

Position on the Commission's Proposal of a Directive on Representative Actions included in the Package "A New Deal for Consumers"

The European Justice Forum (EJF) calls on EU institutions to shape a fair, balanced and efficient civil justice system for dealing with mass consumer complaints in Europe. Playing by the rules is a common interest shared by consumers and business. **EJF fully supports the following EU Commission efforts:**

- With the Consumer Protection Cooperation (**CPC Regulation**) the European Union has developed the right approach for public enforcement of infringements of consumer law and serious cross-border infringements. This is a ready-made platform upon which to design complementary private enforcement mechanisms.
- Through the adoption of the **ADR Framework Directives** and the **ODR Regulation** the Commission has enhanced redress for consumers by fostering out of court settlement.
- The Commission recognized in its **2013 Recommendation on Collective Redress** the potential for abuse of court based collective redress and developed a useful if not comprehensive set of safeguards against such abuse.

With the **Directive on Representative Actions** the Commission proposes now to facilitate EU-wide class actions based on a **design extrapolated from the Injunctions Directive, but with minimal safeguards**. EJF wishes to bring European policy-makers' attention to **four important issues** regarding this Proposal.

OLD TECHNOLOGIES RE-SPUN, NEW TECHNOLOGY IGNORED

The focus on a collective litigation model has driven the Commission into the class litigation corner. In comparison with other redress mechanisms available in the tool box, this is a regressive choice. Class litigation is old technology, it is complex, costly, lengthy and open to abuse, and it won't have any impact on market behaviour. Empirical legal research has established that ADR in its myriad forms, ombudsmen or similar bodies and regulatory redress, whether in combination or separately, score higher on effective redress criteria¹. The Commission has acknowledged this point in its Inception Impact Assessment of October 2017 (A new deal for Consumers – revision of the Injunctions Directive, EC 31 October 2017, p. 6). Despite that, the Proposal for the Directive on Representative Actions is focusing on in-court litigation of mass redress claims providing **no incentives for Member States to improve their collective redress systems towards more efficient and effective technologies**.

¹ The criteria referred to (and most of which judicial process lacks) are: (1) consumer advice, (2) identification of infringement and harm, (3) triage (identification of people harmed, investigation of individual complaints), (4) establishing infringements, and redress where it is due, (5) access, (6) low cost, (7) short duration, (8) outcomes (not only compensation, but changing behaviour of the infringing party), and (9) constant interfaces ("virtuous feed-back loops") with regulators.

CONFLICT WITH FUNCTIONING NATIONAL LEGAL SYSTEMS

The Proposal would **oblige Member States to adopt court based collective litigation mechanisms** that will be **in addition to their own redress systems**. Some Member States, in particular the Nordic countries, have already developed sophisticated redress systems based on a regulatory approach and ombudsmen. Others, in particular Austria and Germany, have developed effective (preliminary and permanent) injunction systems. This inevitably leads to **duplication of systems, and increased complexity and confusion**. The coherence of national civil justice systems is at risk, and the Union's legislative competence is questionable due to the character of this proposal as „civil procedure legislation in the disguise of single market (and consumer protection) legislation“.

MISSING HARMONIZATION POTENTIAL

The Proposal almost entirely disregards the 2013 Recommendation's guidelines on safeguards. **The following safeguards are missing:**

(a) No detailed criteria for recognition of Qualified Entities (QE), in particular as to sustainability and resources / (legal) expertise - (b) No admissibility standards with regard to certification process - (c) No Loser pays' principle - (d) No Opt-in principle - (e) No ban on punitive damages - (f) No practical limitations on the provision of third party litigation funding - (g) No limitations on lawyers' contingency fees - (h) No prohibition of a quota litis agreement with third party funders (for compensatory collective redress remuneration/interest not based on award unless regulated by public authority) - (i) No prohibition of excessive interest - (j) No registry of collective redress actions - (k) No duty to inform consumers concerned cautiously on initiated/pending cases - (l) No information to defendant about the composition of the claimant party and about any changes therein - (m) No protection of right of consumers to full compensation, undiminished by lawyers' fees - (n) In most of the likely practical cases, no possibility for claimant party to leave the procedure before the final judgment is given or the case validly settled - (o) No possibility for consumers to join the claimant party for their own benefit in the most likely practical cases, instead compulsory cy-pres settlement for the benefit of consumer organisations, short-changing injured consumers - (p) No suspension of limitation from attempt of ADR until at least the moment one party withdraws - (q) No ensuring of consistency between final decision of public authority and outcome of collective redress action - (r) No staying of court action until after public entity has finished - (s) No exclusion of expiration of limitation while public entity is still checking - (t) Finally, the Proposal would introduce a discovery system without simultaneously introducing safeguards to make sure this is proportionate and not open to abuse.

It will thus be up to the Member States to adopt **appropriate safeguards**. The Commission published on 26 January 2018 its Report² on the state of adoption of the 2013 Recommendation and recognized that Member States adopted the safeguards proposed by the Commission in varying degrees and to different effects. Without Member States being bound by the full list of safeguards in the Recommendation there is no chance that all **Member States** will adopt them and be in a way **consistent with each other**. The risk is a **“race to the bottom”** in terms of safeguards and consequently of **forum shopping**.

² http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847.

INCREASING LEGAL UNCERTAINTY

The Proposal triggers a raft of **technical issues regarding jurisdiction and enforcement** not only in the case of cross-border infringements but for any case where one or more QEs (possibly in competition with each other) decide to try to launch cases based on similar facts in different Member States concurrently³. If multiple QEs launch actions (absent an opt-in system to identify the plaintiff parties) in several Member States, there is **uncertainty as to which court will be competent and which procedure will bring finality**.

Without clear rules in the Proposal **to identify the aggrieved consumers** and lack of clarity on jurisdiction, there is **limited value for companies to settle matters** as these can resurface in further actions brought under the Proposal.

The **stringent cross-border architecture** already developed via the CPC-Net, where Member States are asked to appoint one single public authority as point of contact, is **at risk** by the introduction of yet another layer of **complexity and conflict between private and public entities**.

SUMMARY

As shown, the Proposal would have a **fundamental impact on basic principles such as subsidiarity, legal certainty, procedural effectiveness & efficiency** for consumers, businesses and Member States.

The complexity of the issues raised here as well as the **need to build a coherent and harmonized civil redress system architecture** in Europe, are not addressed by the Proposal. Limited improvements by way of tinkering with the existing Injunctions Directive and bolting on a class actions mechanism, without a great deal more care in formulating litigation safeguards along the lines outlined in this paper, cannot achieve the goal of assisting consumers and strengthening the single market.

The EU Commission's Proposal should therefore **be fundamentally rethought**.

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³ The Brussels Ia Regulation - Regulation No.1215/2012 of the EP and Council of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters (recast) does not address collective ("mass") claims.