Factsheet: For a REAL "Fair Deal for EU consumers"
7 Industry claims and why they are false or misleading

Last week, the US Chamber Institute for Law Reform, a think-tank subsidiary of the US Chamber of Commerce, launched a website claiming to represent "A Fair Deal for EU Consumers". The website purports to list reasons for why the Directive proposal on collective redress could "hurt consumers" by allowing them to bring "US-style class action lawsuits in the EU". **Below you find the 7 industry claims followed by our replies**:

1. "The proposal does not prevent law firms from backing or creating their own Qualified Entities, effectively allowing them to use Qualified Entities as shell organizations to bring claims."

This statement is misleading:

1. Article 4 of the Proposal establishes three criteria for a qualified identity including that the entity has a **legitimate interest in ensuring that the specific provisions of EU law are observed** and that it has a **non-profit character**. **Member State authorities must check compliance with these criteria before approving a Qualified Entity and on an on-going basis** (Article 4(1)).
2. Article 7(1) of the Proposal then also requires a Qualified Entity to **declare all sources of funding** used for the activity in general as well as to support the specific action. **Article 7(2) specifically prohibits a third party funder to influence the decisions of a qualified entity in the context of the representative action**.

Based on these two provisions it is impossible for a law firm to "call all the shots" or have the "major influence" in a case; moreover because all sources of funding for the non-profit, purpose-based Qualified Entity's activity (both general and specific) must be disclosed, if law firm funding is received, relevant authorities are enabled to properly scrutinise on-going compliance with the criteria.

2. "The proposal allows Qualified Entities to initiate some collective actions without notifying the affected consumers, and in some instances without affording the consumers the right to opt-out of inclusion."

Contrary to this claim**, the Proposal gives Member States the specific possibility to require that in compensation claims consumers must be previously identified (Article 6(1))**. Cases where consumers are not identified will therefore usually only apply to injunctions; in fact **the existing Injunctions Directive already uses a very similar system**. This shows how the system is distinctively different from the USA: Rather than simply allowing anyone or everyone to bring a collective action, it is restricted to only organizations acting in the public interest (Article 4(1) and 5(1)). Some Member States (such as France) already use a system of Qualified Entities and it has not led to abuse – a 2018 study released by the Commission confirms there have been no substantiated instances of abusive litigation in the EU in the last 5 years.[1]

3. "The proposal contains no class certification criteria, an omission that promises an 'anything goes' environment for EU collective actions."

This claim again ignores key differences between the proposed EU system and US class actions:

1. Under the Proposal, a case may be brought by a Qualified Entity which **must specifically show its objectives connect to the specific Directive/Regulation that has been breached (Article 5(1)).** This mechanism removes the need to provide for class certification as the connection between the entity's public interest purpose and the claim must be clearly established.

[1] See January 2018 Commission Study into the Implementation of the 2013 Recommendation, p. 40 which clarifies that only "potential" risks of abuse were reported.

2. When consumers subsequently seek compensation, they will need to do so based on a redress order of the Court (Article 6). In order to succeed, **consumers need to be covered by the Court's redress order, meaning that they actually suffered harm resulting from the specific infringement.**

4. "Under the proposal, in some cases consumers will not receive any payment, with all of the money to be paid to a third party."

Article 6(3)(b) of the Proposal permits national courts in the limited situation where consumers have suffered " a small amount of loss" and it would be "disproportionate to distribute the redress to them" to direct the redress at a "**public purpose serving the collective interests of consumers**". This provision makes sense, as **it does not serve anyone's interest to distribute a small amount of redress if the cost of distributing this amount is greater than the actual harm suffered**. In that case, most of the money obtained from redress would not actually benefit any consumers. Moreover, **it is impossible that the funds are passed on to the "plaintiff law firms and third parties" for their own gain, as the redress is clearly to be directed to a "public purpose serving the collective interests of consumers"**. To allege the redress will nonetheless be passed on without benefitting consumers bespeaks a bewildering distrust of officers of Europe's national judiciaries.

5. "The proposal lacks any mechanism to prevent dozens of Qualified Entities from pursuing simultaneously the same consumers' claims for the same alleged harm, before a myriad of tribunals."

The **Proposal gives specific instructions in Article 16(2) for the situation where different Qualified Entities launch a similar case in different Member States**. Moreover, such a scenario is more than unlikely: There will be a limited number of organizations that meet the requirements to become a Qualified Entity and **to prepare a collective redress action requires an immense investment of work and funds**. In France, where collective actions exist in consumer, health and environmental cases, only 11 actions have been brought in total in the last 5 years.[2]

6. "The proposal contemplates discovery of evidence; claimants can seek it but there is no similar provision for defendants."

Article 13 of the Proposal requires that the Qualified Entity present "reasonably available facts and evidence sufficient to support" the action**. Only once this is established will it be able to seek disclosure of further evidence held by the defendant,** thereby acknowledging the disadvantageous position of harmed consumers as the evidence needed to prove their cases typically lies with the very company having violated EU law. Moreover, the Proposal only sets a level of minimum safeguards to be observed by national procedural law, it **does not replace existing national procedural law and the fair trial guarantees (including the relevant rights of the defence).**

7. "The proposal could lead to forum shopping."

Forum shopping is nothing new to the EU and the legislator has sought to address this issue through the adoption of specific regulations. The **Brussels I and Rome I-III Regulations establish specific rules to be followed when determining which Member State court has jurisdiction – there is therefore no unfettered free choice of forum in the EU**. If these rules are considered insufficient, the Brussels and Rome Regulations should be amended and not the Collective Redress Proposal.

Conflating the EU proposal with "US-style class actions" is not substantiated and appears to be purposely misleading. The EU retains many collective redress mechanisms functioning in various jurisdictions without 'litigation abuse'. From a victims' perspective, this proposal actually appears to be the most restrictive of all EU collective redress mechanisms in existence. We note with final concern this debates emphasis on the supposed phenomenon of "abusive litigation", whilst the relevant, certifiable research proving this phenomenon is wanting.

[2] See October 2018 Study requested by JURI committee, p155.