



**Brussels, 2nd March 2018**

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Consumers and Gender Equality  
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B-1049 Brussels

Mr Valdis Dombrovskis  
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**Dear Commissioners,**

### **A new deal for consumers - revision of the Injunctions Directive**

The Financial Services User Group (FSUG) advises the European Commission in the preparation of legislation or policy initiatives which affect the users of financial services, provides insight, opinion and advice concerning the practical implementation of such policies, and proactively seeks to identify key financial services issues which affect users of financial services.

For many years we have been drawing the Commission's attention to numerous cases of **mis-selling** often arising from misleading information and/or conflicts of interests in the distribution of **financial products, instruments and services**. In many of these cases lack of collective redress mechanisms prevented victims to seek reimbursement and compensation for losses and damages suffered<sup>1</sup>. Therefore, we welcomed the opportunity to comment on the Inception Impact Assessment on the revision of the Injunctions Directive where we strongly supported option 4, i.e. a targeted revision of the Injunction Directive which would introduce procedural efficiencies and redress opportunities in widespread misbehaviors and mass harm situations.

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<sup>1</sup> For instance, in the case of COREM (formerly "CREF", a French insurance-regulated pension plan) **450 000 pension savers were abused**. The scheme – until 2002 - was mostly run illegally as a pay-as-you go scheme. Still today there is no or very poor disclosure of the coverage ratio and of the reserve gaps (€ 2,9 billion at the end of 2014) and no prominent warnings about these severe shortcomings. On the contrary, there are misleading advertisements about the solidity and performance of the pension product. Since there is no collective redress mechanism available in France many victims have not been compensated at all. Even though the Public Supervisor (the French State) has also been convicted and ordered to indemnify 20 % of the prejudice to the plaintiffs it refused to indemnify all the other victims, or even to inform them about their rights to damages.

The most recent examples of Volkswagen or Ryanair have shown that consumers and financial services users are left without an adequate tool to collectively obtain redress for damages suffered. Even where national schemes are available, there are still too many situations where procedures are overly burdensome or costly or are not adequate to solve cross-border cases. Therefore, an effective EU-wide collective redress mechanism is a must to restore consumer confidence in financial services, and for those to stop being ranked as the worst consumer market of the whole EU. Consumers/users protection is also a precondition for the proper functioning of the internal market. Without public confidence in the quality of the products/services traded a market cannot function and thrive<sup>2</sup>.

Moreover, FSUG supports reinforcing sanctioning regimes in the financial services sector **both at EU and national level**.

In view of the ongoing revision of the Injunctions Directive, we therefore take the opportunity to point to the following issues that we consider indispensable for making the Injunctions Directive truly beneficial for financial services users.

### **1. Extending the scope of the Injunctions Directive (ID)**

The right to claim compensation and the right to access to justice should not remain theoretical for consumers and investors.

It is especially important in the area of financial services where:

- quite technical and complex financial products have a serious impact on the quality of life of active and retired citizens; and
- where due to the lack of an effective redress mechanism many consumers are *de facto* unable to exercise their rights and are left with no actual and effective protection

Therefore, the scope of the directive should be extended to all financial services, including investment products/services. Excluding these products and services would be inconsistent with the Capital Markets Union project as its goal is to put European savings to better use and boost investor confidence and certainty.

There have been many mis-selling scandals in the financial services industry with a number of detrimental effects on individuals. Consequently, in the EC Consumer Markets Scoreboard “retail” financial services are constantly ranked as one of the worst consumer markets in the entire EU which shows clearly that consumers and investors have lost their trust in financial services and their providers.

On the other hand, individuals as financial services users are typically not equipped to identify and assess the misbehaviors of their product/service providers, and more importantly they cannot be blamed or held liable for that. Moreover, they are even less equipped to obtain redress in court on their own: it is very often too technical, burdensome, costly and not least **aleatory** for them. Abuses in the financial sector need to be more effectively identified and sanctioned by default by administrative authorities, and the victims need to be properly indemnified. Next to this, a pan-European collective redress system is long overdue in Europe if the EU truly wants to restore individual and public confidence in the financial services market and to enforce legislation in the area of investor protection. It is hard to imagine how otherwise the Commission wants to regain trust of EU citizens as investors and win them back into capital markets in order to accomplish the Capital

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<sup>2</sup> See the paper "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism", by Akerlof, George A, 1970.

Markets Union. The FSUG therefore very much welcomes the Commission's intention to introduce a collective redress mechanism for financial services users.

The FSUG is calling for a EU binding legislative act that would ensure that all Member States have collective redress mechanisms open for both national and cross-border cases, based on the following minimum requirements:

- The group representative should be enabled to act on behalf of identified or not yet identified (though identifiable based on predefined objective criteria related to the claim) group of consumers/users.
- In order to guarantee widespread information to all financial users concerned, an EU-wide register of launched and ongoing cases should be established.
- We also support the opt-out procedure<sup>3</sup>. The consumer/financial services user then has the chance to exclude himself from the group. The opt-out system offers a better protection to victims especially when they are not aware of their rights. Experience also shows that the rate of participation in the opt-out system is much higher compared to an opt-in procedure, so many more financial users can be reached. Additionally, this procedure is easier to handle.
- Agile, efficient and truly independent ADR (Alternative Dispute regulation) schemes can only be a good alternative if there already exists an efficient collective redress system. On the other hand, it is doubtful whether such a system e.g. as a 'Schiedsverfahren' in Germany is able to handle mass claims (the experience with the ADR procedure in the prospectus claims against Deutsche Telekom in Germany shows the contrary). Other experiences with ombudsman systems show that these alternative systems only work in cases where:
  - facts are not debated,
  - both parties accept the outcome (this is one the weakest point of the current system) and
  - the damage is only limited (e.g. up to 10.000 € in Germany in banking ADR procedures). We are against mandatory ADRs. They can very often be used to delay legal actions in order to reach the statute of limitations. In such a case it will then leave the financial user without any protection.
- Costs are a big issue, not only for financial services users but also for their representatives. First of all, some costs and expenses are to be paid in advance (e.g. expert appraisals, reports, stamp duties, taxes, etc.). Secondly, the loser pays principle can be a disincentive for filing collective actions, exemptions for representative organisations should therefore be considered. Also, possible preparatory costs should be taken into consideration, e.g. for identifying the victims, gathering the claims etc. Therefore, the issue of funding can be crucial especially for non-profit organisations.
- We do not plead for the introduction of a US style class action. We do not want punitive damages or contingency fees. On the contrary we look for a European style group action with

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<sup>3</sup> The issue of opt-in and opt-out systems has been debated in the FSUG position from 2011 [https://ec.europa.eu/info/sites/info/files/file\\_import/collective\\_redress-2011\\_04\\_29\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/collective_redress-2011_04_29_en_0.pdf); please see for example p. 14 : *"In general the opt-out system may offer a better protection to victims especially when they are unaware that their rights have been infringed. This is also the case when the costs of a legal action are higher than the compensation the victim would get, and also when the products or services involved are complex (often the case in the financial services area) and therefore where the damage is difficult for individuals to evaluate. This approach is also easier to manage. Recent experience in Europe of the opt-in procedure in consumer claims showed that the rate of participation is very low (less than 1%) On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal). It is claimed that opt-out may sometimes be more difficult to combine with the freedom to take legal action. Yet, it does not necessarily limit the plaintiff's freedom since people are able to withdraw from the group. In any case, this freedom has to be balanced against the need to ensure that all those affected can achieve access to justice. In certain limited cases, an opt-in procedure might however be the best way forward for example when the damage is of high value or limited to a very restricted number of plaintiffs and caused by the same local provider"*.

a great power of supervision by the court. A strong judge in the proceedings which for example is empowered to check the seriousness of the claim and the representativeness of the group representative will certainly act as a safeguard against abusive actions.

- At the same time the public enforcement should be strengthened next to introducing collective redress mechanisms. Each Member State should set up its own Financial Consumer Protection body that is equipped with sufficient human and financial resources.
- Last but by no means least, compensatory collective redress should cover all sectors where mass damage due to the breaches of EU law is possible and not be limited just to the areas of consumer law in restricted sense. Even if there is not yet a real retail financial services single market for consumers, many financial services providers operate in many Member States as do companies, meaning that also in the interest of retail investors collective redress actions against companies are strongly needed. Therefore, EU-wide collective redress mechanisms should at a minimum include all financial services users, such as savers, retail investors, life insurance policy holders, pension fund participants, small and individual shareholders or employee shareholders.

## **2. Standing of consumer, saver and individual investor organizations**

Experienced and well-established organisations representing interests of consumers, savers and individual investors can be considered as a 'safety net' in the system. Their experience with enforcement actions, limited resources and reputation towards the public will ensure that only meritorious claims are pursued. As experience has proven, they will reflect seriously before engaging resources in such litigation. This can be notably demonstrated by the high proportion of successful claims that consumer and retail investor organisations win when taking providers to court.

It has to be ensured that conditions for eligibility to bring representative actions are not used to the detriment of consumers, savers and individual investors organisations.

In some cases, the financial resources of these organisations are very limited as they are independent, thus not funded by the industry, and often they do not receive public funding either. In this context, it is very important for those organisations to be designated in the law as qualified entities able to bring both injunctions and collective redress actions. Otherwise, the 2013 *Recommendation* criterion in Article 4c) concerning organisations' "sufficient capacity in terms of financial resources, human resources, and legal expertise to represent multiple claimants acting in their best interest" would make it easy for traders to challenge these organisations in the court, prolong the proceedings and use this criterion against the interests of consumers.

### **FSUG pleads for an EU binding legislative act that would ensure a coherent collective redress mechanism modelled on best practices in Europe and a relevant extension of the ID scope:**

- In case financial users/insured suffer losses/damage caused by the same financial services provider (e.g. because of conflicts of interests in the distribution chain), then they should be able to join their claims together into one single action in all Member States. Such a collective redress system could be part of Markets in Financial Instruments Directive (MIFID) rules.
- In cases where individual investors suffer damages by the same issuers (e.g. if there is misleading information by the company), they should be able to join their claims together into one single action in all Member States. Such a collective redress system could be part of the Market Abuse Directive (MAD).

We are happy to provide more detail if required. We look forward to hearing from you.

Yours sincerely,



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