

Trilogue Representative Actions – 4 essential points to ensure efficient and fair redress

The European Justice Forum (EJF) acknowledges the efforts made on the proposal for a Directive for Representative Actions and **welcomes several improvements**, both in the Council and the Parliament's positions. Now that we have entered trilogue negotiations, EJF is calling on the three institutions to focus first on core issues that will bring clearer finality, greater efficiency and transparency to the proposal. **The following points are of crucial importance to achieve an effective and coherent legal architecture for representative actions.**

1) Narrower definition of domestic actions

According to the Council's general approach, actions defined as "cross-border" would be subject to the cross-border safeguards set out in the Directive, whereas actions defined as "domestic" would be bound to safeguards defined at national levels without any minimum harmonization. **It is assumed that a key part of the rationale for this approach is that greater safeguards were needed in cross-border context** both generally and specifically against forum shopping. The difficulty with this approach is that the definition of domestic actions would in practice cover actions which in fact have many cross-border components.

The **current Council definition** of a domestic action **requires that only qualified entities and the courts where the claim is brought are based in the same "domestic" country**. As long as the qualified entities are based in the same country as the court hearing the case, the **majority of beneficiaries and the defendant could be from any other Member State, and the action would still be considered "domestic"** (see overview in annex).

The consequences of this are that the intended outcome of having **greater safeguards for cross-border** claims will in practice be **undermined** and there is bound to be great uncertainty as to how the actions should work in practice. Specifically:

- A qualified entity in Member State A could bring a **claim in Member State A on behalf of beneficiaries who live in Member State B**. Member State B may have determined that strict safeguards should apply to the formation of qualified entities based in Member State B but it **could do nothing to prevent a qualified entity (QE) from Member State A (with less strict safeguards) from representing the citizens of Member State B in a claim against a defendant also based in Member State B**.
- **Cross-border effects of representative actions would not be harmonized** with the cross-border criteria serving as safeguard. This would lead to forum shopping (eventually even to a race to the lowest standards) and to a larger conflict with Brussels Ibis due to unclear procedures between Member States.
- **The important principle of opt-in only for cross-border beneficiaries would be undermined**, as the definition of who will be a beneficiary would vary in different parallel domestic cases with different national regulations. This would prevent finality and not address potential unintended consequences such as consumers being represented through opt-in in a foreign representative action, and through opt-out nationally, potentially without their knowledge (see overview in annex).
- **Litigation funders and plaintiff law firms would now be able to establish an ad-hoc entity** in the jurisdiction with the lowest domestic safeguards and use it to bring what is in effect a **cross-border action under the guise of a domestic action**.

Slightly **modifying the definition of domestic actions could decisively reduce these negative effects** and would **help reconcile the Council's and the Parliament's positions**. Cross-border effects resulting from the Council's definition of domestic cases could be limited by adding reference to the "actor defendant" and to the "actor beneficiaries". Completely **eliminating unintended cross-border dangers** by requiring both defendant and beneficiaries to be residents of the same country ("domestic") is unfortunately **not possible** against the background that the **very intention of the selection of only two of the four players for defining "domestic" is the fear of small Member States (MS)** that their QEs could never fulfil the cross-border criteria and could therefore not become active to protect the interests of their citizens in a collective procedure. So two solutions remain possible:

- a) Either the number of situations covered by the definition of "domestic actions" is narrowed down by **requiring the defendant as third actor to be in the same MS as the QE and the Court** (see option 1 in annex). This would ensure that QEs file cases under the same jurisdiction that is familiar to the defendant and would not require the QEs to deal with procedural law they are not familiar with. That should support the effectiveness of the process on both sides. QEs from other MSs than the one in which the defendant is based could make use of the existing "ECC-Net" (European Consumer Centre Network), in order to help beneficiaries in their respective countries to settle disputes with a defendant in another EU country. The concerns of smaller MSs mentioned above would thus be solved by linking QEs from different MSs together. This would also create a stringent architecture across MSs.
- b) Or the other option for narrowing down the number of situations falling under the definition of a domestic action is to **require all or the majority of beneficiaries as actors to be in the same MS as the QE and the Court** (see option 2 in annex). In this case, national opt-out systems could remain purely domestic and would not be able to create any cross-border effects (as it would be the case if non-domestic beneficiaries could opt-in cross-border at a later stage which would lead to the defendant not knowing how many beneficiaries from other MSs might do that). To avoid on the other hand that the inclusion of only few foreign beneficiaries would immediately create a cross-border case with higher requirements for the QE and the representative action, a provision could be added to limit the acceptable portion of non-domestic beneficiaries. A small part of for instance 5 or 10% foreign beneficiaries could still be admitted, but above this smaller portion the action would need to be regarded as a cross-border action due to its increased/related cross-border effects. This option would limit the risk of forum shopping as it would **remove the possibility to look for the national jurisdiction with the lowest representative action standards** while in reality having the intention to target a maximum of beneficiaries in other or all Member States.

2) Full transparency for funding and prohibition of forum shopping

Transparency of funding for each single action brought under the Directive is essential. The Parliament and Council have respectively included a number of safeguards in their own positions, but EJF believes both legislators need to go further to **ensure abusive litigation and forum shopping are avoided**. Contingency fees for lawyers and other participants in the procedure, such as third-party litigation funders (TPLF) and claims collection vehicles, need to be prohibited.

Investments by TPLFs need a clear EU oversight with the obligation for qualified entities (QEs) 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 foreseen in the initial

Commission's proposal, **courts and administrative authorities need to be empowered** 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, other safeguards are needed to ensure that TPLFs do not influence settlements and that limits are defined for the usually significant share they take in the proceeds, be it by excessive interest or by simply taking a sizable portion of the full proceeds.

3) Avoiding duplication of redress and enforcement mechanisms

If the scope of the Directive (via "Annex") covers EU legislative acts that already include collective redress measures and other enforcement mechanisms, such as the GDPR, there is a **risk to create confusion and to generate a multiplicity of conflicting regulatory frameworks**, which could work against each other. The new legislation should not change or extend the definitions of existing redress and enforcement mechanisms, nor replace them within existing legislation. Conflicting regulations would delay procedures and compensations for consumers, while increasing justice costs in Member States.

4) Clearer definition of commonality for clarification of admissibility

Commonality is an **indispensable prerequisite for redress actions to be certified** but is not currently considered as such in the Council's general approach as a criterion to allow a compensatory representative action to proceed. As a consequence, judges may understand this lack of clarity on certification as a **mandate to "reinterpret"** the substantive law and civil liability principles, so that individual cases might be understood as no longer needing to comply with certain civil liability rules in order to be accumulated into a collective representative action. Consequences in Europe would be tremendously damaging if the final compromised text allowed such a change in interpreting the rules of civil liability. It is the view of EJF that harmonised criteria of admissibility must ensure proper safeguards on the commonality criteria for both consumers and defendant.

In addition, EJF strongly recommends to keep the positive framework elaborated in the Parliament's Position specifically regarding the **prohibition of punitive damages and contingency fees** (EP art. 15a, recital 39a) and the **protection of the "loser pays principle"** (EP art. 7a, recitals 13c and 39).

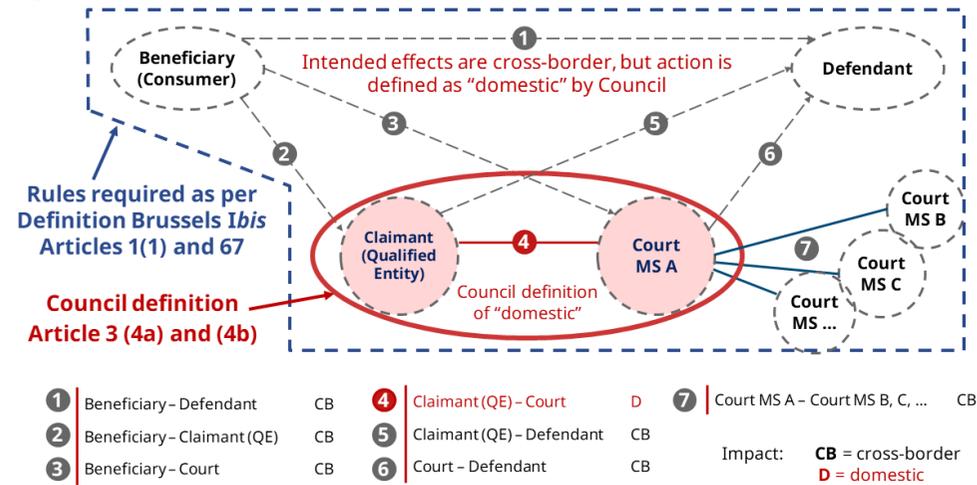
These **points are key** to ensure that the future compromised text brings an efficient and fair redress mechanism both to European consumers and businesses, alongside an increased promotion of **Alternative Dispute Resolution mechanisms**.

EJF calls on decision-makers to take these points, among other key ones such as greater safeguards for qualified entities and opt-in only system, into consideration to provide a **coherent and effective collective redress framework** in the European Union.

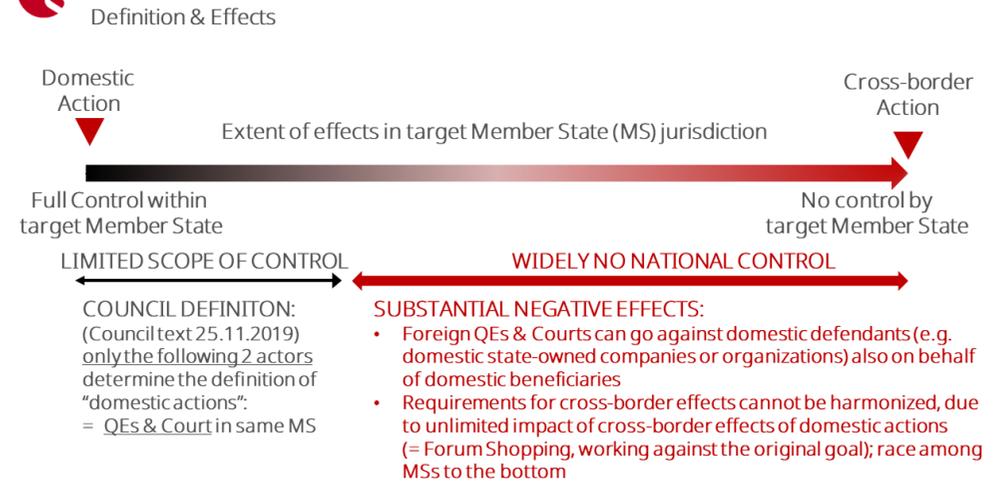
Annex

Overview of the definition of “domestic” vs. “cross-border actions” and their cross-border effects

Council definition - Domestic vs Cross-Border Actions

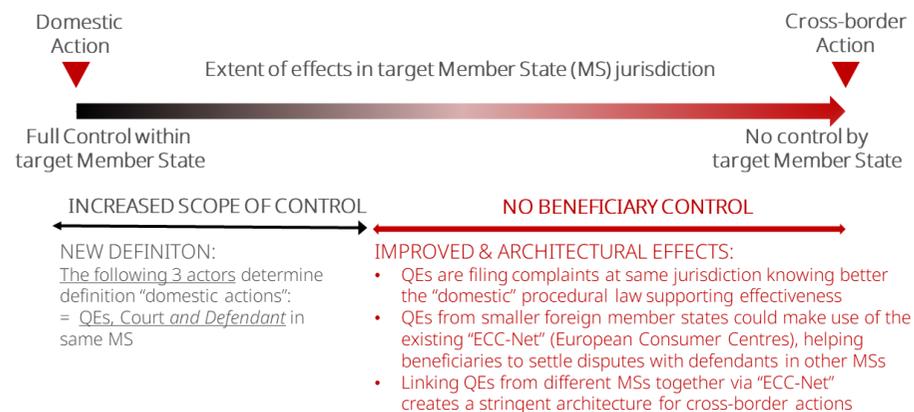


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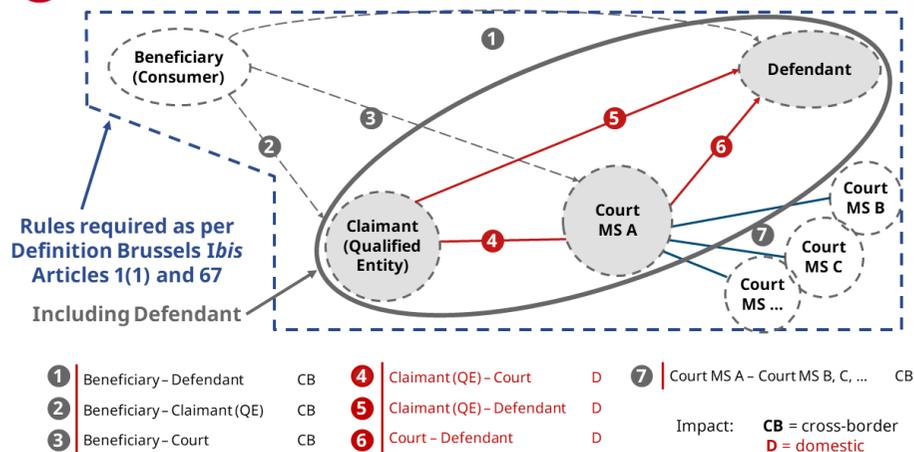


Option 1 – Definition including the defendant

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Option 2 – Definition including beneficiaries

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