

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)

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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.

Contact:

Stefan Voicu, voicu@betterfinance.eu

Christiane Hölz, christiane.hoelz@dsw-info.de

Aleksandra Maczynska, maczynska@betterfinance.eu

INTRODUCTION

Regulation Rome I³⁷ **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 DO NOT IMPEDE collective redress³⁸

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 **do not impede collective redress**. 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 **a judge** appointed by the laws of a Member State **is fully competent and able** 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 **should not be a reason to stay and dismiss collective claims for consumers**.

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.