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## **Massive Attack?**

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### **Selected issues of collective redress mechanisms for consumers in the EU**

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## **1. Abstract**

In an economically globalised and digitalised society, the risk of cross-border infringements of Union law is increasing. Cross-border or even EU-wide infringements affecting a multitude of citizens constitute a particular challenge for the judicial systems of Member States. Courts are addressed with hundreds, sometimes thousands of claims, while the questions of law or fact are often the same. An effective way of tackling these challenges are collective redress mechanisms.

However, the parties concerned display widely divergent views on the need of the implementation of collective redress mechanisms. While consumers and consumer protection organizations have been calling for an implementation of EU-wide regulations for several years, traders and business organisations mainly disapprove of any further regulations, particularly fearing abusive litigation.

The case of *Maximilian Schrems v Facebook Ireland Limited*, which will be presented and discussed in the first part of this paper, is one of the latest and most descriptive examples to illustrate the problems arising around representative actions.

In the second part, the existing European legislation concerning representative actions and the Commission's recent proposal for a directive on representative actions for the protection of the collective interests of consumers will be illustrated.

In the third and last part, two selected issues regularly occurring in cross-border representative actions will be discussed and possible solutions shall be presented. The impact of the Commission's proposed directive on these issues will be critically analysed, taking into consideration the previously presented case of *Maximilian Schrems v Facebook Ireland Limited*.

## **2. Case C-498/16: Maximilian Schrems v Facebook Ireland Limited**

Mr Maximilian Schrems, who is resident in Austria, had started legal proceedings against Facebook Ireland Limited, which has its registered office in Ireland, before a court in Vienna, Austria. He claimed that the company had infringed his privacy and data protection rights, for which he was seeking declarations and an injunction, disclosure, production of accounts and payment in the amount of EUR 4,000. Seven other Facebook users, domiciled in Austria, Germany and India, had assigned their claims for allegations of the same infringements to him for the purposes of those proceedings. Mr Schrems relied on the special head of jurisdiction for consumer contracts provided for in Articles 15 and 16 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the

recognition and enforcement of judgments in civil and commercial matters<sup>1</sup> (hereinafter Brussels I Regulation). Those provisions create a *forum actoris* for consumers, allowing them to sue the other party to the contract in their own place of domicile ('consumer forum'). Facebook argued that the Austrian courts did not have international jurisdiction, since Mr Schrems could not rely on the special head of jurisdiction for consumer contracts provided for in Articles 15 and 16 of the Brussels I Regulation. Mr Schrems could not be regarded as a consumer, as he was using Facebook also for professional purposes, in particular by means of a Facebook page designed to provide information on the steps which he was taking against Facebook. As far as the assigned claims were concerned, Facebook submitted that the consumer forum was not applicable to those claims since such jurisdiction was not transferable. Mr Schrems, on the other hand, took the view that the court in Vienna, Austria, had jurisdiction to hear both his own claims and the ones assigned to him, claiming he was a consumer in the sense of Articles 15 and 16 of the Brussels I Regulation.

In this context, the Austrian Supreme Court (Oberster Gerichtshof) decided to stay the national proceedings<sup>2</sup> and requested the European Court of Justice (hereinafter the Court) to render a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU)<sup>3</sup> concerning the interpretation of Articles 15 and 16 of the Brussels I Regulation in order to clarify the conditions under which the consumer forum may be invoked.<sup>4</sup> Therefore, the following questions were referred to the Court:

*'(1) Is Article 15 of [the Brussels I Regulation] to be interpreted as meaning that a "consumer" within the meaning of that provision loses that status if, after the comparatively long use of a private Facebook account, he publishes books in connection with the enforcement of his claims, on occasion also delivers lectures for remuneration, operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?'*

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<sup>1</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12/1); this regulation has been replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351/1), which entered into force on 10 January 2015 (hereinafter: Brussels I Recast Regulation). Given that the Case of *Maximilian Schrems v Facebook Ireland Limited* refers to the original Brussels I Regulation, the relevant provisions will be cited as laid out in that regulation. Although the relevant provisions for the purposes of this paper have changed in numeration, they have remained the same in content and application with regard to the purposes of this paper. Therefore, the new numeration established by the Brussels I Recast Regulation will be used in the other parts of this paper.

<sup>2</sup> Decision of the Austrian Supreme Court: OGH 20.7.2016, 6 Ob 23/16z.

<sup>3</sup> European Union (2007) *Consolidated version of the Treaty on the Functioning of the European Union* (OJ C 326).

<sup>4</sup> Decision of the Austrian Supreme Court: OGH 30.12.2016, 6 Ob 23/16z.

*(2) Is Article 16 of [the Brussels I Regulation] to be interpreted as meaning that a consumer in a Member State can also invoke at the same time as his own claims arising from a consumer supply at the claimant's place of jurisdiction the claims of other consumers on the same subject who are domiciled*

*(a) in the same Member State,*

*(b) in another Member State, or*

*(c) in a non-member State,*

*if the claims assigned to him arise from consumer supplies involving the same defendant in the same legal context and if the assignment is not part of a professional or trade activity of the applicant, but rather serves to ensure the joint enforcement of claims?*<sup>5</sup>

By its preliminary ruling of 25 January 2018, the Court answered these questions as follows:

*'1. Article 15 of [the Brussels I Regulation] must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a 'consumer' within the meaning of that article.*

*2. Article 16(1) of [the Brussels I Regulation] must be interpreted as meaning that it does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries.'*<sup>6</sup>

With the present decision, the Court first of all clarified that a consumer in an ongoing contractual obligation can, in principle, turn into a professional and thus lose the privilege of the consumer forum of Art 15 – 17 of the Brussels I Regulation. However, the Court recalled with reference to previous decisions<sup>7</sup> that the notion of 'consumer' is defined by contrast to that of an 'economic operator' and that it is distinct from the knowledge and information that the person concerned actually possesses. To that effect, neither the expertise which a person may acquire in the field covered by those services, nor his assurances given for the purposes of representing the rights and interests of the users of those

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<sup>5</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], ECLI:EU:C:2018:37, para. 24.

<sup>6</sup> *Ibid.*, para. 50.

<sup>7</sup> Cf Cases C-269/95 *Francesco Benincasa v Dentalkit Srl.* [1997], EU:C:1997:337, para 16; C-464/01 *Johann Gruber v Bay Wa AG* [2005], EU:C:2005:32, para. 36; and C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA* [2015], EU:C:2015:538, para. 21.

services, could deprive him of the status of a ‘consumer’.<sup>8</sup> The Court’s conclusion that Mr Schrems’ activities as such do not entail the loss of a private Facebook account user’s status as a ‘consumer’ is in our opinion legally correct, notwithstanding the fact that the Court did not explicitly answer the question, whether Mr Schrems was to be considered a consumer in the present case. Consumers as the regularly weaker party to a contract shall be protected by rules of jurisdiction more favourable to them. Therefore, it is not the concrete asymmetry in a specific contract that should be relevant, but rather the general assumption of consumers being the weaker parties to a contract. In addition, consumers’ effective access to justice would be undermined, if the user of a private Facebook account would lose his status as a consumer whenever he used the account for self-promotional purposes with a professional impact.<sup>9</sup>

For the purposes of this paper, the Court’s answer to the second question referred to it is even more significant. The Court initially recalled, that the rules on jurisdiction for consumers must be interpreted strictly, as they constituted a derogation both from the general rule of jurisdiction in Article 2 (1) of the Brussels I Regulation and from the rule of special jurisdiction for contracts, laid down in Article 5 (1) of that regulation. With reference to previous case law, the Court then pointed out, that the consumer was protected by the system of Article 15 et seq. of the regulation only in so far as he was, in his personal capacity, the plaintiff or defendant in proceedings. To that effect, an applicant who was not himself a party to the consumer contract in question could not enjoy the benefit of the jurisdiction relating to consumers. The same considerations must also apply to a consumer to whom the claims of other consumers had been assigned.<sup>10</sup> The Court further held that the wording of Article 16 (1) of the Regulation implied that a contract had been concluded by the consumer with the trader or professional concerned, thereby ensuring that the attribution of jurisdiction was predictable.<sup>11</sup> The Court then recalled its case law (in a different context<sup>12</sup>), stating that the assignment of claims could not, in itself, have an impact on the determination of the court having jurisdiction. Therefore, the jurisdiction of courts could not be established through the concentration of several

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<sup>8</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], ECLI:EU:C:2018:37, para. 39.

<sup>9</sup> Concurring *Christoph Schmon*, *Schrems vs Facebook: Internationale Zuständigkeit bei Forderungsabtretung* (case note), *ecolx* 2018/112, 248; *Paul Oberhammer*, *Schrems vs Facebook vor dem EuGH*, *VbR* 2018/1, 1; disagreeing on the status of consumer *Walter H. Rechberger*, *Rechtsfragen zum Verbrauchergerichtsstand gem Art 15 f EuGVVO aF: Zum Vorabentscheidungsverfahren (Art 267 AEUV) in der Rs Maximilian Schrems vs Facebook Irland Ltd*, *ZfRV* 2017/26, 222 (231).

<sup>10</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], ECLI:EU:C:2018:37, para. 43-44.

<sup>11</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], ECLI:EU:C:2018:37, para. 45-46.

<sup>12</sup> Cf Cases C-147/12, *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* [2013], EU:C:2013:490, para. 58; and C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* [2015], EU:C:2015:335, para. 35.

claims in the person of a single applicant and the assignment of claims could not provide the basis for a new specific forum for a consumer to whom those claims had been assigned.<sup>13</sup>

The Court's answer to the second question referred to it by the Austrian Supreme Court seems debatable. Could the Court not have argued differently and did it even miss out on a unique chance to strengthen European consumers' possibilities of effective access to justice through (one form of) collective redress? In fact, several scholars argued – in contrary to the Court – that Articles 15 – 17 of the Brussels I Regulation are to be interpreted as meaning that they are applicable to proceedings brought by a consumer for claims assigned to him by other consumers domiciled in the same Member State, in other Member States or in non-member States.<sup>14</sup> But notwithstanding the fact that the Court could have come to the contrary conclusion with valid dogmatic arguments, it would have been not only a very broad and consumer-friendly interpretation of the relevant provisions of the Brussels I Regulation, but at least to some extent also an act of judicial legislation. To that effect, we do agree with Advocate General Bobek's opinion, in which he rightly pointed out that '*it is [not] the role of courts, including this Court, [...] to attempt at creating collective redress in consumer matters at the stroke of a pen.*'<sup>15</sup>

### **3. Efforts of the European Union to strengthen collective redress**

The need for comprehensive legislation in the field of collective redress mechanisms in the EU has been the object of heated debates for years for good reasons. In an economically globalised and digitalised society, the risk of cross-border infringements of Union law is increasing. Cross-border or even EU-wide infringements affecting a multitude of citizens constitute a particular challenge for the judicial systems of Member States. Courts are addressed with hundreds, sometimes thousands of claims, while the questions of law or fact are often the same. The pressing need for a proper judicial response to so-called 'mass harm situations'<sup>16</sup> is obvious.

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<sup>13</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], ECLI:EU:C:2018:37, para. 48-49.

<sup>14</sup> Cf *Astrid Stadler*, 'Grenzüberschreitende Rechtsdurchsetzung – Verbrauchergerichtsstand und AGB-Verbandsklagen' in *Petra Leupold* (ed.), *Forum Verbraucherrecht 2016*; *Petra Leupold*, Facebook-Klage: Verbrauchergerichtsstand bei Zession, *VbR* 2015/118, 166 et seq.; *Thomas Klicka/Ulrike Frauenberger-Pfeiler*, Expert opinion in preparation of the appeal to the Austrian Supreme Court against the decision of the Vienna Regional Court of Appeal from 19 October 2015, 11 R 146/15v (available at <http://www.europe-v-facebook.org/sk/Gutachten.pdf>; last accessed: 4 May 2018).

<sup>15</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], Opinion of Advocate General Bobek ECLI:EU:C:2018:37, para. 123.

<sup>16</sup> Since the current proposal focuses on the general protection of the collective interest of consumers, it lacks a concrete definition of 'mass harm situations'. Such a definition can, however, be found in the Commission's Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 201/60). According to Article 2 (3) b of the recommendation, a 'mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons.

Collective redress mechanisms could certainly constitute an effective way of tackling these challenges, which has also been widely recognised by the European Commission. Several attempts by the EU to advance the adoption of mechanisms on collective redress have not yet led to the adoption of any binding legal instruments. However, the Commission has been trying to pave the way.

On 11 June 2013 the Commission adopted a – legally non-binding – Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law.<sup>17</sup> The principles established in the Recommendation should be applicable in relation to violations of rights granted under Union law across all policy fields and in relation to both injunctive and compensatory relief. The Commission's Report on the assessment of the practical implementation of that Recommendation four years after its publication showed that legislative activities affected by the Recommendation had remained rather limited in the Member States. In the majority of cases, where the Recommendation had led to new legislation, the laws were restricted to consumer matters. The Report concluded, that the Commission would follow up this assessment in the framework of the forthcoming initiative on a 'New Deal for Consumers', with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas.

The Commission's announced follow-up had good reasons: Even though the European Union has one of the highest levels of consumer protection standards in the world, consumer policy challenges remain and have become apparent once again through recent large-scale infringements of Union law affecting the interests of consumers. These large-scale events include (alleged) infringements of privacy and data protection rights by social networking services, such as in the case presented above, or the 'Dieselgate' scandal, where certain car manufacturers installed technology in cars to cheat emission tests and thereby infringed the Union regulatory framework for type approval of vehicles and Union environmental legislation. These and other events of abusive practices affecting consumers across Member States once again led to the question, whether the EU has strong enough mechanisms in place that allow consumers to effectively enforce their rights granted under Union law. The current legislative situation, however, seems to be inadequate and shows that victims of mass harm events are not offered suitable instruments in all Member States to enforce their rights effectively and fully in practice.

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<sup>17</sup> European Commission (2013) Commission Recommendation 2013/396/EU 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 (OJ 201/60).

What ultimately followed was the Commission's recent proposal from 11 April 2018 for a Directive on representative actions for the protection of the collective interests of consumers. So far, this proposal constitutes the most comprehensive attempt to introduce collective redress mechanisms across the EU. As opposed to the Commission's Recommendation, Member States are not only encouraged to introduce those mechanisms, but they will be legally bound to do so, provided that the proposal will eventually be adopted by the European legislator.

With its judgement in the case of *Maximilian Schrems v Facebook Ireland Limited*, the Court did not judicially pre-empt that legislative process. Yet, the question remains, what the Commission's recent proposal entails and whether the instruments suggested therein are suitable for tackling the challenges of mass harm situations in Europe. To that effect, a concise overview of the proposed directive shall be presented. On the basis of selected issues arising especially in cross-border mass harm situations, the current paper shall analyse whether the proposed directive could offer feasible solutions to such situations, taking into consideration the case of *Maximilian Schrems v Facebook Ireland Limited*.

#### **4. Proposed directive on representative actions for the protection of the collective interests of consumers<sup>18</sup>**

The Commission's proposal in the framework of the 'New Deal for Consumers' initiative<sup>19</sup> is based on the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests<sup>20</sup> (hereinafter Injunctions Directive), which shall be repealed by the present proposal.

##### **4.1. Implementation of redress measures**

Under the Injunctions Directive, qualified entities<sup>21</sup> can seek an injunction upon cessation or prohibition of certain infringements, laid down in Annex I of that directive. Only where appropriate, measures to eliminate the continuing effects of infringements, such as publication of the decision and/or publication of a corrective statement, can be taken. An order for payment into the public purse against the losing defendant is only available in so far as national laws so permit (Article 2 of the

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<sup>18</sup> Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM [2018] 184 final).

<sup>19</sup> European Commission (2018) Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers (COM/2018/0183).

<sup>20</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110/30).

<sup>21</sup> According to Article 4 (1) of the proposed directive, 'Member States shall designate an entity as qualified entity if it complies with the following criteria: (a) it is properly constituted according to the law of a Member State; (b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with; (c) it has a non-profit making character.'

Injunctions Directive). One of the key innovations of the Commission's proposal is the qualification of redress orders as a measure aimed at the elimination of the continuing effects of the infringements. These measures can be sought either individually or together with an injunction order as an interim measure and/or an injunction order establishing an infringement within a single representative action (Article 5 of the proposed directive). Such redress orders can obligate the trader to provide for inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate (Article 6 of the proposed directive).

The scope of the proposed directive refers to its Annex I containing specific provisions regulating the relationship between a trader and a consumer, which are relevant for the protection of the collective interests of consumers. In particular, the scope includes the Union law covered by the current Injunctions Directive and is aligned with the scope of the revised Regulation of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.<sup>22</sup> Thus, the scope of the proposed directive covers all infringements by traders of Union law listed in Annex I that harm or may harm the collective interests of consumers in a variety of sectors, such as financial services, energy, telecommunications, health and the environment (Article 2 of the proposed directive).

The Commission has laid out procedural modalities for representative actions seeking a redress order adapted to the different needs of characteristic situations. As a rule, redress orders must be available (Article 6 (1) of the proposed directive). The Commission, however, deems necessary to provide a certain flexibility to the Member States in cases where the quantification of the harm of the consumers concerned by the representative action is complex due to the characteristics of their individual harm. In such cases, Member States will have the possibility to empower courts or administrative authorities to decide whether to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law, which may be directly relied upon in subsequent redress actions (Article 6 (2) of the proposed directive). As a counter-exception, this flexibility should not be available in cases where the consumers concerned by the same practice are identifiable and the consumers suffered comparable harm in relation to a period of time or a purchase, such as in the case of long-term consumer contracts, and in 'low-value cases' (Article 6 (3) of the proposed directive).

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<sup>22</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ 345/1).

Concerning the latter, the Commission's proposal differs substantially in procedural modalities. In 'low-value cases', where a number of consumers have suffered such a small amount of loss that it would be disproportionate or impracticable to distribute the redress to them, the infringing trader should still compensate for the damage caused. The redress, however, should be directed to a public purpose serving the collective interest of consumers. In this respect, the Commission mentions awareness campaigns as an example for such purpose.<sup>23</sup> The provision on 'low value cases' is somewhat outstanding. According to the general provision of Article 6 (1) of the proposed directive, Member States may require consumers' mandate. In 'low-value cases', however, they shall ensure that the mandate is not required. Individual consumers may be deterred from seeking redress in court, due to, for example, high litigation costs, especially for low-value claims.

#### **4.1. Striking a balance between the interests of consumers and traders**

Given that the various stakeholders display widely divergent views on the need of the implementation of collective redress mechanisms, the current proposal tries to strike a balance between the interest of consumers and traders. It considers that the possibility of redress orders as a measure to eliminate the continuing effects of infringements is necessary in accordance with consumers' right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights.<sup>24</sup> On the other hand, traders' freedom to conduct a business, recognised in Article 16 of the Charter, is equally taken into account. To that effect, the proposal takes certain procedural safeguards against abusive litigation: Punitive damages should be avoided and clear rules on various procedural aspects, such as the designation of qualified entities, the origin of their funds and nature of the information required to support the representative action, must be laid down (Article 4 of the proposed directive). Therefore, qualified entities would not only have to have a non-profit character and a legitimate interest in ensuring the provisions of relevant Union law are complied with, but the proposed directive also requires them to be fully transparent about the source of funding of their activity. This provision also aims at avoiding abusive litigation and is important for assessing whether the funding third party has sufficient resources in order to meet its financial commitments to the qualified entity should the action fail (Article 7 of the proposed directive). According to the wording of Article 7, the use of third party funding is explicitly encouraged under the condition of full transparency. This approach to the issue of third party funding seems especially remarkable in the context of the prohibition of *quota litis* agreements in many Member States.

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<sup>23</sup> Explanatory Memorandum on the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, Article 6 (COM [2018] 184 final).

<sup>24</sup> Charter of Fundamental Rights of the European Union (OJ C 326/391).

## 4.2. Probative effect of final decisions

Another milestone for consumer protection is the probative effect of final decisions under the proposed directive in subsequent actions for redress. Such actions for redress could be taken individually by consumers, within a representative action under the proposed directive or, if available, within other collective redress mechanisms under national rules. If a decision establishing an infringement has become final, it should constitute irrefutable evidence in any subsequent redress action in the same Member State (Article 10 (1) of the proposed directive). This will avoid legal uncertainty and unnecessary costs for all parties involved, including the judiciary.

The Proposal also provides ground for cross-border representative actions. In such cases, final decisions and final injunctions orders establishing a breach of Union law under this directive will provide for a rebuttable presumption that an infringement of Union law has occurred (Article 10 (2) of the proposed directive). Such effect, however, is not foreseen for declaratory decisions on trader's liability towards consumers concerned by an infringement, since national rules regarding liability may significantly vary across the EU (Article 10 (3) of the proposed directive).<sup>25</sup>

## 4.3. Provisions on settlement

In the Commission's Recommendation<sup>26</sup> the Member States were already encouraged to create structures for parties to settle their disputes consensually or out-of-court before or during proceedings, whereas the binding outcome of a collective settlement should be controlled by a court. The report on the implementation of the recommendation showed that in some Member States the general (national) provisions for settlements apply, while others had adopted specific provisions.<sup>27</sup> In the Netherlands for example, a system of out-of-court negotiations about compensation was introduced. After a binding agreement has been reached, there is no possibility to claim damages. The agreement needs to display the concerned parties, the amount for distribution, the conditions for a claim and the method of distribution.<sup>28</sup>

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<sup>25</sup> Explanatory Memorandum on the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, Article 10 (COM [2018] 184 final).

<sup>26</sup> European Commission (2013) Commission Recommendation 2013/396/EU 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 (OJ 201/60), para 25 et seq.

<sup>27</sup> European Commission (2018) Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of 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) p 14 et seq.

<sup>28</sup> *Nastasja Fuxa*, Consumer Protection in the Markets of Financial Products - Momentum for the Introduction of Collective Redress and Amendment of the Brussels I Regulation, euvr 2014, p 100.

Article 8 (3) of the proposed directive provides for such collective settlement procedures. This procedure shall be available not only before but also during litigation. After a declaratory decision regarding the liability of the infringing trader towards the consumers concerned, the court may request the parties to reach a settlement regarding the redress within reasonable time. Collective settlements reached in all of the above circumstances will be subject to court or administrative authority scrutiny to ensure their legality and fairness. Consumers concerned by an approved collective settlement will always be given the possibility to accept or reject the redress offered therein (Article 8 (4) of the proposed directive). Consumers who do not accept the settlement will be able to file an individual action and benefit from the suspension of limitation periods that comes with initiating a representative action (Article 11 of the proposed directive). The possibility to reject the settlement is quite surprising, since the main incentive for the (allegedly) liable party to enter into a settlement will usually be to ‘buy global peace’. The provision in its current wording does not seem to facilitate settlements, given that traders will hardly gain the legal certainty usually resulting from such settlements.

#### **4.4. Cross-border representative actions**

Concerning cross-border representative actions, the proposed directive on the one hand ensures the mutual recognition of the legal standing of qualified entities designated in advance in one Member State to seek representative action in another Member State. On the other hand, it enables qualified entities from different Member States to act jointly within a single representative action in front of a single forum competent under relevant Union and national rules (Article 16 of the proposed directive).

### **5. Selected issues regularly occurring in cross-border representative actions**

If the proposal should be adopted, one could argue that the Commission has given consumers the well-designed collective redress mechanism, Advocate General Bobek had mentioned in his opinion.<sup>29</sup> Concerning cross-border redress mechanisms, multiple issues that are usually addressed in academic literature were left aside in the Commission’s proposal. Two of these issues even seem to have the power to counteract the Commission’s efforts in strengthening consumers’ rights and effective access to justice and shall therefore be demonstrated in the following paragraphs.

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<sup>29</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018], Opinion of Advocate General Bobek ECLI:EU:C:2018:37, para. 123.

## 5.1. International jurisdiction

According to its Article 2 (3), the proposed directive is without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law. In absence of any provision on international jurisdiction in the proposed directive, the general rules on jurisdiction under Union and national law apply. To that effect, the relevant Union rules for cross-border proceedings are laid down in the Brussels I Regulation, provided that the claimant and the defendant are domiciled in different (Member) States.

As a matter of fact, the Brussels I Regulation is oriented towards individual redress: Even though the regulation does entail provisions on multi-party proceedings,<sup>30</sup> they are only applicable if there is a multitude of defendants. There is, however, no corresponding provision for a situation where several plaintiffs intend to sue the same liable party. The drafters of the regulation obviously did not have collective redress proceedings in mind, which may complicate the possibility to bring cross-border collective actions to court. In the run-up to the adoption of the Brussels I Recast Regulation, the Commission voiced the need to evaluate whether existing rules on jurisdiction would require supplementation by special rules under the Union's coherent approach to collective redress.<sup>31</sup> Unfortunately, these considerations were not given suite so that there are no special jurisdictional provisions on collective redress. Collective redress actions brought in the cross-border context thus have to operate within the general regime of jurisdiction under the Brussels I Recast Regulation.<sup>32</sup>

According to the default rule of Article 4 (1) of the Brussels I Recast Regulation, actions have to be brought in the Member State of the defendant's domicile. This requires consumers to file a law suit in another Member State, entailing inconveniences such as necessary travelling, dealing with foreign language proceedings and additional expenses. Due to the inherent imbalance of powers, consumers typically find themselves in a vulnerable situation vis-à-vis the defendant trader. Therefore, Section 4 of Chapter II sets up a protective scheme for consumer contracts. According to Article 18 (1) of the Brussels I Recast Regulation, consumers may choose to sue the defendant trader in their state of domicile. As a precondition for the application of Article 18 (1), the plaintiff must be a 'consumer'

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<sup>30</sup> Cf Article 8 (1) of the Brussels I Regulation, according to which a person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

<sup>31</sup> Cf Green Paper on the Review of Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM [2009] 175 final), p 11; Commission Staff Working Document - Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC [2011] 173), para. 28.

<sup>32</sup> *Nastasja Fuxa*, Consumer Protection in the Markets of Financial Products - Momentum for the Introduction of Collective Redress and Amendment of the Brussels I Regulation, euvr 2014, p 96 et seq; *Georg Kodek*, 'Kollektiver Rechtsschutz in Europa – Diskussionsstand und Perspektiven' in Walter Plocher/Martin Gelter/Michael Pucher (eds.), *Festschrift Christian Nowotny zum 65. Geburtstag* [2015], p 146 et seq.

and bring an action relating to a type of contract set out in Article 17 (1). It follows from the wording of Article 17 (1) lit c<sup>33</sup> that the *forum actoris* for consumers potentially comprises all types of consumer contracts.

Apart from the special head of jurisdiction for consumers, the Brussels I Recast Regulation also provides for special jurisdiction where there is a connection between the cause of action and the territory of the court on which jurisdiction is conferred or a relationship of inherent inequality exists. In individual redress proceedings, these special rules offer a choice of forum to the claimant.<sup>34</sup>

This freedom to choose a forum, however, is severely restricted for collective redress claimants, given that the provisions on the special head of jurisdiction for consumers are interpreted rather strictly by the Court. In the case of *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*<sup>35</sup> the Court for the first time clarified that the protective rule of jurisdiction (at that time under the Brussels Convention) could not be relied on if an action is brought not by the private final consumer himself, but by an assignee acting on his behalf, the latter not having a contractual relationship with the defendant. In line with this restrictive interpretation, the Court excluded the application of the special head of jurisdiction for representative actions in the case of *Verein für Konsumenteninformation v Karl Heinz Henkel*.<sup>36</sup> With this judgment, the Court held, that the Austrian consumer protection organization ‘Verein für Konsumenteninformation’ was not entitled to bring a representative action for injunctive relief (seeking to prevent a trader from using unfair terms in consumer contracts) before the court of its own seat. The latest decision in this line of interpretation is the case of *Maximilian Schrems v Facebook Ireland Limited*, which was presented in the first part of the paper. The consequence of this line of case law is that jurisdiction for representative actions has to be determined under Article 7 (2) of the Brussels I Recast Regulation, regulating special jurisdiction in matters related to tort, delict or quasi-delict.

The Court’s considerations on the arguments for opening up the consumer forum in the case of *Schrems v Facebook* remained somewhat cursory. While this result may still be justifiable from a dogmatic point of view, it leads to the denial of jurisdictional consumer protection whenever harmed

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<sup>33</sup> ‘In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession jurisdiction shall be determined by this Section, if [...] the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.’

<sup>34</sup> *Nastasja Fuxa*, Consumer Protection in the Markets of Financial Products - Momentum for the Introduction of Collective Redress and Amendment of the Brussels I Regulation, euvr 2014, p 97.

<sup>35</sup> Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993], ECLI:EU:C:1993:15, p 20.

<sup>36</sup> Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002], ECLI:EU:C:2002:555.

consumers decide to overcome rational apathy and inequality of powers by turning to an organisation or another consumer dedicated to upholding the general consumer interests. The clear aim of the proposed directive is to facilitate access to justice for consumers. The current jurisdictional scheme for consumer contracts under the Brussels I Regulation, however, appears to counteract some of the advantages that could be gained through the proposed directive.<sup>37</sup>

In order to ensure an effective protection of consumer rights, we would strongly argue that in the light of the Commission's New Deal for Consumers initiative the Brussels I Recast Regulation be amended. Due to the restrictive case law of the Court with regard to the provisions on the consumer forum, a new special head of jurisdiction for representative actions taken by qualified entities under the proposed directive should be created and could for example establish jurisdiction in the Member State where a majority of the consumers concerned are domiciled.<sup>38</sup>

## 5.2. Parallel proceedings

There is a high probability that cross-border mass harm situations will be picked up by various representative associations or claimants in different Member States. As a consequence, there may be parallel proceedings against the same defendant by different entities, possibly even with overlapping parties, given that individuals may take part in more than one representative action. In addition to taking part in a representative action, some of the consumers concerned may at the same time take individual action. The current proposal does not offer any provisions regarding this issue, which is why the general rules of the Brussels I Recast Regulation will have to be applied in these cases.

The goal of the Brussels I Recast Regulation is to provide clear international jurisdiction in order to avoid parallel proceedings and possibly irreconcilable judgments. Parallel proceedings are therefore addressed by Articles 29 and 30 of the regulation. These provisions, however, are highly problematic in the context of collective suits. The *lis pendens* provision of Article 29 of the Brussels I Recast Regulation essentially prohibits the bringing of 'the same cause of action [...] between the same parties' in the courts of a second Member State. Assuming that a certain infringement by a trader that harms the collective interest of consumers becomes relevant in parallel proceedings, it would regularly establish the 'same cause of action' referred to in Article 29. However, since this provision requires that proceedings be pending between the 'same parties', it will hardly be of any use in the context of parallel collective redress proceedings as this requirement will not be easily satisfied. For example, a class action in Member State A in respect of a consumer contract with a distributor of

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<sup>37</sup> *Nastasja Fuxa*, Consumer Protection in the Markets of Financial Products - Momentum for the Introduction of Collective Redress and Amendment of the Brussels I Regulation, euvr 2014, p 97.

<sup>38</sup> *S. I. Strong*, Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation, 45 Arizona State Law Journal [2013], p 44.

gadgets of Member State A would have little (or no) effect on the collective redress antitrust proceedings in Member State B on a virtually identical contract, which gives rise to the ‘same cause of action’, against the distributor of gadgets of Member State B. The proceedings in Member State B would most probably not be stayed as the ‘same parties’ requirement could not be satisfied. Similarly, several collective redress actions may be brought in two or more different Member States. This may not only lead to irreconcilable judgments regarding related actions, but may also give rise to problems at the recognition stage.<sup>39</sup>

Article 30 of the Brussels I Recast Regulation concerns situations where related actions are pending in the courts of different Member States. The court second seised may, as a matter of discretion, stay its proceedings (Article 30 (1)). Article 30 therefore covers situations that do not fall within the strict confines of Article 29. In particular, Article 30 contains no requirement about the same cause of action or the same parties in the two proceedings. Under the precondition that the collective redress actions are related, this provision may be of relevance. According to paragraph 3 of Article 30, *‘actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.’*

In the light of the aim of Article 30 of the Brussels I Recast Regulation to avoid conflicting and contradictory decisions, the question of whether collective redress actions are related should be determined in a broad common-sense manner.<sup>40</sup>

Since the court second seised may stay its proceedings, the Brussels I Recast Regulation assumes that the court first seised is always more appropriate to hear and determine the action. It is unfortunate that jurisdiction in such cases would depend on the question of who is faster in bringing an action. A more satisfactory result could be reached if the court first seised were entitled to stay its collective redress proceedings or decline jurisdiction should there be a more appropriate forum. A specific provision that would centralise parallel collective redress proceedings before the most appropriate forum and avoid the problem of irreconcilable or inconsistent judgments therefore seems desirable.<sup>41</sup> We are well aware that the introduction of a special head of jurisdiction for qualified entities suggested above may promote parallel proceedings. However, the effects of this downside could be mitigated by the introduction of a provision centralising parallel collective redress proceedings.

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<sup>39</sup> *Mihail Danov*, The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments, *Journal of Private International Law* 6:2 [2010], 359 (381).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p 383.

The probative effect provided for in Article 10 of the proposed directive in combination with the suspension of limitation periods that comes with representative actions (Article 11 of the proposed directive) may ease the situation, since consumers will often wait on the positive outcome of a representative action before bringing individual claims. Thereby, they will considerably minimise their risk of financial disadvantages in case of their action failing.

Howsoever, a better cooperation of courts trying similar proceedings may still help to cope with mass harm situations. In order to facilitate this cooperation and improve the current situation, Member States should provide the necessary information for the courts and parties involved in these proceedings. This flow of information could be guaranteed by establishing an EU register or a system of national registers for collective redress proceedings interconnected with each other.<sup>42</sup> While the Commission's Recommendation of 2013 suggested Member States to introduce such registers,<sup>43</sup> such provisions were surprisingly not included in the proposed directive.

## 6. Conclusion

It is beyond debate that collective redress mechanisms ensure and improve consumers' access to justice, as enshrined in Article 47 of the Charter of Fundamental Rights. The Commission's proposed directive seems to be a promising tool regarding the improvement of the protection of collective interests of consumers and shows several innovative ideas, such as the redress orders, the probative effect of final decisions and the provisions on third party funding.

Nevertheless, certain issues such as questions relating to international jurisdiction and parallel proceedings remain unsolved. In particular, the implementation of a common head of jurisdiction for representative actions taken by qualified entities should be introduced. Besides, a provision allowing to centralise parallel collective redress proceedings before the most appropriate forum should be adopted.

Without further legislative action, Mr Schrems would still not be able to take representative action for other consumers against Facebook Ireland Limited in the state of his domicile, even assuming that he was represented by a qualified entity under the scope of the proposed directive.

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<sup>42</sup> *Astrid Stadler*, 'Mass Damages in Europe - Allocation of Jurisdiction - Cross-Border Multidistrict Litigation' in *Willem H. van Boom/Gerhard Wagner* (eds.), *Mass Torts in Europe - Cases and Reflections* [2014], p 226 et seq.

<sup>43</sup> European Commission (2013) Commission Recommendation 2013/396/EU 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 (OJ 201/60), para. 35.

Even though the proposed directive will certainly be subject to heated debates before its (possible) adoption, it is definitely a big step towards strengthening consumers' effective access to justice.

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