

European Mortgage Federation European Covered Bond Council (EMF-ECBC)

Position Paper

May 2018

EMF-ECBC Position Paper on EC Proposal for a Directive on representative actions for the protection of collective interests of consumers, and repealing Directive 2009/22/EC

1. The EMF-ECBC is pleased to share its comments on the Commission proposal for a Directive on representative actions for the protection of collective interests of consumers.
2. The EMF-ECBC has, in the past, expressed reservations about EU intervention in the area of consumer collective redress, and, most recently in its response to the European Commission's Call for Evidence¹ reiterated its view that more appropriate mechanisms would provide consumers with access to redress for claims of low value, for example, national ADR mechanisms.
3. The EMF-ECBC also took the opportunity of its Response to the European Commission's Call for Evidence to highlight four key principles to follow in regulating collective redress at EU level
 - Promotion of ***consensual dispute resolution***;
 - ***Opt-in method***, rather than *opt-out* method;
 - **Prevention of abusive litigations**, including by **avoiding contingency fees** and by applying the '**loser pays**' principle;
 - **No punitive damages**, but rather **strictly compensatory redress measures**.
4. With these principles in mind, we particularly welcome the fact that the current proposal for a directive clearly states that **no punitive damages can be sought** in a representative action (recital 4) and that **only no-profit entities can qualify** to bring representative actions before courts (art. 4 par. 1). Moreover, we support the explicit confirmation in the proposal of the application of the '**loser pays**' principle (recital 4 and art.7 par.1). Finally, we welcome the objective of **promoting out-of-court settlements** (recital 26 and art.8).
5. The EMF-ECBC would like however to express the following concerns, in particular regarding certain important safeguards against abusive litigations which are left to the discretion of Member States.

¹ [EMF-ECBC Position Paper on European Commission Call for Evidence on the operation of collective redress arrangements in the Member States of the European Union](#)

Promotion of consensual dispute resolution

6. As stated above, the EMF-ECBC welcomes the promotion of consensual dispute resolution. However, we believe that the establishment of permanent national mechanisms for out-of-court settlement should be provided at EU level through this Directive. In particular, we strongly support inserting point 26 of the Commission Recommendation of 11 June 2013² in the Directive, in order to mandate Member States to ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. It is in fact worth noting that the Consumer ADR Directive³ only provides ADR mechanisms for individual disputes.
7. It would be therefore coherent with the previous Commission commitment and with the spirit of the legislative proposal to provide for the **mandatory establishment of national ADR mechanisms** within the framework of the Directive on representative actions, in order to **facilitate consumers and traders in trying to reach out-of-court settlements**.

Opt-in vs Opt-out

8. 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 identifies the opt-in method (where a consumer needs to proactively express its willingness to be included) as the appropriate method to form the claimant party. The Commission itself stated in the Communication⁴ accompanying the Recommendation that the **opt-out method** (where the claimant party is composed of all individuals belonging to a defined group unless they proactively opt-out) could be **more prone to abuse**, not to mention the substantial legal questions arising from it, such as the possible impairment of the freedom of consumers to decide whether they want to litigate.
9. Notwithstanding the previous explicit commitment to the opt-in method as a basis to constitute the European approach to collective redress, we regret to notice that the proposed Directive leaves to the discretion of the Member States the decision on how to design the process for the formation of the claimant party.

Article 6 – Paragraph 1

For the purposes of Article 5(3), Member States shall ensure that qualified entities are entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. **A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.**

² [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](#)

³ [DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation \(EC\) No 2006/2004 and Directive 2009/22/EC](#)

⁴ [COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS "Towards a European Horizontal Framework for Collective Redress"](#)

Article 6 – Paragraph 3

Paragraph 2 shall not apply in the cases where:

- (a) consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase. **In such cases the requirement of the mandate of the individual consumers concerned shall not constitute a condition to initiate the action.** The redress shall be directed to the consumers concerned;
- (b) consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, **Member States shall ensure that the mandate of the individual consumers concerned is not required.** The redress shall be directed to a public purpose serving the collective interests of consumers.

10. The EMF-ECBC strongly supports the previous analysis of the Commission and believes that the opt-out method may raise a series of serious legal concerns, in addition to opening the door to abusive litigations by qualified entities acting in bad faith. Therefore, **Member States should be required to impose the obligation on qualified entities to require the mandate of individual consumers concerned in order to seek a redress order.** This would effectively prevent qualified entities from seeking monetary compensations based on **vague claims coming from unidentifiable consumers**. At the same time, this would ensure that consumers can make a **free and informed decision on whether becoming a party in a litigation.**
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