

Our position

Collective redress in the EU

Towards a mechanism that avoids the pitfalls of the US class action system



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) supports the European Commission's efforts to facilitate access to justice and guarantee a high level of consumer protection.

However, the Commission's latest proposal to create an EU-wide collective redress mechanism could recreate the litigation extremes that we see in the United States. In those cases, the financial stakes in class actions are abusively high and collective claims come easy, resulting in excessive, ill-founded and frivolous lawsuits. Such lawsuits primarily benefit the plaintiff law firms rather than the individuals whose interest they purport to represent. Limits on lawyers' fees and on the earnings of third-party funders are essential to prevent the abuses seen in the US system.

AmCham EU therefore believes that as it stands, the proposal for a Directive on representative actions for the protection of the collective interests of consumers will fail to meet its objective of protecting consumer rights and will prove to be detrimental to both consumers and businesses. The issue is not if reparation should be provided, but how it can be provided more effectively by building on the achievements of existing and proven EU work in this area.

AmCham EU would like to bring European policy-makers' attention to four important issues regarding this proposal:

1. Providing sufficient safeguards against abuses;
2. Ensuring a balance of rights and burdens between claimants and defendants;
3. Further encouraging out-of-court settlements before legal action is taken; and
4. Favours existing solutions at Member State levels.

Our position

1. Better safeguards against abuses

The proposal facilitates EU-wide class actions based on a design extrapolated from the Injunctions Directive, but with minimal safeguards, almost completely ignoring the Commission's own 2013 recommendations on safeguards. Below we have listed just a few of the missing safeguards:

- **The loser pays principle.** The preservation of the loser pays principle is important to discourage speculative litigation by holding litigation funders liable for cost recovery.
- **Detailed criteria for recognition of Qualified Entities (QE).** Guarantees that claims are truly driven by QEs representing affected consumers as opposed to profit-seeking law firms are essential to ensure appropriate compensation. QEs should be pre-existing, reputable actors, not ad-hoc vehicles for self-interested law firms and/or litigation funders.
- **Opt-in or Opt-out principles.** Provisions requiring 'opt-in' over 'opt-out' collective actions, demanding that individual claimants elect to participate, are needed to prevent collective actions pursued on behalf of a class of unnamed and unidentified claimants. The current text favours an opt-out system, and in some cases, even disallows individuals from doing so. This would make it possible for multiple claims to be introduced on behalf of the same claimants, creating further confusion. In accordance with the general principle of party autonomy, legislators should ensure consumers have the choice not to be affected by an action. They could also consider the possibility of a claims register through which consumers could clearly indicate their interest in joining an action.

- **Limitations on the provision of third-party litigation funding and on lawyers' contingency fees.** Consumers' compensation must not be diminished or wiped out by legal fees. Strengthened transparency requirements for funders and third-party funding, as well as restrictions on contingency fees (or other kinds of 'success fees') for litigation lawyers, are crucial.
- **Ban on punitive damages.** Punitive damages or 'exemplary damages' that differ from actual damages are broadly agreed to be incompatible with the principles of most European legal systems and can jeopardise a sound business environment. The proposal should provide assurances that any damages or remediation shall be fully shared with – and for the benefit of – the claimants.
- **Clear certification requirements for suitability.** There should be clear criteria to ensure the suitability of bringing a case as a representative action, as well as the actual link between the plaintive party and the alleged harm. For example, threshold certification requirements should be defined. Even the US system, despite its excesses, has certification requirements and these act as a vital protection against inappropriate and overreaching actions.
- **Prevention of overlapping claims by multiple parties on behalf of the same consumers.** This will result in unnecessary complexity, confusion and undermine the coherence of the collective actions regime.
- **Measures against forum shopping,** especially with respect to favourable document production regimes. This will incentivise QEs to shop for the 'best-suited' national regime. This is especially important as the proposal lacks rules on jurisdiction.

Further, it will be up to the Member States to adopt appropriate safeguards, with a high risk that Member States will adopt them inconsistently. As a consequence, this will lead to a 'race to the bottom' in terms of safeguards and inevitably lead to forum shopping between Member States.

Given the proposal's wide-reaching implications, sufficient safeguards are crucial. Any regulatory framework must maintain, strengthen and reinforce protection against abuses. As American companies with first-hand experience of the damaging effects of frivolous litigation, we call for the inclusion, at a minimum, of the key safeguards above to ensure that consumer rules and collective redress benefit both businesses and consumers.

2. An imbalance between the defendant and claimants

The Commission's proposal gives defendants no information on the composition of the claimant party and about any changes therein. Meanwhile, it gives claimants a much higher degree of confidentiality and access to information. The proposal states that any evidence pertinent to the representative action that 'lies in the control of the defendant' must be unveiled (Article 13). However, in the proposal, this principle is not applicable the other way around. This establishes an evident breach of the general procedural principle of equality of arms.

Even in the US class action system, where defendants produce disproportionate amounts of discovery, they are at least explicitly guaranteed some reciprocity. Therefore, further clarifications are necessary to define what evidence is considered 'pertinent to the representative action,' and to guarantee a greater degree of reciprocity for the claimants.

The proposal also contains favourable financial conditions for QEs to bring forward claims, namely by omitting the loser pays principle. This principle is an essential element in preventing the emergence of a speculative 'have a go' litigation culture, which has been shown in other jurisdictions to promote frivolous litigation. The lack of such a principle in the proposal will remove the incentive for law firms and third-party litigation funders to seriously consider the merits of a case before bringing a lawsuit.

3. Endorsing out-of-court settlements

AmCham EU's member companies generally favour extrajudicial agreements or settlements in hopes of retaining loyal customers. This is a less costly and less time-consuming procedure. The Commission's focus on a collective litigation model is regrettable.

Compared to other redress mechanisms available in the toolbox, class litigation is old technology. It is complex, costly, and lengthy. It is open to abuse, and won't have any real impact on market behaviour. Experience and research show that alternative dispute resolution mechanisms, in the form of ombudsmen or similar bodies and regulatory redress, whether in combination or separately, are more effective than court cases. Court cases inevitably carry with them important reputational, time and resource implications for any involved company.

In contrast, the number of unresolved consumer disputes is extremely limited in AmCham EU's membership. In our experience, when the trader is easy to reach and has a clear process for dealing with complaints, consumers can achieve a satisfactory outcome via extrajudicial agreements. Amicable settlements also allow satisfactory redress even in cases where under national law the consumer does not strictly have a right to a direct remedy.

The proposal provides no incentives for traders to agree on collective settlements of cases since even a court's approval of a settlement will not provide finality to the trader and consumers. Defendants who reach a collective settlement would remain at risk of facing further claims pertaining to the same alleged infringement, particularly given the risk of overlapping claims laid out in Section 4.

Therefore, the Commission's proposal should clearly indicate that out-of-court settlements aimed at providing redress to harmed consumers should be the preferred solution before legal action is initiated.

Data from the US class action system shows that collective actions usually have limited merits for the claimants as they are costly, complex and lengthy. Those damaged don't receive full compensation, as much of it ends up in enriching intermediaries like the lawyers and/or third-party funders. This is of particular concern for 'small individual loss' cases, where damages will be diverted to a public purpose rather than those individuals who were harmed. Such cases are likely to be a significant target of vexatious litigation since plaintiff law firms and litigation funders will be the primary beneficiaries.

AmCham EU also believes that a provision allowing arbitration clauses in contracts, under certain conditions, would bring more balance in the proposal.

4. Focus on existing national solutions

The proposal would oblige Member States to adopt court based collective litigation mechanisms in addition to their own redress systems. Several Member States, in particular the Nordic countries, already have effective redress systems based on a regulatory approach and ombudsmen. Others, including Austria and Germany, have developed efficient injunction systems. This leads to duplication and increases complexity and confusion. The coherence of national civil justice systems is jeopardised.

Furthermore, multiple claims from multiple QEs will make it difficult to reach out-of-court settlements which are often much more cost-effective than the use of the national court system (see the previous section). Judges will struggle to spot parallel and overlapping claims across several jurisdictions given that a mandate from consumers is not necessary to initiate the claim nor there is a requirement for the QE to indicate who it represents.

AmCham EU encourages European policy-makers to draw inspiration from existing national Alternative Dispute Resolution (ADR) systems which have proved to be successful over the years, including giving more regulatory redress power to public authorities, as in Scandinavia.

Conclusion

The Commission's approach to EU collective redress has always been to avoid the mass claim litigation culture associated with the US system. As it currently stands, the Commission's proposal would not avoid those pitfalls and would serve only to enrich law firms and the associated third-party funders.

EU citizens already benefit from a solid legal system with efficient solutions for redress at Member State level. Therefore, we urge the European Parliament and the Member States to take into account the views expressed in this position paper to ensure a balanced legislative outcome to the benefit of both consumers and businesses. Strong legal safeguards against the development of an abusive litigation culture and ensuring a balance between claimants and defendants will be crucial going forward.