BUSINESSEUROPE

POSITION PAPER

5 July 2018

Representative Actions for the Protection of the Collective Interest of Consumers (collective redress)

KEY MESSAGES

Consumer protection is important for business: strong consumer protection rules across the EU foster consumer trust and commerce. Likewise, competition provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice.

BusinessEurope endorsed the Commission's assessment of the effectiveness of existing consumer rules, which are still generally fit for purpose. BusinessEurope also agreed that effective redress procedures are essential where there are infringements of EU consumer's rights and that consistent application of EU consumer rules is vital for the integrity of the single market as this provides protection and also legal certainty. Public enforcement, efficient out-of-court dispute resolution and awareness of the many rules among both consumers and businesses all play a key part in this.

The proposal on Representative Actions for the Protection of the Collective Interest of Consumers is a questionable attempt to find a *silver bullet* to European consumer redress. Not only does it include features of doubtful effectiveness, but it also seems to be departing from the long-standing tradition of prioritising public against private enforcement. The proposal seems to shift the responsibility of enforcement to private entities (qualified entities) via the court system. Furthermore, it mixes the objective of compensation with elements of punishment which is – to say the least – unfamiliar to European Law. Finally, it omits an important link of any litigation instrument which are the associated legal safeguards (e.g. rights of defence, appeal, coordination of cases) to avoid misuse and frivolous claims. The proposal will thus have a deterrent effect on the competitiveness of Europeans businesses and hamper the EU strategy for jobs, growth and competitiveness.

Although further assessment on this complex proposal is still required, BusinessEurope has already identified some important elements that cannot be disregarded or underestimated in the upcoming legislative process, including the Commission's own 2013 Recommendation on Collective Redress. There are many questions/concerns around procedural steps (or lack of them), qualified entities, scope, funding, guarantees and proportionality which we will detail below.

For the abovementioned reasons, BusinessEurope does not support the proposal.

BUSINESSEUROPE a.i.s.b.l.
AVENUE DE CORTENBERGH 168 – BE 1000 BRUSSELS – BELGIUM
TEL +32 (0)2 237 65 11 – FAX +32 (0)2 231 14 45 – E-MAIL main@businesseurope.eu
WWW.BUSINESSEUROPE.EU – Follow us on Twitter @BUSINESSEUROPE
EU Transparency register 3978240953-79

KEY FACTS

Table 1: Quick facts on collective redress	
In the EU	⇒ Compensatory collective redress is available in at least 21 Member States/EEA countries (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK, NO, IS) but in over half of them it is limited to specific sectors, mainly to consumer claims. ⇒ Apart from some exemptions collective redress schemes have not been much used. 15 years after the introduction of the Swedish collective redress scheme only 17 lawsuits have been registered so far. In Finland none since 2007 and Belgium five cases since 2014. In France, 10 lawsuits on consumer affairs since 2014, two lawsuits on health cases since 2016 and one lawsuit for discrimination in the exercise of trade union rights since 2016. ⇒ Collective redress procedures inevitably take longer to litigate, in some cases lasting for 10 years. For example, in Poland (with larger number of cases), only ten out of possibly 210 cases have yet reached a substantive decision since 2010. ⇒ There are dozens of third-party litigation funders becoming active in judicial systems such as the Netherlands and in the UK.
In the US or other parts of the World	⇒ Lawyers are the main beneficiaries of class actions in the US, with an average lawyer earning 1 million US dollars per claim whilst consumers receive only around 32 US dollars per claim. ⇒ In 87% of US cases consumers do not get any compensation at all. ⇒ In the US, there is no evidence that class actions for injunctive relief provide any deterrent effect. ⇒ The US class action system has been considered unbalanced, since the lawyers can pick the forum (forum shopping). ⇒ 51% of Australian class action cases do not reach an ending either due to settlement or dismissal.

SPECIFIC COMMENTS

(Missing) Procedural Safeguards

As a principle, the proposal for a Directive rightly acknowledges the importance of effective safeguards to avoid conflicts of interests between third-party funders and qualified entities. There should not be any abusive litigation (for example between competitors); there should be no punitive damages; there should be no US style class actions enriching law firms; and the procedural autonomy and legal traditions of Member States should be respected. Unfortunately, the Commission fails to include these safeguards properly into the text of the proposed Directive. In many instances, the Commission proposals would achieve exactly the opposite, leading to significant legal uncertainty, overlapping claims, costly procedures, *forum shopping* and risks of abusive litigation. The proposal would provide ample incentives to competitors, third-party investors, and law firms to harass companies. It is absolutely key that these risks are controlled.

BusinessEurope supported the 2013 Recommendation on Collective Redress which precisely addressed the root causes of potential abuses in existing or future national collective redress systems. The recommendation suggested more than twenty minimum safeguards to be implemented in Member States collective redress systems. Here are some of the examples:

- Establishing a general loser pays principle;
- Involvement of a judge in the verification/certification of the claim at the earliest possible stage of litigation;
- Limits to lawyers' incentives (no contingency fees or a fee calculation based on litigation of outcome only);
- Limitations and transparency around funding of claims by third parties;
- Opt-in (voluntary mandate) by the claimant to be represented in the legal suit;
- Etc.

We regret to see that in this proposal the Commission did not follow-through on its own recommendation. Less than 1/5 of the standards have been integrated in the proposal. It is of fundamental importance to ensure that *all* the safeguards in the recommendation are included in order to prevent an abusive litigation culture.

Qualified entities: an easy club to get in (Article 4)

According to the Commission, one of the strongest safeguards against abuse is that representative actions will not be open to law firms but only to "qualified entities" such as consumer organisations that are non-profit and fulfil eligibility criteria monitored by a public authority (Article 4).

However, the proposed eligibility criteria are not sufficient. The "qualified entity" category is very open. If an entity wants to sue on behalf of consumers in another Member State, the latter is forced to accept its legal capacity when this entity fulfils too easy to comply with criteria: it must legally exist; it has a non-profit making character; and it has a legitimate interest to ensure compliance with the relevant EU rules (Article 4). There are no safeguards regarding the governance, financial resources and distribution, capacity, standing/representativeness and expertise as there are in the Commission's own 2013 Recommendation on Collective Redress. Even alternative dispute resolution bodies in EU, a consequence of recent rules[1], have a higher standard to meet.

By setting weak criteria, the proposal undermines those Member States' legal systems which provide stricter criteria to become a qualified entity in order to prevent abuses and even fraud. For instance, in several Member States only consumer organisations are entitled to act on behalf of consumers, and such safeguards implemented by the Member States should not be undermined.

The "not-for-profit" requirement does not preclude that plaintiff lawyers and litigation investors are the ones that will likely most benefit from claims. An entity might pay out large amounts in fees and pay for its own management, staff, offices and expenses, all without making a profit. The broad existing rules on jurisdiction also allow the plaintiff lawyers and litigation investors to file claims in those jurisdictions that benefit them the most. This combined with the fact that the Commission proposal omits rules around contingency fees and is still not strong enough on regulation of third-party litigation funding leaves the path wide open to abusive litigation.

In addition, it is not clear whether Member States can add up further requirements to designate their 'national' qualified entities which should be the case.

And even if the requirements are tightened, the proposal still allows for a qualified entity to be created ad-hoc, which basically off-sets any attempt to bring trustworthiness and seriousness to the activity of qualified entities which, in essence, become *de facto* public (private) prosecutors. The creation of such entities is even encouraged by the proposed public financing in Article 15.

Judicial verification of claims/Lack of class certification

The Commission proposal contains no criteria for determining when representative compensatory actions may be used. A qualified entity can sue for damages for breaches of a broad range of EU law covering consumer protection rules, data protection rules, energy and environmental law, financial services, healthcare, product liability and tourism (Article 2(1)). There is no threshold inquiry; the national court or public authority must verify whether a case is "suitable" for being brought as a representative action, not only for injunctions but also for damages claims linked to personal injury (Recital 18) but no definition is given.

[1] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes foresees that in order to become an ADR entity basic quality criterion needs to be fulfilled: suitable qualifications, impartiality, transparency, effectiveness etc.

The Commission proposal is also silent on robust certification criteria. Even the US has relied on several rules (e.g. numerosity, commonality, adequacy) which allow to identify whether there are common, comparable and quantifiable consumer interests to resolve collectively and whether there is some evidence of merit of the claim.

Undefined and lax validation standards and omission of certification of class could easily lead to the admission of clearly unsuitable frivolous claims and forum shopping (see also below).

Claimants: no need for a mandate (Articles 5 and 6)

A qualified entity can itself select which consumers it claims to represent. In the case of an injunction, the initiation of damages' action, or in case the action is for a "small individual loss" award, there is no need for agreement or even the knowledge from the consumers in question (Article 5(2) and 6(3)) to start the proceedings. On the one hand, it is (at least when it is about compensation) contestable that a consumer becomes subject to a lawsuit without consent. On the other hand, individual consumers will not be able to "opt out" even if they object to the lawsuit or the entity which brings it.

In case of a declaratory action, Article 6(1) establishes unnecessary uncertainty by leaving it up to the Member States, if a consumer mandate is prerequisite for the declaratory decision.

Apart from contradicting the Commission's own 2013 Recommendation on Collective Redress, which clearly states that collective redress should follow the "opt-in" principle, this greatly limits the rights of consumers and harbours the risk of forum shopping in case of declaratory actions. This feature surpasses the US system where at least consumers can benefit from opting out from a claim.

Compensation without damage (Article 6(2))

If due to its complexity the compensatory claim does not fit one of the two forms of awarding damages (identifiable consumers award or low value claims award to a purpose serving the collective interest of consumers), the court can decide to make a declaratory decision on the trader's liability which individual consumers could subsequently use to obtain their compensation (Article 6(2)). This decision would establish irrefutably the liability of the trader towards harmed consumers by an infringement for the purposes of future actions seeking redress on an individual basis.

BusinessEurope has strong reservations on this provision. Enforcing liability for comparable, well-defined and proven damages suffered by consumers is not the same thing as openly declaring liability of a trader without knowing who the consumers are and whether they actually suffered damages.

In our view, this provision risks going against basic principles of procedural and substantive law well-established in the Member States.

No coordination mechanism for overlapping claims and suspension of limitation period (Article 11)

The Commission proposal does not prevent multiple qualified entities bringing an action against the same company in multiple Member States on behalf of the same consumers for the same behaviour. As set out above, consumers are not able to choose which action to join and the different qualified entities could claim to represent the same consumers, even in situations where a collective action against a company has been concluded (*bis in idem*). This creates a real risk of double compensation paid by the defendants and overcompensation of the consumers.

Additionally, multiple claims based on the same facts will lead to conflicts of *lis pendens* and potential contradictory decisions. Recitals 21 and 22 of the Brussels I Regulation stresses the importance of minimising the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States.

Matters are made worse because the Commission proposes that the limitation period for any redress actions is suspended as soon as an action is taken, with no indication when the suspension will end (Article 11). The provision on suspension of the limitation period makes it very difficult for defendants to be in a position to assess accurately the applicable limitation periods and to know whether there will be more claims or not. The proposal seems to allow claimants to bring claims at will; erasing any legal certainty on limitation periods. Also, coupled with the fact that multiple claims can be filed on behalf of the same claimants, and that claims can be filed in multiple jurisdictions, it will be practically impossible for the trader to know, which limitation periods apply to which claims.

Multiple claims from multiple qualified entities will also make it harder to reach out-of-court settlements which are often much more cost-effective than the use of the national court system, especially, as it is proposed in Article 8(6), that an approved settlement shall be without prejudice to any other additional rights to redress.

Judges will find it difficult even to spot parallel and overlapping claims given that mandate from consumers is not necessary to initiate the claim, and that there is no requirement for the qualified entity to indicate who it represents.

The problem of overlapping claims would also arise because the Commission proposal does not prevent Member States from adopting or maintaining other collective redress systems (Article 1(2)). The different choices will lead to confusion, conflicts, legal uncertainty and increased costs.

Third-Party Litigation funding (Article 7)

Third-Party Litigation Funding introduces a profit-motivated stranger into the traditional attorney-client relation which can lead to opportunistic litigation as well as to unreasonably prolonging judicial proceedings (e.g. if the settlement is not profitable enough, a third-party funder might forbid the plaintiff to accept ‘any’ compensation).

Widely used in the US litigation system, international litigation funders are starting to enter and become active in a number of national jurisdictions within the EU.

We welcome the fact that the Commission acknowledge the risks around uncontrolled third-party funding in its Article 7, but the solution found is still far from ideal. At least all safeguards in the 2013 Recommendation on third-party funding (points 15-16) ought to be included.

It will be difficult for courts to assess whether the legal requirements for funders have been met. Also, there are no consequences spelled out regarding breaches of the transparency, independence and conflict of interest obligations foreseen in paragraphs 1 and 2 of Article 7.

To be effective, the provisions around this business activity would need to cover the following aspects:

- Forbid funders to benefit from amounts received in awarded or settled compensation;
- Considering a registry for funders and a licensing system through a public authority;
- Ensuring that funders hold fiduciary duties vis-à-vis the claimants;
- Ensuring that claimants, not funders, control management of the case;
- Banning funders and law firms to be able to create qualified entities. Banning law firms from owning funders and vice versa.

Public funding (Article 15)

Furthermore, it is proposed in Article 15 that Member States must provide financial support to qualifies entities, such as limiting applicable court or administrative fees, granting them access to legal aid, or by providing them with public funding.

Seeing as Member States already have general rules on legal aid which cover all legal proceedings, including class actions, there is no reason to establish special rules on legal aid within the niche of collective redress. Instead such rules will lead to procedural inequality and encourage frivolous and unmerited claims.

To avoid an abusive litigation culture, qualified entities must fund their own class actions subject to the Member States' general rules on legal aid, so that the claims they file against companies are pursued at their own cost and risk.

Also, qualified entities should not be able to recover the costs of informing consumers from the trader (Article 15(2)), since this forms a natural part of the activity of a qualified entity.

No forum shopping shield (Article 10(2))

The Commission proposes that if a national court issues a final decision that an infringement has occurred, the tribunals of other Member States must consider that decision a rebuttable presumption that an infringement has occurred in their country (Article 10(2)).

This will clearly lead to forum shopping as qualified entities will bring actions in those Member States where they believe they can most easily win their case, irrespectively of the consumers' connection with the jurisdiction. This should also be considered in tandem with the lack of criteria for determining when representative actions may be used ("suitability" criteria in relation to Recital 18 as described above).

The proposal awards national court decisions acknowledging legal breaches with strong legal effects but it fails to do the same for decisions that dismiss any breaches. We question: why should a trader (defendant) not be able to rely on a previous decision from a national court as a rebuttable presumption that no breach has occurred?

One-sided discovery rules (Article 13)

It is proposed that if a qualified entity indicates that there is evidence that lies in the control of the defendant, the national court or public authority orders that this evidence is presented by the defendant (Article 13). There is no constraint on the amount or type of evidence. As it can be extremely costly for a company to hand over large amounts of requested data, a proportionality test is missing (such as the one in the 2014 Competition Damages Directive) to avoid unreasonable requests and harassment. Also, the defendant should similarly be able to request documents from the consumer side, if they are in control of evidence.

In addition, the current proposal harbours the risk of forum shopping, since it states that the procedural discovery options shall be in accordance with national procedural rules. This would lead to a fragmented situation at the level of national jurisdictions in this important procedural field.

No punitive damages but… (Article 6(3))

The Commission proposal includes a specific category of damages claims where consumers have suffered a small amount of loss (Article 6(3)). In such a case, consumers will not receive the damages, but instead the trader will be forced to pay an amount to a public purpose serving the collective interest of consumers.

Despite the rejection in Recital 4 of the notion of punitive damages, this instrument brings an element of punishment into the proposed system.

This is a considerable change of narrative of the European Commission which has always justified the option for an EU collective redress instrument in the need to grant consumers with low value claims (not worth to go to court actions individually) with a mean to collect those claims. This feature goes against prevailing national legal traditions that regard compensation and deterrence/punishment as two separate things.

European civil systems rest on the principle of compensation of the victim, as specifically provided in point I.1 of 2013 Recommendation on Collective Redress. The mechanism under Article 6(3)(b) of the proposal allowing for a compensation without a victim is at odds with European civil law traditions and clearly against the recommendation of the Commission. This measure seeks no compensation, but rather a sanction to the trader. Punitive measures arising from consumer lax infringements should be regulated through administrative law and managed by a public body, not left in hands of private entities.

This instrument could potentially be incompatible with rights engraved in the EU Charter of Fundamental rights from both the traders (right not to be punished twice by the same act) as well as from consumers (right to opt out from a representative action).

Lawyers and funders would be highly attracted to trigger this instrument because they are guaranteed a chance of winning a percentage without the need to locate consumers nor to identify concrete damages.

Also, this provision does not exclude the possibility for the paid damages to be directed to the qualified entity itself, as it might argue that it is serving a public purpose. Therefore, qualified entities could have a clear financial incentive to file low-value claims.

Finally, the provision is quite imprecise, as the overall conditions for applying the provision are not specified in the proposal, for instance what amounts to a “small loss” and what constitutes a “public purpose”.

- ***No incentives to settle claims (Article 8)***

Article 8 of the proposal includes basic procedural elements of a judicial settlement. However, it fails to establish the court’s approval of the settlement will be definitive and make the settlement applicable to all cases involving the same practice and the same trader (*res judicata* effect). On the contrary, it says that consumers may or may not accept the settlement and can still rely on other rights to sue. In this context, no trader would be compelled to reach a settlement as there is no legal certainty and expectation that the settlement will be final even for those consumers directly involved/aware of the proceedings.

Any settlement must have *erga omnes* effects. This means that if it is reached by the parties under judicial control, the settlement should put an end to the dispute and close the possibility of obtaining, by any other means, redress for the same infringement. Any settlement that is not binding upon all parties is discouraging.

Obligation to inform the consumer individually (Article 9)

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. This solution would bring many practical difficulties and associated costs. It is therefore highly disproportionate. It is revealing that qualified entities themselves do not have the same standards of information requirements for consumers that they attempt to represent.

Also, many clarifying questions remains, such as: How should the trader even identify the consumers, when the opt-out principle is followed? How should the trader notify the consumer? And what is the timeline to do so?

In addition, the Commission proposal sees reputational damages not only as an unavoidable side-effect, but as a positive outcome of a collective redress case – even in ongoing cases, where the liability of the trader for the damage has not been proven (yet). This contradicts the 2013 Recommendation, where the right to protection of the reputation and value of a company is established in paragraph 11.

Is this proposal really avoiding the traps of the US Class litigation culture?

The Commission narrative on EU collective redress has always been to avoid falling into the trap of a mass claim litigation culture associated to the US system. The Commission has even described the combination of four elements in the US system as a "toxic cocktail" – namely punitive damages, contingency fees, opt-out and pre-trial discovery – and ensured that this should not be introduced in Europe[2].

In the table below, we try to demonstrate how this objective is far from being met in the current proposal.

[2] Green Paper on Consumer Collective Redress – Questions and Answers (Memo/08/741 page 4).

BUSINESSEUROPE

Table 2. Comparing the proposal with the US Class action System		
Features	**Commission proposal VS Class action US**	**Verdict**
Who can start	Proposal limits capacity to qualified entities alone	Although the pool of law suits initiators is reduced compared to the US the criteria for qualified entities is still too open
Certification/Verification by a judge of the class of consumers	No certification from a judge is required or it is left to Member States rules	Worse than in the US
Contingency fees	No direct prohibition of contingency fees	As a mitigating factor in most Member States these are not allowed. A direct prohibition would be necessary also following the 2013 Recommendation
Loser pays principle	This principle is absent in the US	Unlike in the US all EU member states apply this principle. However, the Commission proposal contains favourable financial conditions for qualified entities to bring claims forward which weaken this principle
Punitive damages	Not allowed (Recital 4)	
Settlements procedures	Settlements do not afford *res judicata*	Worse than the US where this is the case
Undistributed damage	Unlike in the US the proposal does not foresee a provision on undistributed damage. However, it proposes a specific solution for low value claim	Worse than in the US as the payment of an amount to a public purpose serving the collective interest of consumers can be seen as a double punishment without really compensating affected consumers.
Coordination of concurrent/parallel claims	The proposal does not contain any provision on this	Worse than in the US where this is the case

CONCLUSION

Significant transaction costs of increased litigation serve no public interest objective and the uncertainty and burdens brought about by more court actions are harmful for businesses and societies. It will lead to companies avoiding new forms of innovative and pro-competitive behaviour allowing them to compete on merit. These negative effects should not be underestimated. The EU should therefore not devise a collective redress system that can be misused.

* * *