

Key messages on representative actions

Insurance Europe cautions against the adoption of the EC's proposal on representative actions under the New Deal for Consumers. The main reason for this is that it fails to follow the EC's own 2013 Recommendations¹, which would have been a good starting point for effective safeguards. Important safeguards such as requiring opt-in and that the loser pays would have tempered the proposal. In the absence of the inclusion of many of the 2013 Recommendations, the proposal is imbalanced between claimants and defendants, fails to properly safeguard claimants' interest to receive effective redress, risks serious chaos in litigation by encouraging forum shopping and introduces the real risk of blackmail settlements and vexatious or frivolous claims being brought. The proposal is not appropriate.

The legal bases for the EC's proposal are doubtful and the proposal fails to meet the principle of subsidiarity. Insurance Europe is not persuaded that Articles 169 and 114, of the TFEU are valid bases for the proposal. Differences in national enforcement systems are not an impediment to the completion of the internal market. There is therefore no need for EU harmonisation of national procedural law on collective redress.

Insurance Europe is not persuaded of the need for the proposal. Several member states have adopted, or are in the process of adopting, collective mechanisms into national law. These mechanisms should be permitted to operate for a reasonable period before assessing whether they afford adequate protection and benefits for consumers. The evidence for the alleged need for action at EU level set out in the EC's Impact Assessment is very weak. It consists, in the main, of opinions submitted as part of the EC's consultation process, and lacks objective and verifiable data supporting the benefits to the EU of introducing the proposal. Care must be taken not to disturb well-functioning, existing, national systems.

A second strand to this argument is that, if given sufficient time, the CPC Regulation ((EU) 2017/2394) may prove to be an effective tool to ensure efficient and effective redress for consumers. It permits competent authorities to take various measures to prevent serious harm to the collective interests of consumers and permits those authorities to resolve alleged instances of harm by also seeking "remedial commitments for the benefit of consumers" from the offending trader or to ensure the offending trader offers "adequate remedies to the consumers that have been affected" by an infringement (Article 9.4). The CPC is without prejudice to national collective redress systems (Recital 46), meaning that consumers in most member states will have two tiers of protection and in member states that do not yet have collective mechanisms, consumers will be protected by the CPC Regulation.

The scope of the proposal is unclear. In annex to the proposal, the EC sets out the legislative measures covered by it. The annex, however, includes measures that do not offer individual rights to consumers (eg, the Solvency II Directive), as well as measures in which it is unclear how the proposal would apply (eg, the ADR Directive). Stricter discipline should have been applied to the scope of the proposal, as seen in the annex to the CPC Regulation. Furthermore, the definition of the scope is extensive and includes personal injuries. The settlement of claims for personal injuries relate to individualised approaches, which are not compatible with a collective evaluation. The inclusion of a specific and little-harmonised sector, such as health, in the scope of a directive that relates to representative actions for the protection of consumers' interests is questionable.

The consumer's fundamental right of disposition is not protected. The proposal allows court procedures to be commenced on behalf of consumers without requiring opt-in and without enabling opt-out. Therefore, the consumer has no choice whether to be affected by this civil procedure or not. This infringes both the fundamental right to be heard and the fundamental right of disposition (right to choose to be affected by the proceedings). This is despite the European Parliament's clear commitment to opt-in systems and respect for the different European legal traditions.

¹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under Union Law