

BETTER FINANCE Working Paper 7

EU COMPETENCE, LEGAL BASIS AND SUBSIDIARITY

Ref.: Proposal for a Directive on Representative Actions for the Protections of the Collective Interests of Consumers (2018/0089 COD)

Date: 15 May 2019

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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“The most relevant sector concerning observed mass claims/issues is the financial services sector”.³⁹

This paper provides a targeted analysis on the **choice of legal instrument** of the Commission and its **compatibility with the Treaty** on the Functioning of the EU (“TFEU”) regarding the European *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*,⁴⁰ hereinafter ‘Collective Redress Directive’. Certain rules are key on

³⁹ European Commission, Directorate-General for Health and Consumers, ‘Study Regarding the Problems Faced by Consumers in Obtaining Redress for Infringements of Consumer Protection Legislation, and the Economic Consequences of such Problems: Final Report’, part I (26 August 2008), p. 4.

⁴⁰ COM/2018/0184 final - 2018/089 (COD).

defining a robust and effective mechanism for consumer redress, while also striking a fair balance between 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.

This paper analyses the issues of (i) *shared competences*, (ii) *harmonization of laws* (Art. 114), and aspects related to (iii) judicial cooperation in civil matters.

Shared competence of the EU and Member States

The EU is competent to legislate in the field of consumer protection by virtue of Article 4.2(f) read in conjunction with Article 2.2 TFEU and has already exercised this attribute in the sub-field of consumer protection rights' enforcement with the first Injunctions Directive.⁴¹

To obtain competence, the provisions of Article 169.1 TFEU must be observed, according to which the EU **must contribute** to promote the right of EU citizens to safeguard their interests.⁴² This will be achieved through the harmonization (approximation) of laws instrument provided in Article 114 TFEU.

Objectives

Although the European Commission's ('EC') proposal also touches on judicial procedure aspects, it is by the objective pursued that an EU action falls within a certain policy area or not,⁴³ which will delimit the EU from Member States' exclusive competence.

The purpose of the Injunctions Directives and of the Directive on representative actions for the protection of the collective interests of consumers ('Collective Redress Directive') is to complete the Internal Market by adding a necessary tool for citizens to enforce their rights, accorded by EU law, according to the same conditions across the EU.

An Internal Market without barriers to the free movement of citizens, services, goods and capital encompasses substantive rights and a corresponding coercive attribute for the addressees. Either through directives or through regulations, consumers benefit of numerous rights in a large sample of fields, including financial services, which must be enforceable since the coercive attribute is intrinsically tied to the substantive right.

Therefore, even if the Collective Redress Directive is tangent to other areas of law, its core purpose is to regulate and ensure a high level of consumer protection, which is in line with the mandate accorded to the Union by the Treaty (TFEU).

⁴¹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55.

⁴² Article 169.1 TFEU provides: "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests".

⁴³ See C-720/112 *Pringle v Ireland*, ECLI:EU:C:2012:756, para 53; C-62/17 *Gauweiler and others v Bundestag*, ECLI:EU:C:2015:400, para 46.

According to Article 169.1 TFEU, the EU shall contribute to promoting certain rights to consumers to ensure that they can organise themselves to safeguard their interests. The CJEU has consistently endorsed the interpretation that “*the existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former*”⁴⁴ throughout its case law.⁴⁵ The meaning of Article 169.1 TFEU, concerning the right of EU consumers “*to organise themselves in order to safeguard their interests*”, includes the right to associate in view of private enforcement, either through judicial or out-of-court mechanisms.

Subject to the subsidiarity and proportionality test, **the EU is therefore competent to legislate** measures necessary to attain its mandate of “*promoting the interests of consumers and ensuring a high level of consumer protection*”, which is also required by virtue of Article 38 of the Charter of Fundamental Rights of the EU.

Subsidiarity

The EU is competent to take the necessary action in the field of consumer protection however only where it is demonstrated that, because of the scale and effects of the matter, the objectives pursued could not be sufficiently achieved by the Member States on their own.⁴⁶

Up to now, action at Member State level did not achieve the purpose of ensuring a pan-EU mechanism for private enforcement of consumer rights, not even do similar systems exist at national level. The EC notice highly divergent and unequal conditions for consumer redress at national level as of 2008,⁴⁷ which it tried to level through soft law (recommendations) in 2013.⁴⁸ However, the 2018 review on the implementation of the recommendations on collective redress states that only one in four Member States attempted at implementing the “same basic principles”, and even in those cases the “reforms have not always followed” the EC’s recommendations.⁴⁹ What is more, in nine EU jurisdictions there is no form of collective redress at all. Consumers have to rely on traditional procedural law instruments. Also the European Parliament’s (‘EP’) report of October 2018⁵⁰ stresses the “strong need for a binding European instrument” concerning collective redress for consumer issues.

On injunctive actions, the 2008 and 2018 reports of the EC highlight the high costs and lengthiness of traditional legal proceedings, which make it difficult and unattractive for consumers to pursue, especially in scattered or small-claim cases. Moreover, between 2008 and 2012, only 1.2% of

⁴⁴ Paul Craig, Grainne de Burca, *EU Law: Texts, Cases, and Materials* (6th ed) 2017, 76.

⁴⁵ See case 8/55 *Federation Charbonniere de Belgique v High Authority* [1976] ECR 245; Cases 281, 283-285 and 287/85 *Germany v Commission* [1987] ECR 3023; Case 176/03 *Commission v Council* [2005] ECR I-7879; Case T-240/04 *French Republic v Commission* [2007] ECR II-4035; Case T-143/06 *MTZ Polyfilms Ltd v Council* [2009] ECR II-4133.

⁴⁶ Article 5.3 of the Treaty on European Union (‘TEU’).

⁴⁷ European Commission, ‘Green Paper on Consumer Collective Redress’, Brussels, 27.11.2008, COM(2008) 794 final, paras 10 and 12; see also European Commission, Directorate-General for Health and Consumers, ‘Study Regarding the Problems Faced by Consumers in Obtaining Redress for Infringements of Consumer Protection Legislation, and the Economic Consequences of such Problems: Final Report’, part I (26 August 2008), p. 8.

⁴⁸ 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.

⁴⁹ European Commission, ‘Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the Implementation of the 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’, Brussels, 25.1.2018, COM(2018) 40 final; see also Christopher Hodges, Stefaan Voet, ‘Delivering Collective Redress in Markets: New Technologies’ (2017) *The Foundation of Law, Justice and Society*, Policy Brief, page 7.

⁵⁰ Policy Department for Citizens’ Rights and Constitutional Affairs, ‘Collective Redress in the Member States of the European Union’, European Parliament, Directorate General for Internal Policies (October 2018), PE 608.829, p. 65.

consumer enforcement actions had extraneity elements, which shows the highly deterrent effect of the Injunctions Directive's provisions on cross-border cases.⁵¹ In 2008, ten times more cases had a cross-border element,⁵² which shows that in 90% of the cases action is not pursued. In the context of increasing cross-border activity due to the elimination of barriers to trade within the single market and expansion of the EU, the aforementioned rates show that it is as if a pan-EU mechanism does not exist.

On compensatory claims, only 12 out of the 28 Member States provide the possibility to request damages for infringements of law (incl. EU law) collectively, on behalf of consumers. What is worse, in four Member States, collective enforcement of consumer rights was not possible due to "the absence of compensatory relief schemes under national law".⁵³

Considering that the need to harmonize consumer private enforcement rules at EU level has been recognized by community institutions and Member States at least for 23 years (since February 1996),⁵⁴ when the EU had only a half of its actual components, **action is not only better placed, but absolutely necessary to be taken at EU level**, fulfilling the first requirement set by the Treaties under the principle of subsidiarity.

The purpose of the EU is to create an integrated single market and to increase cross-border commerce and consumer engagement. Interconnected trade however also entails interconnected negative effects of (Union) law infringements. An investment product issued by a provider domiciled in one Member State may infringe private investors, as consumers, in many other Member States where the product is (allowed to be) distributed. Although, under the Brussels I Regulation,⁵⁵ a consumer may choose the forum for enforcement actions, law should provide the possibility to organise and coordinate a redress action for reasons of (i) sound administration of justice, (ii) effective and equal enforcement of the same rights, (iii) lower costs of litigation, (iv) lack or reduced resources for the vulnerable party and (v) judicial system relief.

Studies have shown that 79% of EU citizens are willing to pursue their rights in court if collective action is available,⁵⁶ while 76% of consumers are willing to trade cross-border if cross-border redress would be available.⁵⁷ The problems go even deeper if the value of the claim is taken into consideration: 50% of consumers would not enforce a claim of less than €200 due to the high individual litigation costs, complexity and lengthiness of procedures.

Another very strong deterrent is accessibility. An individual consumer may not know how to identify the defendant in another Member State, may experience difficulties in acknowledging or understanding the legislation or may be faced with a very complex legal issue.

⁵¹ European Commission, 'Report from the Commission to the European Parliament and the Council Concerning the Application of Directive 2002/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, Brussels, 6.11.2012, COM(2012) 635 final.

⁵² European Commission (n 10), para 15.

⁵³ European Commission (n 12), p. 4.

⁵⁴ European Commission, Proposal for a European Parliament and Council Directive on injunctions for the protection of consumers' interests /* COM/95/0712 FINAL - COD 96/0025 */ , OJ C 107, 13/04/1996 P. 0003.

⁵⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351*, 20.12.2012, p. 1–32.

⁵⁶ Flash Eurobarometer, EU Commission, 2011 -

http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_299_sum_en.pdf.

⁵⁷ Flash Eurobarometer 57.2 – 2002.

Time and time again it has been shown that financial services is the field with the lowest level of consumer trust,⁵⁸ with the most injunctions started,⁵⁹ with the most observed mis-selling practices⁶⁰ and the most difficult to obtain redress.⁶¹ Judging by the largest scandals in financial services, a BETTER FINANCE research suggests that less than 10% of affected investors actually pursued their rights into court, most notably due to lack of proper collective redress measures at national and on cross-border levels, resulting in an approximately €7 million unclaimed damages.

Proportionality

Article 5.4 TEU requires that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. BETTER FINANCE strongly claims that the EC proposal not only **does not exceed** what is necessary, but actually should go even further in order to achieve its purpose stated in Article 169.1 TFEU.

In order to achieve the purpose of enabling consumers to associate in view of private enforcement of rights the Directive must go far enough in order to eliminate the challenges faced so far, in particular:

- Areas of Union law covered
- Standing for representative organizations;
- The opt-out system and measures to inform harmed consumers, including publicity and national registries; or
- Funding solutions for representative organisations.

Harmonization of Laws

The EC chose the approximation of laws instruments – Article 114 TFEU, also referred to as the “harmonization clause”⁶² – based on the provisions of Article 169.2(a) TFEU, which require so. BETTER FINANCE believes that even this instrument, if chosen as legal basis, is still valid from an EU law point of view.

First, the need to adopt this Collective Redress Directive is not based on a mere divergence of national laws,⁶³ but it must show that inconsistencies of Member States’ legislation affect the attainment or functioning of the internal market.⁶⁴ In this case of consumer private enforcement, it is deeply rooted in the indirect barriers to access to justice (Article 47 of the Charter of Fundamental Rights) and effective consumer protection the need to ensure harmonization of the different judicial systems in EU Member States, where rules on collective redress already exist, and level up those legal orders where specific provisions on consumer collective action have not yet been enacted.

⁵⁸ European Commission, ‘Consumer Markets Scoreboard: Making Markets Work for Consumers – 2018 edition’, p. 17: https://ec.europa.eu/info/sites/info/files/consumer-markets-scoreboard-2018_en.pdf.

⁵⁹ European Commission (n 14), p. 3-4.

⁶⁰ European Commission (n 1), p. 4.

⁶¹ European Commission (n 10), para 8 ; see also BETTER FINANCE, ‘A Major Enforcement Issue: The Mis-selling of Financial Products: Briefing Paper’ April 2017, <http://bit.do/eStbA>.

⁶² Craig, de Burca (n 6), p. 93.

⁶³ See Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

⁶⁴ See Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Case C-491/01 *The Queen v Secretary of State for Health* [2002] ECR I-11453; C-210/03 *R v Secretary of State for Health* [2004] ECR I-11893; C-270/12 *United Kingdom v European Parliament and Council*, EU:C:2014:18, after Craig, de Burca (n 6), 76.

Second, with regards to the policy areas in which the approximation instrument can be used, the adjacent or tangent dimensions (areas of law) are obliterated if the main objective of the Collective Redress Directive is to improve the establishment and/or functioning of the Internal Market.⁶⁵ Third, the aspects on which the Collective Redress Directive touches upon are not related to any of the fields expressly precluded in paragraph 2 of Article 114 TFEU, i.e. fiscality, employment or free movement of persons. Fourth, there is no constraint on the EC on whether the approximation of laws must have a minimum, maximum or “hybrid nature”,⁶⁶ i.e. to leave arbitrary powers or not to Member States.

Last, by reference to Article 169.1 TFEU, it is the Treaties that clearly determine that the protection of the health, safety and economic interests, the promotion of the right to information, education and to organise for safeguarding their interests fall in the ambit of “establishment and functioning of the internal market”, in line with Article 26.1 TFEU.

Judicial cooperation in civil matters

EU action for the approximation of laws is allowed by the TFEU in civil matters having cross-border elements to the extent that it is necessary for the proper functioning of the Internal Market.⁶⁷ Considering that the establishment and functioning of the Internal Market also hinges on the possibility of consumers to exercise their rights and pursue them in court, the latter should not be hindered or challenged by the “incompatibility and complexity of legal or administrative systems in EU Member States”.⁶⁸

However, this has been precisely the case, as exhibited above, where collective actions, both at national and cross-border level have been faced with the barrier of the unharmonized, uneven conditions for access to justice. So far, EU Member States’ reluctance to collective redress actions in the field of consumer protection lead to an “unintentional deconstructivism” and have not done much to improve access to justice, which is essential for the proper functioning of the Internal Market.⁶⁹ Moreover, the Collective Redress Directive can fall both under the aim of “*effective access to justice*”⁷⁰ and “*the elimination of obstacles to the proper functioning of civil proceedings*”.⁷¹

Conclusion: same result, different legal basis

The purpose of this Working Paper is to show that the EU is fully competent to enact the Collective Redress Directive in its entirety, and that the actual choice of legal basis and instrument - either through Article 289 read in conjunction with Articles 3 or 81 TFEU, or Article 114 read in conjunction with Article 169 TFEU – does not alter in anyway, in this case and considering the subject matters to be covered by this proposal, the power of the European Parliament and Council to legislate.

⁶⁵ See C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, after Rudiger Veil (ed), ‘European Capital Markets Law’ (2nd edn) Hart Publishing, 2018, p. 34.

⁶⁶ See Veil (n 28) 55.

⁶⁷ Paragraphs 1 and 2 of Article 81 TFEU.

⁶⁸ European Parliament, ‘Judicial Cooperation in Civil Matters’ (Europarl website, accessed 15 May 2019) available at: <https://www.europarl.europa.eu/factsheets/en/sheet/154/judicial-cooperation-in-civil-matters>.

⁶⁹ Xandra E. Kramer, ‘Strengthening Civil Justice Cooperation: The Quest for Model Rules and Common Minimum Standards of Civil Procedure in Europe’ in Marco Antonio Rodrigues, Hermes Zaneti Jr. (eds), ‘Repercussões do CPC - Processo Internacional’ 2018 Editora Juspodivm.

⁷⁰ Article 81.2(e) TFEU.

⁷¹ Article 81.2.(f) TFEU.



Concluding, BETTER FINANCE not only believes that the Collective Redress Directive is rightfully based on Article 114 TFEU, but firmly supports the EU institutions (EC, European Parliament) to use full powers provided by the Treaties and enact a Directive that is practically efficient and serves EU consumers and the economy.