EUROCHAMBRES

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Reaction to the Commission's Proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

The European Commission published on 11 April 2018 its *"New Deal for Consumers"*, containing a proposal for a Directive to introduce common principles on collective redress across the EU.

In the past years, there have been different calls for a more horizontal approach to collective redress in the EU. The European Parliament's Resolution *"Towards a Coherent European Approach to Collective Redress"* published in 2012, was a signal that action was wished for. It clearly states that a common set of principles should be respectful of national legal traditions and should provide safeguards to avoid abusive litigation. Only a year later the Commission published a Recommendation on *"Common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law".*

EUROCHAMBRES followed these developments with interest and has consistently provided the lawmakers with suggestions. While we don't believe businesses should oppose at any cost harmonisation efforts in the area of collective redress, we have always doubted the added-value of such initiatives due to a consistent lack of respect for fundamental principles of civil procedural law, its potential negative impact on the attractiveness of European businesses and their innovation efforts. As such, we don't believe that initiatives in this domain will strengthen the European economy, make the labour market more dynamic or improve relations between consumers and businesses. Rather, with the presented text there are plenty of indications pointing at legal certainty and well-established legal frameworks to be at risk. The , whose flaws do not need any more detailed explanation. It even goes far beyond the US-System of class action.

EUROCHAMBRES has fundamental objections to the approach of the Commission proposal. While the 2013 Recommendation should have been the starting point and the reference document for any subsequent legally binding texts, the Commission has chosen, for inexplicable reasons, for a very different philosophy. Whereas the Recommendation was a solid base with a comprehensive list of safeguards, the proposal for a Directive has become a blueprint how to leave out those safeguards. Unfortunately, the text refers to and mentions safeguards, but only not to include them where it matters: in the articles of the proposal. Unfortunately, the rhetoric seems to have taken precedence over well-crafted law-making.

The proposal also introduces a fundamental shift in the way how litigation works in the jurisdictions of the EU. By granting so much responsibilities (and ultimately, power) to qualified entities, the Commission initiates a de facto shift from public to private enforcement. Eventually, the proposal will be more to the advantage of the qualified entities than the consumers for who these instruments should be designed for. A better solution would be to choose a public entity. A good and well-functioning example is the Scandinavian Ombudsman system.

In the interests of both businesses and consumers, EUROCHAMBRES feels that the Commission omitted to make a careful analysis with respect to the impact the proposal can be expected to have on small and medium-size enterprises. The "level playing field" problem must be addressed not only in cases where individual consumers must face off against a global conglomerate, but also when small businesses are targeted by well-organized qualified entities, advocacy groups and a highly-specialised plaintiff law firm industry. Rather than creating new judicial litigation instruments, one should first explore how to better use existing methods, such as the recently introduced alternative dispute resolution tools.

In short, the proposal is anti-business but not pro-consumer. Therefore, EUROCHAMBRES deems the proposed text to be insufficiently well-drafted to arrive at a robust framework delivering for all. In a constructive spirit, we nevertheless provide more detailed, however non-exhaustive, comments below.

Specific comments on selected parts of the proposal

Article 1 : subject matter

We don't believe that the legislative proposal contains nearly enough safeguards in order to avoid abusive litigation. EUROCHAMBRES could support the main parts of the 2013 Recommendation, exactly because it contained a relatively high amount of safeguards to avoid frivolous claims.

An analysis of the current proposal, shows that it fails to introduce safeguards at several levels:

- While not introducing **punitive damages** as such, the proposal does not ban them explicitly and while not called punitive damages the penalties can, in some cases, be deemed as such due to their potential amounts
- **Damage awards must reach the victims:** In the current proposal they seem to rather benefit the prosecutors. A disproportionate percentage of the damage awarded must not go towards the administrative costs of the action, fund costs or consulting fees. There must be limits on contingency fees.
- **No abusive demands:** In particular, Chambers stress the need to avoid situations in which businesses can be coerced into settling by the threat of public relations damages, the risk of disproportionately high legal fees and costly evidentiary proceedings, even if they win the case, as well as the potential for the revelation of company secrets and the risk of bankruptcy. The right to protect the reputation and the company value, as established in paragraph 11 of the 2013 Recommendation, should be maintained.
- **No high procedural costs for defendants:** Overly expensive evidentiary procedures which impose an unreasonable hindrance to the defendant's business must be avoided.
- **Opt-in solution:** such a rule is necessitated by the right of self-determination of consumers and businesses in the EU. The current proposal introduces a forced-in system, leaving no choice for consumers and therefore disregarding their rights. An opt-out system also ignores the fundamental rights of the parties;
- **No forum shopping:** qualified entities must not be allowed to file the same action in the same case with multiple courts in various EU Member States in an effort to identify the court which offers the best prospects for success. Therfore, the exclusive place of jurisdiction must be the one of the defendant.
- **There is no clear loser pays principle.**
- Consumer organisations do not need to fulfil stringent conditions to obtain the **status of qualified entity.**
- There are **no admissibility standards** as regards the certification process.
- As a court procedure has the main function to determine whether a claim is justified or not the respective procedural law has to be absolutely neutral. The Directive must guarantee **the principle of equality of arms** as it is guaranteed with the fundamental right of due process.

Article 2 : scope

No less than 59 EU laws are covered by the Directive and qualified entities would be entitled to bring cases whenever the *"collective interest of consumers"* have allegedly been harmed. The widely-defined scope will inevitably lead to diverging implementations and interpretations among Member States and, consequently, legal uncertainty for litigants.

The proposal also includes securities market disputes (if the transaction was conducted by a consumer). This is very dangerous. In the USA this has led to companies facing law suits within minutes after a profit warning. There are lawyers specialising in this preparing law suits in advance waiting for profit warnings or

disappointing interim reports. Securities market transactions should be excluded from the scope of the Directive

Article 3: definitions

The definition provided for in article 3 § 3 on *"collective interests"*, is leaving the door ajar for far too many options. Instead, the Directive should make clear that representative actions shall only be legal if they are used to clarify legal issues with comparable facts and identical legal context. In addition, representative actions shall only be legal when a considerable number of identified consumers are affected with a high value of claim in total.

Article 4: qualified entities

The Commission's three criteria for an organisation to be designated as a qualified entity flatter to deceive. They are not in the capacity, on their own, to offer satisfactory guarantees against the designation of organisations driven by the wrong motives. We deem it essential to add eligibility criteria similar to those laid down in Directive 2013/11/EC on alternative dispute resolutions for consumer disputes (i.e. expertise, independence, impartiality, efficiency, transparency).

The term *"legitimate interest"* is not well-defined, and can be interpreted in very different ways. It is not excluded in this context that certain national courts will give a very wide definition to what constitutes a legitimate interest. This will have far-reaching consequences as, the courts can issue final orders as laid out in article 5 which would have consequences for courts in other Member States as described in article 10.

Also, individual actions can be based on a final declaratory decision of a court in collective infringement cases (article 10 § 2). This entails that individuals from a Member State, in a case with cross-border elements, could base themselves on the courts' decision from another Member State. This would also be the case if the court of the country would not have otherwise accepted the legitimacy of the qualified entity.

Requesting the non-profitmaking character of the qualified entity is certainly a good safeguard. Only, the restriction is very far off of being a solid safeguard. It should be complemented by more stringent complements in order to ensure that the (consumer) organisations do not turn collective redress cases into a business model. The risk is there and is fuelled by the lack of safeguards on the proportion of the contingency fees for litigation lawyers who might specialise in collective redress cases and be almost exclusively employed by the said consumer organisations.

While it is laudable that qualified entities will be subject to regular assessments, it is questionable how many might actually lose their privileged status at any point in time.

While courts will be entitled to review the origin of the funds provided to the qualified entities, this is not a guarantee that the financial resources would not stem from professional litigation funders who are driven by personal gain rather than the well-being of consumers.

Article 4 § 2: ad-hoc entities

There is a genuine concern regarding the guarantees to be fulfilled by ad-hoc entities. They would not have to fulfil the preconditions of the qualified entities according to 4 § 1. The possibilities of circumvention of these preconditions are obvious.

As a matter of example, in some countries (such as Malta) the consumer authority is allowed to bring forward representative actions and do so quite successfully, which we have no problem with if an infringement has taken place. Diluting this by allowing ad-hoc QEs (in particular with the current lax criteria) would severely

reduce the credibility of consumer organisations, whilst also bringing forward questions about the interest of the ad-hoc QE.

Article 5: Representative actions for the protection of the collective interests of consumers

The Commission states in article 5 § 1 that there should be a *"direct relationship"* between the main objectives of the entity and the rights granted under EU law. If a qualified entity willing to sue a trader would not have this *"direct relationship"* it can probably easily be achieved by changing a provision in its status or one might even imagine that a new ad-hoc qualified entity would be created boasting the correct type of relationship. A clearer definition of the term would increase legal certainty.

Most worrisome however is that the qualified entities, once they have been set up and acquired their status, will be enabled to represent any consumer without the latter needing to give any form of consent and without the consumer's even being informed of the action. This is the case, not only for injunction orders (as in art 5 § 2), but also for redress orders in non-complex cases as described in article 6 § 3. The rationale behind this approach is difficult to understand, unless the Commission doesn't believe that consumers are individuals able to make responsible and informed decision of their own. We strongly advocate for the "opt-in" approach as a pre-requisite to consumer empowerment. Consumers should be free to decide on their own whether they join a representative action or seek redress on an individual basis. Measures of this nature are taking away from consumers their right to act themselves as self-proclaimed consumer champions will take care of their interests.

The whole issue revolves around the legitimacy of the qualified entities and their lack of mandate of the consumers they claim to represent – contrary to the Recommendation of 2013. The consequences of such provisions are not without consequences for established legal principles such as the right of the consumer to be affected by legal proceedings[1]. Representative action without mandate harms the fundamental right of disposition of the consumer. One might ask himself why it would be fine to walk away of this important principle in the case of Collective Redress, especially considering this would never be accepted in other forms of law enforcement in civil proceedings. The Commission assured in the past not to introduce US-style class actions, but here it seems to go further.

Article 6: Redress measures

The requirement (before a declaratory decision or redress order is made) for the qualified entities to seek the mandate of the individual consumers is not an obligation under art 6 § 1 and would be left to the Member States themselves. This is not in line with the fundamental rights as they are guaranteed under art 6 ECHR and art 47 Charter of Fundamental Rights of the European Union. Courts would be entitled to ask for more information on the consumers concerned. Recital 20 mentions *"expediency issues"* to justify that QEs would not need to seek their mandate and could therefore speed up the proceedings and reimburse the consumers more quickly. One other motive could be that a QE would not be able to find enough consumers in order to commence a proceeding. Or a QE might find it too risky to start proceedings out of fear not to find enough consumers allegedly harmed by similar traders' actions. Ruling out opt-ins brings us on a slippery slope for unclear motives.

The so-called complex cases would give rise to *"declaratory decisions"* (instead of a redress order) regarding the liability of the trader towards the consumers. This would not really solve the problem of a complex case. The liability of a trader must not be the same towards all affected consumers. Also in this point, the proposal

[1] This is the *"right of disposition".* Art. 1 of the First additional Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms protects the proprietor in exercising his rights resulting from his ownership. An essential part of the right of property is the right to dispose of this property. This includes the freedom to decide to assert a claim in a court procedure (also to participate in an opt-in procedure) – or to refrain from an action. The deductive reasoning of this freedom of choice is that there is in principle no doubt that there is no legal obligation ever to have one's own claim asserted by a third party.

ignores the principle of equality of arms. Even if declaratory decisions are accepted they must also be accepted in cases where the decisions states that there is no liability of the trader.

In the case of the non-complex low value cases leading to a redress order, the redress is supposed to be directed to a *"public purpose serving the collective interest of consumers".* There should be strong safeguards that the monies disbursed by the infringing trader do not end up in the wrong pockets. As mentioned in recital 21, the aggregated total of all these small amounts can become significant. There is however no legitimate ground why the monies should end up with consumers movements. There cannot be any doubt that the links between the QEs and the consumer movements are very close. We are strongly opposed to the possibility by which the redress would be directed towards *"a public purpose serving the collective interests of consumers"* without the need to identify consumers nor to identify concrete damages (article 6 § 4). The proposal should take due account of the civil law traditions of Member States and limit redress measures to solely compensate individual damages suffered by consumers. There should be no need to compensate in the absence of any identified victim, nor when failing to prove and quantify the damage incurred.

Further there is no clear definition of what a low value case might be. The broader the definition, the more power is given to QE who do not need any mandate. Legislation should not urge legal proceedings where there is no real need.

The proposal doesn't solve the issue with regards to competing actions. This is very worrisome and needs to be addressed.

We deplore that the proposal does not even mention reparations in kind, whereas these should be favoured if appropriate and offered by the trader. National judges should explicitely be allowed to accept repairs in kind when offered by traders, and where they prove to be the most suitable or efficient. Redress should be limited to compensate the sole material and/or financial losses, leaving compensations for moral injury out of the scope of the directive.

Article 7: Funding

The QEs need to be sufficiently funded in order to pursue their activities, also in case of failure to secure a win.

There is no shadow of a doubt that many representative actions will be funded through third parties. In order to avoid abusive litigation the Commission prohibits the funders to influence the decisions of the qualified entity (art 7 § 2 (a)). It is highly unlikely, if impossible, that there will be no influence at all. The Commission needs to ask herself the question why a third party funder would support an action in the first place. It is hard to imagine that third party funders would only have as a goal the interest of consumers. Of course, as a third party funder, there would be influence on the decision to accept a settlement or not. When an investor takes a stake in a company, automatically that creates a different relationship and changes the dynamics.

While the principle of inserting non-influence conditions is legitimate, the bigger issue lies in the fact that it would be quasi-impossible to prove any undue influence from the third party funder on the QE. It would be a nearly impossible task for courts to find evidence to prove this. Of course, the standing of the QE should be refused when there are doubts as specified in art 7 § 3.

Transparency should be encouraged. Since complex organisation structures can hide the true identity of a funder or an interest, extreme care should be given by the courts to the identity of the third party funders. Any reasonable doubt with regards to the motives of a third party funder should lead to his disqualification.

Any public financing of qualified entities should clearly be prohibited in order to safeguard (i) the responsibility of qualified entities as well as (ii) the procedural equality towards SMEs, which have little

financial means to defend themselves. The qualified entity should be required to prove to have sufficient financial means or to subscribe to an adequate insurance.

Besides, we deeply regret the lack of provisions regarding any possible compensation measures for damages suffered by traders resulting from unfounded, abusive or defamatory actions.

Article 8: Settlements

Through article 8 the proposal provides for a number of procedural steps to be observed by the involved parties. There is however a lack of certainty for the defendant that the reached settlement would be final and cannot be challenged any more subsequently. There is no guarantee under the current wording that the settlement will be applicable for all cases involving the same practice and the same trader. Art 8 § 6 is the culprit in this case: it namely provides that *"individual consumers shall be given the possibility to accept or to refuse to be bound by settlements referred to…".* This puts a serious dent in the confidence that a trader should have when reaching a settlement, as even if he settles he could be confronted with new allegations and procedures. In other words, the settlement should be final and rule out the possibility that any other actions can be launched for the same practice and trader.

Article 9: Information on representative actions

This article establishes that infringing traders are required to inform the affected consumers at their expense. We believe that the way how this obligation is formulated is too wide. If the case is not known to the consumers that have been harmed by the practice at hand, then it is also a sheer impossible task for the trader to reach out to all the affected consumers. Or rather, it is possible but at a considerable and disproportionate cost. This is not even including the reputational damage to the trader. In this case, the trader would have no other choice but to spread the information far beyond the circle of consumers in order to capture all of them.

If the QE have the pretence to represent all the consumers affected by a harmful practice, it would also make sense that they have a good knowledge of their *"constituency".* Consequently, their right to sue in the name of consumers should be combined with an obligation to inform. It is important that this information must not be subjective and emotional but neutral and objective. The information and the way of information should not cause further reputational damage to the trader.

Articles 9 and 15 § 2 are opposed to the principle of presumption of innocence, as the mere fact of the claim as well as its outcome would need to be publicised. In the absence of a final judicial decision establishing the responsibility of the trader, one should refrain from inadvertent advertising.

Article 10: Effects of final decisions

According to art 10 Member States shall ensure that an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement.

This wording is in many points very crucial with respect of fundamental rights. It harms the right of a fair trial, especially the right to be heard and the right of disposition. In addition, it violates the principle of equality of arms because the irrefutability should only be established for the existence of an infringement and not for its non-existence.

Article 11: Suspension of limitation period

In the best scenario, ie with an opt-in system, there is no need for suspensions on limitations periods.

This provision significantly reduces legal certainty as it is impossible to know with certainty whether more claims will be made or not, particularly as the proposal does not preclude other QE to sue against the same company in other Member States for the same alleged infringement.

Further, suspending or interrupting limitation periods should only be applicable to similar claims as the collective action, not other claims concerning the product.

Article 12: Procedural expediency

The fundamental right of a fair trial is a right for everyone who seeks help from the courts. If procedural expediency for representative action harms this right for individual procedures it must be rejected as violation of the right of fair trial of this individual party of a civil court procedure.

Article 13: Evidence

Article 13 introduces a disclosure system for plaintiffs and allows the court under certain conditions to order the defendant to present pieces of evidence.

We are opposed to a provision, which incorporates a reversal of the burden of proof to the detriment of traders, thereby creating an additional procedural imbalance.

The fact that this should happen *"in accordance with national procedural rules",* does not give any sufficient guarantee that the systems that will have to be set up by the Members States will not become overly intrusive. The sheer threat to have to disclose certain information, can push traders in a very weak position, as they might prefer to reach a settlement rather than having to disclose sensitive information. This article has the potential to trigger law suits on flimsy grounds and can be used by plaintiffs who were not planning to bring the law suit very far, but were only after settlement payments.

In this regard, Directive 2014/104/EU, offers stronger safeguards against this type of risks (see chapter II).

Article 14: Penalties

There is no need for additional sanctions because of the fact that the non-compliance of a final decision can be already be sanctioned in an effective way by force.

This resembles the American punitive damages system and is very much at odds with many of the national legal systems in the EU. If a trader loses the case, compensations shall be paid according to current European and national legislation. Adding anything on top of this, is the same as introducing punitive damages. Normally, the trader first tries to repair or replace the product, or gives a discount if that's not possible. Damages should only be paid in case of damage caused, which is not always the case.

Article 15: Assistance for qualified entities

Additional assistance for QE is not fair for other parties of civil court procedures who also want to gain a decision by court. Privileges for QE are not justified. If a QE wants to start a representative action it has to be treated in a way which is also common for other parties – especially for also for the defendant. It is well known that court fees are accepted instruments to avoid abusive claims.

See comment under Article 7. Any public financing of qualified entities should be strongly prohibited in order to safeguard (i) the responsibility of qualified entities as well as (ii) the procedural equality towards traders.

The qualified entities should be required to prove sufficient financial means or be able to present a certificate of their liability insurance.

Article 16: Cross-border representative actions

Art 16 illustrates that the proposal does not tackle the problem of competing representative actions. To avoid remarkable complications we suggest that the only place of jurisdiction must be the place of the defendant. Only with this basic requirement, it can be avoided that more than one representative action in the same context is permitted – with the danger of different decisions which are not compatible with each other.

We refer as well to article 10 § 2 about final decisions as it will lead to QE taking action in countries where it will be the most likely to win a case. In this case, we could wonder why a trader (defendant) would not be able to rely on a previous decision from a national court as a rebuttable presumption that no breach has occurred? In the current draft there is namely only a rebuttable presumption than an infringement actually took place.

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