Collective redress in Europe:
Lessons from the US and Member States
Opening remarks

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Collective redress in Europe: Lessons from the US and Member States

• Eduard Hulicius, Member of Commissioner Jourová’s Cabinet responsible for Consumer Policy, European Commission

• Ken Daly, Sidley Austin LLP, representing the US Chamber Institute for Legal Reform

• Ekkart Kaske, Executive Director, European Justice Forum

• Imelda Vital, Head of Government Affairs Europe & Africa, Amway and Vice-Chair, Consumer Affairs Committee, AmCham EU
The European Justice Forum
Consumer rights in the European Union

“Playing by the rules is a common interest shared by consumers and business.”

EJF supports the EU Commission’s following efforts:

- Consumer Protection Cooperation (CPC) Regulation
- Framework Directives ADR and Regulation ODR
- 2013 Recommendation

**Directive on Representative Actions** would facilitate EU-wide class actions based on a design extrapolated from the Injunctions Directive, but with minimal safeguards.

Four important issues to consider regarding the proposal
1. Old Technology Re-Spun, New Technology Ignored

- **Class litigation is old technology**: complex, costly, lengthy, open to abuse, with no impact on market behaviour

- **New technologies are more effective**: alternative dispute resolutions (ADR) & public redress score higher on effective redress criteria


Member States lack incentives to improve their collective redress systems towards more efficient and effective technologies
The coherence of national civil justice systems is at risk, and the Union’s legislative competence is questionable due to the character of this proposal as “civil procedure legislation in disguise”.

2. Conflict with Functioning National Legal Systems

- Member States to adopt **court based collective litigation mechanisms in addition to their own redress systems**

- Diversity of systems and national cultures will lead to **duplication of systems, increases complexity and confusion**

**Nordic countries**

**Austria, Germany**

**Spain**

Working sophisticated systems

Lost efficiency by grafting compensation onto previously quick and effective injunctions process
3. Missing Harmonization Efforts

- Proposal almost entirely disregards the 2013 Recommendation’s guidelines on safeguards
  
  **20 missing safeguards** have been identified

- Without binding list of safeguards, no chance that all Member States adopt them and that in a way consistent with each other

Member States remain responsible for adopting appropriate safeguards, even though Commission acknowledged they did this only to varying degrees and to different effects in the past

The risk is a “race to the bottom” in terms of safeguards and consequently of forum shopping.
4. Increasing Legal Uncertainty

The Proposal triggers a raft of technical issues regarding jurisdiction and enforcement:

- **Cross-border infringements**
- The **stringent cross-border architecture** already developed via the CPC-Net, is **at risk** by the introduction of yet another layer of **complexity and conflict between private and public entities**.
- In any case **where one or more QEs** decide to try to launch cases based on similar facts in different Member States concurrently

Without clear rules to identify the aggrieved consumers and lack of clarity on jurisdiction
→ limited value for companies to settle matters as these can resurface in further actions
(brought under the Proposal)
Key questions to be raised

Proposal would have a **fundamental impact on basic principles such as subsidiarity, legal certainty, procedural effectiveness & efficiency** for consumers, businesses and Member States.

- **Why is the mass action approach combined with so little safeguards? Why is maximum harmonization not fostered?**
- **How to incentivise Member States to improve their collective redress systems?**
- **How will be well-working national systems supported? How to achieve coherence?**
- **Which are the negative effects on fundamental principles of law by interfering with due process?**

Complexity of issues raised and the need to build a coherent and harmonized civil redress system architecture in Europe are not addressed by the Proposal

Current proposal cannot achieve the goal of assisting consumers and strengthening the single market. It should be fundamentally rethought.
20 important safeguards missing*

(a) No detailed criteria for recognition of Qualified Entities (QEs), in particular as to sustainability and resources / (legal) expertise - (b) No admissibility standards with regard to certification process - (c) No loser pays’ principle - (d) No opt-in principle - (e) No ban on punitive damages - (f) No practical limitations on the provision of third party litigation funding - (g) No limitations on lawyers’ contingency fees - (h) No prohibition of a quota litis agreement with third party funders (for compensatory collective redress remuneration/interest not based on award unless regulated by public authority) – (i) No prohibition of excessive interest – (j) No registry of collective redress actions – (k) No duty to inform consumers concerned cautiously on initiated/pending cases – (l) No information to defendant about the composition of the claimant party and about any changes therein – (m) No protection of right of consumers to full compensation, undiminished by lawyers’ fees – (n) In most of the likely practical cases, no possibility for claimant party to leave the procedure before the final judgment is given or the case validly settled – (o) No possibility for consumers to join the claimant party for their own benefit in the most likely practical cases, instead compulsory cy-pres settlement for the benefit of consumer organisations, short-changing injured consumers – (p) No suspension of limitation from attempt of ADR until at least the moment one party withdraws – (q) No ensuring of consistency between final decision of public authority and outcome of collective redress action – (r) No staying of court action until after public entity has finished – (s) No exclusion of expiration of limitation while public entity is still checking – (t) Finally, the Proposal would introduce a discovery system without simultaneously introducing safeguards to make sure this is proportionate and not open to abuse.

Are 3 safeguards dealing with (1) eligible qualified entities (2) non-interference of litigation funders and (3) court review of settlements sufficient?

* According to the EU COM 2013 Recommendation’s guidelines on safeguards
Process: New technologies & Safeguards

**Types of Enforcement Mechanisms**
- Private/voluntary (e.g. ADR/Ombuds entities)
- Public (e.g. Regulators, Authorities)

**Qualified Entities**
- Certification & Admissability
- Prevention (QEs Inj.Dir.)
- Declaration of Infringement and Liability
- Model Case Procedure

**Litigation in Court**
- Only CPC Q.E.
- Enforcement of Damages Claims

**Important Elements**
- Early Identification (e.g. Dispute Register)
- Early Feedback to business
- Feedback of Declaration of Infringement & Liability to Out of Court Settlement

Note: Process Support via Digitalization

Harmonization of Safeguards (EU Com Rec. 2013)
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Commission’s Proposal for a Directive on Representative Actions: Key Issues

Ken Daly,
Sidley Austin LLP, Brussels
Representing US Chamber Institute for Legal Reform
3 Key Questions

Who can sue?

Who do they represent?

Where will the money go?
Who can sue?

Only “Qualified Entities”, designated by Member States, allowed to pursue litigation on behalf of consumers.

Member States shall designate an entity as a qualified entity if it complies with the following criteria:

(a) it is properly constituted according to the law of a Member State;
(b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with;
(c) it has a non-profit making character.

Positives

- Member States have some control
- Non-profit
- Lawyers/funders can't sue directly

Issues

- Already hundreds on the (likely) list
- Private enterprises
- Suitability, solvency, capacity, track record, motivation not relevant
- Forum shopping for qualification
- Who is behind the QE?
- Cases for profit, through non-profit QE
Who do they represent?

**Injunctions**: “In order to seek injunction orders, qualified entities shall not have to obtain the mandate of the individual consumers concerned”

**Comparable harm**: where consumers are identifiable and suffered comparable harm the requirement of the mandate of the individual consumers concerned shall not constitute a condition to initiate the action (up to Member States to require it later).

**Small loss**: consumers suffered small amount of loss and it would be “disproportionate to distribute the redress to them”. Member States shall ensure that the mandate of the individual consumers concerned is not required.
## Who do they represent?

<table>
<thead>
<tr>
<th>Positives</th>
<th>Issues</th>
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<tr>
<td>• Actions easy to take</td>
<td>• Often no consumer involvement at all</td>
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<td>• For “small loss”:</td>
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<td>– Opt-in not possible</td>
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<td>– Opt-out not possible</td>
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<td></td>
<td>• Will consumers even know?</td>
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<td>• Who are QE’s accountable to and who do they represent?</td>
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<td>• How will Defendants know who they have compensated?</td>
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<td>• Cross border rights to sue: how will Court’s know which cases have been adjudicated?</td>
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Where will the money go?

**Fees to lawyers and third party funders**

- QE’s must be **not for profit** and obliged to declare **source of funds** used to support the action, but:
  - No limitations on fees QE’s will pay to lawyers (e.g. U.S. style contingency fees)
  - No limitations on fees QE’s will pay to third party funders
- Why can’t a law firm/funder arrange its own QE, and hire itself to run the action for 50% of the award?
- No consumer mandate means no client, no-one to satisfy, no-one to complain
Where will the money go?

Compensation to victims

- Victim compensation **not** prioritized
- In other jurisdictions, often leftover “pot” very limited
- Damages pay out:
  - In “comparable harm” cases, (remaining) damages go to victims
  - In ‘small loss’ cases:
    - Money never goes to victims.
    - Payment to “public purpose serving the collective interests of consumers”.
- Art 3(3) “collective interests of consumers’ means the interests of a number of consumers”
- Could the QE itself qualify?
- **Ideal** case for plaintiff law firm = hired by own QE to pursue pan EU “small loss” case. No mandate needed. No client to report to. No limit on fee arrangement.
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Geneva
Hong Kong
Houston
London
Los Angeles
Munich
New York
Palo Alto
San Francisco
Shanghai
Singapore
Sydney
Tokyo
Washington, D.C.
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Our aim

Ensure a growth-oriented business and investment climate in the EU

Who we are

American companies committed to and invested in Europe

What we want

To maintain and strengthen the transatlantic relationship
To build a stronger and more united EU

What we stand for

Trust
Excellence
Expertise
Transparency

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