# The European Commission's Proposal for a Directive on Representative Actions:

# Proposed Amendments to Achieve Minimum Safeguards

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## 1. Introduction

The European Commission's Proposal[1] will create the first pan-EU consumer class action. The proposed system goes further than the broadest form of class action currently in existence in the EU. In some respects, it even exceeds the scope of the U.S. class action system. It also departs dramatically from the Commission's own 2013 Recommendation[2] on how collective redress mechanisms should be developed in the EU.

Fundamental doubts exist regarding the need for a court-based consumer class action system, the design of the system proposed, and the impact that such a system may have on European litigation systems and economies. Experience in other jurisdictions strongly points to the conclusion that the EU should not proceed with the system proposed without an important re-think.

The system proposed contains insufficient safeguards against abuses of consumer and business interests. As experience in other jurisdictions has shown, a combination of opportunity and financial incentive *inevitably* leads to opportunistic claims. Class action systems without adequate safeguards can create immense benefits for lawyers and funders (at the expense of defendants and the public legal system) without corresponding—or sometimes any—benefits to consumers. In short, inadequately safeguarded systems allow consumers' grievances to be exploited for profit by representatives, with actual redress for consumers becoming a peripheral consideration.

The Commission's Recommendation identified a series of safeguards to ensure that collective redress claims do not become abusive. Some of these safeguards include the capacity and expertise of qualified entities, admissibility standards, the loser pays principle, limitations on contingency fees, the necessity of the "opt-in" principle, and a ban on punitive damages. In many cases, the Commission's Proposal has not fully incorporated

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[1] Commission Proposal for a Directive of the European Parliament and Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

[2] 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 Commission's own recommended safeguards, leaving this instead to the discretion of the Member States. However, as the Commission has pointed out, the Member States have, to a large extent, failed to follow the Commission's Recommendation.[3] It therefore seems inevitable that the Member States will also not spontaneously follow the Commission's Recommendations in implementing any law based on this Proposal, resulting in safeguards existing unevenly across Member States, if they exist at all. Litigation by Qualified Entities will naturally gravitate—through forum shopping—to the Member States with the most lax restrictions, making the courts of those Member States the *de facto* arbiters of consumer harm awards for the rest of the EU. Member States that put safeguards in place will soon find their consumers becoming part of cases in courts in Member States with fewer restrictions. This renders futile their efforts to use their national laws to protect EU consumers.

The safeguards in the Recommendation are a critical minimum base, and must be mandated, though they represent only a part of what needs to be done to prevent abusive litigation.

In an effort to offer the most constructive assistance possible, this paper asks: "what are the *bare minimum* amendments required to leave the system in the Proposal intact, while including at least basic safeguards to reduce the incentives and means of abuse?" As such, this paper does not seek to address every Article of the Proposal, but instead offers concrete suggestions for amendments to the provisions that appear to be at the core of the Proposal's flaws.

## 2. Article 1 – Subject Matter

### *Proposal contents*

Article 1(2) provides that so long as Member States *also* put in place the mechanisms foreseen in the Proposal, they will be free to maintain – or even create new – mechanisms covering exactly the same subject matter though with entirely different procedures.

### *Issues with Proposal*

The Proposal would create a new system, which is on top of, not instead of, existing national systems (including existing collective redress systems).

As it is already possible to seek damages for breaches of the laws covered by the Proposal in every Member State—in many cases on a collective basis where the Member State rules

[3] Commission Report on the implementation of 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 (2013/396/EU). *See*, for example, Section 2.

permit that—the new system will coexist and overlap with (and not replace) pre-existing systems. The multiplicity of choices will likely lead to greater complexity and confusion, conflicts of laws, the prolongation of litigation, and an increase in litigation costs. Moreover, defendants will have no way to know when all claims in relation to an issue have been addressed.

Article 1(2) will create a procedural quagmire. The result would be the opposite of the harmonization foreseen (and offered as the justification for) the proposed Directive. For example, if the Proposal specifies a necessary safeguard, Article 1(2) would mean that any Member State would be free to adopt both the mechanism in the Proposal with the safeguard, and also a separate mechanism without the safeguard.

The result will be that the safeguards in the Proposal will become meaningless and ineffective. Profound differences in the systems at national level will continue. In the absence of harmonization on minimum safeguards, incentives for forum shopping will exist, alongside a lack of clarity and certainty for consumers, qualified entities and defendants. What is needed is a harmonized *minimum platform* of safeguards that all Member States must adhere to.

*Suggested amendments to Article 1*

| Commission Proposal | Proposed Amendments |
|---|---|
| **Chapter 1**<br>**Subject matter, scope and definitions**<br>*Article 1*<br>**Subject matter** | **Chapter 1**<br>**Subject matter, scope and definitions**<br>*Article 1*<br>**Subject matter** |
| 1. This Directive sets out rules enabling qualified entities to seek representative actions aimed at the protection of the collective interests of consumers, while ensuring appropriate safeguards to avoid abusive litigation. | 1. This Directive sets out rules enabling qualified entities to seek representative actions aimed at the protection of the collective interests of consumers, while ensuring appropriate safeguards to avoid abusive litigation. |
| 2. This 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. | 2. This 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, ***provided that any such procedural means contain at least equivalent binding safeguards and mechansims to those set out herein.*** |

## 3. Article 2 – Scope

*Proposal contents*

Article 2(1) provides that the Directive will apply to both domestic and cross-border infringements. It also states that the Directive will apply to breaches of the Union laws identified in Annex I that "harm or may harm the collective interest of consumers".

*Issues with Proposal*

The legal base and purported justification for the Proposal is harmonization of laws under Article 114 TFEU, and its rationale is to facilitate the exchange of products and services across the EU's borders by strengthening the legal remedies available to consumers. However, the application of the mechanism to purely domestic infringements bears no relationship at all to facilitating cross border trade.

The concept of "harm to the collective interest of consumers" is defined in Article 3 of the proposal as harm to the "interests of a number of consumers", which is nonsensical. The concept of "harm to the collective interest of consumers" is also defined in the CPC Regulation[4] (which also has Article 114 TFEU as is designed to harmonize consumer protections laws), as harm to the interests of a number of consumers that are affected by (i) intra-Union infringements (which has a definition requiring harm to those in other Member States), (ii) by widespread infringements (which has a definition requiring harm to those in at least two Member States), or (iii) by widespread infringements with a Union dimension (which has a definition requiring harm to consumers in at least two-thirds of the EU's Member States).[5]

There seems to be no rationale for the EU mechanism in the Proposal to apply to purely domestic consumer cases which have no EU dimension. Parallel EU legislation having the same purpose, using the same legal base and even using the same terminology is limited to cross-border cases only. Domestic cases should be excluded from the Proposal, and the Proposal should be limited to cross-border cases where consumer harm arises in at least two Member States as a result of the same infringement of EU law by a trader.

Furthermore, it is necessary for the mechanisms to be available only in cases that have a genuine cross-border nature, rather than being cross border in a merely theoretical or technical sense. An infringement harming one million consumers in France and one in Germany should not be treated as having a genuinely cross-border nature. It should not

[4] Regulation (EU) 2017/2394 of the Parliament and Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the CPC Regulation)

[5] CPC Regulation definitions at Article 3

be possible for parties to circumvent more suitable national mechanisms by contriving to locate or identify a single consumer in another Member State only to render EU law applicable. European competition law uses the concept of "appreciable" impact on cross-border trade as its jurisdictional threshold. Cases having an "appreciable" impact on trade between Member States may be assessed using EU law provisions, whereas cases not having that impact are assessed under national competition laws only.[6] A similar concept of "appreciability", which is already familiar to and routinely interpreted by the EU's Courts, is also suitable here.

There is no tension between the proposition that the safeguards created by the proposed Directive should also apply to national systems and domestic cases, whereas the EU's new collective redress system should apply to cross border cases only and not domestic cases. It is appropriate for a minimum threshold of consumer safeguards to impact national cases, whereas the need for a new EU-imposed mechanism is limited to cross-border cases only.

*Suggested amendments to Article 2*

| Commission Proposal | Proposed Amendments |
|---|---|
| *Article 2*<br>**Scope** | Article 2<br>**Scope** |
| 1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that harm or may harm the collective interests of consumers. It shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded. | 1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that ***appreciably*** harm or may harm the collective interests of consumers ***in at least two Member States***. It shall apply to ~~domestic and~~ cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded. |
| 2. This Directive shall not affect rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law. | 2. This Directive shall not affect rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law. |
| 3. This Directive is without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law. | 3. This Directive is without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law. |

[6] See Article 2.4 of Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty

## 4. Article 4 - who may sue?

### *Proposal contents*

According to the Proposal, an entity that wants to sue on behalf of consumers must apply to a Member State for inclusion in a list of "qualified entities." Member States must include an applicant on that list if it meets just three criteria: it is "properly constituted" (which seems to mean it legally exists); it has a "legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with" (not further defined); and it has a "non-profit making character" (Article 4(1)).

The Proposal specifies that consumer organizations and independent public bodies should be eligible to be qualified entities. Member States may also designate a qualified entity on an *ad hoc* basis for a particular representative action (Article 4(2) and (3)).

### *Issues with Proposal*

The purpose of the draft – to create a means for consumers to receive the redress that may be due to them – is uncontroversial. However, as drafted, the Proposal will fail to achieve its central purpose because (a) it will permit unsuitable entities to pursue damages claims, and (b) those entities will divert money away from consumers and into their own pockets.

It is essential that the concept of a qualified entity be reconsidered and narrowed, to ensure that only entities that genuinely represent the interests of consumers – and not their own interests – may pursue damages claims.[7]

One possible way to achieve this is to ensure that only public entities (i.e. entities that are publicly funded and supervised) have the power to pursue damages claims. For example, public consumer protection authorities and ombudsmen typically are motivated by genuine consumer protection concerns and have no profit motive due to their public funding. Every Member State is already required to appoint and recognize forms of "competent authority" (being "any public authority established either at national, regional or local level and designated by a Member State as responsible for enforcing the Union laws that protect consumers' interests") under the EU's CPC Regulation.[8]

If other bodies are permitted to pursue damages actions, it is essential that the scope for misuse and capture of the system is reduced to a minimum (although it can never be eliminated). With the possibility to seek damages on a collective basis comes immense power and a vast potential for profit. It is axiomatic that entities interested mainly in

7 Note that issues surrounding who may pursue injunctions also arise, though improper motivations are far more likely to become a factor when money damages are at stake.

8 See Footnote 4.

those profits will seek to become involved in any way the system permits. Only by plainly stating enhanced suitability criteria will the Proposal's apparent objective of limiting access to damages claims be achieved. The changes required include at least the following.

- The criteria in the Directive should be a minimum, with Member States free to require additional criteria if they see fit. No automatic right to become a qualified entity should derive from meeting the minimum criteria in the Directive.
- The concepts of "properly constituted" and "legitimate interest" must be expanded.
- Qualified entities should have a material connection with the Member State in which they seek designation to prevent "forum shopping" for designation.
- Additional requirements must be added regarding the entities' capacity, knowledge, experience, ability, its governance and incentive to conduct litigation (which by definition must exclude *ad hoc* litigation entities).
- A requirement that a qualified entity be "not for profit" is welcome though must be enhanced to address the critical point that (for profit) plaintiffs' 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.[9]

### *Suggested amendments to Article 4*

| Original Proposal | Proposed Amendment |
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| **Chapter 2**<br>**Representative actions**<br>*Article 4*<br>**Qualified entities** | **Chapter 2**<br>**Representative actions**<br>*Article 4*<br>**Qualified entities** |
| 1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list.<br><br>Member States shall designate an entity as qualified entity if it complies with the following criteria: | 1. Member States shall ensure that representative actions can ***only*** be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list.<br><br>Member States ~~shall~~ ***may*** designate an entity as a qualified entity if it complies with the following criteria, ***and such other criteria as the Member State may designate***: |

9 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 stichtingen are now commonly used as vehicles for major class action claims in the Netherlands.

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| (a) it is properly constituted according to the law of a Member State; | (a) it is properly constituted according to the law of a Member State ***regarding the suitability of damages litigation vehicles, and has its principal place of business and activity in that Member State***; |
| (b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with; | (b) its ***statutes, objectives, governance and history of protecting consumers demonstrate that it*** has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with; |
| (c) it has a non-profit making character. | (c) it is ***financially and functionally autonomous,*** has a non-profit making character ***and has no structural or contractual links with lawyers, funders, or other private entities that may benefit financially from any actions it may pursue;*** |
| | ***(d) it has sufficient expertise, resources and experience of representing the collective interests of consumers.*** |
| Member States shall assess on a regular basis whether a qualified entity continues to comply with these criteria. Member States shall ensure that the qualified entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph. | Member States shall assess on a regular basis whether a qualified entity continues to comply with these criteria. Member States shall ensure that the qualified entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph. |
| 2. Member States may designate a qualified entity on an ad hoc basis for a particular representative action, at its request, if it complies with the criteria referred to in paragraph 1. | ~~2. Member States may designate a qualified entity on an ad hoc basis for a particular representative action only if it complies with the criteria referred to in paragraph 1.~~ |
| 3. Member States shall ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State. | 3. Member States shall ensure that in particular consumer organisations and independent public bodies ***meeting the requisite criteria*** are eligible for the status of qualified entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State. |
| 4. Member States may set out rules specifying which qualified entities may seek all of the measures referred to in Articles 5 and 6, and which qualified entities may seek only one or more of these measures. | 4. Member States may set out rules specifying which qualified entities may seek all of the measures referred to in Article 5, and which qualified entities may seek only one or more of these measures |
| 5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the right of the court or administrative authority to examine whether the purpose of the qualified entity justifies its | 5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the right of the court or administrative authority to examine whether the purpose of the qualified entity justifies its taking action in a specific case in accordance |

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| taking action in a specific case in accordance with Article 5(1). | with Article 5(1). |

## 5. Article 6 - who do qualified entities represent and what and awards can they seek?

*Proposal contents*

A qualified entity can seek (i) an injunction, which is a declaration that the law has been broken (and should cease, if it has not already), and (ii) an order that damages should be paid.

According to the Proposal, the damages award could come in one of two forms (Article 6(3)):

- *"identifiable consumers"* awards: where the consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase, money can be awarded directly to those consumers, or

- *"small individual loss"* awards: where consumers have suffered a "small amount of loss" and it would be "disproportionate to distribute the redress to the consumers", money will be awarded not to consumers themselves but "to a public purpose serving the collective interests of consumers".

Alternatively, if a claim does not fit into either of these categories because the quantification of individual redress is complex (Article 6(2)), the court may choose not to award damages immediately. The court can instead issue a decision which will "irrefutably establish" that the law has been breached. Individual consumers can then seek damages in separate stand-alone, follow-on actions, based on that decision (in which the issue of breach will no longer be contestable).

As drafted, in all of the above cases, qualified entities will themselves select which consumers they claim to represent in lawsuits. In some cases, they will not need any agreement from (or will not even need to tell) the consumers it claims to represent.[10]

To seek damages, the Proposal states that a "Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued" (Article 6(1)). It will therefore be left to the Member States to decide

10 e.g., to seek an injunction, the Proposal specifies that the Qualified Entity will "not have to obtain the mandate of the individual consumers concerned" (Article 5(2)). This means the outcome of the injunction application can affect consumers without them knowing about the litigation.

whether a mandate for consumers is required. However, even if Member States want to require a mandate, the Proposal goes on to limit the possibility that a mandate could be required for both of the types of damages award the Proposal allows.

(a) Where the action is for an "identifiable consumers" award, the mandate of the individual consumers concerned will not be required to initiate the action. In other words, a qualified entity can always begin a damages action of this kind without needing any mandate whatsoever. Member States will be free to require a mandate at some later stage before the court reaches the decision or issues the redress order, but this requirement is not compulsory (and presumably some Member States will not include it in their systems).

(b) Where the action is for a "small individual loss" award, Member States will be *prohibited* from requiring that the Qualified Entity has a mandate from consumers. In other words, in at least these cases, the law would actively prohibit any system requiring a qualified entity ever to request a mandate from specific consumers.

### *Issues with Proposal (mandate)*

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 2013 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 a basic necessity 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 a damages claim on behalf of consumers without their knowledge or consent, and even against their strong and specific objections. Such a system would interfere profoundly with the personal freedoms and rights of consumers, as well as privacy issues. To exercise rights on behalf of consumers (without their mandate) qualified entities may still need to identify them, whereas under the EU's General Data Protection Regulation, information allowing the identification of individuals may not be used without their explicit consent, save in very limited circumstances.[11]

There is no similar system in the EU, the U.S., or any other developed country. While some systems can allow a presumption that consumers are included in a certain class for

[11] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

the purposes of an action, these consumers at least have the possibility to opt-out of that class if they so choose. However, this is not the case under the Proposal.

Furthermore, the Proposal permits cross-border claims by qualified entities on behalf of unspecified consumers (who might not themselves be aware of the claims), and no EU system exists to track which claims have been filed or are pending. While qualified entities require no mandate from consumers (and indeed it may be illegal in some cases to require a mandate) consumers will have no way of knowing which actions they are part of, qualified entities will have no way of knowing whether consumers are already included in another claim, defendants will have no way of knowing when they have satisfied all consumers' claims, and Courts will have no way to determine whether a consumers' issues are already being considered in another action. A myriad of overlapping and contradictory claims will be created. On the other hand, if qualified entities act only on behalf of those from whom they have a specific mandate, all parties will know who is included in what claim and these issues will be resolved. It is essential that any such mandates shall be exclusive in relation to the subject matter of the claim, so that consumers are not participants (willingly or otherwise) in multiple actions pursuing multiple damages in different contexts for the same harm.

In short, it is essential that the Proposal be adjusted to ensure a specific and exclusive "opt-in" in all cases.

### *Issues with Proposal (type of awards)*

The Proposal includes a specific category of damages claims where the consumers will not receive the damages. Instead, all of the money (after paying lawyers and investors) will be paid to "a public purpose serving the collective interests of consumers" (Article 6(3)(b)), defined simply as "the interests of a number of consumers" (Article 3(3)). In effect, the Proposal offers no clarity at all about exactly how this interest will be decided, or who should qualify; though it implies that even very narrow interests, benefitting only small numbers of individuals, could qualify, and that those interests need not even relate to the subject matter of the claim so long as they serve consumers' interests.

Payments of this kind will arise where individual consumers have suffered a small amount of loss (which is not defined) and it would be "disproportionate to distribute the redress" (which is also not defined).

This gives rise to several important problems. First, the Proposal sets out a system designed not to compensate consumers for any loss, but instead to punish the defendant. This is a significant departure from a core principle of EU damages systems, which are designed to ensure compensation of victims, and also the recitals of the Proposal itself, which notes (at recital 4) that punitive damages should be avoided. Second, the failure to define "small amount of loss" is a significant deficiency. It is precisely the cases where large numbers of consumers have small potential losses that are most attractive to

claimants' representatives, because of the attractions of a potentially large "pot" of compensation, without the inconvenience of consumers who are motivated to exert influence over what it purportedly done on their behalf. In 2017 a class action was filed by a U.S. law firm against Mastercard in London purporting to claim $18 billion on behalf of 46 million consumers (less than $400 each).[12] Would such a case be "small"? Would the same case seeking €5 for each consumer be "small" even though it would amount to a claim of €230 million, enough to bankrupt all but the largest companies? Furthermore, it should not be up to qualified entities to decide when an amount of loss is "small", thereby relieving them of the obligation to distribute any award to consumers. If parameters are not defined, and qualified entities are free to decide themselves which amounts are too small for distribution, there is a risk of consumers being deprived of compensation that they would be entitled to and glad to receive.

In any event, the problem this provision seeks to address is non-existent. It is neither expensive nor complicated to wire compensation directly to the accounts of willing consumers who have identified themselves and opted-in to a meritorious case. Even the distribution of very small amounts would impose no disproportionate burdens on either the consumers or trader.

The ability to direct damages to "a public purpose" is problematic. In the U.S., very significant issues have arisen with similar *cy pres* payments being improperly directed.[13] It occurs regularly that those pursuing claims seek to steer payments to causes they favour, or which reflect well on them (e.g. a public park named after them), leading to distorted incentives. Also, lawyers and funders will be highly motivated to design and bring "public purpose" claims because they may be guaranteed their percentage without a need to locate or identify any actual victims. There is even a danger that qualified entities might argue that their own activities are a qualifying public purpose, in effect meaning they could retain awards and pay nothing to consumers. It is essential to eliminate this misconceived "disproportionate to distribute" category of damages entirely.

Public enforcement is already addressed in the CPC Regulation, and so the Proposal should be limited to private actions designed to deliver restitution. As recognized in the Commission's own Recommendation[14], punitive damages have no place in a European system designed to deliver restitution, and so should be explicitly excluded.

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[12] See, *e.g.* https://www.competitionpolicyinternational.com/us-quins-emmanuel-to-revive-14b-mastercard-class-action/

[13] See, *e.g.,* For Some Class-Action Lawyers, Charity Begins and Ends at Home, Wall St. J., Mar. 22, 2018) https://www.wsj.com/articles/for-some-class-action-lawyers-charity-begins-and-ends-at-home-1521760032.

[14] Commission Recommendation, Article 31

## Issues with the Proposal (certification)

Contrary to the Commission's own Recommendation[15], the Proposal does not require that cases be verified at the outset for their admissibility and suitability to be pursued as collective actions. It also does not require a determination as to whether there are valid common issues to resolve or even whether the case appears to have any merit. Other jurisdictions with class actions (including the U.S.) have relied on detailed threshold "certification" criteria for years.[16] Far greater clarity on certification and admissibility criteria is needed. As it stands, the Proposal leaves the possibility of spurious or "blackmail" suits wide open, where manifestly unsuitable cases could be taken for the purpose of causing defendants cost and reputational damage to force them into a settlement. It is entirely insufficient to leave this critical safeguard to the discretion of Member States, which may or may not implement it.

### *Suggested Amendments to Article 6*

| Original Proposal | Proposed Amendment |
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| *Article 6*<br>**Redress measures** | *Article 6*<br>**Redress measures** |
| 1. For the purposes of Article 5(3), Member States shall ensure that qualified entities are entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued. | 1. For the purposes of Article 5(3), Member States shall ensure that qualified entities are entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. ***Redress orders shall be restitutional in nature, and punitive awards are excluded.*** ***In all such cases*** ~~A~~ Member State***s*** ~~may~~ ***shall*** require the ***specific and exclusive*** mandate of the individual consumers concerned before ***an action seeking a redress order may be initiated, and others joining the action may do so only upon presentation of an exclusive mandate, and up to the point of the first hearing of the substantive issues at the latest.*** ~~declaratory decision is made or a redress order is issued~~ |

[15] Commission Recommendation, Articles 8 and 9

[16] Plaintiffs seeking to certify a class in the United States under Federal Rule 23 must show: (1) adequate class definition; (2) ascertainability; (3) numerosity; (4) commonality; (5) typicality; (6) adequacy; and (7) at least one of the following: (a) that separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims; declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally; or (c) common questions predominate and a class action is superior to individual actions.

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| The qualified entity shall provide sufficient information as required under national law to support the action, including a description of the consumers concerned by the action and the questions of fact and law to be resolved. | The qualified entity shall provide sufficient information as required under national law to support the action, including a description of the consumers concerned by the action and the questions of fact and law to be resolved. ***Member States shall require that Courts verify at the earliest opportunity that qualified entities meet the necessary criteria, that suitable mandates have been provided, that cases are admissible, that funding arrangements are suitable, and that the claims present common issues that are suitable for resolution through collective actions.*** |
| 2. By derogation to paragraph 1, Member States may empower a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law listed in Annex I, in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex. | 2. By derogation to paragraph 1, Member States may empower a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law listed in Annex I, in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex. |
| 3. Paragraph 2 shall not apply in the cases where:<br>(a) consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase. In such cases the requirement of the mandate of the individual consumers concerned shall not constitute a condition to initiate the action. The redress shall be directed to the consumers concerned;<br>(b) consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, Member States shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers. | 3. Paragraph 2 shall not apply in the cases where:<br>(a) consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase. ~~In such cases the requirement of the mandate of the individual consumers concerned shall not constitute a condition to initiate the action.~~ The redress shall be directed to the consumers concerned;<br>~~(b) consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, Member States shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers.~~ |
| 4. The redress obtained through a final decision in accordance with paragraphs 1, 2 and 3 shall be without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law. | 4. The redress obtained through a final decision in accordance with paragraphs 1, 2 and 3 shall be without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law. |

## 6. Article 8 - Will lawyers, litigation funders and other intermediaries be allowed to take a share of damages awards?

### *Proposal contents*

Nothing in the Proposal prevents lawyers, third party litigation funders or other intermediaries from appropriating damages that might otherwise go to victims.

With regard to funding, the Proposal requires that a qualified entity "declare at an early stage of the action the source of the funds that it is going to use to support the action" and that the third party cannot "influence decisions of the qualified entity in the context of a representative action, including on settlements" (Article 7(1) and (2)).

### *Issues with Proposal*

The fundamental driver of abuse in every jurisdiction with class actions is the possibility for non-parties to reap profit from consumers' grievances. As has been seen time and again, it is plaintiffs' lawyers, claims managers, litigation funders and other intermediaries seeking to involve themselves that generates and drives litigation, and their business model is to generate fees and take the highest share they can of any damages available.

The Commission has repeatedly recognized that how actions are funded can have a direct bearing on why and how actions are pursued. The Recommendation was clear that contingency fees (where lawyers take cases for a percentage of the award) and the increasingly common phenomenon of third party funding (where an investor, such as a hedge fund or a private equity investor, provides money for a case in exchange for a percentage of the award) both present profound risks, and that it is necessary to heavily circumscribe them in collective cases. Increasingly case management companies, internet platforms, or other intermediaries also mass-market (often-unneeded) assistance or services to consumers to assist with the processing of claims, thereby claiming a percentage of the damages that would otherwise go to the consumer.

On third party funding, the Proposal requires sources of funding to be disclosed and prevents funders from influencing decisions. These limitations are welcome, but are inadequate in circumstances where—as the Commission acknowledges[17]—not one Member State has a system of regulation of third party funders. Disclosure will not automatically lead to the protection of consumers' interests unless Courts are guided towards the risks that arise in relation to funding, as many Courts may be unfamiliar with how these arrangements typically work. Equally, a prohibition on influencing decisions is insufficient unless the underlying relationship (such as possible ownership connections,

[17] *See* Commission Report on the implementation of 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 (2013/396/EU), at 2.1.6.

or promises of funding portfolios of cases) are also addressed, as it is these connections which dilute the fiduciary relationship the Qualified Entity might otherwise have with consumers.

What is required is an outright prohibition on funding of collective damages actions (whether by lawyers or third parties) for a stake in the "winnings." 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 fails, consistent with the principle of "loser pays". At a minimum, and while the EU considers a possible regulatory model, strict limitations in this Directive are required.

Equally, the Proposal says nothing at all about lawyers or other intermediaries (such as case management entities) acting for a percentage of an award, and this should be addressed.

Finally, the Proposal fails to include a simple basic minimum safeguard against abuse: the loser pays principle. This was recognized as essential in the Commission's own Recommendation and is universally recognized as a valuable deterrent against unmeritorious litigation, while also ensuring that consumers with valid claims do not need to bear their own legal costs.[18] The principle must extend to third party funders of litigation, as they should not be permitted to speculate on litigation only to disappear without consequence if the case they have supported proves meritless, potentially leaving qualified entities and consumers exposed.

### *Suggested amendments to Article 7*

| Original Proposal | Proposed Amendment |
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| *Article 7*<br>**Funding** | *Article 7*<br>**Funding, *Fees for Lawyers and Intermediaries and Costs*** |
| 1. The qualified entity seeking a redress order as referred in Article 6(1) shall declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail. | 1. The qualified entity seeking a redress order as referred in Article 6(1) shall declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action, ***and disclose to the Court and defendants the agreement setting out the terms on which the funding has been made available***. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail. |
| 2. Member States shall ensure that in cases where | |

[18] Commission Recommendation, Article 13

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| a representative action for redress is funded by a third party, it is prohibited for the third party:<br>(a) to influence decisions of the qualified entity in the context of a representative action, including on settlements;<br>(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant; | 2. Member States shall ensure that in cases where a representative action for redress is funded by a third party, it is prohibited for the third party:<br>(a) to influence decisions of the qualified entity in the context of a representative action, including on settlements;<br>(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;<br>***(c) to have any structural, ownership, sponsorship, debtor, mortgagee, means of direct or indirect control, or other relationship with the qualified entity other than a stand-alone contractual relationship in relation to the specific representative action for redress;***<br>***(d) to agree that compensation to the third party should be prioritized over compensation to consumers;***<br>***(e) to be compensated other than based on a proportion of the compensation actually delivered to consumers;***<br>***(f) to exclude their responsibility for adverse costs awards in the event that claims are unsuccessful, and***<br>***(g) to offer funding unless the third party is established in the EU and can demonstrate to the satsifaction of the Court that it has the necessary resources to meets its financial obligations.*** |
| 3. Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case. | 3. Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and ***4 and review the proportionality (in terms of effort, risk and expense) and fairness to consumers of any compensation paid to third party funders, lawyers or other intermediaries and adjust those arrangements including requiring*** ~~***accordingly require***~~ the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case.<br>***4. Neither lawyers nor other parties assisting or representing qualified entities, or assisting consumers as intermediaries, shall charge fees based on a proportion of any award or settlement amount.***<br>***5. Member States shall ensure that the loser pays principle applies so that the necessary*** |

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| | ***legal costs of the unsuccessful party are paid by the successful party.***<br><br>***6. Member States shall ensure that where adverse costs are awarded against a party, any third party funders that have supported the action shall also be responsible for those costs on a joint and several basis.*** |

## 7. Article 8 – Settlements

*Proposal contents*

Article 8 of the Proposal provides that Member States may provide that a qualified entity and a trader who have reached a settlement regarding redress for consumers can jointly request a court or administrative authority to approve it, but only if there is no other claim in existence. The same article allows courts to invite parties to settle at other stages if they so choose. All such settlements will be vetted for fairness by the courts.

The Proposal notes that individual consumers must always have the opportunity to decline the settlement that has been reached by the qualified entity representing them, and pursue their rights in other ways if they so choose.

*Issues with Proposal*

While the Proposal includes opportunities for courts to suggest settlements, it does little to incentivize the process of settlement itself.

The Proposal indicates in paragraph 1 that Courts may only approve settlements if there is no other action against the same trader in that Member State. This strongly discourages settlements, and could lead to a "Catch 22" in which all interested parties to two separate actions may wish to settle, but each would be prevented from settling by the existence of the other action. Where actions are "opt-in" there are fewer issues with overlapping actions in any case, so (assuming opt-in actions will be mandated) this prohibition on settlement is unnecessary.

The Proposal (Article 8(6)) says that all individual consumers may choose to accept the settlement or not, even though the settlement will have been negotiated on their behalf by the qualified entities purportedly best placed to protect their interests. Moreover, the settlement will be without prejudice to consumers' other rights to sue (Article 2(2)), so even if they settled, they could in some cases join another action or make another claim relating to the same facts.

As proposed, the mechanism fails to take account of the main reason defendants would want to settle: to achieve finality by putting the claims behind them. In other words, by offering a favorable settlement (instead of fighting claims) defendants hope to offer appropriate redress and end the dispute with the minimum cost, delay, disruption and harm to their customer relationships. These motivations are exactly aligned with the aims of the Proposal, and so settlements should be prioritized and incentivized.

Instead, as drafted, the Proposal would make it next to pointless to negotiate a settlement with a qualified entity, as they are not in a position to agree a settlement on behalf of those they are supposed to represent.

Furthermore, the Proposal does nothing to allow or incentivize a defendant to seek approval for a voluntary redress scheme which will apply not only to individuals who may already have been identified opted-in to the action, but also all similarly situated consumers. The conceptual framework for such a system already exists in the form of the Dutch *Wcam*[19] and the UK's Consumer Rights Act for competition claims.[20]

A possibility should exist for a defendant to volunteer a fair settlement scheme to all potentially affected consumers, and for the fairness of that scheme to be vetted and approved by the court. While it is acknowledged that some consumers may wish to opt-out of inclusion in that scheme and pursue their rights elsewhere, in the interests of finality the opportunity to do so must be time-limited. For those that do not elect to opt-out within the time limit determined, the court-approved compensation scheme should thereafter be the only compensation available in relation to the circumstances covered by the scheme.

### *Suggested amendments to Article 8*

| **Original Proposal** | **Proposed Amendment** |
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[19] As noted by the Commission itself in its 2012 Report to Parliament concerning the application of the Injunctions Directive "In The Netherlands, parties acting on behalf of consumers who have incurred damages can seek a declaratory judgment stating that an infringement has been committed by the party causing the damage. This declaratory judgment is considered to be an incentive for parties to reach a settlement, and to make the settlement binding through the use of the Dutch Class Actions Act (Wcam). Under the terms of the Collective Settlements of Mass Damages Act 2005, the Amsterdam court of appeal can make a settlement on mass damages between an entity representing collective interests and the person(s) causing the damages binding on all class members. The starting point is an agreement that seeks to compensate collective damages. The parties that have reached the agreement issue a joint request to the Amsterdam court to declare the agreement binding. Crucial to the Wcam is the fact that the entire group of victims is bound by the settlement agreement once the Court has declared the agreement binding. However, there is a possibility to 'opt out'.

[20] See Part I, Schedule 8 of the UK's 2015 Consumer Rights Act

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| *Article 8*<br><br>**Settlements** | *Article 8*<br><br>**Settlements** |
| 1. Member States may provide that a qualified entity and a trader who have reached a settlement regarding redress for consumers affected by an allegedly illegal practice of that trader can jointly request a court or administrative authority to approve it. Such a request should be admitted by the court or administrative authority only if there is no other ongoing representative action in front of the court or administrative authority of the same Member State regarding the same trader and regarding the same practice. | 1. Member States may provide that a qualified entity and a trader who have reached a settlement regarding redress for consumers who ***have chosen to be represented in the action and who have been*** affected by an allegedly illegal practice of that trader can jointly request a court or administrative authority to approve it. ~~Such a request should be admitted by the court or administrative authority only if there is no other ongoing representative action in front of the court or administrative authority of the same Member State regarding the same trader and regarding the same practice.~~ |
| 2. Member States shall ensure that at any moment within the representative actions, the court or administrative authority may invite the qualified entity and the defendant, after having consulted them, to reach a settlement regarding redress within a reasonable set time-limit. | 2. Member States shall ensure that at any moment within the representative actions, the court or administrative authority may invite the qualified entity and the defendant, after having consulted them, to reach a settlement regarding redress within a reasonable set time-limit. |
| 3. Member States shall ensure that the court or administrative authority that issued the final declaratory decision referred to in Article 6(2) is empowered to request the parties to the representative action to reach within a reasonable set time limit a settlement regarding the redress to be provided to consumers on the basis of this final decision. | 3. Member States shall ensure that the court or administrative authority that issued the final declaratory decision referred to in Article 6(2) is empowered to request the parties to the representative action to reach within a reasonable set time limit a settlement regarding the redress to be provided to consumers on the basis of this final decision. |
| 4. The settlements referred to in paragraphs 1, 2 and 3 shall be subject to the scrutiny of the court or administrative authority. The court or administrative authority shall assess the legality and fairness of the settlement, taking into consideration the rights and interests of all parties, including the consumers concerned. | 4. The settlements referred to in paragraphs 1, 2 and 3 shall be subject to the scrutiny of the court or administrative authority. The court or administrative authority shall assess the legality and fairness of the settlement, taking into consideration the rights and interests of all parties, including the consumers concerned. |
| 5. If the settlement referred to in paragraph 2 is not reached within the set time-limits or the settlement reached is not approved, the court or administrative authority shall continue the representative action. | 5. If the settlement referred to in paragraph 2 is not reached within the set time-limits or the settlement reached is not approved, the court or administrative authority shall continue the representative action. |
| 6. Individual consumers concerned shall be given the possibility to accept or to refuse to be bound by settlements referred to in paragraphs 1, 2 and 3. The redress obtained through an approved settlement in accordance with paragraph 4 shall be without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law. | 6. Individual consumers concerned shall be given the possibility to ~~accept or to~~ refuse to be bound by settlements referred to in paragraphs 1, 2 and 3 ***within a limited time period, not to exceed 2 months. Consumers who do not so refuse shall be bound by the settlement***. ***Approved settlements shall be subject to the principle that it shall be prohibited to raise any claims of fact or law on behalf of a consumer that has already been advanced on*** |

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| | ***behalf of the same consumer by any party in another procedure, irrespective of the outcome of that procedure.***<br><br>7. ***A trader that has reached a settlement in relation to an action in accordance with paragraph 6 may apply to the court to have a voluntary redress offer made generally available to all similarly situated consumers (including those that had not opted to be represented in the previously settled action) within that court's Member State who may have been harmed by the same facts and circumstances. Subject to the directions of the court regarding adequate notice to those consumers, they shall be given the possibility to refuse to accept the compensation offer made available, and reserve their rights to pursue other remedies. The possibility to so refuse shall be exercised within a limited time period, not to exceed 3 months. Where consumers do not so refuse, they shall be entitled to avail of the redress offer if eligible, though all other rights to pursue actions arising from the same subject matter of the redress offer shall lapse.*** |

## 8. Article 13 – Evidence and Discovery

### *Proposal contents*

Article 13 of the Proposal would require Member States to create a disclosure (or discovery) system, allowing evidence in the control of defendants to be delivered to claimants to assist with claims. The system would be subject to national procedural rules.

### *Issues with Proposal*

In some jurisdictions, evidence requests in class actions are so intrusive and expensive that the risk of having to produce such documents can itself trigger a settlement (regardless of the merits of the underlying case). This, in turn, can trigger lawsuit abuses with cases designed only to get to the discovery stage in the hope of extracting "nuisance" settlement payments. It is therefore critical that any disclosure system be balanced, and that it contains strict limits and safeguards. These minimum safeguards should be uniform across Member States to prevent choices of jurisdiction based on which jurisdiction can cause the most inconvenience and expense to defendants.

The safeguards should limit the information available to that, which is necessary, proportionate and reasonably obtainable in all the circumstances, subject to the supervision of the Courts.

The EU's 2014 Competition Damages Directive[21] also foresees a disclosure system, but 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." In addition, the Competition Damages Directive insists that discovery be subject to basic legal norms, including the right to be heard, and the respect for legal professional privilege. These limitations curtail the scope for abuse while still permitting the objective of disclosure to be obtained. They should be replicated in the Proposal.

In addition, there can be circumstances in which defendants need reasonable discovery from claimants in order to mount a defense or explore the validity of claims. There is no reason why discovery should be available to one side of litigation only.

### *Suggested amendments to Article 13*

| Original Proposal | Proposed Amendment |
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| *Article 13*<br>**Evidence**<br>Member States shall ensure that, at the request of a qualified entity that has presented reasonably available facts and evidence sufficient to support the representative action, and has indicated further evidence which lies in the control of the defendant, the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by the defendant, subject to the applicable Union and national rules on confidentiality. | *Article 13*<br>**Evidence**<br>Member States shall ensure that, at the request of a qualified entity that has presented reasonably available facts and evidence sufficient to support the representative action, and has indicated further evidence which lies in the control of the defendant, the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by the defendant, subject to the applicable Union and national rules on confidentiality. ***Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.*** |

[21] 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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| | ***Orders pursuant to the foregoing shall be limited to specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:***<br><br>***(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;***<br><br>***(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure***<br><br>***(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.***<br><br>***Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.***<br>***Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.*** |

## 9. Articles 11 and 16 – limitation periods and cross border claims

*Proposal contents*

Article 11 foresees that the submission of a representative action shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned.

Article 16 foresees that qualified entities from one Member State shall be free to pursue actions in other Member States on behalf of consumers from any Member State.

*Issues with Proposal*

Two fundamental issues make the Proposal unworkable in its present form.

First, the Proposal (Articles 5 and 6) foresees the possibility of qualified entities representing consumers without those consumers having given a mandate. By definition, if no mandate is given, the consumers represented will be unaware of actions taken in their name. In addition, the qualified entities representing consumers will not know precisely who they represent, courts will have no way of knowing who is included in an action, and defendants also will not know which consumers are already included in actions.

Second, there is no mechanism or database which allows the existence of claims to be known.

For these reasons, in the event of a consumer harm situation, nothing in the Proposal would prevent multiple qualified entities from suing in multiple Member States in relation to the same harm on behalf of the same consumers. This could either be intentional, or entirely inadvertent, as neither courts, nor qualified entities, nor consumers, nor defendants will have any means to establish which claims have been filed, who is included in which claim, or who is included in any order or decision regarding any claim. The principle of *res judicata* would simply be impossible to apply.

In relation to Article 11 (limitation periods), according to the Proposal, when an action is taken on behalf of consumers this will suspend or interrupt the limitation period for <u>any</u> redress actions for the consumers concerned, without any ability to know who those consumers may be. This suspension increases the risk of a multiplicity of overlapping and competing claims. As it will be impossible to know which consumers are implicated by which claims, it will become impossible to know which limitation periods will apply to which consumers, or when any claims are finally extinguished.

The "passporting" possibility for qualified entities (*i.e.,* where recognition in one Member State implies near automatic rights to pursue actions in other Member States) only exacerbates the problem, as the existence of claims will not be discernible simply by checking (if possible) whether the qualified entities in a Member State have filed any claims. Instead, this could only be established by checking whether any of the qualified entities in the EU had filed a claim in any court in the EU. As above, no EU claim registration system exists, so this would be an impossible task.

The only solution to the risk of multiple overlapping claims is to ensure that claims can only be taken on an opt-in basis, with a specific and exclusive mandate given by each implicated consumer to one qualified entity only, and an obligation for that qualified entity to disclose at the outset the consumers is represents.

In addition, the "passporting" proposition, coupled with the possibility that some Member States may have more lax qualification criteria, creates the risk of qualified entities establishing themselves in one more lax jurisdiction with the real intention of pursuing claims in other jurisdictions, thereby bypassing any more stringent criteria that may exist in those latter Member States, i.e., forum shopping for recognition as a qualified entity, as a precursor to forum shopping for litigation opportunities.

*Suggested amendments to Articles 11 and 16*

| Original Proposal | Proposed Amendment |
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| *Article 11*<br>**Suspension of limitation period**<br>Member States shall ensure that the submission of a representative action as referred to in Articles 5 and 6 shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned, if the relevant rights are subject to a limitation period under Union or national law. | *Article 11*<br>**Suspension of limitation period**<br>Member States shall ensure that the submission of a representative action as referred to in Articles 5 and 6 shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers ~~concerned~~ ***who have given an exclusive mandate to a qualified entitiy to be represented in that action***, if the relevant rights are subject to a limitation period under Union or national law. |
| *Article 16*<br>**Cross-border representative actions**<br>1. Member States shall take the measures necessary to ensure that any qualified entity designated in advance in one Member State in accordance with Article 4(1) may apply to the courts or administrative authorities of another Member State upon the presentation of the publicly available list referred to in that Article. The courts or administrative authorities shall accept this list as proof of the legal standing of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case.<br>2. Member States shall ensure that where the infringement affects or is likely to affect consumers from different Member States the representative action may be brought to the competent court or administrative authority of a Member State by several qualified entities from different Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different Member States. | *Article 16*<br>**Cross-border representative actions**<br>1. Member States shall take the measures necessary to ensure that any qualified entity designated in advance in one Member State in accordance with Article 4(1) may apply to the courts or administrative authorities of another Member State upon the presentation of the publicly available list referred to in that Article. The courts or administrative authorities shall accept this list as proof of the legal standing of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case.<br>2. Member States shall ensure that where the infringement affects or is likely to affect consumers from different Member States the representative action may be brought to the competent court or administrative authority of a Member State by several qualified entities from different Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different Member States ***who have given an exclusive mandate to a qualified entity to be included in such an*** |

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| | ***action***. ***In such circumstances, a consolidated list of all of the consumers who have given such an exclusive mandate and who are represented will be provided to the court and to the defendant at the commencement of an action.*** |
| 3. For the purposes of cross-border representative actions, and without prejudice to the rights granted to other entities under national legislation, the Member States shall communicate to the Commission the list of qualified entities designated in advance. Member States shall inform the Commission of the name and purpose of these qualified entities. The Commission shall make this information publicly available and keep it up to date. | 3. For the purposes of cross-border representative actions, and without prejudice to the rights granted to other entities under national legislation, the Member States shall communicate to the Commission the list of qualified entities designated in advance. Member States shall inform the Commission of the name and purpose of these qualified entities. The Commission shall make this information publicly available and keep it up to date. |
| 4. If a Member State or the Commission raises concerns regarding the compliance by a qualified entity with the criteria laid down in Article 4(1), the Member State that designated that entity shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with. | 4. If a Member State or the Commission raises concerns regarding the compliance by a qualified entity with the criteria laid down in Article 4(1), the Member State that designated that entity shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with. |
| | 5. ***Qualified entities shall be required to be designated in the Member State of their principal place of business and activity, and Member States shall facilitate the transfer of designations where appropriate, subject always to compliance with any criteria applicable in the Member State to which the qualified entity transfers.*** |

## Conclusion

On 25 January 2018, the Commission committed to "further promote the principles set out in the 2013 Recommendation across all areas, both in terms of availability of collective redress actions in national legislations and thus of improving access to justice, and in terms of providing the necessary safeguards against abusive litigation."[22]

Just three months later, it has issued a Proposal that abandons some of the safeguards in its Recommendation and—in one respect (adherence to the critical opt-in principle)—would make it contrary to EU law for the Member States to follow the Recommendation.

Unless the amendments set out in this paper are included as a minimum, a significant risk of chaos, ineffectiveness and abuse will remain.

[22] See Commission's Implementation Report, page 20 (emphasis added).