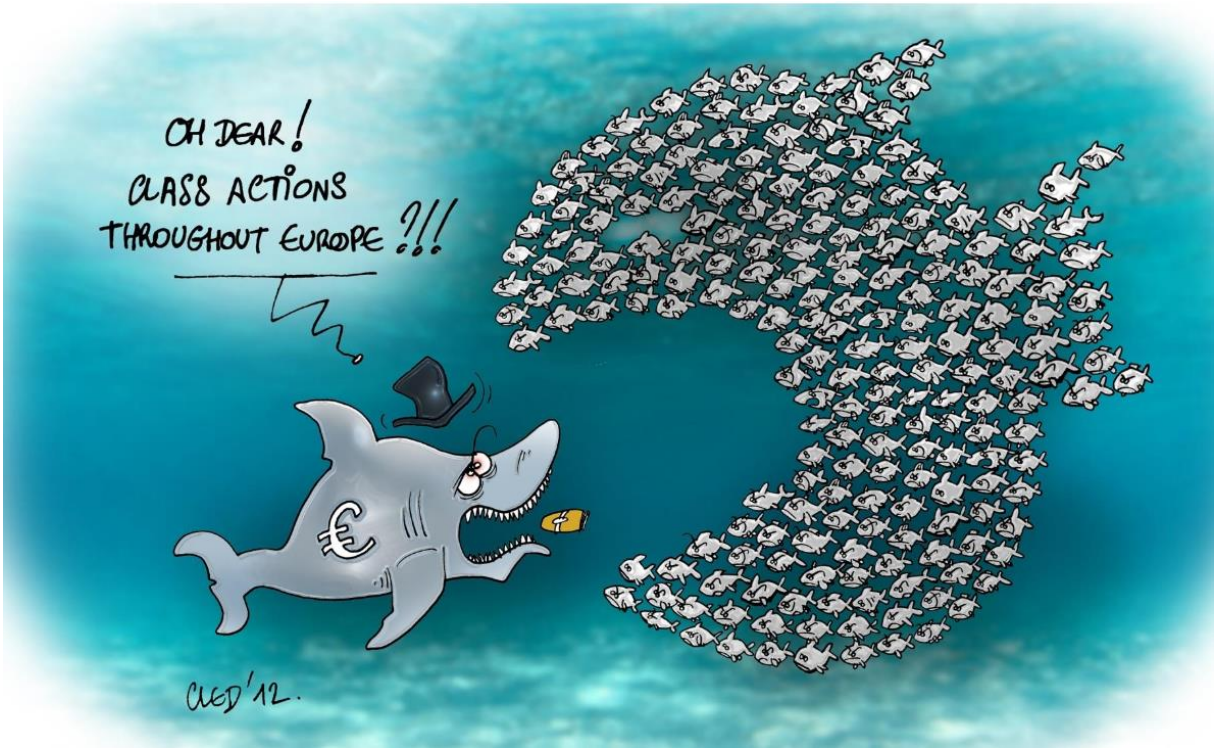
Collective Redress

Representative Actions for the Protection of the Collective Interests of Consumers



"As governments around the world withdraw from welfare provision and promote long-term savings by households through the financial markets, the protection of retail investors has become critically important."

July 2019

BF BETTER FINANCE
The European Federation of Investors and Financial Services Users
Fédération Européenne des Épargnants et Usagers des Services Financiers

BETTER FINANCE
LEGAL COMMITTEE

About us

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

BETTER FINANCE has long advocated for an EU-wide collective redress mechanism for all financial services users, including small and individual shareholders or employee shareholders, and provided support to consumer organisations in collective redress schemes in the field of financial services (such as Fortis, Volkswagen AG).

BETTER FINANCE welcomes the European Commission's (EC) proposal for a Directive on collective redress actions for consumers ("Collective Redress Directive") but warns on several amendments that will diminish the scope and effectiveness of these provisions.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer protection (Art. 38 and 47 of Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 of Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

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"The most relevant sector concerning observed mass claims/issues is the financial services sector".[1]

The quote on the cover page is from Niamh Moloney, *How to Protect Investors: Lessons from the EC and UK* (2010) Cambridge University Press.

[1] See infra, p. 35.

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The contents and views expressed in this Booklet have been endorsed by the BETTER FINANCE Legal Committee.

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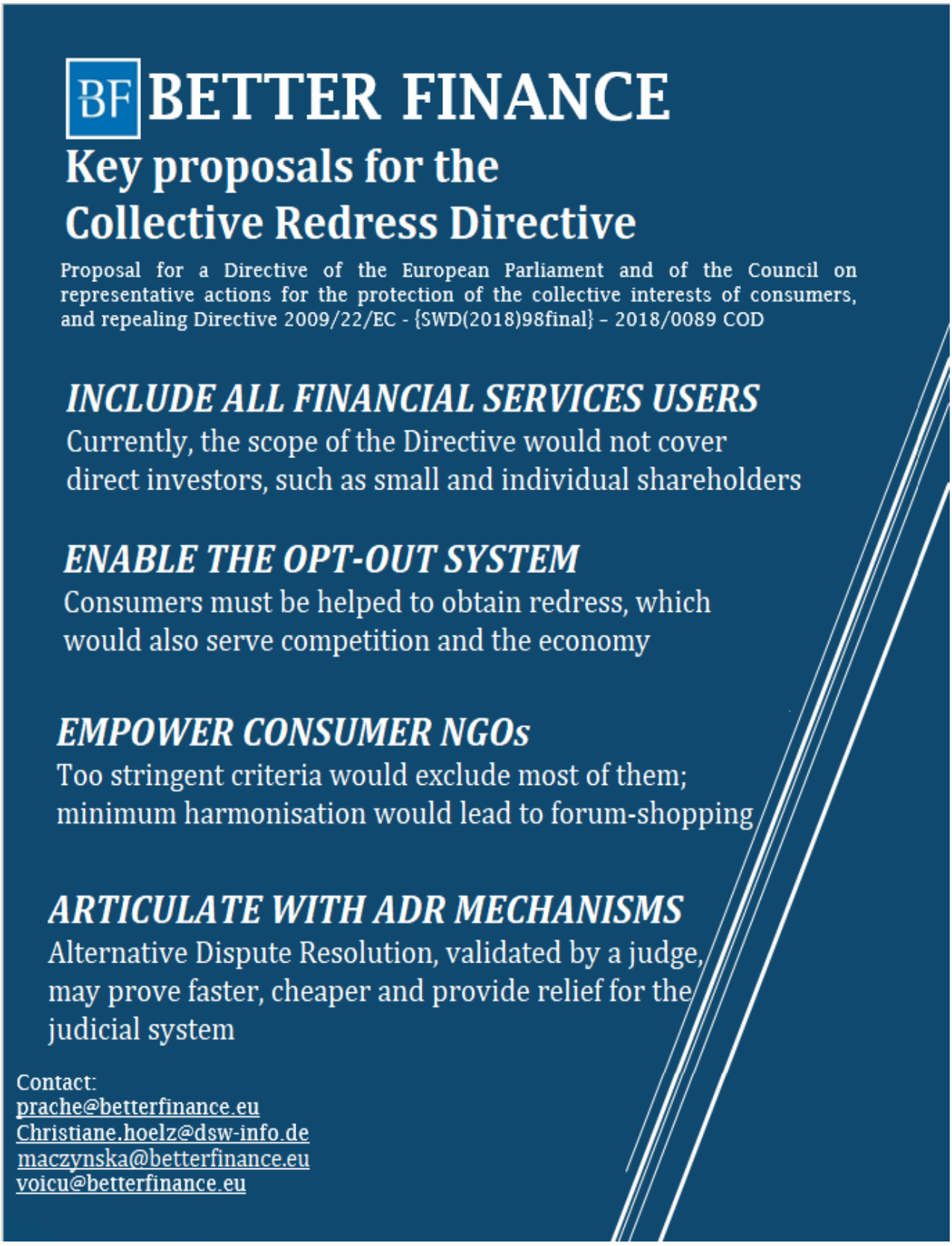
BF BETTER FINANCE
Key proposals for the
Collective Redress Directive
Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC - {SWD(2018)98final} – 2018/0089 COD
INCLUDE ALL FINANCIAL SERVICES USERS
Currently, the scope of the Directive would not cover direct investors, such as small and individual shareholders
ENABLE THE OPT-OUT SYSTEM
Consumers must be helped to obtain redress, which would also serve competition and the economy
EMPOWER CONSUMER NGOs
Too stringent criteria would exclude most of them; minimum harmonisation would lead to forum-shopping
ARTICULATE WITH ADR MECHANISMS
Alternative Dispute Resolution, validated by a judge, may prove faster, cheaper and provide relief for the judicial system
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II. Position Paper on the Collective Redress Directive

POSITION PAPER

on the Collective Redress Directive

Ref.: Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (SWD(2018) 96 final)

EXECUTIVE SUMMARY: BETTER FINANCE welcomes the European Commission's (EC) proposal for a Directive on collective redress actions for consumers ("Collective Redress Directive") but warns on several amendments that will diminish the scope and effectiveness of these provisions. This position paper highlights and justifies the main objections BETTER FINANCE brings to the proposed version of the text.

The **key issues** concern:

A. The **scope of the Directive** (Article 2.1) discriminates EU citizens who save in directly in shares and bonds vs. "packaged" investment products

The "closed-list" determining the scope of the Directive does not cover direct individual investors (share- and bondholders), leaving them less protected than indirect investors (e.g. fundholders). It is paramount to add the Market Abuse Directive (MAD2), Regulation (MAR) and PEPP Regulation in Annex I of the Directive.

B. The **"opt-in" system** and the **cross-border dimension of the opt-out system** is detrimental to consumers

The default "opt-out" approach is essential to ensure the effectiveness of the procedure not only at national level, but **most importantly** cross-border. Requiring consumers from another Member State to explicitly give their mandate for the class action would defeat the purpose of the Directive and contradicts the essential principle of the internal market.

In addition, in order to ensure harmonisation and equal protection for all harmed consumers across the EU, Member States must be required ***not to*** demand the mandate of the individual consumers concerned. This is referred to as an "opt-out" system.

C. **ADR settlements and recourse to judicial review** (Article 5(2)) and the **weakening of representative organisations** limits consumers' legal protection

Representative associations should expressly be allowed to settle the dispute out-of-court (ADR), also allowing the possibility to revert to mandatory jurisdiction should the settlement mechanism fail. BETTER FINANCE suggests adding a new action to Article 5(2).

Recent case law shows that collective actions for investors or financial services users were initiated by foundations established ad hoc. Limiting the possibility for experienced and well-established representative organisations of consumers, savers and individual investors to create spontaneously an organisation for collective redress procedures severely limits the scope and effectiveness of the provisions of the Collective Redress Directive.

This position paper is elaborated by BETTER FINANCE, The European Federation of Investors and Financial Services Users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

"*There is a strong need for Union intervention, on the basis of Article 114 TFEU, in order to ensure both access to justice and sound administration of justice as it will reduce the costs and burden entailed by individual actions*" - (Amendment 2, JURI Committee).

Modernising the existing provisions under the Injunctions Directive (Directive 2009/22/EU) is considerably needed, in particular in the field of financial services. Globalisation and increased interconnectedness of capital markets leave an increased number of investors and financial services users exposed to acts harming their rights and interests. In 2017, BETTER FINANCE highlighted the numerous cases of misselling of financial products that affected shareholders or investors on a cross-border basis. Many other cases where negligence or misconduct of the financial industry has led to mass harm situations have occurred, such as the Swiss franc loans (Greece, Bulgaria, Romania, Poland, Croatia to name a few) or the "unit-linked" scandals.

Some very few were able to be dealt with under the Unfair Terms Directive,[2] but with no common provisions for cross-border action or compensatory claims. For the rest, it was and still is up to national civil procedure laws to determine whether two or more cases stemming from the same infringement of EU law can be joined together. Only five EU Member States enable citizens to effectively use collective redress systems, while the rest have none or seriously flawed procedures.[3]

Providing EU consumers with an efficient and sophisticated procedure to obtain redress collectively is of major importance. Given the lack of expertise, trust, time or resources, individuals rarely pursue their rights or legitimate interests in court to seek for injunctive relief or compensatory redress. However, when offered the possibility to act together, 79% of EU citizens would be more willing to defend their rights.[4]

These are some of the reasons for which the Collective Redress Directive must set up a robust, flexible, and efficient collective redress mechanism for all EU citizens. With some of the amendments proposed by the JURI Committee, the Directive will be rendered practically inefficient.

[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.
[3] See BEUC, 'Myths and Realities on Collective Redress' (2018) https://www.beuc.eu/publications/beuc-x-2018-048_myths_and_realities_on_collective_redress.pdf.
[4] Ibid.

1. Scope of the Collective Redress Directive

Why discriminate EU citizens who save directly into EU capital markets?

The EC's approach to determining the scope of this harmonised procedure was to include in an annex all Union law that, if breached, would trigger the application of the Directive. According to Article 2(1), representative actions under this Directive can be brought only against "*infringements* […] *of the Union law listed in Annex I*".

This "closed list" approach is, first, inflexible. Should new developments (infringements of already existing or new legislation) occur, it requires amending the Directive (level 1 - using the same legislative procedure) in order to bring the cases under the scope of the Collective Redress Directive.

Second, either by mistake or intentionally, leaving out an EU legislative act means leaving out all its addressees and beneficiaries. As is currently the case, the "closed list" approach completely excludes direct investors into capital markets (securities holders) since neither of the acts enumerated thereof concern this category of consumers. Moreover, the new PEPP Regulation, which entered into force one year after this proposal was published, is not included either in the list of Annex I.

Not only that the most affected retail category since the 2008 crisis has been the shareholder's class (Fortis, Dexia, Bankia, Natixis, Banca MPs, Volkswagen), but one of the central actions of the CMU Action Plan was to increase retail investors' direct participation into capital markets and investor confidence.

While for indirect investors - in deposits, investment funds, insurance policyholders – there is already a set of financial safeguards (Solvency II, the Capital Requirements Directive and Regulation, National Deposit Guarantee Schemes), there are no comparable for direct investors, such as shareholders and bondholders. Excluding shareholders from the scope of this Directive means that small individual investors suffering damage by the same issuer will not be able to join their claims together into one single action in all Member States and, by that, they would be unjustifiably worse off that users of other (financial) services or goods. Thus, all the more reason to include in the list Union law acts that protect direct individual investors from infringements of EU financial regulation.

Since the Market Abuse Directive (MAD2)[5] and the Market Abuse Regulation (MAR)[6] are the only pieces of EU legislation that provide sanctions for breaches of obligations of issuers towards securities holder, **BETTER FINANCE strongly asks** the European Parliament and the Council of the EU to endorse an additional amendment **including these three acts in Annex I of the Collective Redress Directive**.

[5] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014, p. 179–189.
[6] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, p. 1–61.

2. The opt-in system and the cross-border dimension

The opt-in system is harmful to consumers and limits the beneficial effects of the Directive

2.1 Opt-in system

Evidence brought in public consultations, NGOs' research papers, and the EC's Flash Eurobarometer show that consumers are more willing to defend their rights as part of a collective action rather than individually. However, there are two possible ways to design a collective redress procedure:

- either by way of an "opt-in" system, where the power of representation must be expressly demonstrated from all concerned consumers, or
- either by establishing an "opt-out" system, where all consumers are represented as long as they do not explicit object to be part of the procedure.

From a consumer perspective, the **opt-in system** contains several **disadvantages**. In most cases, consumers display a passive behaviour on the background of a lack of knowledge, experience, resources (information or financial) or incentive. Case law in financial "scandals" shows striking differences between opt-in and opt-out enforcement files.

First, an empirical observation is the participation rate: while in opt-out cases very few wish to be excluded from the effects of a judgment (achieving, thus, a close to 100% enforcement rate), in opt-in cases very few take the active step to participate. The coverage rate of opt-in systems can be as low as 1.5% (*Deutsche Telekom*) and generally varies depending on how many consumer organisations are involved.

Second, we have observed that opt-in cases feature predominantly active individual members of consumer protection NGOs. On the other hand, opt-out cases have much higher enforcement numbers (*NCC Closet Indexing*). What happens with passive consumers is that they are often not aware that a collective redress procedure has been initiated and that they are required to take an active step and sign in to become an eligible party. It gets worse where the collective redress procedure is launched in a Member State other than their home country.

Consumer passiveness is all the more understandable as being a consumer is not a full-time job. However, it should not be used as a means to exclude them from participating to injunction/collective redress procedures against traders infringing EU law. Sanctioning illegal practices and mandating compensation to all those affected also is a prerequisite for loyal competition between traders in the economy.

However, some consumers may wish to be excluded due to several reasons, such as: they disagree with the claims, the pleas in law, the chances of success, damages etc. However, at this moment is very difficult to tell whether the very large "pools" of consumers that do not actively take part in collective enforcement procedures are just passive or wish to pursue their rights on their own.

The **opt-out system** has the **advantage** of discerning between passive consumers and consumers who wish to proceed differently. First, as the opt-out frame is usually at a later stage of the procedure, it offers more time for consumers to become aware of the case, make up their minds or take an informed decision. Second, the active behaviour of requiring exclusion from a collective redress file is undisputed evidence that the consumer is not merely passive.

From a legal perspective, the opt-out system contains the same *constitutional safeguards* as the opt-in system. The right to private party autonomy and the right to disposition – *the prerogatives*

to choose whether to be part of a procedure or not – are and can still be exercised by the individual consumer. The opt-out merely inverses the effects of the active and express manifestation of will and consent from inclusion to exclusion.[7]

The EC's initial wording of Article 6(1)(1) offered Member States the possibility to institute such a regime under the Collective Redress Directive. What we assume to be a brave attempt to stimulate opt-out systems across the EU, after the failed *recommendations* of 2013,[8] it still falls short of what EU citizens are in dire need as consumers for reasons of legal effectiveness and certainty. Merely offering the possibility to allow for an opt-out system would lead to divergent implementation of the law, different standards of access to justice and forum shopping in the EU.

Therefore, BETTER FINANCE **strongly advises** the European Parliament and Council of the EU **to change the wording** of the precited subparagraph **and indicate** that Member States "***may not*** *require the mandate of the individual consumers concerned…*".

2.2 Cross-border dimension

If the EC's proposal and Amendment 60 of the JURI Committee at least leave open the discussion on the opt-out system, Amendment 61 of the JURI committee definitely closes it for cases with a transnational element.

Where a Member State does implement the opt-out system, subparagraph 1a obliges it to require proof of the "*explicit mandate to join the representative action within the applicable time limit*" of harmed consumers that are not habitual residents in that jurisdiction. This new addition creates a severe barrier to cross-border engagement and legal protection of consumers, contradicting the essential principle of the internal market and infringing Article 26(2) TFEU[9] and Article 38 of the Charter of Fundamental Rights.

A robust and effective pan-EU collective redress mechanism must grant the same rights to affected consumers in all other jurisdictions as in the Member State where the class action takes place. Therefore, BETTER FINANCE **strongly advises the co-legislators** to delete Amendment 61 of the JURI Committee and impose the opt-out system across the EU for the purpose of this Directive.

3. Alternative Dispute Resolution Settlements, recourse to judicial review and the weakening of representative organisations

Effective settlement mechanisms and representation must be ensured

3.1 ADR mechanisms

Due to administrative burdens and disadvantages mandatory jurisdictions pose (e.g. length of the procedure) eligible entities should be expressly allowed to choose, first, to settle the dispute through out-of-court mediation, either privately or via alternative dispute resolution (ADR) bodies. These may present the advantage of appointing specialised arbiters, avoiding procedural obstacles, reducing the cost of litigation, among other.

[7] See also Csongor Istvan Nagy, 'The European Collective Redress Debate After the European Commission's Recommendation: One Step Forward, Two Steps Back?' 22 MJ 4 (2015), 530-552, 536.
[8] European Commission, '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), OJ L 201/60 of 26.7.2013.
[9] Treaty on the Functioning the European Union.

However, in case a settlement is not reached following the procedure, after a reasonable time period, eligible entities should be expressly allowed to address the case to national courts via one of the representative actions mentioned in Article 5(2). In order to ensure equal access to redress mechanism across EU legal orders, this ADR settlement mechanism should be expressly provided as a representative action in Article 5(2), through a new subparagraph c).

A good example of a practice of this kind is the Dutch WCAM statute.[10] The model is based on a collective settlement which is therefore completely dependent on the other party's willingness to settle. As the case of Volkswagen has shown, it is a useless instrument if the issuer rejects any kind of settlement. The Dutch system could be fundamentally improved if, in case a settlement is out of reach, the procedure could be automatically reversed into a court action. Moreover, the Dexia case has shown that settlement procedures can also be very costly for the plaintiff's association and only large ones will manage to bear them, thus all the more reason to allow claimants to revert to mandatory jurisdictions.

3.2 Weakening of representative organisations

The majority of collective redress proceedings brought against infringements of investors and financial services users' interests (since 2008) have been initiated by experienced and well-established associations representing the interests of consumers, savers and individual investors. These organisations created spontaneously (ad hoc) another organisation to represent the interests of consumers in a certain case. A practical example is that of Stichting Volkswagen Investor Claims, established to represent the collective interests of individual shareholders of Volkswagen AG that suffered losses as a consequence of the diesel scandal.

Under the proposed version of the text (Article 4(2) – Amendment 49), such ad hoc created associations would not benefit from the provisions under this Directive. On the contrary, representative organisations are required to be established on a permanent basis and specialized particularly in this type of litigation, creating a new class of consumer associations having the unique purpose of initiating class action when acts of mass harm take place.[11]

First, this contradicts all arguments (Recitals (4), (25) and Article 1) for laying down safeguards against abusive litigation. If an eligible entity must prove its main purpose that of protecting the collective interests of consumers and must function continuously, on a permanent basis, it will not be long before class action turns into a regular activity to ensure the survivorship of these entities.

Second, the essence of collective redress is spontaneity. The Collective Redress Directive must allow consumers to join their claims under one representative organisation when an act of mass harm occurs. As such, a collective redress procedure is spontaneously initiated and fulfils its

[10] Dr. Helene van Lith, 'The Dutch Collective Settlements Act and Private International Law' (2010) Erasmus School of Law, http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf. The WCAM came into force on 27 July 2005. It provides for collective redress in mass damages on the basis of a settlement agreement concluded between one or more representative organisations and one or more allegedly liable parties for the benefit of a group of affected persons to whom damage was allegedly caused. Once such a collective settlement is concluded, the parties may jointly request the Amsterdam Court of Appeal to declare it binding. If the Court grants the request, the agreement binds all persons covered by its terms and represented by the representative organization, except for any person who has expressly elected to opt out within a specific period. Any person having opted out retains his right to initiate individual proceedings against the defendant. While the proceedings regarding the binding declaration are pending, any other proceedings concerning claims in respect of which the agreement provides for compensation are suspended at the request of the alleged liable party.

[11] Article 4(1) of the Collective Redress Directive read in conjunction with Article 5(1) and with the proposed definition of consumer organisation (Amendment 37) and with the deletion of paragraph (2) of Article 4 (Amendment 49).

purpose once a final decision is awarded. The proposed version of the text turns around this mechanism and forces representative organisations to outlive their purpose.

Last but not least, this – and especially read together with amendments 37 and 44 of the JURI Committee – will make the Directive become an instrument that can only be used by large state-subsidised consumer representative organisations.

Hence, BETTER FINANCE **strongly advises to keep subparagraph 2 of Article 4** in the final version of the Collective Redress Directive as proposed by the Commission.

4. Other key issues

Since, at the time of writing still, the only publicly available amendments to the Directive's text are those voted by the European Parliament (JURI/IMCO/TRANS committees), the other key issues analysed below will concern the amendments voted in the plenary session of 26 March 2019.

Amendment 33 – addition of "*broad consumer impact*" to Article 2(1)

BETTER FINANCE questions this amendment as it will create legal uncertainty and divergent application of the law since Article 3 does not provide a definition for what *broad consumer impact* represents. Moreover, it would severely limit the scope of collective redress actions for smaller groups of affected consumers, leaving them out from an important instrument of legal protection. In addition, it contradicts Article 38 of the Charter of Fundamental Rights, which does not distinguish between *narrow* and *broad* consumer interests, but requires that Union policy and law ensures a high level of protection for all EU citizens.

Amendment 38 – addition of "*in civil capacity under the rules of civil law*" to Article 3(1)(2)

BETTER FINANCE warns the European Parliament of the detrimental effects this addition will have not only to the scope of the Directive, but to the uniform application in the EU.

First, there are several legal orders across the EU where private law branch is divided into civil law and commercial law (France, Belgium, Italy for instance). Requiring a trader to be defined as a person acting in civil capacity may unintentionally lead to the inapplicability of the Collective Redress Directive in those jurisdictions where the legislation included in Annex I falls under the commercial law branch and under the rules of commercial law.

Second, this amendment aims to exclude providers of public services or services of public interest, thus bringing an unjustified limitation to its scope. The Directive must ensure that consumers affected by mass harm may be able to benefit from these provisions no matter the source of their legal relationship, where the legal relationship is defined by one party acting in a professional capacity and the other acting outside its habitual business or trade, as a consumer (B2C business).

Last, introducing a validity condition for the applicability of this Directive concerning the civil capacity of the trader will lead to a segregation between Member States where the Directive is applicable and Member States where the Directive is inapplicable.

Amendment 39 – addition of "*data subjects as defined in Regulation (EU) 2016/679 (General Data Protection Regulation*" to Article 3(3)

This amendment represents an implicit extension of the scope of application of the Directive as defined in Article 2(1). BETTER FINANCE does not oppose the inclusion of the GDPR, but warns

that the amendment is inconsistent with the "closed-list" approach and discriminatory to all other affected consumers.

Amendment 52 – addition of "*Article 4*" to Article 4(5)

The purpose of Article 4 is to shorten the length and decrease the burden of judicial proceedings examining the procedural standing of representative organisations by establishing an *ex-ante* administrative authorisation procedure for qualified entities. The purpose of the proceedings and of the competent court should not be extended to examining again the *locus standi* of the already appointed representative organisation.

Amendment 56 – addition of "*the illegal practice*" to Article 5(2)(2)(a)

BETTER FINANCE believes that this amendment leaves the injunctive procedure devoid of substance since a practice is considered illegal if an administrative or judicial body *a priori* sanctions it as such, thus entailing a final decision declaring the practice illegal before being able to institute collective injunctive or compensatory action against that practice.

Amendment 67 – addition of paragraph 4b to Article 6

BETTER FINANCE believes that the second phrase of this new subparagraph attacks the substance of civil law and civil procedure law by limiting compensatory action only to the actual loss (*lucrum cessans*) and expressly prohibiting compensation of unrealized gains (*damnum emergens*) in a procedure under the provisions of this Directive.

This constitutes a severe limitation of legal protection for consumers in all cases where national law allows compensation of the unrealized gains (*damnum emergens*) and will constitute a deterrent for consumers and representative organisations to use the procedure prescribed under this Directive for protecting their rights and interests.

Amendment 98 – addition of paragraph 2a to Article 16

BETTER FINANCE sees the express limitation brought to cross-border representative actions clearly inconsistent with the principles and rules laid down by EU primary law. The justification is the same as that for Amendment 61 thereof.

BETTER FINANCE LEGAL COMMITTEE

5. BETTER FINANCE main amendments

Amendments to the Proposal for a

Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

COM/2018/0184 final – 2018/089 (COD)

European Commission's proposal	BETTER FINANCE's proposed amendments	Summary justification
ANNEX I – List of provisions of Union Law referred to in Article 2(1).	Amedment 1 **Annex I – subparagraph 46 (*new*)** "***46) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).***" Amendment 2 **Annex I – subparagraph 47 (*new*)** "***47) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.***"	**Collective redress for direct investors** Article 2(1) determines the scope of application of the Directive by referring to disputes arising from breaches of EU law listed in Annex I. • none of the EU legislative acts enumerated in Annex I thereof cover individual direct investors (such as shareholders, bond holders, etc); • Direct investors should benefit of the same legal protection ad indirect investors; • **Excluding shareholders from the scope of the proposal means that small individual investors suffering damage by the same issuer;** • Moreover, it contradicts the CMU Action Plan since it will not help regain investors' trust and boost their confidence; the purpose was to increase retail investor direct participation into capital markets.
Article 4 *Qualified entities* 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.	Proposal 1 **Do not endorse Amendment 49 JURI**	**Weakening of representative organisations** The majority of collective redress proceedings brought against infringements of investors and financial services users' interests (since 2008) have been initiated by ad hoc organisations to represent the interests of consumers in a certain case: • Under the proposed version of the text (Amendment 49) such ad hoc created associations would not benefit from the provisions under this Directive; • The essence of collective redress is spontaneity, thus it must allow consumers to join their claims under one ad hoc

		representative organisation when an act of mass harm occurs; • This contradicts all arguments (Recitals (4), (25) and Article 1) for laying down safeguards against abusive litigation. If an eligible entity must prove its main purpose that of protecting the collective interests of consumers and must function continuously, on a permanent basis, it will not be long before class action turns into a regular activity to ensure the survivorship of these entities; • This – and especially read together with amendments 37 and 44 of the JURI Committee – will make the Directive become an instrument that can only be used by large state-subsidised consumer representative organisations.
Article 5 *Representative actions for the protection of the collective interests of consumers* Member States shall ensure that qualified entities are entitled to bring representative actions seeking the following measures: (a) an injunction order as an interim measure for stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice; (b) an injunction order establishing that the practice constitutes an infringement of law, and if necessary, stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice. In order to seek injunction orders, qualified entities shall not have to obtain the mandate of the individual consumers concerned or provide proof of actual loss or damage on the part of the consumers concerned	Amendment 3 **Article 5, paragraph 2, letter c) (*new*)** ***"c) collective private settlement, through administrative dispute resolution procedures established according to Directive 2013/11/EU, by which both actual damages and unrealised gains can be compensated, having also the possibility to reverse to either of the representative actions listed above in letters a) and b) or to another procedural mean according to national law, if within a reasonable time frame an agreement is not reached".*** ***For the purposes of letter c) above, the appointed dispute resolution arbiter shall establish, at the beginning of the procedure, the reasonable time frame, taking into account both parties' opinions and giving due consideration to the scale, nature and complexity of the case.*** ***In using the representative action under letter c) above, qualified entities shall not have to obtain the mandate of the individual consumers concerned, even where concerned consumers are not habitual residents of the home Member State to the procedure.*** ***In case of injunction orders they shall not provide proof of actual loss or damage on***	**ADR settlements as representative actions** Article 5 of the Directive lays down the types of actions that can be used in collective redress for injunctive and compensatory measures. • There are several advantages to alternative dispute resolution (ADR) mechanisms, including reduced time-length, specialised arbiters, simplified procedure; • Authorised entities should be expressly allowed to first try to settle the case out-of-court; • In order to avoid unnecessary delays, parties should be directed to alternative dispute resolution as per Directive 2013/11/EU; • The purpose of ADR settlements should not be to deter representative associations from entering into negotiations, nor to force for an unjust settlement; • Thus, the parties subject to an ADR settlement should have the possibility, if within a reasonable time frame a resolution is not reached, to revert the case to national courts; • In line with the opt-out system, representative associations should not be required to obtain the explicit mandate of all consumers concerned.

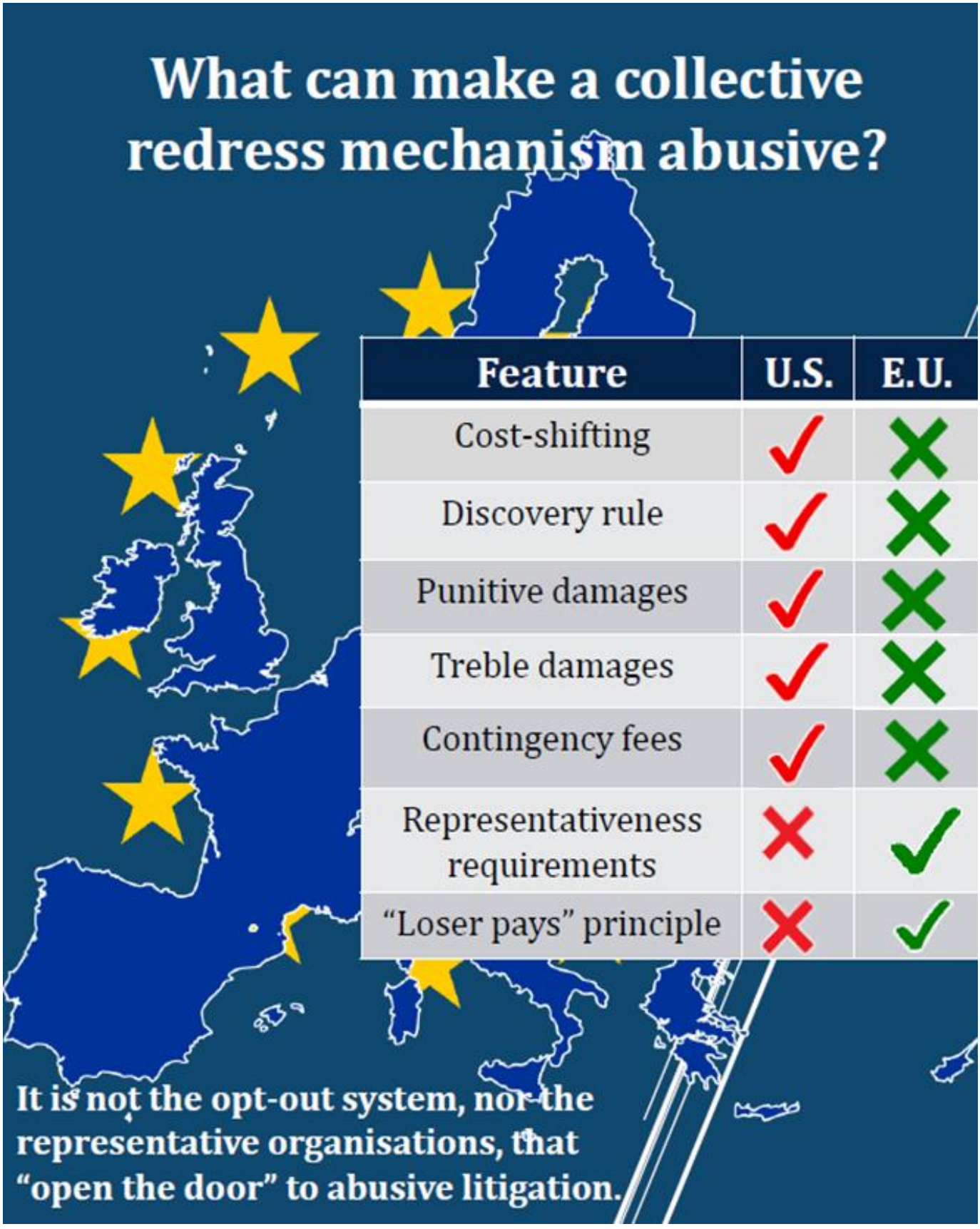
or of intention or negligence on the part of the trader.	***the part of the consumers concerned or of intention or negligence on the part of the trader***".	
Article 6 *Redress measures* 1. For the purposes of Article 5(3), Member States shall ensure that qualified entities are entitled to bring representative 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.	Amendment 4 **Article 6, paragraph 1, subparagraph 1** 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 not*** require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.	**Opt-in system** Consumers are more willing to defend their rights as part of a collective action rather than individually. • Consumers are often not aware that collective redress has been initiated and that they are required to take an active step and sign in to become an eligible party, especially when it takes place in another Member State; • Consumers are sometimes passive; this passiveness should not be used as a means to exclude them from participating to collective redress procedures; • EU consumers need an opt-out system, also for reasons of legal effectiveness and certainty. • Merely offering the possibility to allow for an opt-out system would lead to divergent implementation of the law.
Article 16 *Cross-border representative actions*	Amendment 5 **Article 16, subparagraph 2a (*new*)** "***2a. Member States must ensure equal conditions to consumers other than those habitually resident to access a collective redress procedure initiated in their jurisdiction. The provisions of Article 6, paragraph 1, shall apply mutatis mutandis***".	**Cross-border dimension** The current wording of Article 6(1) allows Member States to adopt an opt-out system. • If a Member State implements an opt-out system, it would create discriminatory conditions to access to justice for residents of other Member States; • This new addition creates a severe barrier to cross-border engagement and legal protection of consumers, contradicting the essential principle of the internal market and infringing Article 26(2) TFEU[12] and Article 38 of the Charter of Fundamental Rights.

[12] Treaty on the Functioning the European Union.

6. Other key amendments

European Commission's Proposal	JURI Amendment	BETTER FINANCE Amendment
Article 2 *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.	Amendment 33 – **Article 2 – paragraph 1** 1. This Directive shall apply to representative actions brought against infringements ***with a broad consumer impact*** by traders of provisions of the Union law listed in Annex I ***that protect*** 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.	**Endorse EC initial proposal** 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.
Article 3 *Definitions* (2) 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession;	Amendment 38 - **Article 3 – paragraph 1 – point 2** (2) 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting ***in civil capacity under the rules of civil law,*** including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession;	**Endorse the EC initial proposal** (2) 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession;
Article 3 *Definitions* (3) 'collective interests of consumers' means the interests of a number of consumers;	Amendment 39 - **Article 3 – paragraph 1 – point 3** (3) 'collective interests of consumers' means the interests of a number of consumers ***or of data subjects as defined in Regulation(EU)2016/679 (General Data Protection Regulation)***;	**Endorse EC initial proposal** (3) 'collective interests of consumers' means the interests of a number of consumers;
Article 5 *Representative actions for the protection of the collective interests of consumers* 5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without	Amendment 52 - **Article 4 – paragraph 5** 5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the ***duty*** 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 with ***Article 4 and*** Article 5(1).	**Endorse EC initial proposal** 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 with Article 5(1).

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 with Article 5(1).		
Article 5 *Representative actions for the protection of the collective interests of consumers* (a) an injunction order as an interim measure for stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practices;	Amendment 56 - **Article 5 – paragraph 2 – subparagraph 2 – point a** (a) an injunction order as an interim measure for stopping the ***illegal*** practice or, if the practice has not yet been carried out but is imminent, prohibiting the ***illegal*** practices;	**Endorse EC initial proposal** (a) an injunction order as an interim measure for stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practices;
N/A.	Amendment 67 - **Article 6 – paragraph 4 b (new)** ***4 b. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, shall be prohibited. For instance, the compensation awarded to consumers harmed collectively shall not exceed the amount owed by the trader in accordance with the applicable national or Union law in order to cover the actual harm suffered by them individually.***	Endorse EC initial proposal ~~***4 b. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, shall be prohibited. For instance, the compensation awarded to consumers harmed collectively shall not exceed the amount owed by the trader in accordance with the applicable national or Union law in order to cover the actual harm suffered by them individually.***~~


What can make a collective redress mechanism abusive?
Feature
U.S.
E.U.
Cost-shifting
Discovery rule
Punitive damages
Treble damages
Contingency fees
Representativeness requirements
"Loser pays" principle
It is not the opt-out system, nor the representative organisations, that "open the door" to abusive litigation.

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IV. Working Paper 1: Articles 3, 5, 6 and 8 of the Directive

BETTER FINANCE Working Paper 1

Targeted Provisions on the Proposal for a Directive on Representative Actions for the Protections of the Collective Interests of Consumers

(2018/0089 COD)

Ref.: Articles 3 (definitions), 5 (representative actions), 6 (redress measures), and 8 (settlements)
of the Proposed Directive (COM/2018/0184 final)

Date: 11 April 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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This Working Paper provides a targeted analysis on several provisions of the European Commission's (EC) *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*,[13] hereinafter 'Collective Redress Directive' or 'CRD'. The approach of this paper is to scrutinize the initial solution tabled by the EC, the views adopted by the European Parliament (EP) and shed light on the potential benefits or disadvantages for the Single Market and the right to access to justice for the European citizen.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer (Art. 38 Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

Below we lay down the initial, amended texts and the issues identified in relation to Articles 3, 5, 6 and 8 of the Directive.

Article 3 *Definitions*

1. **Defining a consumer organization** as a group "*that seeks to protect consumers' interests from illegal acts or omissions committed by traders*" unneccessarily narrows the scope of eligible organisations without any benefits to the Directive's aim:
    a. it incentivizes litigation as an activity or business model, since the purpose of most consumer organisations is to represent, advocate and protect the interests of their constituent group, without a focus on illegal acts;
    b. it restricts litigation to illegal acts or omissions committed by traders while the Directive encompasses any "infringements of provisions of Union law listed in Annex I that harm or may harm the collective interests of consumers", see Article 2 (1);
    c. in line with pt. a, it excludes from the scope of the Directive the majority of consumer organisations, general or specialized; and, as such

it goes against the two principles of granting an effective tool of private enforcement of collective rights and avoiding creating consumer litigation as a permanent, self-standing practice.

2. **Defining a trader** as a natural or legal person who acts "*in civil capacity under the rules of civil law*" excludes from the scope of the Directive:
    a. all providers of goods or services which, under national law, are not endowed with a *civil capacity*, regardless of their domain of activity;
    b. all consumer-related activities in jurisdictions with a dual system of civil law, divided between *civil* and *commercial* contracts and counterparties.
3. **Defining the material scope** of the Directive as "*Union and national law adopted to protect consumers*" will lead to:
    a. divergent interpretation and application of the law between courts of the same jurisdiction and between Member States;

[13] COM/2018/0184 final - 2018/089 (COD).

b. exclude from its scope all obligations of "traders" which are not specifically directed at consumer protection but which, if breached, may lead to significant mass harm situations;

e.g.: the double-cap equity trading volume limit on unregulated markets (OTC, dark pools) is aimed at preserving market integrity and stability, but adjacently affects investors since, if breached, it distorts the mechanism of price formation.

Article 5 *Representative actions for the protection of the collective interests of consumers*

1. The addition to paragraph (1) of Article 5, read in conjunction with the deletion of Article 4(2), weakens the position of representative organisations against breaches of Union law by 'traders' and does not serve the purpose of avoiding abusive litigation or ensuring an effective tool for harmed consumers:
    a. in the field of financial services, the past 10 years' experiences have shown that it was either ad-hoc established entities or investor-protection organisations coupled with ad-hoc established entities that have brought collective redress actions against mass harm practices;
    b. the ad-hoc establishment of representative organisations serves as an additional proof of the good faith of litigation and true objective of consumer protection since it can occur only when an actual mass harm results in practice;
    c. ad-hoc established organisations have served the purpose of representing classes of consumers that were not represented by other long-established organisations in the same case, ensuring an effective and exhaustive remedy for all affected members of the group;

e.g.: *the Fortis Case Settlement* – Stichting Fortis Investor Claims; *the Volkswagen AG shares case* – Stichting Volkswagen Investor Claims;

    d. ad-hoc established organisations may serve the purpose of defending the collective interests of the harmed group in those fields of Member States where an already-existing representative organization is not established;

e.g.: in Slovenia, Bulgaria, Greece, Denmark – to name a few – there are only shareholder or insurance policyholders' associations, but none dedicated to retail investors (fund investors).

2. The deletion of paragraph (4) of Article 5 does not serve any purpose:
    a. it does not prevent abusive litigation;
    b. it makes the procedure under this Directive ineffective, lengthy and costly since it separates injunctive orders (relief) from compensatory orders (redress), forcing representative organisations to first go through the entire procedure of an injunctive award and then, separately, ask for compensation of consumers, **which contravenes to the fundamentals of collective litigation and to the sound administration of justice.**

Article 6 *Redress measures*

1. The addition of a new paragraph (1a) creates uneven conditions for access to justice on a cross-border basis and stimulates "forum shopping":
    a. if a Member State chooses to allow, at national level, an opt-out system, but the Directive imposes the individual mandate of consumers harmed from other Member States (opt-in), it will prove in practice more difficult and less effective to cover all consumers harmed;
    b. if both Member States A and B allow for an opt-out system at national level, but the action is initiated in Member State A, consumers affected in Member State B will have a disadvantageous position compared to the conditions set by their own Member State, thus the Directive **creates a conflict between the levels of protection at Member State level**;
    c. imposing uneven levels of access to justice based on the extraneity element goes against Article 67(4) and Articles 8, 12, 18, and 26(2) of the Treaty on the Functioning of the European Union and Articles 20 and 47 of the Charter of Fundamental Rights of the European Union;
    d. for those representative organisations that have a cross-border or pan-EU scope of coverage or representation, these amendments incentivize forum shopping in those cases governed by special jurisdiction under the Brussels I Regulation since it allows differences between opt-in and opt-out systems at Member State level.
2. The deletion of paragraph (2) eliminates the possibility of due and full compensation of harmed consumers in those cases where the harm, resulting from a similar legal relationship with the same counterparty, requires a different analysis of the damages. In fact, it stimulates representative organisations not to choose the mechanism provided by this Directive and try enforcing the rights of the harmed group via available national procedures or via individual claims.
3. The deletion of paragraph (3) eliminates the possibility:
    a. to obtain collective redress for small claims, constituting an unjustified discrimination between affected consumers;
    b. for the reasons specified in Recital (3), it renders ineffective and useless consumer protection rights that do not have a high value.

Article 8 Settlements

BETTER FINANCE proposes to add an ADR solution that would be fit for purpose. Consumers, through representative organisations, must have be able to choose to settle via an out-of-court procedure to which the 'trader' must be bound, and with certain safeguards attached:

- the ADR mechanism must also provide for an opt-out system, insofar as affected consumers that are not satisfied with the settlement reached can individually claim and enforce their rights;
- the Settlement Agreement should be subject to a court of law's validation and approval.

Encompassing the mechanism provided under this Directive with an ADR alternative for consumers would: eliminate the risk of "forum shopping"; ensure equal and effective protection of all members of the harmed group, even with opt-in systems provided for judicial proceedings; foresee cost-efficient and time-economic settlement of cases; make less burdensome the enforcement of the award.

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V. Working Paper 2: Article 2 of the Directive

BETTER FINANCE Working Paper 2

Targeted Provisions on the Proposal for a Directive on Representative Actions for the Protections of the Collective Interests of Consumers

(2018/0089 COD)

Ref.: Article 2, *Material Scope of the Directive* (COM/2018/0184 final)
Date: 6 May 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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This Working Paper provides a targeted analysis on several provisions of the European Commission's (EC) *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*,[14] hereinafter 'Collective Redress Directive' or 'CRD'. The approach of this paper is to scrutinize the initial solution tabled by the EC, the views adopted by the European Parliament (EP) and shed light on the potential benefits or disadvantages for the Single Market and the right to access to justice for the European citizen.

Certain rules are key on defining a robust and effective mechanism for consumer redress, while also striking a fair balance between the diverging interests and avoiding abusive litigation.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer (Art. 38 Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

Below we lay down the issues identified in relation to Articles 2 of the Directive.

Article 2 *Scope*

The material scope of the Directive is delimited by the first paragraph of Article 2, which refers to a set of EU law provisions contained in Annex I: "*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*".

This "closed list" approach, as referred to in academic literature, has several disadvantages:

- First, it is inflexible and:
  - prevents any new cases that appear, and do not strictly fall under one of the legislative acts listed in Annex I, to be brought under the scope of the Directive and of EU law, making the mechanism provided in Articles 4, 5, 6 and 8to be practically effective;
  - in order to (rightfully) extend the scope of application of the Directive, it requires explicit legislative referral in new Directives and Regulations to the provisions of this Directive or, even worse, it requires an amendment (Article 289 *et seq.* TFEU).
- Second, it is incomplete, **as *direct investors*** (shareholders, bondholders employee shareholders) are currently **excluded** from the scope of the Directive:
  - by not expressly including the Market Abuse Directive[15] and Regulation[16] in Annex I, the legal protection offered to consumers at EU level to collectively enforce their rights is not accorded to direct investors.
  - it creates an unjustified imbalance with the legal protection offered to other, indirect investors (in funds, insurances, pensions, structured products, banking products) and consumers in general.

[14] COM/2018/0184 final - 2018/089 (COD).
[15] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014, p. 179–189.
[16] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, OJ L 173, 12.6.2014, p. 1–61.

An exclusion of direct individual investors is all the more incomprehensible as retail investors, when buying shares or bonds, are normally "*acting for purposes which are outside their trade, business, craft or profession*" and by that fall within the definition of "consumer" provided in Article 3(1) of the Directive.

The Capital Markets Union (CMU) Action Plan[17] states that the EU household is at the core of an integrated and efficient single market for financial services. The initial CMU Action Plan mentioned:

- "***retail savings*** *held* ***directly*** *or indirectly through asset managers, life assurance companies and pension funds* ***are key to unlocking capital markets***";[18]
- "*for retail investors saving for the future, greater investor confidence, transparency, certainty and choice can help to make the right investments*";[19]

This target has not been taken into account by the New Deal for Consumers.[20] On the contrary: a prominent category of consumers is excluded from the scope of the Directive. An EU collective redress system covering also individual shareholders is a must. If the EU truly wants to deliver on the Capital Markets Union it needs to restore individual and public confidence in the financial services market and to enforce legislation in the area of investor protection.

Albeit these ambitious initiatives of the European Commission with the CMU Action Plan and the New Deal for Consumers, the mechanism under this Directive falls short from providing a practically efficient and flexible redress procedure to allow all EU consumers to enforce their rights, especially since a considerable part of them is **still excluded** from the list of Annex I after the European Parliament first reading.

Therefore, the Council of the EU should include in Annex I the Market Abuse Directive (MAD2) and the Market Abuse Regulation (MAR) in order to cover as well direct investors, such as equity investors, employee shareowners or bondholders.

[17] European Commission, 'Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union' (COM/2015/0468 final), hereinafter "CMU Action Plan".
[18] CMU Action Plan, p. 5, emphasis added.
[19] Ibid.
[20] European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers' (COM/2018/0183 final).

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VI. Working Paper 3: Aligning the opt-out system with compensation claims

BETTER FINANCE Working Paper 3

Targeted Comments on the Proposal for a Directive on

Representative Actions for the Protections of the Collective Interests of Consumers

(2018/0089 COD)

Ref.: **Aligning the opt-out system with compensation claims**
Date: 9 May 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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Certain rules are key on defining a robust and effective mechanism for consumer redress, while also striking a fair balance between the diverging interests and avoiding abusive litigation.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer (Art. 38 Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

Below we lay arguments on how the **opt-out system** can be aligned with **compensation calculation and distribution**, and also a text proposal for the Directive.

Opt-out system: judicial and ADR-based redress

The opt-out system is the only way to embed the constitutional right of disposition and the principle of private autonomy of the parties in a judicial action, having the added value to use the effects of the *express manifestation of will* of the party to its benefit. This is of particular importance in consumer cases, where the value of claims may be heavily offset by lengthy and costly individual court actions, or where the lack of resources, knowledge or information act as strong deterrents for pursuing a right in court.

"*Rights which cannot be enforced in practice are worthless*"[22]

The right to choose whether or not to be included in a redress action remains intact for each member of the group. However, exercising this right would inverse the would have the effect from inclusion to excludsion from a redress action. Each member is free to actively exercise the right of disposition, reject the class action and individually pursue his rights in court.

In other words, **a collective redress mechanism should not punish the vulnerable position of consumers.**

The current provision of the Directive on the opt-in/out system at national level lays down (Article 6.1):

> "[...] *A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.*"

[21] COM/2018/0184 final - 2018/089 (COD).
[22] European Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress, SEC(2011) 173 fi nal, para 1.1.

For cross-border cases, the provisions of Article 6.1 would apply mutatis mutandis. However, Amendment 61 of the JURI Committee adds:

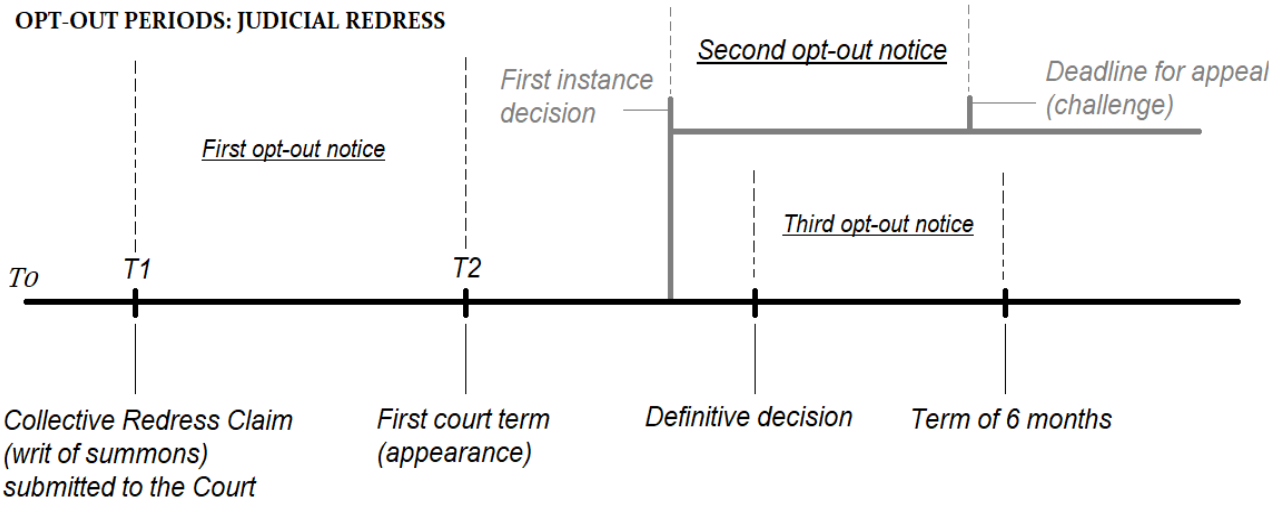
> "[...] *If a Member State does not require a mandate of the individual consumer to join the representative action, this Member State shall nevertheless allow those individuals* [...] *to participate* [...] *in the event they gave their explicit mandate to join the representative action*".

This amendment goes against Articles 38 and 47 of the Charter of Fundamental Rights of the EU and against Article 67 of the Treaty on the Functioning of the EU.

In order to be effective and fit-for-purpose, **a collective redress mechanism must include all members of the harmed group by default and from the beginning**, i.e. without requiring the active consent from the beginning (opt-out). The opt-out system is put in place with respect to the constitutional right of disposition by offering one or more ***opt-out deadlines***. Moreover, any member of the group that does not consider itself harmed can also choose to **not submit a compensation claim**.

The opt-out mechanism would be available both for judicial and ADR-based redress.

In the judicial form, the first opt-out deadline should be between the formal writ of summons (or equivalent, depending on the legal order) is submitted and the first scheduled appearance in court.

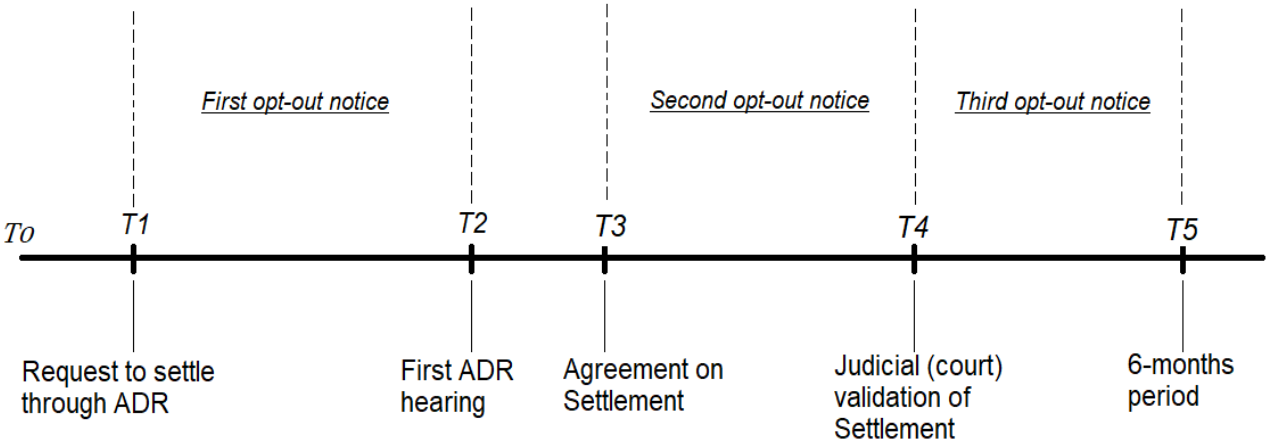


The second opt-out deadline can (and should) be included after the decision of the first instance is pronounced until the expiry of the deadline for appeal – applying *mutatis mutandis* for all other judicial challenge actions (extraordinary appeal – *recours* – revision etc).

The last type of opt-out deadline should be after a judicial decision becomes definitive, but limited in time (e.g. 6 months) for reasons of legal certainty.

The same argumentation would be applied for ADR mechanisms, as presented below.

OPT-OUT PERIODS: ADR MECHANISMS



Establishment and calculation of compensation

Opt-out systems do not (and should not) award compensation (damages) *in rem*, but for a determinate or objectively determinable number of claimants, based on the characteristics of the case. The actual "universe" of beneficiaries of a judicial award or ADR settlement can be determined using strict, objective and commonly agreed criteria, such as: all contracts concerning type x of goods/services, concluded between the T_0 and T_1 periods, having a certain provision included, etc.

Real case example – compensation calculation and distribution

In the Fortis case, the parties to the settlement estimated a maximum number of 220,000 affected consumers by establishing two classes of claimants (persons having *buyer shares* and *holder shares*), three periods of share acquisition (e.g. "*21 September 2007 o.o.b. up to and including 7 November 2007 c.o.b.*") and share characteristics; the compensation has been established per share (e.g. "*EUR 0.23 (period 1), EUR 0.51 (period 2) and EUR 0.15 (period 3)*") and the settlement agreement provides for additional compensation for particular situations.

In addition, the parties agreed on the distribution procedure for compensation ("*the Settlement Amount will be distributed pursuant to the Settlement Distribution Plan*"): first, claimants must submit a claim compensation form to an agreed Claims Administrator - named by the parties (claimants and defendant): "*Eligible Shareholders who do not, or not timely, submit a Claim Form, or whose Claim Form has not been approved, will not be entitled to any compensation*" – which will "*determine each Eligible Shareholder's pro rata share of the Settlement Amount based upon each Eligible Shareholder's Claim Form and in accordance with this Settlement Distribution Plan*".

Real case example – safeguards for parties

Defendants: settlement agreements (through ADR mechanisms) or judicial proceedings in collective redress actions may impose an "opt-out cap", meaning that if a significant part of the harmed consumers opt-out within a specific deadline, the binding decision will be null and void for all parties.

This allows sound administration of justice (avoiding conflicting judicial awards) and alleviates potential "litigation booms" for the defendant.

Moreover, it allows collective redress actions with opt-out systems to have an significantly high **accuracy rate, compared to the EU average[23] in the past 20 years of 10% of compensated consumers.**

Claimants (consumers): the compensation decision or settlement is calculated to cover a determined damage per each claimant and a determined maximum number of claimants, estimated by the parties, based on the characteristics of the case.

- In case the actual number of approved consumers is higher, an "additional settlement amount" (determined by the Court of through ADR) will be used by the Claims Administrator to satisfy the claims;
- In case the actual number of approved consumers is lower, the parties can either agree on:
  - Instructing the Claims Administrator to redistribute pro-rata the excess amount; or
  - Deciding that the excess amount is to be returned to the Defendant;
- In case the actual number of approved consumers is significantly lower or higher (***never happened in practice***), the court decision or settlement can be amended.

Ample evidence (judicial and ADR case law in Europe) has shown that opt-out systems for consumer redress have not led to abuses, blackmailing, or abusive litigation; moreover, there are no irreconcilable features of an opt-out system with a compensation action. Therefore, the EU must include the opt-out system in the Collective Redress Directive.

Below, we provide an example text for the amendments that must be included in the *Directive on representative actions for the protection of collective interests of consumers* in order to create a mechanism that benefits consumers, the European economy and that is practically useful.

Article 6	**Redress measures**	
Current text	JURI amendments	BETTER FINANCE amendments
A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.	*A Member State* ***may or may not*** *require the mandate of the individual consumers concerned before a redress order is issued.*	*A Member State sha****ll allow representative organisations to represent all harmed consumers concerned without requiring the individual mandate*** *before a declaratory decision or redress order is issued.*
	(new) 1a. If a Member State does not require a mandate of the individual consumer to join the representative action, this Member State shall nevertheless allow those individuals who are not habitually resident in the Member State where the action	***(new) 1.a. On the basis of the declaratory decision or redress order issued, no compensation may be awarded to consumers that explicitly decided to be excluded from the case or that have not explicitly claimed compensation within a specific timeframe subject to conditions laid down by the Member State.***

[23] Only large mis-selling of financial scandals included in the calculations.

	occurs, to participate in the representative action, in the event they gave their explicit mandate to join the representative action within the applicable time limit.	
		(new) 1.b. The European Commission, after consultation with the Member States, shall lay down through a delegated regulation the minimum and maximum criteria for claiming compensation in accordance with paragraphs 1 and 1.a. above, which Member States will have the freedom to implement as necessary in accordance with national law. In particular, the European Commission will pay due attention to the necessity to avoid forum shopping and to allow sufficient safeguards for consumers who wish to be excluded from the case, without unduly burdening the compensation procedure.
		(new) 1.c. Member States shall ensure that, where a number of affected consumers that exercised the right to be excluded from the action exceeds a significant part of the total minimum number of estimated consumers affected, established in accordance with Article 6bis, paragraph (1), the binding decision of the court shall be subject to judicial review, if the defendant requests so.
(new) Article 6bis	**Establishment of compensation**	
		1. Member States shall ensure that the parties, either through judicial or alternative dispute resolution actions, establish the compensation amount based on objective and commonly accepted criteria, which must be based on the estimated (minimum and maximum) number of consumers, clearly distinguishable characteristics of the legal relationship bringing together the collective claims and based on quantifiable sources of information, which shall be subject to judicial review, except where the one of the parties does not object to the latter estimation. ***2. Where the actual number of compensation claims submitted, according to the procedure laid down in Article 6tertiary, is significantly higher or lower than the estimated total minimum or maximum number of affected consumers, the binding decision will be reviewed or amended.***

(new) Article 6ter Distribution of compensation	
	1. The parties shall appoint, or the court shall name, in case the parties do not agree, a Claims Administrator in charge of accepting compensation claims, calculating and distributing compensation amounts as per the declaratory decision or redress order issued pursuant to Article 6. ***2. Member States shall ensure the independence of the Claims Administrator and shall establish legal safeguards concerning the compensation amounts.*** ***3. The Claims Administrator shall be custodian of the compensation amount, submitted by the defendant in accordance with the declaratory decision or redress order issues in accordance with Article 6.*** ***4. Claimants shall be provided with an adequate and specific deadline for submitting compensation claims. Exceeding the deadline will not affect the binding force of the declaratory decision or redress order towards a concerned consumer but will exclude the latter from the right to be awarded compensation as per the declaratory decision or redress order issued in accordance with Article 6.***
(new) Article 6tetra Conflict resolution	
	1. Any conflicts arising from the procedure established in Article 6ter above, between the claimants or the defendant and the Claims Administrator, shall be subject to judicial review. ***2. Member States shall ensure that the decision issued in accordance with paragraph 1 herein will be final and binding.***

BETTER FINANCE
LEGAL COMMITTEE

VII. Working Paper 4: Definition of consumers

BETTER FINANCE Working Paper 4

Targeted Comments on the Proposal for a Directive on

Representative Actions for the Protections of the Collective Interests of Consumers

(2018/0089 COD)

Ref.: **Definition of consumers**
Date: 30 May 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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This Working Paper provides a targeted analysis on several provisions of the European Commission's (EC) *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*,[24] hereinafter 'Collective Redress Directive' or 'CRD'. Certain rules are key on defining a robust and effective mechanism for consumer redress, while also striking a fair balance between the diverging interests and avoiding abusive litigation.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer (Art. 38 Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

Below we lay arguments explaining why financial services users are the most vulnerable category of **consumers**.

Financial services users as consumers – Article 3(1)

The purpose of the collective redress mechanism is to serve EU citizens in their capacity as consumers on a cross-sectorial and cross-border basis. However, there have been debates on whether financial services users, such as investors, shareowners, bondholders, life insurance policy holders etc., qualify as consumers or not.

The current text of Directive contains, in Article 3(1), the definition of a consumer, specifying:

> *(1) 'consumer' means any natural person who is acting for purposes which are outside their trade, business, craft or profession;*

This definition follows the line of other EU consumer protection acts[25] and revolves around the nature and scope of a contract in qualifying a person as a consumer. Albeit the EU financial framework uses a different, specific, legal terminology for qualifying the non-professional counterparties – individual investors, life insurance policy holders, retail clients, savers – the latter are no less consumers than air passengers, for instance.

This finding is based on the (I.) *rationale of consumer protection law*, the (II.) *nature* and (III.) *purpose* of consumer contracts, the (IV.) *characteristics of financial services or products* and the (V.) need to acknowledge the *equivalence of terminology*, elaborated below.

[24] COM/2018/0184 final - 2018/089 (COD).

[25] See Article 3(12) of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L345/1; Article 17(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32; Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34; Article 3(a) Directive 2008/48/CE of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66.

I. *Rationale of consumer protection*

The reasoning starts from the premise that consumer protection law has a derogatory nature (*lex specialis*) from common law due to the unequal position of consumers in legal relationships with traders. The unequal position is in turn explained by several factors affecting consumers: (i) lack of specific knowledge; (ii) the lack of resources, financial and material; (iii) lack of experience in a sector of activity; and, many times, (iv) the reduced value (monetary or patrimonial) of the legal relationships. These factors trigger two practical effects:

- First, a significant ***imbalance*** in the negotiation power ***between the consumer and trader***;
- Second, but most important, the consumer's ***passive behaviour***.

These factors are used to justify the need for extra protection of consumers, the case at hand being an attractive, flexible and practically efficient redress mechanism. However, the rationale goes even beyond the need to protect consumers, as the Working Group on 'Parties' of UNIDROIT and the European Law Institute (ELI) obliterates the concept of 'consumer' for collective redress and acknowledges the necessity to assess and adjudicate jointly cases where: such procedure would make dispute resolution more efficient; all claims arise from the save event or legal relationship; and the claims are similar.

Notwithstanding the following reasoning, the inclusion of financial services users under the scope of a pan-EU collective redress mechanism should not, by principle, keep account of whether the former qualify or not as consumers. Nevertheless, the following reasoning will assume that collective redress is only possible for consumers.

II. *Nature of a contract – acting outside a trade or profession*

EU law qualifies a party to a contract as a consumer based on the context and capacity in which he or she concludes the contract (*nature*), finding which was validated by the Court of Justice of the EU[26] ("CJEU") and by Advocate-General Tanchev in a recent preliminary reference proceeding before the CJEU.[27] This explicit criterion leaves small room for interpretation, referring only to the *objective situation* of a person, and is not anchored in his or her behaviour, level of knowledge, expertise or degree of risks assumed.[28]

In other words, the CJEU explained that the nature of the contract must mean that the legal relationship for the consumer arises "*in the course of activities outside of a trade, business or profession*",[29] since the assessment must take into consideration the objective nature of the concept of consumer.[30]

The CJEU upheld this reasoning in interpreting the same definition of a consumer in different provisions of EU law relating to consumers or consumer contracts.[31] It is therefore evident that the construction "*acting for purposes outside his trade or profession*" creates an absolute assumption (*juris et de jure*) that a person will qualify as a consumer whenever he or she concludes

[26] Case C-375/13 *Harald Kolassa* v *Barclays Bank plc*, ECLI:EU:C:2015:37, para 23.
[27] Opinion of AG Tanchev in Case C-208/18 *Petruchova* v *FIBO*, ECLI:EU:C:2019:314, para 46.
[28] See Ibid, para 47; see also Case C-498/16 *Maximillian Schrems* v *Facebook Ireland Ltd*, ECLI:EU:C:2018:37, para 39; Order of the Court in Case C-74/15 *Tarcau* v *Intesa Sanpaolo*, ECLI:EU:C:2015:772, para 23.
[29] Case C-74/15 *Tarcau* v *Intesa Sanpaolo* (n 5) para 27 ; see also Case C-534/15 *Dumitras vs BRD Groupe Societe Generale*, ECLI:EU:2016:700, para 30.
[30] Case C-110/14 *Horatiu Ovidiu Costea* v *SC Volksbank Romania*, EU:C:2015:538, para 21.
[31] Such as the Unfair Terms Directive (93/13/EC), the Rome I Regulation (1215/2012), or the Brussels I Convention/Regulation (593/2008) – see also Case C-348/14 *Maria Bucura* v *Bancpost*, ECLI:EU:C:2015:447;

a contract with a professional or trader in a context that is not related to the person's trade or profession.

Although, according to the settled case law of the CJEU, the above explanations are sufficient to determine in abstract when is a party to a contract a consumer, below we refer to additional arguments *de lege ferenda* to justify why financial services users are consumers and maintain this status.

III. *Purpose of the contract – obtaining a profit*

As per the definition in Article 3(1) of the proposed Directive, one must analyse also the purpose of consumer contracts. From the traders' point of view, the purpose of concluding a contract is undoubtedly to obtain a profit. Conversely, from a consumer perspective, although the immediate purpose (*causa proxima*) is that of consumption, on the short- or long-term, depending on the nature of the product or service, the indirect purpose of a contract (*causa remota*) is also that of **achieving a profit**. This is explained by the general theory of commerce, by which a trade is no longer rational if a contracting party could procure the good or service on its own account at a lower cost of resources than that charged by the seller of the good or service.

If one were to make a distinction of contracts by their intended purpose, these would be divided into gratifications (donations, wills, free leases) and beneficial contracts, where both parties aim to obtain a patrimonial benefit in exchange of performing an obligation.

In general, gratification contracts are not only subject to different legal branches (such as inheritance law), but the rationale behind consumer law no longer applies as the consumer is by default gratified and does not incur the performance of any obligation he or she is not able to negotiate or assume.

Therefore, it must be concluded at this point that **a consumer always pursues obtaining a profit** as well by concluding a contract with a trader, in addition or adjacently to the purpose of consumption. As such, in financial services and capital markets, **retail investors must qualify as consumers** in spite of the fact that they pursue a speculative purpose or not.

IV. *Characteristics of financial products or services*

BETTER FINANCE contends that financial services users are one of the most vulnerable categories of consumers, due to the exceptional nature and characteristics of financial services and products.

> "*We don't expect people to design and build their own cars. We do it for them, in a way that makes the technology so transparent that a 16-year-old can use it. The same goes for computers and all of the other important instruments of daily life. Why is saving and dissaving* […] *so "special" that it requires us to educate ourselves — and protect ourselves from fraud and misinformation — in a field for which most of us have no aptitude?*"[32]

Capital markets structures and investment products have grown so much in complexity that bare mathematical or financial knowledge are by far insufficient as to allow individuals to

[32] Foreword by Laurence B. Siegel for a Research Paper on Financial Education and Consumer Protection, see Research Foundation of the CFA Institute, 'Life-cycle Investing: Financial Education and Consumer Protection', editors Laurence B. Siegel, Zvi Bodie, Laura Stanton, (2012), vii, https://www.cfainstitute.org/-/media/documents/book/rf-publication/2012/rf-v2012-n3-full-pdf.ashx.

make an informed decision, consider risks and assume obligations on an equal position as professionals. Therefore, why they not benefit of a special protection as all other consumers?

Academic literature even submits that, out of the three categories of consumers – based on the abstract type of product purchased – financial services users have the weakest position, since investment products:

- Can neither be tested after purchase ("*experience goods*");
- Nor can they be verified beforehand ("*searchable goods*").[33]

What is more, surveys researching the level of basic financial literacy of the adult population in the EU have shown that less than half (49.86%), on average, have the correct answer to at least three out of four simple questions relating to finance: inflation, numeracy, risk diversification and compounding.[34]

It is even worse, considering that academics and researchers in behavioral finance observed that retail investors tend to underestimate risks, emphasize positive returns or overestimate their ability to predict returns, even apply "*hyperbolic discounting of future costs*".[35]

It follows that it is crucial that retail investors place their confidence in the investment advice received and in the best execution of financial services providers for the purpose of investing,[36] which they must receive additional protection and accessible conditions for redress than other investors, in general.

Therefore, the abovementioned considerations all the more strengthen the reasons to qualify retail financial services users as consumers, irrespective of the specific terminology used to describe the objective capacity in a contract (creditor, debtor, guarantor, investor, saver, insured etc).

V. *Equivalence of terminology*

The arguments presented above (I-IV) explain why retail financial services users must be considered a consumer on the basis of its objective and subjective conditions. Nevertheless, in order to avoid divergent interpretation and application of the law, the EU co-legislators must acknowledge the equivalence of the specific terminology used in EU consumer protection law and EU financial regulation. Based on a short query on the CJEU website, 62% of most recent preliminary references in the category "consumer protection" concern financial services, capital markets or financial institutions only.

The issue at stake is that MiFID II makes a distinction between professional and retail "clients" of investment services providers. Although there is no legally binding connection or reference between what MiFID considers "retail" and what consumer protection law considers "consumers", terminology should not impede qualification as the assessment must be made on the *objective nature and purpose*, not on wording.

[33] David Merenda, 'Protection of Retail Investors' (6 December 2018) Prague Law Working Papers Series 2018/III/1, p. 2.
[34] Own calculations based on Leora Klapper, Anamaria Lusardi, Peter van Oudeheusden, 'Financial Literacy Around the World: Insights from the Standard & Poor's Ratings Services - Global Financial Literacy Survey" (2014).
[35] See Merenda (n 10) p. 4.
[36] See Niamh Moloney, *How to Protect Investors* (2010) Cambridge University Press, p. 85.

BETTER FINANCE LEGAL COMMITTEE

VIII. Working Paper 5: Private International Law applicable to Collective Redress cases

BETTER FINANCE Working Paper 5

Public International Law applicable to Collective Redress Actions:

Solutions for Multiple-law Cases

Directive on representative actions for the protection of the collective interests of consumers (2018/0089 COD)

Date: 1 July 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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INTRODUCTION

Regulation Rome I[37] **already** provides the applicable law in legal relationships with a cross-border (*extraneity*) element, distinguishing between 5 categories of referral rules:

a) Overriding mandatory provisions – Article 9

According to Article 9 of the Regulation, provisions of national substantive law safeguarding public interests derogate from the Regulation and apply to all legal relationships falling under their scope, eliminating by default the conflict of laws.

b) Public policy of the forum – Article 21

Article 21 of the Regulation provides that the applicable law, determined pursuant to the referral rules under the Regulation, may be set aside if it creates a conflict with other provisions of public policy (*ordre public*) of the laws of the motioned court's Member State.

c) General rule – freedom of choice – Article 3

The parties to a contract can decide the applicable law to their *contractual* relationship. This possibility is not accorded to disputes arising from tort (*responsabilité civile delictuelle*).

d) Absence of choice – Article 4

The referral rules of Article 4 of the Regulation are a residual category, as these would apply the last if any of the rules in Articles 3, 9, 21, or in the special categories (below) would not be incident.

e) Special categories – Articles 5, 6, 7, and 8

The special categories of referral rules are derogatory only from Article 3 and provide a solution to conflicts of law arising from carriage, insurance, consumer and individual employment contracts. Of relevance are those of Article 6 (*consumer contracts*) by which freedom of choice (Article 3) is still granted, provided that it does not deprive the consumer of mandatory provisions prescribed by the applicable law in absence of a consensual choice.

LEGAL ISSUE

Regulation Rome I is not applicable for disputes arising from EU or Commission Regulations (Levels 1 and 2) since these are directly applicable across jurisdictions. In addition, there would be no conflicts if the court would apply overriding mandatory provisions (Article 9) or the public policy of the forum (Article 21).

However, when legal relationships would fall under the scope of a Directive – even of maximum harmonisation – it may be that the motioned court must apply different laws (*lato sensu* – Article 12) for the same group of affected consumers and in the same case, in particular for establishing liability and compensation.

Therefore, BETTER FINANCE proposes principle-based solutions for these potential conflicts based on the type of diverging provisions – on liability and on compensation – under two guiding principles.

[37] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6.

GUIDING PRINCIPLES

Principle 1. Duty of the representative organisation to act in the best interest of sound administration of justice

The representative organisation is held to act of such nature as to reduce conflicts of applicable laws and not unnecessarily burden the court or the defendant by way of forum choice. If possible, the representative organisation must coordinate its action with the rules of the Rome I Regulation and that of Brussels Ia Regulation.

If laws of different jurisdictions would apply in the same collective action, the representative organisation has an additional duty of care and must take all necessary steps to ensure that divided action would not better serve the purposes of consumers.

In all cases where multiple laws would apply to different sub-groups of consumers in the same collective redress action, the representative organisation should attempt to settle the case in agreement with the trader or through alternative dispute resolution. As settlements, in general, are flexible, they result with less divergencies and conflicts than would arise through judicial resolution. The representative action must demonstrate it undertook the necessary efforts and acted in good faith to settle with the trader.

If settlement with the trader cannot be reached, the representative organisation must motion the court in a jurisdiction whose law would govern the majority of cases, when allowed by virtue of Brussels Ia Regulation.

Principle 2. Different applicable laws <u>DO NOT IMPEDE</u> collective redress[38]

Notwithstanding the principles set out above, BETTER FINANCE firmly suggests clarifying, by virtue of Recitals or provisions in the Directive, that multiple applicable laws on the substance of the same collective redress action **<u>do not impede collective redress</u>**. Even in the worst of scenarios, for example where a motioned court would need to apply 28 different laws of Member States, it was *intrinsic to the Rome Convention* and to the *Rome I Regulation* that **<u>a judge</u>** appointed by the laws of a Member State **<u>is fully competent and able</u>** to properly rule and apply any and all incident laws by virtue of public international law.

This situation can and has already occurred in practice, even where all consumers were residents of the forum, involving no cross-border element. Therefore, in any way it **<u>should not be a reason to stay and dismiss collective claims for consumers</u>**.

However, in order to alleviate potential difficulties for motioned courts, BETTER FINANCE proposes several *solutions* for the purpose of this Directive. These rules would be derogatory from Rome I Regulation and would be strictly interpreted for the scope of the Collective Redress action.

[38] See Rule X31 of the UNIDROIT-European Law Institute Working Paper on Transnational Principles to European Rules of Civil Procedure - https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/Unidroit_Materials/Trier_2018/WG_Parties_-_Draft_on_Collective_Redress.pdf.

SOLUTIONS

Solution 1. Motioned court's assessment of the optimal solution

From the outset, the motioned court should rule on its competence and then on the applicable law(s). If the motioned court should find that the action at hand represents a multiple-law case, it should have the possibility:

- to continue proceedings normally, as it would with an individual claim; or
- to decide on the application of one or the other of Solutions 2 and 3.

In assessing this choice, the motioned court must hold account of the best interests of consumers, which under the scope of this Directive would be that of collective adjudication and enforcement of claims. Therefore, the judge should proceed with any of Solutions 2 or 3 below only where it can justify that consumers would suffer a significant detriment by continuing the proceedings as in a single-law case.

The principle 2 above – multiple-law cases do not impede collective redress – must have precedence, therefore Solutions 2 and 3 below must only be applied in exceptional circumstances.

Solution 2. Separation of proceedings into sub-groups before establishment of liability

If the motioned court were to find that consumers would suffer a significant detriment by continuing proceedings as in a single-law case, pursuant to Solution 1 above, the it must analyse the diverging laws and decide:

- whether the potentially divergent judgments may arise from the conditions to establish liability, and the degree of it; or
- whether the potentially divergent judgment may arise from the conditions to calculate and distribute compensation (damages).

In the first scenario, the court must separate into sub-groups by applicable law from the outset and continue proceedings. If the second scenario is applicable, the judge must apply Solution 3 below.

Solution 3. Separation of proceedings into sub-groups before establishment of compensation

The purpose of the harmonised mechanism under the Collective Redress Directive is to ensure that the assessment and adjudication of a legal dispute is, to the largest extent possible, unitary for all affected consumers in a particular case of mis-selling.

Therefore, the rule should be that, where possible, the case must be heard and resolved jointly as long as possible. The judge should not be able to decide the division into sub-groups before establishment of liability in a situation where criteria for the latter are common in all applicable laws and the solutions do not diverge.

Under Solution 3, the scenario is that the judge can establish the same type and degree of liability of the trader concerning all consumers based on the different applicable laws pursuant to Rome I Regulation.

However, where rules on compensation (*damages*) differ to a sufficient degree that a unitary judgment would no longer be optimal or serve the purpose of sound administration of justice, the motioned court should be allowed to stay proceedings and separate into sub-groups by the applicable law.

This Solution 3 would be equivalent to *declaratory binding judgments*, by which a court establishes only the illegal nature of a practice and the liability of the trader, being at the choice of consumers whether to continue with the same court in assessing damages with the same court or with a different court.

CONCLUSION

The purpose of this paper is to find the optimal solutions to make the Collective Redress Directive work in practice, align it with the different procedural laws of Member States and safeguard consumer interests, sound administration of justice, whilst also taking into account the diversity of legal traditions that define an EU for all Europeans.

Therefore, the ultimate purpose is to keep the Directive "alive" and find the compromises that would align the different interests of Member States with the purpose of ensuring a collective redress mechanism for consumers.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer and investor protection (Art. 38 and 47 of the Charter of Fundamental Rights), and equal conditions for access to justice (Art. 67 of the Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU.

IX. Working Paper 6: Consumer Protection provisions in key EU Financial law

BETTER FINANCE Working Paper 6

Consumer Protection Provisions in Key EU Financial Legislation Instruments

(2018/0089 COD)

Ref.: **Directive on representative actions for the protection of the collective interests of consumers**
Date: 24 June 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

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This Working Paper provides a targeted analysis on all the provisions contained in the EU financial legislation instruments listed in Annex I of the Directive that refer to consumer protection rights. The analysed instruments are:

1. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (OJ L 271, 9.10.2002, p. 16).
2. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).
3. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32–96).
4. Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (OJ L 266, 9.10.2009, p. 11–18).
5. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7–17).
6. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1–155): Articles 183, 184, 185 and186.
7. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73).
8. Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1–17).
9. Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18–38).
10. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).
11. Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214): Articles 3 to 18 and Article 20(2).
12. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1–23).
13. Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98 – 121).
14. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35–127).

15. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 26, 2.2.2016, p. 19–59).
16. Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37–85).
17. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12–82).
18. Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8–45).

Consumer protection provisions contained in key EU financial legislation instruments

The purpose of this paper is to show: first, that almost 40% of the legislative instruments identified by the Commission in the field of consumer protection concern financial services and, second, to show precisely which and how many provisions from each of these instruments have rights addressed or benefiting retail financial services users.

Important note: All the below-listed provisions are addressed ***directly the relationship between consumers and traders*** *(horizontal rules). However, it is of* ***utmost importance*** *to note that just a few of the EU consumer protection provisions are directly addressed to consumers, as* ***the vast majority are issued through vertical rules (concerning the legal relationship between a national competent authority and a trader)****. As such, all those latter* ***rules still*** *have the aim to* ***protect investors****, e.g. minimum capital requirements or organisational obligations to avoid conflicts of interests, and many of them are to be found in the financial services contract, Prospectus, or other documents concerning the clients. In addition, most consumer protection rules in capital markets are enshrined in the subsidiary (level 2) legislation.*

Therefore, even if a provision does not explicitly state that "the consumer has the right to…", it will still have the vocation of protecting the consumer and conferring him indirect rights. As such, we give a couple of examples in the table below.

EU financial regulation works through the "Lamfalussy" process, by which the general principles and main policy lines are drawn by the co-legislators through Directives and Regulations ("Level 1" legislation – adopted via Article 289 TFEU), and the acts laying down the details (*delegated* or *implementing acts*) constitute "Level 2" legislation, being adopted by the EU Commission on the basis of Article 291 TFEU.

Therefore, the "main" consumer protection rights are listed below. Nevertheless, an entire scheme of subsequent rights were established and are enforceable by virtue of Level 2 legislation.

Name of piece of legislation	Horizontal rules (industry – consumers)	Vertical rules (Member State – industry)
Solvency II: Directive 2009/138/EC	Article 183 (1) Article 184 paras (1) to (7) Article 186(1)	
Payment accounts directive: Directive 2014/92/EU	Article 4 paras (1) to (7) Article 5 paras (1) to (5) Article 6 (1) and (2) Article 7 (1) to (4) Article 8 Article 9 Article 10 (1) to (6) Article 11 (1) and (2) Article 12 (1) to (4) Article 13 (1) to (3) Article 14 (1) and (2) Article 15 Article 16 (1) to (4), (6), (7), (9), (10) Article 17 (1) to (8) Article 18 (1) to (4) Article 20	
MMF Regulation: Regulation (EU) 2017/1131	Article 9 Article 6 Article 7 Article 10 Article 27 Article 39 Article 48 Article 50 Article 56 Article 34, paras 1, (a)(i); (b)(i) Article 36 (1) to (5)	
AIFMD: Directive 2011/61/EU on Alternative Investment Fund Managers	Article 14. (2) Article 19 (3) Article 23 (1)	Article 12 (d)
Credit transfers regulation: Regulation (EU) No 260/2012	Article 5 (3) (d). (i), (ii) and (iii) Article 5 (8) Article 9 (1) to (3)	Article 11 (1), (2) Article 12, para 1, (9)
EuVECA: Regulation (EU) No 345/2013 European venturecapital funds	Article 7 (b), (f), (g) Article 9, (4) Article 13 (1)	Article 18 (3)
EuSEF: Regulation (EU) No 346/2013 on	Art 7 (b), (f) Article 9 (1) Article 13 (1), a) to b)	Article 20 (1)

European social entrepreneurship funds	
UCITS Directive: Directive 2009/65/EC relating to undertakings for collective investment in transferable securities (UCITS)	Article 13(2) Article 14 Article 19 Article 20 Article 22 Article 24 Article 25 Article 30 Article 32 Article 44 Article 45 Article 46 Article 48, para (1), point b) Para (2), point b) Para (3), point b) Article 50 Article 63 Articles 68 to 82 Articles 84 to 89
Cross-border payments: Regulation (EC) No 924/2009 on cross-border payments in the Community	Article 3(1) Article 4 Articles 6 to 8
E-money Institutions: Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions	Article 3(3) Article 6(2)
MiFID II: Directive 2014/65/EU on markets in financial instruments	*Main investor protection rules* Article 23 Articles 24-30
PRIIPs: Regulation (EU) 1286/2014on key information documents for packaged retail and insurance-based investment products	Article 5 Article 6 (1), (4) – (6) Article 7(1) Article 9 Article 13 (1), (3) and (4) Article 14 (1), (2) Article 19
IDD: Directive (EU) 2016/97 on insurance distribution (recast)	Article 14 Article 15 Articles 17-24 Articles 27-30
Prospectus Regulation: Regulation (EU) 2017/1129 on the prospectus to be published when securities	Articles 4-9 Article 11 Article 18 Article 21 Article 22

are offered to the public or admitted to trading on a regulated market		
Directive concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC	Art 3 Art 5 Art 7 51), (3), (4) Art 10 (1), (3)	Art 4 (2) Art 6 (1) Art 7 (2) Art 8 Art 9 Art 10 (2), (3) Art 11 Art 12 Art 13 Art 15 Art 17
ELTIF: Regulation 2015/760 on European long-term investment funds	Art 14 Art 18 (2), c, e. (4), (5), (6) a & b Art 19 (2), (4) Art 20 (2) Art 21 (1), (2) Art 22 (1) Art 23 (1), (2), (3) c, 4, 6 ART 25 (1), (2) ART 26 (1) ART 28 ART 29 (2), (3), (4), (5) ART 30	Art 5 , (1), d & (5), b Art 24 (2), (3), (4)
Directive 2015/2366 on payment services in the internal market	Art 46 Art 47 Art 48 Art 56 Art 57 Art 58 (1), (2) Art 89 (1)	Art 45 Art 58 (3) Art 64 (1) Art 76 (1), (4) Art 87 (3) Art 97
IORP II: Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision	Article 19 Article 20 Article 21 Article 22 Article 23 Article 25 Article 30 Articles 36-44	

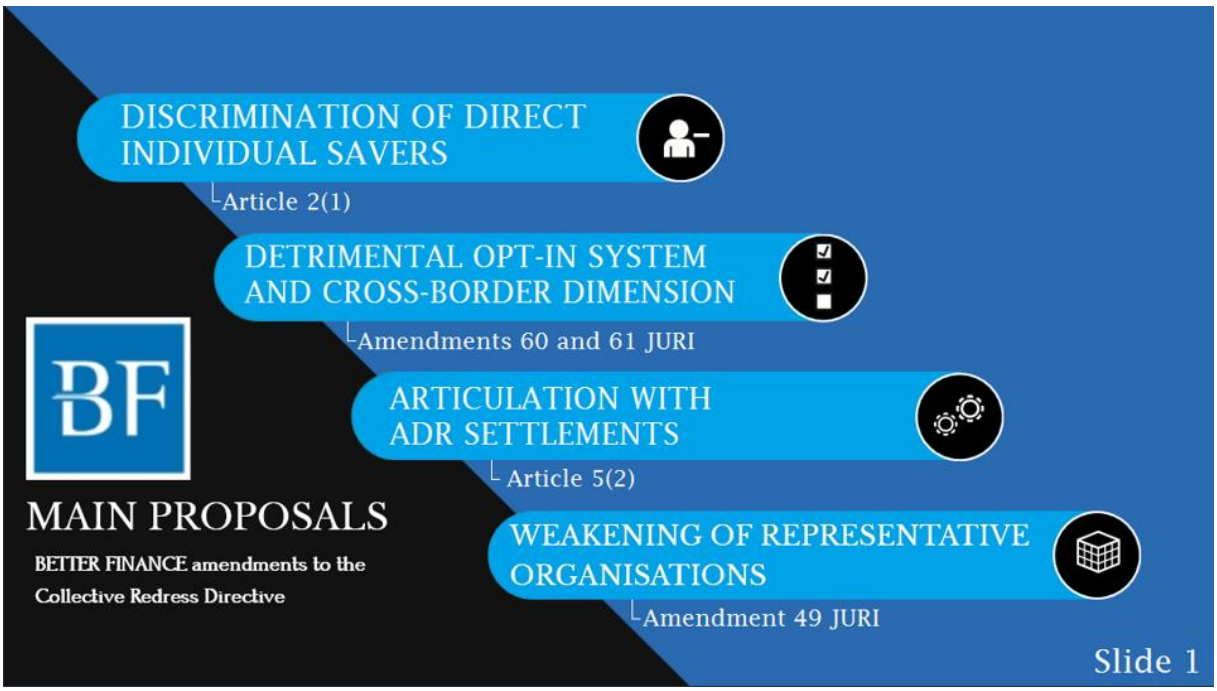
Table source: BETTER FINANCE own assessment

Additional information on the three key legislative instruments proposed by BETTER FINANCE to be included in the material scope of coverage of the collective redress Directive:

1. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014,
2. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014.
3. PEPP Regulation: Regulation (EU) of the European Parliament and of the Council on a pan-European personal pension product (PEPP) – 2014/0143/COD

Name of piece of legislation	Horizontal rules (industry – consumers)	Vertical rules (Member State – industry)
Market Abuse Directive (II): Directive 2014/57/EU on criminal sanctions for market abuse	Article 3 Article 4 Article 5 Article 6	
Market Abuse Regulation: Regulation (EU) 596/2014 on market abuse	Articles 4-12 Article 14 Article 15 Articles 17-21	
PEPP Regulation (*not yet in force*) 2017/0143/COD	Article 4 Article 10 Article 17 Article 18 Article 19 Article 20 Articles 22-39 Articles 41-60	

X. Collective Redress Slide Presentation



DIRECT INDIVIDUAL SAVERS EXCLUDED

- Article 2(1) defines the material scope of the Directive as "*infringements of EU law provisions listed in Annex I*"
- Annex I does not contain any piece of EU legislation laying down obligations protecting direct securities holders
- As such, the Directive grants ***uneven protection*** of direct investors vs indirect (intermediated) ones

➡ Annex I should be extended to include:
- the Market Abuse Directive (MAD2)
- the Market Abuse Regulation (MAR)

Slide 2

Application of the Collective Redress Directive - CMU perspective

Scope		Legislative act
Indirect investors	✓	**MiFID 2**
Fund unitholders	✓	UCITS, AIFMD
Insurance policy holders	✓	IDD, Solvency 2
Other packaged investments holders	✓	PRIIPS
Direct investors	✗	**MAD2, MAR**
Shareholders	✗	-
Bonds holders	✗	-
Other direct investors	✗	-

Amendments 60 and 61 JURI

BF

Opt-in system

Passiveness

Given the lack of expertise, trust, time or resources, individuals rarely pursue their rights or legitimate interests in court.

Unawareness

Consumers are sometimes passive: this passiveness should not be used to exclude them from collective redress

➡ **Preferred way: opt-out system**

For reasons of legal effectiveness and certainty, EU consumers need an opt-out system

Cross-border dimension

Inconsistent provisions

The current wording allows Member States to establish a national opt-out system, but imposes the opt-in system at cross-border level

Purpose of an EU Directive

The purpose of the Directive is to make it easier for consumers to engage cross-border and ease access to justice, not impede it

➡ **Preferred way: cross-border opt-out system**

In order not to create barriers within the Internal Market, EU consumers must benefit of the same opt-out system in all jurisdictions

Slide 3

OPT-IN SYSTEM AND CROSS-BORDER DIMENSION

Opt-in system

Article 6.1 (subparagraph 1) allows Member States to require the mandate of each individual consumer before a redress order is made

EU citizens would much more **benefit** of an ***"opt-out system"***, by which all affected consumers are by default included in the collective redress action.

BETTER FINANCE strongly advises **to modify the abovementioned provision** and **impose an "opt-out system"** to Member States.

(Amendment 60 JURI)

Cross-border dimension

This Directive must ensure consistent application and the same set of rights to consumers on a cross-border basis.

This "mirroring" provision is also necessary to ensure the same legal protection of harmed consumers in all Member States.

BETTER FINANCE ***strongly advises not to add a new requirement to Article 6.1*** (Amendment 61 JURI).

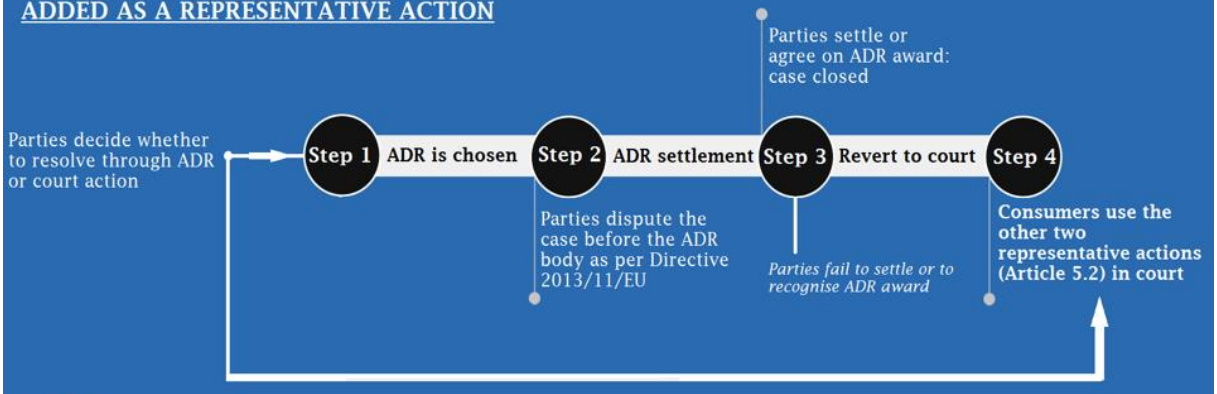
Slide 4

Article 5(2) lays down the "representative actions" eligible entities may choose under the provisions of the Directive

ADR SETTLEMENTS

BF

FUNCTIONING OF AN ADR MECHANISM ADDED AS A REPRESENTATIVE ACTION



Slide 5

ADVANTAGES OF USING ADR MECHANISMS

BF

Specialisation

Expert panels are sometimes better placed to resolve highly technical legal disputes.

Rapidity

Tailor-made procedures allow for a faster settlement.

Judicial system relief

Out-of-court dispute resolution can reduce the overburden of courts

EU procedure

The new representative action will be subject to the provisions of Directive 2013/11EU

Slide 6

Article 5(2)

WEAKENING OF REPRESENTATIVE ORGANISATIONS

(Amendment 49 JURI)

Article 4(2) provides the possibility for entities to be established ad-hoc for the purpose of a collective redress action

This is a necessary provision since most recent class actions in the financial sector were initiated by spontaneously established entities (see Stichting Volkswagen Investor Claims

Amendment 49 (JURI report) deletes this norm and significantly weakens the position of consumer organisations to properly protect and represent the interests of their constituents

Deleting this provision would go against the purpose of avoiding abusive Litigation.

Slide 7

XI. EU Competence, Legal Basis and Subsidiarity

Accompanying document

EU COMPETENCE, LEGAL BASIS AND SUBSIDIARITY

Ref.: <u>Proposal for a Directive on Representative Actions for the Protections of the Collective Interests of Consumers</u> (2018/0089 COD)
Date: 15 May 2019

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

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"The most relevant sector concerning observed mass claims/issues is the financial services sector".[39]

[39] European Commission, Directorate-General for Health and Consumers, 'Study Regarding the Problems Faced by Consumers in Obtaining Redress for Infringements of Consumer Protection Legislation, and the Economic Consequences of such Problems: Final Report', part I (26 August 2008), p. 4.

This paper provides a targeted analysis on the **choice of legal instrument** of the Commission and its **compatibility with the Treaty** on the Functioning of the EU ('TFEU') regarding the European *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*,[40] hereinafter 'Collective Redress Directive'. Certain rules are key on defining a robust and effective mechanism for consumer redress, while also striking a fair balance between diverging interests and avoiding abusive litigation.

The Collective Redress Directive must reflect the EU innovative approach and create a mechanism that ensures a high level of consumer (Art. 38 Charter of Fundamental Rights), equal conditions for access to justice (Art. 67 Treaty on the Functioning of the European Union) for the entire spectrum of consumers in the EU, including investors and financial services users.

This paper analyses the issues of (i) *shared competences*, (ii) *harmonization of laws* (Art. 114), and aspects related to (iii) judicial cooperation in civil matters.

Shared competence of the EU and Member States

The EU is competent to legislate in the field of consumer protection by virtue of Article 4.2(f) read in conjunction with Article 2.2 TFEU and has already exercised this attribute in the sub-field of consumer protection rights' enforcement with the first Injunctions Directive.[41]

To obtain competence, the provisions of Article 169.1 TFEU must be observed, according to which the EU **must contribute** to promote the right of EU citizens to safeguard their interests.[42] This will be achieved through the harmonization (approximation) of laws instrument provided in Article 114 TFEU.

Objectives

Although the European Commission's ('EC') proposal also touches on judicial procedure aspects, it is by the objective pursued that an EU action falls within a certain policy area or not,[43] which will delimit the EU from Member States' exclusive competence.

The purpose of the Injunctions Directives and of the Directive on representative actions for the protection of the collective interests of consumers ('Collective Redress Directive') is to complete the Internal Market by adding a necessary tool for citizens to enforce their rights, accorded by EU law, according to the same conditions across the EU.

An Internal Market without barriers to the free movement of citizens, services, goods and capital encompasses substantive rights and a corresponding coercive attribute for the addressees. Either through directives or through regulations, consumers benefit of numerous rights in a large sample

[40] COM/2018/0184 final - 2018/089 (COD).
[41] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55.
[42] Article 169.1 TFEU provides: "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests*".
[43] See C-720/112 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 53; C-62/17 *Gauweiler and others* v *Bundestag*, ECLI:EU:C:2015:400, para 46.

of fields, including financial services, which must be enforceable since the coercive attribute is intrinsically tied to the substantive right.

Therefore, even if the Collective Redress Directive is tangent to other areas of law, its core purpose is to regulate and ensure a high level of consumer protection, which is in line with the mandate accorded to the Union by the Treaty (TFEU).

According to Article 169.1 TFEU, the EU shall contribute to promoting certain rights to consumers to ensure that they can organise themselves to safeguard their interests. The CJEU has consistently endorsed the interpretation that "*the existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former*"[44] throughout its case law.[45] The meaning of Article 169.1 TFEU, concerning the right of EU consumers "*to organise themselves in order to safeguard their interests*", includes the right to associate in view of private enforcement, either through judicial or out-of-court mechanisms.

Subject to the subsidiarity and proportionality test, **the EU is therefore competent to legislate** measures necessary to attain its mandate of "*promoting the interests of consumers and ensuring a high level of consumer protection*", which is also required by virtue of Article 38 of the Charter of Fundamental Rights of the EU.

Subsidiarity

The EU is competent to take the necessary action in the field of consumer protection however only where it is demonstrated that, because of the scale and effects of the matter, the objectives pursued could not be sufficiently achieved by the Member States on their own.[46]

Up to now, action at Member State level did not achieve the purpose of ensuring a pan-EU mechanism for private enforcement of consumer rights, not even do similar systems exist at national level. The EC notice highly divergent and unequal conditions for consumer redress at national level as of 2008,[47] which it tried to level through soft law (recommendations) in 2013.[48] However, the 2018 review on the implementation of the recommendations on collective redress states that only one in four Member States attempted at implementing the "same basic principles", and even in those cases the "reforms have not always followed" the EC's recommendations.[49] What is more, in nine EU jurisdictions there is no form of collective redress at all. Consumers have to rely on traditional procedural law instruments. Also the European Parliament's ('EP') report of

[44] Paul Craig, Grainne de Burca, *EU Law: Texts, Cases, and Materials* (6th ed) 2017, 76.
[45] See case 8/55 *Federation Charbonniere de Belgique* v *High Authority* [1976] ECR 245; Cases 281, 283-285 and 287/85 *Germany* v *Commission* [1987] ECR 3023; Case 176/03 *Commission* v *Council* [2005] ECR I-7879; Case T-240/04 *French Republic* v *Commission* [2007] ECR II-4035; Case T-143/06 *MTZ Polyfilms Ltd* v *Council* [2009] ECR II-4133.
[46] Article 5.3 of the Treaty on European Union ('TEU').
[47] European Commission, 'Green Paper on Consumer Collective Redress', Brussels, 27.11.2008, COM(2008) 794 final, paras 10 and 12; see also European Commission, Directorate-General for Health and Consumers, 'Study Regarding the Problems Faced by Consumers in Obtaining Redress for Infringements of Consumer Protection Legislation, and the Economic Consequences of such Problems: Final Report', part I (26 August 2008), p. 8.
[48] European Commission, '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), OJ L 201/60 of 26.7.2013.
[49] European Commission, 'Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the Implementation of the 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', Brussels, 25.1.2018, COM(2018) 40 final; see also Christopher Hodges, Stefaan Voet, 'Delivering Collective Redress in Markets: New Technologies' (2017) The Foundation of Law, Justice and Society, Policy Brief, page 7.

October 2018[50] stresses the "strong need for a binding European instrument" concerning collective redress for consumer issues.

On injunctive actions, the 2008 and 2018 reports of the EC highlight the high costs and lengthiness of traditional legal proceedings, which make it difficult and unattractive for consumers to pursue, especially in scattered or small-claim cases. Moreover, between 2008 and 2012, only 1.2% of consumer enforcement actions had extraneity elements, which shows the highly deterrent effect of the Injunctions Directive's provisions on cross-border cases.[51] In 2008, ten times more cases had a cross-border element,[52] which shows that in 90% of the cases action is not pursued. In the context of increasing cross-border activity due to the elimination of barriers to trade within the single market and expansion of the EU, the aforementioned rates show that it is as if a pan-EU mechanism does not exist.

On compensatory claims, only 12 out of the 28 Member States provide the possibility to request damages for infringements of law (incl. EU law) collectively, on behalf of consumers. What is worse, in four Member States, collective enforcement of consumer rights was not possible due to "the absence of compensatory relief schemes under national law".[53]

Considering that the need to harmonize consumer private enforcement rules at EU level has been recognized by community institutions and Member States at least for 23 years (since February 1996),[54] when the EU had only a half of its actual components, **action is** not only **better placed,** but **absolutely necessary to be taken at EU level,** fulfilling the first requirement set by the Treaties under the principle of subsidiarity.

The purpose of the EU is to create an integrated single market and to increase cross-border commerce and consumer engagement. Interconnected trade however also entails interconnected negative effects of (Union) law infringements. An investment product issued by a provider domiciled in one Member State may infringe private investors, as consumers, in many other Member States where the product is (allowed to be) distributed. Although, under the Brussels I Regulation,[55] a consumer may choose the forum for enforcement actions, law should provide the possibility to organise and coordinate a redress action for reasons of (i) sound administration of justice, (ii) effective and equal enforcement of the same rights, (iii) lower costs of litigation, (iv) lack or reduced resources for the vulnerable party and (v) judicial system relief.

Studies have shown that 79% of EU citizens are willing to pursue their rights in court if collective action is available,[56] while 76% of consumers are willing to trade cross-border if cross-border redress would be available.[57] The problems go even deeper if the value of the claim is taken into

[50] Policy Department for Citizens' Rights and Constitutional Affairs, 'Collective Redress in the Member States of the European Union', European Parliament, Directorate General for Internal Policies (October 2018), PE 608.829, p. 65.
[51] European Commission, 'Report from the Commission to the European Parliament and the Council Concerning the Application of Directive 2002/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, Brussels, 6.11.2012, COM(2012) 635 final.
[52] European Commission (n 10), para 15.
[53] European Commission (n 12), p. 4.
[54] European Commission, Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests /* COM/95/0712 FINAL - COD 96/0025 */, OJ C 107, 13/04/1996 P. 0003.
[55] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012, p. 1–32.*
[56] Flash Eurobarometer, EU Commission, 2011 - http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_299_sum_en.pdf.
[57] Flash Eurobarometer 57.2 – 2002.

consideration: 50% of consumers would not enforce a claim of less than €200 due to the high individual litigation costs, complexity and lengthiness of procedures.

Another very strong deterrent is accessibility. An individual consumer may not know how to identify the defendant in another Member State, may experience difficulties in acknowledging or understanding the legislation or may be faced with a very complex legal issue.

Time and time again it has been shown that financial services is the field with the lowest level of consumer trust,[58] with the most injunctions started,[59] with the most observed mis-selling practices[60] and the most difficult to obtain redress.[61] Judging by the largest scandals in financial services, a BETTER FINANCE research suggests that less than 10% of affected investors actually pursued their rights into court, most notably due to lack of proper collective redress measures at national and on cross-border levels, resulting in an approximatively €7 million unclaimed damages.

Proportionality

Article 5.4 TEU requires that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". BETTER FINANCE strongly claims that the EC proposal not only **does not exceed** what is necessary, but actually should go even further in order to achieve its purpose stated in Article 169.1 TFEU.

In order to achieve the purpose of enabling consumers to associate in view of private enforcement of rights the Directive must go far enough in order to eliminate the challenges faced so far, in particular:

- Areas of Union law covered
- Standing for representative organizations;
- The opt-out system and measures to inform harmed consumers, including publicity and national registries; or
- Funding solutions for representative organisations.

Harmonization of Laws

The EC chose the approximation of laws instruments – Article 114 TFEU, also referred to as the "harmonization clause"[62] – based on the provisions of Article 169.2(a) TFEU, which require so. BETTER FINANCE believes that even this instrument, if chosen as legal basis, is still valid from an EU law point of view.

First, the need to adopt this Collective Redress Directive is not based on a mere divergence of national laws,[63] but it must show that inconsistencies of Member States' legislation affect the

[58] European Commission, 'Consumer Markets Scoreboard: Making Markets Work for Consumers – 2018 edition', p. 17: https://ec.europa.eu/info/sites/info/files/consumer-markets-scoreboard-2018_en.pdf.
[59] European Commission (n 14), p. 3-4.
[60] European Commission (n 1), p. 4.
[61] European Commission (n 10), para 8 ; see also BETTER FINANCE, 'A Major Enforcement Issue: The Mis-selling of Financial Products: Briefing Paper' April 2017, http://bit.do/eStbA.
[62] Craig, de Burca (n 6), p. 93.
[63] See Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

attainment or functioning of the internal market.[64] In this case of consumer private enforcement, it is deeply rooted in the indirect barriers to access to justice (Article 47 of the Charter of Fundamental Rights) and effective consumer protection the need to ensure harmonization of the different judicial systems in EU Member States, where rules on collective redress already exist, and level up those legal orders where specific provisions on consumer collective action have not yet been enacted.

Second, with regards to the policy areas in which the approximation instrument can be used, the adjacent or tangent dimensions (areas of law) are obliterated if the main objective of the Collective Redress Directive is to improve the establishment and/or functioning of the Internal Market.[65] Third, the aspects on which the Collective Redress Directive touches upon are not related to any of the fields expressly precluded in paragraph 2 of Article 114 TFEU, i.e. fiscality, employment or free movement of persons. Fourth, there is no constraint on the EC on whether the approximation of laws must have a minimum, maximum or "hybrid nature",[66] i.e. to leave arbitrary powers or not to Member States.

Last, by reference to Article 169.1 TFEU, it is the Treaties that clearly determine that the protection of the health, safety and economic interests, the promotion of the right to information, education and to organise for safeguarding their interests fall in the ambit of "establishment and functioning of the internal market", in line with Article 26.1 TFEU.

Judicial cooperation in civil matters

EU action for the approximation of laws is allowed by the TFEU in civil matters having cross-border elements to the extent that it is necessary for the proper functioning of the Internal Market.[67] Considering that the establishment and functioning of the Internal Market also hinges on the possibility of consumers to exercise their rights and pursue them in court, the latter should not be hindered or challenged by the "incompatibility and complexity of legal or administrative systems in EU Member States".[68]

However, this has been precisely the case, as exhibited above, where collective actions, both at national and cross-border level have been faced with the barrier of the unharmonized, uneven conditions for access to justice. So far, EU Member States' reluctancy to collective redress actions in the field of consumer protection lead to an "unintentional deconstructivism" and have not done much to improve access to justice, which is essential for the proper functioning of the Internal

[64] See Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079; Case C-491/01 *The Queen* v *Secretary of State for Health* [2002] ECR I-11453; C-210/03 *R* v *Secretary of State for Health [2004] ECR I-11893;* C-270/12 *United Kingdom* v *European Parliament and Council*, EU:C:2014:18, after Craig, de Burca (n 6), 76.
[65] See C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, after Rudiger Veil (ed), 'European Capital Markets Law' (2nd edn) Hart Publishing, 2018, p. 34.
[66] See Veil (n 28) 55.
[67] Paragraphs 1 and 2 of Article 81 TFEU.
[68] European Parliament, 'Judicial Cooperation in Civil Matters' (Europarl website, accessed 15 May 2019) available at: https://www.europarl.europa.eu/factsheets/en/sheet/154/judicial-cooperation-in-civil-matters.

Market.[69] Moreover, the Collective Redress Directive can fall both under the aim of "*effective access to justice*"[70] and "*the elimination of obstacles to the proper functioning of civil proceedings*".[71]

Conclusion: same result, different legal basis

The purpose of this Working Paper is to show that the EU is fully competent to enact the Collective Redress Directive in its entirety, and that the actual choice of legal basis and instrument - either through Article 289 read in conjunction with Articles 3 or 81 TFEU, or Article 114 read in conjunction with Article 169 TFEU – does not alter in anyway, in this case and considering the subject matters to be covered by this proposal, the power of the European Parliament and Council to legislate.

Concluding, BETTER FINANCE not only believes that the Collective Redress Directive is rightfully based on Article 114 TFEU, but firmly supports the EU institutions (EC, European Parliament) to use full powers provided by the Treaties and enact a Directive that is practically efficient and serves EU consumers and the economy.

[69] Xandra E. Kramer, 'Strengthening Civil Justice Cooperation: The Quest for Model Rules and Common Minimum Standards of Civil Procedure in Europe' in Marco Antonio Rodrigues, Hermes Zaneti Jr. (eds), 'Repercussões do CPC - Processo Internacional' 2018 Editora Juspodivm.
[70] Article 81.2(e) TFEU.
[71] Article 81.2.(f) TFEU.

Notes

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