Position Paper

New Deal for Consumers

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The European Commission published its proposals for the "New Deal for Consumers" (New Deal) on 11 April 2018. The New Deal includes a proposal for a Directive on representative actions for the protection of the collective interests of consumers and an "Omnibus" directive amending relevant legislative files.[1]

Bitkom would like to thank the European Commission for the opportunity to comment on the two proposals:

1. Proposal for Representative Actions

The proposal provides for the introduction of EU-wide collective redress by designated entities in case of infringements of EU laws. This provision applies in particular to the sectors of consumer and data protection, environment, energy, telecommunications, transport, financial and insurance services, and health (Annex 1 of the proposal lists the 59 acts concerned).

Bitkom Position:

In general, we welcome the harmonisation and unification of consumer law enforcement in the EU. However, Bitkom would like to voice some concerns regarding specific provisions, particularly with regard to proportionality. We would like to summarise the main issues and go into further detail on the main aspects below:

(1) Definition of qualified entities: the definition of the qualified entities needs to be specified and requirements of claims clarified in order to implement safeguards against claims for commercial reasons.

[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

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(2) Collective redress needs to be based on individual harm to avoid consolidation into a lump sum, which is uncommon practice in tort law and compensation law apart from narrow circumstances.

(3) A consumer mandate needs to be a requirement in all Member States to ensure coherence and harmonisation in the field of collective actions for consumer protection. Where national rules already provide for opt-out mechanisms, these provisions could still be upheld in the Member States context.

(4) Individual claims by consumers involved in the same collective redress claim should be precluded (ne bis in idem).

(5) Funding through third parties for commercial interests should be prohibited. Bitkom welcomes that qualified entities have to ensure and demonstrate sufficient resources for bringing claims under the proposed Directive.

(6) If companies are obliged to inform the consumers on representative actions, such information should be provided via established communication channels (such as website announcements). Individual communications would introduce an undue burden and would, at least in some cases, be impossible.

(7) Regarding the gathering of evidence, businesses should not be obliged to provide information that is protected under the rules of business secrecy or that goes beyond the procedural rules of evidence.

(8) Coherence is needed with other representative actions, for instance following the provisions of Articles 80 ff. of the GDPR.

Detailed Comments:

1) Safeguards

The current proposal lacks safeguards against abusive litigation and would lead to potential overlaps with existing measures of collective redress in the Member States. Since a variety of areas is affected by the proposal, it also covers sectors which are already highly regulated. It would be beneficial for reaching the objectives of the Directive if it addressed only targeted areas of law, identifying issues in the relevant sectors and focusing on enforcing existing rules. The principles of proportionality and adequacy should be upheld when drafting new enforcement provisions.

2) Admissibility Requirements

The abovementioned missing safeguards become apparent in the provisions on the admissibility of a collective redress claim. The thresholds for such a claim are significantly lower than the current German enforcement procedures. The Proposal is built around “consumers’ collective interests”. However, it is not evident

that the qualified entities would be obliged to argue or explain the specificities of such an interest or to present prima facie evidence.

Bitkom proposes an obligation for presenting such evidence, including a detailed explanation on why a large number of consumers are affected. In addition, collective enforcement claims should be linked to a minimum number of affected consumers (similar to the German "*Musterfeststellungsklage*"). Since the proposal is aimed at "situations of mass harm", a critical number of affected consumers should be a clear prerequisite for such claims.

Additional enforcement mechanisms, particularly collective redress mechanisms, should also only be implemented in situations where the individual consumer is unlikely to seek enforcement. This would, for instance, be the case in situations where the monetary loss is small and, therefore, would not incentivise the consumer to sue on his own. Furthermore, if a collective action is already pending, individual claims by the consumers should be precluded. Such safeguards could ensure proportionality while at the same time facilitating better enforcement of consumer law.

3) Qualified Entities, Article 4

Qualified entities entitled to bring representative actions under the proposal should be limited to independent public bodies, consumer organisations and business associations, excluding third parties that have commercial interests in the matter. Such a clarification and limitation would implement a safeguard against the introduction of procedures similar to the US class actions. Consumer interests should be the sole basis for collective claims on behalf of consumers.

4) Measures, Articles 5 and 6

The proposal provides that so-called "qualified entities" can bring representative actions seeking an injunction order as an interim measure for stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice; an injunction order establishing that the practice constitutes an legal infringement, and if necessary, stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice and measures eliminating the continuing effects of the infringement. The proposal should provide that an injunction always needs to be the first measure when raising collective claims. Furthermore, it should be provided that to seek an injunction order, qualified entities should have to obtain the individual consumers' mandate or provide proof of actual loss or damage by the consumers concerned or of intention or negligence by the trader. The German collective action provisions and the German civil code are not compatible with an "opt out" enforcement mechanism, where consumers do not have to actively decide to pursue their claims via a qualified entity.

Bitkom urges the co-legislators to implement amendments that provide for an "opt in" model. Furthermore, German associations are already competent to raise claims for an injunction under the German Act Against

Unfair Competition and the Act Relating to Actions for Injunctions in the Case of Breaches of Consumer Protection and Other Laws.

Furthermore, qualified entities would be entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. Bitkom welcomes that Member States may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued. However, non-harmonisation in this regard would mean that all companies which offer their services or products across EU borders could face an "opt out" redress claim in another Member State, even if the German legislator would (in line with German procedural law) implement a requirement for a mandate from the consumer. Hence, Bitkom urges the co-legislators to agree on a requirement for a mandate valid in all Member States, if collective redress is sought by qualified entities.

Article 6 para 3 lit. b provides that if consumers have suffered a small loss, it would be disproportionate to distribute the redress to them. Member States shall ensure that the mandate of the individual consumers concerned is not required. The redress shall then be directed to a public purpose serving the collective interests of consumers. In our view, this provision might incentivise abuse by entities pursuing monetary interests instead of consumer interests. It is also still unclear to whom and how the redress would be paid out and whether it could indeed be paid directly to the suing association.

Moreover, there is legal uncertainty regarding the wording of "small amount", "disproportionate" and "public purpose serving the collective interests of consumers". The provision would effectively mean that consumers' claims would be transferred to the "collective interests of consumers" and "their" monetary redress paid out to another entity. Whether the consumer could still bring individual claims is still not sufficiently clear and would also be a breach of the *ne bis in idem* principle. We therefore urge the co-legislators to amend the provision, introducing a strict requirement for a mandate by the consumer and providing for balanced provisions on redress distribution.

Considering the proposal and the aim of achieving better consumer law enforcement, Bitkom would like to voice general concern with regard to collective redress. The example of the German *Musterfeststellungsklage* shows that a high level of consumer protection can also be achieved by means of a declaratory action while at the same time balancing the defendant's rights. In addition, collective damages are less well integrated into (German) procedural law. In our view, the two-stage enforcement of the *Musterfeststellungsklage* would therefore be preferable.

5) Funding of Qualified Entities, Article 7

Bitkom welcomes that entities have to ensure and demonstrate sufficient resources for bringing claims under the proposal. However, to ensure sufficient preclusion of commercial interest-based claims, third-party funding should be precluded or at least be limited to an amount or percentage (again, the German

Musterfeststellungsklage provides for a balanced provision in this regard). Third-party litigation funders should not be allowed to profit or benefit from the compensation in a collective redress action or provide funding for claims against competitors.

6) Settlements, Article 8

The provisions on settlements need to take other measures into account that already address dispute settlements, such as ADR and ODR, to limit overlaps and legal uncertainty. Furthermore, settlements should be a voluntary measure of dispute resolution. If a settlement is agreed upon, additional individual claims of the consumers need to be precluded. Coherence with other representative action provisions and settlement rules is also necessary. The proposal does not clarify whether settlements and collective redress would be possible if there were already claims ongoing under Articles 80 ff. GDPR.

7) Information on Representative Actions, Article 9

If companies are obliged to inform consumers of representative actions, such information should be provided via the usual communication channels (such as website announcements), as individual communications would introduce an undue burden and could even prove impossible if the businesses no longer has the contact details of the affected consumers.

Bitkom proposes to introduce another paragraph in Article 9 providing for the possibility that the qualified entity bringing the collective claim could share information on the representative action with the consumers.

8) Effects of Final Decision, Article 10

Article 10 provides for the effects of final decisions taken by the administrative authority or the court. Bitkom would like to propose clarification that Article 10 para.3. does not provide for irrefutable evidence that an infringement occurred regarding all consumers in situations where no mandate was required for the collective actions.

9) Evidence, Article 13

Obligations to provide evidence and information have to be limited in scope to protect trade secrets. Defendants should only be obliged to produce information under current evidentiary procedures and rules. Provisions influencing the burden of proof must be coherent with current civil code rules. Safeguards against exploratory evidence must be maintained.

2. Changes regarding specific Directives

a) Amendment of the Directive on Unfair Commercial Practices, Article 11a, 13

- The newly introduced Art. 11a extends the range of persons entitled to sue or bring actions to consumers and seeks to give them contractual and non-contractual remedies, if harmed by unfair commercial practices. This is an extraordinary right of termination for consumers who are affected by unfair business practices, and offers additional claims for damages and possible injunctive relief. This should be reassessed to provide a more balanced provision.

- Sanctions: Bitkom urges the co-legislators to amend Article 13 para 4, since it is disproportionate. Article 13 para 2 already ensures sufficient sanctions. Furthermore, the wording is not clear enough, as it does not facilitate a clear rule on maximum sanctions in the Member States. The provision would harm companies of all sizes, since it would burden small companies with high and unclear rules on sanctions, as well as larger groups, because all companies of the group could be sanctioned on the basis of the group's turnover. Such a provision would harm all intentions of further business innovation. Clarifications are hence needed as safeguards. Bitkom proposes a limitation: the provision should only apply when harm is caused deliberately, or in cases of negligence. A clear limitation on the maximum penalty should be introduced.

b) Amendments of the Consumer Rights Directive, Article 2

- Where transparency on platforms is addressed, coherence with the currently discussed Platform-to-Business proposal should be ensured. Transparency obligations should always provide for adequate protection of trade secrets and maintain safeguards against manipulation.

- Bitkom welcomes the proposed changes regarding the reimbursements in case of contract withdrawal in Article 2 (7a – amendment for Article 13) and Article 2 (9 – amendment for Article 16) regarding service contracts.

- On Article 24 regarding penalties see comments above (UCP Amendments)