ETNO and GSMA joint position paper on the proposal for a Directive on Representative Actions for the Protection of the Collective Interests of the Consumers

COM(2018)184 final

I. Executive Summary

ETNO and the GSMA welcome the objective to improve law enforcement and strengthening consumer protection across the EU, irrespective of the location of size of an undertaking. This also requires Member States to provide sufficient resources, which is unfortunately not addressed in this proposal. Rules should be fully harmonised, providing Member States some flexibility to specify EU level provisions. As general remark, we believe that the new rules should take into account sector specific law to make sure they are aligned and do not create too much burden on actors that are already strictly regulated.

- The **definition of qualified entities** as well as their rights and obligation need to be further specified to avoid any risk that collective actions through such entities becomes a commercial business model.
- As a key proposal in this Directive, we believe that **collective action** should be based on harm identified by consumers and consumers' mandate should therefore be required. Such action must also ensure legal certainty for undertakings and ensure the *"ne bis in idem"* principle.
- Any **redress mechanism** should be based on an individual court decision in principle. Giving flexibility to Member States to introduce mechanisms such as automatic compensation would thus be misleading and create legal uncertainty.
- Concerning **funding**, we fully agree that qualified entities have to ensure and demonstrate sufficient own resources. It has to be specified that funding through third parties, who have commercial interests, have to be prohibited.
- **Settlements** need to remain voluntary and agreements need to ensure legal certainty, not becoming binding blue prints for other cases.
- **Information on representative action** should be provided through those communication channels normally used by undertakings. Providing individual information is extremely burdensome and in many cases not possible.
- New obligations for undertakings to share information to **provide evidence** need to respect business secrecy and not be excessive.
- **Suspension of limitation periods** for any consumer not being party in a specific case is unreasonable, adds little value and creates high legal uncertainty for undertakings.
- **Assisting measures** such as refunding of any case-related costs are misleading and over-load courts with unreasonable complaints. Instead qualified entities should be supported sufficiently by public funds in general.
- **Considering cross-border infringements** has to be limited, taking into account that there is no fully harmonised consumer law across Member States.

II. General comments

ETNO and the GSMA **welcome the objective of ensuring better law enforcement**, irrespective of the size or the location of an undertaking. Collective actions and private law enforcement contribute to better enforcement, when established in an **effective and proportionate way**.

However, this does not replace the primary duty of Member States to **provide sufficient resources for public enforcement** and for **public authorities to adequately apply existing instruments before new ones are added**.

Unfortunately neither this Directive nor the draft Directive on better enforcement and modernisation of EU consumer protection rules (COM(2018)185 final) contain an obligation for Member States to ensure **sufficient resources for better law enforcement**. This may include the strengthening of the recently introduced structures in the scope of the Consumer Protection Cooperation or providing sufficient resources to consumer protection agencies.

ETNO and the GSMA fully support **harmonisation of consumer law**, to ensure consistency across Member States, providing certainty to businesses and making it easier for consumers to know their rights. This f**ull harmonisation approach**, while **preventing** the creation of **conflicting or additional rules** at national level, should **leave some flexibility** to Member States **for detailing** Union law provisions within the framework laid down by the EU legislative act. Insofar, we fully agree with the draft's intention as described in e.g. recital 23.

We are concerned that the draft **proposal does not sufficiently take into account sector specific instruments** that are applicable in parallel. The draft's assumption that stricter instruments for specific sectors such as telecoms are required is misleading (Rec. 6 referring to Art. 1, Annex I). For the sake of consistency and proportionality, general consumer law should refrain from adding rules that particularly burden those already more strictly regulated undertakings, including telecoms.

III. Qualified entities (Art. 4)

The agents that should be considered as qualified entities to bring representative actions need to be **explicitly limited to independent public bodies consumer organisations and business associations**. Such a clarification should be added in the criteria for qualified entities in Art. 4(1). **Third parties with commercial interests**, such as law firms, would then be **per se excluded**, reducing the risk of introducing US-type class action law enforcement, which is sometimes based on pure commercial rather than consumer interests. In addition, the regular assessment of such qualified entities carried out by Member States should include monitoring of claims and regular reporting of qualified entities and the number of claims brought by such entities as a safeguard against frivolous actions.

IV. Representative actions (Art. 5)

Any collective action through qualified entities should address **harm identified by consumers**. This criterion is crucial to **ensure** that collective actions are **reasonable and address real problems**. It also reduces the risk that qualified entities bring more than one collective action in relation to the same issue – one based on consumers' complaints and the other one based on the qualified entities' own initiative. Therefore, qualified entities should be required to get **consumers' mandate in order to initiate collective actions**. Clearly, it is not sufficient if a qualified entity only needs to require an administrative authority's permission as proposed in Art. 5(2) and provide evidence based on Art. 13. The last sentence of Art. 5(2) needs to be adjusted accordingly. Article 5(4) should not be a right but an obligation to examine and the claim should have to meet a threshold – a balance of probabilities – if it is allowed to continue.

The provision in Art. 5(3) which enables qualified entities to file **cumulative actions** (tackling continuing effects of an infringement) should be removed as this is against the "ne bis in idem" principle and is not consistent with Art. 5(2).

A redress order based on Art. 5(2) should have effects of res judicata, stopping the continuing effects of identified infringements if necessary. Therefore, it should be clarified that the provisions of Art. 5 (3) does not foresee the interposition of later representative actions seeking to redress infringements already known by the Court under the measures of Art. 5 (2).

V. Redress measures (Art. 6)

As stated above, any collective actions should always **require consumers' mandate**. **Providing flexibility to Member States** in the scope of declaratory decisions as included in Art. 6(1) is **misleading**.

In principle, any **individual redress should be based on an individual court decision**, ensuring that individual circumstances are duly taken into account. Individual damages claims would always need to be brought in addition to the collective action.. Accordingly, the **process reflected in the declaratory decisions** in Art. 6(2) should **not be an exemption and up for Member States' decision, but the general rule**. Based on decisions triggered through collective actions, individual consumers can then seek for individual redress.

ETNO and the GSMA are **very concerned about significant legal uncertainty** for undertakings resulting from collective action through a court decision, which grants **redress rights to consumers who were not a party to that collective action** (Art. 6(3), a). Collective actions should **always be based on consumers' mandate** and **only those consumers who were a party** in the respective collective actions should benefit from resulting redress rights. Redress rights for any consumer after court decisions impose **inappropriate financial risks** on undertakings.

Granting additional rights for redress as foreseen in Art. 6(4), **on top** of the redress right resulting from collective action, is **highly inappropriate**. Undertakings must **not be obliged to pay compensation to the same consumer twice**. This needs to be **clarified in the text**.

VI. Funding (Art. 7)

We **fully agree** that only entities that can **ensure and demonstrate sufficient own resources**, including public financial support, should be qualified to file collective actions (Art. 7(1)).

Additionally, Art. 7(1) should **clarify** that qualified entities that use **third party litigation funders** for court cases, **are excluded**. This avoids collective action becoming a commercial business model, particularly if the third party litigation funder directly benefits from successful court cases.

VII. Settlements (Art. 8)

We take note of the new proposal on settlements, which **risks to conflict with other similar legal provisions** on dispute settlement such as included in the Alternative Dispute Resolution and sector-specific mechanisms in the European Electronic Communications Code. **Consistency needs to be ensured and overlaps have to be avoided**.

We agree that **settlements are an important step in dispute resolution**, as included in Art. 8(4). In any case, the decision whether an undertaking enters negotiations on a settlement concerning consumer law **should remain purely voluntary**.

Besides this, since there should be no situations where there is more than one collective action in relation to the same issue, there should be not more than one settlements in relation to the same issue.. Article 8(1) should be clarified accordingly.

Also, we are **concerned that a settlement reached with specific consumers in the scope of a collective action** may serve subsequently as **blueprint for any other redress claims** coming from consumers **who were not parties** in the collective actions (see comments on Art. 6). Undertakings need certainty that a settlement is **only binding with regard to those consumers involved in the collective action**. Otherwise, undertakings would need to anticipate financial risks related to further complaints when negotiating the settlement, which can become a disincentive to enter negotiations at all.

The right for consumers to **accept or refuse settlements** given in Art. 8(6) has to be **reciprocal**. Moreover, undertakings may decide to refuse the finally agreed settlement with a qualified entity, e.g. if many consumers refuse the agreement and intend to file individual redress claims.

Once settlements are agreed by consumers involved in the collective actions, this **settlement needs to be binding**. **Subsequent or additional redress claims by those same consumers should not be possible any more**. Otherwise, undertaking would face high legal uncertainty and legal risks, undermining the incentive to reach settlements. Therefore, Art. 8(6) should be adjusted.

VIII. Information on representative actions (Art. 9)

An obligation to inform each consumer individually in case of a representative action is **very burdensome and not proportionate**. Undertakings may even **no longer have details of affected consumers**, who may no longer be customers at the time of an action and indeed may be required by data protection law not to keep any details in relation to past customers. Undertakings should have the possibility to use **other channels they normally use in their general communication** (e.g. websites). Such information channels are **at least equally well suited to properly inform** interested consumers.

Alternatively, **public authorities or consumer agencies should be considered** to provide information publicly to consumers, taking into account that some consumers prefer getting such information from a source other than the undertaking at stake.

IX. Suspension of limitation period (Art. 11)

The suspension of limitation period **needs to be limited to those consumers who have filed a complaint before the court or who are parties in a representative action**. Extending a suspension to **any consumer** and for a long time after the infringement or even after a court decision would lead to a **significant legal and financial uncertainty for undertakings**, as any consumer potentially affected through the infringement at any time could claim for redress. This would be even more detrimental for undertakings in **conjunction with Art. 6(3)**, which allows consumers to benefit from court decisions on collective actions, even if the respective consumer was no part in this collective action.

X. Evidence (Art. 13)

We strongly **oppose broadening obligations to provide information** on request **by a court or an authority**. Already today defending industries have to provide information to courts, if found relevant for a decision. This practice **works well and should not be undermined**. Provided information often include trade secrecies and **must not be shared with other stakeholders**. In addition, broadening the obligation to share information would **encourage "fishing expeditions"** whereby actions are begun in the hope of flushing out documents and other evidence that would harm a defendant's case.

XI. Art. 15, Assistance for qualified entities

The proposal to remove threshold for filing complaints **should be rejected**. Instead, Member States should **ensure that consumer agencies are adequately financed by public resources**, irrespectively whether they file complaints before courts.

If a qualified entity does not face any (significant) costs when going to court, such an entity will be **tempted to even bring cases to court where the chance for success and potential benefit for consumers is very low**.

Additionally, **courts will be over-loaded** with such cases and undertakings will have to invest much **more resources in defending against unreasonable complaints**, including application of newly introduced collective actions. Consequently, defending undertakings would **generally face strong disadvantages**.

XII. Cross-border infringements (Art. 16)

In principle **we support better law enforcement**, which should be equally effective **irrespective of the size and location of the undertaking**. Therefore, **close cooperation** of law enforcement authorities as well as of qualified entities **is critical**.

However, it has to be taken into account that unfortunately **consumer protection law significantly differs between EU Member States**. An identified or potential infringement in one Member State may not be an infringement in another Member State. Therefore, representative actions always need to be **addressed before the court of the Member State where the infringement has been identified**.

Equally this has to be **considered in the scope of Art. 10(2)**, which obliges Member States to ensure that court decisions from other Member States are considered in national law enforcement. Such an **obligation is only reasonable in situation where legal situations between Member States are fully comparable**. This **requires profound legal analysis**, performed by experts that know the different legal situation across Member States. Today, courts appear not sufficiently equipped to ensure such analysis.