

**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

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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>21</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.

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”<sup>22</sup>*

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 exclusion 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.”*

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

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<sup>21</sup> COM/2018/0184 final - 2018/089 (COD).

<sup>22</sup> European Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress, SEC(2011) 173 final, para 1.1.

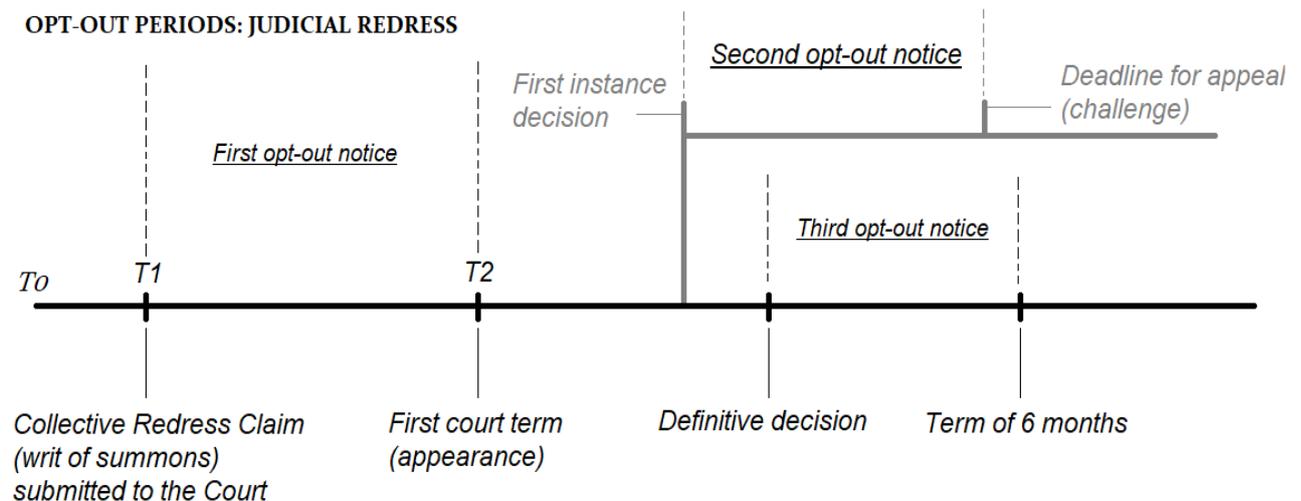
“[...] If a Member State does not require a mandate of the individual consumer to join the representative action, this Member State shall nevertheless allow those individuals [...] to participate [...] in the event they gave their explicit mandate to join the representative action”.

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.

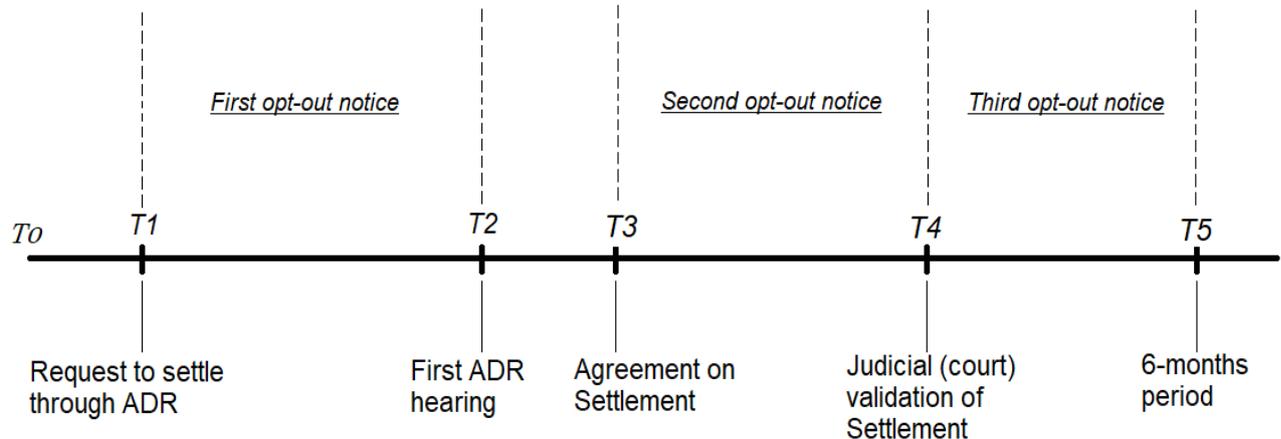


The second opt-out deadline can (and should) be included after the decision of the first instance is pronounced until the expiry of the deadline for appeal – applying *mutatis mutandis* for all other judicial challenge actions (extraordinary appeal – *recours* – revision etc).

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 a significantly high accuracy rate, compared to the EU average<sup>23</sup> 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
<p><i>A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.</i></p>	<p><i>A Member State <b>may or may not</b> require the mandate of the individual consumers concerned before a redress order is issued.</i></p> <p><b><i>(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</i></b></p>	<p><i>A Member State shall <b>allow representative organisations to represent all harmed consumers concerned without requiring the individual mandate</b> before a declaratory decision or redress order is issued.</i></p> <p><b><i>(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.</i></b></p>

<sup>23</sup> 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.*

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*(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.*

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*(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.*