



A new deal for consumers – proposal for a directive on representative actions

The Financial Services User Group (FSUG) that advises the European Commission (EC) in the preparation of legislation or policy initiatives affecting the users of financial services and practical implementation of such policies welcomes and supports the EC's proposal setting a minimum EU-wide framework for collective redress mechanisms across Member States.

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. Consequently, FSUG has advocated for introducing procedure efficiencies and redress opportunities in widespread misbehaviours and mass harm situations in the field of financial services¹ and now would like to congratulate the Commission on having included in the scope of this new tool a wide range of financial services.

However, having in mind the recent FSUG position on the "New deal for consumers" and review of the Injunctions Directive² as well as its open letter to the European Commission³ we regret that this proposal lacks ambition and we would like to draw co-legislators' attention to the following issues that we consider indispensable for making the new tool truly beneficial for financial services users.

1. The scope excludes protection for EU citizens investing directly in capital markets

There is a general consensus that 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. As it stands now the proposed framework for collective redress mechanisms covers many financial services users, such as savers, retail investors, life insurance policy holders, pension fund participants, but excludes the protection for small and individual shareholders. In other words, on the one hand it offers protection to consumers who invest their money in capital markets indirectly (in intermediated, "packaged" investment products), but on the other hand it excludes such protection for EU citizens investing directly in the economy (i.e. individual shareholders)⁴. An EU collective redress system covering also individual shareholders is a must 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

¹ Please see the FSUG position from 2011 https://ec.europa.eu/info/sites/info/files/file_import/collective_redress-2011_04_29_en_0.pdf;

² Please see the FSUG feedback from 2017 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969/feedback/F7854_en

³ Please see the FSUG letter from 2018 https://ec.europa.eu/info/sites/info/files/fsug-opinions-180302-injunctions-directive_en.pdf

⁴ Please note that the FSUG has asked the European Commission for clarification of the scope of the proposal, i.e. to clarify if the "New Deal for Consumers" protects also the collective interests of individual investors against an issuer providing misleading information (e.g. violating MAD/MAR provisions) and enables them to join their claims in order to collectively claim redress from the issuer, but we have not received the answer until the date of publication of this feedback.

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 goals of its flagship project the Capital Markets Union.

Therefore, FSUG pleads for extending the protection to small and individual shareholders. 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. To this end Annex 1 to the Directive should include both Market Abuse Directive (MAD) and Market Abuse Regulation (MAR).

2. The new directive requires claimants to obtain a final injunction

The FSUG would like to draw co-legislators' attention to articles 5(2) and 10 of the proposal which state that the procedure requires claimants to first obtain a final injunction order from a court before the judge decides whether to allow for some form of collective compensation. This requirement may not only severely prolong the procedure but also increase its cost to the detriment of consumers, thus restricting the new tool's accessibility.

3. The Commission left redress measures at the discretion of Member States

The FSUG regrets that the proposal lacks ambition as regards the effectiveness of the redress tool. We have been 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 have also supported the opt-out procedure⁵. 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.

4. The need to clarify and ensure a minimum level of harmonisation

⁵ 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); 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".

The new Directive should allow EU countries to have higher standards and maintain or introduce other national procedures. In this sense it needs to be clarified, in the proposal, what is meant by the indication, in recital 24, that the existing or new national procedures need to be 'compatible' with the new Directive. It is crucial that this directive has a minimum harmonization character and thus will not preclude better national rules or force Member States to amend to the disadvantage of consumers their existing collective redress systems.

The FSUG hopes that the co-legislators will take into consideration its opinion and adopt a new legislative proposal that will be truly beneficial for all financial services users and will not discriminate small and individual shareholders.