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PROPOSAL FOR A DIRECTIVE ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS

POSITION OF THE FRENCH ASSOCIATION OF LARGE COMPANIES (AFEP)

Within the package on consumer law ("New Deal for Consumers") published on 11 April 2018, the European Commission has included a proposal for a Directive "*on representative actions for the protection of the collective interests of consumers*".[1]

As it is, this proposal reaches the exact opposite of what it announces. Far from protecting the consumer and avoiding abusive actions, it creates a system that encourages all abuses hitherto denounced (opt-out, financing by unauthorised third parties, forum shopping ...) and will multiply actions without guaranteeing proper benefit to consumers. The proposal indeed focuses on the organisation of actions lodged by the so-called 'qualified entities' rather than on the creation of conditions allowing genuine redress for the damage suffered by consumers.

Legally speaking, this proposal for a Directive cannot achieve the stated aims. The Commission claims the text provides strong safeguards and stands out from class actions in the United States. In reality, it sets a general framework without including the safeguards existing in many Member States or even the minimal boundaries existing in the US law. Whilst in its 2013 Recommendation *"on common principles for injunctive and compensatory collective redress mechanisms"*,[2] the Commission proposed to Member States a normative framework that has been used as a reference by various Member States to introduce collective redress procedures into their judicial systems, the institution now paradoxically calls into question its main provisions.

Economically speaking, this text is destabilising as it offers no visibility to companies on the modalities of actions brought by entities that are not adequately defined, across all economic fields (the Commission underlines that 59 sectoral texts are concerned by this reform). Thus, to be able to face long and costly litigation proceedings companies will need to set aside large amounts of resources that they will not inject into the productive economy (including research, innovation, new market developments…). These proceedings will be in the hands of private actors ("private enforcement") whose main motivation, in the light experiences abroad, is to take advantage of it.[3]

Therefore, AFEP considers that it is necessary to broadly amend the text in order to create a system that offers an effective protection to consumers in the framework of an harmonised procedure where the rights of the parties are balanced and protected by effective and comprehensive safeguards drawing on the best practices of the existing judicial systems.

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[1] COM(2018) 184 final; procedures: 2018/0089(COD)

[2] 2013/396/UE

[3] According to a study conducted by the U.S. Consumer Financial Protection Bureau, 87% of class actions result in no consumer benefit at all (these cases were either dismissed by the court or settled with the named plaintiff only) . A consumer who gets relief in a class action receives on average only $32. The average "recovery" for a class action lawyer is $1 million. (Source: ILR, 2018)

The text shall include at least the following key changes:

- ***Qualified entities must be better framed (Art. 4 and 5-1)**:* the criteria laid down in the proposal to define 'qualified entities' are unclear, particularly as regards the notions of 'proper constitution' (Art. 4.1(a)) and 'non-profit making character' (Art. 4.1(c)). The latter does not exclude that lawyers and investors are those who benefit the most from representative actions (no rules about contingency fees). On the contrary:

    - **A real system of certification by Member States must be required** so as to ensure that only the most competent and relevant entities are granted the right to take representative actions (financial and human capacities, duration of existence, expertise…). The conditions for funding actions must also be part of this certification (see below). It is also necessary to **prevent the creation of *ad hoc* entities** which would be exploited by plaintiff lawyers and litigation investors with little regard for the interest of consumers. Thus, Article 4.2 shall be deleted.
    - In addition to the certification system, it is necessary to **maintain a systematic review by the competent courts or authorities of the adequacy between the acting qualified entity and the intended purpose of the action**. Article 4.5 shall be amended accordingly. Similarly, Article 5.1 states that a "direct relationship between the main objectives of the entity and the rights granted under the Union law that are claimed to have been violated" is sufficient to bring a representative action. This is inadequate and shall not replace certification by Member States nor the examination of the judge or of the competent authority.

- ***Fundamental principles of civil procedures must be respected***: the provisions laid down in Article 5 must be reviewed to ensure that the civil liability rules already in force in the Member States are not breached. Accordingly:

    - An injunction order **shall not be issued against an imminent practice** (Art. 5.2.(a)) (which is an unclear concept legally speaking) or **without proof of actual damage by the qualified entity** (Art. 5.2.§2). Both of these provisions are unacceptable in our view;
    - The concept of '**declaratory decision**' (Art. 6.2) is inappropriate. In cases where "the quantification of individual redress is complex" the decision would irrefutably establish "the liability of the trader towards the harmed consumers by an infringement for the purposes of any actions seeking redress" in their jurisdiction (Art. 10.3). This is **in clear contradiction with national rules of civil procedure**. Inspired by the practice developed in competition law, it nevertheless forgets the prior decision made by the supervisory authorities showing the damage to the economy, a decision that does not exist in this case.

- ***Actions must be brought for the benefit of consumers***: the absence of a clear provision on opt-in and opt-out mechanisms will not allow consumers to adhere to representative actions, whilst the 2013 Recommendation retained the principle of opt-in as being the sole to avoid abuse.

    - As proposed, qualified entities may act without on behalf of consumers without their consent. It is therefore impossible for a consumer to opt out from an action. On the contrary, **a mandate should be required for any redress action** (opt-in principle) and Article 6.1 must be amended accordingly;
    - The proposal states that providing redress to consumers who have suffered a minor loss (Art. 6.3(b)) would be disproportionate, as "the redress shall be directed to a public purpose serving [their] collective interests". Thus, consumers would no longer be compensated, the actions brought on their behalf serving a more general interest decided

by private actors ("private attorney general"). This idea must be excluded, because **it must be ensured that any well-founded redress action ends up with a redress for consumers**. In addition, this provision would add a punitive character that would be contrary to the 2013 Recommendation and would go against the very purpose of the proposal (Art. 1.1).

- ***The oversight of the funding of qualified entities must be reinforced***: the synchronicity of the actions undertaken by qualified entities and the declarations relating to their sources of funding must be reviewed:

    - In order to avoid frivolous or abusive actions, **the financial standing must be assessed before any litigation**, not at "an early stage of the action" (Art. 7.1);
    - The financial capacity must be an **essential criterion of admissibility**, and therefore be subject of special attention **via the certification procedure**. Otherwise, there is a risk that courts will be unnecessarily clogged up and funding by third parties encouraged. Abuses of such systems are particularly well known in the United States and should be avoided.

  In fact, the phrasing of Article 7.2 suggests that those systems are likely to flourish in Europe: whilst the current proposal includes two provisions of the 2013 Recommendation (Art. 7.2. (a) & (b)), it omits the most important aspect, namely the prohibition for a sponsor to charge excessive interest on the funds made available. In addition, Article 15 allows the use of public funds to ensure the ability of any qualified entity to act, thereby **encouraging the numerous abuses** otherwise denounced (creation of "sockpuppets" to multiply specific disputes). These two points shall be corrected.

- ***Settlements must be encouraged***: in line with the 2013 Recommendation, alternative dispute resolution must be an integral part of the process, whilst **guaranteeing legal certainty**. **The settlement between the harmed consumers and the company must be definitive and applicable to all cases involving the same practice and the same company** (*res iudicata* effect). However, not only does Article 8 not give a definitive value to the settlement, but it also enables consumers to accept/reject it individually.

- ***"Forum shopping" should be avoided***: the proposal provides that courts must consider a final decision taken in another Member State as a "**rebuttable presumption** that an infringement has occurred" (Art. 10-2). This provision **encourages forum shopping.** This risk is further reinforced by two other elements: any qualified entity may seize courts or administrative authorities of another Member State and the latter accept all the national lists of qualified entities as proof of their legal standing to act (Art. 16-1). As described above, **in addition to the national certification system, the competent courts or authorities shall always review the adequacy between the acting qualified entity and the intended purpose of the action**.

- ***One-sided discovery rules must be limited***: in order to respect the principle of proportionality and the right to the presumption of innocence, and to avoid abusive actions, it is necessary to amend Article 13. The Commission has not defined any constraint on the amount or type of evidence that the trader should bring.

Without these minimum procedural safeguards, this proposal for a directive will be primarily useful for the interests of parties other than consumers and will therefore fail to serve the collective interest of consumers in the context of an economically efficient and unified market.

About Afep

Since 1982, Afep brings together large companies operating in France. The Association is based in Paris and Brussels. Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority. Afep has 120 members. More than 8.5 million people are employed by Afep companies and their annual combined turnover amounts to €3,000 billion.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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