

## 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)

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*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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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*,<sup>13</sup> 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*" unnecessarily 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;

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<sup>13</sup> 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.