

## EXPLANATORY MEMORANDUM ON A EUROPEAN DOCUMENT

7877/18  
COM(2018) 184 final

7876/18 ADDs 1-4  
SWD(2018) 98 final

**Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of collective interests of consumers, and repealing Directive 2009/22/EC**

**ADDs 1-4: Commission Staff Working Document Impact Assessment Accompanying the document Proposals for Directives of the European Parliament and of the Council (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC**

Submitted by the Department for Business, Energy and Industrial Strategy on <sup>14<sup>th</sup></sup> ~~12~~ May 2018.

### SUBJECT MATTER

1. This Explanatory Memoranda (EM) reports on the European Commission's 'New Deal for Consumers' package of legislative proposals, which was published on 11 April 2018. The New Deal comprises two overarching 'strands' of action. The first, which concerns amendments to the four main horizontal EU consumer Directives, is the subject of a separate EM which was also published by this Department today.
2. This EM focuses on the second 'strand' of action: the proposal on representative actions for the protection of consumers' collective interests. This legislative proposal stems from the EU Commission's January 2018 report on its Recommendation on Collective Redress as well as the 2015-2017 Regulatory Fitness ("REFIT") review of EU consumer and marketing law. This review found that whilst EU consumer law is fit for purpose overall, more should be done to ensure that consumers are fully aware of their rights and to ensure the rules are enforced effectively across the EU.
3. The Commission considers that a strong and efficient enforcement system is necessary to ensure that EU citizens are able to access adequate redress when things go wrong. Furthermore, evidence collected through the REFIT evaluation demonstrated that the risk of EU consumer law infringements affecting consumers on a large scale is increasing as a result of economic globalisation and digitalisation. For example, a trader which infringes EU law could affect thousands of consumers at the same time across a range of economic sectors.

The advent of cross-border trade also means that such infringements are likely to affect consumers residing in more than one Member State.<sup>1</sup>

4. Currently, the EU Injunctions Directive enables qualified entities designated by Member States (for example, consumer organisations or independent public bodies) to take forward representative actions for the protection of consumers' collective interests. Annex I of this instrument lists the domestic and cross-border infringements which it aims to tackle.
5. However, whilst the REFIT review confirmed the importance of this Directive, it also concluded that it contains a number of shortcomings which must be addressed to ensure it is fully effective in the best interests of consumers. Its main shortcomings were found to be its scope, the limited effects of injunctions decisions on redress for consumers and the cost and length of the procedures brought about through it.<sup>2</sup>
6. The European Parliament has also been calling for an EU-wide instrument to improve collective redress since 2012, when it published a "Resolution Towards a Coherent European Approach to Collective Redress". This called for a horizontal approach at EU level to collective redress, based on a common set of principles respectful of different Member States' legal systems and including safeguards to avoid abusive litigation.
7. In its Impact Assessment, the Commission highlights fragmentation across the EU in relation to consumer mass harm. In Spain, for example, a consumer organisation brought forward a collective action in 2013 where the court ruled that 20 of the general terms and conditions used by the Irish airline Ryanair were unfair. However, the REFIT review found in 2017 that Ryanair had still not removed the unfair clause related to the law applicable to conflicts with consumers in Spain. Meanwhile in Ireland, around 160,000 consumers were mis-sold a credit card protection policy, resulting in EUR 15-30m worth of consumer detriment. However, there is currently no collective redress system in Ireland enabling consumers to seek financial compensation for damages.
8. The Commission is taking action through the New Deal to address the limitations of the Injunctions Directive and improve the enforcement landscape for European consumers. It is proposing a new Directive which would repeal the Injunctions Directive. The new Directive would have an increased scope, covering both horizontal and sector-specific EU instruments which relate to the protection of consumers' collective interests across different economic sectors including financial services, energy, the environment and telecommunications.
9. The new Directive would give 'qualified entities' (to be defined in the Directive and designated by Member States) the authority to bring forward representative actions on behalf of consumers, seeking different types of measures as appropriate, depending on the case in question. The measures could include interim measures (to stop or prohibit a trader's action) or measures to eliminate the continuing effects of the infringements.

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<sup>1</sup> 7877/18, Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of collective interests of consumers, and repealing Directive 2009/22/EC, p.11

<sup>2</sup> 7877/18, Proposal for a Directive of the European Parliament and of the Council on representative actions, p.3

10. The definition of 'qualified entities' will be agreed between Member States and the EU institutions and set out in the Directive. However, the current drafting of the proposal says that the entities should, as a minimum, be not-for-profit and should have a legitimate interest in protecting consumers' collective interests. The Commission has made clear that its intention is to avoid the potential for abusive litigation under the instrument.
11. The Commission envisage that qualified entities will be able to bring actions which seek a redress order, obligating the trader to provide the consumer with compensation, a repair, replacement, price reduction, contract termination or a reimbursement of the price they have paid, as appropriate.
12. As currently drafted, however, the proposal will also give Member States flexibility to decide whether, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed should be issued, which could be relied upon in future redress actions. This would be intended for cases whereby the consumer detriment is complex due to the specific characteristics of the individual harm.

### **SCRUTINY HISTORY**

13. The Department for Business, Energy and Industrial Strategy submitted EM 6043/18 on the implementation of the European Commission's 2013 Recommendation on Collective Redress on 26 February 2018.
14. The Department for Business, Energy and Industrial Strategy submitted EM 9660/17 on the European Commission's report on the evaluation of the Consumer Rights Directive on 30 June 2017.

### **MINISTERIAL RESPONSIBILITY**

15. The Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Corporate Responsibility has primary responsibility for consumer protection. The Secretary of State for Justice will have an interest in the potential impact of the new provisions on existing UK law and the UK legal system.
16. As the Commission anticipate that the new Directive would apply to Member States' existing rules for the protection of consumers' collective interests in cross-cutting sectors such as energy, telecommunications, and financial services, Secretaries of State for other Government Departments are likely to have an interest in the possible implications for the new rules across different economic sectors. We will continue to engage extensively across Government as the negotiations progress to understand the full impact of the proposal on Departmental portfolios.

### **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

17. Consumer protection is devolved to Northern Ireland but reserved for Scotland and Wales. As these documents contain legislative proposals, the Devolved Administrations have been sent a draft copy of this EM.

## **LEGAL AND PROCEDURAL ISSUES**

18. Consumer protection is a shared competence between the EU and Member States. The legislative proposals reported on here are based on Article 114 of the Treaty on the Functioning of the European Union (completion of the internal market) and the Explanatory Memorandum also makes reference to Article 169 (ensuring a high level of consumer protection).
19. The Government does not consider that the Justice and Home Affairs (JHA) opt-in is triggered by this proposal. The proposal does not cite as a legal base Title V of Part 3 of the Treaty on the Functioning of the European Union, which is the JHA chapter of that Treaty and the [Government] also concludes that its subject matter does not fall within the JHA opt-in. The Government has, in particular, considered articles 10 and 11 of the proposal with reference to Article 81 under Title V. Article 10(2) of the proposal requires that where an administrative authority or court in another Member State reach a final decision that there has been an infringement harming the collective interests of consumers that decision should be taken by the UK courts and relevant administrative authorities as a rebuttable presumption that an infringement has occurred. The Government has concluded that that requirement is fundamentally one relating to evidence of an infringement (which leaves the UK courts or authorities able to reach a different conclusion and rebut the presumption), as opposed to a requirement of mutual recognition in the context of judicial cooperation to which Article 81 applies.

### **European Parliament Procedure**

20. The ordinary legislative procedure applies.

### **Voting procedure**

21. Qualified Majority Voting

### **Impact on United Kingdom Law**

22. This proposal would repeal the existing Injunctions Directive (2009/22/EC), and is likely to require amendments to Part 8 of the Enterprise Act 2002 which sets out the current UK law on enforcement of actions which harm the collective interests of consumers.

### **Application to Gibraltar**

23. This proposal for legislation would be applicable in Gibraltar.

### **Fundamental rights analysis**

The proposal is expressed to be in accordance with the following Articles of the Charter of Fundamental Rights:

- a. Article 38 (ensuring a high level of consumer protection) and Article 47 (right to an effective remedy before a tribunal). The Commission considers that the proposal contributes to the safeguarding and enforcement of consumer interests

and that it may, in particular, obviate those situations where individual consumers may be deterred from seeking redress in court for instance because of high litigation costs. The Commission also considers that the proposal does not hamper claims by individual consumers: for instance, the proposal provides that the limitation period for individual claims are suspended to allow the conclusion of the relevant representative action.

- b. Article 16 (freedom to conduct a business). The Commission considers that the proposal strikes a balance between the interests of consumers and the rights of traders. The Government agrees with that conclusion, given that, in its view, the proposal maintains appropriate procedural safeguards and judicial oversight so that the trader will be able to defend any action, and/or settle the case on fair terms, and ensures appropriate regulation and transparency in the designation and conduct of the qualifying bodies able to bring the representative actions.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

24. The legislative proposal would be applicable to the European Economic Area (EEA).

## **SUBSIDIARITY**

25. The Government agrees with the EU's assessment that robust consumer protection rules remain relevant as the number of online and offline consumer transactions increases between Member States.
26. The Government also agrees that economic globalisation and digitalisation increases the risk of infringements of consumer law affecting the collective interests of consumers. Furthermore, as cross-border trade increases, we agree that it is likely that such infringements will increasingly also affect consumers in more than one EU state. We will work closely with relevant Government Departments, in particular with the Ministry of Justice, to ensure that any new rules introduced at EU level are proportionate to tackle consumer detriment of this nature and that the rules provide legal certainty.
27. The Government notes that aspects of the proposal give discretion to Member States such as the ability, in certain cases, to enable courts to make declaratory decisions or to allow qualified entities and traders who have reached a settlement regarding redress to request a court or authority to approve it.

## **POLICY IMPLICATIONS**

28. The Government worked closely with the EU on its REFIT review of EU and consumer marketing law and its parallel review of the CRD. We support EU efforts to ensure that consumers' rights are robust and that they can be enforced effectively.
29. Until EU exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.

30. The EU's New Deal legislative package addresses many of the same themes which the UK is currently consulting on in our 'Consumer Green Paper: Modernising Consumer Markets', which was also published on 11 April. For example, our consultation considers whether digital markets work in the best interests of consumers, and whether consumers are able to easily seek redress when things go wrong.

31. We will, however, continue to engage closely with business and consumer organisations as well as other interested Government Departments to ensure that new EU rules in this area are proportionate for traders, citizens and for the UK legal system.

## **CONSULTATION**

32. Alongside its ongoing consultation with stakeholders on the Consumer Green Paper, the Government will continue to work closely with business and consumer organisations as negotiations on the New Deal for Consumers progress. We welcome their views to ensure that any new rules agreed as part of the package are proportionate for business and citizens alike.

## **IMPACT ASSESSMENT**

33. The commission has published a full impact assessment (IA) on the proposal. The IA sets out the rationale for action in this area, including why action at EU level is necessary, what the regulation is expected to achieve, and which legislative and non-legislative options have been considered. The IA also analysis the costs and benefits of the preferred policy options and how businesses, including SMEs, and consumers will be affected.

34. Further work will be done as the negotiations on the New Deal progress to understand the potential impacts of the proposal on Government, business and consumers.

## **FINANCIAL IMPLICATIONS**

35. The Commission anticipates that EU-level interventions on collective redress will generate costs for those Member States which need to reform their national rules. However, it considers that subsequent increased compliance with EU consumer rules will generate savings as a result of the reduced costs of administrative and judicial procedures. Collective redress mechanisms will also rationalise judicial proceedings in mass harm situations.

36. The Commission considers, however, that there will be no significant costs for traders who are compliant with EU consumer rules as a result of the introduction of new rules on collective redress. On the other hand, non-compliant traders are likely to face additional costs as a result of the new measure, as EU citizens will have better mechanisms to secure redress in collective proceedings.

37. Further work will be done as the discussions progress to understand and reflect the potential costs and benefits to the UK Government, business and consumers.

## **TIMETABLE**

38. EU Commission President Juncker included the New Deal for Consumers in his 2017 State of the Union address, and it is part of the Commission's Work Programme for 2018. The Commission has prioritised making swift progress on the New Deal measures as it approaches the final 12 months of its tenure. However, it is currently too early to say how quickly negotiations will progress across the whole package of legislative measures. The majority of Member States do not yet have agreed positions on the proposals and, like the UK, are holding a scrutiny reserve.
39. The first negotiations in the Council of the EU took place on 24 and 25 April 2018, where the Commission presented their findings and the new proposals and sought initial views from Member States on the whole package of measures.
40. A provisional schedule of Working Group negotiations in the EU Council of Member States has been published between May and the end of June as the current Bulgarian Presidency are prioritising negotiations across the Package under its tenure.
41. It is also possible that the New Deal for Consumers will be tabled as an item for discussion at the next EU Competitiveness Council in Brussels on 28 May. Although we do not yet know what the topic of discussion will be, it is likely that it will be a 'for information' item, and not seeking Ministerial clearance to any aspect of the package at this stage.

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