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Council working party draft of an EU Directive on representative actions for the protection of the collective interest of consumers

The legal specifications for Europe-wide representative actions are of major importance to the German economy.

The Council working party has drafted a preliminary compromise text on the draft of the EU Directive on representative actions for the protection of the collective interest of consumers (2018/0089 (COD)).

This draft constitutes an unnecessary and at the same time disproportionate tightening of the existing national consumer protection laws and unnecessarily endangers the recognized as well as successful German private enforcement system.

The draft waives essential safeguards and unreasonably extends the scope of the Directive. This would lead to massive false incentives and would give ground for organisations to abuse this instrument, bringing significant disadvantages for the economy across the Union.

The proposal contradicts legal traditions in Europe and, as a result, gives ground for an unbridled commercialisation of law and susceptibility to blackmail small and medium-sized enterprises. We strongly appeal to the Council to only send a position of balance into the trilogue.

Safeguards

In order to prevent abuse of a collective instrument with regard to redress measures, it is necessary to set up procedural minimum standards (safeguards) with high requirements at European level.

This includes, for example, appropriate and verifiable rules on third-party funding in order to prevent inappropriate influences, as well as the prohibition of contingency fees to protect litigants from being overprivileged by excessive remuneration rates and to promote the principle of equality of arms. Equally important is the explicit prohibition of punitive damages, i.e. sanctions whose only purpose is to be punitive or deterrent, as well as the inclusion of the principles of losers pay and opt-in.

Furthermore, with regard to the requirements of qualified entities, the text of the Council needs to be improved. Only recognised, stable and sufficiently audited entities should be able to bring actions in order to ensure the credibility of the system as well as effectively prevent abuse. At least, the entities should have a minimum number of members and a minimum period of existence as well as a necessary independence from third parties. Moreover, representative actions by qualified entities appointed on an ad hoc basis should be prohibited. The current proposal is not suitable to prevent the misuse of the instrument.

Safeguards must be mandatory for both national and cross-border representative actions. The current text of the Council presidency, which does not include uniform requirements for national representative actions, actively aims to make forum shopping possible. There are no reasons for this - especially since the qualification as a 'domestic claim' is based solely on the place where the qualified entity is registered. It is necessary that additional criteria such as the place of residency of the consumer who is represented or affected, needs to be taken into account. In the current proposal by the Council working party the law of representative actions will not be harmonised, but competition will be created where the lowest requirements apply and where the highest revenues can be generated with the action.

Purpose of the action

As the text only allows damages actions, and not declaratory actions, this leads to serious interferences in almost all national codes of procedures. This is not necessary at all, and it is not covered by the EU's competence. Germany, for example, has an effective collective redress instrument in form of its "Musterfeststellungsklage", a special kind of a declaratory action. This "Musterfeststellungsklage" corresponds to the purpose of the Directive, to provide consumers with compensation for damages suffered. As a result, the European legislator must give the Member States, due to the different procedural and substantive particularities of civil procedural law, the choice between declaratory and damages actions.

In addition, the Council working party proposal provides that for collective redress actions, damages must be calculated on a flat-rate basis which is fundamentally contrary to any continental law system. The aim of the continental law system is to compensate the actual occurred damages and therefore to determine the damages individually.

Only with the possibility of choosing a damages or a declaratory action, a non-system intervention can be prevented.

Summary

The Presidency's proposal does not allay fundamental concerns of enterprises. If on its current basis a general approach of the Council is achieved and the trilogue negotiations are started with the other two European institutions, not only the German economy will be burdened, but also companies throughout the EU will be at risk of becoming actual or potential victims of abusive lawsuits. Therefore, it is of great importance for the trilogue that the Council's proposal will be improved on the points mentioned above.