

The transposition of the Collective Redress Directive in Austria

What to expect

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By 25 June 2023, the transitional provisions of the Collective Redress Directive should have been applicable throughout the EU. Austria - like several other EU Member States - did not meet this deadline. The following article deals with potential transposition options, for the Collective Redress Directive, by the Austrian legislator.

1 Collective redress in Europe and the Collective Redress Directive

To date, collective redress has been regulated differently among EU member states ("**Member States**"). Austrian law also provides for various instruments of collective redress (collective action Austrian-style, representative action pursuant to Sec 29 of the Consumer Protection Act, Sec 14 of the Unfair Competition Act). For this reason, a uniform and efficient enforcement of collective consumer interests is hardly possible throughout the EU.

Directive (EU) 2020/1828 on "*representative actions for the protection of the collective interests of consumers*" ("**Collective Redress Directive**"), which is part of the so-called "*New Deal for Consumers*", now aims to harmonise collective redress at the European level (and to a certain extent on a national level), whereby it should be emphasised that the Collective Redress Directive does not provide for full harmonisation.

The centrepiece, and a major innovation, of the Collective Redress Directive are the "*redress measures*" (Art 3, para 10). This is a genuine collective action for performance in the form of "*compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid*", whereby consumers shall directly benefit from the remedies provided by said redress measure without the need to bring a separate action (Art 9, para 6).

2 Status quo of transposition

The Collective Redress Directive entered into force on 24 December 2020 and should have been transposed into national law by 25 December 2022. This deadline has been met by only a few member states. By 25 June 2023, the national transitional provisions of the Collective Redress Directive should have entered into force in every Member State and thus be applicable to those subject to the Directive. Some Member States - such as Austria - did not meet this deadline either.

Therefore, the transposition process has progressed differently throughout the EU. To date, 16 Member States have enacted a law transposing the Collective Redress Directive. In other Member States, such as Germany, there is only a governmental draft available. A ministerial draft is still pending in Austria.

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3 Possible transposition of the Collective Redress Directive in Austria

3.1 Who is included?

The Collective Redress Directive applies exclusively to B2C relationships (Art 2, para. 1). A consumer within the meaning of the Directive is "*any natural person who acts for purposes which are outside that person's trade, business, craft or profession*" (Art 3, para. 1, recital 14). Notwithstanding this limitation, based on the Collective Redress Directive, Member States are still entitled to apply provisions of the Collective Redress Directive to areas that do not fall within its scope (recital 18).

The fact that businesses often also find themselves in consumer-like situations was taken up in the German draft for the transposition of the Collective Redress Directive. According to this draft, small businesses, namely those that employ less than 50 people and whose annual turnover/balance sheet does not exceed 10 million euros, are also to be considered consumers (Sec 1, para. 2 Consumer Rights Enforcement Act "**VDuG**" (Verbraucherrechtsetzungsgesetz)). In literature, however, this extended transposition is partly criticised; particularly because it gives rise to divergences from the definition of consumer in substantive law. For example, the assumption that small businesses are considered consumers under the VDuG does not change the fact that entrepreneurs are not otherwise subject to the special provisions of consumer law.

In Austria, group proceedings were already to be introduced within the framework of the Civil Procedure Reform 2007 ("**Ministerial Draft 2007**"). Although the efforts failed, the Ministerial Draft 2007 provides an indicator for a possible transposition of the Collective Redress Directive. Plaintiffs of the group claim within the meaning of the Ministerial Draft 2007 were "*all persons asserting claims in class proceedings*" (Sec 629 70/ME 23.GP), whereby the draft referred to B2C relationships (cf. no 1). Against this background, whether Austria will also pursue an extended transposition within the meaning of the German draft, or whether the applicability of the redress measure will be limited to consumer claims only is questionable.

3.2 Opt-in or opt-out?

The Directive leaves it up to Member States to provide for an opt-in or opt-out model (or a combination thereof [recital 43]). With opt-in, consumers must actively join the proceedings. Opt-out (cf. American class action) includes all affected parties who do not actively opt out of the proceedings.

The German draft provides for an opt-in model, according to which consumers can participate in the redress or model declaratory action (Musterfeststellungsklage) until two months after expiry of the first deadline (Sec 46, para. 1, Sec 44 no 7 VDuG). The 2007 Ministerial Draft also provided for an opt-in mechanism (Sec 624 70/ME 23.GP). Furthermore, the Austrian-style collective action provides for an opt-in model. This involves damaged parties assigning their claims to a vehicle for collection; thus, the damaged parties must actively participate in the collective action. It is quite clear that the Austrian legislator will also follow this model when transposing the Collective Redress Directive.

3.3 How big is the collective interest of consumers?

A representative action within the meaning of the Directive is an action to protect the "*collective interests of consumers*" (Art 3, para. 5). It is left to each Member State to decide how many consumers constitute such a collective interest (recital 12).

The German draft provides in Sec 4, para. 1 VDuG that at least 50 consumers must be affected. In contrast, only 10 consumers need be affected in Poland and only two in Luxembourg. With regard to the Ministerial Draft from 2007, at least three persons were required to appear in a representative action and a total of at least 50 claims had to be asserted. The group action announced in the government programme for the 24th legislative period provided for a minimum number of 100 plaintiffs. It can be assumed that for the Austrian legislator the collective interest will be at least in the double-digit range.

3.4 Who may sue?

Collective actions may only be brought by qualified entities, to be designated by the Member States (Art 4). It is up to each Member State to determine the requirements to be met by said bodies.

According to the German draft, qualified consumer associations that are registered in the list pursuant to Sec 4 of the Injunctions Act, and that do not obtain more than 5 per cent of their financial resources through donations from companies, are entitled to file an action (Sec 2, para. 1 VDuG). Accordingly, the purpose of the statutes must be the protection of consumer interests, the association must have at least 75 individual persons or at least three associations active in the same field of activity among its members, it must have been registered in the register of associations for at least one year, it must have been performing the tasks set out in the statutes for the same length of time and it must not act in a commercial manner.

A group representative as defined in the Ministerial Draft from 2007 could be any individual person or legal entity entitled to act on its own. It can be assumed that the Austrian legislator will refrain from such a broad right of action. The Austrian legislator already provides for certain restrictions on representative actions under Sec 29 of the Consumer Protection Act, Sec 14 of the Unfair Competition Act (e.g. Association for Consumer Information, Austrian Chamber of Commerce, Chamber of Labour) and it can therefore be assumed that it will also impose certain "barriers" related to eligibility with regard to the Collective Redress Directive. Not every self-proclaimed consumer protection organisation will be eligible to file a lawsuit.

3.5 Which infringements are covered?

The Collective Redress Directive only covers actions relating to infringements of consumer protection provisions under EU law contained in Annex I. However, Annex I is not an exhaustive list. In the future, whether these 66 legal acts (e.g. data protection, energy, financial services, travel, tourism, telecommunications) should be supplemented by others will be constantly examined at EU level.

The taxative list has been criticised in literature as experience has shown that consumer rights violations often also violate national legal provisions (especially tort and contract law) and this can open up corresponding gaps in legal protection. In order to avoid this, member states (e.g. Germany) will (have to) extend the scope of application to all civil disputes in B2C relationships.

3.6 How is jurisdiction determined?

As the Collective Redress Directive does not contain any special provisions regarding the international jurisdiction of the courts of Member States (Art 2, para. 3), the provisions of the Brussels Ia Regulation apply in case of cross-border situations. This will inevitably cause problems, but discussion of said problems goes beyond the scope of this client alert.

It is nevertheless questionable whether the Austrian legislator will go their own way in the sense of the Ministerial Draft from 2007, or leave it as a reference to the jurisdiction rules of the Brussels Ia Regulation (e.g. Germany). In the past, it was provided that if the defendant had no general place of jurisdiction in Austria, or if several courts had jurisdiction, the competent court of first instance in the first district of Vienna would have exclusive jurisdiction (Sec 621 70/ME 23.GP).

4 The way forward

Although Austria has missed the deadline for the transposition of the Directive on representative actions, it can nevertheless be assumed that transposition will take place in the near future. The Collective Redress Directive grants Member States considerable room for manoeuvre. It remains to be seen what the specific transposition by the Austrian legislator will look like. One thing is clear, however: The Collective Redress Directive would provide the basis for a far-reaching reform of the system of collective redress in Austria. Ultimately, the question is how willing the Austrian legislator is to enact reform.

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