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Approaching consumer collective redress in the EU — business-oriented perspective[1]

Zbiorowe dochodzenie roszczeń konsumenckich w UE z perspektywy przedsiębiorców

Abstract

The main question to be answered in this analysis relates to the impact of the EU new legislative framework on the collective redress on the legal position of the business environment. The analysis concerns the system of collective redress as proposed by the European Commission in the Proposal for a Directive on representative actions (2018). The paper presents and examines the stakeholders concerns related to the proposed by the European Commission. Specifically, it discusses the issues such as: (i) lack of adequate safeguards mitigating the risk of abusive legal actions commenced by the consumers (abusive litigation), (ii) missing criteria for qualified entities entitled to bring an representative action and (iii) uncertainty in terms of consumer mandate to initiate representative action. The paper elaborates if and to what extent these concerns were shared by the EU institutions involved in the various stages of the legislative process.

Key words: collective redress, consumer rights, representative action, European Union, C2B, business environment

JEL: K20, K41, K42

Streszczenie

Podstawowe pytanie badawcze stawiane w ramach niniejszego artykułu dotyczy wpływu kształtującego się unijnego systemu zbiorowego dochodzenia roszczeń na sytuację prawną przedsiębiorców w Unii Europejskiej. Przedmiotowa analiza obejmuje system prawny zaproponowany przez Komisję Europejską we wniosku dotyczącym wydania dyrektywy w sprawie powództw przedstawicielskich (2018). W artykule zaprezentowano obawy przedsiębiorców związane z wprowadzeniem mechanizmu prawnego zaproponowanego przez Komisję. W szczególności poruszane zostały kwestie: (i) braku odpowiednich zabezpieczeń służących uniknięciu nadużywania drogi sądowej przez konsumentów, (ii) niewystarczających kryteriów stawianych podmiotom upoważnionym do występowania z powództwem przedstawicielskim oraz (iii) niejasności dotyczących wymogu udzielenia upoważnienia przez konsumentów, których dotyczy powództwo przedstawicielskie. Przedmiotowe rozważania dotyczą tego, czy i na ile wskazywane obawy przedsiębiorców zostały podzielone przez instytucje unijne oraz uwzględnione na poszczególnych etapach unijnego procesu legislacyjnego.

Słowa kluczowe: zbiorowe dochodzenie roszczeń, prawa konsumenta, powództwo przedstawicielskie, Unia Europejska, C2B, przedsiębiorcy

Introductory remarks

In the Proposal for a Directive on representative actions for protection of the collective interests of consumers[2] (hereinafter referred to as the Proposal for a Directive on representative actions) European Commission proposed a new legislative framework for consumer collective redress in the EU. The goal of this act is to contribute to the effective enforcement of the EU law and provide adequate redress for consumers. The evaluations conducted by the Commission demonstrated that the risk of infringements of the EU law affecting the collective interests of consumers is increasing and that such infringements may affect thousands or even millions of consumers with the same practice in a number of different economic sectors. The existing legal framework for collective redress as provided in the Directive 2009/22/EC[3] (hereinafter referred to as the "Injunctions Directive") seems to be insufficient to satisfy the consumer needs (Mucha 2019, p. 205). The Injunction Directive allows the qualified entities — such as consumer organisations and independent public bodies — to bring actions on behalf of consumers before the courts or administrative authorities. However, it does not provide any collective compensatory redress mechanism for consumers. As a part of "A new deal for consumers", the Commission wants to extend the scope of remedies for

consumers by providing for a compensatory relief (Twigg-Flesner, 2018, p.166; Loos, 2019, p. 113).

The idea of including actions for damages in the collective redress system of the EU is not new. It stems from the complex history of the proposal for a system of collective redress in the EU. The idea of granting private parties the possibility to demand compensation was discussed at the EU level already in 2000s. In effect of discussions held in 2009, Commissioner Kroes prepared a legislative proposal according to which collective actions could be introduced for private parties so that they could claim damages for breach of competition law (Hodges, 2014, p. 67). However, due to heavy pressure imposed at that time by some national governments supported by business environment, the proposal for compensatory collective redress has never been introduced at the EU level.

In 2018 the Proposal for a Directive on representative actions Commission returned to the primary idea of the broad system of collective redress in the EU. Unsurprisingly, this concept still raises many doubts in the business sector which strongly opposes the Commission's Proposal.

Business concerns as regards the Commission's Proposal for a Directive on representative actions

Modus operandi provided in the Proposal follows the path included in the Injunction Directive. The mechanism is based on representative actions which can be brought by qualified entities designated by Member States. Qualified entities — in practice, consumer organizations and public bodies — shall satisfy the minimum criteria specified in the Proposal. As a result, consumers cannot bring an action either by themselves or by their lawyers. Such structure, in principle, shall facilitate access to justice to safeguard consumers' interests on one hand and ensure adequate safeguards against an abusive litigation in the other.[4]

In spite of the assurances declared by the Commission, the main concern articulated by the business sector is that the use of the representative actions will give rise to abuse of collective litigation. In order to provide balance between the interests of consumers seeking redress and the rights of traders, the legal framework for collective actions shall include some procedural safeguards which will prevent the misuse of the this legal instrument. The Commission seems to comply with traders in that the Proposal should not provide incentives to competitors, third-party investors and law firms to litigate against companies at the expense of consumers. However, according to stakeholders, the Proposal misses to provide many safeguards necessary to minimize the risk of abusive litigation. It should be observed that many of such elements were included in the 2013 Commission's recommendation on collective redress[5] (Stadler, 2013, p. 483; Sorabji, 2014, p. 62) and they were not transferred to the Proposal for a Directive on representative actions.[6] Some of the most problematic issues in this respect will be discussed below.

Lack of safeguards mitigating the risk of abusive litigation

According to the Proposal, in the representative action the qualified entities are entitled to seek different types of measures, including compensation (damages) (Article 6). However, the Proposal does not provide that the compensation shall cover the actual harm suffered by the consumers. Consequently, it does not explicitly exclude punitive damages from its scope. Although the Commission notices that they could lead to overcompensation in favour of the consumers, it does not provide an explicit prohibitions of such punitive damages in the main body of the Directive.[7] Instead, the Proposal refers to the punitive damages only in the recitals to the Proposal for a Directive, stating that they should be avoided (and not prohibited).

Furthermore, the Proposal never refers to the "loser pays" principle, according to which the party that loses a collective redress action reimburses the necessary legal costs borne by the winning party. Instead of such principle, it includes the Member States' obligation to ensure that the costs related to the representative action may be recovered from the trader where the action is successful (Article 15 point 2). Moreover, the Proposal neither refers to the lawyers' remuneration nor specifies any method to calculate it. It ignores the issue of contingency fees which are calculated as a percentage of amounts awarded, and such information would undoubtedly constitute an incentive to initiate litigation.

According to some stakeholders, "leaving choice of safeguards to Member States will lead to significant inconsistency, provoking a "race to the bottom" in terms of safeguards and consequently leading to forum shopping".[8] Furthermore, lack of necessary safeguards leaves defendants, including small and medium-sized enterprises "even more exposed to the risks of misuse than under the US Class Action system".[9] Comparison of the current Commission Proposal for a Directive for representative actions with the U.S. class action system is particularly controversial, due to the fact that for many years the Commission has kept recalling that the U.S. class action system is not envisaged in Europe.[10] Referring to the judicial collective redress procedure in 2008, the Commission directly expressed the view that such procedure should "(…) avoid elements which are said to encourage litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements."[11]

Missing criteria for the qualified entities

Another concern voiced by the business environment against the Proposal for a Directive on representative actions is a lack of precise requirements for recognition as qualified entities. In line with Article 4 (1) of the Proposal, qualified entities shall satisfy only very general criteria, according to which they: (i) shall be properly constituted according to law of the Member State, (ii) shall have a legitimate interest in ensuring that the provisions of the EU law covered by the

proposal are complied with, and (iii) they shall have a non-profit character. With reference to the second condition, it is emphasized that such legitimate interest cannot be only claimed on the surface, but it shall be demonstrated by the entity and it should be capable of being verified by the court.[12] Additionally, in order to avoid abuses, qualified entities shall prove their stability and seriousness, for example, by the minimum period of existence. The constitution of qualified entities *ad hoc*, with the sole purpose of bringing an representative action, which is permitted under Article 4 (2) of the Proposal, is clearly against the interests of business environment. Moreover, the Proposal does not explain how the non-profit character of qualified entities shall be demonstrated and verified by the court or an administrative body. It does not prohibit the lawyers and litigation funders to be members of qualified entities, which — according to traders — entails a risk that lawyers will use qualified entities for their profit-making activities.[13]

Likewise, there are many doubts concerning the issue of funding of qualified entities. The Proposal for a Directive on representative actions set forth a controversial innovation related to the possibility to finance the activity of the qualified entities from the private sector, among other things, from the business environment. Member States may decide whether the qualified entities financed by third parties will be allowed to seek all the redress measures available (including compensatory collective redress) or whether this right is only granted to some of them. As regards the entities seeking compensatory collective redress, the EU legislator provides for an additional obligation to declare the source of the funds used for their activity in general, and the funds they use to support the action.[14] In theory, the Proposal prohibits third party funding in case of actions brought against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent. However, although the Commission suggest that imposing such transparency over the source of funding will prevent abusive litigation, it does not precise how it can be verified by courts or administrative bodies. This, in turn, entails a risk of the use of qualified entities by one company to act against its competitors.

Uncertainty in terms of consumer mandate to initiate representative action

There are two basic approaches, according to which individuals affected may join the group in order to be represented in the collective action, namely systems referred to as *opt-in* and *opt-out.* Under the opt-in mechanism they join the group at their express consent only, while under opt-out principle individuals belonging to certain group can automatically take part in the litigation unless they expressly withdraw (Stuyck, 2009, p. 483; Ervo, 2016, p. 185). The Proposal for a Directive on representative actions makes it unclear how the consumers shall join the group in order to be represented. One the one hand, it states that in order to obtain injunctive orders, qualified entities shall not have to obtain the mandate of the individual consumers concerned.[15] Such wording suggests that — in terms of injunctive redress — the opt-out rule is the governing principle. On the other hand, there is no reference in the Proposal to the necessity of having consumer mandate in order to seek compensatory redress. This leaves the decision on the choice of the opt-in or opt-out model for compensatory redress at the discretion of Member States.

One scenario that seems quite plausible is that business environment is strongly against the introduction of the opt-out principle.[16] In line with this procedure, the number of consumers represented within the representative action can be significant. They are not obliged to grant a consent to be represented, instead they are included automatically since they have been harmed by the same or similar infringement. Unless they withdraw the claim, consumers will be bound by the judgement and entitled to obtain compensation if such is awarded. As a result, it can be reasonably expected that the total amount of compensation awarded to consumers will be higher in the opt-out system.

Changes to the Proposal for a Directive on representative action suggested by the European Parliament and the Council

Some concerns of the business environment discussed above were shared by the European Parliament who was dealing with the Commission's Proposal for a Directive on representative actions at the latter stage of the legislative process. In March 2019 the Parliament adopted legislative resolution in which it acknowledged some requests of stakeholders, including business environment.[17] The resolution suggested an explicit prohibition of punitive damages (Article 6 para 4b) and contingency fees (Article 15a) in the Proposal for a Directive on representative actions. It also required Member States to introduce the loser-pays-principle (Article 7a). With regard to the third-party funding, in its resolution the Parliament obliged the qualified entities to disclose to the court all details of their financing to demonstrate that they are not in a conflict of interest. Qualified entities shall disclose publicly how they are financed, organized and managed. Courts would be allowed to declare a representative action inadmissible where it is funded by a third party and where that funding would influence the decision of a qualified entity, including its decision to initiate a representative action, and where the defendant is competitor of the fund provider (Article 7 para 2). In line with the amendments proposed by the Parliament, Member States would not be allowed to designate qualified entities on an *ad hoc* basis (Article 4).

Further, the Proposal for a Directive on representative actions was referred to the Council, which in November 2019 adopted its general approach.[18] In this document the Council

presented its own vision as regards the legislative framework for collective redress. The main change proposed by the Council consists in introducing the distinction between domestic and cross-border representative actions. In line with this suggestion, Member State may decide on the criteria for designation of qualified entities for domestic representative actions, whereas the criteria for designation of qualified entities for cross-border representative actions would be decided at the EU level. The latter have to prove that they had existed for at least 18 months prior to the designation request and would have to demonstrate 12 months of actual public activity in the protection of consumer interests. Member States would be able to allow courts or administrative bodies to reject the legal capacity of a qualified entity designated in another Member State if it is funded by a third party having an economic interest in the outcome of the action. The decision regarding opt-in or opt-out procedure was left at the discretion of Member States, with a reservation that consumers from another Member State would be required to opt in.

Additionally, the Council discussed the position of the Parliament specified in its resolution. However, it should be observed that, in general, the Parliament's suggestions were not shared by the Council. Just to mention, the Council did not include the prohibition of contingency fees and referred to the loser pays principle and prohibition of punitive damages only in the recitals to the Proposal. This is only one of many examples confirming that the EU institutions have different views as regards the shape of the legislative framework for collective redress.

Conclusions

It is difficult to assess the actual impact of the new legislative framework for representative actions on business activity at this moment. The uncertainty is conditioned by there being varied approaches to the collective redress system, as presented by the Commission, the Parliament and the Council. To conclude, one may say that the proposal of the Commission is definitely the most consumer-oriented of the three, while the position taken by the Parliament may be reckoned rather business-oriented. The position of the Council discussed in the general approach seems to transfer the burden of preparing the domestic legislative system which would regulate the mechanism of collective redress on Member States. Whether the Directive is going to be introduced remains undecided yet.

Irrespective of the outcome of the trilogue negotiations run at the moment by the institutions, one thing remains undisputable. The institutions agree that the introduction of compensatory collective redress in the EU is needed. Therefore, the situation of business environment will be affected by the new legislation, especially in those Member States in which there was no possibility to seek compensatory collective redress so far. In line with the Injunctions Directive, traders infringing collective consumer interests have to reckon with injunction order. After the Proposal will enter into force, they will also have to reckon with compensatory redress. It can occur to be very pricey for those infringing consumer interests, especially when the Proposal, in the shape as proposed by the Commission, enters into force.

Przypisy/Notes

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[2] European Commission, Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final.

[3] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJEU, L 110/30.

[4] Explanatory Memorandum to the Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, p. 4.

[5] European Commission, Recommendation of 11.06.2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under Union law, 2013/396/EU, OJEU of 26.7.2013, L 201 p. 60.

[6] Ecommerce Europe Position Paper, *Policy recommendations New Deal for Consumers Package — Part II Proposal on Representative Actions*, https://www.ecommerce-europe.eu/wp-content/uploads/2018/10/ECOM-Position-Paper-RAD.pdf (5.04.2020).

[7] Rec. 4 and 17 of the Proposal for a Directive on representative actions.

[8] Joint Statement of the associations AIRE, Airlines 4 Europe, AmCham EU, Bitkom, CER, Digitaleurope, EDiMA, EEPIA, European Banking Federation, European Justice Forum, IATA, MedTech Europe, U.S. Chamber Institute for Legal Reform, *Directive on Representative Actions The European Commission's proposal risks undermining civil justice systems to the detriment of consumers across Europe* http://www.cer.be/sites/default/files/publication/181008_Joint%20Statement_Proposal%20for%20a%20Directive%20on%20Representative%20actions.pdf (5.04.2020).

[9] Ibidem.

[10] European Commission, Green Paper on consumer collective redress, COM (2008) 794 final.

[11] Ibidem.

[12] See: European Savings Bank Group, *Position on the proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC*, https://www.wsbiesbg.org/SiteCollectionDocuments/ESBG_position_proposal_on_collective_interests_of_consumers_final.pdf (4.04.2020).

[13] Conversely, legal professionals claim that limiting the collective redress process to designated organizations reduces the access to justice and brings detriment to consumers. See: Council of Bars and Law Societies of Europe, *Position on the Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC 24/09/2018*, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_ATJ_20180924_CCBE-position-on-the-Proposal-for-a-Directive-on-representative-actions-for-the-protection-of-the-collective-interests-of-consumers-and-repealing-Directive-200922EC.pdf (4.04.2020).

[14] Article 7 of the Proposal for a Directive on representative actions.

[15] Article 5 (2) of the Proposal for a Directive on representative actions.

[16] Business Europe, U.S. Chamber Institute for Legal Reform, Eurochambers, EuroCommerce, SME United, EDiMA, Insurance Europe, European Banking Federation, EFPIA, ESBG, FEDMA, Word Federation of Advertisers, AmChamEU, European Justice Forum, Airlines for Europe, *Joint Business Statement on the Proposal on Representative Actions (Collective Redress)*, https://www.ebf.eu/wp-content/uploads/2018/12/Joint-Business-Statement-on-Representative-Actions-proposal-collective-redress-November-2018.pdf (4.04.2020).

[17] European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, (COM(2018)0184–C8-0149/2018–2018/0089(COD)).

[18] Council of the European Union, General approach as of 21 November 2019 on the proposal for a directive of European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

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