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## **G. Injunctions Directive (98/27)**

*Drafted by Christian Twigg-Flesner*

### **Executive Summary**

#### **1. Transposition deficiencies**

- MALTA has not adopted legislation that extends to all the Directives listed in the Annex, and there are therefore gaps in the transposition of this Directive
- the law in HUNGARY requires that “substantial” harm be caused, which adds an additional element and raises the threshold before action can be taken
- no summary procedure is available in ESTONIA and LITHUANIA (cf. Art. 2(1)(a) of the Directive 98/27)
- CYPRUS and MALTA do not refer to the list in the Official Journal required under Art. 4(3) of the Directive in their domestic law, although in both countries, entities from another Member State appear to have the right to take action in any event
- IRELAND requires that consumer associations must have a *statutory* function of protecting collective interests, which seems to be narrower than the requirement in the Directive

#### **2. Enhancement of protection**

##### **a. Use of options**

- Article 5(1) of the Directive 98/27 (consultation with the defendant) – used by 13 member states. Out of the 13, eight require consultation only with the defendant, and five require consultation with the defendant and the relevant domestic independent public body.
- The NETHERLANDS and GERMANY do not expressly refer to the two-week period for consultation before action can be taken

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**b. Use of minimum clause (i.e. more stringent provisions in the field covered by the directive)**

- many countries have extended the provisions implementing the Directive to domestic consumer legislation not transposing an EC directive
- some countries permit a wider range of orders, such as
  - o CYPRUS (corrective measures to be taken by trader)
  - o MALTA (correction to unfair contract terms; for other areas, order may specify measures to be taken to ensure compliance)
- There are several countries where collective actions by consumers are available against a single trader who has harmed several consumers (e.g. FRANCE, ITALY and the UNITED KINGDOM)
- In FRANCE and the UNITED KINGDOM, the criminal law is used as a means of enforcing some aspects of consumer protection law

**c. Extension of scope**

- no reference to "collective interests" as threshold (may permit broader range of actions) in CYPRUS, LATVIA, and MALTA.
- PORTUGAL and SPAIN also include diffuse interest in the scope of their domestic law
- Some member states permit action even where an individual consumer has been harmed (CYPRUS, PORTUGAL, ESTONIA, and LATVIA).

**d. Other measures enhancing consumer protection (i.e. more stringent provisions in fields not covered by the directive)**

- competitors have the right to take action under the legislation dealing with unfair competition in some member states (e.g., AUSTRIA and GERMANY).

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### **3. Inconsistencies**

- Article 2(1)(c) of the Directive 98/27 (penalty payments where domestic law so provides) has been transposed expressly in 19 countries. In three countries (CYPRUS, DENMARK, UNITED KINGDOM), recourse is had to the general law on contempt of court.
- wide variation in national law determining criteria for recognising consumer associations as qualified entities (cf. Art. 3(b). of the Directive)
- variations in procedural rules make it more difficult to give full effect to requirements of the Directive
- several of the Directives contained in the Annex also contain provisions requiring the member states to set up procedures to ensure the effectiveness of their transposing law (e.g., Directive 97/7). This is usually done by injunction, but the threshold for taking action under these provisions is lower as it does not refer to the “collective interests” of consumers.
- variation in dealing with the Annex (transposition not required): 12 member states have transposed the Annex into their domestic law; 2 refer to it in the explanatory notes to their implementing legislation; two (- variation in dealing with the Annex: 12 member states have transposed the Annex into their domestic law; 2 refer to it in the explanatory notes to their implementing legislation; two (CYPRUS and LUXEMBOURG) have amended each domestic law transposing the directives listed in the Annex; and nine member states have not transposed the Annex.

### **4. Potential barriers to trade**

- scope of Directive 98/27 only extends to the rights granted under corresponding directives, but many of these are minimum harmonisation measures
- financial cost for consumer associations and public bodies to take action in another member state is a deterrent
- possible delays in updating list in *Official Journal* could deprive a qualified entity from one member state from taking action in another

## **5. Conclusions and Recommendations**

- A clarification regarding the applicable law in cross-border cases might be desirable. It is noted that this may be resolved through the proposed “Rome II” convention.
- A related question is whether injunctions obtained in a domestic context ought to have Europe-wide reach, at least where the activities of the trader against whom an injunction has been obtained are not limited to one member state. An analysis as to whether this is already possible within Regulation 44/2001 (Brussels-Regulation) may be desirable
- The relationship with Directive-specific enforcement mechanisms should be clarified. Thus, Art. 11 of Directive 97/7 and Art. 7 of Directive 93/13 both require that member states put into place adequate and effective means to ensure compliance with these respective Directives. This seems to overlap, to an extent, with this Directive. There is a difference in that the provisions in the specific Directives do not include the “collective interest” criterion, although, at a practical level, this may not matter hugely. It may therefore be possible to consider whether these specific provisions could be deleted.
- The evidence to date shows that the cross-border procedure is not being utilised. One reason may be the question of costs for qualified entities from one member state to take action in another. The Directive is silent on the question of costs; a basic rule giving the qualifying entity the right, if successful in the action, to recover costs (not just of the court action, but the costs incurred in taking the action, such as translation, legal advice etc.) could be considered.
- It may be desirable to consider whether a power to ask for compensation should be introduced. Difficulties in this regard may be establishing the loss caused and identifying beneficiaries (e.g., through creating a central fund to which individual consumers may apply). Linked to this is whether cross-border class-actions ought to be facilitated, too.

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### **I. Member State legislation prior to the adoption of the Injunctions Directive**

The situation in the member states before the adoption of the Directive 98/27 was rather diffuse, with only some countries having in place a system comparable to that introduced by the Directive 98/27. It should be noted that most member states had introduced procedures for some aspects of consumer law, notably in the context of the Directive 93/13.<sup>1618</sup> However, not all the member states had a regime comparable to that in the Directive 98/27; moreover, the existing frameworks were generally only accessible to qualified entities from the respective member state, and not those from another member state.

In AUSTRIA, for example, there were provisions dealing with challenges to unfair contract terms in standard form contracts, with standing given to a number of commercial associations, as well as the Association for Consumer Information (Verein für Konsumenteninformation).<sup>1619</sup> BELGIAN law also recognised a right for domestic consumer organisations to seek an injunction.<sup>1620</sup> In DENMARK, there was a possibility of bringing an action, provided that the claimant could demonstrate “a sufficient legal interest” to bring an action, although it was not clear whether this extended to the protection of collective interests. The ESTONIAN Consumer Protection Act of 1994 had empowered the Consumer Protection Board to take action “to demand that a third party terminate activities in violation of consumer rights if the activities of the third party affect the common interests of an unspecified number of consumers”.<sup>1621</sup> In FINLAND, the Consumer Ombudsman (CO) had a primary right to bring cases to Market Court. In case the CO did not act, consumer organizations and even labour organizations had a secondary right to bring cases concerning (unfair) marketing practices or (unfair) contract terms. However, authorities from other member states did not have right to bring the case to Market Court. In FRANCE, it had been possible since 1973 for consumer organisations to take action “if there was a direct or indirect disadvantage for consumers collectively”;<sup>1622</sup> these provisions were subsequently improved with the introduction of a “collective action” procedure.<sup>1623</sup> The law in the NETHERLANDS was similarly advanced.<sup>1624</sup>

<sup>1618</sup> Cf. Art. 7 of the Directive 93/13.

<sup>1619</sup> Art. 29 and 30 of the Consumer Protection Act 1979.

<sup>1620</sup> Art. 98(1), (4) of the Trade Practices Act.

<sup>1621</sup> Art. 12(3) of the Consumer Protection Act 1994.

<sup>1622</sup> Ordonnance (Law) of 27 December 1973.

<sup>1623</sup> Arts. 411(1) – 422(2) Consumer Protection Law, codifying provisions previously contained in Law no. 88-14, “*Actions en justice des associations agréées de consommateurs*”, of 5 January 1988. This provides for

GERMANY had also introduced a right of action for consumer associations in the context of unfair competition law,<sup>1625</sup> and also in respect of standard contract terms,<sup>1626</sup> but associations had to establish their standing in every case. PORTUGAL had extensive procedures for the protection of the collective interests of consumers,<sup>1627</sup> as well procedures for individual consumers (whether or not harmed), consumer associations, the public prosecutor (Ministerio Publico) and the Institute of Consumers (Instituto do Consumidor) to take action. In SPAIN, the role of consumer associations to represent the collective interests before the courts had been recognised for some time,<sup>1628</sup> and this position was progressively strengthened up to the point of having to implement the Directive 98/27.<sup>1629</sup> The position regarding consumer associations was confirmed in the Spanish Law on Civil Procedure,<sup>1630</sup> which also extends the scope of protection beyond collective interests to diffuse interests. GREECE<sup>1631</sup> and SWEDEN also had procedures in place for the protection of collective consumer interests. HUNGARIAN law also recognised a right of action for the General Inspectorate of Consumer Protection, as well as social organisations representing consumers' common interests; moreover, foreign qualified entities could register injunctions through an administrative procedure.<sup>1632</sup> Similarly, in POLAND, a procedure permitting social organisations with a statutory task of consumer protection could initiate proceedings for the protection of consumer interests.<sup>1633</sup> In the UNITED KINGDOM, consumer associations had no right of action; the only entity empowered to act was the Director-General of Fair Trading.<sup>1634</sup> Action could be taken where there has a persistent course of conducted which was (a) detrimental to the interests of consumers and (b) 'unfair' to consumers (but a conduct would only be unfair if it breached an existing legal rule). Whilst it was possible to seek an injunction in CYPRUS, this procedure was not available to public authorities or other organisations seeking an injunction for the protection of third

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different types of actions, including the "*action en representation conjointe*", which is the nearest to a collective action procedure.

<sup>1624</sup> CC, Art. 3:305a and 3:305b, and Art. 6:240-242.

<sup>1625</sup> Art. 13 of the Unfair Competition Act 1965.

<sup>1626</sup> Art. 13(3) of the Law on Standard Terms of Business 1976.

<sup>1627</sup> Law 83/95.

<sup>1628</sup> Law 26/1984.

<sup>1629</sup> See Law of the Judicial Power (1985), and specific laws on advertising (1988), unfair competition (1991) and standard contract terms (1998).

<sup>1630</sup> Law 1/2000.

<sup>1631</sup> Art.10(9) Consumer Protection Act (Law 2251/1994).

<sup>1632</sup> Art. 39 Consumer Protection Act.

<sup>1633</sup> Art. 61 of the Code of Civil Procedure 1990.

<sup>1634</sup> Fair Trading Act 1973, Part III.

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parties such as consumers. No corresponding provisions existed in the CZECH REPUBLIC, ITALY,<sup>1635</sup> IRELAND, LATVIA, LITHUANIA, MALTA,<sup>1636</sup> SLOVAKIA, and SLOVENIA.

## **II. General Comments**

The Directive 98/27 requires that all member states make it possible for qualified entities to take action before domestic courts to protect the various specific rights given to consumers under the measures implementing the EC directives on consumer law into the domestic legal system. Such action may be taken for purely domestic problems, i.e., an entity from member state A can take action before the courts in that state to prevent infringements of the relevant legislation by a trader from that state. In addition, the Directive 98/27 introduces specific provisions on the cross-border enforcement of such rights by allowing qualified entities from one member state to take action against a trader from another member state in the courts of that trader's jurisdiction.

The Directive 98/27 therefore differs from all of the other directives under consideration in this study, because it does not confer any specific rights on individual consumers. Rather, this measure is concerned with the enforcement of consumer law by "qualified entities". Such entities are empowered to seek an injunction to protect the "collective interests" of consumers. It is not dealing with class actions by consumers against traders.

The structure of this particular analysis therefore adopts a different format from the analyses of the directives covered so far, concentrating on the procedural rules specified in the Directive 98/27, and the use of the minimum harmonisation clause in Art. 7 of the Directive. It should be noted that even that clause is not a minimum harmonisation clause as they appear in the other consumer directives, because Art. 7 of the Directive is not concerned with granting *consumers* a higher degree of protection, but rather permits the adoption/maintenance of more extensive rights to take action at the national level. This section will first turn to the procedural rules contained in the Directive.

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<sup>1635</sup> Law 281/1998 is contemporaneous with the Directive and introduced similar rules for the first time.

<sup>1636</sup> Although a registered consumer association could request the appointment of a representative during proceedings under relevant consumer protection statutes.

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In general terms, all the member states have taken steps to give effect to the central provisions of the Directive, although there are some variations, and potential gaps in some member states. It can also be noted that not all of the member states have transposed the Directive simply by adopting one single piece of legislation. In CYPRUS and LUXEMBOURG, provisions based on the Directive 98/27 have been inserted into each piece of legislation on particular aspects of consumer protection.<sup>1637</sup> In MALTA, where the laws transposing the directives listed in the annex to the Injunctions Directive, are administered by different public authorities, the provisions based on the injunctions directive have been implemented in the procedural parts of the various domestic laws.

### **III. Procedural Rules**

#### **1. Article 1(2) – Protection of “collective interests” of consumers**

Article 1(2) of the Directive 98/27 sets out the definition of “infringement” for the purposes of the Directive. There has to be an “act contrary to the Directives listed in the Annex as transposed in the internal legal order of the member states”, and this act has to harm the “collective interests of consumers”. Such “collective interests” do not, however, include the culmination of the interests of individual consumers harmed by an infringement.<sup>1638</sup> An action for an injunction to protect the collective interests of consumers is therefore not the same as a “class action”, representing a group of consumers harmed by an infringement.

The second requirement (“collective interests”) does not appear to have been transposed in all the member states. Thus, in CYPRUS, there is no specific reference to “collective interests”, although reference is made to “the general interest” and “the interests of consumers in general”, which is similar in substance. In addition, however, the relevant provisions can be used also in respect of individual cases. HUNGARIAN law refers to illegal activities causing substantial harm to a wide range of consumers *or* illegal activities affecting the wide range of consumer<sup>1639</sup> as the threshold criteria. These are based on legislation existing before the

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<sup>1637</sup> For Luxembourg, see Loi du 19 décembre 2003 fixant les conditions d’agrément des organisations habilitées à intenter des actions en cessation (Act on injunctions of 19 December 2003).

<sup>1638</sup> Cf. second recital of the Directive.

<sup>1639</sup> Art. 39 of the Consumer Protection Act 1997.

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adoption of the Directive, and were retained. It is arguable that the requirement that the harm be “substantial” may create a higher threshold than under the Directive. However, the reference to “a wide range of consumers” does not seem to be a significant variation from the notion of “collective interests”.

In LATVIA, the legislation extends to individual and group consumer interests, and is therefore broader than collective interests.<sup>1640</sup> In LITHUANIA, the legislation does not list the relevant measures as such, but rather includes a list of areas of consumer law in respect of which an injunction is available.<sup>1641</sup> The law in MALTA is also not restricted to the ‘collective interests’ of consumers, and provides for the issuing of ‘compliance orders’ for any breaches of consumer legislation.<sup>1642</sup> In POLAND, the legislation states that the ‘collective interests’ of consumers are not merely the sum of the individual interests of consumers, and, moreover, that the conduct that harms these collective interests must be illegal.<sup>1643</sup> The scope of the legislation in PORTUGAL extends beyond “collective interests”, and also includes individual as well as ‘diffuse’ interests of consumers. Similarly, the legislation in SPAIN does not define ‘infringement’ expressly and therefore does not refer expressly to collective consumer interests, but the legislation covers both collective (i.e., an ascertainable group of consumers) and diffuse (the group of affected consumers cannot be determined precisely) interests of consumers.

## **2. Article 2 – Actions for an injunction**

This article requires that the member states designate a court or administrative authority which has the competence to deal with applications for an injunction. The powers of the court/authority concerned must include: (i) to issue an order to stop the continuation, or prohibit, an infringement; (ii) to initiate the publication of the decision in an appropriate format and/or of a corrective statement to deal with the continuing effects of the infringement; and (iii) to make an order for penalty payments for non-compliance, but only if the domestic legal system of the member state would already permit this.

<sup>1640</sup> Art. 25(8) of the Consumer Rights Protection Law.

<sup>1641</sup> Chapter X of the Law on Consumer Protection.

<sup>1642</sup> Art. 94 of the Consumer Affairs Act. In the context of the Consumer Affairs Act, such orders may be issued in relation to breaches of that Act, any regulations made under that Act and any other law relating to consumer protection as the Minister may by order designate in the Government Gazette. There are similar provisions in the other laws implementing the various directives listed in the Annex to the Injunctions Directive.

<sup>1643</sup> Art. 23a of the Law on the protection of consumers and competition.

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### **a. Action for an order for the cessation or prohibition of an infringement**

Article 2(1)(a) of the Directive 98/27 requires that it must be possible for qualified entities to seek an order which requires the cessation of, or prohibits, an infringement. This has been transposed in accordance with the Directive 98/27 in all the member states with the exception of MALTA and SWEDEN. In Malta, the implementing legislation is the Consumer Affairs Act,<sup>1644</sup> but this only covers the directives on misleading and comparative advertising, unfair terms, consumer credit and distance selling. The Minister has the power to issue orders extending the relevant provision to other consumer protection measures, but the legislation on package travel and timeshare is administered by the Maltese Tourism authority, and therefore beyond the reach of the Consumer Affairs Act. Maltese legislation therefore does not cover all the directives listed in the Annex, either because a ministerial order extending the relevant legislation to cover those directives has not been made, or because the necessary amendments in the laws administered by other public authorities<sup>1645</sup> have not yet been enacted. In SWEDEN, the Market Court the Market Court deals with cases involving marketing cases, and there are two special authorities, the Consumer Ombudsman and the National Board of Consumer Protection, responsible for ensuring compliance by traders with consumer protection legislation.

#### **aa. Availability of summary procedure**

Article 2(1)(a) of the Directive also refers to the availability of a “summary procedure”. The situation in the member states is rather diverse. A temporary injunction may be obtained in AUSTRIA, which does not require proof of an immediate threat to consumers’ rights.<sup>1646</sup> In BELGIAN law, the action for an injunction must be brought before a court by a procedure which is comparable to a summary procedure but imposes even less strict conditions. In CYPRUS, there is a procedure for the issuing a temporary injunction,<sup>1647</sup> which is applicable to injunctions to protect the general interests of consumers, and the provisions introduced to transpose the Directive 98/27 expressly provide for the power of the court to issue a

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<sup>1644</sup> Arts. 94, 95 and 98 Consumer Affairs Act.

<sup>1645</sup> Such as the Malta Tourism Authority in the case of the laws implementing the timeshare and package travel directives.

<sup>1646</sup> Art. 30(1) of the Consumer Protection Law.

<sup>1647</sup> Art. 32 of the Courts Law of 1960, L.14/60.

temporary injunction in accordance with the principles laid down in the Courts Law, Art. 32. DENMARK relies on its general procedures regarding interlocutory injunctions, which are also available in this context. In FINLAND, the Market Court may impose a temporary injunction, which, if necessary, can be accompanied by a conditional imposition of fine.<sup>1648</sup> In FRANCE, there is a general procedure (“référé”) for when an urgent decision from a judge is needed; this can be used by a consumer association in order to stop an infringement.<sup>1649</sup>

In GERMANY, it is not necessary to prove the urgency of the order at the time it is issued.<sup>1650</sup> GREECE also provides for temporary injunctions.<sup>1651</sup> SPAIN also offers an accelerated procedure (“juicio verbal”).<sup>1652</sup> In ITALY, where there are justified grounds of urgency a summary procedure is available.<sup>1653</sup> It needs to be shown that: (a) in all likelihood the claimant has a valid right which will be or is being infringed by the defendant (*fumus boni iuris*); and (b) the claimant has not delayed in seeking the relief; and (c) the matter is urgent because there is a danger of irreparable damage from the defendant’s wrongful activity (*periculum in mora*). An urgent injunction can usually be obtained within one to four months from filing the action.

In MALTA, where a compliance order is being contested before a Court, the Director of Consumer Affairs may request that court to issue an interim order if he considers that it is necessary to do so in the public interest, pending the final outcome of the proceedings.<sup>1654</sup> The procedure in PORTUGAL follows a summary procedure, too.<sup>1655</sup>

In POLAND, a summary procedure has been available since 2000.<sup>1656</sup> It is available for claims resulting from contracts the value of which does not exceed 10000 PLN (around 2500 EURO) (increased from 5000 PLN in 2005). In SLOVENIA, a temporary injunction can be obtained in

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<sup>1648</sup> Art. 3 Cross-Border Injunctions Procedure Act.

<sup>1649</sup> See e.g. Cass. Civ. [Cour de cassation, chambre civile ; France] judgment of 1 December 1987; *Recueil Dalloz*, 1987, Informations rapides, p. 255.

<sup>1650</sup> Art. 940 of the Civil Procedure Code in conjunction with Art. 935 of the Civil Procedure Code and Art. 8 and 12(2) of the Act against Unfair Competition: Art. 940 of the Civil Procedure Code concerns general summary procedure that is applicable to an order for cessation and to an order for prohibition. Art. 12(2) of the Act against Unfair Competition states that – in contrast to general summary procedure – the plaintiff is not required to prove the urgency of the order at the time it is issued.

<sup>1651</sup> Art. 10(9) lit. (c) of the Consumer Protection Act (Law 2251/1994).

<sup>1652</sup> Art. 250(1) no. 12 of the Law of Civil Procedure.

<sup>1653</sup> Art. 669-bis to 669-quaterdecies of the Civil Procedure Code.

<sup>1654</sup> Art. 97(3) of the Consumer Affairs Act.

<sup>1655</sup> Art. 111(1) of the Law 24/96.

<sup>1656</sup> Articles 5051 to 50515 were inserted into the Code of Civil Procedure of 1964.

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a dispute regarding misleading advertising or comparative advertising.<sup>1657</sup> A court can issue a provisional ruling following an application by a claimant in line with the provisions regulating insurance, by which it shall order the cessation of the misleading advertising or the illegal comparative advertising, or prohibit the publication of misleading advertisements or advertisements containing illegal comparative advertising in the event it has not yet been published and is about to be published in public. Otherwise, there are no special summary procedures available under Slovenian Law.

No summary procedure is available in ESTONIA or LITHUANIA.

### **b. Order for publication of decision**

Article 2(1)(b) of the Directive 98/27 provides that an order may be sought for the publication of the decision to grant an injunction, and of a corrective statement. There is corresponding legislation in all the member states. For example, in ITALY, a court may order that a decision is published in one or more national newspapers, or in regional/local newspapers, where this would help in dealing with the consequences of the infringement.<sup>1658</sup> In MALTA, such a publication has to be made in at least to daily newspapers, and at the expense of the trader concerned.<sup>1659</sup>

In POLAND, the publication of the decision has to be funded by the business subject to the proceedings.<sup>1660</sup> In SLOVENIA, the plaintiff can demand that the decision be published at the defendant's expense. It seems that in SWEDEN, publication occurs only in the regular journal published by the Market Court.<sup>1661</sup> LITHUANIA has not directly implemented this rule, but instead relies on the general rule that decisions by a court must be available publicly.

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<sup>1657</sup> Art. 74 of the Consumer Protection Act.

<sup>1658</sup> Art. 140(1) lit. (c) of the Consumer Code.

<sup>1659</sup> Art. 101 of the Consumer Affairs Act.

<sup>1660</sup> Art. 23 of the Act on the protection of consumers and competition.

<sup>1661</sup> See correspondent's comment in the Database (SE).

### **c. Order for payments into the public purse**

Article 2(1)(c) of the Directive provides for an order, if permitted under national law, for payments into the public purse or any beneficiary designated under national legislation; this may include daily penalty payments. Legislation based on this provision has been adopted in BELGIUM, CZECH REPUBLIC, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SPAIN and SWEDEN.

In GREECE, a qualified entity from another member state cannot request compensation; this right is restricted to Greek qualified entities. However, as an order for compensation is subject to the rules of domestic law, this will not be a problem under the Directive; it may however, be problematic under the general non-discrimination principle.

ITALIAN courts will set a deadline for compliance with the order. If the defendant fails to do so, the court can require the payment of a lump sum into the public purse, or impose a periodic penalty payment of between 516 and 1032 EURO per day for as long as the infringement continues.<sup>1662</sup> Money collected in this way must be paid into State funds, and these can be re-allocated to a fund to be set up as part of a special basic budgetary section of the Ministry of Productive Activities to finance initiatives for the benefit of consumers.

LITHUANIA has not taken specific steps to transpose this provision; instead, the general principle that court judgments can be enforced, with appropriate sanctions for non-compliance, is relied upon.

In MALTA, a failure to comply with a compliance order is a criminal offence. On conviction, a fine of up to Lm 10,000 (circa 23,000 Euros) and/or a daily fine of up to Lm 50 (circa 130 euros) may be imposed for each day of non-compliance with the order.<sup>1663</sup> In POLAND, for example, the fine may be set at the equivalent of between 500 to 10,000 EURO for each day.<sup>1664</sup> In SPAIN, fines range from 600 to 60,000 EURO.<sup>1665</sup> With regard to the third element, in CYPRUS, a failure to comply with a court order puts the defendant into contempt of court and

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<sup>1662</sup> Art. 140(7) of the Consumer Code.

<sup>1663</sup> Art. 106 of the Consumer Affairs Act.

<sup>1664</sup> Art. 102(1) of the Act on the protection of consumers and competition.

<sup>1665</sup> Art. 711(2) of the Law on Civil Procedure.

renders him subject to imprisonment, or his property subject to seizure. There is, however, no provision akin to Art. 2(1)(c) of the Directive.

In DENMARK, acting in violation of an injunction is a criminal offence generally; the same is true of the UNITED KINGDOM, where a failure to comply with a court order renders the defendant liable to proceedings for contempt of court, and there is no separate provision for penalty payments.<sup>1666</sup>

#### **d. Private International Law**

Article 2(2) of the Directive also requires that the rules of private international law regarding the law applicable to the situation, are not affected by the Directive. Most member states have not implemented this provision expressly. These countries rely on existing provisions in their rules on private international law. Those that have transposed this Article by adding specific provisions are the CZECH REPUBLIC,<sup>1667</sup> ESTONIA,<sup>1668</sup> HUNGARY,<sup>1669</sup> and SLOVAKIA.<sup>1670</sup>

### **3. Article 3 – Qualified Entities**

This article defines “qualified entity”, which is a body or organisation with a legitimate interest ensuring that the collective interests of consumers, as provided for in the directives listed in the Annex, are complied with. This should include both at least one independent public body (in countries where these exist), and/or other organisations whose purpose it is to protect the collective interests of consumers in accordance with the criteria laid down by their national law.

The implementation of this provision has taken different forms. In many member states, the relevant “qualified entities” are listed expressly in the legislation transposing the Directive 98/27, whereas in others, these entities are specified through a separate ministerial order.

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<sup>1666</sup> The OFT has recently reported that it has secured the imprisonment of a trader who had failed to comply.

<sup>1667</sup> CC Art. 64.

<sup>1668</sup> Art. 34 of the Private International Law Act.

<sup>1669</sup> Art. 28/A of the Decree on Private International Law 1979.

<sup>1670</sup> Art. 10(1)-(3); Art. 11 and 15 of the Code of International Law.

Furthermore, some member states have included a general provision setting out the criteria to be applied in determining whether a particular body might satisfy the requirements for being recognised as a “qualified entity”, whereas others have not done so. Many member states maintain lists of domestic “qualified entities”, and a domestic association needs to be on such a list to have standing before the courts. There does not seem to be scope for the courts to admit associations not on such a list to bring an action.

In AUSTRIA, the legislation<sup>1671</sup> mentions those organisations that have the right to take action, which includes the Association for Consumer Information.<sup>1672</sup> BELGIUM had already provided a right of action for domestic entities recognised by the Minister of Economic Affairs or represented in the “Raad van Verbruik” to take action. To this, the right of qualified entities from another member state to act was added in the implementing legislation. In CYPRUS, the Competition and Consumer Protection Authority of the Ministry of Industry, Commerce and Tourism is specified as qualified entity. In addition, any legally constituted organisation which by virtue of any law or their memorandum of association have an interest in the protection of consumers’ collective interests may take action. No further criteria are laid down, and there is no approvals procedure which would allow for the exclusion of entities with an insufficient interest from the scope of the implementing provisions.

The DANISH provision authorises the relevant minister to appoint the qualified Danish authorities and organisations.<sup>1673</sup> Moreover, the minister may also appoint Danish authorities which can act on behalf of authorities from another member state in taking action. Similarly, FRANCE requires that qualified entities must be approved,<sup>1674</sup> and that only those entities which have the protection of the collective interests of consumers as an objective will be considered for approval,<sup>1675</sup> as will the Association of Family Unions (*unions d’associations familiales*). However, with the exception of the *Commission des clauses abusives*<sup>1676</sup> (a public body whose task is to monitor the use of unfair terms), French law does not know the kind of independent public body referred to in Art. 3(a) of the Directive 98/27 and no specific attempt at giving effect to this provision was undertaken. GERMANY requires that associations must be

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<sup>1671</sup> Art. 29 of the Consumer Protection Act 1979.

<sup>1672</sup> „Verein für Konsumenteninformation“.

<sup>1673</sup> Art. 4 of the Act on the protection of consumer interests.

<sup>1674</sup> Art. L. 421-6 of the Consumer Code.

<sup>1675</sup> Articles R. 411-1 et seq. of the Consumer Code lists the criteria used to agree an association of consumers.

<sup>1676</sup> See Articles L. 132-2 of the Consumer Code.

registered with the Federal Administrative Office (Bundesverwaltungsamt), that their membership must comprise at least 75 natural persons and that they have been in existence for at least one year.<sup>1677</sup> However, there is a presumption that Consumer Associations and Centres (Verbraucherverbände und –zentralen) funded by the public purse meet these requirements. In addition, certain trade associations can taken action,<sup>1678</sup> as can the relevant Chambers of Trade and Commerce. In GREECE, there are detailed rules regarding consumer associations. These may only accept natural persons as their members, and the financial sources for their activities are restricted to subscriptions, proceeds from public events and the sale of newsletters/magazines, public funds and EU funds; no private funding is permitted. This should guarantee the association’s independence. Associations need to be recognised by court order and entered on a register of consumer associations. In order to be entitled to take action under the rules giving effect to the Directive, an association must have at least 500 members and must have been registered for at least 2 years.<sup>1679</sup>

In HUNGARY, there are a number of criteria which an organisation seeking to become a “qualified entity” must satisfy: it must be a social organisation founded on the appropriate legal basis; have consumer protection as one of its declared goals; must have been active for at least two years; and must have a membership of at least 50 persons. It must then apply to be included on the register of qualified entities.

ITALY also maintains a list of those entities which satisfy the criteria laid down in the provisions transposing Art. 3 of the Directive. A list is maintained by the Ministry of Productive Activities. Furthermore, independent public organisations, and organisations recognised in other EU member states, are also qualified entities. In IRELAND, the legislation simply states that a qualified entity is one which protects the collective interests of consumers affected by the infringement concerned, but such an entity must also satisfy the Court that it has a *statutory* function in relation to the protection of consumer interest which are the subject of the infringement concerned. The fact that this function must be “statutory” may exclude associations both from within Ireland and from another member states whose functions may not be statutory, but purely based on the terms of association.

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<sup>1677</sup> Art. 4 of the Injunctions Act.

<sup>1678</sup> Art. 3(1) of the Injunctions Act.

<sup>1679</sup> Art. 10 of the Consumer Protection Act (Law 2251/1994).

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In LATVIA, the qualified entity is the Consumer Rights Protection Centre, a public body, under the supervision of the Ministry of Economics. In LITHUANIA, there is no definition of ‘qualified entity’ in the domestic legislation, although the term itself is used in this legislation. The National Consumers’ Rights Protection Board is referred to as a ‘qualified entity’. The Board along with the State Food and Veterinary Service, State Inspection of Non-Food Products, the State Public Health Service or the Public Health Centres in districts under the State Public Health Service controls enforcement of the Law on Consumer Protection.<sup>1680</sup>

In MALTA, “qualified entity” means a consumer association which is registered under the Consumer Affairs Act, or any other body whether constituted in Malta or elsewhere, which is designated as a ‘qualified body’ by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.<sup>1681</sup>

The legislation in POLAND mentions the Ombudsman, Insurance Ombudsman, Consumers’ Representative and consumer organisations as qualified entities. PORTUGUESE law takes a very wide approach to the notion of ‘qualified entity’ by granting a right of action to individual consumers (whether or not they have been harmed by the conduct), consumer associations, the public prosecutor (Ministerio Publico) and the Institute of Consumers (Instituto do Consumidor). This is because of the pre-existing legislation in this field, which had adopted a wider approach than the Directive requires.

SLOVAKIA maintains a list of qualified entities which contains approximately 10 different consumer associations. In SLOVENIA, a qualified entity is “any legal person that has been founded for the protection of consumers” as well as an “organisation or independent public body of another member state if the consumer’s rights of that State could be endangered”; in case of the latter, prior consultation is required (see also below).<sup>1682</sup> The entity must have been operating for at least one year.

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<sup>1680</sup> Art. 29 of the Law on Consumer Protection.

<sup>1681</sup> Art. 2 of the Consumer Affairs Act. A somewhat different definition exists under other Maltese laws implementing the Injunctions Directive – for example the Distance Selling (Retail Financial Services) Regulations, 2005, which whilst including registered consumer associations, makes a list of the categories of those entities which may be eligible to be considered as a ,“qualified entity“.

<sup>1682</sup> Art. 75(1)-(3) of the Consumer Protection Act.

The implementation in SPAIN does not include the criteria from the Directive, but instead lists those entities which are qualified to take action under the national legislation implementing the Directive 98/27. In addition to relevant consumer associations, this also extends to independent public bodies, including Chambers of Commerce and the professional bars. In the UNITED KINGDOM, there are different categories of ‘enforcers’: general enforcers, designated enforcers, and Community enforcers. Only those in the latter category have the specific power to take action under the provisions transposing the Directive 98/27.<sup>1683</sup> The legislation states who the general enforcers are. In respect of “designated enforcers” there is a power for the Secretary of State to specify by order that a person or body of which he “thinks that it has as one of its purposes the protection of the collective interests of consumers” should be a designated enforcer.

In the CZECH REPUBLIC, however, there is no list of qualified entities at all; moreover, no independent public body has been established responsible for the protection of the collective interests of consumers.

#### **4. Article 4 – Intra-Community infringements**

##### **a. Recognising Qualified Entities from another EU Member State**

Article 4(1) of the Directive 98/27 requires that each member state where an infringement originates must permit any qualified entity from another member state where the collective interests of consumers are affected by the infringement, to bring an action for an injunction. The *locus standi* of a qualified entity to launch proceedings may not be questioned if it is included in the list compiled and published by the Commission. To that end, member states are obliged by Art. 4(2) of the Directive to notify the Commission of the qualified entities from their jurisdiction.

The following countries have given effect to this requirement by referring expressly to the list published in the Official Journal under Art. 4(3) of the Directive: AUSTRIA,<sup>1684</sup> BELGIUM, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY,

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<sup>1683</sup> Sec. 213(1), 213(5), 215(2), 215(4) of the Enterprise Act 2002.

<sup>1684</sup> Extending the scope of Art. 29 of the Consumer Protection Act to the qualified entities in the list published in the Official Journal.

ITALY, IRELAND, LITHUANIA, LUXEMBOURG, NETHERLANDS, POLAND, PORTUGAL, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM.

In LITHUANIAN law, the Consumer Rights Protection Board has the right to empower other institutions or organisations protecting consumers rights and having a right to protect public interests of the consumers to launch proceedings in the courts or other qualified entity of any other EU member state in order to oblige the seller or service provider acting within the member state to cease the infringements of the public interest of Lithuanian consumers.<sup>1685</sup>

No specific transposition of this article can be found in CYPRUS. However, this does not mean that entities from the member states are deprived of a right to take action, as the provisions on the right of a qualified authority to bring an action is not restricted to qualified entities from Cyprus. However, it is not stated expressly that entities from other member states can take action, and no reference is made to the list published in the Official Journal.

MALTA has also not transposed this provision, and does not seem to refer to the list in the Official Journal. There is a general power to recognise non-Maltese entities as “qualifying entities” for the purpose of the Consumer Affairs Act, which would then permit them to take action in the same way as domestic qualified entities.<sup>1686</sup> Under the Maltese laws other than the Consumer Affairs Act, there is a direct reference to those entities operating in other member states which are entitled to be recognized as ‘qualified entities’ under Maltese law.<sup>1687</sup> LATVIA has also not transposed this provision, although the Law of Civil Procedure theoretically, admits the possibility that an entity from another member state could take action before the Latvian courts.

member state courts retain the right to consider whether the purpose for which the qualified entity was set up justifies its taking the specific action before them. This has been expressly incorporated into domestic law include AUSTRIA, BELGIUM, GREECE, IRELAND, and POLAND. However, in respect of IRELAND, it must be noted that any qualified entity must have a *statutory* function of protecting the collective interests of consumers; this seems to restrict the

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<sup>1685</sup> Art. 28-7(2) of the Law on Consumer Protection.

<sup>1686</sup> Art. 2 of the Consumer Affairs Act.

<sup>1687</sup> Thus, under the Distance Selling (Retail Financial Services) Regulations 2005 and the Advertising, Sponsorship and Teleshopping (Protection of Consumers’ Interests) (Television Broadcasitng Injunction) Order, 2005 there is express reference to those qualified entities from another Member State which are included in the list compiled by the EU Commission.

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national legislation to a scope which is narrower than the Directive itself. DENMARK relies on a general requirement for standing that a claimant must show “sufficient legal interest” in bringing the action, and this applies to the type of action under the Directive. In FINLAND, a court is also entitled to investigate whether a claimant is entitled to bring an action, in line with the proviso contained in the Directive. In POLAND, the qualified entity from another member state has to show that the purpose of its activities justifies its starting proceedings in the Polish courts, and that these proceedings are aimed at conduct taking place in Poland but harming the collective interests of consumers in the member state where that entity is based.<sup>1688</sup>

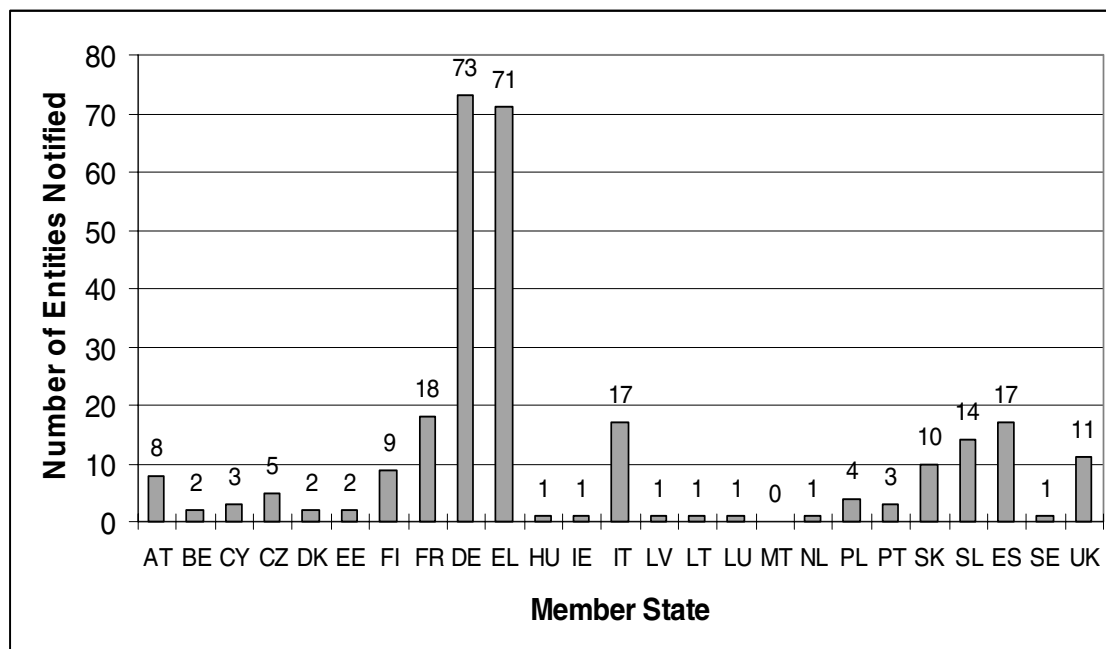
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<sup>1688</sup> Art. 100a of the Act on the protection of consumers and competition.

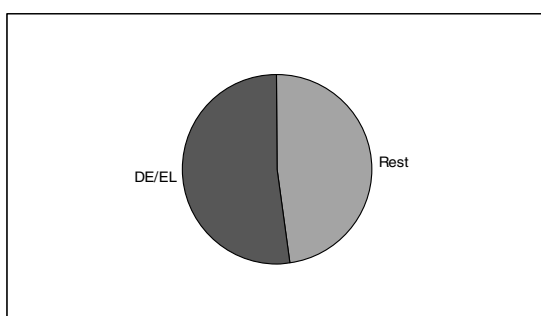
**b. List of Qualified Entities published in the Official Journal**

The European Commission is required to publish a list of all the qualified entities notified to it by virtue of Art. 4(2) of the Directive 98/27 in the Official Journal (see Art. 4(3) of the Directive). The most recent list was published in February 2006 ([2006] O.J. C 39/2). With the exception of MALTA, all member states have notified at least one qualified entity, although the number of entities varies considerably between the member states.

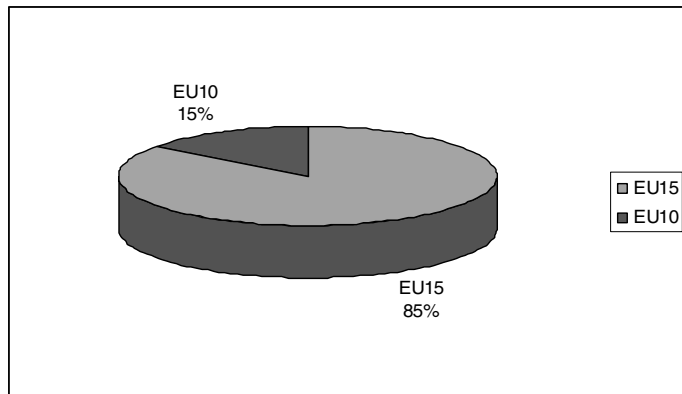
The following table illustrates the distribution of 'qualified entities' between the member states:



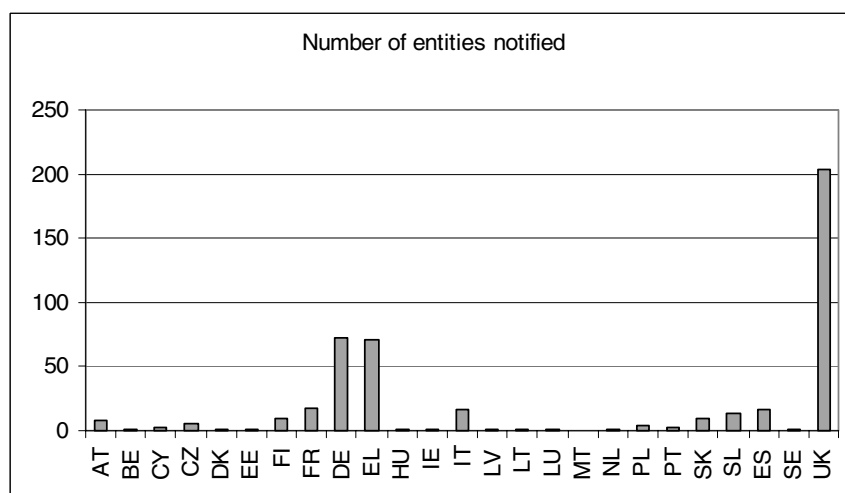
The total number of qualified entities notified to the Commission is 276. GERMANY has notified 26.4% of the total of qualified entities, followed closely by GREECE with 25.7%. This means that more than half of all qualified entities originate in two member states.



Overall, 235 qualified entities emanate from the pre-2004 member states (EU15), with only 41 entities from new new member states (EU10). The overall distribution is illustrated in the graph below.



It should be noted that the UNITED KINGDOM has notified 11 entities, although one of them is, in fact, simply a reference to 204 separate entities, i.e., local weights and measures authorities. The analysis above is based on the assumption that only 11 qualified entities exist for the United Kingdom, although if each of the local authorities were treated separately, the position would be different:



On this view, the total would be 468 qualified entities, of which the UNITED KINGDOM would have 43.4% of the total. It would also mean that the percentage of qualifying entities from the EU 15 States would rise to 91%.

## **5. Article 5 – Prior Consultation**

This article grants member states the option to require a qualified entity to consult with the defendant before applying for an injunction. Alternatively, member states may require such consultation to be with both the defendant and the independent public body who is a qualified entity. Even where such a requirement is introduced, it is limited to a two-week period, after which an action may be brought if there has been no response.

Member states which have not made use of the option to require consultation at all are: AUSTRIA, BELGIUM, CYPRUS, DENMARK, FINLAND, FRANCE, GREECE, LATVIA, POLAND, PORTUGAL, and SLOVENIA. In CYPRUS, whilst consultation is not a formal requirement, in practice, most qualified entities will consult voluntarily. In FINLAND, the Consumer Ombudsman can act as an advocate for, or assistant to, qualified entities from another member state, in order to help them with both language and relevant law, but there is no requirement to consult before taking an action.<sup>1689</sup>

In MALTA, there is no requirement of prior consultation; however, the Director of Consumer Affairs has the power to attempt to achieve voluntary compliance by the trader against whom an order might be sought if it is “possible and reasonable to do so”.<sup>1690</sup> POLISH law refers to the possibility of an amicable settlement, which would, presumably, bring to an end the need for formal court proceedings.<sup>1691</sup> In SLOVENIA, only a qualified entity from another member state is required to consult the Slovenian consumer protection office before bringing an action, although if no response has been received within two weeks, the action may proceed. In SPAIN, consultation is possible (albeit optional – no consequences flow from not consulting) in respect of specific areas, (medicines, broadcasting and advertising). Beyond that, no consultation is required, with the exception of the area of standard contract terms, where voluntary consultation with the Registrar of Standard Terms is provided for.<sup>1692</sup>

Consultation within the meaning of Art.5(1) before bringing an action for injunction before domestic court is required in: CZECH REPUBLIC, ESTONIA, GERMANY, HUNGARY, IRELAND,

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<sup>1689</sup> Art. 2(3) of the Act on cross-border injunction procedure.

<sup>1690</sup> Art. 100 of the Consumer Affairs Act.

<sup>1691</sup> Art. 100d of the Act on the protection of consumers and competition.

<sup>1692</sup> Art. 13 of the Law 17/1998.

ITALY, LITHUANIA, the NETHERLANDS, SLOVAKIA, SPAIN , SWEDEN and the UNITED KINGDOM.

It should be noted that in GERMANY, the requirement to consult in the circumstances covered by the Directive was not transposed directly, but there is a wider principle that a claimant must consult a defendant before bringing an action against him before a court which has the equivalent effect.<sup>1693</sup>

Out of the member states which do require prior consultation, the following do *not* demand that the qualified entity seeking to take action first consults with the independent public body in that member state: CZECH REPUBLIC, IRELAND, ITALY, LITHUANIA, the NETHERLANDS, SPAIN, and SWEDEN.

<b>No consultation required</b>	<b>Consultation with defendant only</b>	<b>Consultation with defendant and public body</b>
AT, BE, CY, DK, EL FI, FR, LU, LV, PL, PT, SL, <sup>1694</sup>	CZ, DE, IE, IT, LT, NL, ES, SE	EE, HU, MT, SK, UK.

A specific a reference to the two week period can be found in the laws of the CZECH REPUBLIC, ESTONIA, HUNGARY, IRELAND, ITALY, LITHUANIA, MALTA, SLOVAKIA, SPAIN, and the UNITED KINGDOM. There appears to be some of variation between these countries with regards to the exact time period that needs to elapse before an action may be brought. Thus, in a both Italy and Spain, the entity in question needs to wait for 15 days. In Malta, the 15-day period starts when the qualifying entity is informed by the Director that he has decided not to issue the compliance order requested. Once that period has expired, the qualifying entity may apply to the courts for an order requiring the Director to issue a compliance order.<sup>1695</sup>

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<sup>1693</sup> Art. 5 of the Injunctions Act in conjunction with Art. 93 of the Civil Procedure Code establishes the principle that the plaintiff must consult the defendant before bringing an action against him to court. If he fails to do so, the plaintiff may be liable for the costs of litigation if the defendant immediately accepts the claim. However, it is not compulsory for the plaintiff to consult an arbitration board.

<sup>1694</sup> As noted above, Slovenia does require a qualified entity from another Member State to consult the Slovenian public body before taking action.

<sup>1695</sup> Art. 95 of the Consumer Affairs Act. There is a similar procedure under the Distance Selling (Retail Financial Services) Regulations , 2005 – see reg. 15 thereof.

ITALY maintains a conciliation procedure, which is available prior to starting legal proceedings, which associations and other qualified entities may bring before the Chamber of Commerce, Industry, Trade and Agriculture competent for the local area as well as some other organisations dealing with out-of-court settlements in relation to consumers. The conciliation report, signed by the parties and the representative of the organisation dealing with out-of-court settlement, shall be filed for approval in the registry of the Court at the place in which the conciliation proceedings were conducted. The Court, having established that it complies with the relevant formal requirements, can order it to be made enforceable, and the approved conciliation report is an enforceable instrument

## **6. Annex**

The Annex to the Directive 98/27 lists all the directives to which it applies. This Annex has been amended by all the consumer directives adopted since the Injunctions Directive became law. Some member states have chosen to implement the Annex directly into their relevant domestic law, whereas others have not seen the need for this to be done.

Countries which have transposed the Annex as a separate list into their domestic law are: BELGIUM,<sup>1696</sup> DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, MALTA, PORTUGAL, SLOVAKIA, and the UNITED KINGDOM. Those which have not transposed it into their domestic law are: AUSTRIA, CZECH REPUBLIC, ITALY, IRELAND, LATVIA, LITHUANIA, the NETHERLANDS, SLOVENIA, SPAIN and SWEDEN.

In this regard, it must be stressed that there is no obligation to transpose the Annex itself. What is crucial is that domestic law ensures that an action for injunction is available for all the infringements covered by the Directive. Including the Annex in domestic law could be seen as increasing transparency in that it is easier to identify the collective interests of consumers included in directives listed in the Annex.

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<sup>1696</sup> The Law of 26 May 2002 Concerning Intra-Community Actions for an Injunction in the Field of the Protection of Consumer Interests contains an annex such as the Injunctions Directive. This law however, does not apply to the liberal professions (Art. 3), for whom the Injunctions Directive was transposed in the Liberal Professions Act, which does not contain such list.

In AUSTRIA, Art. 28(a) of the Consumer Protection Act refers to transactions involving those circumstances on which there is a Directive, rather than listing either the directives or implementing legislation themselves. In IRELAND, reference to the Annex is made in the explanatory notes to the implementing legislation. Similarly, in SPAIN, there is no separate list of relevant Directives, although some of these are mentioned in the Exposition of Motives of the Law 39/2002.

CYPRUS and LUXEMBOURG have not transposed the Annex because these countries have chosen to implement the Directive 98/27 by amending each respective domestic law implementing the consumer directives concerned.

<b>Method of Transposition</b>	<b>Member State</b>
Include Annex in domestic law	BE, DK, EE, FI, FR, DE, EL, HU, MT, PT, SK, UK
Reference in explanatory notes	IE, ES
No transposition but relevant domestic law amended	CY, LU
No transposition	AT, CZ, IT, LV, LT, NL, PL, SL, SE

#### **IV. Use of the minimum harmonisation clause**

Article 7 of the Directive 98/27 permits the member states to grant qualified entities, as well as other persons, more extensive rights to take action in their territory. This provision therefore has a two-fold effect: on the one hand, it effectively enables the member states to broaden the ambit of the injunctions scheme by giving *locus standi* to a wider range of persons. On the other hand, a member state remains free to grant qualified entities a right to bring an action in circumstances not covered by this Directive (such as for additional domestic consumer protection rules).

In AUSTRIA, it is possible to challenge standard contract terms even when they are not specifically designed for consumer transactions; moreover, an injunction may be available for a wider range of contracts.

In BELGIUM,<sup>1697</sup> the injunctions procedure can be used to challenge infringements of domestic consumer rules not based on an EC Directive. Such action is also possible in ITALY, HUNGARY, the NETHERLANDS, PORTUGAL and SWEDEN. Similarly, GERMANY applies the implementing legislation to infringements of consumer legislation generally. In the UNITED KINGDOM, the injunctions procedure can also be used for to deal with infringements of other consumer protection legislation, but the right of action excludes the qualified entities from another member state and is restricted to “domestic” and “designated” enforcers.

The law in CYPRUS permits qualified entities to seek a wider range of orders, such as requiring the trader to take corrective measures, or any other order that may be reasonable in the circumstances of the case. Furthermore, it is not necessary that the collective interests of consumers are harmed, and even an infringement affecting a single consumer makes it possible to apply for an injunction, although it is not clear whether an injunction can be sought directly by an affected individual consumer, or whether this should be done by a qualified authority on his behalf. No reference is made to such a right vested on individual consumers. Actions for an injunction to protect individual consumer interests are also possible in LATVIA.

In MALTA, wider orders can be made: where the action is based on the use of unfair contract terms, the order may require the trader to incorporate terms to improve the information of consumers or to prevent a significant imbalance in the rights and obligations of the parties to the contract (if this would benefit consumers); for other actions, the order may specify the measures that need to be taken to ensure compliance. In POLAND, the implementing legislation covers all natural and legal persons providing public services which are not an economic activity as such, as well as professions.

In SPAIN, a qualified entity from another member state may bring an action before the Spanish courts without having to show that the collective interests of the consumers in that State were harmed by the infringement originating from Spain. Moreover, in the fields of advertising, including advertising of medicinal products, and broadcasting, individual consumers also have standing to bring an action for an injunction. Moreover, entities from another member

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<sup>1697</sup> See Art. 95, 97 and 98 of the Trade Practices Act and the Annex of the Law, 26 May 2002 Concerning Intra-Community Actions for an Injunction in the Field of the Protection of Consumer Interests, which includes infringements on the TPA .

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states can intervene in proceedings already pending before a Spanish court. Finally, the procedure for applying for an injunction is a fast-track one, requiring only oral proceedings.

Individual consumers can also take action in ESTONIA. No specific use of this provision was made in the CZECH REPUBLIC, DENMARK, FINLAND (although note that the Consumer Ombudsman has an advisory role for entities from another member state), FRANCE, IRELAND, LATVIA, LITHUANIA, the NETHERLANDS, SLOVAKIA, SLOVENIA, and the UNITED KINGDOM.

## **V. General Comments on Adequacy of Implementation of the Directive**

### **1. Difficulties encountered during the transposition process**

It has been noted that the Directive contains a number of features that may make it weaker than necessary. In particular, there are options given to the member states with regard to the appropriate procedure and competent authority, prior consultation and the criteria for recognising “qualified entities”. This creates a risk of different standards and may make it more difficult for a qualified entity from one member state to take action in another member state. Of course, such a flexible approach is needed, to an extent, because of the diversity of the national legal systems.

Moreover, the obligation under the Directive to establishing certain procedures which must be in existence in the member states to ensure the full effectiveness of a Directive may be problematic for some states, given the different – and contrasting – legal traditions. For example, in MALTA, the Directive has been implemented on a piecemeal basis (i.e., as part of the legislation transposing specific directives), which now means that different authorities each with their own different appellate tribunals and procedures are charged with the enforcement of these rules.

## **2. Gaps in the Directive**

It has been suggested that it would be beneficial to provide some guidelines on the application of the powers given by this directive. Otherwise, too much discretion may be left to the domestic courts, which will make it more difficult to apply these rules effectively.

Directive 98/27 only applies to domestic measures giving effect to corresponding EC directives, but most of these directives contain minimum harmonisation clauses. Some traders may therefore be subject to infringement proceedings in one member state, but not in another. A further question - illustrated by the *Duchesne* litigation by the UK's Office of Fair Trading - is which law should be applied by the court in which the action is brought. In the *Duchesne* litigation, the Belgian commercial tribunal and the Court of Appeal took different views as to whether Belgian or English law applied, although in that case, there was an infringement under both laws.

In several member states, commentators have expressed scepticism about the practical relevance of the Directive in view of the financial difficulties which qualified entities may face when seeking to take action in another member state. Indeed, at the time of writing, there had only been one reported cross-border case.<sup>1698</sup> One suggestion has been to give injunctions granted in one member state immediate EU-wide reach.<sup>1699</sup> However, the Directive 98/27 is not limited to cross-border injunctions, and at a domestic level, there have been cases where action was taken to combat infringements at a national level.

Concern has also been expressed about the possible delays in notifying the Commission of new qualified entities, and also in publishing a revised list in the Official Journal. Consideration might also be given to extending the right of qualified entities to ask not only for an injunction, but also, in appropriate cases, to bring a claim for compensation on behalf of affected consumers (see, e.g., the French procedure on collective action).

Finally, it may be observed that the Directive 98/27 does not address the relationship with other consumer protection directives which already require that there is a right of action for independent public bodies and other organisations with a legitimate interest in the protection

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<sup>1698</sup> The UK's Office of Fair Trading successfully took action in the Belgian courts.

<sup>1699</sup> See *Calais-Auloy and Steinmetz*, *Droit de la consommation*, Dalloz<sup>6</sup> (2003).

of consumers (see e.g., Art.7 of Directive 93/13; Art.11 of Directive 97/7). This is usually done by permitting such bodies and organisations to seek an injunction, but the threshold for taking action under these provisions is lower as it does not refer to the “collective interests” of consumers.

### **3. Other enforcement mechanisms**

Correspondents were asked whether there were additional enforcement mechanisms for the protection of collective consumer interests available in the member states.

In AUSTRIA and GERMANY, competitors may be able to take action under the laws on unfair competition; the same applies in LATVIA. Moreover, in Germany, the legislation on investor protection<sup>1700</sup> provides for the possibility of bringing a test case to establish whether incorrect information about investments was published, or whether information was withheld. Provided that there are at least 10 claimants, the action will take evidence only once and a decision for all investors affected will be handed down. In ESTONIA, the Consumer Protection Board can intervene in individual cases. In the CZECH REPUBLIC, an organisation in charge of consumer interests may bring an action for injunction with a civil court.<sup>1701</sup> In FRANCE, a form of collective action is available in circumstances where a number of consumers have been affected by the same conduct of a single trader. Accredited consumer organisations may take up these cases on behalf of the consumers affected, provided that at least two consumers have instructed the organisation to act. Discussions are also underway to introduce the possibility of a class action taken on behalf of consumers directly. HUNGARY also contains provisions in its law on collective actions. FRANCE also involves the criminal law in the enforcement of several of the consumer directives. The same is true of the UNITED KINGDOM, which provides a range of criminal sanctions, e.g., for a breach of the information obligations under the Directive 85/577, or the Directive 90/314.

In MALTA, registered consumer associations may ask to intervene in proceedings before the Commission of Fair Trading. Moreover such associations have the right to make complaints to the Director of Consumer Affairs in relation to any law which he administers. A

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<sup>1700</sup> Law on Test Cases for the Protection of Investors.

<sup>1701</sup> Art. 54(2) of the CommC (Act No. 513/1991).

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representative of the association is entitled to participate and assist in the proceedings undertaken following such reports.<sup>1702</sup> In the case of complaints made by the association under the Trade Descriptions Act, the association may participate in any subsequent proceedings as an aggrieved party.<sup>1703</sup>

ITALY is also considering reform in this area. The “Disegno di legge” no. 679 “Disposizioni per l’introduzione della class action” of 26 June 2006 is before Parliament. It would introduce a new article 141-bis into the Consumer Code to provide that consumers’ associations are entitled to recover damages on behalf of one or more consumers.

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<sup>1702</sup> Art. 37 of the Consumer Affairs Act.

<sup>1703</sup> Art. 30 of the Trade Descriptions Act.

## **VI. Conclusions and Recommendations**

- A clarification regarding the applicable law in cross-border cases might be desirable. It is noted that this may be resolved through the proposed “Rome II” convention.
- A related question is whether injunctions obtained in a domestic context ought to have Europe-wide reach, at least where the activities of the trader against whom an injunction has been obtained are not limited to one member state. An analysis as to whether this is already possible within Regulation 44/2001 (Brussels-Regulation) may be desirable
- The relationship with Directive-specific enforcement mechanisms should be clarified. Thus, Art. 11 of Directive 97/7 and Art. 7 of Directive 93/13 both require that member states put into place adequate and effective means to ensure compliance with these respective Directives. This seems to overlap, to an extent, with the Directive 98/27. There is a difference in that the provisions in the specific directives do not include the “collective interest” criterion, although, at a practical level, this may not matter hugely. It may therefore be possible to consider whether these specific provisions could be deleted.
- The evidence to date shows that the cross-border procedure is not being utilised. One reason may be the question of costs for qualified entities from one member state to take action in another. The Directive is silent on the question of costs; a basic rule giving the qualifying entity the right, if successful in the action, to recover costs (not just of the court action, but the costs incurred in taking the action, such as translation, legal advice etc.) could be considered.
- It may be desirable to consider whether a power to ask for compensation should be introduced. Difficulties in this regard may be establishing the loss caused and identifying beneficiaries (e.g., through creating a central fund to which individual consumers may apply). Linked to this is whether cross-border class-actions ought to be facilitated, too.