EU Directive

"NEW DEAL" FOR CONSUMERS – PART 1: REPRESENTATIVE ACTIONS

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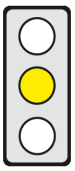
Centrum für Europäische Politik

KEY ISSUES

Objective of the Directive: The possibilities for bringing representative actions in consumer law are to be substantially expanded thereby promoting the enforcement of consumer law whilst also preventing abusive litigation.

Affected parties: Consumers, companies, "qualified entities" entitled to bring proceedings, litigation funders.



Pro: Extending the scope of representative actions strengthens the legal position of consumers and the principle of liability.

Contra: The Directive is disproportionate and thus unlawful because it fails to provide sufficient safeguards against abusive litigation. It should basically requirean opt-in for consumers.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2018) 184 of 11 April 2018 for a **Directive** of the European Parliament and of the Council **on representative actions for the protection of the collective interests of consumers,** and repealing Directive 2009/22/EC

Brief Summary

- **Context and objectives**
  - According to the Commission, digitalisation increases the risk of a large number of consumers being affected simultaneously, and increasingly across borders, by the same infringement of Union law by a company (p. 1).
  - The Commission therefore wants to strengthen the enforcement of EU consumer law and with this aim
    - improve the scope of representative actions against infringements of consumer law (this cep**PolicyBrief**) and
    - amend four important EU consumer protection directives by way of an "Omnibus Directive" (cep**PolicyBrief** follows).
  - Consumers are faced with obstacles within individual actions and collective redress is not yet available in all Member States. The Injunctions Directive [2009/22/EC] is ineffective because inter alia its scope for eliminating the continuing effects of an infringement, in the case of representative actions for injunctions, is unclear which means that harmed consumers have to bring separate claims for damages (p. 2, 10, Recital 3).
  - The Commission therefore wants to amend and expand the Directive and in particular (p. 2–4)
    - introduce representative actions for eliminating the continuing effects of an infringement ("redress") alongside injunctive actions,
    - expand the scope of representative actions to include infringements of many other EU laws and
    - prevent abusive litigation by way of safeguards and requirements applicable to "qualified entities".

- **Scope and definitions**
  - "Representative actions" are administrative or judicial remedies against national and cross-border infringements of EU law which harm or may harm the collective interests of consumers – i.e. the interests of a number of consumers – [Art. 2 (1), Art. 3 No. 3 and 4].
  - Representative actions can only be brought by "qualified entities" [hereinafter: "QuEs") (Art. 4 (1)]. The consumers themselves are not parties to the proceedings (Art. 3 No. 4).
  - Member States must ensure that it is possible to bring "representative actions" for injunctions, for eliminating the continuing effects of an infringement or a combination of both [Art. 1 (1), Art. 4 (1), Art. 5].
  - Representative actions may be brought in the case of infringements against the EU laws listed in the Annex [Art. 2 (1)]. This list will be extended to include numerous other consumer-related laws including those in the areas of financial services, energy, telecommunications, travel, environment and data protection (Recital 6).
  - Not affected by this Directive are other individual and collective remedies for consumers, the EU rules on jurisdiction and on applicable law as well as substantive consumer rights such as the right to damages [Art. 1 (2), Art. 2 (2) and (3), Recitals 15 and 23].

- **Requirements applicable to QuEs**
  - QuEs are bodies, particularly consumer organisations and independent authorities, that are designated by the Member States "in advance", i.e. generally, or "ad hoc" to bring representative actions (Art. 4).
  - Member States must designate every body which so requests and [Art. 4 (1), Recital 10]
    - has a legitimate interest in ensuring compliance with the relevant EU law,
    - does not pursue a commercial purpose, i.e. is non-profit making (Recital 10) and
    - is properly constituted according to national law; each Member State determines the respective requirements.

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- **General requirements for representative actions**
  - Member States can choose whether representative actions can be brought before the courts or administrative authorities or both [Art. 5 (1), Recital 12].
  - They must ensure that the courts and authorities
    - treat representative actions expeditiously [Art. 12 (1)];
    - only permit representative actions where there is a "direct relationship" between the "main objectives" of the QuE and the EU law that has been violated and on which the claim is based [Art. 5 (1), Art. 4 (5), Art. 16 (1)];
    - can, under certain circumstances, require the defendant to submit "further" evidence in its possession, that has been "indicated" by the QuE, provided the claim has already been sufficiently substantiated (Art. 13);
    - require infringers to inform affected consumers of final decisions (Art. 9).
  - Member States must "restrict" the third-party financing of representative actions as follows [Art. 7 (2) and (3)]:
    - competitors of the defendant or those who are financially dependent on the latter are not permitted to finance actions;
    - third-party fund providers are not permitted to influence settlements or procedural decisions made by the QuE.
  - Member States must limit the procedural costs for QuEs or provide them with legal aid or public funding to ensure that they do not refrain from representative actions for reasons of cost (Art. 15).
  - QuEs designated in advance are also permitted to bring representative actions in other Member States. Where a Member State or the Commission raises "concerns", the designating state must investigate the QuE and, where appropriate, revoke the designation. (Art. 16)

- **Representative actions for injunctions**
  - QuEs can bring an action for an injunction in order to "stop" or "prohibit" an unlawful "practice" by
    - in urgent cases, applying for a preliminary (interim) injunction order to prevent irreversible damage to consumers [Art. 5 (2) (a), Recital 13, Art. 12 (2)], or
    - obtaining a final injunction order establishing that the practice constitutes an infringement [Art. 5 (2) (b)].
  - The QuEs do not have to identify the affected consumers individually and obtain their mandate ("opt-in") nor do they have to provide proof of fault on the part of the infringer or loss on the part of the consumer [Art. 5 (2)].

- **Representative actions for "redress" to eliminate the effects of the infringement**
  - QuEs can also bring an action to eliminate the "continuing effects" of the infringement by seeking "redress" measures, e.g. for damages, repair, price reduction, contract termination or reimbursement of the price [Art. 5 (3), Art. 6] if the infringement is established in a final injunction order and a right thereto exists under national laws (Recital 16).
  - QuEs "should" be permitted to bring claims for redress without having to identify all the affected consumers. Member States may however require consumers to register their individual claims prior to the decision in the action and issue an opt-in (Art. 6 (1), Recitals 18 and 20).
  - Where the representative action for redress is upheld, a "redress order" is generally issued [Art. 6 (1)].
  - In exceptional "justified" cases in which the determination of individual claims is complex and therefore inefficient in a representative action, Member States may empower courts and administrative authorities to issue just a "declaratory decision" establishing the fundamental liability of the infringer towards the affected consumers [Art. 6 (2), Recital 19] instead of a redress order. It is essential that the latter are able to seek redress on the basis of such declaratory judgement easily and expediently [Art. 10 (3)].
  - A redress order must however be issued [Art. 6 (3) (a) and (b), Recitals 19–21] if
    - the affected group of consumers can be clearly identified and they have suffered comparable harm; in this case redress must be "directed to the consumers concerned"; or
    - the harm for individual consumers is so small that it is disproportionate to distribute redress to them ("low-value damage"); redress must then be "directed to a public purpose serving the collective interests of consumers".

    In these cases, Member States are not permitted to require the affected individual consumers' mandate (opt-in) as a prerequisite to initiate the action or, in the case of low-value damage, to obtain an order for damages.
  - QuEs seeking redress must disclose their funding and prove that they have sufficient financial resources to represent the best interests of the consumers and to meet the opponent's costs should the action fail [Art. 7 (1)].

- **Legal effects of representative actions**
  - Member States must require that
    - the submission of a representative action suspends or interrupts any limitation periods applicable to the consumers' rights to redress (Art. 11),
    - in the case of subsequent actions for redress against the same trader for the same infringement, final decisions of an administrative authority or court have the following evidential force (Art. 10):
      - an infringement is irrefutably deemed to exist where it has been established by a final decision of an administrative authority or court of the home Member State, and is refutably presumed to have occurred where such a decision has been taken in another Member State.
      - The infringer's liability is deemed to be irrefutably established where it has been established by a final decision of an administrative authority or court of the home Member State.

Main Changes to the Status Quo

- In future, representative actions can be brought against infringements of numerous other consumer-related EU laws.
- In future, Member States will have to provide for representative actions for "redress" in addition to injunctions.

Statement on Subsidiarity by the Commission

Only EU action can establish effective collective actions for damages EU wide, prevent legal fragmentation and the unequal treatment of consumers and companies in the internal market, strengthen consumer confidence and compliance by businesses and thus promote cross-border trade (p. 6).

Policy Context

Following its recommendation on common principles for injunctive and compensatory collective redress mechanisms [2013/396/EU, see cep**PolicyBrief**], which were inadequately implemented by the Member States [Report COM (2018) 40], the Commission carried out a fitness check of EU consumer legislation in 2017 on which the proposal is based.

Legislative Procedure

11 April 2018	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice and Consumers (leading)
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: Didier Geoffroy (EPP, FR); Internal Market and Consumer Protection; Transport and Tourism
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market);
Type of legislative competence:	Shared competence [Art. 4 (2) TFEU]
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

In those EU Member States where there is no equivalent collective redress mechanism and in cases where a number of consumers are harmed by the same infringement, **the** proposed **expansion of the scope of representative actions strengthens the legal position of consumers and** thus **the principle of liability.**

Representative actions avoid the hurdles often faced by consumers in individual actions, such as the mismatch between the effort and benefit of bringing a low-value claim. They reduce procedural costs as there is only one court case. They also increase compliance on the part of businesses as the financial advantages of non-compliance are more likely to be claimed and the risk of damage to reputation will increase. They also place a burden on companies, however, because the latter will have to protect themselves – such as by way of higher provisions or insurance premiums – against the associated risks.

The safeguards in the Directive – such as **limiting** the group with **legal standing to QuEs that comply with the requirements, as well as the restrictions on third-party funding** – mean that claims and settlements will have to be more focussed on actual consumer interests. They thereby **hinder a profit-oriented claims industry like that of the USA. The Directive fails, however, to provide sufficient safeguards against abusive litigation** in that it gives an incentive to QuEs to use representative actions to push through settlements on redress, even where there is no proof of harm to consumers, insofar as the defendant businesses agree to this out of fear of damage to their reputation:

Firstly, the Directive fails to prevent law firms from being able to make large profits out of settlements by way of contingency fees and thus having an incentive to induce QuEs to undertake abusive litigation. Secondly, even though some representative actions are only made financially viable for QuEs due to the possibility of third-party funding and the limitation on procedural costs, private third-party funding of representative actions is generally profit-oriented and, thirdly, low procedural costs mean a lower litigation risk for QuEs. All this serves – despite the proposed restrictions – to encourage abusive litigation. In addition, the criterion that a QuE must be "properly constituted" by the Member States can be very broadly and thus flimsily worded. There is a risk that QuEs with spurious consumer interest, that seek to profit from actions – e.g. in favour of third-party funders – can too easily acquire the authorisation to bring an action.

In order to prevent abusive litigation EU wide, the Directive should remedy the aforesaid deficiencies by way of additional safeguards for representative actions. First and foremost, it should **prescribe an opt-in mechanism** and generally prohibit opt-out procedures where no consumer mandate is required because, although these make it easier to bring an action and facilitate the compensation of as many consumers as possible, they also facilitate actions which only have a tenuous link to any actual harm to consumers.

Legal Assessment

Legislative Competency

Measures for the approximation of laws regarding procedure can be based on the internal market competence (Art. 114 TFEU) in order to remedy procedural obstacles in the internal market which hamper the effective enforcement of consumer rights, thereby "reacting" to the restriction of basic freedoms or distortions of competition. Whether the EU-wide introduction of collective claims for damages is actually going to stimulate cross-border trade to any noticeable degree – as the Commission assumes –, or remedy any appreciable distortions of competition (CJEU Case C-376/98), is uncertain, especially since the Commission fails to provide a more detailed rationale.

Subsidiarity

Collective remedies against cross-border infringements – which are increasing in number – can only be regulated by the EU. The Directive, however, also applies to purely national infringements in relation to which the Member States are basically responsible for redress. The fact alone that, despite a Commission recommendation, some Member States have not brought in any collective remedies for claiming damages, or that such remedies vary in strength, does not justify EU action. Restricting the Directive to cross-border infringements would, however, be inappropriate. The planned redress actions are based on injunctive actions that, under the Directive [2009/22/EC], can be brought against all – including purely national – infringements. A separation would lead to an additional fragmentation of national legal systems because QuEs would only be able to pursue cross-border infringements with the EU redress action. When starting an action, it may be unclear whether an infringement has a cross-border element, especially since the increasing level of international interconnectedness between companies makes legally valid classification difficult. The aim of improving the enforcement of EU consumer law can therefore be better achieved by EU action to create an alternative collective remedy that is basically the same in all Member States and can be applied to all infringements.

Proportionality with Respect to Member States

The obligation to provide for representative actions constitutes intervention in the procedural autonomy of the Member States. The intervention is mitigated by the fact that the Directive does not replace existing national remedies but only specifies common principles for alternative representative actions and largely leaves their concrete design up to the Member States. EU-wide representative actions for redress may reduce enforcement deficits resulting from the limited efficacy of national remedies. This applies principally in the case of cross-border infringements, in the case of low-value damages for which individual actions are, in practice, hardly ever brought due to "rational disinterest", and in case of major mass damages where individual claims can lead to judicial congestion and protracted proceedings. It must be taken into account that Member States are obliged under EU law to provide effective legal protection and must not excessively hamper consumers in the exercise of their rights under EU law (cf. CJEU Case 432/05). Instead of redress actions it may be sufficient to prescribe the less stringent measure of a declaratory action combined with simple, similarly effective follow-up proceedings for redress. In the case of low-value damages and cases where the affected consumers and their comparable harm can be identified, direct redress actions are proportionate, however, because they are more efficient.

The Directive is nevertheless **disproportionate and thus unlawful because it fails to provide sufficient safeguards against abusive litigation** (see economic evaluation). **It should** drastically reduce irrelevant financial incentives for collective actions, make the lack of abuse a requirement for admissibility and **basically require a** simple **opt-in for consumers,** at least after the action has been brought**.** It remains unclear how unjustified multiple claims against companies, by parallel representative and individual actions, can be prevented.

Compatibility with EU Law in other Respects

Decisions on representative actions may be legally binding on consumers without giving them the possibility of exercising their fundamental right to a fair hearing and other rights to take part in proceedings [Art. 47 CFR]. Without the requirement of an opt-in, their rights can even become the subject matter of proceedings without their knowledge which, in some Member States, contravenes the principle of party disposition. In addition, the calculation and distribution of damages proves difficult without an opt-in. Only where de facto nothing is taken away from the consumers, e.g. because an opt-in is hypothetical (low-value damage), it may be possible to justify an opt-out for reasons of effectiveness.

Impact on German Law

The Code of Civil Procedure, the German Civil Code and possibly the Court Costs Act must be amended. The new "model declaratory action" is not sufficient for implementation as the remedies in the Directive go further.

Conclusion

The expansion of the scope of representative actions strengthens the legal position of consumers and the principle of liability. Limiting legal standing to QuEs that comply with the requirements, as well as the restrictions on third-party funding, hinder a profit-orientated claims industry like that of the USA. The Directive is, however, disproportionate and thus unlawful because it fails to provide sufficient safeguards against abusive litigation. It should basically require an opt-in for consumers.