Report on Annual Conference on Consumer Law organized by ERA with specific highlights of the recent Representative Actions Directive

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Introduction:

On 8-9 October 2020, ERA – the Academy of European Law – organized its Annual Conference on European Consumer Law 2020. It provided an insight into the main priorities of the new Consumer Agenda and remarks on key topics such as the impact of Covid-19 on consumer protection, the new Digital Services Act package, and the Collective redress framework in the EU with a specific focus on the new EU Directive on representative actions for the protection of collective interests of consumers. This report starts with an introduction to several presentations given by renowned scholars, followed by an overview of the recent Representative Actions Directive.

Day 1: The New Consumer Law Updates, digital transition, and green transition

The New Consumer Agenda, which presents a vision for the EU consumer policy from 2020 to 2025, builds on the 2012 Consumer Agenda (which expires in 2020)

was the focus of the first panel. Massimo Serpieri (Deputy Head of Unit, DG Justice and Consumers, European Commission, Brussels) spoke about the action plan for the next five years to empower European consumers to play an active role in the green and digital transitions. She mentioned how the Agenda also addresses the need to increase consumer protection and resilience during and after the COVID-19 pandemic, which brought significant challenges affecting the daily lives of consumers.

Ursula Pachl (Deputy Director-General, BEUC – The European Consumer Organisation, Brussels) then expanded on the challenges of the COVID-19 outbreak and the need for drawing lessons from the crisis to reshape consumer protection and accelerate the digital and green transition. The core of her presentation was the inevitability of a powerful Competition Law framework for consumer choice, higher quality, and more investments, as well as the need for protecting consumers and ensuring that they have the right to object to decisions made by machines in the arena of automated decision-making.

Teresa Rodríguez de las Heras Ballell (Associate Professor, Carlos III University, Madrid) started the second panel of the discussion by giving a brief background on the new Digital Services Act package, a comprehensive set of rules comprising of the Digital Services Act and Digital Markets Act. They will create a safer and more open digital space, with European values at its core. With this, she addressed the need for updating the E-commerce Directive of the year 2000. The manner in which the E-commerce Directive has been implemented across the EU varies greatly, and national jurisprudence on online liability today remains very fragmented. This fragmentation has created uncertainty in the implementation regime, and it is, therefore, essential to revise the EU liability regime for online intermediaries.

Jan Penfrat (Senior Policy Advisor, EDRi – European Digital Rights, Brussels) proceeded then by highlighting the key issues raised by dominant platforms ahead of the adoption of the new Digital Services Act package. He addressed the main problems with centralized platforms, which dominate the online space, and work on the business model of providing free services in exchange of highly confidential personal data by analyzing Regulation (EU) 2019/1150 on promoting transparency for business users of online intermediation services.

The second half of the first day was dedicated to a discussion on the Green Transition and how to achieve sustainable consumption. Emmanuelle Maire (Head of Unit, DG Environment, European Commission, Brussels) started the discussion with a comprehensive overview of the European Commission's New Circular Economy Action Plan with a focus on main proposals concerning consumers.

Guaranteeing sustainability at the pre-contractual stage was the focus of the presentation of Petra Weingerl (Assistant Professor, University of Maribor), in which she analyzed the Guidance on implementation of the Unfair Commercial Practices Directive. This was followed by the presentation of Evelyne Terryn (Professor, Catholic University of Leuven), which focused on the topic of promoting sustainable choices at the contractual stage and the "right to repair" under the Sale of Goods Directive.

A discussion was then convened on best practices of the transition to the Circular Economy, in the Member States in Belgium and France by Evelyne Terryn, Slovenia by Petra Weingerl and Sweden by Carl Dalhammar (Associate Professor, International Institute for Industrial Environmental Economics, Lund University) on the need for minimization of waste to achieve a circular economy. The following round table discussion that ensued between Eva Dalenstam (Policy Officer, Circular Economy, DG Environment, European Commission, Brussels), Carl Dalhammar, Margreeth Pape (Programme Manager, Sustainability and Logistics, Thuiswinkel.org) offered an insight into the main challenges posed in the real world while bringing the green and digital transitions together and explained ways to achieve more sustainable e-commerce.

Day 2: Recent Case Law Update of CJEU and Collective Redress

The next day's first panel began with a presentation from Massimiliano Puglia (Legal Secretary, Court of Justice of the European Union, Luxembourg), who provided a comprehensive overview of cases involving consumer protection at the CJEU in the past year. He spoke about several important cases involving judicial cooperation in civil matters under Regulation (EU) No. 1215/2012 (C-213/18, easyJet; C-343/19, Verein für Konsumenteninformation) and protection of consumers against unfair contract terms C?511/17, Lintner; C?260/18, Dziubak;

C?125/18, Gómez del Moral Guasch; C-779/18, Mikrokasa and Revenue; C-81/19, Banca Transilvania).

Christine Riefa (Reader in Law, Brunel University, London) proceeded then with an interesting discussion on the concept of 'vulnerable consumer' and the lack of access to justice to such a consumer who is a weaker party in the justice system.

Stefaan Voet (Associate Professor, Catholic University of Leuven) was then handed the floor to reflect on the final text of the proposed Directive on representative actions for the protection of the collective interests of consumers, which is a part of the 2018 New Deal for Consumers. After providing some brief background, Stefaan Voet focused on four points of the Directive – scope of application, the cross-border element of representative actions, application of private international law, funding, and financing. He analyzed the standing of qualified entities and criteria for recognizing such qualified entities to bring a cross border action under the said draft directive. The Representative Actions Directive (Directive 2020/1828) has now been finalized and published on 25 November 2020.

Highlights of the Representative Actions Directive

The recent Directive on representative actions for protecting the collective interests of consumers repeals the earlier Injunctions Directive 2009/22/EC (hereinafter referred to as the Directive) and creates provisions for qualified representative entities, private or public entities to lodge cross-border claims. As per the said Directive, three types of representative entities shall have the standing to bring representative actions on behalf of consumers. These are private representative entities designated in advance by the Member States and placed in a publicly available list, representative bodies designated on an ad hoc basis for a specific action or particular consumer organization, and independent public bodies.

For domestic actions, Member States have to set out proper criteria consistent with the objectives of the Directive. Accordingly, all entities complying with the requirements of the Directive would have the right to benefit from its regime. The EU legislator offers some flexibility to the Member States regarding the possibility to designate entities on an ad hoc basis for bringing specific representative actions. The proposed Directive allows 'qualified entities' to bring actions against the infringement by traders before the competent court or administrative bodies in other Member Nations. This means that 'qualified entities' have standing before the competent courts or other administrative bodies in all Member Nations to file a representative action. In other words, Member States are bound to accept the legal standing of foreign 'qualified entities' who fulfil the requirements established by their national laws in order to take action, in case an infringement of the collective interests of consumers has a cross-border dimension. Article 4 of the Directive states that cross-border cases can be brought by entities that comply with the following criteria. It must at least have 12 months of activity in protecting consumer's interests; it must be of a non-profit character; its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests. Additionally, it must be independent of third parties whose interests oppose the consumer interest, it must not be subject to an insolvency procedure or declared insolvent, and it must make public disclosure of the information demonstrating compliance of the above.

Additionally, qualified entities from different Member States can also join hands to file a claim before a single court having jurisdiction under relevant EU and national law. It is important to mention here that the requirements of the Directive entail that the statutory purpose of qualified entities demonstrates that they have a legitimate interest in protecting consumer interests. They must demonstrate that they have been functioning in the field of protection of consumer interests for about one year. At the same time, they must be able to bear the costs of the representative proceedings on their own and disclose that they are capable of doing so. The Member States, which designate qualified entities, shall verify whether they continue to fulfil these criteria every five years. If they fail to comply with these criteria, the Member States have the power to revoke their designation. Thus, the standard for determining the capacity of the qualified entity is now the 'economic capability' and not based on the litigant's rights or moral agency. The display of economic capability will require the qualified entities to thrive in the field of consumer protection continuously, and it

will not be long before collective redress actions become a means of survival of these entities.

Further, in the context of cross-border cases, Member States may also designate entities representing consumers from the different Member States. Article 6 of the said Directive allows mutual recognition of legal standing of qualified entities designated in advance in one Member State as per Article 4(1) to seek representative action in another Member State. However, it is important to note that it is yet to be seen how the Directive will be implemented in the Member States.

Finally, in the last presentation of the second day, Alexia Pato (Postdoc Research Fellow, University of McGill, Montreal) addressed the interplay between collective redress and general data protection regulation(GDPR) with a focus on the representation of data subjects under its Article 80. The said provision allows consumer associations to litigate on behalf of data subjects. She also spoke about the said Representative Actions Directive and that data protection has been added into the scope of the Directive. She pointed out that it will be interesting to see how the Directive will be implemented in the Member States.

To sum up, this two-day event provided an up-to-date insight into the latest policy developments, legislative initiatives, and case law in the field of consumer protection, including related conflict-of-laws issues. The detailed presentations from renowned experts in this field generated a good understanding of several challenges faced by the consumer in the real world and the future consumer agenda to ensure effective consumer protection.