

# ECOMMERCE EUROPE POSITION PAPER

## Policy recommendations New Deal for Consumers Package - Part II Proposal on Representative Actions

October 2018



## INTRODUCTION

On 11 April 2018, the European Commission proposed two Directives that constitute the “New Deal for Consumers”, namely:

- A proposal to amend the [Council Directive on unfair terms in consumer contracts](#), the [Directive on consumer protection in the indication of the prices of products offered to consumers](#), the [Directive concerning unfair business-to-consumer commercial practices](#) and the [Directive on consumer rights](#). The Commission’s aim is to ensure better enforcement and to modernize EU consumer protection rules, in particular in light of digital developments;
- A proposal on representative actions for the protection of the collective interests of consumers and repealing the [Injunctions Directive 2009/22/EC](#). The Commission’s aim is to improve tools for stopping illegal practices and facilitating redress for consumers where many of them are victims of the same infringement of their rights, in a mass harm situation.

This position paper covers only the second proposed Directive, on representative actions for the protection of the collective interests of consumers.

In general, Ecommerce Europe calls on EU institutions to shape a fair, balanced and efficient civil justice system for dealing with mass consumer complaints in Europe. In its view, playing by the same rules is a common interest shared by consumers and businesses. In this perspective, Ecommerce Europe’s has fully supported the European Commission’s efforts on:

- The Consumer Protection Cooperation (CPC) Regulation, in which the European Union has developed the right approach for public enforcement of infringements of consumer law and serious cross-border infringements.
- The adoption of the ADR Framework Directives and the ODR Regulation, which has enhanced redress for consumers by fostering out-of-court settlement;
- The 2013 Recommendation on Collective Redress in which the Commission recognized the potential for abuse of court based collective redress and developed a useful if not comprehensive set of safeguards against such abuse.

With the proposed Directive on Representative Actions, the Commission aims to facilitate EU-wide collective injunction and redress actions based on a repealing of the Injunctions Directive. Ecommerce Europe wants to bring to the attention of European policymakers 10 important issues regarding this proposal:

1. **It focuses too much on the collective litigation model**
2. **It creates conflicts with existing and functioning national collective redress systems**
3. **It does not contribute to the harmonization of collective consumer redress**
4. **It lacks essential and comprehensive safeguards to avoid abuse or malfunctioning**
5. **It increases legal uncertainty**
6. **It provides for counterproductive and undesired rules on settlements**
7. **It has no equality of arms for parties involved on costs of informing the public**
8. **The final redress order is not fit for mass compensation for loss or damages**
9. **Opt-in and opt-out and the relation between collective and individual redress**
10. **There is no proven need for fines in a collective redress system.**

After having assessed the proposal, Ecommerce Europe came to the conclusion that the proposed Directive certainly provides for an EU-wide collective civil or administrative court action for qualified entities that can seek injunction and redress orders. However, the proposal is missing essential provisions regulating the interaction/collision of the proposed collective court action with, on the one hand, existing national mass redress systems and, on the other hand, individual consumer redress rights, providing only minimal harmonization and minimal safeguards to avoid abuse and malfunctioning, no rules for competence and applicable law in case of cross-border action and only minimal, often unclear and confusing or conflicting rules. The proposal would have a fundamental impact on basic principles such as subsidiarity, legal certainty, procedural effectiveness and efficiency for consumers, businesses and the legal procedural rules of Member States.

In the view of Ecommerce Europe, the complexity of the issues raised here, as well as the need to build a coherent and harmonized civil redress system architecture in Europe, are not efficiently addressed by this proposal. Fundamental questions on several basic issues of collective court action are not answered or taken into account, which makes Ecommerce Europe advise the European legislators to fundamentally rethink and redesign the whole proposal. All the above-mentioned arguments are further developed below.

## FUNDAMENTAL ISSUES RELATED TO THE PROPOSAL

### 1. Too much focus on the collective litigation model

The proposal (article 5) is focused on introducing a collective litigation model for injunctions as well as collective remedies for consumers in case of collective infringements of European Consumer Law. By focusing on the litigation model, in the view of Ecommerce Europe, the proposal fails to integrate in a balanced way alternative mass redress models like ADR, Ombudsman or similar bodies and regulatory redress systems that have proven to be very successful and effective to solve mass consumer redress needs. In comparison with alternative collective redress mechanisms, class litigation before courts or administrative authorities is not the best system because it is complex, costly, lengthy and open to abuse and it does not have any significant impact on market behavior.

Empirical legal research shows that ADR in its myriad forms, Ombudsman or similar bodies and regulatory redress, whether in combination or separately, score significantly higher on effective redress criteria<sup>1</sup>. The Commission has acknowledged this point in its Inception Impact Assessment of October 2017 (A New Deal for Consumers – revision of the Injunctions Directive, EC 31 October 2017, p. 6). Despite that, the proposal is only focusing on in-court litigation of mass redress claims and thus providing no incentives for Member States to improve their collective redress systems towards more efficient and effective systems. That is why Ecommerce Europe calls on the EU legislators to widen the focus of the proposal to alternative mass redress systems that have proven to be effective and integrate them in a balanced way in the text.

Furthermore, focusing on collective litigation does not take into account that the proposed collective litigation model can easily conflict with alternative mass redress models like ADR, Ombudsman and similar bodies or regulatory redress systems, for instance on priority/hierarchy of coexisting collective redress models and on the relation between outcome and decisions made in different coexisting collective systems. The proposal does not give any solutions to solve the most common conflicts and it

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<sup>1</sup> Redress criteria: consumer advice; identification of infringement and harm; identification of people harmed, investigation of individual complaints; establishing infringements and redress where it is due; access; low costs; short duration; better outcome: not only compensation, but also changed behavior of the infringing party; and constant interaction via interfaces (virtuous feedback loops) with regulators.

does not provide for such conflict rules, thus leaving the regulation of this issue to the discretion of the Member States, which will undoubtedly not contribute to further harmonization of such conflict rules. That is why Ecommerce Europe calls on the EU legislators to provide for more guidance and basic principles in case of coexisting different mass redress systems.

## **2. Conflicts with existing and functioning national collective redress systems**

Basically, the Member States will have to provide in their national legal systems for a collective court action or a collective administrative authority action for qualified entities. The proposal obliges Member States to adopt court or administrative court based collective litigation mechanisms that will be in addition to their own redress systems.

Some Member States, in particular the Nordic countries, have already developed sophisticated redress systems based on a regulatory approach and ombudsmen. Others, in particular Austria and Germany, have developed effective (preliminary and permanent) injunction systems. Most likely, Member States will not change their existing and functioning national collective redress systems. Thus, Member States will either integrate this collective court action in existing similar collective redress mechanism or will have to create new provisions to ensure such collective actions. This inevitably leads to duplication of systems and an increased complexity on a national level, since Member States will have to ensure coherence of their national civil justice system.

In the view of Ecommerce Europe, it is obvious that the integration of the proposed collective court action will lead to conflicts, for instance on penalties and fines (article 14), with existing and functioning national collective redress systems (see also point 1). However, the proposal does not provide for any guidance or solutions for these potential conflicts between the existing systems and the newly proposed court and administrative redress actions. Thus, Member States have to provide for their own solutions, which will lead to complex and different national rules on this subject and will not contribute to a uniform EU Single Market. This will ultimately hamper cross-border trade. That is why Ecommerce Europe asks the EU legislators to take this issue explicitly into consideration and provide for guidelines or basic principles on how to cope with these potential conflicts.

Furthermore, although the proposal is supposed to deal with protection of consumers, in the view of Ecommerce Europe this Directive basically deals with civil or administrative procedure legislation. That is why Ecommerce Europe questions the Union's legislative competence on this matter and would like to invite the Commission to explicitly justify the legislative competence on Member States' civil or administrative procedure legislation.

## **3. Hardly no contribution to harmonization**

The proposal provides for a basic framework with the fundamental and general obligation for Member States to provide for collective civil or administrative court action in which qualified entities can seek an (interim) injunction order, a redress order or a declaratory decision on liability. The provisions of the proposal are not detailed, and it is up to the Member States to integrate these obligations in their national law systems. EU countries are basically free to decide on how to fill in crucial details because the proposal lacks guidelines, detailed provisions or safeguards.

There are especially, amongst others:

- No detailed criteria – in particular on sustainability, resources and (legal) expertise - for recognition of Qualified Entities (QE) (art. 4.1);

- No detailed admissibility standards with regard to certification of QE's especially QE's requesting on ad hoc basis (art. 4.2);
- The right for Member States setting out rules specifying which Qualified Entities may seek all of the measures (injunction order and redress order) and which may only seek limited measures (art. 4.4);
- No provisions on appeal and revision of the court's decision;
- No provisions for conflicting coexisting collective redress systems or conflicting similar ongoing representative actions;
- Freedom of choice for Member States to require a mandate or not of the individual consumers concerned before a declaratory decision is made or a redress order is issued (article 6.1);
- Freedom of choice for Member States to allow courts to issue a declaratory decision regarding liability of the trader instead of a redress order (art. 6.2);
- Freedom of choice for Member States to allow parties having a settlement approved by court (art. 8.1);
- No guidelines on necessary measures to ensure due expediency (art. 12.1);
- No specific rules on the allocation of the costs of the procedure;
- No choice for opt-in or out-out for consumers.

It will thus be up to the Member States to adopt appropriate provisions in their national law at their own discretion. This will lead to individually different national collective redress systems and will not contribute to transparency nor to the harmonization of the EU Single Market. Especially in cross-border cases or cases where consumers of different nationalities are involved, it will consequently lead to forum shopping. That is why Ecommerce Europe asks EU policymakers to provide for more guidance, clear provisions and recommendations to establish more uniformity, consistency and congruence in the way Member States should integrate the obligations of the proposed directive.

#### **4. Missing essential safeguards**

The proposal misses essential and comprehensive safeguards as proposed in the European Commission's 2013 Recommendation on Collective Redress to avoid abuse or malfunctioning of the collective redress system. The proposal provides only for a few of the 2013 Recommendation's guidelines on safeguards. Amongst others, the following safeguards are missing:

- Detailed criteria for recognition of Qualified Entities (QE), in particular as to sustainability and resources / (legal) expertise;
- Admissibility standards with regard to certification process;
- "Loser pays" principle;
- Opt-in principle;
- Explicit ban on punitive damages;
- Practical limitations on the provision of third party litigation funding;
- Limitations on lawyers' contingency fees;
- Registry of collective redress actions;
- Duty to cautiously inform consumers concerned on initiated/pending cases;
- Information obligation to defendant about the composition of the claimant party and about any changes therein;
- Possibility for consumers to join the claimant party for their own benefit in the most likely practical cases;
- Suspension of limitation from attempt of ADR until at least the moment one party withdraws;

- Ensuring consistency between final decision of public authority and outcome of collective redress action.

It will thus be at the discretion of the Member States to adopt the missing safeguards or not. The Commission, in its Report<sup>2</sup> published on 26 January 2018 on the state of adoption of the 2013 Recommendation, recognized that Member States adopted the safeguards recommended by the Commission in varying degrees and to different effects. One of the main reasons for this varying adoption was the non-binding character of the Recommendation. This varying adoption level has brought various levels of safeguards in the national legal systems, which invite for forum shopping in cross-border cases and did not contribute to harmonization of the internal market.

In the view of Ecommerce Europe, there will be only a limited chance that Member States will adopt the most important safeguards in a harmonized, consistent and congruent way unless they are obliged to do so. That is why Ecommerce Europe suggests EU policymakers to include in the proposal the missing safeguards in a binding way and, thus, make all Member States adopt them and contribute to further harmonization in the Single Market.

## 5. Increasing legal uncertainty

The proposal is overall unclear and does not give congruent answers or guidance on several basic legal and procedural questions related to collective court action such as:

- On the procedural aspects of getting registered as Qualified Entity;
- On the level of leeway Member States have in respect to denial of registration requests;
- On procedural aspects as jurisdiction, competence in conflicting collective redress systems (*ne bis in idem*), execution of redress orders, competence of courts in case of similar pending collective actions on the same infringement and the relation between collective redress order and individual redress rights;
- On similar pending public enforcement and private collective civil or administrative court actions;
- On cross-border and international aspects of cross-border mass redress like jurisdiction, applicable law, execution of redress orders and how to deal with similar pending procedures on the same infringement.

The proposal raises several technical issues regarding jurisdiction and enforcement not only in the case of cross-border infringements but also for any case where one or more QEs (possibly in competition with each other) decide to try to launch cases based on similar facts in the same or different Member State(s) concurrently. If multiple QEs launch actions (absent an opt-in system to identify the plaintiff parties) in several Member States, there is uncertainty as to which court will be competent, which procedure will bring finality and which law will be applicable. The Brussels and Rome Regulations on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters and on the applicable law do not address collective (“mass”) claims and do not deal with administrative court procedures.

Ecommerce Europe strongly believes that the absence of clear rules in the proposal on how to identify the aggrieved consumers and their individual harm or loss and the lack of clarity on jurisdiction and applicable law, will lead to limited incentives for companies to settle matters, as they can be subject to further individual or collective redress actions on the same infringement brought under the proposal or on the basis of National law, despite the settlement.

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<sup>2</sup> [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=612847](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847)

As it is also unclear how national courts will deal with similar pending public enforcement and private civil or administrative court actions, Ecommerce Europe believes that the stringent cross-border architecture already developed via the CPC-Net, where Member States are asked to appoint one single public authority as point of contact, is at risk by the introduction of yet another layer of complexity and conflict between private and public entities.

In the view of Ecommerce Europe, the above-mentioned issues need to be addressed in the proposal in a congruent way to avoid an increased level of legal uncertainty on basic principles of collective injunctions and redress actions and their interplay with public enforcement and coexisting mass redress systems. In this way, it will also be avoided that individual national civil and administrative courts have to answer those questions on the basis of their own national procedural law rules, which would consequently not contribute to more uniformity and harmonization of the Single Market.

## **6. Counterproductive and undesired rules on settlements**

The proposal permits Member States to allow a Qualified Entity and the traders to jointly request a court or administrative authority to approve a settlement regarding redress for consumers affected by an allegedly illegal practice of the trader (art. 8.1), provided that there is no pending collective action on the same practice. It also empowers the court or administrative body to invite parties to settle at any moment within the representative action (art. 8.2) or to settle on redress after a declaratory decision on liability of the trader for an infringement (art. 8.3). In all such cases, a settlement shall be subject to the scrutiny of the civil or administrative court assessing the legality and fairness of the settlement. Consumers will have the possibility to accept (opt-in) or to refuse (opt-out) to be bound by the settlement. If they accept the redress obtained through such an approved settlement (either by opt-in or not opting-out), it will be without prejudice to any additional right to redress that the concerned consumer may have.

In the view of Ecommerce Europe, the proposal does not provide for optimal incentives for parties and especially traders to settle, which would be the most preferable, fastest and cheapest way to solve the impact of “mass” infringements, to repair the relation between the trader and the involved consumers and to eventually compensate for individual harm or loss. In that perspective, the proposal misses a clear incentive to give a settlement a chance before starting the collective court action, which means that a qualified entity should not be admissible to the court action if it did not give the trader a reasonable time to satisfy its claims on the alleged infringement and come to an out-of-court settlement.

Ecommerce Europe strongly believes that it should be fundamentally at the discretion of parties involved to what they agree in a settlement. Equally, the decision to request court approval (and scrutiny on legality and fairness) of the settlement or not, should be at the discretion of parties, especially considering the risk that courts would disapprove the settlement. Automatic court approval will furthermore not be an incentive for traders to come to such a settlement. In that perspective, Ecommerce Europe does not support the proposed provision in article 8.4 and it strongly advises to make the approval of the settlements meant in article 8.2 and 8.3 subject to a joint request of the trader and the qualified entity.

Ecommerce Europe is also concerned about the provision in article 8.6 on the non-binding character of settlement in relation to any additional individual consumer rights. It is hard to understand that a consumer who has chosen to opt-in or not to opt-out for the collective redress result that the settlement offers, should automatically and despite the fact that he has chosen for the settlement result, have the right to hold the trader that has settled as liable, or sue him in another court action with additional redress claims on the same infringement. This automatic right will not stimulate traders to settle with the qualified entity as they know that they still might face additional redress claims from individual consumers that

accepted the outcome of the settlement and they prefer the settlement to be a final solution for all that consumers that opt-in or do not opt out. In fact, it should be allowed as part of the deal that consumers that opt-in or do not opt out lose their eventual further rights on the same infringement.

To stimulate settlement in mass redress cases, Ecommerce Europe strongly advises EU policymakers to limit the provision of article 8.6 to those consumers that opted-out or did not opt-in to the redress result of the settlement.

## **7. No equality of arms on information costs**

The proposal does not provide at all levels of the court procedure for the essential equality of arms for both parties involved in the court or administrative action. Ecommerce Europe is especially concerned about the provisions in article 9.1 on the costs of informing the public on the outcome of the procedure or approved settlement.

Article 9.1 requires the trader to inform at his expenses affected consumers on the final outcome providing for redress measures and of the approved settlements. This is a logic provision facilitating qualified entities in case the court comes to an injunction or redress order. In the view of Ecommerce Europe and in the perspective of the basic procedural principle of equality of arms for both parties involved in the procedure, it would equally be logic that the provision covers cases where the court or administrative body will deny partially or in whole the qualified entities claims, or when the court comes to the conclusion that there is no infringement that entitles to such claims.

That is why Ecommerce Europe pleads for a revision of article 9.1 facilitating the trader in the same way, requiring the qualified entity to inform alleged affected consumers at its expenses on the outcome of the court procedure. As the allocation of the costs of informing the public can be part of the approved settlement, Ecommerce Europe also pleads for an exception on the provision of article 9.1 in case the approved settlement provides for another solution on the allocation of costs of informing the public.

## **8. Individual character of harm and loss makes it unfit for final compensation order**

In the proposal, mass compensation for loss or damages as result of an infringement should in general be dealt with by way of a final redress order and should only exceptionally and when provided for by the involved Member State be dealt with by way of issuing a declaratory decision. In the view of Ecommerce Europe, this is fundamentally wrong and should be the other way around, as loss and damages - in practically all mass infringement cases that cause harm or loss - will be individual and thus not suited to be dealt with before the final redress order on compensation can be given. For effectiveness and time reasons, the assessment of individual harm or loss should not be done by the court in the procedure establishing liability for such harm or loss. In that perspective Ecommerce Europe pleads for a fundamental rule that compensation in mass claim actions shall only be allowed by way of a declaratory court decision, unless the individual harm or loss is equal for all consumers or, by its nature, is fit to be assessed by courts easily and within a reasonable time.

## **9. Opt-in or opt-out and relation to additional individual redress rights**

Article 6.4 does not give a clear answer on whether the individual consumer concerned is automatically bound by the final court redress order or not, and on the question whether he can exclude himself from the effects of the collective court order by means of a possibility to opt-in or to opt-out. A strict interpretation of the wording of article 6.4 seems to suggest that the final decision is binding for all concerned consumers without them having a possibility to opt-out or opt in. As Ecommerce Europe considers an action right on collective redress always subsidiary to the consumers individual redress

right, it will not support a provision that does not provide explicitly for an opt-in or opt-out possibility for consumers concerned to accept or to refuse - within a reasonable period after the court decision became final - to be bound by the final court decision on redress.

Furthermore, as already mentioned in point 6, Ecommerce Europe does not support the provision in article 6.4 and article 8.6 on the non-binding character of redress obtained through a final civil or administrative court order or a settlement in relation to any additional individual consumer rights. It is hard to understand that a consumer that has chosen to opt-in or not to opt-out for the collective redress result the court order or the settlement offers, should automatically and despite the fact that he has chosen for the court order or settlement result, have the right to hold the trader that is subject to the court order or has settled, liable or sue him in another court action with additional redress claims on the same infringement. In that perspective, Ecommerce Europe will only support these provisions when they are limited to those consumers that opted out or did not opt-in to the redress result of the settlement.

## **10. No proven need for fines in a collective redress system**

Article 14.2 of the proposal on penalties obliges Member States to ensure that penalties for non-compliance with final court decisions issued in collective actions may take the form of fines. First of all, the provision is unclear because, on the one hand, it is mandatory considering the wording "Member States shall ensure" while, on the other hand, it is voluntary, considering the wording "may take the form of fines".

Furthermore, Ecommerce Europe does not see any need for the instrument of fine besides the instrument of penalty as described in article 14.1, nor the European Commission bringing up an argument in favor of a proven need for this instrument. Also, to avoid the question on who has to benefit from the fines and to avoid unnecessary criminalization of traders involved in collective court actions, Ecommerce Europe strongly advises EU legislators to restrict article 14 to paragraphs 1 and 4 and delete paragraphs 2 and 3.

The section on penalties lacks a provision on who should benefit from the penalty, thus leaving this issue unclear. As it seems logic that any penalty applicable on non-compliance should be to the benefit of the complaining qualified entity, unless the court's decision on penalties instructs otherwise, Ecommerce Europe asks EU policymakers to reformulate paragraph 8.1 accordingly.

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