european justice forum

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Priorities on the Proposal for the Directive on Representative Actions

The European Justice Forum acknowledges the efforts and improvements made on the proposed Directive for Representative Actions, both within the Council and the Parliament. **Nevertheless, we would like to point out a general lack of ambition to provide a realistic framework for collective redress in the EU.** The current proposal is not meeting the purpose of a minimum harmonization but rather opening doors for forum shopping without a clear cross-border process or architecture. EJF is calling on policymakers to amend the proposal in **three main areas to achieve an efficient and coherent legal architecture for representative actions.**

1) Establishing a minimum harmonisation on safeguards across the European national systems

The proposed Directive on Representative Actions is **a unique opportunity to implement a common legal ground across Europe to prevent misuse**. Yet, several safeguards initially included in the Commission's 2013 Recommendation on collective redress are missing from the text while even more are required.

EJF would particularly like to draw attention to the criteria defining qualified entities. It is paramount that **qualified entities (QE) in the European Union should comply with consistent criteria,** possibly **more generous** and following Member States' traditions for the purpose of **actions targeting domestic effects**, but certainly **very strict and unified for representative actions targeting cross-border effects.** Allowing the possibility for consumers from different Member States to be represented in a "domestic" action, or for a "domestic" action to target a defendant from a different Member State, would open the doors to forum shopping and to a race to the bottom. Member States wishing to attract litigation business would be tempted to lower conditions for designation of "domestic" QEs, notably as **ad hoc-entities** are intended to be admitted as "domestic" QEs, which thereby would have **wide-ranging cross-border impact**.

In addition, a qualified entity should also demonstrate its legitimate interest in protecting consumers and its sufficient capacity to represent multiple claimants acting in their best interests which must be demonstrated by its governance documents and also by continued activity in this area. Most importantly, it must have a governance structure providing complete independence from third parties and their interests to generate income and profit from the procedure. Furthermore, it must also demonstrate to have duly supervised procedures to identify, prevent and deal with conflicts of interests.

Minimum procedural requirements should also apply in order to avoid abusive litigation and forum shopping. EJF believes that the proposal should include a strict prohibition of punitive damages, the application of the "loser pays" principle as well as clearer provisions on admissibility and evidence applicable to representative actions. EJF also calls for the **prohibition of contingency fees for lawyers and other participants** in the procedure, like **third-party litigation funders** (TPLF) and **claims collection vehicles** and of any form of circumvention of that prohibition. **Law is not an asset class for investment, just as breaking the law is no acceptable business model. Investments by TPLFs need a clear EU oversight** with the obligation for qualified entities to declare the source of the funds used to support a specific action, and to demonstrate sufficient funds to meet any adverse costs should the action fail, as the initial Commission proposal foresaw. Courts and administrative authorities should be

empowered [as the initial Commission proposal did in Art. 7(3)] to assess the circumstances of the funding and accordingly require the QE to refuse the relevant funding and, if necessary, reject the standing of the QE in a specific case in order to enforce the defined standard. Furthermore, currently nothing ensures any more that TPLFs do not influence settlements as previously Art. 7(2)(a) did, and no limits are defined for the usually significant share they take in the proceeds, be it by excessive interest (see 2013 Recommendation) or by simply taking a sizable portion of the full proceeds.

2) Introducing further clarity on how to deal with cross-border cases involving parallel court proceedings in Europe

EJF appreciates the efforts of the two co-legislators to **address the inherent issue of cross-border representative action cases** across Europe. We particularly welcome **the Council's Legal Service's opinion**, which concludes in regard to international procedural law that **Brussels 1*bis* must be further analysed and complemented by harmonized national provisions on international civil procedures in each MS.** These must ensure that there are no contradictions between the objectives in the Directive and the fact that the Directive as such cannot change the contents of the very Brussels I*bis* Regulation. However, Art. 67 Brussels I*bis* offers a solution explicitly for "specific matters". In this regard, national provisions for representative actions can produce the legal effects required as long as this new Directive clarifies the relationship between the effects of the Brussels I*bis* Regulation and these new **harmonized national provisions**.[1] This requires in particular to harmonise the rules on the **cross-border effects of administrative decisions**.

The provisions of the text on cross-border effects remain unclear and must be rephrased to cope with the Legal Service's criticism. How shall it be made sure consumers are not represented in multiple parallel collective actions? Which effects will final decisions in court or by a public body have on other courts' rulings or administrative bodies' decisions, e.g. when the final outcome of the decision is that an infringement occurred, but also when it is ruled on the contrary that no infringement occurred? Which courts are actually competent for collective actions? Which relationship is there between the binding effects of an administrative order for redress and a respective court order, both domestically and cross-border? To what extent could a reform of the EU jurisdictional architecture allow a better management of such highly complex cross-border procedures?

To address these uncertainties, a short-term practical solution can be implemented, offering a functionally satisfactory outcome even before Brussels I*bis* may be amended in the future to fully solve the issue, which would be the most effective solution. Given that cross-border cases should already be known through previous complaints and "alerts" by the application of the CPC Regulation (Art. 8, 16, 18, 26, 27 35), EJF considers **national Consumer Protection Cooperation entities, which must be in place by January 2020, as ideal bodies** to decide on which qualified entity should be leading on behalf of **all** European consumers as a **Consolidating Qualified Entity (CQE). Designating one CQE** per Member State would allow **to bundle all claims in a first step nationally, and in a second step Union-wide, via a Union-wide**

[1] Otherwise the contradiction would persist between the general assertion that the Directive is "without prejudice" to the existing rules of international civil procedure (i.e. Brussels I*bis*), while it requires MSs at the same time to adapt their respective national rules (without any guidance how to do it uniformly) to accommodate the objectives outlined on issues of *lis pendens* and *res iudicata* in the current status of the proposal, like ensuring that consumers participate in only one representative action (Art. 5b(3)(a) "cannot") or Art. 8(6) "to accept or to refuse to be bound by settlements …".

IT system that should serve as a backbone connecting all national Member State claims registries.

3) Promoting the use of alternative dispute resolution (ADR) mechanisms

ADR and/or public redress have proved to be the **most effective and efficient pathway to deliver redress** for mass harm, as they are valuable and cost-effective alternatives to court proceedings. The merit of these mechanisms has already been acknowledged through the adoption of the ADR Framework Directives and the ODR Regulation.

Reflecting on the issues raised in the previous sections of this paper, the Directive on Representative actions is a great opportunity to **introduce modern redress techniques** such as a registry of disputes as a single point of entry to (initially out-of-court) redress as an often quicker and cheaper alternative. A text like Art. 16a in the Parliament's position comes close to this idea by providing for the possibility of establishing national registries of collective redress actions, linked to the European Commission's database for all communications between the Consumer Protection Cooperation authorities. Creating such registries would constitute an important basis for knowledge-sharing and identifying issues early across the EU – following the motto that prevention is much better than cure.

Overall, **ADR technologies** offer satisfactory and speedy outcomes for consumers and traders. They have the advantage to allow functionalities that courts do not provide, such as early capturing of disputes, feedback loops preventing new issues arising, or a greater **digitalisation of processes and guidance**. Those ADR technologies could even serve as a means to bringing individual claims closer to enforceability in cases where the infringement and the duty of redress as such have been confirmed by a final court decision (i.e. a merely declaratory decision). After that, ADR technologies can determine to which group of cases the precise individual claim in question belongs (extent of damage etc.) and seek out-of-court settlement, or even, based on innovative national legislation, full enforceability. This would - without driving consumers into the arms of **profit oriented claims collection vehicles** with **oligopoly prices** - provide a solution to Art. 5b(5)'s request on MSs to ensure that consumers obtain redress without generally bringing a separate action. EJF encourages policymakers to be more ambitious in the use of ombuds entities and public supervisory bodies in dealing with consumer mass harm.

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Building on the elements mentioned in this document, EJF calls on decision-makers to take the opportunity of the proposed Representative Actions Directive **to design and implement modern, fair and effective civil justice systems** in Europe.

Minimum harmonisation preventing misuse, further clarity on effects for cross-border claims and the promotion and integration of ADR mechanisms should be the three priority issues to address in the finalisation of the Directive's text. EJF remains committed to provide further input and insights into the debate.

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