AK – Prinz Eugen-Strasse 20-22, 1040 Vienna

Directive on representative actions – start of trilogue negotations

Dear Members of Parliament,

The Federal Chamber of Labour refers to the last Council draft from 6.11.2019 (WK 12536/2019 INIT) as well as to text (P8_TA-PROV(2019)0222) adopted by the European Parliament and would like to point out the following issues, which are of particular significance from a consumer perspective:

- Clarification of minimum harmonisation
- Declaratory action for ceased infringements required
- Special rules concerning jurisdiction and applicable law for qualified entities
- Maintenance of the status as qualified entity
- No ban on third-party funding
- Ensuring the removal of all effects of the infringement through redress action
- Clear right to choose by MS between opt-in and opt-out in case of redress actions
- Maintenance of redress actions without previous injunction measures
- Information on representative actions at the trader's expense
- Impact of final decisions
- Maintenance of suspension of limitation periods
- Clearer assistance for qualified entities
- Ensuring the application of air and rail passenger rights
- Applicability of the Directive to previous infringements
- Maintenance of a broad area of application

On the demands in detail:

- **Clarification of minimum harmonisation**

The Directive should clarify at the outset that a minimum level of harmonisation applies to it, that Member States may also retain or introduce more favourable provisions for the consumer. According to the current proposal in Art 1 Paragraph 2 of the Council text, Member States may retain their national systems; however, they have to provide for a system, which implements the Directive. However, it is important that Member States are able to introduce or retain more favourable provisions for the consumer. This is shown by the example of the possible cease and desist proceedings pursuant to Art 5a Paragraph 3 of the current Council text. According to this, Member States may provide for cease and desist proceedings prior to representative action. However, if such cease and desist proceedings are introduced or retained, this - in accordance with the current Council text - has to be mandatory. Representative action without previous request for consultation will then not be possible. If only a minimum level of harmonisation applies to the Directive, Member States may provide for more favourable provisions and thereby only provide for cease and desist proceedings voluntarily, as it is currently the case in Austria concerning the implementation of the Injunctions Directive.

- **Declaratory action for ceased infringements required**

Art 2 Paragraph 1 of the Council text, which describes the area of application, also states that this Directive applies to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started. In contrast, Art 5a of the Council text only provides for mandatory provisional and definitive injunction measures; in addition, Member States may provide for measures to establish that the practice constitutes an infringement. In the opinion of the BAK, this declaratory action has to be possible in any case. Hence, Art 5a Paragraph 1 should be supplemented by following lit c so that Art 5a Paragraph 1 reads as follows:

Art 5a

Injunction measures

1. The injunction measures referred to in Article 5(2)(a) are:

(a) a provisional measure to cease or, where appropriate, to prohibit a practice deemed to constitute an infringement;

(b) a definitive measure to cease or, where appropriate, to prohibit a practice that constitutes an infringement;

(c) a measure to establish that the practice constitutes an infringement.

The mandatory declaratory action ensures that infringements that have already ceased can still be fought against, which is necessary i.a. if the effects of an infringement continue. This enables proceedings with 'injunction measures' against impending as well as continuing and ceased infringements.

- **Special rules concerning jurisdiction and applicable law for qualified entities**

Pursuant to Art 2 Paragraph 3 of the Council text, this Directive shall remain without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction, recognition and enforcement of judgements and applicable law.

In the present Directive, the BAK supports special rules concerning jurisdiction and applicable law. The qualified entity should be able to bring representative action in the Member State where it is based and in doing so be able to apply the national law of its Member State, if infringements have taken place in this Member State against consumers who are resident there.

- **Maintenance of the status as qualified entity**

With regard to implementing the Injunction Directive, the BAK is currently one of the qualified entities. According to the current draft of the Representative Actions Directive, Member States *are able* to designate public bodies as qualified entities, without having to fulfil the criteria in Art 4a for cross-border representative actions to obtain the status of qualified entity. The BAK was established as a public body and legally represents workers and employees in Austria. Membership is mandatory by law and the BAK is funded by member contributions. Within the scope of interest representation, the BAK is also involved in law enforcement and consumer protection. The BAK is a so-called self-governing entity; it acts independently in its own sphere of action; however, it is subject to state supervision and control. Any further review of the BAK - as provided for by the Council text in Art 4a Paragraph 4 and Paragraph 5 as well as Art 4b Paragraph 3 and Paragraph 5 f - is not possible.

In our opinion, the BAK is to be understood as a '*public body*' within the meaning of the Representative Actions Directive; therefore it does not have to fulfil any criteria - as stated in Art 4a for cross-border representative action - which means, that there is no need for it to be regularly monitored concerning the compliance with the criteria.

However - in accordance with Amendment 48 proposed by the European Parliament - it should be made clearer that those public bodies, which are already designated after the entry into force of the current Injunction Directive, shall remain eligible in accordance with the to be implemented Representative Actions Directive, without having to fulfil the criteria set out in the Directive. This Amendment of the European Parliament's proposal only refers to '*public bodies*' and only provides for an option or the Member States. In order to also exempt the Association for Consumer Information of Austria (VKI), which is also an entity designated after the entry into force of the Injunction Directive, from fulfilling and complying with the criteria, the term '*public bodies*' should be replaced by the more general term '*entities*, so that the new Paragraph to be added in Art 4a has to read as follows:

"*Member States shall provide that entities already designated before the entry into force of this Directive in accordance with national law shall remain eligible for the status of qualified entity within the meaning of this Article.*"

Of course, these per se qualified entities have to be exempt from the provisions of the Directive, which provide for a guarantee of the monitoring duty by Member States and courts (namely Art 4a Paragraph 4 and 5, Art 4b Paragraph 3, Paragraph 5 f of the Council text).

- **No ban on third-party funding**

Even though the BAK calls for the clarification of its classification as a '*public body*' resp. for maintaining the current right to bring action and thereby immediate recognition as qualified entity without monitoring by Member State or courts (see above), in case of maintaining the current Council text one has to decisively oppose the criterion of the ban on third parties, which have an economic interest in bringing representative action, including the case of third-party funding (Art 4a Paragraph 3 lit cb) taking influence. Apart from that, Art 4b Paragraph 3, 2nd sub-Paragraph of the Council text now provides for an option for the Member States to enable courts or administrative authorities in case of funding by a third party, which has an economic interest in the outcome of the proceedings, to refuse the right to bring action by the qualified entity for this specific cross-border representative action. In combination with Art 4a Paragraph 3 lit cb and the corresponding Recital 10 of the Council text this apparently refers to redress action against competitors. However, this provision too should be deleted, unless BAK and VKI, as described above, are recognised as qualified entities without fulfilling and complying with any criteria. It must also be possible to bring action against competitors of the third party, which assumes legal costs funding. In Austria, acting legal costs financers are insurance companies for example, which, in case of such a ban, are not permitted to financially support an action e.g. against a legal protection insurer, which uses inadmissible clauses in the insurance contract and thereby rejects unlawfully covers.

Should this criterion and the option to assess by courts be maintained, the Austrian system of legal costs funding by a third party, required in particular in case of representative actions in connection with major mass tort, would no longer be possible. Because the legal costs financer, which assumes liability for the pending legal costs (= lawyers' fees and court costs, but also costs for a necessary expert opinion to be paid to the court in advance), thereby financially enabling the litigation by the qualified entity in the first place, usually stipulates a co-determination right concerning the decision-making with possible negative financial implications, for example the consideration whether an appeal should be lodged or not against the first-instance decision, as in this case he would be responsible for any legal costs arising. In return for this risk financing, the legal costs financer retains a percentage of

the successfully contended amount for the consumers, which had been agreed in advance with the qualified entity resp. the financer receives a certain agreed amount from the consumers participating in the action, thereby securing his own economic progress. Consumers, who participate in such actions, which are out of necessity supported by a legal costs financer, know in advance, which amount resp. which percentage of the successfully contended amount will be retained for legal costs funding. It must be possible to maintain this system; otherwise, due to the sometimes high financial risk, which the qualified entity cannot advance, larger representative actions to redress the situation with many affected consumers can no longer be conducted.

- **Ensuring the elimination of all effects of the law infringement through redress action**

Art 5b of the Council text regulates redress measures in more detail. Paragraph 1 leg cit demonstratively lists some redress options, namely compensation, repair, exchange, price reduction, contract termination or reimbursement of the price paid. Here, in the opinion of the BAK - to ensure the removal of all possible effects of the infringement - the following general description of the redress measures should be added at the start of Paragraph 1:

"*Redress measures shall cover all measures eliminating the continuous effects of an infringement.*"

- **Clear right to choose by MS between opt-in and opt-out in case of redress actions**

Art 5b Paragraph 2 provides - in connection with Recital 15b - for Member States to set rules on the participation of affected consumers in representative action for redress measures. In doing so, Member States may determine whether and when consumers expressly or implicitly have to express their will to participate in the redress action. The wording is unfortunate. In case of an opt-out model, affected consumers do not express their will, but are included by the redress action in bringing the action, provided they do not explicitly oppose their inclusion in the redress action within a to be determined time frame. Here, one could either follow the wording of the second sentence in Recital 15b or Amendment 60 of the European Parliament. Member States should - as stated in Recital 15b - also have the option of creating a hybrid between opt-in and opt-out.

- **Maintenance of redress action without previous injunction measures**

Art 5b Paragraph 8 provides for the option of bringing redress action without previous injunction measures. This provision has to be welcomed from a consumer protection point of view and should be maintained for speedy redress in case of infringements, without having to conduct preliminary injunction proceedings to await res judicata.

- **Information on representative actions at the trader's expense**

Art 9 Paragraph 1 of the Council text obliges traders - in case of a final decision - to inform the affected consumers at their own expense. This provision is important to ensure that consumers are definitely being informed. In case the qualified entity informs the consumers, a refund of the costs and effort incurred must be guaranteed and not only as provided for in Art 9 Paragraph 1a of the Council text a possibility of a reimbursement of costs.

- **Impact of final decisions**

It would be better if Art 10 would go back to the proposal of the European Commission, according to which a final decision for the purposes of other redress actions against the same company because of the same infringement are deemed to be irrefutably established. According to the original Commission proposal, a decision issued in another Member State shall be regarded as a rebuttable presumption .

According to the current Council text and the proposal of the European Parliament (Amendment 83) the final decision can now only serve as evidence of law infringement. This wording is also too weak and does not provide any security that a law infringement determined once, will again be judged as infringement in other proceedings.

- **Maintenance of interruption or suspension of limitation periods**

The interruption or suspension of limitation periods with bringing representative action for an injunction measure and representative action for a redress measure is one of the key provisions of the Directive proposal and must also be retained to ensure efficient law enforcement. Without such regulation - to prevent the impending limitation periods - a large number of mainly identical claims would be brought, which would result in the courts being flooded and in high costs of the parties.

- **Clearer assistance for qualified entities**

In the version of the Commission proposal, Art 15 still provided for Member States to take the measures required to ensure that legal costs do not pose a financial obstacle for effective exercise of their right to seek the injunction and redress measures. Mentioned were the limitation of court costs, granting access to legal aid as well as making earmarked public funds available. Now Art 15 of the Council text only contains the declaration of intent that legal costs may not present insurmountable obstacles, without naming concrete measures. It would be better to go back to proposal of the European Commission.

- **Ensuring the application on air and rail passenger rights**

A year after this Directive entered into force, Art 18 para 2 provides for an evaluation whether the provision of the rights of air and rail passengers have a level of protection, which is comparable to the Directive. Should this be the case, the relevant provisions should be deleted from the Annex (Annex 1 No. 10 and No. 15).

The BAK is vehemently opposed to such an evaluation and the deletion of these provisions respectively, as in particular in these areas in case of occurring irregularities such as cancellations a large number of passengers are affected at once; with the help of the Representative Actions Directive these passengers will be able to obtain fast and effective access to redress.

Hence this paragraph should be deleted entirely.

- **Applicability of the Directive to previous infringements**

Art 20 Paragraph 2a of the Council text states that the suspension or interruption of the limitation period does not apply to representative actions for redress measures based on a law infringement, which occurred prior to the application of this Directive. This means in reverse that the suspension or interruption of the limitation period for representative actions for *injunction measures* does apply, even if the law infringement took place prior to this Directive provision coming into force. There is no factual

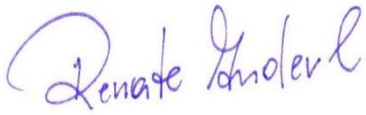
justification for such a regulation. Upon this Directive coming into force, it should be possible to combat infringements, which occurred before this Directive came into force, with all means provided for by the Directive, with action for injunction measures and with redress action under interruption or suspension of the statute of limitations of the underlying claims.

- **Maintenance of a broad area of application**

Annex I of the Directive should remain as comprehensive as possible. The General Data Protection Regulation (Annex I No 53) for example should under no circumstances be deleted, as otherwise no sufficient level of protection in case of infringements is guaranteed.

We would like to ask you to take all points mentioned into account in the interest of consumers and we will be gladly at your disposal for any questions and discussions.

Yours sincerely



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