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Comments on the Rapporteur's Draft Report on the Proposal for Directive on representative actions for the protection of the collective interests of consumers

The Rapporteur's Draft Report unfortunately only raises proposals to weaken the currently proposed Directive by the Commission.[1] Not all amendments are of great concern, as some only reiterate existing obligations or should not disrupt the operation of collective redress in practice**. However, other amendments go to the heart of the functioning of the Proposal. In particular three problems arise from the Draft Report : (1) The exclusion of smaller, ad-hoc and non-consumer NGOs**; **(2) the prohibition of third-party funding and (3) changes that limit the effectiveness/efficiency of collective redress actions.** These issues are explained below together with the corresponding amendments.

	Commission Proposal	JURI Draft Report	Comment
1. Excluding smaller, ad-hoc and non-consumer NGOs			
Art. 4(3)	Member States shall ensure that **in particular** consumer organisations and independent public bodies are	Member States shall ensure that **only** consumer organisations and independent public bodies	A strong point of the Commission's Proposal is that it establishes general criteria for the qualified entity that can be fulfilled by any independent, non-profit organization that can demonstrate that "it has a legitimate interest in ensuring that provisions of Union law

[1] Except amendments 15 and 36 which concern making information on the mechanism available

Am. 17	eligible for the status of qualified entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State.	are eligible for the status of qualified entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State.	covered by this Directive are complied with." As recital 6 of the Proposal specifically confirms, the Directive covers and impacts on a range of legal areas, namely health, environment, energy and telecommunications amongst others. Accordingly, it must be ensured that an NGO working in these areas can bring collective actions, as they will retain the most relevant and requisite expertise. The proposed amendment would remove this possibility.
Art. 4(1)(2)(cb (new)) Am. 11		**[I]t has a minimum number of members, namely five associations or at least 250 natural persons at national level. For the qualified entities on a local level or those representing small countries, the minimum number of individual members shall be adjusted according to the size of the territory considered;**	The Draft Report introduces a range of new requirements to be fulfilled by a Qualified Entity (amendments 9-15). We do not believe that any of these additions are necessary, as the number of organizations able to fulfil the criteria proposed by the Commission will already be low. Moreover, the number of organizations with sufficient resources to bring a collective redress action will be even lower, in some jurisdictions it will be none. amendment 11, which introduces a requirement of 5 associations or 250 members needs to be clearly opposed. Throughout the EU, organizations are organized in different manners and such an arbitrary requirement would factually exclude some of the most representative organizations with the most experience and resources in defending collective interests. As an example, in Austria the only major consumer organization (VKI) has only members organizations (two public institutions) and no membership of natural persons.[2]
Art.	**Member States may**	**deleted**	Another proposal to further limit the already low number of

[2] https://vki.at/wer-sind-wir

4(2) Am. 16	**designate a qualified entity on an ad hoc basis for a particular representative action, at its request, if it complies with the criteria referred to in paragraph 1.**		qualified entities is to remove the possibility to designate entities on an ad hoc basis. In jurisdictions with no organisations meeting the other existing requirements for QE's this will mean no organisation will be available to represent consumers, despite willingness and capacity. Given that the Proposal does not allow for individuals to represent themselves, ad-hoc entities are an essential mechanism to allow consumers to join together on single issues of mass harm. The proposed amendments remove this safeguard for groups of consumers that are affected by mass harm that no qualified entity has the resources to address. Importantly, ad hoc organizations can bring collective claims both in France and Italy and this has not led to any abuse. The amendment works together with amendments 1 (amending recital 10) and 18 (limiting the applicability of article 5(1) to entities fulfilling the criteria in Article 4(1). These are amendments are therefore equally to be rejected.
2. Prohibition of third party funding			
Art. 7(3) Am. 30	Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case.	Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case.	Due to the fact that qualified entities are non-profit organizations, it will be of central importance that they can obtain third party funding to finance hugely expensive collective redress actions. In order to avoid conflicts of interest, the Proposal already includes the requirements that third party funding needs to be disclosed and that funders may not influence the decision-making on the action (Art. 7(2) of the Proposal). Almost all NGOs and consumers associations are funded by third party funding. Prohibiting this type of funding would therefore result in preventing most of NGOs and consumer organisations from actually relying on the directive. National experience shows no

		Member States shall provide that third party funding is prohibited, except in the case of individual contributions.	problems with third party funding and the safeguards included in the Proposal are entirely sufficient. As the Study requested by the JURI Committee concluded: "The Reports by Member States annexed to this study are in favour of third party funding and consider it should be regulated, in line with the rules of the Proposal"[3] By referring to "individual contributions", this amendment would also introduce great uncertainty, which risk lengthy and costly satellite litigation on the nature of the specific funds received by an entity. The same idea is reflected in amendment 4 to recital 25, which is equally to be rejected.
3. Further hurdles hindering effective and efficient litigation			
Art. 5(2)(2) Am. 19	In order to seek injunction orders, qualified entities shall not have to obtain the mandate of the individual consumers concerned or provide proof of actual loss or damage on the part of the consumers concerned or of intention or negligence on the part of the trader.	**deleted**	This amendment removes the clarification that for injunctions there is no need to obtain the mandate of individual consumers. However, the draft report does not instead include a requirement that such a mandate is required, it therefore results in considerable confusion and uncertainty. Moreover, requiring a mandate of individual consumers to obtain an injunction would make the Proposal more restrictive than the already existing Injunctions Directive.

[3] October 2018 Study requested by the JURI Committee, p. 91 - available online at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282018%29608829.

Art. 3(1)(3) Am. 8	(3) 'collective **interests** of consumers' means the interests of a **number of** consumers;	(3) 'collective **interest** of consumers' means the interests of a **minimum of 50** consumers;	This requirement is more restrictive than the 2013 Recommendation, which referred to 2 or more consumers. The same definition can for instance be found in France, which has only seen 11 collective actions overall since 2014, demonstrating that there is no necessity for such a limitation. Introducing a number of 50 consumers is not only arbitrary but it is also impractical in practice as organizations will not at the outset have to provide proof of individual harm for these 50 consumers, i.e. the basic idea of permitting representative organizations to bring a claim is disregarded by this amendment. The amendment to Article 2(1) referring to "broad public impact" (am. 6) falls in the same category and should equally be rejected.