

INCEPTION IMPACT ASSESSMENT

TITLE OF THE INITIATIVE	A New Deal for Consumers – revision of the Injunctions Directive
LEAD DG – RESPONSIBLE UNIT	DG JUST E2
LIKELY TYPE OF INITIATIVE	Proposal for a Directive of the European Parliament and the Council
INDICATIVE PLANNING	First Quarter 2018
ADDITIONAL INFORMATION	http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

This Inception Impact Assessment aims to inform stakeholders about the Commission's work in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options. The Inception Impact Assessment is provided for information purposes only and its content may change. This Inception Impact Assessment does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content.

A. Context, Problem definition and Subsidiarity Check

Context

On 13 September 2017, President Juncker announced, in his Letter of Intent, a 'New Deal for Consumers'¹. In response to mass-harm cases, such as the 2015 "Dieselgate" scandal or the massive 2017 flights cancellation affecting hundreds of thousands of consumers across the EU, the Commission Work Programme 2018² under the title 'A new Deal for Consumers' foresees a revision of the EU consumer directives, including the Injunctions Directive (ID)³. The initiative is aimed at ensuring cheaper and more effective means to stop and remedy breaches harming multiple EU consumers simultaneously.

The initiative would build on the 2017 EC Fitness Check of EU Consumer and Marketing law⁴ and on the 2017 assessment⁵ of the implementation of the 2013 Recommendation on Collective Redress⁶. It aims to ensure that the planned "Targeted revision of EU consumer law directives"⁷ is complemented by strengthened procedural rules for both domestic and cross-border breaches harming collective interests of consumers. Subject to the results of an impact assessment, the two above-mentioned initiatives would be presented as a package contributing to achieve the overarching objective of a robust enforcement of EU consumer law by simultaneously (1) improving public enforcement through more effective, proportionate and dissuasive penalties for breaches of EU consumer law, (2) providing for an EU wide right to remedies for victims of unfair commercial practices and (3) improving the procedural means for stopping infringements harming the collective interests of consumers and eliminating their effects, including possibly by providing for consumer redress.

Building on the 2013 Alternative Dispute Resolution⁸ and Online Dispute Resolution⁹ (ADR/ODR) acquis¹⁰ and on the 2017 revision of the Regulation on Consumer Protection Cooperation (CPC)¹¹, this package would aim at stepping up the enforcement of EU law in a holistic way and securing more effective consumer redress in mass harm situations.

¹ Letter of Intent: https://ec.europa.eu/commission/sites/beta-political/files/letter-of-intent-2017_en.pdf

² COM(2017)650 final of 24.10.2017, Annex II – REFIT initiatives (no 8).

³ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1463044551139&uri=CELEX:32009L0022>

⁴ SWD(2017) 209 final of 23.5.2017: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

⁵ The Commission Report on the implementation of the Commission Recommendation of 11 June 2013 on collective redress will be soon published.

⁶ EC Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law: <http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32013H0396>

⁷ Inception Impact Assessment already published: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3287178_en

⁸ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011>

⁹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>

¹⁰ For general ADR/ODR information: http://ec.europa.eu/consumers/solving_consumer_disputes/nonjudicial_redress/adr-odr/index_en.htm

¹¹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004R2006>. See also: http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm

Problem the initiative aims to tackle

Diverging and/or inadequate solutions for collective injunctions and redress in the Member States impede the efficient and equal enforcement of EU rules relevant for the protection of collective interests of consumers. As a result, the level of protection of EU consumers differs depending on their Member State of residence, whilst rogue traders are not consistently and equally deterred across the EU. Illegal practices thus continue to cause significant loss to EU consumers and compliant traders do not enjoy an EU-wide level playing field.

The 2017 Consumer Conditions Scoreboard¹² shows that compliance with and enforcement of EU consumer law is not yet satisfactory. Notwithstanding slight improvement in recent years, still 20.1% (2.6 percentage points less than in 2014) of consumers report having faced, in 2016, a problem worth complaining about. The 2017 Commission Study on measuring consumer detriment in the EU¹³ estimates that, in the six assessed markets¹⁴, consumers suffered, in 2015, between EUR 20.3 - 58.4 billion detriment due to the most serious problems encountered¹⁵. In 2016, almost a third (6.1 percentage points more than in 2014) of the consumers having faced a problem within the EU, whether domestically or cross-border, did not follow this up despite feeling it would have been legitimate to do so. The main reasons for not acting are: excessive length of the procedures (for 32.5% of those who didn't take action); perceived unlikelihood of obtaining redress (19.6%); previous experience of complaining unsuccessfully (16.3%); uncertainty about consumer rights (15.5%); not knowing where or how to complain (15.1%); psychological reluctance (13.3%)¹⁶.

Within the current Single Market context of globalisation, digitalisation and e-commerce growth, the risk of mass harm situations affecting collective interests of consumers is growing. Business models outreaching a large number of consumers simultaneously exist in an increasing number of economic sectors, such as electricity, telecommunications, financial services, travel and transport. The 2015 "Dieselgate" emissions scandal and the 2017 massive flight cancellations illustrate, on the one hand, the scale of harm that may be caused by multinational businesses' activities and, on the other hand, the limits of existing national procedural means to stop mass breaches and secure appropriate consumer redress.

Already back in 1998 the ID sought to address the need of stopping infringements harming collective interests of consumers both in domestic and cross-border cases by enabling qualified entities (mainly consumer organisations and independent public bodies) to seek injunctions before a court and/or administrative authority. The 2017 EC Fitness Check however shows that, whilst being a crucial enforcement mechanism, the injunction procedure is not being used to its full potential across the EU, mainly due to cost, length and lack of direct effect of injunction procedures on the harmed consumers.

The 2013 EC Recommendation on Collective Redress explicitly called Member States to ensure, in their legal systems, injunctive and compensatory collective relief in all areas of EU law, without prejudice to the ID. However, as shown by the assessment of its implementation, the impact of this Recommendation has been limited. Only a few Member States have introduced or amended their legislation and nine Member States still do not provide for any possibility of claiming compensation collectively. In Member States where compensatory redress exists, it is still reported to be too complex, costly and lengthy to fully reach its objectives¹⁷.

A recent Study¹⁸ confirms the insufficient effectiveness¹⁸ of both injunctive and compensatory collective redress mechanisms in the Member States and highlights the lack of direct effects of injunctions on affected consumers¹⁹. Also the 2017 Justice Scoreboard²⁰ highlights significant variations in functioning across national justice systems in terms of length of proceedings, including for injunctive relief.

Subsidiarity check (and legal basis)

The legal base for this proposal would be Article 114 TFEU. The main EU added value of the ID relates to the

¹² 2017 EC Consumer Conditions Scoreboard: http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=126110

¹³ See: http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm

¹⁴ Markets assessed where: clothing and footwear; large household appliances; loans, credit and credit cards; train services; mobile telephone services; electricity services.

¹⁵ These estimates refer to the sum of total post-redress financial detriment (i.e. financial detriment net of any redress received) and monetized time loss. In the markets for mobile telephone services and electricity services - where the risk of infringements harming a multitude of consumers simultaneously is high - respondents in the four surveyed countries (UK, FR, IT, PL) recovered respectively only 14% and between 12% and 21% of their initial costs and losses (pre-redress financial detriment).

¹⁶ 2017 EC Consumer Conditions Scoreboard

¹⁷ Study supporting the assessment of the implementation of 2013 EC Recommendation on Collective redress, to be published soon

¹⁸ The evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU law, prepared by a Consortium of EU Universities led by the Max Planck Institute for Procedural Law to be published soon.

¹⁹ *Ibidem*, pages 271-279

²⁰ 2017 EC Justice Scoreboard: https://ec.europa.eu/commission/news/commission-publishes-2017-eu-justice-scoreboard-2017-apr-10_en

enhanced enforcement of the underlying substantive EU consumer rules to which the ID applies (as set out in its Annex I). Thanks to the ID, qualified entities - mainly consumer organisations and independent public bodies – can concretely act to protect collective interests of consumers across the EU. Given the increasingly EU-widespread nature of infringements of EU rules relevant for the protection of consumers' collective interests, the cross-border implications of procedural ways to stop such infringements and redress their consequences become more important. Fair competition in the Single Market requires comparable exposure to deterrent (injunction) and corrective (redress) actions in all Member States, based on further harmonised EU rules. This proposal would address these needs by providing for a more harmonised and effective legal framework enabling qualified entities to seek, in mass harm situations, injunctive relief possibly with compensatory relief within a single procedure.

B. Objectives and Policy options

The general objectives of this initiative are to increase consumer trust whilst improving the Single Market functioning.

More specifically, this initiative aims at enhancing business compliance with EU rules providing concrete consumer rights, thus reducing consumer detriment and contributing to a level playing field for traders. Since the collective interests of consumers at stake would be represented by qualified entities, this proposal would address the main problems faced by consumers which stand in their way to obtain redress, including the excessive length of the procedures, uncertainty about consumer rights, not knowing where or how to complain.

The initiative is a REFIT initiative and the potential for simplification and reducing unnecessary costs will be particularly assessed.

The following policy options will be explored and possibly further elaborated in the course of the impact assessment process:

1. The baseline scenario: Consumers would continue benefiting from the existing EU enforcement and redress framework. In particular, the revamped cooperation mechanism between national consumer law enforcers and the Commission, laid down by the just revised CPC Regulation, would help tackling cross-border breaches affecting collective interests of consumers in a more effective and efficient way. In parallel, consumers would continue benefiting from the ADR/ODR regulatory framework, which allows for a simple, efficient, fast and low-cost solution of contractual disputes with traders, both domestic and cross-border, thanks to the help of qualified ADR entities. The Commission would continue improving the ODR platform outreach as an efficient way to solve online disputes. In those Member States where compensatory collective redress is already available, consumers would continue benefiting from it. However, diverging national measures to stop infringements that harm a multitude of consumers simultaneously would continue causing unequal enforcement and unequal level playing field for traders across the EU.

2. Non-legislative options: going beyond the baseline scenario, such options would include actions to enhance the qualified entities' capacity to prepare and manage both injunction and redress actions, as well as to support cooperation between qualified entities from different Member States. However, the non-legislative options would be unable to effectively address several key aspects of diverging procedural rules that would continue to lead to unequal access to procedural means for stopping breaches of EU consumer laws and for eliminating their effects in the same mass harm situation across the EU.

3. A targeted revision of the Injunctions Directive limited to injunctive relief: this legislative option would improve the functioning of the existing procedure by introducing targeted amendments in several key areas. Firstly, the impact assessment will assess the extension of the scope of application of the ID from the EU instruments currently enumerated in its Annex I to the EU instruments covered under the Annex of the just revised CPC Regulation. The impact assessment will further explore whether the scope of the ID should be possibly expanded to other EU instruments relevant for the protection of collective interests of consumers in different economic sectors such as financial services, energy, telecommunications, or environment. The above would ensure that the injunction procedure is sufficiently future-proof and responsive to the large spectrum of traders' illegal practices that affect consumers. In complement to the revised CPC Regulation, which will help stepping up public enforcement, this option would also aim to ensure that consumer and business organisations can help stepping up private enforcement, by acting as qualified entities in all Member States, subject to independence criteria. It could moreover facilitate access to justice for underfunded qualified entities by providing dedicated financial support (e.g. exemption from court fees) based on objective criteria. This legislative option would also consider appropriate time-limits for the relevant procedural steps and making sure that the infringing trader is obliged to widely publicise and, where possible, individually inform all concerned consumers about the injunction order. Consumers would then be able to bring follow-on actions using the injunction order as proof of the breach of EU law. In case the infringing trader fails to comply with these procedural obligations, the courts/administrative authorities would be able to issue effective, proportionate and dissuasive penalties. This option would also explore

ways to improve the investigative powers of the courts/administrative authorities and to ensure a better functioning of the procedure in cross-border situations. The above legislative amendments could be complemented by non-legislative actions described under point 2.

4. A targeted revision of the Injunctions Directive (option 3) + consumer collective redress: with targeted additions complementing option 3, this legislative option would aim to introduce further procedural efficiencies and redress opportunities for consumers in mass harm situations. This could be achieved by establishing a single procedure ("one stop shop") in which qualified entities could simultaneously ask the courts and/or administrative authorities to stop the breach and ensure redress for the victims. In such a scenario the court/administrative authority would be able to issue, next to the injunction order, a direct redress order or to invite the infringing trader and the qualified entity to enter into out-of-court redress negotiations, depending on its assessment of the circumstances of the case. If the negotiations lead to an amicable settlement, the court/administrative authority would check the fairness of the settlement and approve it in order for it to become enforceable. However, if the negotiations were unsuccessful, that court/administrative authority would continue the proceedings in view of providing consumer redress according to rules defined by the Member States. This would mean that Member States which currently do not have collective redress rules in place would need to introduce such rules in this context. As with option 3, to ensure the effectiveness of all stages of the procedure, the introduction of time-limits, publicity requirements and deterrent penalties would be considered. The above legislative amendments would be complemented by non-legislative actions described under point 2.

C. Preliminary Assessment of Expected Impacts

The impacts of this proposal will be analysed together with the impacts of the planned "Targeted revision of EU consumer law directives"²¹. The impact assessment will analyse to which extent a reform of the ID entailing also a redress procedure is likely to curb the lack of compliance with relevant EU rules whilst improving the level playing field for traders and to reduce consumer detriment in mass harm situations whilst enhancing consumer trust, thus tapping into the full potential of the Single Market. Non-legislative actions will be analysed as well.

Likely economic impacts

Having more effective injunction and redress mechanisms in place across the EU would mean that the costs of breaches harming the collective interests of consumers would be borne by the infringers, and not by the victims and law-abiding traders. They would increase the likelihood that a greater number of illegal practices would be detected and infringers held liable. The proposal would thus tangibly help deterring future infringements and stimulating greater compliance with EU rules relevant for the protection of collective interests of consumers. It is expected to reduce consumer detriment across the EU. The initiative would contribute to ensuring a more level playing field and fairer competition, essential for the effective functioning of the Single Market and to foster innovation and investment. Combined with the proposed targeted adjustments to substantive consumer law, further harmonised procedures for injunction and possibly redress representative actions would lead to more equal treatment of affected consumers in a similar situation in all Member States.

For public enforcement authorities and courts, the proposal may lead to an increased number of collective injunction and redress cases. Those Member States which do not have any compensatory collective redress scheme in place would face additional costs to set them up. However, redress actions in the collective interests of consumers would make superfluous a significant number of individual compensation actions, thus leading to increased efficiency and rationalisation of the justice systems. Moreover, these costs would be likely off-set by an overall reduction of consumer law breaches due to an increased deterrent effect. The reduction in the number of infringements is expected to also lead to a reduction in consumer detriment, improved level playing field for traders and overall enhanced welfare. Exposure to such actions may have a positive influence on traders' behaviour. In many cases, the mere availability of effective civil and administrative procedures would deter wrongdoing or trigger voluntary redress, without the actual need for consumers/qualified entities to approach courts or enforcement authorities to apply the remedies. The above would thus entail savings for courts, administrative authorities and, ultimately, traders too by stimulating enhanced ex ante compliance.

The future initiative would allow enforcing relevant EU rules at lower costs for all concerned actors, namely consumers, qualified entities representing them and traders.

By being a representative action introduced by a qualified entity in the collective interests of consumers, the proposed redress procedure would bring substantial benefits to the harmed consumers. Consumers would save money and time thanks to improved information about their rights and increased possibilities of obtaining redress within the same procedure.

²¹ Inception Impact Assessment already published: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3287178_en

Cheaper and quicker injunctions would entail significant savings for qualified entities. Their efforts to prove the breach and inform consumers thereof would be helped by the proposed improved evidentiary rules and new information requirements imposed on traders. Moreover, underfunded qualified entities would benefit from measures facilitating their access to justice. The above savings would be significantly reinforced by the creation of a single procedure for injunctions and redress, thus reducing procedural cost for the involved parties as well as for court and administrative authorities.

The initiative would not create additional substantive requirements for complying traders. On the contrary the law-abiding traders that compete with infringing traders would benefit from a more level playing field thanks to the more deterrent effect of the proposed procedure and increased legal certainty concerning the outcomes of the procedure, particularly if the single procedure for injunctions and redress is used. However, traders whose infringements would be established by the injunction order would need to cover the cost linked to adequately informing the harmed consumers as to the existence of the infringements and related redress possibilities. They would also need to cover the cost of the providing such redress.

The economic detriment suffered by consumers is expected to be reduced, so that consumers would have more money available for spending on compliant goods or services. The culture of compliance stimulated by this proposal would contribute to better allocation of resources, greater economic efficiency, increased innovation and lower prices.

Likely social impacts

The proposal will have direct and indirect positive impact on the protection of vulnerable consumers, notably those who cannot afford professional legal assistance or belong to societal groups that lack knowledge and awareness of their rights, such as disabled, elderly people or people with a migrant background, especially in Member States which previously had no collective mechanisms, as well as in cross-border disputes. As indicated above, this proposal is expected to have a deterrent effect on rogue traders, thus reducing the marketing and sale of potentially harmful products and services. No significant impacts on employment or working conditions are expected.

Likely environmental impacts

More effective injunction and redress procedures will have beneficial environmental effects as they will stop, prohibit and dissuade non-compliant traders also in case of unfair green claims (claims that omit or mislead about important environmental features of the product affecting the consumer's transactional decision, e.g. recent pan-European "Dieselgate"). More compliant traders' behaviour may enhance consumer trust in environmentally-friendly forms of collaborative economy and sustainable consumption.

Likely impacts on fundamental rights

Should legislative action be deemed necessary, any future proposal will be in accordance with Article 38 of the Charter of Fundamental Rights whereby the Union must ensure a high level of consumer protection. Better enforcement and redress opportunities in mass harm situations will contribute to ensuring the right to an effective remedy as well the right of defence enshrined in Article 47 of the Charter.

Likely impacts on simplification and/or administrative burden

Depending of the legislative option chosen, traders may need to face additional expenses linked to the risk of more efficient procedural rules for stopping and redressing breaches harming collective interests of consumers. On the other hand, traders are expected to benefit from economies of scale due to the improved level playing field and higher sales volumes due to higher consumer trust. A streamlined procedure will enable the aggregation of individual mass claims within representative actions, as well as the opportunity of a judicial/administrative approval on the out-of-court settlements reached with the qualified entity. Such approval will enhance legal certainty and may considerably limit the number of further possible individual actions for damages.

As the primary objective of the proposal is to improve traders' compliance with EU law and reduce the need for injunctions and redress actions, costs of judicial and administrative procedures would, in the medium-term, be reduced in the Member States thanks to the deterrent effect of the proposal. In cases where legal actions would be still needed, several elements being explored under the initiative, including the new evidentiary and information rules, the streamlining effects of the initiative (injunctions and redress brought within the single procedure) and the important out-of-court element, may lead to savings for national budgets.

D. Data Collection and Better Regulation Instruments

Impact assessment

An Impact Assessment will be prepared to support this initiative and inform the Commission's decision. It will analyse the extent to which a revision of the ID is likely to curb non-compliance with EU law, improve the level playing field for traders, reduce consumer detriment in mass harm situations and tap into the full potential of the Single Market.

For reasons of synergies and coherence, the results of the analysis conducted for the two initiatives falling under the "New deal for consumers" package, i.e. the targeted revision of EU consumer law and the revision of the Injunctions Directive will be presented jointly in one impact assessment report.

Data collection

Substantive research is already available regarding the need to revise the Injunctions Directive. The future Impact Assessment will chiefly rely on information and evidence gathered within the 2017 Fitness Check of EU Consumer and Marketing law and the 2008²² and the 2012²³ Commission reports on the application of the ID, as well as on the 2017 assessment of the implementation of the 2013 Recommendation on Collective Redress. Data gathered within an Evaluation Study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of EU consumer protection will be also used. Further data will be collected, in particular through targeted stakeholders' consultation.

Consultation strategy

Wide-reaching stakeholder consultations have already been carried out, including the 2011 public consultation on collective redress, the 2017 public consultation carried out within the Fitness Check of EU consumer and marketing law, and the 2017 Commission call for evidence on collective redress.

In addition, there will be a targeted consultation through the Commission stakeholders' networks in November 2017 and subsequent structured discussions with relevant networks and organisations. The above consultation and structured discussions will aim at collecting stakeholders' views and additional facts and figures on the problem definition, policy options for the proposal and their likely impacts.

The targeted questionnaire will be sent to main European Commission's networks in the area of consumer policy, such as European Consumer Consultative Group (ECCG), Consumer Policy Network (CPN), Consumer Protection Co-operation Network (CPC network), as well as to the qualified entities communicated by the Member States in accordance with Article 4 of the Injunctions Directive. Judiciary, lawyers' and competition authorities' networks will also be consulted.

Furthermore, the REFIT Stakeholder Consultative Group, which brings together the leading European and national consumer and business organisations, will be consulted. This Expert Group already met seven times before and after the publication of the Fitness Check Report; further meetings are planned throughout the preparation of this initiative.

The results of the consultations will be summarised and published on the relevant Commission web page.

Will an Implementation plan be established?

In order to address implementation issues and to improve future application, an implementation plan will be established to help Member States transpose and successfully implement the possible future legislative changes.

²² Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests (COM/2008/0756 final), available at

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0756>

²³ Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest (COM/2012/0635 final) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635>