**Discussion note**

**Representative action: collective interests of consumers**
 **Forum shopping**

‘*Litigation by qualified entities will naturally gravitate – through forum shopping – to the Member States with the most lax restrictions, making the courts of those Member States the de facto arbiters of consumer harm awards for the rest of the EU*’

(US Chamber Institute for Legal Reform, April 24, 2018).

In order to evaluate this criticism concerning ‘most lax restrictions', three matters of law need to be examined:
- jurisdiction and competence of national administrative authorities responsible for imposing penalties for infringements of consumer law;
- substantive law on the basis of which an undertaking’s responsibility is judged;
- procedural law.

In our view, the criticism is unjustified in the light of the Regulations on jurisdiction and on the (substantive) law applicable to contractual obligations (consumer contracts) and to non-contractual obligations (unfair commercial practices, etc.). The Proposal for a Directive does not deal with this, whereas it could lay down specific harmonised provisions for cross-border/pan-European collective actions without these Regulations having to be amended.

1. Jurisdiction

The study ‘Collective redress in the Member States of the EU’ carried out for JURI states: ‘*The general jurisdictional rule designates the courts of the Member State of the defendant’s domicile. It is the only provision of the regulation allowing a consolidation of claims before the courts of one single State’.* The study underlines the fact that this situation *‘provides a considerable procedural advantage for the defendant*’.

We are therefore a long way from ‘*forum shopping*’, which would allow consumer organisations in different countries and even the BEUC – if it is recognised as a qualified entity in one or more Member States – to organise themselves in order to bring the case before a national court whose national rules (procedural and substantive) would be more conducive to winning the case. The Regulation on jurisdiction did not bother with collective actions but only with individual actions. Thus the ECJ judgment in *Schrems* stated that Article 16 of the revised Brussels I Regulation favouring the forum of the consumer in contractual matters, does not apply where there is a ‘*concentration of several claims in the person of a single applicant*’. Collective actions therefore do not benefit from this judicial privilege, namely not being forced to refer a case to the defendant’s courts.

2. Substantive law

It should be noted at the outset that the Proposal for a Directive does not in any way alter substantive law for collective actions.

The above-mentioned study recommends ‘*a single collective action: The idea is to avoid parallel proceedings. There is a single litigation: all claimants are suffering from the same damage. The main issue is the one of jurisdiction. In our opinion a single action implies one single applicable law. It reduces the scope of this cross-border collective action because some harmonised rules are needed…*.’

Concerning the judgments on the liability of the undertaking, the substantive law essentially relied upon for collective actions, namely that governing unfair commercial practices (UCPD) and the law on consumer contracts (CRD), is sufficiently harmonised (albeit to a lesser extent regarding contractual law), largely ensuring that the judge hearing the case is not required to be familiar with the various national transposing laws applicable to consumers residing in different countries.

In fact, ‘*in contractual matters, according to Article 6 of the Rome I Regulation, claims of consumers domiciled in different Member States are governed by different laws even if the contracts contain a choice of law clause designating the seller’s home State, unless the chosen law provides the same level of protection as the law of the consumer’s habitual residence*’ (JURI study). Regarding compensation sought for unfair commercial practices, the Rome II Regulation provides that ‘*the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected*’.The substantive law of every national market affected by an undertaking operating at pan-European level must therefore be applied.

The difficulty arises with regard to redress measures because the key questions surrounding the requirements for proving harm and quantifying it are not harmonised and the rules governing them are extremely varied owing, in particular, to developments in national case-law. One only has to look, for example, at civil liability for harm caused to another person, which is the basis for determining the redress to which consumers who are victims of unfair commercial practices are entitled (e.g. Dieselgate and the VW Group).

What about the option of splitting the two stages by first of all seeking a *declaratory ruling*  on the liability of the trader or professional from an administrative authority or a court in a country where the law is said to be particularly favourable to consumers or where the procedures are swifter than elsewhere; and then bringing actions for redress before the courts of other countries on the basis of this foreign declaratory ruling? According to the Proposal, the split between, on the one hand, a legal ruling on liability which is collective in scope and, on the other, actions for redress brought individually by consumers who have sustained harm, must remain the exception for complex actions. Depriving this second stage of its collective nature determined by the qualified entity will not encourage use of this procedure, which is, moreover, criticised by consumer organisations even if German law on the *Musterfeststellungsklage[[1]](#footnote-2)* follows this course.

3. Solutions envisaged

According to the JURI study, ‘*when a sole collective action is not possible (because of the different applicable laws), several collective actions should be brought…The main issue is the coordination of the proceedings….The courts of the Member State within the territory of which the centre of the group’s main interests is situated shall have jurisdiction to open the main proceeding*…*The determination of the centre of the group’s main interests is a delicate issue. The solutions given by Brussels I Recast for individual claims should be a basis for our recommendation: the country of residence of the consumers mainly affected, the country of the affected market, the country in which the event giving rise to the damage occurred; the country in which the damages occur…When the centre of the group’s main interests cannot be determined, the courts of the MS within the territory of which the defendant has his domicile should have jurisdiction. In this case, secondary proceedings are likely*.’

The implementation of this recommendation could pose a problem or even result in justice being denied. Take the example of Dieselgate and suppose that the Directive including this recommendation were in force. It is indisputable that the German court would have to be named ‘head jurisdiction’, which is, moreover, in line with the logic of the revised CPC Regulation for determining the lead national authority. In the present case, collective actions have been brought before the Belgian and Italian courts. Should these courts postpone giving a ruling and wait to find out whether a qualified entity will refer the case to the German courts? The hands of the qualified entities and jurisdictions of the other countries concerned would then be tied and dependent on the action/inaction in Germany and of the course of this procedure. This seems unacceptable to us. Instead of promoting collective actions in Europe, this would curb them.

In the present case, another question emerges. In the Dieselgate affair, two national authorities (Italy and the Netherlands) concluded separately on the basis of the UCPD that VW had infringed these provisions and imposed fines on it; these rulings are the subject of appeals which are still ongoing. According to the Proposal for a Directive, these are decisions taken by administrative authorities recognising the liability of VW which may be relied upon in civil proceedings (provided that they are confirmed on appeal) in order to request redress measures for consumers who have sustained harm not only in those two countries but also before the courts of other Member States (rebuttable presumption that an infringement has occurred). Would these authorities have been obliged to postpone giving a ruling because most of the consumers who have sustained harm live in Germany? We say ‘no’. The Directive must *not* attempt to *organise multiple collective actions into a hierarchy*.

Some warn against *several redress measures* being imposed on the same undertaking *concurrently* by several courts with consumers profiting from this several times. If actions are launched in several countries, the qualified entities will primarily defend the consumers residing in their country.
The Directive should, however, enable *non-residents* to individually join actions of this kind as provided for in Belgian law on collective actions *in accordance with the opt-in procedure*[[2]](#footnote-3). Steps should also be taken to ensure that foreign consumers are duly informed of this possibility. The undertaking may itself verify whether the same consumer has joined several collective actions in several countries, e.g. in his/her own country where the harm occurred and before the court in the country in which the undertaking is established. Even in the case of an opt-out in the consumer’s country, the undertaking may avoid having to pay compensation twice over during the stage when the redress measures are implemented.

What if it is not individual consumers but qualified entities themselves which bring multiple actions against one undertaking? As indicated above, the rules on jurisdiction drastically limit the choice of courts to which a case may be referred, in general that of the firm’s headquarters and that of the consumers’ country of residence. Prohibiting qualified entities from bringing an action before the courts in different countries in order to have more chance of success is scarcely conceivable. The courts concerned should, however, be informed about this by these qualified entities, which may in no event be awarded damages by several courts for the same harm suffered (*non bis in ibidem*). Moreover, the high costs incurred for initiating several sets of proceedings will discourage people from ‘having several goes’.

*Forum shopping* is therefore strictly regulated and limited in law and in fact, and is very unlikely to give rise to abuse. The study for JURI concludes that: ‘*Overall, the EU legislation should be reluctant to provide too many safeguards as this might make collective actions impossible in practice. However, some principles laid down in the 2013 Recommendation are missing in the draft directive – the prohibition of contingency fees and the ‘loser pays’ rule*’. On this last point, the Proposal could take inspiration from the Regulation establishing a European Small Claims Procedure: ‘*The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.’* (Art. 16).

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1. This legislation enters into force on 1 November 2018. [↑](#footnote-ref-2)
2. Article XVII.38 § 2° ‘for those who are not habitually resident in Belgium, have explicitly expressed the desire to be part of the group within the period provided for in the admissibility decision’. [↑](#footnote-ref-3)