ECCG opinion – Communication of the Commission to the European Parliament, the Council and the European Economic and Social Committee
A New Deal for Consumers
(COM/2018/0183 final)

The ECCG very much welcomes the Commission's New Deal for Consumers, which consists of a proposal for a directive on representative actions[1] and a proposal for a directive to amend four essential consumer law directives[2].

Proposal on representative actions

It is crucial to strengthen private enforcement of consumer law and give consumers a realistic chance to obtain redress in case of mass damages.
The ECCG strongly supports this proposal, which establishes a new instrument that could make a real change in areas where mass consumer harm occurs.

The ECCG finds it crucial that the wide scope of the proposal is preserved, including passenger rights. The respective re-evaluation clause in Article 18.2 should be deleted. Otherwise consumers facing mass harm situations in this area, e.g. last- minute mass flight cancellations, would be stripped of a possibility to collectively enforce their rights before the courts.

The proposal respects the subsidiarity requirement for EU action. Action by Member States alone is likely to result in fragmentation, which in turn would contribute to unequal treatment of consumers and traders in the internal market and further deepen diverging levels of consumers redress in the Union.

The ECCG strongly supports obliging Member States to designate consumer associations as qualified entities. Experience in the EU countries that provide for national collective redress procedures clearly shows that consumer associations successfully make use of this possibility, getting millions of euros back to consumers. At the same time, the status and recognition our members have in their countries, act as a strong safeguard against any potential abuse. The national experience in the EU also shows that it is not enough if only public bodies are entitled to bring collective actions, as for various reasons they often do not or cannot act.
The new possibilities for collective redress actions by qualified entities will finally plug the huge gap in the enforcement of the EU consumer rights landscape. Once adopted with some improvements as proposed in this opinion, they will mean that the EU consumers will not be helpless in the face of any eventual *Dieselgate or similar* scandals.

[1] 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 (COM (2018) 184/3)
[2] Directive of the European parliament and of the council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernization of EU consumer protection rules (COM (2018) 185 final)

For this proposal to be effective Consumer Organisations must be strong financially and in some Member States they are not. Therefore this needs to be considered and public funding should be made available where necessary.

The new Directive should allow EU countries have higher standards and maintain or introduce other national procedures. In this sense it needs to be clarified, in the proposal, inter alia, what is meant by recital 24, that says that the Member States can decide whether to create a new procedure implementing this Directive, or to integrate it into the existing procedure. In both situations the national mechanism has to comply with the modalities set by the future Directive.
Article 1 paragraph 2 says that the Directive does not prevent adopting or maintaining in force provisions concerning "other" procedural means to bring actions aimed at the protection of the collective interests of consumers at national level.
It is crucial that this directive has a minimum harmonization character and thus will not preclude more extensive rights, or force Member States to amend to the disadvantage of consumers their existing collective redress systems.

As a general rule, consumer organizations should have legal standing to bring opt-out cases, if opt-out collective redress is available under national law.

However, the possibility for the Member States to derogate from the proposal in the instances of complex quantification of the damage of the individual consumer (Article 6 paragraph 2), leaving consumers to have to act individually, might have the effect of seriously undermining the usefulness of the new procedures. Cases with more complex quantification are exactly the types of cases where consumers would not be able seek redress individually, as it would be economically unreasonable. Even if those consumers could rely on the declaration of the infringement (with or without a collective damage fixed), they would still have to prove both their individual damage and the link between the illegal behavior and the damage in complex cases both of those elements are likely to require expensive legal, technical or expert opinions, which will be huge barriers for individuals.

Another big risk is only allowing to introduce redress actions once the decision concerning the infringement has become final (Article 5.3). This can take many years and can result in consumers no longer having the product in question or losing the evidence of the damage. It may incentivize the defendants to drag the litigation as long as possible with the hope redress actions will become impractical. This can be solved by allowing to introduce claims for the declaration of the infringement and redress at the same time. Any one of them can anyway be appealed, thus preserving full access to justice for both parties.

The ECCG strongly supports the provisions in Articles 9 and 15.2 obliging the trader, against whom the injunction was issued, to cover the costs of informing consumers. It is crucial for the effectiveness of actions and the preventive effect of repetitive infringements that the information both about the decisions establishing the infringements and about any further redress measures reach consumers. These should be published on the trader's website to be most visible to customers.

For this proposal to be effective and for any Consumer Organisation to act as watchdogs and important pillars of society the competent authority should give information to Consumer Associations when requested, about the number of complainants, details of the damage being claimed and any action being taken. Otherwise it could be difficult for Consumer Associations to see the extend of the damage in their Member State. The Competent Authority and consumer organisations should work together to support consumers in the best way possible. Proposal on better enforcement and modernization of EU consumer protection rules

The Commission's proposal allowing consumers to seek remedies in case of unfair commercial practices is very positive. Besides the right to compensation and the right to contract termination, further remedies, such as to ask for specific performance or right of restitution should be envisaged. In order to ensure that consumers are equally protected against unfair practices and ensure access to justice, it should be examined whether to specify conditions for the exercise of those remedies.
Also, there should be clear definitions of what those remedies entail, for example whether the right to damages include moral and material damages. Besides the Unfair Commercial Practice Directive, there should also be a standard remedy for non-compliance in the Consumer Rights Directive, for example the consumer is not bound by the contract if the trader does not meet his/her essential obligations. This should be without prejudice to remedies provided under national laws.

The ECCG strongly supports the inclusion of more dissuasive sanctions in consumer law. It is important to have truly dissuasive penalties for infringing companies, amounting to a significant percentage of their annual turnover and taking into account the EU wide dimension of the infringement. The Commission should examine the possibility of the highest sanctions, taking the example of the General Data Protection Regulation.

Regarding the online dimension of consumer protection, the ECCG supports the proposal to apply the provisions on the right of withdrawal and information requirements under the Consumer Rights Directive to situations where consumers provide personal data as a counter-performance if they sign up to a digital service. However, consumers should also be protected if they provide non-personal data in exchange of the service. As a general principle, the scope should be extended to cover all kinds of counter-performance in exchange of goods, services, or digital content products. Also, the current information requirements should be adapted. Traders should always inform consumers about the purpose to monetize their data. Finally, similar changes to other Directives are necessary, at least the Unfair Commercial Practices Directive, in relation to the definition of price and the unfairness of marketing such services as being provided for free.

Regarding the important issue of how to insure a better protection of consumers who buy products at online marketplaces, it is a step into the right direction to suggest better transparency obligations for providers of those marketplaces, related to ranking criteria used by the platforms, the information on the status of the trader/consumer, whether EU Consumer Law applies and who is the responsible contracting party. However, a standard remedy is missing if traders do not comply with those requirements. The platform should be liable if it fails to inform the consumer that a third party is the actual supplier of the goods or

service, thus becoming contractually liable vis-a-vis the consumer. In general, rules on the liability of platforms are missing in the Proposal. Online platforms which have a predominant influence over the supplier should also be held liable 1) for the contract performance, 2) if they fail to remove misleading information given by the supplier and notified to the platform, and 3) for guarantees and statements made by the platform operator. What is also missing are rules for a better, more transparent user feedback/review system, how reviews influence the point system or other ranking and these to be certified. This should be introduced in consumer law.

Efforts should be made to ensure all traders join the ODR platform.

With respect to the reform of the right of withdrawal system anchored in the Consumer Rights Directive, the ECCG stresses its major concern that the European Commission decided to deteriorate the best-known consumer right without providing any conclusive evidence that there is a large-scale misuse of this right by consumers.

On the contrary, all data suggest a severe lack of compliance by traders, signaling the need to protect, rather than deteriorate, consumers right of withdrawal (EC Staff Working Document to CRD Report {SWD (2017) 169 final; at 30; 86-87; etc. http://www.beuc.eu/publications/beuc-x-2018-023_what_a_new_deal_for_consumers_should_look_like_in_2018.pdf pg 20). Hence, the Commission should investigate how to strengthen this important consumer right rather than weakening it.

The ECCG very much welcomes the European Commission's announcement to publish a Guidance document on the Directive 93/13/EEC on unfair contract terms in consumer contracts which would help clarify its's interpretation.