



THE EUROPEAN TRAVEL AGENTS'  
AND TOUR OPERATORS' ASSOCIATIONS

BC19-031-440 -10/05/2019

## ECTAA'S POSITION REGARDING THE DIRECTIVE ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS

ECTAA is the European federation representing travel agents and tour operators in Europe. It is composed of 35 associations in 27 Member States, Norway, and Switzerland, representing more than 70,000 enterprises in Europe, mostly SMEs.

Please find hereafter ECTAA's position regarding the directive on representative action for the protection of the collective interests of consumers.

### **SUMMARY:**

- ECTAA considers that the **directive proposal does not provide sufficient safeguards** to prevent abusive claims and will create an unbalanced environment where the right of the defence is clearly ignored. It is therefore of outmost importance that safeguards are in place to guarantee the right of defence and prevent abuses from claims management companies: more precise qualification criteria for qualified entities (QE), more transparency of QE's funding and no procedural facilitations for QE.
- **The procedure should only be accessible to consumers who actively opt in the procedure. Qualified entities have to prove the existence of a damage and have been mandated by consumers.**
- The proposed system will be particularly damaging for SMEs, which will be particularly vulnerable to low value litigations. **An exclusion of SME or at least micro enterprise (less than 50 employees) is therefore necessary.**
- To preserve the level playing field in the travel sector, it is of outmost importance, that the directive treats all travel and transport legislations on the same level. **Therefore, the report on of the adequacy of the Air and Rail passengers' rights regulations should be extended to all legislation specific to travel and transport (PTD and passenger rights regulations in all modes of transport).**

ECTAA considers the above-mentioned modifications crucial, otherwise the proposal will have disproportionate repercussions for enterprises, notably SMEs.

### **General Comments:**

*ECTAA would like to make the following general comments regarding the opportunity to adopt a directive setting a collective redress procedure. ECTAA considers the adoption of the Directive untimely, unclear on key provisions and will conflict with several existing systems having similar purposes:*

1. **Careful and thoughtful consideration of the Directive:** ECTAA believes that the directive date of publication, at the end of both Parliament's and Commission's terms, may lead to a hasty adoption. As this proposal will importantly impact companies, ECTAA calls for a careful assessment of the measures taken. Moreover, assessment of other recently adopted enforcement instruments such as the revision of the CPC regulation, should firstly be carried before considering additional legislation in the area of enforcement of consumer laws.
2. **Unclear relation with existing national collective redress procedure:** The Directive proposal sets up a system that will exist in parallel with existing collective redress instruments in Member States, which will lead to confusion and competition between the different procedures. The proposal provides that Member States shall set up a collective redress procedure if they do not have one already. ECTAA believes that, in the name of the principle of subsidiarity, Member States should have the possibility to not implement the provision on redress measures in order to better adapt the Directive to existing national procedures.
3. **Out of court systems should be promoted:** ECTAA is concerned that the system put in place will ruin the efforts of the tourism industry to develop and use mediation and arbitration procedures. The travel industry is one of the most advanced in this field with the recent creation, on 10 November 2017, of Travel.net, a European network of mediators and out-of-court dispute resolution entities with consumers in the field of transport and travel. **ECTAA supports any initiatives and provisions that would promote out of court resolution before starting an injunction procedure.** For example, provisions inviting Qualified Entities to first contact the trader to reach an amicable settlement would be particularly welcomed.
4. **Cross border litigation:** The functioning of cross-border representative actions is vague and silent on the treatment of competing complaints for the same dispute. Combined with the automatic recognition of qualified entities, the proposal encourages QE to choose jurisdictions that are more favourable to them. Clarifications in this area is needed to ensure that these cross-border procedures remain proportionate and respectful of the rights of the defence.

### **An unbalanced system in particular for SMEs:**

*Every legislation adopted in the field of consumer protection is justified by the fact that a consumer is usually the weaker party in a contract with a trader. This should justify the introduction of several mechanisms aiming at facilitating the representative action procedure for QE. However, it is difficult to affirm that a QE is a weak party as a consumer could be. A contrario, the introduction of this type of procedure aims at combating large scale infringements, such as the Dieselgate. However the proposal does not make any difference between large companies and SMEs, less able to defend themselves. ECTAA is concerned that the mechanisms introduced in this Directive will worsen the existing imbalance between QE and SMEs and will encourage qualified entities to bring action against them.*

5. **No financing of QEs via low value cases:** The Directive provides for the possibility that, in the context of low-value disputes, compensations may not be reverted back to the consumers but will be used to fund a "public purpose serving the collective interests of consumers. However, this public purpose includes the financing of consumer associations, creating additional incentives for qualified entities to introduce a procedure in order to obtain a financial gain, in particular against SMEs. ECTAA therefore calls the European Council to prohibit QE from receiving consumers' compensations, in order to avoid abuses.

6. **Procedural facilitations for QEs are not justified:** As qualified entities are usually administration or consumer associations, they are not weaker parties when suing an SME and should therefore not benefit from financial and procedural assistance as provided in Article 15.
7. **Less rights of the defence, more frivolous complaints:** ECTAA is concerned that the proposed representative action procedure does not have sufficient safeguards to ensure a right to a fair trial for the defence and will enable the introduction of frivolous complaints. In particular, the lack of need for a mandate or proof of damages when submitting a claim will encourage qualified entities to introduce frivolous complaints, as these necessary assessments will not be carried by them before the start of the procedure. **It is therefore crucial that a real opt in procedure is put in place, including the requirement for QEs, when introducing a complaint, to provide the court with the consumers' mandates and a calculation of the damages suffered.**
8. **Unbalanced effects of court ruling:** finally, Article 10 (1) and (2) provides that a final decision establishing an infringement will be opposable as an irrefutable proof in similar actions brought in the Member States. ECTAA believes that this measure is unbalanced. **ECTAA therefore calls for the deletion of the provisions on opposability of the decisions or a equivalent provision when a court rules in favour of a trader and establishes that there is no infringement.**

### **More guarantees are necessary to prevent frivolous claims:**

*While understanding the concept of leaving a lot of flexibility in the Directive in order to better adapt to national specificities, ECTAA believe that at least a minimum set of safeguards should be provided in the directive to effectively prevent the introduction of frivolous claims, notably by claims management companies. The travel industry already has an experience of such abuses and this phenomenon is considered very seriously. For example, tour operators have recently been victims of an explosion of fraudulent food poisoning complaints in Great Britain (700% increase between 2013 and 2016, from 5,000 to 35,000 complaints<sup>1</sup>). It is therefore necessary to improve the directive on the following aspects:*

9. **More Criteria for qualified entities:** The current requirement to qualify has a QE are clearly insufficient. For example, the non-profit criterion is easy to circumvent. The for-profit character of an organization can be discovered several months, even years after a representative action procedure has been launched. It is therefore necessary to add additional criteria. ECTAA support several criteria that has been proposed in the first reading report such as:
  - The source of funding, in general and when supporting the collective action, must be fully transparent
  - It has a proper procedure to resolve conflicts of interests
  - It has a no structural or financial interrelationship with a third person or organisation that benefits of the action by providing legal advises
10. **No QE designated on ad hoc basis:** The possibility of abuses is reinforced by the ability of Member States to designate qualified entities on an ad hoc basis. This will create a favourable environment for claims management companies. Therefore, ECTAA does not support the possibility for Member States to be able to designate such entities on an ad-hoc basis and calls for a deletion of the provision.

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<sup>1</sup> <https://www.gov.uk/government/news/new-curbs-on-bogus-holiday-sickness-claims>

11. **Transparency of QE general funding:** ECTAA believes that measures to ensure transparency of third-party financing (Article 7 (1)) is insufficient. ECTAA considers that a case should be rejected in the event that the financial assessment shows that the qualified entity is not independent or has a financial interest in initiating a procedure. For this, the rules of transparency are insufficient and it is necessary to widen the assessment to qualified entities to possible para-commercial activities competing with the defendant.
12. **More safeguards on third-party financing** in Article 7 (2), prohibiting a third party from being a competitor or a dependent of the defendant, ECTAA considers that the Directive does not go far enough in this area. A third party should not be able to finance a qualified entity by other means outside of the procedure, such as via a participation in the general budget of the Qualified Entity or the financing of actions unrelated to the case but generating savings in the QE budget (e.g. financing a communication campaign).

### **All travel and transport legislations should be considered in the report (Art 18.2)**

*Lastly, article 18 provides that a year after the entry into force of this Directive, the Commission will assess if the air and rail passenger rights Regulations should be removed from its scope if they provide a comparable level of consumer protection. On this specific issue, ECTAA would like to highlight the following:*

13. **ECTAA suggests to consider in a harmonised approach of all legislations specific to the travel and transport sectors, including Directive 2015/2302 on package travel and linked travel arrangements (PTD) and other passenger rights regulations** (when travelling by ships, bus and coaches) instead of limiting the scope to only air and rail passenger rights regulations. Not considering travellers and passengers legislation would be detrimental for both consumers and traders.

Passenger rights Regulations and PTD are linked to each others, notably regarding compensations when failing to provide a transport service (Article 14 (5) of the PTD), as a traveller can introduce a claim under either legislation in certain cases. Differentiating the enforcement instruments between the two set of legislations would be detrimental for travel agents and tour operators, as the consumer would be inclined to only seek compensations via the PTD, putting a disproportionate burden on smaller travel agents and tour operators rather than transport companies.

Therefore, ECTAA call for a harmonised approach regarding the application of the representative action to all travel legislations and transport legislations. ECTAA believes that legislations in the travel sector (such as the package travel Directive 2015/2302), offers high level of protection for travellers, providing a wide range of instruments to remedy to any consumer detriment, before, during and after the trip. As most of the remedies are addressed on spot, there are no justification to introduces a representative action in these sectors. ECTAA therefore calls for a consideration of the Directive 2015/2302 on package travel and linked travel arrangement and passenger rights regulations in all modes of transport to be considered in the report foreseen in article 18 of the proposal on representative action.

We hope you will take the above into consideration and we remain at your disposal should you need additional information.

With kind regards,

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Legal Adviser