

**Feedback: The New Deal For Consumers
Proposal on Representative Actions for protection of collective interests of consumers
21 June 2018**

This paper¹ is provided by way of feedback on the European Commission's proposed Directive on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC (the "Draft Directive").² That proposal has been made as part of the European Commission's New Deal for Consumers package, targeted at strengthening enforcement of EU consumer law. We comment on the safeguards necessary to ensure that collective redress through private litigation contributes to enforcement of consumer law - rather than operating to confuse regulatory enforcement objectives or risk policy being driven by litigation. We also address the risk that private litigation may be abused by those seeking to profit from unmeritorious claims or pursue commercial interests against competitors.

1. Summary

- 1.1. Collective redress could be an effective tool both for consumers and companies looking to address harm arising from infringement of law and regulation. However, the European Commission rightly recognises the risk that collective redress via private litigation mechanisms could be high-jacked by entities looking to profiteer, disrupt legitimate commercial operations in their own interests or who simply fail to act with any understanding of consumer interests or the law.
- 1.2. The European Commission cites Dieselgate and unfair contract terms in mortgage contracts as illustrating an enforcement gap for consumers. The solution proposed - enabling private litigation by representative action brought by any entity meeting relatively low qualification criteria - would not necessarily have expedited compensation in those cases and certainly would not assist in others. If the concern is to add weight to regulatory enforcement by making compensation following from an infringement a real risk, this can be addressed through individual regulatory mandate. For example, the UK Financial Conduct Authority is empowered to review and authorise collective settlement proposals offered to consumers. Structures of that sort ensure that regulatory discipline and understanding of the law informs settlement, that compensation is calibrated appropriately and removes the risk of bad actors exploiting the process against the interests of both consumers and business.
- 1.3. The European Commission also suggests that it is concerned to empower consumers to be able to act against digital services and online platforms. It is particularly difficult to understand how a private litigation collective redress model is helpful here given the challenges that consumers will face in

¹ This paper sets out the views of its authors and does not necessarily reflect those of Baker McKenzie or its clients. It is not legally privileged advice and no such advice is intended to be conveyed.

² https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en

demonstrating how they have been harmed by regulatory infringement in order to secure compensation.

- 1.4. Insofar as an objective of the Draft Directive and related measures is to ensure that online platforms and intermediaries are held to greater account by consumers and their representatives, in our view the better focus is on more specific legislative and regulatory guidance as to the exact scope of the duties owed by online platforms and intermediaries, following proper consultation and public debate. Opening up broader avenues of collective redress before these matters have been clarified unambiguously, risks policy being driven by litigation.
- 1.5. The eCommerce Directive, Articles. 12-15, addresses a complex balancing act concerning the liability of online platforms and intermediaries, designed to protect individual rights and freedoms, particularly the right to freedom of expression. Lowering the threshold for litigation through representative actions in this space is likely to have a chilling effect on free speech, as intermediaries are likely to have a risk preference that undermines the rights of the consumers that use such services to express themselves. A regulated notice and take-down/put-back regime would be preferable to creating broader litigation remedies for consumers.
- 1.6. In the context of use of personal data, and the objective of applying greater scrutiny to those online providers with access to large datasets, it is also unclear why the enhancement of rights of private action might be necessary in light of the enhanced protections that users of these services will enjoy under Regulation 2016/679 (EU) on General Data Protection ("GDPR"). This also comes alongside greater powers granted to regulators under GDPR both to enforce the law and to clarify the law.
- 1.7. GDPR, in particular, is relatively new yet broad reaching legislation where it is acknowledged that greater clarity is still required from regulators on the application of key aspects, and where the collective understanding of the legislation is an ongoing journey. It would not be helpful to have these matters determined by the advancement of private claims for compensation. Many duties under GDPR are risk based and contextual: in our view a cohesive, well coordinated regulatory approach to these issues is much more likely to drive certainty for both consumers and industry, than an expansion of scrutiny by the courts of Member States.
- 1.8. In addition, we believe that there is a risk that permitting broad avenues of private redress will lead to an abuse of the availability of compensation for emotional distress under GDPR, and in effect create a common tariff for alleged distress. In our experience, we are already starting to see this in the

increased use of some of the most binary rights granted to data subjects, such as subject access requests, on the back of which claims for emotional distress are now commonly founded. We believe that these rights are very important, but the determination of compensation should be driven by a careful individual analysis of the claim made and the actual loss suffered by that data subject, which is not best served by collective redress mechanisms.

- 1.9. It should also be noted that GDPR contains its own provisions on the use of representative bodies to exercise data subject rights, under Article 80. While the objective of this appears to be aligned with the Draft Directive, further clarity is needed as to how this Article interrelates with it, and further consideration is needed as to why it is necessary now to go further than GDPR itself provided for, when the same issue was considered.
- 1.10. Frankly, the conflation of consumer law and private enforcement may only serve to undermine and confuse the application of GDPR principles to the digital and other sectors. In our view, business and users would be best served in terms of certainty and clarity where lead supervisory data privacy regulators lead enforcement priorities and objectives.
- 1.11. Any proposal that does rely on private enforcement to facilitate collective redress needs to meet the serious risk that representative actions will be abused. The European Commission would have to impose much stricter criteria for qualification of representative bodies and their funding than is currently proposed, as well as giving clear guidance on implementation that addresses certification of a class, appointment of class counsel and distribution of compensation that is not collected by consumers. In particular, the European Commission needs to be clear on what is required to recognise a collective action and ensure that its expectations on certification are understood. It is important that common interest is represented in cases of this type and that expanded classes with inherent conflicts in interest are not permitted simply because representative bodies wish to inflate either the value of the claim or their own profile in pursuit of the case.
- 1.12. Failure to do so not only exacerbates the risk of abuse but also increases the likelihood of years of satellite litigation as each Member State works through how these procedural matters ought to be addressed. The European Commission recognises the limits on its competence in this regard, but nonetheless should consider what guidance and support can be provided to Member States and any representative bodies that they designate in order to address it or otherwise not proceed with a private enforcement model.

1.13. We set out below further detail on the following fundamental issues:

- Safeguards to prevent abusive litigation - designation, standing and distribution of unclaimed damages (¶2)
- Scope of application (¶3)
- Opting In and Opting Out (¶4)
- Compensation and other redress measures (¶5)
- Funding and cost recovery (¶6)
- Settlement (¶7)
- Effect of a final decision (¶8)
- Disclosure and evidence (¶9).

We would be happy to meet with you to discuss these concerns further or otherwise to supplement this paper if that would be helpful.

2. Safeguards to prevent abusive litigation - designation, standing and distribution of unclaimed damages

2.1. Safeguards are essential to address the risk of unmeritorious or vexatious litigation and procedural abuse. The proposal recognises that entities should be qualified in order to bring any representative action. However, the criteria for qualification and recognition of those entities should be set so as to ensure that any litigation pursued is meritorious, appropriately resourced and pursued in the interest of consumers.

2.2. Our experience of defending actions pursued by consumer associations across EU Member States is that the resourcing and competence of these associations varies (which may be compounded by the ability 'forum shop, as described in paragraph 2.7 below). It does not strengthen enforcement of consumer law where litigation is based on an ill-informed understanding of the law. It does not serve consumer interest where litigation is pursued in the interest of the profile of the organisation and reasonable proposals on settlement or even discussions of resolution will not be entertained. The risk of confusion in the law and undue constraint on commercial activity need to be weighted carefully

through safeguards that ensure only serious, credible and well-intentioned associations qualify to represent consumer interests. The European Commission should designate qualification criteria that requires a representative body to demonstrate its competence in addition to its interest in enforcement. At a minimum the Draft Directive should prescribe the following criteria:

- the qualified entity should be sufficiently representative of the consumers whose interests it represents (particularly if our recommendation in ¶4.3 is not accepted);
- adequate governance, with adequate checks and balances, such as a two-tiered board system, with a governing board and a supervisory board;
- transparency of its funding, not only in relation to the case that it brings, but also generally;
- criteria that ensure both sufficient capacity and experience to deal with the litigation, both in terms of case management and litigation experience and subject-matter experience.³

2.3. There must be court supervision as to whether a qualified entity meets all of the 'entrance criteria', where Article 4(5) of the Draft Directive seems to limit this to a test whether the action falls with the qualified entity's purpose. Article 16 should make clear that it does not prejudice this court supervision in case of cross border representative actions.

2.4. Article 4(1)(b) combines with Article 5(1) to form a basis for this procedural safeguard against abuse by requiring a legitimate interest in securing compliance with the law and a direct relationship between the entity's objectives and the rights afforded by the law. Article 7 is helpful in prohibiting funding by commercial operators looking to disrupt competitor activities by funding strategic litigation against them. However, in our view, privately funded entities ought not be in a position to qualify as representative bodies at all, because any private funding, whether direct or indirect, creates a risk that drivers other than the protection of consumer interests start to play a role. Further, funding structures can be created that subvert these restrictions and, as explained further below, it is unclear how this might be monitored or enforced. These are real risks, given that some large commercial organisations have a history of funding third party litigation against their rivals not to make a profit, but to secure a competitive advantage.

³ Cf. The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ 26 July 2013, L 201/60 (the "Commission Recommendation"); point 4(c).

- 2.5. To the extent that the European Commission is not minded to limit the nature or number of entities that may be designated as representative bodies, we suggest that careful consideration be given on how to disincentivise a proliferation of bodies being established that then compete to claim in consumer interests and confuse rather than aid resolution. It is helpful that organisations are required to be non-profit in order to qualify. However, it should also be clear that any funds not distributed to consumers in a collective settlement or judgement situation revert to the defending entity or to charity, rather than the representative body. This will minimise the risk that representative bodies will pursue unmeritorious claims so as to build funds for wider activity. In addition, it would be worth considering that the Draft Directive provides guidance as to the level of compensation of cost that courts may award to qualified entities, either in a cost order or as part of a collective settlement. This should no more than the actual cost of the action in question.⁴ We also suggest that the European Commission consider what actions can be taken to ensure the competence of the representative body - including regular and intensive training from responsible regulators on the law and their enforcement objectives. Consider also the scenario where a non-profit qualified entity obtains an interim injunction, but then loses at trial; who is going to compensate the trader for the losses it has incurred during the period of the overturned injunction?
- 2.6. Article 4 (2) allows Member States a discretionary exception to designate a qualified entity on an *ad hoc* basis. It should be made clear that this discretion cannot be exercised so as to designate qualified entities that do not comply with the requirements of the (draft) Directive.
- 2.7. It should also be specified that the qualified entity needs to be a legal entity. Otherwise, there may be debate as to its legal standing, especially if it starts litigation in another Member State than its home jurisdiction, potentially leading into complex issues of private international law. It would also be prudent to include a provision that the law of the place of incorporation determines whether the entity is a legal person.
- 2.8. Article 4 (1) requires that a qualified entity be "properly constituted" according to the law of "a Member State" (emphasis added). It is unclear whether this means the law of the Member State under whose laws it was originally constituted, the law of the Member State in which the representative action is being brought, or simply any Member State. This should be clarified, and logically should be the Member State under whose laws the entity was originally constituted. In addition, considering the limited number of criteria for qualified entities, the risk may arise that all (or the vast majority of)

⁴ The judgments of the Court of Appeal Amsterdam of 16 June 2017 (ECLI:NL:GHAMS:2017:2257) and 5 February 2018 (ECLI:NL:GHAMS:2018:368) show that this is an issue.

qualified entities will be incorporated in the Member State(s) with the least stringent requirements or checks (a form of 'forum' shopping). In that regard, the examination by the court or administrative authority – as provided for in Article 4(5) – should also include an examination of whether the qualified entity (still) complies with the laws of the Member State of origin.⁵

3. Scope of application

- 3.1. It does not appear from the Draft Directive and its accompanying material that sufficiently detailed consideration has been given to whether the legislation identified in Annex 1 can effectively be enforced on behalf of collective interests. Some of that legislation clearly is targeted at individual interest that will require specific pleading to their facts and that cannot be remedied by any aggregate model of damages. Other legislation may be apt for collective pleading but likely will have extensive conflict in interests for individual claimants if the scope of certification is too wide.
- 3.2. Article 2(1) establishes that the subject matter of the representative actions covered by the Draft Directive is only infringements of the provisions of EU law listed in Annex 1 to the Draft Directive. The legislation listed in Annex 1 deals with a wide range of consumer rights relevant to a variety of different industry sectors. In the words of the Commission, the purpose of the Draft Directive is to aid the "protection of collective interests of consumers"⁶ (emphasis added) against "infringements" of EU law which cause or may cause harm to those collective interests. It is therefore not intended to be another court mechanism for enforcement of the rights of individual consumers.
- 3.3. A careful analysis should be carried out to determine whether, for each piece of legislation listed in Annex 1, there are really: (a) "infringements" which could be the subject matter of a representative action; and (b) "collective interests" which could be protected through a representative action.
- 3.4. A case in point is the first piece of legislation in the list, namely the Product Liability Directive (85/374/EEC). Our reasoning is twofold:
 - 3.4.1. Article 2(1) provides that the Directive will apply to representative actions brought against "infringements" of laws listed in Annex 1. Infringement means "breach" or "violation". For there to have been a breach or violation, there must be a law which mandates or prohibits certain behaviour. This is not the subject matter of the Product Liability Directive. Rather, it deals with the circumstances in which compensation must be paid to individual claimants for damage

⁵ Cf. article 4 (5).

⁶ Explanatory Memorandum, Section 1, Page 3

caused by a defective product. This much is clear within the first Article of the Product Liability Directive, which provides that "[t]he producer shall be liable for damage caused by a defect in his product ." It is clear to us that there is no "breach" or "violation" of European Union law here, at least not a direct one, so we query where the "infringement" could be which would found a representative action.

3.4.2. The Product Liability Directive as interpreted by courts across the EU requires a claimant to show that the specific product in question actually caused the specific personal injury or property damage because it was defective. It would be very rare for any two claims to have exactly the same causative path to injury/damage and the same injury/damage in magnitude and extent. Clearly, causation is individualistic. Each person therefore has a different claim, so we do not understand how a representative action under the Product Liability Directive would be protecting "the collective interests of consumers".

3.5. It seems that no impact assessment has been done of whether there is need for additional protection of the consumer interests under each and every instrument of Union law in Annex 1 (we refer to the Commission's "Better Regulation" agenda and REFIT in this regard). We think that the draft Directive would benefit from such an impact analysis in order to get it scoped more properly.

3.6. Another point where we see a risk of potentially unintended scope creep is the definition of "trader". Article 3(2) of the Draft Directive provides that a trader means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession. This opens up the possibility that a manufacturer becomes liable under the Draft Directive for conduct of the distributor of its products or services, although the latter is entirely independent and determines its market conduct independently. There seems little justification for such a broad scope of application of the Directive and the European Commission may want to clarify this point.

4. Opting In and Opting Out

4.1. As noted above, it is important that common consumer interest is represented in cases of this type and that expanded classes with inherent conflicts in interest are not permitted simply because representative bodies wish to inflate either the value of the claim or their own profile in pursuit of the case.

- 4.2. We understand that the European Commission recommends opt in collective structures only. We agree that this may disincentivise abuse.
- 4.3. Representative bodies should be required to demonstrate that interest exists on filing a claim by procuring that a material percentage of affected consumers opt in to the action. Claims should not be permitted to proceed to certification or further consideration without that step having taken place. A further opportunity for opt ins can be provided should any collective proceeding be certified by a court (once it is satisfied that all other requirements to proceed are met). A two tiered approach of this type is used in US employment collective actions (29 U.S.C. § 216(b)), which allow for conditional certification with minimal burden on the claimant followed by a decertification stage at a later date should opt in thresholds not have been met by that date or the class otherwise fail to meet certification requirements on rigorous scrutiny.
- 4.4. The European Commission should also issue clear guidance on implementation that addresses certification of a class. The Draft Directive also does not provide for a similarity or commonality requirement in certification of any action, except in Article 6(3) that excludes the application of Article 6(2), pursuant to which the court (or administrative authority) may limit its decision to a declaratory judgment. That opens the possibility of inclusion of varying interests into one action. That will generally not lead to "effective and efficient way of protecting the collective interests of consumers".⁷ As a minimum, a similarity requirement should be included across the board so as to ensure that only claims that have a common or at least a similar basis in fact and in law can be brought in a representative action.

5. Compensation and other redress measures

- 5.1. Article 5(3) suggests that "measures eliminating the continuing effects of the infringement" require a final decision that establishes that a practice constitutes an infringement of Union law. This suggests that these measures can be obtained only in 'follow-on' litigation i.e. there will need to have been prior proceedings in which the infringement has been established.
- 5.2. We agree that there should be a final decision from regulators establishing infringement before any action to claim compensation can be issued. This minimises the risk of uncertainty on legal principle or regulatory objectives being introduced via private litigation..

⁷ Cf. recital (3).

- 5.3. Article 6(1) provides for redress in the form of compensation. We understand that this includes compensation for damages as well as mandating a change in operations so as to cease any ongoing infringement. Article 6(1) provides that qualified entities can get a redress order, which obligates the trader to provide for "inter alia [...] price reduction [...] or reimbursement of the price paid, as appropriate". Actual redress will be determined by national law and this provision does not appear to account for principles governing calculation of damage or constraints upon Member State Courts that apply in doing so. As far as we are aware, most continental law systems do not have a *iustum pretium* (i.e. just price) doctrine. Courts do not have the expertise to set a price and would either have to invite the regulator to submit an opinion or otherwise allow economic evidence on the point. This raises the question whether "as appropriate" means to refer to the availability of the remedy under national law or to the circumstances of a particular case.
- 5.4. Article 6(3)(b) should make explicit that the "public purpose" must be approved by the court.

6. Funding and Cost Recovery

- 6.1. The Commission suggests that abusive litigation - including use of qualified representatives by one company to act against a competitor - will be limited by imposing transparency over the source of funding. However, it is unclear how this will work in practice or the degree of due diligence a court likely will carry out before authorising proceedings.
- 6.2. It is questionable whether Article 7 provides for sufficient transparency to enable the courts to monitor the prohibitions of Article 7(2). Ideally, the qualified entity would be required to submit a copy of the funding agreement (with the possibility to 'black out' confidential information, such as the amount of the funding and the compensation), but at the very least there should be a possibility to obtain disclosure if there are reasonable grounds to suspect that the qualified entity or the funder are not complying with the prohibitions.⁸
- 6.3. As noted above, we think that privately funded entities should not be permitted to pursue these actions. To the extent that the European Commission is not minded to limit the nature or number of entities that may be designated as representative bodies, it should nonetheless seek to avoid a proliferation of bodies competing to claim and representing different views on the law and consumer interests. Also, it should be clear that any funds not distributed to consumers in a collective settlement or judgement

⁸ Cf. article 13 that provides for disclosure in favour of the qualified entity.

situation revert to the defending entity or charity so as to remove the risk that representative bodies will pursue unmeritorious claims so as to build funds for wider activity.

- 6.4. Article 15(1) of the draft Directive presents on the one hand a risk of 'outsourcing' regulatory oversight to private enforcement and on the other hand a risk that Member States will influence decisions on private enforcement. The latter creates issues of regulatory due process. Also, it raises the question whether Member States in this regard should be treated as a third party in the meaning of Article 7.

7. Settlements

- 7.1. Article 8 puts an emphasis on settlement. Given the impact of representative actions, there should be a cooling off period of (at least) four weeks, in which the qualified entity must try to obtain in negotiations with the prospective defendant the remedies that it intends to seek in the representative action.⁹ This could be supported by a form of ADR, such as mediation.
- 7.2. Article 8(1) provides the Member States with an option. They may introduce a mechanism that will allow a qualified entity and a trader who have reached a settlement to apply for the court's approval. It is seen as improving access to justice, if both judicial and extra-judicial dispute resolution methods are available to the parties.¹⁰ If the qualified entity seeks a redress order for compensation of damages,¹¹ a settlement between the qualified entity and the trader will be feasible only if the settlement binds the class of consumers that have been harmed by the infringement in question. In order to facilitate such collective settlements, the Directive should make their introduction mandatory. This is underpinned by the US experience where hardly ever a class action results in a redress order (to use the Directive's terminology) and a significant portion is eventually settled. If class settlements will not be mandatory, this may result in forum shopping. A jurisdiction that offers the possibility of a class settlement may be more attractive to qualified entities than those that do not, because it gives the qualified entity the prospect of a quicker result.
- 7.3. We understand that the Draft Directive allows Member States to introduce opt-in and/ or opt-out collective settlement.¹² If, however, a consumer elects to be bound by the settlement, either by opting-in or not opting-out, they should be deemed to have waived their other rights, if the settlement agreement so provides and if the court approves. The situation that a settlement will always be

⁹ Cf. article 3:305a (2) Dutch Civil Code.

¹⁰ Cf. for instance Directive 2008/52/EC, recital (5).

¹¹ Cf. article 6(1) in conjunction with recital (17).

¹² Article 8(6).

without prejudice to any additional rights of redress that the consumers may have under Union or national law is unhelpful. Defendants are much more likely to settle if they can obtain finality of the mass harm case by so doing.

- 7.4. The provision that a collective settlement can be approved only if there is no longer any other representative action pending before the courts of the same Member State should be deleted.¹³ This effectively hands the power dynamic for resolving the totality of the dispute to the most stubborn qualified entity, not to the most reasonable one. Of course, there is a risk that the defendant will play one qualified entity off against the other. In our experience, this happens rarely in practice. Court review and approval of proposed settlements is a sufficient safeguard against abusive settlements.
- 7.5. Article 8 should make clear whether court approval means that the settlement is binding on the class in case of an opt-out system. Also, it should set a maximum term for opting in or out in order to achieve sufficient harmonization and legal certainty.

8. Effects of final decisions

- 8.1. Article 10(1) provides that a decision of a court or administrative authority shall establish the infringement in a representative action irrefutably against the same trader for the same infringement before a court in a Member State. This includes a final injunction pursuant to Article 5(2)(b) of the draft Directive (i.e. an injunction not given as an interim measure). The only other requirement seems to be that the infringement must concern an infringement harming the collective interests of consumers. This provision seems too imprecise to us. It also seems unfair if the same does not work in reverse ie a trader who successfully defends a claim also received the benefit of being able to use that as irrefutable evidence in another jurisdiction.
- 8.2. First, a distinction must be made between a decision of an administrative authority and a decision of a court. A further distinction must be made, as the Draft Directive does, between decisions from the same and from another Member State.
- 8.3. *Decisions from the same Member State*

8.3.1. In case of a decision of an administrative authority, that decision should be binding before the courts of the same member state (in follow-on litigation).¹⁴

¹³ Article 8(1), final sentence.

¹⁴ Cf. article 9(1) Directive 2014/104/EU.

8.3.2. If the decision is a judgment of a court, such binding effect should be given only to a judgment in a representative action, including a final injunction pursuant to Article 5(2)(b). It goes too far to give such *res judicata*-effect to just any decision on the infringement between a consumer and the defendant, let alone to a decision in proceedings in which the defendant did not appear (either because it defaulted or was not a party).

8.4. *Decisions from another Member State*

8.4.1. A decision from an administrative authority can be given binding effect in the fashion of article 10(2). Such a decision results in a rebuttable presumption of the infringement before the courts of the other member state.¹⁵

8.4.2. There is no compelling reason to treat foreign judgments any differently under the Directive than they are treated in the recast Brussels Regulation. Judgments from courts in other Member States should be recognized pursuant to Articles 36ff of the recast Brussels Regulation (with the safeguards that the Brussels Reg. provides). As a result of the automatic recognition, the judgment will have the same effect in the Member State of recognition as it has in the Member State of origin.¹⁶ If the Directive provides for binding effect in the Member State of origin (as per our comments in para. 8.3.2), it will, as a result of recognition pursuant to Articles 36ff recast Brussels Regulation, have the same binding effect in the Member State of recognition, rather than merely a rebuttable presumption as per Article 10(2). This inconsistency must be addressed expressly in the Draft Directive.

8.4.3. If Article 10(2) is not aimed at recognition, but rather introduces a provision on evidence, we query whether it is justified to accept a rebuttable presumption that an infringement occurred on the basis of just any judgment. There only is such justification if the fact pattern and legal issues in the case that led to the judgment are similar to those in the representative action in the other Member States. Also, we have misgivings as to giving a judgment in an individual case such status in a representative action. We do not see how such a judgment may give rise to a rebuttable presumption that the infringement harmed collective interests of consumers.

8.5. A related issue which needs to be addressed in order to avoid contradictory decisions from different Member States is the issue of if, and how, to prevent representative actions being brought at the same

¹⁵ See also article 9(2) Directive 2014/104/EU.

¹⁶ ECJ 4 February 1988, case 145/86, *Jur.* 1988, p. 645 (*Hoffmann/Krieg*)

time in multiple Member States against the same trader for the same alleged infringement, or even in the same Member State but by different claimants.

- 8.6. We understand that the choice has been made to leave jurisdictional issues to the Brussels Regulation and other existing instruments.¹⁷ This is, in our view, the right choice in principle for the sake of a consistent approach across all types of civil litigation. However, this opens up the possibility of different representative actions in different Member States about the same infringement particularly in high profile scenarios like Dieselgate. This clearly raises the likelihood of inconsistent decisions, which could cause chaos for the *res judicata*-effect envisaged by the European Commission and discussed in the previous paragraphs. The same degree of risk does not apply in normal civil proceedings, and highlights a need for judicial coordination.
- 8.7. In addition, there may be different representative actions in the same Member State about the same infringement. This too calls for a coordination mechanism.¹⁸ In our view, especially where a choice is made for opt-out actions, all individual actions in the same Member States should be suspended until the consumer issued an opt-out statement (see also para. 4.1).

9. Limitation periods

- 9.1. Article 9 provides that the submission of a representative action is sufficient to suspend or interrupt the statute of limitation. We think that the suspension or interruption should be tied to additional criteria, such as the expediency of the representative action and commonality between it and the individual redress actions of the consumers concerned.

10. Disclosure and Evidence

- 10.1. Article 13 provides a one sided approach to provision of documentary evidence, which is clearly unfair to defendants, and arguably in breach of Article 6 of the ECHR and Article 47 of the Fundamental Charter. In Member States in which, ordinarily, extensive document disclosure phases do not take place, this provision may well give claimants a right over and above national law, but without providing a reciprocal right to the defendant to seek evidence in the possession of the claimant entity.

11. Conclusion

¹⁷ Cf. recital (9).

¹⁸ Cf. article 3:305a(6) Dutch Civil Code.

- 11.1. Collective redress should be facilitated for consumers in the EU. However, private litigation likely will neither maximise recovery of compensation nor deliver coherent support of regulatory objectives without effective safeguards.
- 11.2. In situations where harm to consumers can be demonstrated, reliance on private litigation risks a result where any compensation recovered is subsumed by the costs incurred by the representative body, lawyers instructed and insurers underwriting the action. Private litigation also carries the risk of abuse or, simply, introducing incoherence in the approach to representation of consumer interests and interpretation of applicable law.
- 11.3. There are solutions on collective redress that can be promoted via voluntary or regulator supervised solutions. Any solution that does rely on private enforcement needs to meet the serious risks and challenges posed. At a minimum that includes:
 - 11.3.1. Strict criteria for qualification of representative bodies that ensures they are competent to represent consumer interests as well as indeed acting in those interests and with sufficient funding;
 - 11.3.2. No private funding of representative bodies or, to the extent that private funding is permitted, implementation of monitoring and oversight to ensure transparency and compliance with funding rules regarding competing commercial entities;
 - 11.3.3. Clear guidance on implementation on certification of a class that defines common interest so that classes with inherent conflicts in interest are not permitted simply because representative bodies wish to inflate either the value of the claim or their own profile in pursuit of the case; and
 - 11.3.4. Stipulations on handling of compensation not distributed to consumers in a collective settlement or judgement situation so that funds revert to the defending entity or to charity, rather than the representative body.