

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)

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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*,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 8 to 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 Directive¹⁵ and Regulation¹⁶ 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 Plan¹⁷ 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).