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An introduction to this issue

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Publication date

2019

Document Version

Final published version

Published in

European Review of Private Law

[Link to publication](#)

Citation for published version (APA):

Loos, M. B. M. (2019). Towards Civil Justice in the EU: the European Commission's New Deal for Consumers: An introduction to this issue. *European Review of Private Law*, 27(6), 1219-1225.

<https://kluwerlawonline.com/journalarticle/European%20Review%20of%20Private%20Law/27.6/40768>

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Towards Civil Justice in the EU: The European Commission's New Deal for Consumers. An Introduction to This Issue

M. B. M. Loos*

Abstract: In this special issue, a series of authors from all over Europe discuss aspects of both the proposal for a Representative Actions Directive and the proposal for a Modernization Directive. Both directives deal with better enforcement of EU consumer law and follow from the European Commission's Communication on a New Deal for Consumers. In this introduction I will briefly introduce and discuss these papers in relation to one another.

Résumé: Dans ce numéro spécial, une série d'auteurs de toute l'Europe discutent des aspects de la proposition de directive sur les actions représentatives et de la proposition de directive sur la modernisation. Ces directives portent sur une meilleure application du droit communautaire de la consommation et font suite à la communication de la Commission européenne intitulée 'Un nouveau pacte pour les consommateurs'. Dans cette introduction, je présenterai et discuterai brièvement ces articles les uns par rapport aux autres.

Zusammenfassung: In dieser Sonderausgabe diskutieren eine Reihe von Autoren aus ganz Europa Aspekte sowohl des Vorschlags für eine Richtlinie über repräsentative Maßnahmen als auch des Vorschlags für eine Modernisierungsrichtlinie. Beide Richtlinien befassen sich mit der besseren Durchsetzung des EU-Verbraucherrechts und knüpfen an die Mitteilung der Europäischen Kommission über einen neuen Handel für Verbraucher an. In dieser Einführung werde ich diese Aufsätze kurz vorstellen und diskutieren.

Keywords: New Deal, consumer law, Representative Action Directive, Modernization Directive

1. Introduction

In 2018, the European Commission published its Communication 'A New Deal for Consumers'¹ (hereinafter: A New Deal). The Communication indicated the approach that the Commission would take regarding the further development of the consumer *acquis*. The communication was published together with two proposals for directives. The first proposal concerned the improvement of the

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1 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 11 April 2018, 'A New Deal For Consumers', COM (2018) 183 final.

possibility for consumer organizations to start a representative action, including a mass claim for compensation of consumer detriment (hereinafter: Representative Actions Directive).² The second proposal (hereinafter: Modernization Directive)³ aimed at amending the Unfair Contract Terms Directive,⁴ the Unfair Commercial Practices Directive,⁵ the Injunctions Directive⁶ and the Consumer Rights Directive⁷ by introducing, in particular, instruments enabling consumer authorities to impose serious penalties for infringements by a trader of the obligations arising from the national implementations of these directives.

Whereas regarding the Modernization Directive a political compromise between the European Parliament and the Council has already been reached,⁸ much less progress is reported on the Representative Actions Directive: although the European Parliament has adopted the directive in first reading on 26 March 2019,⁹ from the part of the Council no substantive documents have been made available to the public at large.¹⁰ This may suggest that within the Council the proposal is somewhat controversial.

One of the likely reasons why the Council may be hesitant to adopt the Representative Actions Directive is the fear of American ‘ambulance chasing

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- 2 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final.
 - 3 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernizing the rules for consumer protection in the EU, COM (2018) 185 final. The directive is also referred to as the Omnibus Directive, see for instance Pavillon in this issue. See on this proposal also critically my earlier paper in this review: M.B.M. Loos, ‘The Modernization of European Consumer Law: A Pig in a Poke?’, *European Review of Private Law* 2019/1, pp 113–134. In a paper to be published in this review next year I will be much more positive as to the compromise text mentioned below.
 - 4 Directive 93/13/EEC, *OJ* 1993, L 95/29.
 - 5 Directive 2005/29/EC, *OJ* 2005, L 149/22.
 - 6 Directive 2009/22/EC, *OJ* 2009, L 110/30.
 - 7 Directive 2011/83/EU, *OJ* 2011, L 304/64.
 - 8 The compromise text of 29 March 2019 and the text after the Corrigendum Procedure of 14 October 2019 are available at the Council’s website, see <https://www.consilium.europa.eu/registers/en/content/int/?lang=en&typ=ADV>, enter ‘2018/0090(COD)’ under ‘Institutional file’ (accessed 15 October 2019).
 - 9 This document is available at the same website, enter ‘2018/0089(COD)’ under ‘Institutional file’ (accessed 15 October 2019).
 - 10 By mid-October 2019, apart from some merely procedural documents, only the introductory part of a document of 17 July 2019 on the legal basis for the directive was made public; the reasoning and the conclusions of this document have not been made accessible to the public.

practices' coming to Europe. In her contribution to this special issue, Maria Ioannidou argues that this fear for abusive litigation has taken debates about the need for collective redress mechanisms hostage for far too long. In this respect, during the symposium in Amsterdam where most of these papers were presented,¹¹ it was remarked that 'stirring up the fear of ambulance chasers is actually part of businesses' strategy stopping effective access to justice. Abusive action is not the problem, effective access to justice is'.¹² Especially for low value claims, public enforcement or collective enforcement are the only ways in which such claims *can* be enforced. Moreover, since the low value of these claims prevent many consumers from becoming active in joining collective enforcement procedures, specific legislation is needed ensuring not only consumer redress, but also allowing for concrete deterrence mechanisms preventing consumer harm.

Nevertheless, there is also cause for scepticism as to the Communication and the proposals. For instance, in her paper Hanna Misiak states that the notion of collective consumer interests itself is unclear: it may pertain to the combined interests of consumers, but also may imply 'something more' (than just a mere sum of individual interests) or even 'something else'. She argues that the two proposals combined may in fact call for an extensive overhaul of the system of consumer protection enforcement in the Member States, in particular in those Member States that currently distinguish between regulatory enforcement by a public authority, and collective redress sought in court. In this respect, regulatory enforcement could be in the public interest, whereas collective redress would be seen more as in the (collective) interest of consumers. However, as Charlotte Pavillon indicates in her paper, a strict distinction between *consumer interest* and *public interest* is a false dichotomy. As collective action contributes to individual consumers' redress as well as to the more public interest of access to justice, I believe she is right in criticizing such a strict distinction. Pavillon then argues that the European Commission's Communication and the Modernization Directive basically ignore the deterrence function of private enforcement of EU consumer law. She argues that the balancing of the principles of effectiveness, proportionality and dissuasiveness requires more attention when it comes to 'civil remedies'. She illustrates this with empirical research conducted in the Netherlands on the way in which Dutch district courts in private law cases act as enforcers of EU consumer law.

11 Centre for the Study of European Contract Law (annual conference, University of Amsterdam), *A New Deal for Civil Justice? The New Deal for Consumers and the Justiciability of EU Consumer Rights*, Amsterdam, 11 and 12 April 2019.

12 Thus discussant Patrick Haas, a lawyer representing consumers in a Dutch collective action procedure against Volkswagen in the Dieselgate-affair.

Whereas Pavillon thus advocates the role of private enforcement, both Anna van Duin and Candida Leone and Iris Benöhr (who discusses the case of financial services, but in fact makes a much more general argument) point at a series of obstacles for consumers to enforce their rights through individual proceedings, e.g. the costs of litigation, the length of proceedings, burden of proof rules, a lack of awareness among consumers of their rights and the possibilities to enforce these.¹³ Whereas Benöhr primarily looks at the position of consumers as plaintiffs, Van Duin and Leone also pay attention to the position of consumers as defendants. In that situation, the role of the courts in appropriately considering the consumer's right is crucial, they argue. In this respect, the case-law of the Court of Justice takes better account of the role of the courts in ensuring consumer rights than the European Commission's New Deal and the accompanying proposals, they state. According to them, a new deal for civil justice in consumer cases requires the need for harmonization of national procedural law for consumers, leading to the adoption of a new directive consolidating the Court of Justice (CJEU's) case law and/or containing general principles or minimum standards for civil litigation in consumer cases. A point with which I wholeheartedly agree.

Regarding collective enforcement, severe limitations are posed by consumer organizations' limited resources and the current absence of compensatory collective redress mechanisms in most Member States. Benöhr argues that effective cross-border and collective redress procedures are necessary. In her view, the Commission's proposals fall short from what is needed due to the Representative Actions Directive's narrow scope and its strict requirements on legal standing.

For both collective redress and administrative enforcement to function, important obstacles need to be overcome. Like Benöhr, Rita Simon points to the lack of funding for consumer organizations (and ombudsmen). This lack of funding not only causes a lack of expertise, but often results in the consumer organization not being able to appeal against an unfavourable first instance verdict. Moreover, the 'loser pays'-principle - with the resulting risk of insolvency for the consumer organization - in fact hinders collective enforcement in the same way as it hinders individual consumers' private enforcement of consumer rights. In this respect it is not surprising that Simon calls for stricter obligations for Member States to fund collective enforcement by consumer organizations. The length of collective proceedings constitutes another problem: Simon argues that it is sometimes faster to abstain from such proceedings and 'just' push for legal reform, as changing the law may actually be faster than enforcing consumer rights through collective procedures ... In her view, regulators and consumer organizations should team up and join forces, with an administrative procedure followed on by collective settlement negotiations. If

13 See on this also extensively M.B.M. Loos, 'Individual private enforcement of consumer rights in civil courts in Europe', in R. Brownsword, H. Micklitz, L. Niglia & S. Weatherill (eds), *The Foundations of European Private Law* (Oxford/Portland: Hart 2011), pp 487-511.

these negotiations would be successful, this could lead to the imposition of only low fines by the regulator, whereas in the case of a negative outcome the fines could be substantively higher and, in that way, skimming off the profits the business might have had by making use of the unfair commercial practice.

So, what do we need to do to make representative actions (actually) work? In his paper, Colin Scott urges us to first look at the position of *businesses*: they have the most capacity to achieve the goals set by the legislator, and they are most capable (but not necessarily willing) to guarantee a high level of consumer protection. Scott therefore argues that we should think how we can make sure that businesses get the right nudges to comply with these goals and with consumer law rules? In this respect, we should think of influencing business practices, in particular through (self-regulatory) norm-setting in business associations, as such norms are internalized and relate to such matters as product and service quality and of staff training (which is relevant to consumer information, after-sales services and complaints handling). In fact, this is in line with what Ioannidou claims: we should rather think of what we need to solve a problem, and not so much as whether we need a private or a public law remedy and whether something fits in a particular scheme. Think in results, not in remedies.

Starting from the position of businesses, it seems natural to first look at the potential role of Alternative Dispute Resolution (ADR), as ADR is typically set up on a voluntary basis by business organizations, which suggests that there is support for ADR within the business community. In their paper, based on the Spanish and Portuguese implementations of the ADR Directive,¹⁴ Fernando Esteban de la Rosa and Cátia Marques Cebola show that the transposition of has not proven to be significant in both Spain and Portugal.¹⁵ They argue that the national legislators just formally transposed the directive without further adjustments needed for a better functioning of the ADR system. They point to the problem that ADR entities derive their competence based on territorial criteria. Because of such criteria, consumers may be forced to travel within a Member State to have their case heard by a specific ADR entity in the region where the business is located. Moreover, they point out, a regional organization of ADR makes it difficult to aggregate the outcomes of ADR and therefore to determine the quality of ADR across the board.

Whereas they specifically look into the domestic aspects of this matter, there is an international, and more substantive, aspect to this as well. Whereas the Brussels I bis-Regulation¹⁶ in many consumer cases leads to the competence of the court of the place of residence of the consumer, ADR is based on the business' willingness to

14 Directive 2013/11/EU, *OJ* 2013, L 165/63.

15 The same is true in other European countries as well, see the country reports in *Journal of EU Consumer and Market Law* 2018/2 and 3, p 82-91 and 116-129.

16 Regulation 1215/2012, *OJ* 2012, L 351/1.

participate in the scheme organized in the country where that business is established. This implies that in cross-border cases it is the *consumer* who may have to travel cross-border to the place where the ADR entity is located. This problem may be taken away by the fact that consumers may be heard via a video link (e.g. via a Skype- or FaceTime-connection), as the ADR entity must enable the parties to access the procedure also online.¹⁷ However, the ADR Directive also provides that the ADR entity determines in which language(s) complaints may be submitted and in which language(s) the ADR procedure will be conducted.¹⁸ This suggests that the consumer could be forced to submit the complaint in a language he does not master - which then either requires him to hire a translator to translate the complaint into the relevant language, or to opt for the ordinary court system, e.g. on the basis of the EU small claims procedure, in which case he can submit the complaint in his own language and it is the business that faces the language problems. Moreover, there are doubts about the quality of ADR, in particular regarding the question whether mandatory law is applied properly,¹⁹ and whether they are indeed quick and cheap. In short, ADR may be the way forward for individual enforcement of consumer claims, but we're not quite there yet.

Moreover, there are other obstacles compromising the effectiveness of both ADR and collective redress. To be successful, both consumer organizations and ADR entities must be able to finance claims and proceedings, and both face serious problems. ADR entities are largely financed by businesses and business organizations, and can only hear a case if a business voluntarily accepts their competence. These elements combined may lead to a conflict of interest for the ADR entity - on the one hand it sanctions businesses for a breach of consumer interests, but on the other hand it asks these same businesses to provide it with the means to be able to sanction them. From their part, consumer organizations face strong disincentives to engage in collective redress. Consumer organizations typically receive (most of) their funding through membership fees and have difficulty in justifying investing funds in representative action procedure. If they do not reach a settlement with the infringing businesses, all investments are lost unless there is an effective collective redress system that can either force businesses to settle or empower courts to award the consumer organizations' claim. The benefits of the representative action procedure, however, typically are not for the consumer organization itself, but for the individual consumers that suffered from the unfair commercial practice, and it is doubtful whether the consumer organization will be awarded compensation for all its costs - in particular for the costs involved in obtaining the knowledge of the

17 See Art. 8 (a) ADR Directive.

18 See Art. 7 (1)(h) ADR Directive.

19 See for instance C.M.D.S. PAVILLON, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk', 5. *TvC (Tijdschrift voor Consumentenrecht en handelspraktijken)* 2015, pp 239-252.

commercial practice that is later found to be unfair. In areas such as financial services, the matter is so complex that only very specialized lawyers can handle such cases. In this respect, as also Ioannidou argues, I think the only way forward is to accept that - within bounds to be established by the legislator - parties involved in collective redress schemes should be able to make money from that, in the same way as lawyers make money in individual claims too. Especially when the proceeds are made available for future collective redress procedures, this seems to be in the public interest as well. To come back to what Pavillon suggested: a strict distinction between *consumer interest* and *public interest* is indeed a false dichotomy. The two need to go together and should strengthen one another. With this issue of the European Review of Private Law we hope to encourage the new European Parliament and the new European Commission to set the next step. We'll be watching ...

