

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE IV FLANKING AND HORIZONTAL POLICIES

EEA EFTA Comment on the proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

1. EXECUTIVE SUMMARY

- *This Comment is aimed at the upcoming interinstitutional negotiations (trilogues).*
- *The EEA EFTA States - Iceland, Liechtenstein and Norway – welcome the Commission’s proposal for a directive on representative actions for the protection of the collective interests of consumers.*
- *The EEA EFTA States are in favour of a minimum harmonisation approach, which better facilitates the possibility of adjusting existing collective redress mechanisms to the directive’s requirements.*
- *To ease implementation at national level the EEA EFTA States urge the negotiating parties to strive toward a coherent end result.*
- *The EEA EFTA States generally support the approach in the Council General Approach adopted on 28 November 2019. However, with recourse to the principles of subsidiarity and proportionality, they would welcome further adjustments, in particular that it should be left to the Member States to:*
 - *decide the extent to which consumers may bear the cost of proceedings under representative actions,*
 - *decide whether a requirement of approval of settlements on redress should be implemented,*
 - *decide on a case-by-case basis who should be responsible for informing consumers about representative actions, and who should bear the costs for this,*
 - *prioritise between groups, including qualified entities, that will receive financial assistance,*
 - *decide on the procedural steps that lead to suspension of limitation periods.*

2. INTRODUCTION

1. The European Parliament (EP) adopted its position on the proposed Directive on 26 March 2019, reconfirmed by the new EP. The Council adopted a General Approach on 28 November 2019. This Comment is aimed at the upcoming interinstitutional negotiations (trilogues), expected to start under the Croatian Council Presidency.
2. The EEA EFTA States urge the negotiating parties to strive toward a well-drafted and coherent end result. A coherent text greatly eases implementation at national level and enables Member States to adjust existing representative action mechanisms more easily.
3. This EEA EFTA Comment is without prejudice to the EEA EFTA States' assessment of the directive's EEA relevance.

3. COMMENTS ON SPECIFIC AMENDMENTS ADOPTED BY THE EUROPEAN PARLIAMENT AND THE COUNCIL

Qualified entities

4. The EEA EFTA States support the Council position regarding the need for differentiating more clearly between domestic and cross-border representative actions. Granting Member States more flexibility in forming the requirements for “qualified entities” in domestic representative actions, would seem in better conformity with the principle of subsidiarity.
5. However, the EEA EFTA States call for a clarification of whether the proposed directive would require a system of pre-approval of qualified entities for the purpose of domestic representative actions, or whether a system where courts or administrative authorities approve qualified entities on an ad hoc basis based on criteria established by law, would be sufficient.

Representative actions

6. The EEA EFTA States are uncertain about the rationale behind the provision introduced by the Council, requiring that consumers may bear costs of proceedings only in exceptional circumstances. As far as opt-in mechanisms are concerned, it would not seem unreasonable that consumers sometimes could be held responsible for parts of the costs of proceedings. Indeed, such a possibility would represent an important mechanism to avoid abusive litigation, in line with the proposed directive's purpose. Therefore, the EEA EFTA States propose that it should be up to the Member States to decide the extent to which consumers may bear the costs of the proceedings. Alternatively, the directive could be amended to require a mechanism where the court or administrative authority could determine in advance the maximum amount for which a consumer may be held responsible.

7. Also, the EEA EFTA States are concerned about the proposed requirement that individual consumers, who are not habitually resident in the Member State of the court or administrative authority before which the representative action has been brought, would have to express their willingness to be represented in that action in order to be bound by the outcome of the decision. Such a requirement would render existing opt-out mechanisms that do not differentiate between class action members with habitual residency within or outside the Member State, in breach of the directive. Thus, this requirement would seem difficult to reconcile with the directive's aim not to prevent Member States from maintaining existing procedural means in force for the protection of the collective interests of consumers.

Settlements on redress

8. The EEA EFTA States support the European Parliament's and the Council's amendments to leave it up to the Member States to decide whether to implement rules allowing consumers to accept or refuse to be bound by a settlement on redress between traders and qualified entities.
9. However, the EEA EFTA States question the necessity of the Council's amendment to require the court or administrative authority to approve all settlements on redress between traders and qualified entities. This requirement seems excessive, especially as far as opt-in mechanisms are concerned – where consumers can choose to withdraw from the action before a settlement is reached. The EEA EFTA States suggest that it be left to the Member States to decide whether such a requirement should be implemented. Alternatively, the directive could allow Member States to choose an alternative mechanism, where consumers instead would be granted the possibility of disputing the legality of a settlement before the court or administrative authority.

Information on representative actions

10. The EEA EFTA States also question the merit of the proposed rules requiring the trader to inform consumers about a decision providing for injunction and redress measures, or alternatively to cover the expenses whenever qualified entities inform consumers about such final decisions. Which party is best situated to inform consumers, and who should reasonably bear the costs of this, will likely vary from case to case. The EEA EFTA States therefore recommend amending the proposed directive in order to allow the court or administrative authority to decide on a case-by-case basis who should be responsible for informing the consumers, and who should bear the costs.

Redress measures

11. The EEA EFTA States support the European Parliament's and the Council's amendments to remove the provision allowing redress to be directed to a public purpose serving the collective interests of consumers. Such a mechanism would give consumer organisations an incentive to litigate, which in turn would be contrary to the aim of avoiding abusive litigation.

Effects of final decisions

12. The EEA EFTA States also support the European Parliament's and the Council's amendments to the proposed rules on the effects of final decisions. Requiring Member States to treat prior final decisions that have established an infringement, as evidence of the existence of said infringement – rather than as irrefutable evidence or a rebuttable presumption – would be more in line with the proposed directive's aim of not affecting the rules on private international law on recognition and enforcements of judgments, and would better respect the principle of procedural autonomy.

Assistance for qualified entities

13. The EEA EFTA States welcome amendments that relax the requirements on the Member States' assistance for qualified entities. The EEA EFTA States would like to note that although securing proper access to courts continues to be paramount, expanding existing arrangements of legal aid entails a difficult balancing act between the interests of different groups, all in dire need of legal aid. How a Member State chooses to prioritise between these groups should therefore be up to each national government to decide. In line with this, the EEA EFTA States recommend a moderate approach, which would ensure that the directive would not impose too strict a demand on the Member States.

Suspension of limitation periods

14. Finally, the EEA EFTA States question the need for a provision requiring pending representative actions for an injunction measure to have the effect of suspending or interrupting applicable limitation periods for redress measures. Given that actions for an injunction measure do not prevent consumers or qualified entities from bringing forward a parallel action for redress measures, it would seem unnecessary for actions for an injunction measure to have this effect. Moreover, such a rule could raise difficult legal questions concerning its scope, which in turn could become a cause for dispute between traders and consumers.