

INTERIM MEASURES AND INJUNCTIVE RELIEF IN COMMON LAW AND CIVIL LAW JURISDICTIONS: A COMPARATIVE STUDY

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1. – Interim measures: an overview.

Interim measures represent a kind of provisional or conservatory relief by which the court may safeguard the position or assets of a party before issuing the final ruling.

Interim measures can take the form of:

- restraining orders, which are intended to prevent situations in which either party may suffer harm because the other party did/continued an act which was the matter in issue;
- directive orders, which are intended to ensure that a party maintains a specific behaviour until the trial is finalised or additional orders are given by the court¹.

Although the principal aim of interim measures is to safeguard the interests and rights of the party which has started the case, for the duration of the proceedings, interim measures may also protect the interest of a third party, who may be affected by the proceedings and more generally speaking the interest of justice.

To give an example, in the case of a legal dispute between spouses, an interim measure can take the form of a preliminary court order regarding

¹ For instance, in *Raja v Secretary of State*, England, the Employment Appeal Tribunal ordered to continue the contract of employment of a dismissed employee pending a full tribunal hearing. *Raja v Secretary of State for Justice* UKEAT/0364/09/CEA.

the parties' duties towards any existing children. Such a measure is intended to protect both the parents' and the children's interests².

In criminal proceedings, the detention of a defendant is an interim measure, imposed in the interest of justice and for the protection of the whole society³. In a civil case, the interim measure usually adopted in order to guarantee that a final judgment can be enforced is an injunction hindering a party from interfering with its assets or from engaging or not engaging in certain activities⁴. Interim measures may also involve freezing or seizing of certain assets until the final ruling is issued, or else interim-based payment of an established sum to the court. The validity of interim measures may be upheld:

- until the case is resolved;
- until enforcement prerequisites are satisfied, or
- until temporary protection is no longer required⁵.

Interim measures are divided by legal theorists⁶ into three major types, as follows:

- conservatory measures: they ensure that a substantive right will be fulfilled;
- regulatory measures: they ensure provisional settlement of specific issues disputed between the parties⁷;
- anticipatory measures: they ensure that the substantive right is upheld until the final ruling is issued⁸.

Interim measures have the following inherent characteristics:

- they support the goal of the primary proceedings, which is substantive legal action according to the merits of the case;
- they are embedded in the principle of disposition;
- they are provisional rather than decisive in nature; this means that, on the one hand, they cannot influence the decision of the proceedings on

² E. ROZALINOVA, A. ANGELOV and I. GEORGIEV. *Jurisdiction, Recognition and Enforcement of Provisional and Protective Measures under Regulation 44/2001 (International cooperation in civil matters)* in 4 *Revist Forumul Judecatorilor* 2012, 81

³ *Ibidem*

⁴ K.R. HICKIE. *The Enforceability of Interim Measures of Protection Granted by Arbitral Tribunals Outside the Seat of Arbitration: A New Approach* in 12 *Vindobona J. Int'l Com. L. & Arb* 2008, 221

⁵ T. ZOROSKA-KAMILOVSKA. *Interim Measures in IP Litigation from the Macedonian Perspective* in 4 *Iustinianus Primus Law Review* 2013, 1

⁶ M. STORME (ed). *Rapprochement du Droit Judiciaire de l'Union européenne/Approximation of Judiciary Law in the European Union*, Leiden, 1994

⁷ X.E. KRAMER. *Harmonisation of Provisional and Protective Measures in Europe* in M. Storme (ed), *Procedural laws in Europe: towards harmonisation*, Antwerpen – Apeldoorn, 2003, 305

⁸ ZOROSKA-KAMILOVSKA, *supra* note 5

the merits and, on the other hand, their effect may be nullified by the result of the proceedings on the merits;

- they are subject to time limitations due to their transient nature;
- they exhibit flexibility, that is their content can be modified or even finished if the conditions so require;
- they are proportional to the parties' goals⁹.

The plaintiff may approach the court before which the case is pending during any stage of the proceedings, with a motion to grant interim protective measures. Interim measures may be sought even before the action is brought before the court.

In a nutshell, in civil proceedings the purpose of the interim measures is to preserve the rights and interests of both parties, avoiding the occurrence of irreversible harm prior to the final court ruling on the merits of a case.

Moreover, in some cases, protective measures are applied to coerce the defendant to continue carrying out his/her legal duties, which could lead to dispute resolution before trial. Under such circumstances, provisional measures serve to prevent waste of time and financial resources for both parties.

Interim measures are most frequently requested in cases involving debt claims or property disputes in situations when the debtor threatens or intends to remove or dispose of his property to defraud his creditor or if the defendant in the suit threatens to dispossess the claimant or otherwise cause injury to the claimant in relation to the disputed property.

In similar cases, the court may grant to the plaintiff:

- Attachment of immovable property;
- Attachment of movables and receivables;
- Suspension from operating a motor vehicle; and
- Stay of enforcement proceedings.

In any case, the court may grant any other provisional measures that it deems appropriate¹⁰.

Interim measures are most frequently enforced within the national context. They are applied in administrative and/or civil proceedings as provided for in national legislation. On the other hand, these measures can be considered in the context of enforcement of EU law provisions. The

⁹ C.A. ESPLUGUES. *Provisional Measures in Spanish Civil Procedure* in R. Stürner and M. Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures*, Heidelberg, 2011

¹⁰ ROZALINOVA, ANGELOV and GEORGIEV, *supra* note 2

Treaty of Functioning of the European Union ('TFEU')¹¹ has a specific provision, Article 279, according to which: a) interim measures may be requested alongside claims brought before the Court of Justice of the European Union ('CJEU') and b) the CJEU may order interim measures in any case which it has to decide.

Based on this norm, a request for interim orders may be made by the European Commission to the CJEU with the purpose of instructing defendant Member States to stop enforcing specific national legislation or administrative rules, as well as to adopt the necessary actions to put a halt to existing or potential activity that the European Commission claims to breach EU law¹².

It can be deduced from Article 279 TFEU that interim measures may be applied for solely when cases are taken before the CJEU. As a consequence, interim measure proceedings cannot exist on their own, but only in conjunction with other legal proceedings pursued at EU level¹³.

The international context involves frequent application of interim measures as well, particularly with regard to the safeguard of human rights. For example, according to Rule 39 of the Rules of the European Court of Human Rights, interim measures conducive to the interests of the parties or to the smooth unfolding of the proceedings may be proposed by the Chamber to the parties involved, or, under particular circumstances, by its President.

In sum, interim measures are not substitute for civil litigation, as they "do not in principle determine civil rights and obligations"¹⁴, but have a great significance in the determination of civil rights and obligations, as stated by the European Court of Human Rights ('ECtHR'). In the same decision, the ECtHR highlighted that there is a widespread consensus among the Council of Europe Member States on the use and application of interim measures¹⁵.

In addition, EU Member States have been guided by EU Directives (including the Procurement Remedies Directive and the IPR Enforcement Directive) and a number of international conventions (including the International Convention for the Protection of All Persons and the New York

¹¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union

¹² M. HEDEMANN-ROBINSON. *Enforcement of EU Environmental Law and the Role of Interim Relief Measures*, in 19 *European Energy and Environmental Law Review* 2010, 204

¹³ *Ibidem*

¹⁴ *Micallef v Malta* – 17056/06 [2009] ECHR 1571 (15 October 2009)

¹⁵ HEDEMANN-ROBINSON, *supra* note 12

Convention) to grant their national courts the authority to enforce interim measures.

2. – Prerequisites for granting interim measures.

Interim measures will be granted when specific prerequisites are met:

- the claimant brings an admissible action, that is the claimant is allowed to enforce the alleged right;
- the action is *prima facie* founded (*fumus boni iuris*), that is there are sound reasons to believe that such right has been or is likely to be infringed by the defendant. In other words, this requirement refers to the reasonable probability of the claimant's success with the alleged claim. For this reason, the claimant must submit solid written evidence to the court. *A contrario*, if upon examination it appears that the facts alleged by the applicant cannot as a matter of law sustain such a right, then there are two possibilities: 1) the court may require submission of further evidence showing the need for imposing the requested measure; 2) there is no subject matter to be preserved and therefore no interim measure will be granted¹⁶.

Moreover, in several countries:

- the requested protective measure has to be urgent, that is the court has to estimate that this measure is important to avert any risks of impending danger, uphold a right or manage a situation (*periculum in mora*)¹⁷;
- the protective measure requested by the claimant has to be necessary for protecting specific interests and rights under the future judgment;
- the particular interim measure has to be proportional to the claimant's interest. This means that the benefits provided by interim measures to the plaintiff must be balanced with the inconveniences caused by them to the defendant¹⁸. In other words, an interim measure limiting the defendant's rights beyond what is needed to guarantee that the final judgment is enforced will not be awarded to the claimant.

3. – Interim measures in selected countries.

3.1. – Types of Interim Measures: Greece, Poland, UK.

Greece

¹⁶ ZOROSKA-KAMILOVSKA, *supra* note 5

¹⁷ B. ADKINS and S. BEIGHTON (eds), *Private Antitrust Litigation*, London, 2013

¹⁸ M. BORONKAY, *The Protection of Trade Secrets and Know-How: Hungary*, Stockholm 2015

The injunctive measures available are the following:

- surety;
- registration of a mortgage prenotation;
- conservative attachment;
- judicial sequestration;
- interim hearing of claims;
- interim regulation of the situation;
- impoundment;
- release from impoundment;
- stock-taking; and
- deposit of assets at a bank¹⁹.

Poland

Pecuniary claims are secured by:

- seizure of movables, remuneration for work, bank accounts or other claims or property right;
- establishing an obligatory mortgage on the obligor's real estate;
- establishing a prohibition to sell, or encumber real estate for which there is no land and mortgage register, or for which the land and mortgage register is lost or damaged;
- establishing a sea mortgage on a vessel or vessel under construction;
- establishing a prohibition to sell the cooperative ownership right to premises;
- issuing an administration order against the obligor's business, farm or an establishment making up the obligor's business or its part, or a part of the obligor's farm (Art. 747 Code of Civil Procedure).

Non-pecuniary claims

Based on the circumstances, a court can resort to various means to secure pecuniary or non-pecuniary claims. In particular, the court may:

- settle rights and obligations of the parties or participants for the entire period when the proceedings are carried out;
- order a prohibition to sell objects or rights covered by the proceedings;
- suspend execution or enforcement proceedings;
- settle responsibilities related to child custody;
- order to issue a warning to the land and mortgage register or to any other register (Art. 755 sec. 1 Code of Civil Procedure).

UK

¹⁹ ADKINS and BEIGHTON, *supra* note 17

Based on the circumstances of each case, the claimant may need to: (i) maintain assets in keeping with the expected decision of the civil case against the defendant; (ii) protect evidence that the defendant might seek to destroy or hide upon finding out that their breach have come to light; and (iii) consolidate the civil claim by securing proof from third parties. These objectives can be accomplished by means of specific interim measures outlined below:²⁰

- interim injunctions;
- interim declarations;
- orders regarding detention, custody, preservation, inspection, sampling, sale of or payment regarding a property;
- orders authorizing the entry into any land or building;
- orders to give up goods;
- freezing orders and orders directing that a party provide information about the location of any property or assets which are the subject of such freezing order;
- search orders;
- orders for disclosure of documents or inspection of property prior to a claim being made against either an actual or potential opposing party and/or against an entity which is not party to the proceedings;
- orders for interim payment on account of any damages, debt or other sum the court may hold the defendant liable to pay;
- orders regarding the payment of monies to the court pending the outcome of proceedings;
- orders directing a party to file an account or directing an account/inquiry be made by the court; and
- orders regarding the enforcement of intellectual property proceedings (CPR 25.1(1)).

Freezing orders (Mareva orders)

The order takes its name from the case *Mareva Campania Naviera S.A. v International Bulkcarriers S.A.*²¹. The Civil Procedure Rules now refer to it as a freezing injunction (CPR 25.1 (1)(f)).

Initially, the authorities believed that injunctions were not applicable to UK-based defendants, as they were originally formulated against non-British defendants who owned assets in the UK. The Civil Procedure Rules currently provide that the injunction may be granted in relation to assets “whether located within the jurisdiction or not” (CPR 25.1 (1)(f)).

²⁰ K. OLIVER. *UK: Civil Interim Measures in England* in *Mondaq*, 2016

²¹ *Mareva Compania Naviera SA v International Bulkcarriers SA* *The Mareva* [1980] 1 All ER 213.

To ensure that a defendant's assets are enough to fulfil a ruling against him/her, the defendant can be forbidden from dissipating his/her assets through a freezing order, which can also be implemented after the ruling in order to maintain the assets until the ruling is enforced. A worldwide freezing order can be issued by the court if the assets owned by the defendant in the jurisdiction are not sufficient to cover the plaintiff's claim.

A Penal Notice serves to authorize both freezing and search orders. However, the viability of worldwide orders depends on their recognition, registration or enforcement by the relevant foreign courts, since the English court lacks jurisdiction over third parties not residing in the UK. This procedure is known as the 'domestication' of the English order²².

The freezing order does not encompass all the assets of the defendant, but only those which are necessary to cover the plaintiff's claim and any accruing legal expenses and interest. The "surplus" assets can be used by the defendant. In addition, the freezing order can be discharged through payment into court of the amount equal to the value of the limit or providing security in that sum²³.

Freezing orders do not deprive the defendant of his/her proprietary rights over the owned assets but prohibit the defendant from dissipating them. Hence, if the defendant becomes insolvent, the plaintiff does not gain any benefit from the insolvency. However, in cases in which claims of proprietary rights are made over frozen assets, things stand differently. Since a freezing order constitutes an interim measure, the defendant can resort to the frozen assets to cover legal costs and daily living costs to a limit established by the court. To ensure that the assets are not used unreasonably by the defendant, the plaintiff can control, to a certain extent, cost increases asserted by the defendant. For instance, the plaintiff, or if there is no agreement, the court, must approve any rise in costs²⁴.

The worldwide freezing order requires that the defendant give details of the value, location and other characteristics of assets within the jurisdiction or elsewhere.

The level of control afforded to the plaintiff enables him/her to keep track of the assets and inform third parties about the freezing order. However, if such information is compromising for the defendant, it may be concealed or disclosed only partially. On the other hand, if the defendant relies on this privilege, this is generally regarded as an admission of liability²⁵.

²² OLIVER, *supra* note 20

²³ *Ibidem*

²⁴ *Ibidem*

²⁵ *Ibidem*

The defendant is not informed when a freezing order request is submitted to the court, becoming aware of the order only when he/she receives it personally. This procedure is intended to avoid informing the defendant and third parties that the claimant intends to start a claim against the defendant or to take legal action in order to secure the assets and/or evidence. If the plaintiff's intent is known to the defendant, the freezing order may be denied by the court, as "the court is unlikely to make orders which are futile"²⁶.

The plaintiff must fulfil several conditions to secure a freezing order: he/she must:

- have a good arguable case;
- demonstrate that the likelihood of assets dissipation is high; and
- demonstrate the correctness and viability of the order²⁷.

In order to keep a proper balance, the plaintiff will be requested by the court to give a "cross-undertaking in damages", that is to pledge that he/she will conform to any action the court might take if it concludes that the defendant suffered damages due to the freezing order and is therefore entitled to be repaid for his/her loss.²⁸

Proprietary injunctions

The plaintiff can obtain a proprietary freezing injunction if he/she can prove that his/her property, including cash or earnings from the property – in other words his/her proprietary assets – are held by the defendant²⁹.

Section 25 of the Civil Jurisdiction and Judgments Act 1982 provides the plaintiff with a valuable weapon, as it enables an English court to award interim relief in order to support legal action unfolding in another location. This is applicable in cases in which the assets are in England whereas the defendant is in another location, outside the jurisdiction, where the substantive proceedings are undertaken. Foreign proceedings do not necessarily need to have already been initiated, if it is sure that they will be initiated. As long as adequate geographical connection can be proven, relief that cannot be secured where the substantive proceedings occur can be secured in England³⁰.

3.2 – Eligible applicants

²⁶ *Oaktree Financial Services Ltd v Higham* [2004] EWHC 2098 (Ch), LTL 11/5/04

²⁷ C.A. RICKARDS and J.M. MANNING. *Mareva Injunctions and Attachment Orders: How we Have Reaped What the Shady Mariners Have Sowed* in *Legal Education Society of Alberta*, 2008

²⁸ OLIVER, *supra* note 20

²⁹ *Ibidem*

³⁰ *Ibidem*

In some countries, for instance in Poland, the beneficiary or the entity exerting beneficiary rights (e.g. the prosecutor or a voluntary organisation) can demand security interests. Moreover, in cases in which proceedings can be commenced *ex officio*, the security interests may be granted *ex officio* as well³¹.

3.3 – Jurisdiction

Belgium

In Belgium there are different courts that can grant interim measures, depending on the subject matter of the dispute: for instance, an application for interim measures can be made to the President of the Court of First Instance, to the Labour Court or the Commercial Court.

Italy

In Italy, state courts have jurisdiction over interim proceedings when either the measure requested has to be enforced in Italy or judgment on the merits (*giudizio di merito*) falls within Italian jurisdiction. As Italian Law prevents arbitral tribunals from granting any preliminary or interim relief measures (such as seizures or other interim measures), whether *ante causam* or during the proceedings (Art. 818, Codice di procedura civile) ('c.p.c.'), interim measures must be sought from state courts, addressing the request to the competent court. The parties' request to a court for interim relief has no effect on the jurisdiction of the arbitral tribunal; Article 669–*octies* c.p.c. deals with interim measures in disputes submitted to arbitration.

England and Wales

In England and Wales, English courts have jurisdiction on the interim measures' decision if:

- a defendant is in England;
- a defendant submits to the jurisdiction;
- the assets in question are within or have passed through the jurisdiction; and
- the act was within the jurisdiction.

Moreover, English courts have the power to grant interim relief when proceedings between the same parties are pending in the courts of another Lugano Convention³² State (Civil Jurisdiction and Judgment Act 1982, section 25).

³¹ E–note 1, *The prerequisites for execution in European judicial Enforcement* 2016

³² Convention on the jurisdiction and the enforcement of judgments in civil and commercial matters Lugano 1988.

In general, an application must be made to the court where the claim is presently being dealt with. This will be the court where the proceedings were commenced (CPR 23.2(1)) unless:

- the claim has been transferred (CPR 23.2(2));
- the claim has been listed for trial at another court, in which event the application should be made to the trial court (CPR 23.2(3)); or
- the application is made after judgment, in which event the application may need to be made to the court dealing with enforcement (CPR 23.2(5)).

3.4 – *Ex Parte* Orders and the Right of Defence of the Defendant

Hungary

Courts usually grant the defendant the chance to respond to an interim measure request brought by the claimant, unless in extremely urgent cases (Section 156(4) Code of Civil Procedure), in which the interim measures are awarded by the court *ex parte*. The occurrence of *ex parte* orders is rather rare: they are only issued when it is likely that deferral might engender irreversible damage, or when evidence might be lost (Section 88(11) of the Competition Act).

Romania

In the last few years the Romanian courts have granted a significant number of interim measures, even in *ex parte* proceedings³³.

3.5 – Experts' reports

Belgium

Experts' reports are an important source of evidence, especially in cases of technical complexity. The court may demand an expert report based on its own initiative, or one of the parties' request. In both circumstances, the court is responsible for establishing the role of the expert, who provides advice exclusively on technical issues. Furthermore, during the process, the parties shall cooperate through attending meetings and supplying the expert with the information and documents needed to conduct a technical evaluation of the points at issue. If the parties refuse to cooperate, the court can draw the appropriate conclusions from their refusal. The expert provides the court with a draft of the report with his/her findings. The final expert report is not binding on the court, nevertheless it is considered as important evidence. In

³³ D.M. VILAU, *Romania: Tackling infringement in Romania*, in *World Trademark Review* 2016

general, the expert's conclusions are accepted by the court. If instead the court does not accept the conclusions reached by the expert, it has to state the reasons for its decision³⁴.

In case of urgency, the President of the Court can be petitioned to designate an expert during the interim proceedings³⁵.

Italy

If the matter is complex, the judge could appoint a court expert (*consulente tecnico d'ufficio*) ('CTU') to assist the court in the technical matters involved; in this case, the urgent proceedings could have a duration of about two/six months (Art. 62 c.p.c.).

3.6 – Appeal

Hungary

The court has to decide on the request for interim measures within 15 days and, in case of an appeal, the second instance court also has 15 days to render its decision (CPC, s 156(8)).

Italy

If the court awards its decision regarding the interim measure request, granting or refusing seizure, description and injunction, during the hearing or hearing communication or service, the petitioner can appeal the decision (*reclamo*) before a panel consisting of three judges of the court of first instance in a period of 15 days from the decision (Art. 669.13 c.p.c.). Every aspect is reanalysed by this panel and its decision is final.

However, if new information or juridical justification arises in an urgent case, a new request for interim measures may be brought by the claimant (Art. 669.10 c.p.c.).

Netherlands

The party who initially requested interim measures can afterward demand a summary appeal (*spoedappel*)³⁶.

4. – Injunctive Relief

³⁴ BAKER and MCKENZIE, *Dispute Resolution Around the World – Belgium*, Chicago, 2013

³⁵ *Ibidem*

³⁶ W. SCHENK and J.H. BLAUW. *Het kort geding. A Algemeen deel*, Alphen aan den Rijn, 2002

4.1 – Overview on Injunctive Relief

An injunction is an order issued by a court, which requires a *person* to *do* or cease doing a particular action: in the former case the court will issue a mandatory injunction, in the latter a prohibitory injunction³⁷.

Injunctions are aimed at hindering future infringements of the law, or at demanding that the defendant rectify past violations of the law. Injunctions are needed in all those cases in which the harm done to the claimant would be protracted or worsened if the court's decision was issued only at the end of the trial. An example thereof could be an oil spill, which otherwise could pollute marine and coastal environment: in such case, a prohibitory injunction would forbid the defendant to pump oil in the pipeline as long as the malfunction or *breakdown has not been* fixed, and a mandatory injunction would impose to the defendant to clean up waters and coasts. It is not uncommon to find injunctions that have both prohibitory and mandatory elements, disallowing certain conduct and prescribing another one.

In the United States, injunctions can be distinguished also into preliminary injunctions and permanent injunctions. The former are granted provisionally before a trial to maintain the *status quo* until the court hears both sides and decides whether to grant a permanent injunction; the latter are given after the trial. In the EU the different forms are called interlocutory injunctions and permanent injunctions: their purpose is, respectively, to avert impending infringement or stop the alleged infringement from going on.

For instance, in order to comply with Directive 2004/48/EC on the Enforcement of Intellectual Property Rights ('IPRED'), Member States must make specific measures available to the holder of rights, including interlocutory and permanent injunctions (Arts. 9 and 11 IPRED).

Research pointed out that not only can "consumers (...) be protected better at the European level than at the national level"³⁸, but also that "consumers expect and support such action"³⁹.

Many researchers and experts share the opinion that consumer protection policy must be shaped at the EU level for several reasons:

³⁷ K. STOLL-DEBELL, N.L. DEMPSEY and B.E. DEMPSEY. *Injunctive Relief: Temporary Restraining Orders and Preliminary Injunctions*, Chicago, 2009

³⁸ J. HUET. *Recent Developments in the Field of Consumer Protection in the European Community* in 16(4) *Hastings International & Competition Law Review*, 583

³⁹ D.J. SCHWARTZ. *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, in 28 *Ga. Journal of International and Comp Law* 2000, 527

- No single Member State has the authority to generate community-wide law, and so no single Member State can address the problem of generating consumer confidence in the single market;
- The European institutions are the only bodies with the authority to carry out EU-wide initiatives due to the primacy and direct applicability of EU law.

Indeed, the EU adopted a first program for consumer protection and information policy already in 1975: here, one of the five consumers' fundamental rights was mentioned as "proper redress (...) by means of swift, effective, and inexpensive procedures".⁴⁰

However, until 1998 substantive consumer law directives were adopted with the principal aim to afford individual consumers a better position. In that year, the Action for Injunction was introduced by the EU (then still known as the European Communities) as an autonomous collective enforcement tool.

5. – The Injunctions Directive

The Directive 98/27/EC of 19 May 1998 on Injunctions for the Protection of Consumers' Interests ('Injunctions Directive') offers a comprehensive scheme regarding implementation of consumer law in court proceedings undertaken at both national and international level.

It was aimed at giving attention to the "urgent need for some degree of approximation of national provisions designed to enjoin the cessation of (...) [violations of consumer protection regulations] irrespective of the country in which the unlawful practice has produced its effects" (Recital 6 Injunctions Directive).

This "urgent need" arose, on the one hand, from the fact that businesses had the possibility to move to a different Member State with lower consumer protection standards (Recital 4 Injunctions Directive), distorting competition in this way; on the other hand, it derived from the awareness that, although there were both national and EU measures aimed at guaranteeing compliance to directives for consumer protection, the existing legislation could not always stop infringements in a timely fashion (Recital 2 Injunctions Directive).

It was considered that such shortcomings interfered with the "smooth functioning of the internal market" (Recital 2 Injunctions Directive) and likely diminishing "consumer confidence in the internal market" (Recital 5 Injunctions Directive).

⁴⁰ Preliminary Program of the European Economic Community for a Consumer Protection and Information Policy 1975

Therefore, the Injunctions Directive was deemed necessary, especially in cases of collective interests. To put it in the words of Weatherill “such collective action represents an important mechanism for securing law enforcement in light of the inability of an individual consumer relying on the private law effectively to dissuade widespread malpractice”⁴¹.

This paper will now examine in detail the main characteristics of the Injunctions Directive, according to the approach proposed by some researchers⁴².

5.1 – Strengths of the Injunctions Directive

The main strengths of the Injunctions Directive concern standing and the principle of mutual recognition, the strict time constraints granted for stopping unlawful practices, its breadth and resoluteness.

Standing through Mutual Recognition

Compared to earlier consumer protection directives, the Injunctions Directive constituted a major step forward: through the principle of mutual recognition, the Injunctions Directive afforded legal standing, in cases bearing a transnational dimension, to qualified bodies: not only to public agencies but also to consumer organizations with EU-level registration.

According to the principle of mutual recognition, the standing of these entities must be accepted by courts at national level in all Member States. Overcoming the problems previously related to the non-recognition of consumer organizations, the Injunctions Directive removed an important obstacle hindering consumer organizations from requesting termination of infringements harmful to the collective interests.

In effect, when the Proposal for an Injunctions Directive was made, the effectiveness of the existing directives⁴³ was circumscribed by the following limitations:

- litigation could be initiated solely by qualified entities, and
- “in certain Member States the very admissibility of the action [was] predicated on the infringement of a provision of national law”⁴⁴.

⁴¹ S. WEATHERILL. *EC Consumer Law and Policy*, Harlow, 1997

⁴² SCHWARTZ, *supra* note 39

⁴³ Council Directive 84/450/EEC of 10 September 1984; Council Directive 89/577/EEC of 20 December 1985; Council Directive 87/102/EEC of 22 December 1986; Council Directive 89/552/EEC of 3 October 1989 (as amended by Directive 97/36/EC); Council Directive 90/314/EEC of 13 June 1990; Council Directive 92/28/EEC of 31 March 1992; Council Directive 93/13/EEC of 5 April 1993; Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997.

⁴⁴ Commission Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests (1996) (96/C 107 /03)

Although the first limit has not been addressed by the Injunctions Directive, the second one has been tackled through the implementation of the mutual recognition principle (Recital 11 Injunctions Directive). The principle has been precisely defined in the Opinion of the European Economic and Social Committee ('EESC') on the "Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests", in which the EESC stated: "[it means] that a 'qualified entity' (i.e. a person having an interest in bringing an action) in country A may either apply directly to a court in country B or initiate injunction proceedings via a qualified entity in country B (para 1.5)"⁴⁵.

If the principle of mutual recognition did not apply and the situation was not covered by any international convention, Member State B would not be bound to enforce rulings awarded to groups in Member State A, nor to groups in Member State B representing a plaintiff in Member State A⁴⁶. On the contrary, applying the principle of mutual recognition, "[w]hen practices contrary to ... [the covered directives] are detected ... in a Member State apart from the one in which they originated, the Directive requires the relevant bodies in the second Member State to take direct or indirect action in the first one"⁴⁷.

Many researchers stressed that the mutual recognition principle is one of the most important legal instruments in international and transnational relations⁴⁸.

Strict Time Constraints Granted for Stopping Unlawful Practices

The Injunctions Directive affords a two-week time span to infringers in order to cease infringement and conform with the rules in force prior to the issuing of an injunction (Art. 5(1) Injunctions Directive).

Breadth

Referring to nine directives, the Injunctions Directive is very broad and serves to compel Member States to comply with the EU requirement of implementing homogeneous injunction proceedings⁴⁹.

⁴⁵ Economic and Social Committee, Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers' Interests' 1997 OJ C 30/27

⁴⁶ B. SCHMITZ. *Advertising and Commercial Communications—Towards a Coherent and Effective EC Policy* in N. Reich and G. Woodroffe (eds) *European Consumer Policy After Maastricht*, Heidelberg, 1994

⁴⁷ SCHWARTZ, *supra* note 39

⁴⁸ M. ORTINO. *The Role and Functioning of Mutual Recognition in the European Market of Financial Service*, in 56(2) *The International and Comparative Law Quarterly* 2007, 309; A. ROMA VALDÉS. *The Mutual recognition principle in criminal matters: a review*, in 16(3) *ERA Forum* 2015, 29123

⁴⁹ SCHWARTZ, *supra* note 39

Resoluteness

Some directives concerning consumer protection are listed in the Annex to the Injunctions Directive. These directives already included injunction provisions; but the Injunctions Directive significantly differs from the earlier ones because here the EU adopted a much more resolute position.

For instance, Article 7 Directive 93/13/EEC on Unfair Terms in Consumer Contracts affirms that “Member States shall ensure that adequate and effective means exist to prevent the continued [infraction]” but does not set some highly desirable characteristics of the response, such as promptness and efficacy.

On the contrary, the Injunctions Directive establishes that Member States shall possess the capacity to act with “all due expediency” by way of “summary procedure” (Art. 2(a) Injunctions Directive) issuing orders, publishing decisions and corrective statements in order to “eliminate[e] the continuing effects of the infringement” (Art. 2(1)(a)(b) Injunctions Directive).

The powers attached to the Injunctions Directive are reinforced by Article 2, which grants Member States the power to force infringers to make payments to the public purse or to a beneficiary chosen, “insofar as the legal system of the Member State concerned so permits” (Art. 2(1)(c) Injunctions Directive).

5.2 – Limitations of the Injunctions Directive

As research pointed out, the power of the Injunctions Directive is weakened by some internal limitations: some of them are connected to its specific content, whereas others are rather connected to its nature as a directive⁵⁰. Among the former there are: narrowness of the term “qualified entities”, lack of provisions for damages and limitation in the covered directives. Among the latter we can identify subsidiarity principle and purpose of directives.

Scope of the Term “Qualified Entities”

As previously mentioned, standing in legal proceedings under the Injunctions Directive is restricted to qualified entities.

Art. 3 clarifies what this term encompasses: “A ‘qualified entity’ is: any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or (b) organisations whose purpose is to protect the interests referred to

⁵⁰ *Ibidem*

in article 1, in accordance with the criteria laid down by their national law" (Art. 3 Injunctions Directive).

Notwithstanding the narrowness of this definition, these qualified entities exhibit significant variation in terms of numbers and power within national jurisdictions. In some Member States such as the United Kingdom and Germany, these entities are government funded. In other Member States these organizations can count only on membership fees⁵¹.

Lack of Provisions for Damages

The EESC found that a major shortcoming of the Injunctions Directive is the absence of any provisions related to action for damages⁵². In the context of a mass default, defined as a situation in which a company obtains high revenues from the infringement of EU consumer laws to the disadvantage of consumers, such as the case where a company imposes high penalties on consumers who want to repay their loans earlier than scheduled, in violation of EU law. In this situation, the likelihood of later injunctions may not necessarily constitute a deterrent for the infringer, and the risk of lawsuits is rather low, as the legal costs significantly exceed the monetary damage caused to each consumer.

The practical consequence is that the infringer can continue to cause damages to others remaining unpunished⁵³.

Some scholars argue that pressure from the industries might have determined the non-inclusion of such a provision in the Injunctions Directive⁵⁴.

Limitation in the Covered Directives

Only a handful of directives associated with consumer protection are listed in the Annex to the Injunctions Directive, whereas some key directives, such as those related to product safety, banking and insurance, are not included⁵⁵.

Subsidiarity

Although paragraph 7 in the Preamble states that: "the objective of the action envisaged can only be attained by the Community; (...) [and] it is therefore incumbent on the Community to act", based on the principle of

⁵¹ European Commission, *Consumer Policy in Austria as Compared with the Other Member States of the European Union*, XXIV (98) A.2 (1998)

⁵² Economic and Social Committee, *Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers' Interests'* 1997 OJ C 30/27

⁵³ SCHWARTZ, *supra* note 39

⁵⁴ G.T. BRADY, *Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?*, in 23(1) *NCJ Int'l L & Com Reg* 1997, 155

⁵⁵ *Ibidem*

subsidiarity, Member States are allowed to interpret enforcement-related aspects in their own way.

According to the Preamble, the Injunctions Directive can be enforced:

- “by independent public bodies, specifically responsible for the protection of the collective interests of consumers”; and
- “by organisations whose purpose is to protect the collective interests of consumers, in accordance with criteria laid down by national law” (Recital 9 Injunctions Directive).

Research argued that the second option is detrimental to consumers, because, in cases with transnational implications “the authorities at the place of the damage are not obliged to take legal action as they are not the national bodies of the country of the individual affected”⁵⁶.

An additional important limitation of the Injunctions Directive can be found in Article 4. The foreign plaintiff may be requested by the Member State where the infringement occurred to resort to a qualified entity from that Member State to initiate proceedings: the EESC claimed that this results in a restriction of the principle of mutual recognition⁵⁷.

Nature of Directives

Some limits are linked to the specific nature of this kind of secondary legislation. It is widely known that directives have usually no horizontal direct effect: this means that they cannot directly impose obligations on private parties, as they are only “binding in relation to each Member State to which (...) [they are] addressed”⁵⁸. As a consequence, the effectiveness of a directive is closely connected to the way it is transposed by the different Member States.

Member States enjoy a considerable freedom in transposing directives, which they use for establishing the most appropriate way to improve achievements. However, some researchers claim that sometimes this freedom could also be interpreted “as a concise formula for inaction”⁵⁹.

5.3 – External constraints

Research stressed that there are also external constraints which limit the effectiveness of the Injunctions Directive: they include the traditional European diffidence against class actions, the lack of a single authority in

⁵⁶ V. KENDALL, *EC Consumer Law*, Hoboken, 1994

⁵⁷ Economic and Social Committee, Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers’ Interests’ 1997 OJ C 30/27

⁵⁸ R. SCHÜTZE, *European Union Law*, 2 ed., Cambridge, 2018

⁵⁹ L. GIBSON, *Subsidiarity: The Implications for Consumer Policy*, in 16 *J. Consumer Pol’y*, 1993, 323

charge for consumer affairs, and the different attitudes toward consumers and businesses.

Diffidence against Class Actions

Due to the traditional European diffidence against class actions, the actions available are not class actions, but group actions, which are structured in a different way. In group actions individual plaintiffs having similar rights join together as co-plaintiffs or have their actions consolidated. In class actions one party brings a claim in his name, both on his own behalf and on behalf of the class, that is all those who are in a similar situation.

Lack of a Single Authority in Charge for Consumer Affairs

Most Member States did not designate one single authority to deal with consumer affairs⁶⁰. This leads to issues regarding the allocation of duties between the various ministries responsible for consumer protection and, as a consequence, to a lack of co-ordination and harmonization of the Member States' policies on consumer protection.

Different Attitudes toward Consumers and Businesses

Consumer protection is implemented to different extents in the Member States. Research highlighted that: "[t]he organizations of the northern countries are more structured and there is a strong tradition of consumer awareness [as] compared to the Mediterranean countries"⁶¹.

Other researchers pointed out that the lack of homogeneity among Member States is detrimental to the standardization that the single market needs⁶².

Moreover, a Member State may show a benevolent attitude towards defendant businesses. In presenting itself as a business-friendly haven, the State could promote the localization of multinational corporations within its borders⁶³.

6. – Further secondary legislation

⁶⁰ Italy: Ministry of Economic Development; Spain: the consumer protection policy is a shared competence between the State (the Central Government) and the regional governments of the Autonomous Communities ('Comunidades autónomas'), the latter ones within their respective territories, the Central Government through the Ministry of Health, Social Affairs and Equality; Hungary: Ministry for National Economy, Ministry of National resources, Ministry of Public administration and Justice.

⁶¹ KENDALL, *supra* note 56

⁶² BRADY, *supra* note 54

⁶³ S LI. *East Asian Business in the New World: Helping Old Economies Revitalize*, Amsterdam, 2016

Further pieces of secondary legislation concerning injunctions were issued between 2009 and 2013. They are Directive 2009/22/EC on injunctions for the protection of consumers' interests and Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms

Directive 2009/22/EC on injunctions for the protection of consumers' interests

In 2009, the Directive on injunctions for the protection of consumers' interests was issued, repealing Directive 98/27/EC.

Indeed, the preamble and the articles are identical, except for Article 8 on implementation. The amended part is, essentially, the list of the directives covered.

Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms

In June 2013, the European Commission published the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law ('Commission Recommendation'). It does not impose obligations on Member States but may represent a guide to improve their present legislations, making available to consumers and investors effective methods to compensate the harm endured.

The Commission Recommendation inspired the European Parliament in its report "Towards a Coherent European Approach to Collective Redress" ('European Parliament Report'), in which the European Parliament expressed its own perspective:

"[The European Parliament] takes the view that injunctive relief also plays an important role in safeguarding rights which citizens and companies enjoy under EU law and believes that the mechanisms introduced under Regulation (EC) No 2006/2004 on consumer protection cooperation, as well as Directive 2009/22/EC on injunctions for the protection of consumer interests can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations" (Recital 11 European Parliament Report)⁶⁴;

"takes the view that the need to improve injunctive relief remedies is particularly great in the environmental sector" (Recital 12 European Parliament Report)⁶⁵;

"consider that injunctive relief should focus on the protection of both the individual interest and the public interest, organisations should not

⁶⁴ European Parliament, report "Towards a Coherent European Approach to Collective Redress" (2011/2089(INI))

⁶⁵ *Ibidem*

enjoy easier access to justice than individuals” (Recital 13 European Parliament Report)⁶⁶;

“emphasis[e], nonetheless, the fact that neither Directive 98/27/EC nor Regulation (EC) No 2006/2004 allows consumers to be compensated for the damage suffered” (Recital 14 European Parliament Report)⁶⁷;

“stress that many of the infringements of Union law identified by the Commission in the field of EU consumer protection measures call for the strengthening of injunctive relief (1), while acknowledging that injunctive relief is not sufficient when victims have suffered damage and have the right to compensation” (Recital 23 European Parliament Report)⁶⁸.

7. – Policy evaluations

The most important evaluations on the policies concerning injunctions are: the Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers’ interests, the REFIT Fitness Check of consumer law, and the Roadmap for the REFIT of the Consumer Law Acquis 2016.

Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers’ interests

This study was commissioned in December 2011 by the Directorate-General Health and Consumer Protection of the European Commission (DG SANCO): it deals exclusively with the application of the Injunctions Directive 2009/22/EC in nine Member States, examining the practices of both domestic and cross-border injunctions for the protection of consumers’ interests⁶⁹. The study constitutes a useful basis for considerations on the relevant role that consumer injunctions can play in the protection of consumers’ interests.

Indeed, the European Parliament itself stressed that: “Injunctive relief plays an important role in safeguarding rights which citizens and companies enjoy under EU law and believes that the mechanisms introduced under [...] Directive 2009/22/EC on injunctions for the protection of consumer interests can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations”⁷⁰.

REFIT Fitness Check of consumer law

⁶⁶ *Ibidem*

⁶⁷ *Ibidem*

⁶⁸ *Ibidem*

⁶⁹ J. KARSTEN. *Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers’ interests (former Directive 98/27/EC)*, European Commission Directorate-General for Health and Consumers, 2011

⁷⁰ European Parliament, Committee on Legal Affairs, Draft Report on Towards a Coherent European Approach to Collective Redress, 2011/2089(INI), Motion for a European Parliament Resolution, para. 6.

In December 2015, the European Commission issued the REFIT Fitness Check of consumer law: therein, with regards to the Injunctions Directives, it claims:

“The first 2008 Report on the Injunctions Directive reported on its transposition by Member States, its application and obstacles for the use of the injunction procedure for cross-border infringements. The second 2012 Report provided for more detailed analysis of the use of the injunction procedure, reported on its impact on consumers and explored more in depth the question of its effectiveness. The two above mentioned Commission reports showed that the introduction – thanks to the Injunctions Directive – of the injunction procedure in all EU Member States has brought substantial benefits to the European consumers. Injunctions proved to be a successful tool for policing markets, especially to ensure fair contract terms. The injunction procedure has been largely used for national infringements but had had a much more limited impact on cross-border infringements. The two reports provided for an important analysis of the application of the Directive, responded to some extent to the evaluation questions and concluded that the application of the Directive should be further examined at the occasion of future Commission reports, in order to decide whether there is a need for its amendment”⁷¹.

Roadmap for the REFIT of the Consumer Law Acquis 2016

The Roadmap for the REFIT of the Consumer Law Acquis 2016 was published in April 2016 by BEUC – The European Consumer Organization.

This document stresses that there are several reasons why the Injunctions Directive has failed as a consumer protection mechanism. These reasons include the expensive nature of international proceedings, the potential lack of compensation for the expenses accumulated during the proceedings by consumer organizations, even when the latter won the case, as well as procedural difficulties like issues of evidence acquisition and extensive duration of proceedings.

Moreover, it suggests assessing the possibility to include other areas in the scope of the Directive, for instance product liability or data protection, and to create a platform for collecting information on all injunction requests filed in cross-border cases. Furthermore, it highlights that besides consumers’ collective interests, individual consumers’ interests should be protected as well, for instance through compensation or through the possibility to withdraw from the contract if the trader acted unfairly.

8. – Conclusive remarks

⁷¹ European Commission, REFIT Fitness Check of consumer law (2015)

This article has provided the reader with an introduction to interim measures, whose main purpose is to preserve the rights and interests of both parties, avoiding the occurrence of irreversible harm prior to the final court ruling on the merits of a case. In its first part, the paper has highlighted some relevant aspects of interim measures, such as requirements, applicants, jurisdiction, *ex parte* orders, experts' reports, and appeal.

A particular type of interim measures is the injunction, through which a court may order to perform or to abstain from performing a certain act. In its second part, the article has specifically focused on the evolution of injunctive measures at the European Union level, analysing the Injunctions Directive and the pieces of secondary legislation which originated from it.

Abstract

INTERIM MEASURES AND INJUNCTIVE RELIEF IN COMMON LAW AND CIVIL LAW JURISDICTIONS: A COMPARATIVE STUDY

L'articolo offre una panoramica comparatistica sui provvedimenti cautelari, ne presenta le tipologie e i presupposti per l'adozione. La prima parte dello studio esamina la normativa sulle misure cautelari in diversi Paesi europei, analizza le condizioni e i requisiti di ammissibilità del ricorso, la competenza del giudice, le condizioni per l'emissione di un decreto *inaudita altera parte* e le impugnazioni ai provvedimenti cautelari. La seconda parte dell'articolo verte sulle ingiunzioni come tipologia di misura cautelare. Ripercorre l'evoluzione della normativa sulle ingiunzioni a livello europeo, ed analizza la Direttiva 98/27/EC, relativa a provvedimenti inibitori a tutela degli interessi dei consumatori, abrogata dalla Direttiva 2009/22/CE e relative modifiche. Lo studio analizza i limiti intrinseci della Direttiva 2009/22/CE e i fattori esterni che ne hanno determinato un'applicazione non ottimale, chiarendo le ragioni del suo insuccesso come strumento di protezione dei consumatori, e presenta le proposte avanzate per un uso più ampio delle ingiunzioni.

This paper provides an overview on interim measures, presenting the different forms they can take and the necessary requirements to grant them. The first part of the paper examines the regulation of interim measures in various European countries and discusses the eligibility of applicants, the court's jurisdiction, ex parte orders and the available remedies. The second part of the article focuses on injunctions, a specific kind of interim measures. It retraces the evolution of injunctive measures at the European Union level. It analyses the Injunctions Directive, on the injunctions for the protection of consumers' interests, and further pieces of secondary legislation which stemmed from it. By scrutinising its inherent limitations and external constraints, it examines the failures on the implementation of the Injunctions Directive to act as a consumer protection mechanism and presents suggestions for a wider use of the injunction procedure.
