The proposal for a regulation on consumer protection cooperation from the point of view of “vzbv”

Prof. Edda Müller, chair of the Federation of German Consumer Organisations (vzbv)
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Ladies and gentlemen,

I would like to begin by thanking you for inviting me here today to explain the position of Verbraucherzentrale Bundesverband – the Federation of German Consumer Organisations – on the proposed cooperation regulation.

1. **Our position**
The vzbv favours co-existence of government authorities and private organisations with regard to the enforcement of consumer laws. Within the scope of this co-existence, it is our view that the state should intervene only where consumer organisations and market participants cannot achieve the same effect more efficiently and better.

2. **Our reasons**
In Germany, the involvement of consumer organisations in the enforcement of laws enacted for the protection of consumers has a long and proven tradition. Since 1965, the Law on Unfair Competition (“Gesetz gegen den unlauteren Wettbewerb”, or UWG) has given consumer federations the right to initiate collective litigation against misleading or dishonest advertising. Since 1977, these federations have also been able to sue against General Terms and Conditions of Business that are unlawful and to the gross disadvantage of the consumer.
By way of comparison: the EU directive on injunctions for the protection of consumers’ interests, which introduced similar powers of collective litigation in all Member States, was not enacted until 1998.

German consumer federations make frequent use of their rights of action. The role they play in the enforcement of collective consumer rights has always been decisive in the justification of public funding for these federations.

- **Examples of successful suits**
  With these rights of action, German consumer federations have promoted legal evolution in the area of consumer legislation.

  One of the better-known actions involving General Terms and Conditions is the 1987 advance payment ruling by the Federal Court of Justice, which bans travel agencies from demanding payment of the entire price of a trip in advance unless they can provide evidence of insurance against bankruptcy.

  In 1994, there were a number of rulings dealing with the inadmissibility of ten-year terms in insurance contracts.

  In the area covered by the Law on Unfair Competition, a number of actions and leading cases brought by the vzbv before the Federal Court of Justice have established the opt-in concept for telephone advertising.

- **2002 – 2004 figures**
  Between the first of January 2002 and the thirtieth of January 2004, the vzbv and its member organisations initiated nearly 2000 warnings (the exact figure is 1876). Of these, 1400 dealt with infringements of competition laws (Law on Unfair Competition) and 475 were in reaction to non-permissible clauses in General Terms and Conditions. Forty-four of these warnings were addressed to companies operating abroad. In addition to these various warnings, there were also several actions brought by the Wettbewerbszentrale (the central German organisation against unfair competition) and by other competing institutions.

- **A functioning system**
  In Germany, all market participants agree that until now the private system has provided efficient monitoring of compliance with consumer laws. One of the reasons for
this success is that market participants have a vested interest in a good monitoring function, and therefore they do everything in their power to use existing instruments effectively and efficiently.

On the other hand, German consumer federations have a broad and comprehensive network of consumer protection offices where consumers anywhere in Germany can go to get advice or lodge complaints about companies. This gives us a considerable empirical basis to build on, and as a result we are quickly aware of abuses, we can assess their spread and set the right priorities in the selection of available judicial instruments. This sensor role played by the consumer federations is a major factor for their success in enforcing consumer laws.

This advantage and the consumer federations’ decades of experience would be lost if the existing system were replaced by a purely government-run system.

3. Unsolved deficiencies in law enforcement in the case of cross-border infringements

Our experience and the instruments available to us allow us to solve up to 80% of cross-border cases in which another Member State asks Germany for administrative assistance. In all cases, these are situations where the company is relatively easy to identify and where the problem involves misleading advertising, improper contract clauses or other infringements of consumer laws.

Our experience has taught us, however, that there are always some cross-border cases where the means at our disposal are inadequate and where the intervention of government authorities would be desirable.

It is our impression that dishonest companies deliberately and systematically take advantage of these deficiencies. There is currently no established system of cooperation that, for instance, could be helpful in identifying foreign parties responsible for infringements.
• **Advertising by fax, e-mail or SMS text messages**
Most of the time, the sender of this type of advertising remains anonymous, for instance by concealing the source of unsolicited faxes, e-mails or SMS text messages. In many of these cases, senders can be identified only by their premium service number. However, this seldom leads to successful identification, as the company whose name the network operator has been given is often not registered at all or not located at the place of registration, or the subscriber of the premium number refuses to reveal details of who is behind the scheme. In one case, it took more than one year of research to identify a company in Liechtenstein as the owner of a particular fax number.

• **Advertising in the form of prize draws**
We are faced with a comparable situation in the area of conventional advertising post and print adverts. Examples here are, for instance, misleading prize draws where the recipient is deceived as to his or her real chances of winning, or where there is an unfair connection between the draw and the sale of goods. The same applies to eye-catching advertising for ineffective diet products. One of the main characteristics of all these type of advertising is that the identity of the advertiser is systematically concealed through the use of bogus company names and foreign post-office-box addresses, and it is often impossible to identify the party behind the scheme in the country in question.

4. **Proposed change**
A regulation that would facilitate cross-border enforcement of consumer rights is, in our view, an important step to minimise future cross-border infringements of consumer laws.
As one of the functions of our federation is law enforcement, and as we are well aware of the problems involved in cross-border infringements, we have a vital interest in the strengthening of consumer rights which is intended by the regulation and in a stronger involvement of government authorities.

We agree that the best way of achieving this objective is the mutual assistance system between the administrative authorities of Member States which is proposed
by the draft regulation. Such a system, once implemented, should lead to a situation where the Member State approached for assistance would prosecute infringements taking place in the Member State requesting the assistance with Community-wide comparable instruments, in the same manner and with the same commitment as it would a domestic infringement against consumer rights.

In our proposed amendment, we show a solution in which government authorities and private institutions would jointly assume the tasks arising from the regulation.

- **Network of state authorities**
  We share the opinion set forth in the draft regulation that a Community network of public enforcement authorities and central liaison offices is desirable. Only the networking of government authorities that are subject to the principle of loyalty inherent to Community law can guarantee Community cooperation in the prosecution of cross-border infringements of consumer laws.

- **Commissioning of private organisations**
  It is, however, not necessary to exclude private institutions categorically from handling requests for mutual assistance at national level. It must remain possible to take advantage of the existing skill and experience of private institutions. Our proposal is therefore that Member States have the right to commission the enforcement of consumer laws to private institutions, as long as these are institutions that, under national law, serve the protection of collective consumer interests.

- **Conditions of the commissioning:**
  - **Competence of the private organisation**
    A private institution can be commissioned with law enforcement only if this institution has the necessary competence for the individual tasks it is expected to perform. This means, therefore, that the option to commission tasks is restricted in situations where the proper processing of a request for assistance requires the exercise of sovereign powers. Our experience in law enforcement has shown that we as a private institution already have the necessary powers in 80% of all expected cases of cross-border infringements of consumer laws. In terms of the investigation and en-
forcement powers mentioned in Article 4 para. 3 of the regulation, we have all the rights and instruments covered by letters d to g.

- Guaranteed compliance with data protection regulations
Furthermore, there may be requests for assistance that involve the communication of sensitive data. Situations where data protection interests are against the communication of the necessary information to private institutions do require the direct involvement of the competent government authority. It should be noted, however, that the enforcement of collective interests does not normally depend on the communication of sensitive data, as what is most often involved are public statements of companies.

- Final responsibility in the hands of the Member States
We know and understand the misgivings of our partner organisations in the other Member States, but we believe these misgivings can be cleared up. In our proposed amendment, the responsibility for fulfilling the tasks arising from the regulation remains in the hands of the Member States! This guarantees that the Member States do not use the services of alibi organisations to do the enforcement for them or simply abandon their responsibility.

I thank you for your attention.