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Preliminary CCBE comments on the Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members on policy issues which affect European citizens and lawyers.

On 11 April 2018, the European Commission launched the 'New Deal for Consumers' package composed of two proposals for Directives and a Communication to strengthen consumer protection.

The CCBE welcomes the Commission's endeavours to ensure all European consumers fully benefit from their rights, by helping Member States to enforce existing rights better, and by modernising redress systems.

With this paper the CCBE wishes to share its initial observations in relation to 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. A more detailed position paper will follow in due course.

The main issue which the CCBE would like to address at this stage is that the current proposal reserves the possibility to initiate representative actions aimed at the protection of the collective interests of consumers to qualified entities only. This monopoly provided to qualified entities raises difficulties, as explained in more detail below.

1. Avoiding the risk of abusive or unmerited litigation

The CCBE stresses that it supports any measure discouraging abusive or unmerited litigation, no matter by whom it is initiated, whether by consumer organisations, companies specialising in financing litigation, or lawyers or any third parties. Mass claims should be pursued with the sole purpose of compensating the consumer who has suffered harm.

However, instead of reserving the possibility to initiate collective redress to a specific set of actors only, the CCBE considers that there are other and less restrictive mechanisms to prevent unreasonable, artificial and vexatious actions, such as introducing the loser-pays-principle or by prohibiting the right of representative entities or lawyers to receive a share of what was obtained in the proceedings.

The proposal of the European Commission aims to prevent any participation of the legal profession in the procedure from the outset which is not acceptable.

As a general rule, it can be assumed that all Member States strive for keeping their national redress mechanisms as time and cost-effective as reasonably possible. At the same time, there always tends to be a tension between finding justice and moving cases as smoothly as possible. Different legal cultures have developed different approaches to ensuring this goal.

Generally speaking, the proceedings are the more likely to be treated diligently and efficiently, if those who are running the process are qualified legal professionals. Accordingly, if consumers in a collective redress proceeding are represented by qualified lawyers who can build and join their cases in a streamlined manner, consumers will benefit. European lawyers are subject to strict codes of ethics and have the necessary experience in e.g. exploring facts and gathering evidence in preparation of the trial.

At the same time, following the principle of equality of arms and open proceedings, the rights of defendants also need to be preserved by due process. It is indispensable to the CCBE that due process be respected at every single stage of the proceedings, including admissibility, liability and compensation (including distribution).

In addition, tasks, which are usually assigned to the state – such as criminal prosecution – should not be delegated to "qualified entities".

2. Assistance for qualified entities

The CCBE has serious concerns about the assistance which qualified entities may receive from Member State authorities (Article 15). This may lead to procedural inequality and actions that are politically motivated or that, for reasons that are not made clear, targets traders in certain Member States. (See also point 6 below on conflict of interest). Moreover, it may conflict with the prohibition of State aid as stipulated in European primary law if "qualified entities" are subsidised or receive a part of the compensation from the outset.

3. "Opt-in" instead of an "opt-out" procedure

Contrary to the *Commission 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*, the proposal seems to establish an opt-out instead of an opt-in procedure. As a consequence, parties belonging to a certain class/group automatically take part in the litigation unless they expressively withdraw. According to the CCBE, since collective redress is always based on individual claims, the "opt-in" principle, whereby the natural or legal persons joining the action should do so based on their express consent only, is the only way to respect appropriately and guarantee the freedom of every single consumer to decide individually whether to pursue his/her claims or not in a self-determined and active way. The consumer should have to say "yes" to opt-in to collective redress and should not be forced to do anything just to get out of a collective redress mechanism he/she does not agree with.

The opt-out system would lead to consumer decisions which are not self-governed but under pressure of a collective: in other words, to stay within the process of a perhaps unmeritorious or excessive claim just because a consumer is under the collective pressure of a group, and not having been decided in a free and self-determined way, would lead every single consumer to be deprived of legal capacity, i.e. of the right to self-determination. The fundamental right for citizens to decide in a free and self-determined way whether to bring a claim or not is more important than the objective of increasing the number of persons to join the action.

4. The absence of qualified entities

The proposal does not consider the possibility that there may not be any qualified entities capable of bringing consumers' collective redress actions.

By depriving people who meet the criteria to join a group but then cannot join the collective redress in the absence of qualified entities, the proposal seems to disregard the principle of access to justice.

5. Inaction from qualified entities

Another issue arises from the inaction of qualified entities.

According to the proposal, qualified entities are the only bodies able to bring collective redress actions, of which all other entities are excluded, with the exception of trade unions under certain conditions.

Therefore, in a situation where no qualified entity initiates a representative action, the citizens who fulfil the criteria of joining a group proceeding have no recourse to assert their rights when they are the ones who suffer harm in the first place.

Here again, the fundamental principles of, access to justice, access to a judge and compensation for harm seem to be undermined.

6. Conflict of interest

The proposal does not contain any provisions concerning a potential conflict of interest related to qualified entities which would clearly be prejudicial to the rights of persons who meet the criteria for joining a collective redress.

Qualified entities are not subject to the deontological rules which lawyers must adhere to, in particular those regarding conflicts of interest.

It is therefore possible, for reasons which are not inherent to the nature of the dispute itself but specific to the qualified entity, that a collective redress action is not brought.

7. Refusal or obstruction of qualified entities

If it is possible for the qualified entity to refuse to bring a collective redress action, an obstruction may occur.

An obstruction differs from an outright refusal to bring proceedings, in that there is a manifest absence of any action to bring a group proceeding for reasons such as disagreement, cost, feasibility, etc.

Citizens would therefore be deprived of their right to compensation without being able to blame qualified entities for a refusal which would never expressed. Citizens would therefore be deprived of their right to compensation due to qualified entities obstructing a collective redress proceeding.

8. Duty to provide evidence

Article 13 introduces an obligation for the defendant to present evidence without providing procedural safeguards. Such an obligation originates from a different legal system with different rules on burden of proof. In most of the EU Member States such a disclosure requirement would be in contradiction to the general rule of procedure that the plaintiff has to provide evidence. If the European Commission, as often emphasised, does not want to introduce a US-style class action system, there should be no obligation to provide evidence for the defendant. However, if the EU wants to maintain Article 13, specific procedural safeguards should be added, such as whether the evidence would be only used in camera or only for the ongoing proceeding.

9. Effects of final decisions

The proposed effects of final decisions as mentioned in Article 10 applies unilaterally in favour of the consumers/qualified entities establishing the existence of an infringement. To guarantee procedural equality, the binding effect should also apply to the defendant so that no other action can be brought by another qualified entity based on the same alleged infringement.

10. Proposal for the integration of a subsidiary mechanism

In the event an appointed judicial representative does not act properly or fails to represent the interests of its principals, some judicial systems foresee the possibility to appoint a trusted third party in case a formal notice remained unsuccessful after a certain period of time.[1]

The CCBE suggests introducing a similar subsidiary mechanism into the directive. The third party to be appointed could then be a lawyer.

Conclusion

The monopoly conferred upon qualified entities to bring collective redress therefore will lead to many difficulties.

The removal of this monopoly for the inclusion of lawyers, who are subject to strict deontological rules, would guarantee the proper administration of justice and better protection of consumers' rights

[1] This is the case for example in French insolvency proceedings, see Article L. 622-20 of the French Commercial Code: this provision grants the judicial representative with the legal monopoly of the action on behalf of the declared creditors; but in case a formal notice remains unsuccessful for two months, the action of a creditor appointed controller is admissible (R. 622-18).