

06.07.18

Decision of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of, and repealing Directive 2009/22/EC

COM(2018) 184 final; Council doc. 7877/18

At its 969th session on 6 July 2018, the Bundesrat adopted the following position pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG):

1. The Bundesrat welcomes the aim behind the proposal for a Directive, which is that representative actions should provide an efficient instrument to prevent infringements against EU law that damage consumers' collective interests, and act as a deterrent from unlawful practices. The possibility pursuant to Directive 2009/22/EC 23 April 2009 on injunctions for the protection of consumers' interests for qualified entities to bring representative actions in order to prevent infringements of EU law that protect consumer rights, and also the possibility for consumers to claim in individual actions for damages resulting from such unlawful practices, do not seem to be sufficient to effectively protect the consumers concerned. The Bundesrat therefore agrees in principle that it should be possible to protect the collective interests of consumers in the framework of representative action.

* First Decision of the Bundesrat of 8 June 2018, see Bundesrat document 155/18 (decision)

2. The Bundesrat welcomes the creation of a legal remedy that enables ‘qualified entities’ such as consumer associations to bring action in future on behalf of injured parties. The Bundesrat sees this as marking significant progress towards equal opportunities for consumers.
3. It shares the Commission’s view that the instrument of representative action can, however, also be misused to the detriment of business and that measures need to be taken to prevent any such abuse. Even a representative action which ultimately turns out to be unfounded can put a considerable strain on companies and their reputation. The Bundesrat is accordingly concerned that no minimum number of affected consumers is required for representative action, also in so far as this is directed towards establishing liability or compensation, but that the collective interests of the consumers are defined in Article 3(3) of the proposed Directive merely as the ‘interests of several consumers’.
4. The Bundesrat asks the Federal Government to call for clarification at EU level to establish that the criterion in Article 4(1)(c) of the proposed Directive, namely that ‘it has a non-profit making character’, cannot exclude the existing consumer associations of the *Länder* or the Federation of German Consumer Associations ‘Verbraucherzentrale Bundesverband e. V.’.
5. The proposed Directive goes much further than Directive 2009/22/EC in that the aim and outcome of representative action may be to not only end or prohibit an unlawful practice, but also to establish in the interest of consumers that a certain practice infringes EU legal provisions and is detrimental to the collective interests of consumers. The related implications are extremely far-reaching: according to Article 6 of the proposed Directive, such a finding is to be the basis for redress measures; according to Article 10(1) of the proposed Directive, an established infringement will also be deemed irrefutably established in other proceedings in so far they are brought in the same Member State, and will be considered a rebuttable presumption in proceedings in other Member States. Bringing representative action is in itself to have implications affecting not only the parties to the proceedings in that, according to Article 11 of the proposed Directive, limitation periods for claims by consumers concerned are to be suspended or interrupted without further action.
6. The Bundesrat considers that the coming into effect of such far-reaching implications is only justified where consumers are also bound by the outcome of the proceedings in that they participate passively in a mechanism that may be

specified by national legislation, for example registering in a register of actions for the proceedings ('opt-in'). The Bundesrat refers in this regard to Commission Recommendation 2013/396/EU on 'common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' of 11 June 2013. Point 21 therein explicitly states: 'The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.'

7. The Bundesrat considers the obligation under Article 9 of the proposed Directive for traders to inform the consumers affected as to final decisions handed down to be too extensive. For a trader it is as a rule not possible to establish all the consumers who are affected and thus to inform them. The trader may only know those consumers who have participated in the proceedings through mandates. However, they will already have been informed through the actual proceedings.
8. In the Bundesrat's view, Article 10 of the proposed Directive contradicts the principle of equality of arms in stating that an infringement harming collective interests of consumers established in a final decision is deemed to irrefutably establish the existence of that infringement for the purposes of any other actions seeking redress while conversely, if a court establishes there is no infringement, the defendant trader is not protected from any individual action brought before national courts. Here we must call for the final decisions of the court in connection with the representative action to fully clarify the legal situation, i.e. also in the interests of the defendant trader, if no infringement can be established. However, as already explained, a binding effect also in this sense would require consumers to have made known by registering in a register of actions that the representative action is also to have an impact on them or their individual legal situation and procedural position.
9. Against this background, the Bundesrat points out that the provisions in Articles 5 and 6 of the proposed Directive appear unclear on whether or not a mandate from the consumer is required. According to the first sentence of Article 6(1) of the proposed Directive, a Member State may require the mandate of the individual consumers concerned before a declaratory decision if made or a redress order is issued. According to the second sentence of Article 5(2) of the proposed Directive, in order to seek injunction orders pursuant to (b), i.e. to

establish that the practice constitutes an infringement of law, qualified entities will not have to obtain the mandate of the individual consumers concerned. According to the second sentence of Article 6(3)(a), in cases where consumers concerned by the infringement are identifiable and have suffered comparable harm, the requirement of the mandate of the individual consumers concerned will not constitute a condition to initiate the action. The same applies according to the second sentence of Article 6(3)(b) of the proposed Directive, in so far as consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. Here the Member States are to ensure that the mandate of the individual consumers concerned is specifically not required. The interplay between these provisions remains unclear. In the Bundesrat's view, the action and the judgment can only also have legal implications for these consumers, if they participate in the proceedings through a mandate in the broader sense (for example, registration in a register). This registration should take place at an early stage in the proceedings so that the defendant trader can establish, especially with regard to settlement negotiations, the extent to which its connections with the consumers affected are included in the proceedings. Consumer participation would only seem to be superfluous for those types of proceedings which could already be initiated under Directive 2009/22/EC, in so far as these entail no additional legal implications.

10. The Bundesrat asks the Federal Government to examine the list in Annex I includes all relevant consumer law provisions and if necessary to ask for additions to be made at EU level.
11. The Bundesrat shall transmit this Opinion directly to the Commission.