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EBF POSITION PAPER
On the Commission's proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC - COM(2018) 184 final

Key points:

- European Banking Federation (EBF) fully supports European Commissions' endeavors to set a high level of consumer protection across the EU and the basic view that consumers should be able to ask for compensation for actions violating their rights. Our members follow legal requirements and wish to solve any outstanding disputes with customers in dialogue. Nevertheless, effective court/administrative systems are crucial for any business, therefore any legal act affecting them must be considered with strong attention. In this light, this proposal is not acceptable since it breaches the principle of subsidiarity as well as many basic principles enshrined in juridical systems of EU Member States.
- Therefore, the EBF considers that the Commission should withdraw its proposal and that only public authorities dealing with consumer protection issues should be entitled to bring forward collective legal actions to avoid abuse. Moreover, it is EBF's view that it is not necessary to amend Directive 2009/22/EU as, in general terms, the proposal will increase litigation and legal uncertainty. We base our opinion on the following main topics:
    a. **Principle of subsidiarity**: We consider that representative actions across Member States are a reality (sometimes, in excess). As mentioned in the Commission's report on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States (EC Report), compensatory collective redress is available in 19 EU Member States. As it appears from the reading of the EC Report, it is a well-regulated subject in most Member States and there is no actual need for harmonization. Therefore, in light of the principle of subsidiarity, we consider that this subject should be regulated at the Member States level and the Commission should withdraw its proposal.
    b. **Harmonization**: The Proposal states that the Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities or any other persons concerned other procedural means to bring actions aimed at the protection of the collective interests of consumers at national level. This could be problematic because

qualified entities might choose the jurisdiction to litigate regarding the procedural means to bring actions in each member state.

c. **Punitive damages and Discovery**: As the EU Commission recognized in its Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (Recommendation), elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards are foreign to the legal traditions of most Member States and should be avoided as a general rule. Nonetheless, the Commission disregarded its own recommendations in the proposal. It is EBF's view that any damages suffered by consumers should be duly proved.
d. **Legal costs**: The proposal does not include the principle "loser pays", which is crucial to avoid excessive litigation.
e. **"Opt-In" principle**: The EC Report reminds that the Recommendation urges Member States to introduce in their national collective redress schemes the principle of "opt-in", whereby the natural or legal persons joining the action should do so based on their express consent only. It also concludes that even where the opt-out principle is applied there appears to be the perception of a need to distinguish between purely domestic and cross-border cases and to rely more on the "opt-in" principle in cross-border contexts.
f. **Settlements**: Settlements should be binding for the consumer to reduce litigation. If not, settlements do not lead to finality, and regulating settlements loses its meaning. Moreover, there is no justification to grant consumers any additional rights to redress after an approved settlement exists.
g. **Independence**: Requirements regarding independence of qualified entities should be more clear, demanding and verifiable by a court. Regarding its funding, third party funding should be prohibited as should be contingency fees arrangements with lawyers.

- To the extent that the Commission decides not to withdraw its proposal, the EBF considers it necessary that all the safeguards against the abuse of collective actions included in the Recommendation should be reflected in the proposal, in particular the following:
    a. Detailed criteria for recognition of Qualified Entities (QEs), in particular as to sustainability and resources / (legal) expertise.
    b. Admissibility standards with regard to certification process.
    c. Loser pays principle.
    d. Opt-in principle / duty to inform consumers concerned cautiously on initiated/pending cases – in particular in relation to cross-border cases.
    e. Ban on punitive damages.
    f. Limitations on the provision of third party litigation funding, limitations on lawyers' contingency fees, protection of right of consumers to full compensation, undiminished by lawyers' fees.
    g. Prohibition of contingency fees with third party funders (for compensatory collective redress remuneration/interest not based on award unless regulated by public authority).
    h. Prohibition of excessive interest.
    i. Suspension of limitation from attempt of ADR until at least the moment one party withdraws.
    j. Ensuring consistency between final decision of public authority and outcome of collective redress action.

EBF position:

I. Subject matter, scope and definitions:

a. Article 1 (Subject matter)

- The qualities of the individual consumer who can join the collective action should be clearly defined (here or in article 3), also with reference to the damage that can be claimed through the representative actions. See recitals (4), (17) and (18) in this respect, which are insufficiently reflected in the Directive itself.
- Contrary to the wording in paragraph 2 of article 1, the Directive shall prevent Member States from adopting provisions that allow qualified entities other procedural means. The intention should be to harmonize regulation regarding collective protection. Provided that the aim of the proposal is to enhance collective representative actions, harmonization of procedural means is a much better way of protecting consumers than allowing member states to regulate the subject (which would end up in settling frontiers on representative actions).

b. Article 2 (Scope)

- The scope of the directive is very extensive (Annex I) including Consumer protection; Energy, Passenger rights, Tourism & Accommodation; Environment, Healthcare, Financial Services, Data Protection, Product liability, Telecommunications and media services. The scope of application should be limited only to EU consumer law rules. The extension to other areas of law could lead to overlaps with specific EU and national legislation and with the forms of protection provided.
- The scope should be more clearly defined, especially with regards to existing collective redress systems, keeping in mind that the existence of parallel systems would just end in a lack of clarity (hence poor utilization) both for the industry and the consumers.
- In many EU Member States a mechanism for collective redress is already in place, but the scope of the national legislation is narrower than the one in the Proposal.
- Both the Prospectus Regulation and the MiFID fall within the scope of the Proposal. This has undesired consequences. In particular, the fact that the Prospectus Regulation is in scope does not facilitate the access of enterprises to capital markets.

II. Representative actions:

c. Article 4 (Qualified entities)

- According to the role recognized for Qualified Entities, more stringent criteria should be established to guarantee their independence and lack of conflict of interests. Further criteria could be indicated in addition to those reported in article 4, such as, by way of example:
  - Once a decision declaring a breach of law by the trader is issued, "opt-in" should be the guiding principle for qualified entities to initiate legal procedures. The EC Report reminds that the Recommendation urges Member States to introduce in their national collective redress schemes the principle of "opt-in", whereby the natural or legal persons joining the action should do so based on their express consent only. It also concludes that even where the opt-out principle is applied there appears to be the perception of a need to distinguish between purely domestic and cross-border cases and to rely more on the "opt-in" principle in cross-border contexts;
  - The requirement that a qualified entity be "not for profit" appears to limit the possibility of claims motivated only by financial gain. It however misses the

critical point that (for profit) plaintiff lawyers and litigation investors are the ones that will likely benefit most from claims, and are likely to set up their own qualified entities or direct their activities from behind the scenes. An entity might pay out millions in fees to its lawyers and investors and pay for its own management, staff, offices, marketing, and expenses associated with taking its claim and becoming a professional claimant, all without making a profit. This phenomenon of non-profit shell vehicles being used to house lucrative lawsuits already exists in the EU. For example, not-for-profit Dutch foundations are now commonly used as vehicles for major class action claims in the Netherlands. This practice should not be allowed for qualified entities under the Directive.

- Be transparent in its activities, financing and interests. In particular, there should not be third parties financing for representative actions;
- Have sufficient capacity in terms of financial resources, human resources and legal experience;
- Being able to present injunctions only in cases where there is a direct relationship between the main objectives of this entity and the rights guaranteed by the claimed EU law;
- If possible, have a specific legal form in the member state that guarantees a sufficient level of minimum capital, financial reporting obligations and a governance structure that ensures accountability;
- The qualified entity shall lose its status if one or more of the conditions are no longer met. The compliance with the requirements established should be verified by an administrative authority before the qualified entities are placed in the publicly available list.

d. **Article 5** (Representative actions for the protection of the collective interests of consumers)

- In case the Commission does not withdrew its proposal, it is essential to amend it to ensure that collective actions do not endanger trader's presumption of innocence and its reputation and to avoid unnecessary harmful negative publicity, as an unfounded action may result in dramatic consequences for the trader if this affects or even destroys consumers' confidence (this is particularly important for the financial sector). It is key for the judge to be able at an early stage of the procedure to exclude clearly unfounded claims. Therefore, in our opinion the procedure should take place in two phases:
  i. Phase 1 procedure to cease the infringement or if it has ceased to declare breach of law by the trader and to establish its responsibility for the breach. No publicity should be done as long as there is no final judgment.
  ii. Phase 2 after a final judgment of the trader's responsibility, then the proceeding for compensation should be launched with compulsory consumer's mandate to obtain reparation of the damage caused (reparation with opt-in principle). A time limit should be provided within which consumers should notify that they are affected.
- Moreover, there is no reason that justifies legal actions against practices that are about to happen and have not become yet an infringement, because a future practice is undefined. Furthermore, it might encourage excessive litigation. Moreover, interim measures shall not be a common practice in this kind of procedures to avoid legal uncertainty.

e. **Article 6** (Redress measures)

- One issue related to this Article refers to the role of the mandate of the individual consumers concerned, which may be required by Member States before a declaratory decision is made or a redress order is issued. Particularly, paragraph 3

of article 6 describes the cases where it is not possible to apply paragraph 2, which allows Member States to empower a court or an administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the "consumers harmed" for complex cases. Actually, paragraph 3 provides for specific procedural rules for the cases where: a) consumers are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase; b) consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. With specific regard to the mandate of the individual consumers, for the latter, it's clearly provided that "the mandate of the individual consumers concerned is not required"; less clear is the procedure applying to case sub a), for which the rule states that "the requirement of the mandate of the individual consumers concerned shall not constitute a condition to initiate the action". The choice to use different expressions for the two cases suggests the will to differentiate them, but the difference in the relevant regimes is frankly not so clear.

- Moreover, this article turns damage payments into a penalty, which is contrary to civil procedure of many EU Member States and ethical standards permeating them.
- In relation to article 6.3(a), it is crucial that any kind of punitive damages is avoided. Consequently, any redress or compensation can only be awarded when the damages can be proved. For example, there could be no damages in a case in which a consumer has a contract containing a clause that has been legally declared unfair but has never been applied. Compensation should be proportionate, reasonable and limited to a material damage suffered.
- Accordingly, article 6.3(b) should be eliminated because it is an undoubted punitive damages provision. The EC itself indicated in the Recommendation of 11 June 2013:
    - Punitive damages are against the legal traditions of most Member States and should be avoided.
    - The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.
    - Additionally, Recital 4 of the proposal indicates the following:

      It is important to ensure the necessary balance between access to justice and procedural safeguards against abusive litigation which could unjustifiably hinder the ability of businesses to operate in the Single Market. To prevent the misuse of representative actions, elements such as punitive damages and the absence of limitations as regards the entitlement to bring an action on behalf of the harmed consumers should be avoided and clear rules on various procedural aspects, such as the designation of qualified entities, the origin of their funds and nature of the information required to support the representative action, should be laid down. This Directive should not affect national rules concerning the allocation of procedural costs.

- Another point that should be considered is that article 6.3(b) does not take into account that consumers might initiate individual actions after redress has been directed to a public purpose, which can lead to overcompensation and to a violation of the *ne bis in idem* principle.
- Moreover, this provision could lead to a situation where no benefit is brought to the consumer, but consumer associations or legitimate groups would receive the amount resulting from the procedure, which would imply a motivation for them to

initiate actions (similar to the situation from USA). Moreover, if such compensation is not intended to repair/compensate the damage suffered by the affected customers as a consequence of the infringing conduct, the compensation would lose its main nature and its repairing aim and would acquire a "sanctioning effect" which can only derive from administrative or criminal breaches but not from a civil collective redress process. We suggest the deletion of this point (6.3(b)).
- In circumstances where a qualified entity does not have to obtain a mandate from consumers, it seems that an individual consumer will not be able to "opt-out" even if the consumer objects to the suit or to the entity taking it. The Commission clearly stated in its Recommendation that collective redress should adhere to the "opt-in" principle (i.e. that consumers would actively choose to take part in the actions that concern them). Such a principle is necessary to avoid abuse, respect the wishes of consumers, and ensure that courts know whose case they are being asked to adjudicate. Not only has the Commission abandoned this principle, it has proposed to make it a legal requirement that the Member States not follow it.
- The proposed system would allow a private entity to make damages claim on behalf of consumers without their knowledge or consent, and even against their strong and specific objections. Such a system is unprecedented and would interfere profoundly with the personal freedoms and rights of consumers.

f. **Article 7** (Funding)
- The obligation of declaring the source of the funds is limited to those cases stated in article 6 (1) where only certain types of actions are mentioned. However, it does not extend to those actions aimed at declaring the responsibility of the infringing trader before the affected consumers.
- Therefore, we suggest that the obligation to inform about the source of funds in collective redress extends to all classes of actions contained in the Directive.
- Funding by a third party might be problematic, allowing the litigation funder to influence the decisions of the representative party. Although article 7 does contain some limitations to third party funding, the limitations are inadequate in circumstances where—as the Commission acknowledges in the EC Report (para 2.1.6)—not one Member State has a system of regulation of third party funders. What is required is an outright prohibition on funding of collective damages actions (whether by lawyers or third parties) for a stake in the "damages awarded" to avoid frivolous and excessive litigation. Absent an outright prohibition, far greater limitations are required to curtail the potential for abuses arising by those with financial motivations to pursue cases, including mandatory licensing and supervision of funders and a requirement to pay full costs when the litigation they back fail. These safeguards are especially important where consumers themselves are not steering the action, and may not even be aware that litigation is being pursued on their behalf.
- Also, regarding the funding of qualified entities and seeking independence of these entities, it should be established that their funding by grants or public resources is obtained exclusively on an objective criteria basis.

g. **Article 8** (Settlements)
- Before filling a redress action, the qualified entities and the defendant should be imposed to follow a mediation procedure. Moreover, the courts should have the possibility to observe if the qualified entities negotiated in good-faith and in consumers' best interest, in order to ensure a safeguard against the abuse of the qualified entities.
- It is important that the settlements define clearly the consumers affected by them, and the way for consumers to prove that they have actually suffered the harm

derived from the infringement. The way of notifying consumers should be part of the settlement.

- Settlements should have effects *erga omnes*, unless otherwise agreed by the qualified entity and the trader. The approval by court could not make sense if it is not binding on all parties. It would reduce litigation and increase the use of these settlements if both "parties" are bound by the effects of them. Every agreement reached by the parties and accepted by the final consumer should close the possibility of obtaining by other means redress for the same practice by the trader. If not, there is no incentive for the trader to settle and the will of the trader to try to reach an agreement would be discouraged. Therefore, in order to increase the interest in settlements for traders and bring stability for them, it should be established that the settlement is applicable to all claims regarding the same trader and the same practice, which is the system available under the Dutch Wcam.

h. **Article 9** (Information on representative actions)

- There is no reason to indicate a possible way to inform consumers about the final decision or settlement. Since the proposal – if not withdrawn – should include "opt-in" and not an "opt-out" clause, there is consequently no need for such information. All consumers who have opted-in will be informed by the group administrator.
- Individual notification is probably not going to be necessary to make sure that consumers are duly informed. Moreover, in some cases it can be impossible to comply with such information obligation as the affected group can be very big and not be determined.
- The publication of the final resolution should be considered enough, reason why we suggest deleting such obligation.

i. **Article 10** (Effects of final decisions)

- If an injunction order is given, it is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress for the same infringement. This touches upon a fundamental principle of procedural law of many EU Member States that say that only the litigants can be bound by a decision in civil courts. This proposal introduces the stretching out of the binding force of a civil decision to non-parties, which is fundamentally different from current civil procedural law of many EU Member States.
- Another issue related to this Article refers to the definition of the individuals who can join the collective action, which should de clearly defined.
- As indicated in our comments on article 6.3 above, sometimes it will be necessary to prove or demonstrate the individual harm suffered, that the infringement affected a consumer or that the consumer did not have enough information. Therefore, this article must establish an exception for those cases.
- Paragraphs 2 and 3 of article 10 should be deleted, as they do not contribute to a uniform application of EU law. It could even increase strategic litigation. In practice, the harmful event is regulated by each national law and the reach and consequences of the same fact can vary from one Member State to another.

j. **Article 11** (Suspension of limitation period)

- This suspension increases the risk of a multiplicity of overlapping and competing claims. As it will be impossible to know which consumers are in which actions (in part because it will be forbidden to require that they be asked), it will become extremely difficult to know which limitation periods will apply to which claims. It will always be possible for a qualified entity to argue that it is the true representative of a consumer, but that an earlier claim by another qualified entity interrupted any limitation period that might apply.

- The suspension of the limitation period makes it difficult for defendants ever to know when all claims in relation to an issue have been dealt with, or whether more can be expected. This, in turn, will deter defendants from reaching settlements with consumers, as a defendant has little incentive to abandon defences and compromise if doing so will not definitively resolve all claims, especially given the risk that settlement could spur new claims.

k. **Article 13** (Evidence)

- This article raises more questions than it answers, since it refers to national procedural rules. Furthermore, normally courts may order to prove evidence in accordance with national procedural rules in case such procedural rules actually exist; but if they do not exist, it is not clear what effect this Article is supposed to have.
- Also, in many EU Member States the rules in relation to pre-trial discovery are very strict and limited and "fishing expeditions" are not allowed. Moreover. this type of Discovery might bring excessive litigation, by lawsuits with cases designed only to get to this discovery, looking for settlements.
- As a first option, the EBF would propose to delete Article 13. As a second approach, for the reason that this collective redress action could be initiated anywhere in Europe and national procedures differ quite significantly, the EBF would propose to narrow the scope down. For example, the EU's 2014 Competition Damages Directive[1] also foresees a disclosure system and requires that the evidence requested must be "circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification." Courts must moreover "limit the disclosure of evidence to that which is proportionate" and consider "the extent to which a claim is supported by facts," "scope and costs of disclosure" and "whether the disclosure would include confidential information." No such reasonable limitations are foreseen in this Proposal.

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

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European Banking Federation

About EBF

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.1 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth.

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