BETTER FINANCE
LEGAL COMMITTEE

# 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.

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*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.

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[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

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[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.

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## 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 |
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| ANNEX I – List of provisions of Union Law referred to in Article 2(1). | Amedment 1<br>**Annex I – subparagraph 46 (*new*)**<br><br>"***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).***"<br><br>Amendment 2<br>**Annex I – subparagraph 47 (*new*)**<br><br>"***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**<br><br>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.<br><br>• none of the EU legislative acts enumerated in Annex I thereof cover individual direct investors (such as shareholders, bond holders, etc);<br>• Direct investors should benefit of the same legal protection ad indirect investors;<br>• **Excluding shareholders from the scope of the proposal means that small individual investors suffering damage by the same issuer;**<br>• 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<br>*Qualified entities*<br><br>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<br>**Do not endorse Amendment 49 JURI** | **Weakening of representative organisations**<br><br>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:<br><br>• Under the proposed version of the text (Amendment 49) such ad hoc created associations would not benefit from the provisions under this Directive;<br>• The essence of collective redress is spontaneity, thus it must allow consumers to join their claims under one ad hoc |

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| | | representative organisation when an act of mass harm occurs;<br>• 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;<br>• 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<br>*Representative actions for the protection of the collective interests of consumers*<br><br>Member States shall ensure that qualified entities are entitled to bring representative actions seeking the following measures:<br>(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;<br>(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.<br>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<br>**Article 5, paragraph 2, letter c) (*new*)**<br><br>"***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".***<br><br>***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.***<br><br>***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.***<br><br>***In case of injunction orders they shall not provide proof of actual loss or damage on*** | **ADR settlements as representative actions**<br><br>Article 5 of the Directive lays down the types of actions that can be used in collective redress for injunctive and compensatory measures.<br><br>• There are several advantages to alternative dispute resolution (ADR) mechanisms, including reduced time-length, specialised arbiters, simplified procedure;<br>• Authorised entities should be expressly allowed to first try to settle the case out-of-court;<br>• In order to avoid unnecessary delays, parties should be directed to alternative dispute resolution as per Directive 2013/11/EU;<br>• The purpose of ADR settlements should not be to deter representative associations from entering into negotiations, nor to force for an unjust settlement;<br>• 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;<br>• In line with the opt-out system, representative associations should not be required to obtain the explicit mandate of all consumers concerned. |

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| 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<br>*Redress measures*<br>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<br>**Article 6, paragraph 1, subparagraph 1**<br>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**<br><br>Consumers are more willing to defend their rights as part of a collective action rather than individually.<br>• 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;<br>• Consumers are sometimes passive; this passiveness should not be used as a means to exclude them from participating to collective redress procedures;<br>• EU consumers need an opt-out system, also for reasons of legal effectiveness and certainty.<br>• Merely offering the possibility to allow for an opt-out system would lead to divergent implementation of the law. |
| Article 16<br>*Cross-border representative actions* | Amendment 5<br>**Article 16, subparagraph 2a (*new*)**<br><br>"***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**<br><br>The current wording of Article 6(1) allows Member States to adopt an opt-out system.<br>• If a Member State implements an opt-out system, it would create discriminatory conditions to access to justice for residents of other Member States;<br>• 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<br>*Scope*<br>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**<br>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**<br><br>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<br>*Definitions*<br>(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**<br><br>(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**<br><br>(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<br>*Definitions*<br>(3) 'collective interests of consumers' means the interests of a number of consumers; | Amendment 39 - **Article 3 – paragraph 1 – point 3**<br>(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**<br>(3) 'collective interests of consumers' means the interests of a number of consumers; |
| Article 5<br>*Representative actions for the protection of the collective interests of consumers*<br><br>5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without | Amendment 52 - **Article 4 – paragraph 5**<br>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**<br>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). |

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| 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<br>*Representative actions for the protection of the collective interests of consumers*<br><br>(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**<br>(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**<br><br>(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)**<br>***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<br>~~***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.***~~ |