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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**Concerning the application of Directive 2009/22/EC of the European Parliament and of
the Council on injunctions for the protection of consumers' interest**

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1. INTRODUCTION

Directive 98/27/EC of 19 May 1998 on injunctions¹ for the protection of consumers' interests introduced a Court or administrative procedure enabling consumer organisations and/or public authorities to seek an injunction to stop a trader's practice that infringes a number of EU rules on consumer protection (listed in the Annex to the Directive) in all Member States. Directive 98/27/EC has been amended several times (new Directives have been added to the Annex). In the interest of clarity, this Directive has been codified by Directive 2009/22/EC, which is currently in force.

1.1. Transposition of the Directive by Member States and its application until 2008.

The first report concluded that the major benefit of the Directive on injunctions was the fact that it introduced a procedure enabling an entity to bring injunctions to protect the collective interest of consumers in each Member State. These procedures were successful for national infringements, but had a more limited impact on cross-border infringements. The main reasons mentioned by both the Member States and the interested parties to explain the small number of injunctions sought in another Member State were the cost, complexity and length of time involved in taking action in another Member State.

The Commission's report also highlighted that the entry into force of Regulation (EC) N°2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC Regulation)² partially explained the limited recourse by public authorities to the injunctions procedure for cross-border infringements, as the mutual assistance mechanisms under the Regulation are less costly.

1.2. Methodology and purpose of this report.

Article 6(1) of Directive 2009/22/EC on injunctions for the protection of consumers' interests ('the Directive') provides for the adoption of a report on its application every three years. Initially planned for 2003, the first report was adopted in November 2008.

In March 2011, in order to prepare this second report, the Commission sent questionnaires on the application of the Directive to public authorities and consumer organisations. The Commission received 58 replies, 37 of which were from ministries or other public authorities of Member States and 21 from consumer organisations at national or European level.

In addition, the Commission commissioned an external study³ designed to collect further data on the application of the Directive and providing an overview of the impact of the Directive on consumers in nine Member States, namely Austria, Bulgaria, France, Germany, The Netherlands, Portugal, Spain, Sweden and United Kingdom. These Member States were

¹ The text of the Directive (OJ L 110, 1.5.2009, p. 30–36) can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0022:EN:NOT>.

² (OJ 364 09 12 2004, p.1-11)

³ Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests, carried out by IBF International Consulting.

chosen because, next to the injunction procedure, they have systems of compensatory collective redress which have been already running for a number of years.

2. APPLICATION OF THE DIRECTIVE FROM 2008 ONWARDS

2.1. Estimate of the number of injunctions.

Only limited data are available on the number of national and cross-border injunctions that have been initiated to defend the collective interests of consumers in the various Member States. This lack of comprehensive and reliable statistical data is due to the absence of a formal obligation on Member States to maintain a central database of the injunctions initiated on their territory and report this information to the Commission. For this reason, estimating the number of injunctions is a difficult task and any estimate we make needs to be treated with care. It is possible to report a number of documented cases, but this does not mean that these are the only actions for injunctions that have actually been initiated.

In the questionnaire sent to relevant stakeholders, respondents were asked about the number of injunctions they had tabled since 2008, at both domestic and cross-border level. In total, 5632 actions for injunction were reported. The vast majority of these were national. Respondents reported only around 70 injunctions with a cross-border dimension during the specified period. If we break down these figures by Member State, the Member States with the **highest number of actions for injunction reported**, as from 2008 are as follows: Germany: although there is a lack of centralized and comprehensive statistical data, the Federal Republic of Germany declared that just seven German qualified entities had introduced over 3,000 actions. This may well be linked to the fact that, in Germany, the policing of consumer markets is traditionally subject to private enforcement. Latvia: the Consumer Protection Authority has reported 956 cases. United Kingdom: The Office of Fair Trading (OFT) reported 938 actions. In Austria, the external study identified more than 500 actions and the Government of Malta reported 267 cases.

Concerning **injunctions with a cross-border dimension**, the Member States with the highest number of actions reported during the specified period are as follows: Germany: The Federation of German Consumer Organisations declared that it had initiated approximately 20 injunctions for cross-border infringements. Austria: The Federal Chamber of Labour declared that it had filed 8 cross-border injunctive actions. Qualified entities, as well as lawyers (barristers) specialised in consumer law, tend to bring actions only in cases where the standing of Austrian courts is ensured.

The success rate of actions initiated is usually high. However, this is partly because, owing to the cost risks linked to litigation, qualified entities only launch injunctive actions when they are sure to win.

2.2. Most affected economic sectors.

Although there have been injunctions in a very wide range of economic sectors, the majority of injunctive actions are concentrated in only a limited number of sectors.

The economic sectors which were most often mentioned by respondents as being most affected by injunctions are the following:

- (1) Telecommunications
- (2) Banking and investments
- (3) Tourism and package travel

Other sectors mentioned by several respondents are distance selling, insurance, energy, non-food consumer goods and passenger transport. A few respondents mentioned real estate and home repairs, or lending by non-banking institutions (so-called "quick loans"), as other affected sectors.

2.3. Most common infringements of consumer protection rules

Injunctions have been taken out against a wide range of breaches in consumer protection legislation. In addition, some Member States have extended the scope of injunctions beyond the limited list contained in the Annex to the Directive. This extension is positive for consumers. However, an appropriate reference should be made to the legislation included in the Annex to the Directive, in order to ensure legal certainty. Germany, Austria, Portugal, Spain, Bulgaria and the Netherlands are some Member States where the scope of injunctions is much broader than the list of legislation included in the Annex to the Directive. However, the majority of injunctive actions have been initiated to stop only a limited number of illegal practices harming the collective interests of consumers.

Judging by the responses to the questionnaire, the following illegal practices that harm consumers' collective interests have resulted most frequently in the exercise of injunctions, in order of importance:

- (1) Unfair contract terms. This is clearly the type of practice which most frequently gave rise to an action for injunction;
- (2) Unfair commercial practices and misleading advertising, in equal measure.

To a much lesser extent, other violations of the rights of consumers that led to the serving of an injunction were violations of provisions regarding guarantee rules, price indication regulations or the sending of unsolicited e-mails. Some Member States (Spain, in particular) also have a group of injunctions concerning the application of the Consumer Credit Directive. In some Member States where the injunctions have a broader scope, actions were brought against the interruption of essential services (such as electricity supply). In this case, the injunction order can perfectly order to comply with consumer rights requiring a party to take a certain action. Cases such as the interruption of services or utilities in Spain are a good example of this kind of injunction ordering action to be taken.

2.4. Qualified entities: legal environment in the different Member States.

The latest list of qualified entities⁴ includes a total of 313 qualified entities. The number and characteristics of these entities vary widely from one Member State to another. While several Member States have designated just one qualified entity (Ireland, Latvia, Lithuania, The Netherlands, Romania and Sweden), others have designated more than 70 (Germany and

⁴ OJ C 97 of 31.3.2012

Greece). Spain, Italy and France are in an intermediate position, with more than 15 and less than 30 designated qualified entities. In general terms, when Member States have designated a single qualified entity, it is typically a public authority in charge of consumer protection, although there are exceptions, such as the Netherlands.

The Member States that have designated several qualified entities normally include a mix of public authorities responsible for consumer affairs at local, regional and national level, plus the most representative consumer organisations. The list of qualified entities contains the list of entities authorised to seek an injunction in another Member State, but in many Member States some legal entities that are not included in the list also have the legal standing to bring injunctions at national level. Some consumer organisations criticize the excessive margin of discretion in deciding which legal entities are included in the list, which may lead to unfair and arbitrary decisions. Others also claim that consumer organisations should have the legal standing to bring injunctions in all Member States, both for national and for cross-border cases.

The study also shows that whether injunctions are actually used depends on the knowledge and capabilities of the legal staff entitled to apply them. Experience also shows that, even in those Member States where a large number of entities have the legal standing to seek injunctions, only a small proportion of them make use of this possibility.

2.5. Injunctions with a cross-border dimension: the design of the Directive and the situation on the ground.

In order to properly assess the use of injunctions in the EU, the concept of cross-border litigation needs to be clarified. It appears that cross-border injunctions, i.e. injunction proceedings which include a cross-border element, can take different forms.

The Directive was crafted to permit qualified entities of Member State A to pursue business operators in Member State B if the latter, by trading with consumers in Member State A, were breaching consumer laws. In order to make this possible, qualified entities were vested with legal standing in foreign courts. The Court in Member State B, served with a request to issue an injunction against a trader established within its jurisdiction, would hear and decide the case without questioning the legal standing of the qualified entity of Member State A.

However, one of the main findings of the study is that the Directive's designation of a 'cross-border case' is only one of two possible forms of injunction proceedings with a cross-border dimension, and it is rarely used.

The second, more common, form of 'cross-border case' appears in the same scenario of trade from Member State B into Member State A. However, contrary to what the drafters of the Directive had in mind, a lawsuit is brought by a qualified entity in Member State A before a court in Member State A. The trader, although established abroad, is sued in the country to which he directs his commercial activity. Operating in this way has the advantage that a qualified entity can file a case in its own familiar jurisdiction which applies the procedural law that it probably knows best. If, in addition, the applicable law is the law of Member State A (the *lex loci damni* principle of Article 6 of 'Rome II'⁵), and the problem of the serving of

⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31.7.2007, p. 40–49

legal documents abroad can be resolved, this second possibility of injunctive action is the easiest option to choose. This also makes it possible to seek injunctive relief against traders in third countries.

A "cross-border" action of a particular kind was started in May 2009 by DECO⁶ in cooperation with France's UFC-Que Choisir and Belgium's Test-Achats. The "coordinated action" concerned airlines' general conditions of carriage (Directive 93/13/EEC). A judgment was delivered for Belgium, and obliged three airlines to stop using a number of contract terms regarded as unfair. Every step of the consumer organisations was coordinated, including the accompanying publicity measures such as press releases. This form of coordinated action represented a particular type of cross-border cooperation, although it did not formally qualify as cross-border litigation.

2.6. Interaction with the CPC Regulation on cross-border infringements.

The CPC Regulation establishes a mutual assistance framework for national enforcement authorities which allows authorities to call on each other to seek investigative and/or enforcement assistance in order to stop practices that are not compliant with the legislation listed in the Annex to the Regulation. The CPC Regulation aims at protecting collective consumer's economic interests and not at handling individual complaints.

The 2008 report on the injunctions Directive, indicated that the CPC Regulation had an impact on the use of injunctions, in particular experience showed that, since the entry into force of the CPC Regulation, most public authorities have opted to use its mutual assistance mechanisms when combating an illegal practice by a trader in another Member State, instead of directly seeking an injunction before the courts of that Member State, as the first possibility could be less costly for them. The replies to the questionnaire in 2011 confirm this trend, although one public authority of a Member State highlighted the fact that injunctions still constitute a valuable tool for public authorities, which could be used should the CPC mechanisms not reach the results expected.

Finally, several respondents emphasized that the list of legislation contained in the Annex to the Directive on injunctions should be aligned with that of the Annex to the CPC Regulation.

3. IMPACT OF THE DIRECTIVE ON CONSUMERS.

The replies to the questionnaire and the findings of the study show that injunctions are a successful tool for policing markets, especially to ensure fair contract terms. In this respect, they have brought substantial benefits to consumers as a whole. However, their impact is projected more towards the future rather than being useful for correcting past damage, and it is very difficult to quantify in monetary terms.

Although injunctions do not, as such, provide a remedy for claiming damages for the past, the possibility of using injunctions can in itself be of value. As a governance tool, injunctions can be used as a deterrent without being applied in Court.

⁶ Associação Portuguesa para a Defesa do Consumidor.

Another important conclusion is that injunctions work particularly well with market players who respect to a certain extent the law. Against rough traders and criminal actors, injunctive actions are not always an appropriate mechanism to put a stop to illicit practices. Several interviewees say that, in such situations, criminal and administrative sanctions like penalties and imposing specific restrictions on carrying on business activities may be necessary to ensure compliance with consumer protection legislation.

3.1. Reduction in the number of infringements to consumer protection rules

While most of the respondents and experts interviewed declared that the effect of injunctions cannot only be measured in terms of the number of cases brought to Court, it is also an important option that can be used to convince companies to cease infringements voluntarily. For several interested parties, the very possibility of being able to bring injunctive actions has an inherent deterrent effect in negotiations with those who infringe the legislation. In some cases, on the other hand, when an injunctive action is successful and declares that a practice of a trader is illegal, other traders tend to refrain from using similar practices, even if they are not legally bound by the ruling.

Taking into account the results of the study and the replies to the questionnaire, our conclusion is that the Directive has to a certain extent enhanced compliance with consumer protection laws among economic operators in certain sectors of the economy, although there are not enough data available to estimate this reduction in percentage terms.

3.2. Reduction in consumer detriment

An important conclusion of the study is that the Directive has had direct qualitative benefits for consumers, although it was not necessarily possible to express these benefits in monetary terms. This is due to the fact that, in many cases, it is not possible to establish the exact number of consumers who potentially suffer damage as a result of an illegal practice. Moreover, many contract terms which are declared illegal following an injunction are not related to the price to be paid by consumers.

In order to assess the possible effect of injunctions in reducing consumer detriment, a particular attention should be paid to unfair contract terms that can have immediate direct affect on consumer obligations under the contract.

When a Court declares a particular contract term to be null and void, the trader can no longer apply that term in all contracts. This benefits the consumer, particularly if the term regulates price increases or other financial effects, and in such a case the benefit can be evaluated in monetary terms, since many consumers will reduce their future payments as a direct consequence of injunctions. For instance, the "rounding up" cases in Spain have led to the banning of new illegal charges in a range of sectors (banking, telecommunications, parking).

For instance, in Austria an action for injunction was brought against unfair terms in the banking contracts of an Austrian bank. In August 2009 the bank informed its customers in the statement of accounts that prices for current accounts were to be increased as from 1 October in line with the increase of the consumer-price index for 2008, which amounted an increase of 3.2%. The bank referred to the index-clause in the Standard Contract Terms, which allowed the bank to automatically increase prices for continuing obligations once a year, according to the movements of the consumer-price index. This injunction measure had a significant impact on consumers, because in spring 2011 most of the other banks, which had used similar terms,

refrained from automatically increasing the price, and this benefited several million clients of Austrian banks. This is a clear instance of a successful injunction having a tangible impact on compliance with the law, not only with regard to the defendant, but for the whole economic sector. Moreover, the benefit for consumers was easy to evaluate in monetary terms.

Another case where the consumer benefit flowing from the successful proceedings has been computed in monetary terms is the Foxtons' case in the UK ⁷ (concerning unfair terms in lettings agreements with consumer landlords). The test of fairness related to Foxtons a) Renewal Commission terms, b) Commission on Sale of the Property, and c) Third Party Renewal Commission. The High Court declared formally that certain terms in Foxtons' contracts were unfair, and granted an injunction restraining Foxtons from relying on these or on similar terms, or inserting these terms into future contracts. According to the OFT consumer benefit amounts to £4.4 million, although one interviewee believes that the positive effect might easily turn out to be ten to twenty times higher.

3.3. Effects of injunctions on individual consumers affected by infringements: possibilities of redress in different Member States.

As a general rule, the injunction procedure introduced by the Directive does not enable consumers who have suffered harm because of an illicit practice to obtain compensation. However, the possibilities of redress for consumers affected by a trader's practice that has been declared illegal following an injunction varies from one Member State to another. Some Member States pass on the impact of an injunction, to a certain extent, to the affected consumers. Several of those responding to the questionnaire and interviewees, underlined the importance of extending the effects of injunctive actions to include individual consumers, enabling them to obtain appropriate compensation for the harm suffered. Some possibilities of redress, of both an individual and a collective nature, which are available to consumers in the various Member States, are described below.

a) Individual redress

In most Member States, there is no link between an injunctive action and the granting of compensation to consumers for the harm suffered due to an illegal practice. Thus, consumers whose rights have been infringed have to enforce their rights by bringing an action before an ordinary Court, either individually or collectively, in those Member States where collective redress mechanisms exist. Moreover, in many Member States, Courts dealing with such proceedings initiated by consumers to obtain compensation are not bound by the earlier ruling on the injunctive action. Consumers seeking damages will have to prove the infringement, the damage and the causal link between the two.

However, in some Member States the situation is different. For instance, according to the Bulgarian Commission for Consumer Protection, consumers may invoke an enforceable Court decision on a claim for an injunction when filing a claim for damages, having to prove only the amount of damage suffered. In Luxembourg, the consumer can use the court decision on an injunction to request the "juge de paix" to award him damages. In Ireland, it is open to the Court to require the trader to pay damages to a consumer who has suffered loss as a result of the trader's actions. In Malta, in connection with the administrative proceedings, the restitution of any money or property given by the consumer may be ordered.

⁷ <http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons>

In other Member States, consumers affected by illegal practice can obtain compensation through the enforcement of a Court ruling, and the Court may then determine how consumers affected by the illegal practice should be compensated, for instance by making the trader repay the amounts unduly paid.

In The Netherlands, a Court accepted that the wrongfulness of the behaviour of a company was also established with regard to the individual claimant in as far as he belonged to the group mentioned in the declaration. This means that the judgment of the wrongfulness of the behaviour in a collective proceeding can be taken as a starting point in a later follow on action. The injunction procedure thus helped an individual claimant to establish the wrongfulness of the defendant's behaviour.

b) Collective redress

In some of the Member States where systems of collective redress exist, the successful pursuit of an injunction may have some consequences on a collective action initiated by the affected consumers to claim damages resulting from the illegal practice, in addition to the normal effects of a successful injunction mentioned in the previous point.

In Spain, it is possible to append to the injunction a request to pay back the amounts received from consumers as a result of an unlawful practice, and the ruling which declares a practice as illegal will also, in this case, set the damages to be paid by the trader. If the affected consumers have been identified, the court will determine the amount each of them must receive. However, there are some procedural obstacles, which make it difficult in practice to combine both the injunction and the application for damages.

In The Netherlands, parties acting on behalf of consumers who have incurred damages can seek a declaratory judgment stating that an infringement has been committed by the party causing the damage. This declaratory judgment is considered to be an incentive for parties to reach a settlement, and to make the settlement binding through the use of the Dutch Class Actions Act (Wcam⁸). Under the terms of the Collective Settlements of Mass Damages Act 2005, the Amsterdam court of appeal can make a settlement on mass damages between an entity representing collective interests and the person(s) causing the damages binding on all class members. The starting point is an agreement that seeks to compensate collective damages. The parties that have reached the agreement issue a joint request to the Amsterdam court to declare the agreement binding. Crucial to the Wcam is the fact that the entire group of victims is bound by the settlement agreement once the Court has declared the agreement binding. However, there is a possibility to 'opt out'. One of the limitations of this system is that it only works if the parties reach an agreement, and even a decision establishing the wrongfulness of the behaviour is not always sufficient to ensure that a settlement is reached.

In Bulgaria, a claim for compensation of the injured parties can be filed at the same time as an action for injunction. The Court sets a time limit by which the injured parties may declare that they will take part in the proceedings. After handing down its decision, the court may stipulate that compensation is to be paid to the injured parties. The court judgment is binding on the infringer, the plaintiffs and all persons who suffered damage from the same infringement and have not declared that they will bring an individual claim. The action for injunction precedes the action for compensation. If the action for injunction is successful, a group of consumers

⁸ Wet collectieve afwikkeling massaschade

can bring an action for compensation. In this (new) court action they will not have to prove infringement of the legislation (illegal practice or unfair term); they will have to prove only the amount of damage suffered. Although the representative action may be considered in the same proceedings as the action for injunction, or in separate proceedings, courts quite often split the two actions into separate proceedings.

In Sweden, a central role in collective consumer enforcement is also played by the Consumer Ombudsman, who can file a group action for damages on behalf of a plurality of consumers in injunction proceedings. However, this possibility has been used in only a limited number of cases.

4. OBSTACLES TO THE EFFECTIVENESS OF INJUNCTIONS

The obstacles that prevent the injunctive actions to be effective can be classified in the following groups: financial risks, length of the proceedings, complexity of the proceedings, limited legal effect of the rulings and enforcement of the rulings.

4.1. Financial risk linked to the proceedings

Costs of the proceedings are indicated as one of the major obstacles to a wider use of injunctions. Although Court fees are generally low and lawyers are not exorbitantly expensive in all countries, cost remains a major deterrent, mainly due to the "loser pays principle". In order to limit the risk of paying the fees and costs of the opposing party, only cases that are 'sure to be won' are taken to court. However, qualified entities that are better funded are occasionally prepared to take a case to the Courts, accepting the risk of losing when a matter of principle is at stake. But even winning a case does not prevent qualified entities from incurring a financial risk: stakeholders also mention the risk of the costs of proceedings not being reimbursed even if the plaintiff wins the case, because the defendant is unable to pay the costs. Moreover, in some Member States such as Austria, there is an obligation on the party seeking the injunction to pay damages if the decision reached in interlocutory proceedings is subsequently set aside in the main proceedings.

The financial risk of injunctions is mitigated in some Member States where organizations defending collective interests are exempted from Court fees and can even apply for a subsidy under the general legal aid system. This is the case, for instance, in Spain and it is also under consideration in The Netherlands. In Spain, this right to legal aid includes lawyers' and solicitors' fees, publication of announcements or edicts, copies, certificates, etc. However, even in those Member States where consumer organizations benefit from legal aid systems, payment for the advertisements in the mass media that are required when consumer organisations initiate collective claims for damages, in addition to the injunction, is one of the main problems that consumers associations face, because this cost is not reimbursed.

In Bulgaria, consumer organisations do not receive any subsidy for Court actions, but financing is provided to consumer organisations according to what actions they have taken in favour of consumers in the previous year. One of the criteria used for the allocation of the State subsidy assigned to consumer organisations is the number of actions for injunction brought to court during the previous year. In addition, in Bulgaria there are additional criteria set out on the Civil Code Procedure with regard the admissibility of claims, whereby 'qualified entities' have to prove their capacity to assume the charges related to the conduct of the case, including costs.

4.2. Length of the proceedings

The second obstacle is the length of the proceedings. The concept of what length would be acceptable varies from one Member State to another. It is worth pointing out that the length of the proceedings is not linked to the injunction mechanism in itself, but rather to the inherent slowness of the national Court proceedings.

In Sweden, the existence of a special Court, the Market Court, which deals predominantly with injunction proceedings for the protection of collective consumer interests, guarantees a relatively speedy procedure in such cases. Nevertheless, the average length of proceedings before the Market Court is still around 11-12 months. In other Member States, the length of the whole procedure going through three Court hearings may even exceed 5 years in some complex cases.

Another obstacle related to the length of the proceedings is when the enforcement can be requested. For instance, in Spain, although the law provides as a general rule for the provisional execution of any sentence and there are no special rules for collective actions that contradict this general rule, normally the courts have decided not to allow execution because of the provisional nature of these pronouncements, and the qualified entities are therefore obliged to wait until the final decision.

In Bulgaria, the entry into force of the provisions of the new Code of Civil procedure in 2008 meant that the court decisions on actions for injunction, in case of appeal, can only be enforced after the third instance court has taken a decision.

4.3. Complexity of the procedure

Most stakeholders and experts consider that another major deterrent to the wider use of injunctions is the complexity, real or perceived of the procedure. This situation is aggravated in cross-border cases, due to the ignorance of substantive and procedural rules in other Member States.

In connection with this, one of the difficulties in cross-border cases that has been mentioned by stakeholders and experts is the difficulty in applying the rules of private international law, in particular those concerning jurisdiction (Regulation 44/2001 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters, "Brussels I"⁹) and applicable law (Regulation 864/2007 on the applicable law on the non-contractual obligations, "Rome II"¹⁰). It is difficult to understand from the submissions by stakeholders whether this is due to a lack of knowledge, inexperience or the weakness of the law. The harmonisation of the private international law rules at Union level has without doubt increased legal certainty compared to the situation a couple of years ago where each Member State applied its own rules. Nevertheless, despite the harmonisation of these rules, doubts on the interpretation of these rules may remain pending further guidance by the ECJ on their application, especially as regards the Regulation on the applicable law on the non-contractual obligations "Rome II", which only applies since recently in the Union.

⁹ OJ L 12, 16.1.2001, p. 1–23

¹⁰ OJ L 199, 31.7.2007, p. 40–49

The complexity of the injunctions in cross-border cases is compounded by other problems of a more practical nature, such as language barriers and also the difficulty of accessing company data abroad. One of the problems is to identify a foreign trader and find his address. This makes the sending of Letters of Caution or filing a lawsuit more difficult. Even if the trader is identified, serving notices on foreign companies can take a long time and be unsuccessful, particularly when traders give only P.O. boxes or fake addresses¹¹.

4.4. Limited effect of the rulings

In many Member States, a ruling is mandatory only in respect of the case and the parties involved.

In some Member States this principle is less strictly applied, particularly with regard to the nullity of unfair contract terms. France is a prime example of the strict application of this principle, since the annulment of unfair clauses only affects the future contracts of the trader, thereby making lawsuits against unfair terms useless when the disputed contract term is no longer proposed by the trader to the consumers.

In Spain, when a clause is declared unfair, the consequence is the clause becomes null and void with effects *ex tunc*, which involves reverting to the status quo ante and the obligation to return the money illegally paid to the affected consumers in application of the unfair clause. Moreover, in some cases the courts ruled that the effects of the nullity should be extended to other companies using the same contract term.

Another problem is the fact that the scope of an injunction is not pan-European, meaning that a rogue trader can move from one Member State to another, repeating its activities. A stakeholder also mentioned the fact that, in many jurisdictions, orders cannot be served against individuals. In the UK, the OFT can take action for misleading advertising against “any person” involved in the dissemination of an advertisement (such as company Directors and Chief Executive Officers).

4.5. Enforcement of rulings

The difficulties highlighted in the previous sections have related mainly to the declarative stage of the injunction proceedings. From this, it may be assumed that, once the obstacles have been overcome and the qualified entity has obtained a final favourable decision in Court, the case is resolved. However, this is not necessarily true, as on many occasions the taking of a favourable decision does not mean that it is actually enforced and that the infringement is stopped. Many stakeholders underlined the difficulty of ensuring the settlement of adopted decisions, especially in cases where the seller or service provider ignores the decision, regardless of the penalties enforced. Experience has shown that infringements can only be properly challenged when traders expect a sanction which is sufficiently dissuasive and actually enforced. If the sanction is not sufficiently dissuasive, many traders consciously accept the cost of legal proceedings, which is low by comparison with the profits made.

The sanctions imposed for non-compliance with injunction rulings vary from one Member State to another, but they are generally considered as not dissuasive enough. In The

¹¹ Regulations (EC) No 1393/2007 and No 1206/2001 have increased the speed and legal certainty of cross-border service of documents and taking of evidence.

Netherlands, it is possible to impose the payment of a lump sum where the decision of the Court is not complied with. When this occurs, and the payment of a lump sum is imposed, this sum goes to the other party. In Sweden, injunctions are issued under penalty of a fine in the case of non-compliance. In Bulgaria, a financial penalty ranging from 5000 to 23 000 BGN¹² is imposed on any person who fails to comply with an injunction order. In Spain, there is a daily penalty for non-compliance ranging from 600 to 60.000 € per day of delay in implementing the court decision. Theoretically, anyone who persistently refuses to comply with a court decision may face criminal sanctions in Spain, but to our knowledge this has never happened in an injunctions-related case.

5. NEXT STEPS

5.1. Introduction

Despite its limitations, injunctive actions are regarded by the overwhelming majority of stakeholders and experts as a useful tool with considerable potential if the shortcomings identified are addressed.

In the European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’, the European Parliament takes the view that "injunctive relief also plays an important role in safeguarding rights which citizens and companies enjoy under EU law and believes that the mechanisms introduced under Regulation (EC) No 2006/2004 on consumer protection cooperation, as well as Directive 2009/22/EC on injunctions for the protection of consumer interests can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations".

Possible measures suggested by stakeholders to improve the effectiveness of injunctions:

a) Non legislative measures

There are measures which may increase the use of injunctions and their effectiveness without changing the legal framework, either at European or at national level. One possible such measure is organising **awareness-raising campaigns and training** for qualified entities in the use of injunctions, as many of them do not have enough knowledge to make use of them. In the same vein, some stakeholders suggest the introduction of mechanisms (such as a **website**) to give publicity to injunction cases across Europe. Such a website could also contain information on the scope of injunctions and the procedural rules in the different Member States, translated into all the official languages of the EU.

b) Possible changes in the legal framework

Most stakeholders believe that the Directive is a straightforward, well crafted, piece of legislation. However, it appears that the level of use and effectiveness of injunctions varies from one Member State to another more than would be desirable. The Directive contains some basic rules, but leaves considerable latitude for Member States to design the characteristics of injunctive actions, including the procedural rules, as well as their scope and effects. Unequal effectiveness of injunctions in different Member States derives largely from

¹² From 2.556 to 11.759 € according to the exchange rate of 21 June 2012.

differences in the way that Member States have transposed the Directive into domestic law and from differences in their procedural and substantive law. Several respondents, including some public authorities of Member States, advocate a greater degree of harmonization (with regard to time limits for introducing the action, the deadline for rendering a court decision and costs) in the injunction procedures of the various Member States, at least for cross-border cases. In any event, it would be appropriate for those provisions that are particularly useful for improving the effectiveness of injunctions used in some Member States to be introduced into the others.

Stakeholders have suggested a number of possible measures that would ensure that injunctions are more frequently used and are more effective. It has been suggested to introduce some of the measures which already exist in some Member States at European level. The most important of these are as follows:

1. **Extension of the scope of application** of the Directive to all consumer protection rules. Several stakeholders are in favour of extending the scope of injunctions beyond the list included in the Annex, as is already the case in some Member States. For instance, laws on the protection of privacy and personal data are increasingly regarded as "consumer laws".
2. **Extension of the effects of the decisions.** Most stakeholders take the view that consumers should benefit directly from a judgment following a successful case, rather than being obliged to introduce new proceedings to enforce their rights. Clear provisions on the possibility of compensating consumers and the method of doing so should be introduced into the Directive. Furthermore, the limitation period for claims by consumers affected by the legal infringement must be suspended during the injunction proceedings. When a contract term is declared illegal, the effect of this decision should be extended to all similar present and future contracts (it is already the case in some Member States).
3. **Fast-track proceedings** for interim measures. Several stakeholders were in favour of a provision requiring the mandatory use of an accelerated procedure for all actions for injunction, and not only "where appropriate", as provided for by Article 2 of the Directive. However, as different national legislations do not have the same understanding of the meaning "accelerated procedure", the Directive should contain some requirements relating to the accelerated procedure, such as regarding deadlines for rendering the court's decision on the injunction.
4. **Right to information.** Several stakeholders indicated that qualified entities should have the right of access to the name and legal address of businesses involved in unlawful practices. Companies should be obliged to make available the standard contracts that they use, as is the case in Spain, where standard contract terms have to be included in the "Registro de Condiciones Generales de la Contratación". Most stakeholders are also of the opinion that decisions should be published in order to inform consumers and to dissuade traders. This is already the case in some Member States.
5. **Financing.** Most stakeholders consider that the "loser pays" principle should continue to apply in actions for injunction. Some however acknowledged that this

principle should be applied in a flexible manner which is favourable to qualified entities, as is the case in some Member States.

6. **Enforcement of decisions** should be improved. To this end, several stakeholders consider that Member States should be required to impose dissuasive penalties for non-compliance with injunction orders, in order to ensure that unfair business practices are unprofitable for traders.

Finally, several stakeholders, including public authorities from some Member States, declared that a mechanism of collective redress for consumers should be introduced at European level, in addition to possible improvements on injunctions.

6. CONCLUSION

Based on the above findings, the Commission draws the following conclusions concerning the application of the Directive:

Despite its limitations, injunctive actions constitute a useful tool for the protection of the collective interests of consumers. Qualified entities are gradually becoming aware of the possibilities offered to them by the Directive and gaining experience with its use.

However, important disparities exist among Member States in its level of use and effectiveness. In any event, even in those Member States where injunctions are considered quite effective and are widely used, their potential is not fully exploited due to a number of shortcomings identified in this report. The most important are: the **high costs linked** to the proceedings, the **length** of the proceedings, the **complexity** of the procedures, the relatively **limited effects** of the rulings on injunctions and the difficulty of enforcing them. These difficulties are even more present in injunctions with a cross-border dimension.

The Commission takes note of the issues raised by stakeholders and their suggestions to address them. The Commission will continue monitoring the application of the Directive in the Member States. It will further assess how best to address with Member States the issues identified in this report, and how to achieve improvements within the current legal framework. The Commission considers that there does not appear to be sufficiently strong reasons to propose amendments to the Directive at this stage, and will review the situation when preparing the subsequent report on its application.