Rue Joseph II, 40/8 - B-1000 Brussels
T.: +32 (0)2 234 65 10 - ccbe@ccbe.eu - www.ccbe.eu

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

24/09/2018

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.

As the proposal recognises, globalisation and digitalisation have provided great cross-border economic benefit to consumers and traders across the EU. European Commission research[1] in 2012 showed that 53% of European consumers had made an online purchase in the previous twelve months and that 15% of consumers had purchased online from a trader in another Member State in the same period. Confidence was high amongst those people who had purchased online: 90% were confident about purchasing domestically, and 80% were confident about cross-border purchasing.

As the proposal states, the potential for breaches of Union law increases with the prevalence of cross-border consumer purchases. Misleading advertising, unfair contractual terms or other issues can affect wider groups of consumers across a range of Member States. The proposed Directive must ensure confidence for consumers, protection for traders from unmerited litigation and effective resolution of disputes between consumers and traders.

The CCBE[2] underlines the CCBE's preliminary comments 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 on 18 May 2018. This paper reiterates and expands on the CCBE's position regarding the proposal and in the following main areas:

- The restriction of collective actions under the proposed Directive to qualified entities – we believe that this risks creating severe conflicts of interests. Depending on the definition, funding, impartiality or inaction of such entities, the restriction in favour of qualified entities is likely to impede access to justice. A wider pool of potential representatives must be considered so as to avoid disproportionate restrictions and any restriction must be objectively

[1] European Commission, *Consumer Attitudes towards Cross-Border Trade and Consumer Protection*, June 2013 (http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_358_en.pdf)

[2] The Dutch delegation to the CCBE could not support the present position paper and therefore abstained in the vote.

justified. In the CCBE's view, a wider pool of potential representatives is likely to advance access to justice.

- 'Opt in' and 'opt out' procedures – we believe that an approach based on express consent of the individual is appropriate. 'Opt in' respects the right of legal self-determination and avoids the pressure of a collective.
- Low value claims – we believe that further clarification may be required around situations in which, as the proposed Directive states, individuals have "suffered a small amount of loss and it would be disproportionate to distribute the redress to them". As these situations would see redress contributed towards a public purpose, rather than direct to the individual, any assessment of the overall damage would likely need to be estimated given that no damaged entity will be involved in the matter. What should be clarified in the proposed regulation is that any estimation or other form of determining the amount of damages does not contain a punitive element.
- The chosen model of the restriction of collective actions to qualified entities as proposed by the Directive is not a suitable instrument to obtain financial compensation for damages suffered by individuals. Therefore, it should be made clear, that collective actions initiated by qualified entities do not exclude actions taken by individuals seeking compensation of damages they have suffered. That being the case it is of essence to also make clear that final decisions in proceedings initiated by qualified entities have no binding effect on proceedings initiated by individuals and should have binding effect only in regard to claims of individuals who expressly opted to accept such a decision as binding in advance.

Our response highlights several other issues, particularly around the duty to provide evidence, which we believe should be removed or subject to adequate procedural safeguards; the effect of final decisions, which we believe should be applied bilaterally rather than unilaterally as currently proposed; and the integration of a subsidiarity mechanism.

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

Article 6(4) of the proposed Directive states that the remedies available would not prejudice any additional rights that consumers may have under Union or national law. The proposal highlights that adoption under the Directive 2009/22/EC has not been as successful as anticipated, and the varying degree to which Member States provide collective actions under national law.

Qualified entities

1. **Provisions of Article 4**

The status of qualified entities under the proposed Directive may present a challenge to that harmonized approach around access to justice. Article 4 of the proposed Directive outlines the criteria for such qualified entities:

- It is properly constituted according to the law of a Member State
- It has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with

- It has a non-profit making character

Article 4 further provides:

- Regular assessment by the Member State on whether the qualified entity meets these criteria
- Allowing Member States to designate entities on an ad-hoc basis
- Ensuring Member States allow for consumer organisations and independent public bodies are eligible for designation as qualified entities
- Allowing Member States to determine which measures under the Directive that particular qualified entities may operate under

There are also provisions in Article 5 around ensuring that there is a "direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought" and in Article 7 around the adequacy and transparency of funds to bring collective action.

The definition in the proposed Directive focuses on and anticipates that "in particular consumer organisations and independent public bodies will be eligible for the status of qualified entity", envisaging, in Article 15, the funding, support of and facilitation of information sharing between these groups across Member States.

We believe that limiting the collective redress process to designated organisations reduces access to justice. Instead of reserving the possibility to initiate collective redress to a specific set of actors only, we consider that, applying a proportionality analysis to the proposal, 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. As we will outline below, considering the appropriateness of the actor bringing the collective action in the context of the circumstances of the case itself may be a more appropriate approach. As currently drafted, the proposed Directive would largely exclude the legal profession across Europe from participation in this collective redress procedure without so much as an attempt to justify the proposing of such a restriction, and the CCBE firmly believes that this position is unacceptable.

Generally speaking, 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 brought together and/or 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. aggregating claims, putting in place corporate or other structures with sound governance to represent claimants, exploring facts and gathering evidence in preparation of the trial.

Moreover, the very nature of collective redress in relation to cross-border claims (which must be at least a focus of the proposal) is that existing national qualified entities may not be fit for purpose to represent consumers from two or more Member States who may well have an interest in setting up a special purpose vehicle in order to bring a relevant claim.

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. **Legitimate interest and standing in national law**

A number of Member States allow for wider standing in national law for collective redress proceedings than that contained in this proposal – including Austria, Belgium France, Germany, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the UK - and have, correspondingly, developed procedural safeguards to ensure access to justice, protection of consumer interests and balance between consumers and traders. These already existing national law instruments need to be properly analysed to find the best solution for an EU wide instrument providing cross border collective redress proceedings.

3. **Funding of qualified entities**

Pursuing collective actions can be a lengthy, complex and expensive process.
We have serious concerns about the assistance which qualified entities may receive from Member State authorities under Article 15 of the proposed Directive. These 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. 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.

4. **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. Funding may present such a conflict of interest, for instance, a publicly funded body bringing collective action against a publicly funded trader, such as a publicly funded railway service.

5. **Inaction by qualified entities**

The proposal does not consider the possibility that there may not be any qualified entities willing or able to bring 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. We believe this would result in situations in which some consumers could look to resolve their disputes through collective actions under national law, while consumers in other jurisdictions that did not have such system would be deprived of redress.
A further 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 and we highlight the example of the UK after the *JJB Sports* case as an example of a situation in which an organisation with such a power has decided not to undertake such actions in the future due to bad experience in a single case.

6. 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.

7. Summary

In short, we believe that the Directive in all cases, should provide for the possibility of consumers having recourse to qualified legal professionals.

<u>Opt in or opt out procedure</u>

8. Opt in procedures preserve legal self-determination

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 appropriately respect 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.

<u>Low value claims</u>

9. Direct redress or funds to a public purpose

Article 6 exempts from particular remedies consumers who have “suffered a small amount of loss and it would be disproportionate to distribute the redress to them”. The proposal highlights a different modality for such situations: “Member States should not require the mandate of consumers concerned within the representative action and the funds awarded as redress should be directed to a public purpose serving the collective interests of consumers, such as awareness campaigns.”

Mass harm situations can occur in which a very large category of persons individually suffer a small amount of loss. While under some circumstances it might make sense to enforce violations that only lead to small damage, the proposed mechanism for collectively enforcing small amounts of losses

should not lead to an estimation of damages that includes a punitive element as a punitive damage system should not be the outcome of such an instrument.

Besides, it would be helpful to understand what threshold might be considered “a small amount of loss”, as the consequences of this threshold for consumers, either receiving awards direct or having awards contributed to a public purpose, are substantial. The cost of distributing funds to such consumers may also be mitigated. For instance, consumers may be ongoing subscribers to goods or services, or have payment details stored for future purchases, to which awards could be directed with minimal effort.

General comments

10. 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 on the defendant to provide evidence.

11. 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.

12. Proposal for the integration of a subsidiary mechanism

In the event a judicially appointed representative does not act properly or fails to represent the interests of its principals, some judicial systems provide for the possibility of appointing a trusted third party in the event a formal notice remains unsuccessful after a certain period of time.[3] The CCBE suggests introducing a similar subsidiary mechanism into the directive. The third party to be appointed could be a lawyer.

Conclusions

The monopoly conferred upon qualified entities to bring collective redress therefore will lead to many difficulties as regards proper access to justice for consumers and the guarantee of the rule of law for consumers` claims. 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.

---

[3] 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).