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Injunctions Directive - Inception Impact Assessment

I. Introduction

- At the end of October 2017, the Commission published an Inception Impact Assessment (Inception IA) on different policy options to be explored for the revision of the 1998 Injunctions Directive. It was accompanied by a targeted questionnaire which includes questions on an imaginary case study.
- The Injunctions Directive will most likely be one of the legislative acts to be revised next year in the framework of President's Juncker promise for a New Deal for Consumers.
- The Injunctions Directive imposes on Member States the obligation to enable so-called 'qualified entities' to seek an injunction in front of a court or of an administrative authority to stop an act contrary to the EU consumer law, which harms the collective interests of consumers. It leaves to the discretion of each Member State whether the injunction procedure is of judicial or/and administrative nature.
- BusinessEurope has been working together with EU institutions and other stakeholders for many years to find solutions towards better enforcement in the Single Market as well as effective and easily accessible redress mechanisms for consumers. Throughout the years, it adopted several position papers expressing its views on many related topics ranging from alternative dispute resolution, cooperation of national consumer authorities to collective redress.
- BusinessEurope takes this opportunity to give its preliminary feedback on the Inception IA. We were not able to reply to the targeted consultation due to the very short deadline given (two weeks) which is not compatible with the complexity around procedural matters of the injunctions directive.

II. General messages on the Inception IA the injunctions directive

- ✓ BusinessEurope agrees that the injunctions directive is an important piece of the EU Consumer Acquis when it comes to enforcement.
- ✓ However, BusinessEurope has serious doubts and concerns about extending the scope of the injunctions directive to collective redress cases as it is asked in the questionnaire and as it appears in option 4 of the Inception IA. Given



its nature, this directive does not seem to be the right place to discuss collective compensation. This is a debate to be held in other fora which would also include elements such as loser-pays principle, limitations around legal representation and contingency fees and other safeguards against frivolous actions. These safeguards against unmerited and abusive litigation are one of the cornerstones of European national legal traditions.

- ✓ The targeted questionnaire appears to overlook other relevant aspects of the implementation of the directive (beyond compensation issues) which have been raised in previous reports¹. Here are some examples:
 - Cost of the proceedings has been one of the major obstacles to a wider use of injunctions.
 - The second obstacle is the length of the proceedings.
 - Complexity and enforcement of the decisions also appear as problematic.

We therefore believe that only the elements of option 3 in the Inception IA that address the above issues should be considered for a future revision. On the element of cost, the revision should not harm the well-functioning loser-pays principle, an important gatekeeper against abusive litigation.

- ✓ In addition, the Commission Inception IA seems to mostly base the need for action on the lack of suitability of the Injunctions Directive to deal with compensation of damages suffered by consumers (Options 3 and 4).
- ✓ Changing the mechanics of injunctions might go against the way national legal systems are currently working and could have unintended consequences, at least on the access to procedural guarantees from the different parties of a dispute.
- ✓ It should not be forgotten that in some cases an injunction decision can be taken by a judge without a complete assessment on the merits of the case (i.e. whether the substantive right of the claimant has been affected/harmed or even if this right exists). In this scenario, it is difficult to see how a decision which has not been decided on the merits of the case can be used subsequently (and directly) to provide parties a possibility to directly make a collective compensation claim. Defendants would risk being deprived of fundamental rights like due process and procedural guarantees (e.g. burden of proof; legal challenge; appeal). These are basic defense rights that are granted by the EU Charter of Fundamental Rights to everyone, whether they are individual citizens or companies.
- ✓ We would disagree that follow-on actions for damages should always be available also in the form of collective action. A damage and the compensation attached to it tend to be concrete and individual. Hence, enabling the abstract decision of the injunction to be used in collective cases

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635>



would not be appropriate because the damages assessment by judges would have to be made on a case by case basis.

- ✓ We highlight the fact that the (soon-to-be-adopted) revised Consumer Protection Cooperation Regulation already provides an important extension of national authorities' powers that will grant new ways to protect consumers. Therefore, discussing the increase of these powers as options 3 and 4 suggest seems like an overlap.
- ✓ BusinessEurope also has doubts on creating an obligation for traders to individually inform all concerned consumers about the injunction order, redress order and approved settlement. Beyond the practical difficulties and associated costs of such information, it is unclear whether 'concerned consumers' means only those who are parties or also consumers who are not parties but have, for example, bought the same defective product as the injunction order or redress order refers to.
