Joint Business Statement on the Proposal on Representative Actions (Collective Redress)

30 November 2018

Our organisations support fair and balanced civil justice systems with effective enforcement of consumers' rights. We have, however, genuine concerns regarding the ability of the Commission's original proposal to deliver on these goals. It is a concern shared by industry in a significant number of Member States and sectors, even in countries that already have in place collective redress instruments.

We acknowledge and welcome the efforts made in both the draft report and the amendments under discussion to bring legal clarity to some of the elements of the proposal. The amendments currently being considered include some improvements, but there remain important flaws. Given the complexity of the proposal and the many open questions, it is essential for the European Parliament Legal Affairs Committee (JURI) to use caution and take the time needed to reflect and identify the most effective solutions.

In this context, the business community would like to put forward its key priorities/concerns ahead of the JURI Committee vote:

1. Need for further procedural safeguards

The proposal contains problematic features and loopholes that would lead to unnecessary and wasteful litigation in Europe. The proposal should not provide incentives to competitors, third-party investors and law firms to litigate against companies at the expense of consumers. It is imperative that the JURI Committee assesses and mitigates these risks.

We welcome the efforts made to strengthen principles such as the loser pays rule; the prohibition of punitive damages; and the admissibility criteria for compensation claims.

However, these important safeguards must be applicable to all collective claims, and not just to a sub-set of claims (such as third-party funded claims).

The text is still missing safeguards that need to be clearly stated, and which should apply to all claims. They include, for example:

- Prohibition of contingency fees (where fees for lawyers, claims collection vehicles or third-party litigation funders are calculated as a percentage of amounts awarded);
- Joint and several liability of third-party funders for adverse cost orders;
- Prevention of overlapping claims; and
- Requirement of consumer mandates to initiate collective claims - also known as the opt-in principle.

These and other safeguards serve the purpose of balancing the interests of claimants and defendants and ensuring that compensation truly reaches the affected consumers.

2. Qualified entities

Due to their central role, the criteria to become a qualified entity are among the most important elements of this proposal. They are set to avoid abuses and even fraud. Appropriate criteria must apply equally to all qualified entities, including those entities already certified under pre-existing national representative actions laws.

Weak EU-level criteria would undermine those Member States' legal systems that already provide stricter criteria to become a qualified entity. We strongly suggest additional common criteria applicable, *inter alia*, around:

- Proof of stability/seriousness (*e.g.,* minimum number of years of existence) and sufficient human, legal and financial resources and expertise;
- Governance that allows for independence and is geared towards the protection of consumer's interests;
- Transparency for court and defendant in contractual relations of the qualified entity with funders/law firms as well as on its activities of legal representation;
- Transparency on successes of representative litigation outcomes and distribution of awards to consumers affected, and
- Prevention of conflicts of interest.

The EU Alternative Dispute Resolution Directive from 2013 offers a legislative roadmap to many of these requirements, particularly on transparency.

3. Interaction with national systems and with international procedural law

Because of the inherent risks of collective litigation, it is important that all collective redress systems available in the EU adhere to a common minimum set of principles and safeguards. A harmonised set of rules at the EU-level will also avoid the pitfalls of forum shopping and a race to the bottom.

As currently drafted, the proposed EU Directive on collective action risks undermining existing national collective redress systems, and would create chaos. It is therefore essential to clarify the relationship between the proposed Directive and national collective redress systems, and set in place a minimum level of procedural safeguards at the EU level.

The proposal also does not address the essential question around the ill-suited nature of the Brussels I (Recast) Regulation on jurisdiction of national courts for collective redress cases. As recently confirmed by a study commissioned by the European Parliament[1], the Brussels I (Recast) Regulation needs updating. If not done, Europe risks replicating the problems of Canada when various provinces introduced collective instruments without clearly defining which courts are in charge of which cases, leading to complex overlapping and conflicting claims in multiple provincial jurisdictions. Such an outcome in the EU would lead to years of complex jurisdictional disputes instead of a quick improvement in European consumer redress.

4. Third Party Litigation Funding

Third Party Litigation Funding introduces a private and purely profit-seeking element into the national civil justice systems, which as seen in other jurisdictions like Australia, can lead to opportunistic or speculative litigation and unreasonable fees at the expense of consumers. To avoid these and other risks, it is critical to address the issue of litigation funding properly.

We welcome the Parliament's efforts to improve the transparency requirements on litigation funding. However, transparency is not enough. Litigation funding investments in collective redress cases should be subject to financial and fiduciary rules, including liability for adverse cost orders to protect claimants and defendants equally.

Funders and other third-parties should not be paid excessive fees, nor should they receive any fees based purely on a percentage of the results of the claim (*i.e.,* contingency fees). Too often, funders extract disproportionate and excessive fees from awards, greatly diminishing the amounts left for consumers. In all cases, funders should be paid only after consumers have received their redress.

5. Evidence

We welcome the proposal to extend the rules on evidence gathering to both defendant and claimant and to make discovery claims subject to a proportionality test controlled by a judge. This also has the advantage of ensuring consistency with the well-functioning provisions on discovery in the EU competition (damages actions) directive.

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[1] Collective Redress in the Member States of the European Union, October 2018, European Parliament: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf