European Federation of Building Societies
Fédération Européenne d'Epargne et de Crédit pour le Logement
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Position paper on the European Commission proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (2018/089(COD))

We should like to make the following comments on the European Commission proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC:

I. General comments

The European Federation of Building Societies supports the objective pursued in the proposal for a Directive of an effective system for collective claims for consumers in the event of infringements of EU consumer law.

However, in most Member States, regulations on collective redress have already been introduced or extended. For example, in France, the regulations on "action de groupe" entered into force with effect from 1 October 2014 (Article L. 423-1 ff. of the "Code de la Consommation", under LOI n° 2014-344 du 17 mars 2014 relative à la consommation, published in JORF n°0065 of 18 March 2014, page 5400 ff.) and in Slovakia with effect from 1 July 2016 (Zákon č. 160/2015 Z.z. Civilný sporový poriadok). Most recently, in Germany, collective redress for consumers has been improved through the additionally created legal remedy of the Musterfeststellungsklage (model declaratory action) with effect from 1 November 2018 (§§ 606 ff. Zivilprozessordnung (Code of Civil Procedure) based on the Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage (Act introducing a model declaratory action under civil procedure) of 12 July 2018, published in the Bundesgesetzblatt of 17 July 2018, 2018 I page 1151 ff.).

In so far as effective, efficient collective redress procedures already exist in the Member States, these should not be undermined by the proposal for a Directive. We therefore explicitly support the observation that the legal traditions of the Member States are to be respected (recital 24). However, to achieve this, it is not sufficient that existing national procedures can continue to exist alongside the representative actions provided for in the Directive.

Rather, the scope of the representative action should be confined to the assertion of cross-border infringements of consumer rights, as it is only in the case of a cross-border dimension of this kind that consumers in several Member States may be affected in the same way by possible infringements by a trader. Only in the case of cross-border matters does the risk also arise that consumers, in the absence of an effective and efficient means of redress, lose confidence in the

internal market so that only then does competence under Article 114 TFEU for a single pan-European representative action come into consideration. In Article 2(1) of the Directive it should therefore be clarified – in accordance with Article 2(1) of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws – that the Directive applies only to intra-Union infringements and widespread infringements within the meaning of Article 3(2) and (3) of this Regulation.

However, if such a restriction of the Directive to cross-border infringements is refrained from, it must be ensured that the new specifications on the representative action take account of the particularities of the individual national procedural systems and respect the existing national procedural principles. This legal concept is also based on Article 81 TFEU, which provides for the adoption of measures for the approximation of laws and regulations only as a supplement to judicial cooperation between the Member States based on the principle of mutual recognition.

II. Comments on individual proposals in the proposal for a Directive

In our view, the following provisions should be adapted:

1. Requirements concerning qualified entities

We welcome the aim underlying the proposal for a Directive not to unjustifiably hinder the activity of businesses and to this end in particular prevent the misuse of representative actions (recital 4 and Article 1(1)).

To prevent misuse of representative actions, it is necessary to adapt the requirements laid down for qualified entities.

1.1 Additional conditions for the legal standing of qualified entities

Article 4(1) lays down the following requirements for the legal standing of a qualified entity:

- properly constituted according to the law of the Member State and included in a publicly available list;
- legitimate interest in ensuring the provisions of relevant Union law covered by the Directive are complied with;
- non-profit-making character.

In order to prevent the creation of an abusive lawsuit industry through the introduction of the representative action, a qualified entity should have legal standing only if it does not primarily pursue the objective of bringing representative actions. Rather, the qualified entity with legal

standing should already have a sufficiently large number of members, have been in existence for some time and focus primarily on ensuring the enforcement of the consumer rights arising from Annex I to the Directive through informative or advisory activities. Here, the Directive could take the provisions on legal standing in the German Act introducing a model declaratory action under civil procedure (BGBl I 2018, page 1151) as a guide (period of at least 4 years in operation in the field of consumer protection, have at least 10 associations or at least 350 natural persons as members). The "direct relationship" required in Article 5(1) between the main objectives of the qualified entity and the EU consumer rights asserted in the action should already be established in Article 4(1), since the legitimate interest of the qualified entity for legal standing required in Article 4(1) arises only from these main objectives. This is in line with Commission Recommendation 2013/396/EU 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, OJ L 201/60 of 26 July 2013), according to which a relationship between an entity and the subject-matter of the action should already be necessary for the legal standing.

Establishing the main objectives and the minimum number of members and the minimum period in operation of the qualified entity as a prerequisite for its legal standing would also, in the interests of consumers, restrict the legal standing to entities which already possess years of relevant experience in the field of EU consumer protection, as well as sufficiently sound financial resources. This could boost consumer confidence in the representative action and in its chances of success. Furthermore, the probability could be increased as a result that the entity listed in accordance with Article 4(1) also sustainably has sufficient financial resources at its disposal to represent the best interests of the consumers concerned (Article 7(1), second sentence).

We welcome the fact that the proposal for a Directive provides for the absence of a "profit-making character" of the entity as a requirement for legal standing. To effectively minimise the risk of abuse, however, the entity should – in addition to the absence of profit-making character – considering in particular its membership and participation structure – offer the guarantee that it will not be misused by lawyers, traders or other third parties for the purpose of making a profit or deliberately harming other traders. To this end, it is necessary for the entity to disclose who holds participating interests in it, which members it has and from where it obtains its financial resources.

Admittedly, according to recital 10, Member States can for example impose requirements regarding the number of members or the degree of permanence of the entity or transparency requirements concerning the structure or objectives and working methods. However, these requirements should be clearly defined uniformly for all Member States in Article 4(1) in order to create legal certainly and to counter misuse of the representative action throughout Europe.

Against this background, we propose the following amendment to Article 4(1), second sentence:

> *"Member States shall designate an entity as qualified entity if it complies with the following criteria:*
>
> *a) It **has been** properly constituted according to the law of a Member State, in which it has its registered office **for at least four years**.*
>
> *b) **Its membership includes at least 10 associations which operate in the same field or at least 350 natural persons**.*
>
> *c) **Its main objective is to protect collective consumer rights resulting from the provisions of Union law listed in Annex I, by providing consumers with non-commercial information and advice**.*
>
> *d) It has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with.*
>
> *e) It has a non-profit making character **and is not used for making profits for its members, parties holding participating interests in it or other persons**."*

1.2 Exclusion of ad hoc entities

To prevent misuse (see point 1.1 above), legal standing of entities founded primarily to bring the representative action should be precluded.

> **Therefore Article 4(2) should be deleted without replacement.**

1.3 Restriction of qualified entities to consumer organisations and public bodies

To prevent misuse of representative actions, only consumer organisations and public bodies should have legal standing as qualified entities. This is in line with the provision of Article 5(1), which requires a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in the specific case.

> **Therefore, in Article 4(3) of the Directive, the term "in particular" should be deleted:**
>
> "Member States shall ensure that ~~**in particular**~~ consumer organisations and independent public bodies are eligible for the status of qualified entity."

1.4 Examination of the legal standing by the court or the administrative authority

Article 4(5) provides that compliance with the conditions referred to in Article 4(1) is without prejudice to the right of the court or the administrative authority to examine whether the purpose of the qualified entity justifies its taking action in a specific case in accordance with Article 5(1). It should be clarified here that the court or administrative authority overseeing the representative action – in addition to the conditions of Article 5(1) – should also examine the conditions for legal standing in accordance with Article 4(1).

Article 4(5) should therefore be amended as follows:

*"~~**The compliance by a qualified entity with the criteria referred to in paragraph 1**~~ **The inclusion of a qualified body in a publicly available list in accordance with paragraph 1** is without prejudice to the right of the court or administrative authority to examine **whether the conditions provided for in paragraph 1 have been met** and whether the purpose of the qualified entity justifies its taking action in a specific case in accordance with Article 5(1)."*

1.5 Transparency in relation to funding

Article 7 of the Directive provides that the qualified entity must declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action. This provision, which serves to check the independence of the entity and its non-profit-making character, should not be restricted only to actions with which a redress order is to be sought in accordance with Article 6(1). A declaratory decision in accordance with Article 6(2) can also have significant consequences for the trader concerned, especially on account of the associated negative effects on its reputation. The purposes pursued by Article 7 (prevention of a conflict of interests and misuse of an action, examination whether the funding third party has sufficient financial resources to meet its commitments if the action is dismissed) apply similarly for a declaratory decision pursuant to Article 6(2). The same applies for seeking injunction orders in accordance with Article 5(2).

Article 7, first sentence, should therefore be amended as follows:

*"The qualified entity seeking a redress order as referred in Article 6(1) **or a declaratory decision as referred to in Article 6(2) or a measure in accordance with Article 5(2)** shall declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action."*

2. Allowance of declaratory decisions

We welcome the fact that Article 6(2) gives Member States discretion to provide for a declaratory decision instead of a redress order. Such a declaratory decision can, in complex proceedings, definitely be in the legitimate interest of consumers, since then under the collective redress, the often lengthy determination of the amount of damage and any objections of the trader for the exclusion or reduction of the damage have to be examined. For example, it is possible that a trader justifiably refuses to pay compensation, referring to the fact that it has outstanding payment claims against the consumer to an amount exceeding the consumer's claim, the existence and amount of which would have to be examined on a case-by-case basis. In so far as a trader invokes the period of limitation, it would have to be examined whether the conditions of the limitation have been met in the individual case. In this respect, action limited to establishing a legal infringement would have the advantage for the consumer of resulting in a far more rapid resolution.

If a declaratory decision is issued in the context of a representative action against the trader, usually no additional redress order will need to be issued by the court or the authority. Rather it is to be expected that the settlement of the claim for damages or other individual claims can take place amicably and without filing an action, as a trader against which an infringement of EU consumer law has been established and communicated in accordance with Article 9 will be inclined, already for reputational reasons, to satisfy the resulting claims of the consumers amicably. Furthermore, under the Directive on consumer alternative dispute resolution for consumer disputes, the consumer is usually entitled to a conciliation procedure free of charge.

It should therefore be borne in mind that a declaratory decision offers a sufficiently effective and efficient legal enforcement instrument for the consumers concerned and also has the advantage compared to the redress order of more rapid legal certainty for both parties.

2.1 Extension of the scope for the implementation in the Member States

Due to the advantages of a declaratory decision referred to above, the conditions for the admissibility of the declaratory decision in Article 6(2) should not be limited exclusively to the case of complex quantification of individual redress.

Article 6(2) should therefore be amended as follows:

"By derogation to paragraph 1, Member States may empower a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law listed in Annex I, in duly justified cases **especially** where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex."

The exemption in Article 6(3)(a) should be deleted without replacement for the reasons set out above.

2.2 Deletion of the special regulation for low-value loss

Article 6(3)(b) provides that a declaratory decision is precluded if the individual consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In this case, provision is made in Article 6(3)(b) that the redress obtained through a redress order will not benefit the consumers who have suffered the loss, but rather a public purpose serving the collective interests of consumers.

Such a form of representative action, which is not intended to compensate the harmed consumers, but only to damage the traders concerned, is alien to the system. It is contrary to the purpose of the Directive to improve the protection of harmed consumers and is incompatible with the principle of proportionality. Since compensation paid in favour of a public purpose does not preclude the legitimate individual claim of any one of the harmed consumers to redress for the loss he has suffered under general principles (see Article 6(4)), the trader would possibly have to pay the damages twice: on the one hand to the consumer and on the other to promote public purposes under the representative action. This is contrary to the specification in recital 17 that the trader should not pay more under the representative action that it owes under substantive law and that punitive damages should be avoided.

Moreover, a declaratory decision already has a deterrent effect for the trader on account of the harmful effects on its reputation, especially as information must be provided on each negative declaratory decision under Article 9. Recital 31 is explicitly based on these reputational risks and the ensuing deterrent for traders. A further penalty imposed on the trader is not necessary and would be alien to the system.

Against this background, Article 6(3)(b) should be deleted without replacement.

3. No action without mandate (opt-in principle)

It is in keeping with European legal principles that consumers wishing to assert their claims against a trader by means of legal action must actively opt for legal action. The requirement for a legal hearing and the freedom of action of each consumer therefore demand that the consumer must himself be able to decide whether he wishes to join the action of a specific qualified entity (opt-in principle). The consumer must have the option, instead of participation in a representative action, to take action himself and if necessary be able to appeal to a court other than the one overseeing the representative action. This applies in particular against the background that according to Article 2(2), the consumer, in addition to the representative action, is also to be entitled to remedies under national law. Finally, the consumer may also have a legitimate interest in not taking action at all but, for example by means of an out-of-court settlement or on the basis of an out-of-court dispute resolution procedure, seek an even more rapid solution or a more favourable result for himself. The

Commission had already recommended using the opt-in principle as a basis for representative actions on 11 June 2013 (2013/396/EU, common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201/60 of 26 July 2013).

Contrary to recital 18, it should not be necessary in this respect for the qualified entity to individually identify all consumers affected by an infringement. Rather, consumers should be given the option of joining an action brought by a qualified entity within a certain time limit.

It is also necessary for the parties to the representative action to know the identity of the "consumers concerned", who join the representative action, so that the parties can negotiate an appropriate settlement and the court or the administrative authority can assess the fairness of this settlement in accordance with Article 8(4) "taking into consideration the rights and interests of all parties, including the consumers concerned". Furthermore, knowledge of the consumers concerned is necessary so that the trader can duly comply with its obligation to inform pursuant to Article 9(1).

For this reason, the need for a mandate both in Article 5(2) and Article 6 should be established. In the case of seeking an injunction order under Article 5(2), provision should also be made that the qualified entity proves that it meets the conditions for its legal standing and the regularity of its funding. The question of whether the trader has acted intentionally or negligently should then have to be proved if the claim for injunctive relief or removal so requires under substantive law. A general renunciation of evidence of intention or negligence must be rejected, as the prerequisites for claims under substantive law should not be changed by the Directive. The same applies for the question of whether consumers have suffered actual loss or damage.

Article 5(2), second sentence, should therefore be amended as follows:

"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.**~~ ***They must demonstrate plausibly that the requirements of Article 4(1) are met."***

If the provision in Article 6(3)(a) is not deleted without replacement (see the comments under point 2.1 on this subject), on the basis of the indispensability of the mandate presented above, in any event the necessity of the mandate mentioned there should be established.

Article 6(3)(a) should therefore be deleted or in any event be amended as follows:

*„[…] In such cases **too** 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."*

4. Legal certainty and level playing field

The regulations on settlement and a final decision should, for reasons of legal certainty and level playing field, be configured so that they have a binding effect for and against the trader and the consumers concerned. In addition, both parties should be treated equally in terms of the costs of the proceedings.

4.1 Binding effect of settlements

We welcome the possibility provided for in Article 8 of ending the action amicably with a settlement. The legal certainty created with a settlement can occur only in so far as it is binding on both parties to the agreement are bound. However, Article 8(6), first sentence, provides that consumers are free at any time to accept or refuse to be bound by the settlement reached. In order to create legal certainty, the right of the consumer to refuse to be bound by the settlement should be subject to a time limit. For the case that a substantial proportion of the consumers concerned refuse to be bound by the settlement, the trader should be permitted, on its part, to refuse to be bound by the settlement and to continue the proceedings.

Article 8(6), second sentence, according to which the consumer, in spite of accepting the settlement, is to be entitled to claim "additional rights to redress" against the trader concerned, should be rejected as a settlement has been concluded and a consumer accepts it, there should be full legal certainty in the relationship between the trader and this consumer. For reasons of a level playing field, it should not be permitted either for the trader to reject the obligations regulated in the settlement or for the consumer to lodge further claims on the basis of the same infringement beyond the claims established in the settlement.

Article 8(6), second sentence, should therefore be deleted without replacement.

4.2 Binding effect of final decisions

We welcome the binding effect of final decisions provided for in Article 10. For reasons of an equal playing field, however, a unilateral binding effect at the expense of the trader concerned should be rejected. Rather, the final decision should also have binding effect in the case that the action is dismissed, since otherwise the trader concerned could have action brought against it repeatedly for the same event.

Article 10 should therefore be amended as follows:

"(1) Member States shall ensure that ***the existence or non-existence of*** *an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order referred to in Article 5(2)(b), is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement.*

(2) Member States shall ensure that a final decision referred to in paragraph 1, taken in another Member State is considered by their national courts or administrative authorities as a rebuttable presumption that an infringement has ***or has not*** *occurred.*

(3) Member States shall ensure that a final declaratory decision referred to in Article 6(2) is deemed as irrefutably establishing the ***existence or non-existence of*** *liability of the trader towards the harmed consumers by an infringement for the purposes of any actions seeking redress before their national courts against the same trader for that infringement. Member States shall ensure that such actions for redress brought individually by consumers are available through expedient and simplified procedures."*

Article 6(4) is to be rejected, according to which, in spite of a final decision, any additional rights to redress that the consumers concerned may have under Union or national law are not affected. This provision is to be rejected on the grounds of a level playing field and the aim to create full legal certainty; in this respect, we refer to our comments above.

Article 6(4) should therefore be deleted without replacement

4.3 No preferential treatment for qualified entities in relation to procedural costs

Article 15(1) provides that Member States should take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively exercise the right to seek the measures referred to in Articles 5 and 6. These would include limiting applicable court or administrative fees, granting them access to legal aid where necessary, or providing them with public funding for this purpose.

Preferential treatment for qualified entities against the traders concerned regarding the amount or the assumption of procedural costs would be contrary to the principle of an equal playing field and a fair procedure. If a qualified entity could bring actions without or with only a small risk of procedural costs, this would also encourage actions which from the outset are without prospects of success and an abuse of law, from which for the traders concerned, considerable damage to their reputation could result merely by the action being brought. For this reason, the Commission, in its 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,

OJ L 201/60 of 26 July 2013) correctly provided that procedural costs in the field of collective redress mechanisms should in each case be borne by the unsuccessful party – without preferential treatment of the rights of the non-profit organisations. This is in line with Article 7(1), second sentence, in which it is correctly required that the qualified entity should demonstrate that it has sufficient financial resources to meet any adverse costs should the action fail.

Against this background, Article 15(1) should be deleted without replacement.

5. Consideration of the particularities of the rules of evidence

Article 13 requires Member States to ensure that, at the request of the qualified entity, the court or administrative authority may order the presentation of evidence by the defendant. The prerequisite for this is only that the qualified entity has presented reasonably available facts and evidence and has indicated "further evidence".

The rules on evidence may be arranged differently according to the underlying rules of procedure and depend in particular on whether the Code of Civil Procedure of a Member State is based on the negotiation principle or also allows an investigation by the court or authority ex officio. In so far as the negotiation principle intervenes, the courts base their decision in principle only on the facts presented unsolicited by the parties and, where appropriate, determined by way of taking evidence on request. It would not be compatible with this if the court orders the taking of evidence without the party bearing the burden of proof first having first presented the underlying facts in sufficient detail. In this connection, the European Parliament, in its Resolution of 2 February 2012 on the subject "Towards a Coherent European Approach to Collective Redress" (2011/2089(INI)) pointed out that an obligation to disclose documents to the claimants ('discovery') is mostly unknown in Europe. The Parliament required in this respect that collective claimants must not be in a better position than individual claimants with regard to access to evidence from the defendant.

Considering the differences in the rules on evidence of the individual Member States, which do not prevent efficient and effective law enforcement, Article 13 – similarly to, for example, the rules on settlements in Article 8 – should allow the Member States discretion regarding implementation. Such discretion is in line with recital 37, according to which the need, scope and proportionality of such disclosure of evidence should be carefully assessed by the court or administrative authority having regard to the protection of legitimate interests of third parties and subject to the applicable Union and national rules.

The introductory sentence in Article 13 should therefore be amended as follows:

"Member States ~~**shall ensure**~~ ***may provide*** *that, at the request of a qualified entity […]".*