op. cit.,* note 21, p. 185; Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 104

72 Case C-78/95, Hendrikman and Feyen v Magenta Druck & Verlag GmbH [1996] ECR-I-04943, para 15

73 Collective redress in the Member States of the EU, *op. cit.,* note 25, p.105

74 *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB [27]

75 Danov, *op. cit.*, note 43, p. 391

76 *Ibid.*

vidual consumers concerned, since it only seeks injunction of the practice which constitutes an infringement of law. In the second case, it is left to the disposition of a Member State whether it will require the mandate of the individual consumer concerned (arg ex Art 6/1 in relation to Art 5/3). Additionally, Art 6/1.2 sets out the obligation of qualified entities to provide sufficient information (as required under national law) to support the action, including the description of the consumers concerned by the action and the questions of fact and law. This is comparable to the far more detailed and direct provisions of the EC Recommendation on the *opt-in* system, which required the claimant party to be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle) (arg ex p 21 EC Recommendation). It might seem as that the Directive Proposal left narrow space for the critics of collective redress which were in a habit of justifying their disapproval merely on the fact that *opt-out* principle, which is common in the American - style class action does not satisfy due process requirements and is contrary to public policy of Member States. This would also mean that there is an open path to recognition of foreign judgments brought in collective cross-border redress proceedings. But, since the EC decided to allow Member States to chose whether there will be an obligation for the qualified entities to require the mandate of individual consumers concerned in compensatory collective redress proceedings, again there is a risk of different interpretation in Member States. Since the Directive Proposal also allows for Member States to withdraw from providing compensatory redress order by way of derogation from Art 6/1 Directive Proposal under certain conditions, it may be argued that a very large margin of appreciation is left to Member States in estimating which type of mechanisms it deems appropriate to introduce. The obligation of Member States to provide for compensatory redress is only set out in situations where consumers are identifiable and have suffered comparable harm or the consumers suffered a small amount of loss (but then the redress is directed to public purpose)(arg ex Art 6/3a and b).

An infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before the national court (arg ex Art 10/1). A final decision taken in another Member State is considered by their national court or administrative authorities as a rebuttable presumption that an infringement has occurred. This might seem to suggest an asymmetry in regard to the acceptance of the effect of a national and a foreign judgment. Upon close examination it becomes obvious that this solution is reconciled with Art 45 Brussels

I bis Regulation in that it allows non-recognition of a foreign judgment if either of the requirements under the provision is satisfied.

Directive Proposal also removes doubts to what extent settlements obtained in collective proceedings can be regarded as judgments and thus circulate under the same conditions. As Art 8/1 Directive Proposal provides, if a settlement forms part of a court-supervised procedure and is court-approved, it should be considered as a judgment and circulate as such, at least where the court exercised a judicial function beyond the mere certification of a private compromise. Although Member States are free to choose whether they will provide for such a possibility in their national legislation, it does not seem likely that there will be any resistance from the Member States (arg ex Art 8/1). In the light of the ambition to smoothen the recognition of a foreign judgment rendered in collective cross-border redress proceedings, it should be hoped for that this assumption was accurate.

6. CONCLUDING REMARKS

The undertaken analysis of the efforts made in order to resolve issues which affect effective and efficient protection of collective interests of consumers in national and cross-border cases through a modernised legal framework for collective redress, once again demonstrated all of the difficulties of the task undertaken by the EC. There are some promising solutions, which suggest that the EC finally made a choice in regard to the terminology (collective redress, representative action, injunction and compensatory collective redress), qualified entities (consumer organisation, independent public bodies), types of legal protection (protective measures, injunction order, redress order (compensation)) and cross-border collective redress. Although this might not seem as a significant step forward, it will help in harmonising different mechanisms available under the current national law of Member States and providing a more unified approach to collective redress for EU consumers. Namely, the implementation of the Injunctions Directive resulted in various attempts of Member States to provide mechanisms for collective redress, which due to their inconsistency and divergence do not ensure an equal level of protection of collective interest of consumers at national level and hinder cross-border redress.

Still, there is room for further improvements of some solutions provided under the Directive Proposal. Although there was criticism of the term 'representative action' on the account of this expression being reserved for the 'injunctive collective redress' in Members States (that is to say, one of two sorts of collective redress or collective actions), this should not limit its potential.[77] The 'represen-

[77] For the criticism see Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 70

tative action' as introduced under Directive Proposal should be understood and implemented consistently by Member States and its meaning should be interpreted independently of national preconceptions. At the same, providing for a representative action which allows only consumer organisations or independent public bodies to act as qualified entities dissociates collective redress at EU level from the American mechanism of class action. Namely, opponents of introducing a mechanism embracing both types of collective redress often argued that due process requirements are not satisfied under the rules on standing in class action. The most important novelty introduced under the Directive Proposal is allowing for both types of redress, injunctive collective redress and the compensatory collective redress. However, the redaction of these provisions still leaves leeway to Member States to undermine the idea of providing for effective compensatory collective redress. By establishing a link between an injunction and redress order, that is, a final injunction order as a precondition for initiating compensatory proceedings, the Directive Proposal leaves a possibility for postponment of a compensatory redress procedure for several years. There is also an option which allows for Member States to derogate from the collective redress procedures if individual redress is difficult to quantify. Althought there are requirements under which its use would be possible, still the fact that derogation is available under the Directive Proposal will affect its uselfulness. Under no condition can it be argued that the individual redress is more efficient than collective redress, regardless of the complexity of the case. Hence, the underlying reason will have more to do with the fact that the EC wanted to provide at least some flexibility in regard to the obligation of Member States to introduce compensatory collective redress. This was probably necessary in order to ensure a broad consensus among Member States on the issue of compensatory redress. The mechanism which resembles the skimming-off procedure, and is available under the Directive Proposal when the individual damage is to small for the consumer to initiate individual proceedings, is in principle, a welcome novelty. Yet, without a detailed approach, there is room for different interpretation and also implementation of these provisions. More specifically, it is left for the Member States to decide whether there will be a general fund for awarded funds, or they will be addressed to the state budget or a specific purpose (financing of collective redress proceedings). Obviously, depending on the regulatory choices made, it is left to the Member States to encourage or discourage the development of this mechanism in practice.

Finally, it seems that the long-awaited opportunity to address the issues hindering cross-border collective redress has been missed. The only improvements are the possibility of a mutual recognition of the legal standing of qualified entities in one Member State to seek representative action in another Member State and the clari-

fication that the final decision establishing infringement will constitute a rebuttable presumption that the infringement has occurred in a Member State where an action seeking redress is brought. So, without the necessary amendments to the Brussels I bis Regulation and the introduction of specific rules on jurisdiction and recognition and enforcement in collective cross-border redress proceedings, the opportunities for adequate cross-border protection will remain, at best, limited.

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