

## AFEP position on the Commission proposal for a directive on representative actions for the protection of the collective interests of consumers

### IN VIEW OF TRIALOGUE NEGOTIATIONS

- Large French companies support a balanced collective redress system in the EU, a **harmonised procedure where the rights of the parties are balanced and where both sides are protected by effective and comprehensive safeguards**, drawing on the best practices of the existing judicial systems.
- The positions of the European Parliament and of the Council however largely differ, with a Council approach leading to fragmentation throughout the EU and offering no visibility on the modalities of actions.
- You will find below our **key recommendations for trialogue negotiations**.

#### 1. Stick to the Commission and Parliament approach on the definition of actions so as to avoid fragmentation

- Companies are **opposed to the Council position of having separate definitions for domestic and cross-border representative actions**, with criteria defined in accordance with national law for qualified entities for the purpose of domestic representative actions. This double-standard approach makes it impossible to achieve harmonisation of rules. **AFEP supports the European Parliament's approach of having identical criteria of certification of qualified entities for all (domestic or cross-border) representative actions**. Moreover, the conditions for the admissibility of cross-border actions defined by the Council are not clear (e.g. extent of the infringement, number of consumers concerned, common elements of the case...) which could lead to a lack of legal clarity.
- **Forum shopping should be avoided**. It might however flourish without minimum common criteria and safeguards. **The Council text, which does not define cross-border actions strictly, might lead to actions being brought in the most lenient jurisdictions**. It moreover does not prevent heterogeneous national specificities from being used in cross-border actions, in particular ad-hoc entities or non-certified "third party litigation fundings" (TPLF). **Their existence in a national civil procedure should not lead to mutual recognition by other Member States in which their existence is not allowed**.

#### 2. Better frame qualified entities and strongly control their funding

- Companies support the **additional common and reinforced criteria laid down by both the Council (for cross-border actions) and by the European Parliament to define qualified entities**. They particularly welcome the amendments requesting qualified entities to have consumer protection as their core interest, to prove their sufficient funding, personnel resources, expertise, and independence, and to disclose all information regarding their governance, activities, statuses and funding.
- 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 bring representative actions. **AFEP supports the suppression in the Parliament report of the possibility to create ad hoc entities** which could be exploited by plaintiff lawyers and litigation investors.
- Financing of the action must be governed by cumulative rules and should be part of the criteria of approval of the qualified entities. To limit abusive actions and to make all stakeholders accountable, the **loser pays principle must be expressly included and punitive damages should be prohibited**, as they incentivise excessive lawyer fees and frivolous actions. **AFEP therefore supports the European Parliament amendments on these issues, and in particular its prohibition of contingency fees**.

- 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. The certification of one qualified entity in one Member State and its presence on the list shared by this country with the Commission should not replace the **duty of examination** of the judge of the qualified entity compliance with all the criteria nor its right to **declare the action inadmissible where the criteria are not met**. AFEP supports amendments from the Parliament and the Council going in that direction.

### 3. Guaranty a balanced system between consumer protection and legal certainty for companies

- Actions must be brought for the benefit of consumers: qualified entities should not act on behalf of consumers without their consent. AFEP therefore supports the Parliament's and Council's wording requiring a mandate for citizens residing in another Member State. However, a **mandate should be required for any redress action** (opt-in principle) and AFEP urges that **such a requirement be considered as a possible admissibility criterion** when they exist in national civil procedures.
- 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. *The Parliament's approach should, therefore, be chosen.*
- A final decision taken in a Member State must be considered as **rebuttable and not irrefutable evidence** that an infringement has occurred in another Member State and should not prevent the court or administrative authority from reviewing whether the same infringement has occurred in the Member State concerned.

### 4. Additional remarks

- AFEP supports the precisions brought to the scope of the directive by the European Parliament, with concerned actions being brought against infringements **"with a broad consumer impact"** by traders.
- The European Parliament's amendments to information and evidence requirements making them adequate and proportionate are positive. **One-sided discovery rules must be limited**, and AFEP supports that communications from qualified entities must be factual and must also take into account the defendant's reputational rights and rights to business secrecy.

#### About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, 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 around 120 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 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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ANNEX to the AFEP position on the Commission proposal for a directive on representative actions for the protection of the collective interests of consumers in view of triologue negotiations

**3-COLUMN TABLE**

How to read this annex?

- In green: text supported by AFEP
- In red: text opposed by AFEP

Commission proposal	Council General Approach	European Parliament's Amendments
<b>Definition of actions (article 3 : Definitions)</b>		
(4) 'representative action' means an action for the protection of the collective interests of consumers to which the consumers concerned are not parties;	<i>(4a) 'domestic representative action' means a representative action brought by a qualified entity in the Member State in which the qualified entity is designated;</i> <i>(4b) 'cross-border representative action' means a representative action brought by a qualified entity in a Member State other than that in which the qualified entity is designated;</i>	(4) 'representative action' means an action for the protection of the collective interests of consumers to which the consumers concerned are not parties;
<b>Criteria for qualified entities (article 4; 4a Council text)</b>		
Article 4 <b>Qualified entities</b>	Article 4a <i>Designation of qualified entities for the purpose of cross-border representative actions</i>  Regarding the Council text, AFEP welcomes the additional criteria added in article 4a, but underlines that they should be applied to both domestic and cross-border actions	Article 4 <b>Qualified representative entities</b>
1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States	1. Member States shall ensure that entities, in particular consumer organisations, including those representing members from more than one Member State, are eligible to apply for the status	1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States

<p>in advance for this purpose and placed in a publicly available list.</p> <p>Member States shall designate an entity as qualified entity if it complies with the following criteria:</p> <p>(a) it is properly constituted according to the law of a Member State;</p> <p>(b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with;</p> <p>(c) it has a non-profit making character.</p>	<p><i>of qualified entity for the purpose of cross-border representative actions.</i></p> <p><i>2. Member States may designate public bodies as qualified entities for the purpose of cross-border representative actions.</i></p> <p><i>3. Without prejudice to paragraph 2, Member States shall designate an entity, at its request, as a qualified entity for the purpose of cross-border representative actions if it complies with all of the following criteria:</i></p> <p><i>(a) it is a legal person</i> properly constituted according to the law of the Member State <i>of designation 18 months prior to the designation request and can demonstrate 12 months of actual public activity in the protection of consumers' interests;</i></p> <p><i>(b) in accordance with its statutory purpose,</i> it has a legitimate interest in protecting consumer interests as provided by Union law covered by this Directive;</p> <p>(c) it has a non-profit making character;</p> <p><i>(ca) it possesses knowledge and skills in the field of its activity necessary for the bringing of cross-border representative actions in that field;</i></p> <p><i>(caa) it is in a sound and stable financial situation;</i></p> <p><i>(cb) it is not influenced by persons, other than consumers, who have an economic interest in the bringing of any representative action, in particular by traders, including in case of funding by third parties, and it has procedures to prevent such an influence;</i></p> <p><i>(cc) it discloses publicly by any appropriate means, in particular on its website, information on the above listed criteria and information about the source of funding of its activity in general.</i></p>	<p>in advance for this purpose and placed in a publicly available list.</p> <p><i>Member States or its courts shall designate within their respective territory at least one qualified representative entity for the purpose of bringing representative actions within the meaning of Article 3(4).</i></p> <p>Member States shall designate an entity as qualified <i>representative</i> entity if it complies with <i>all of</i> the following criteria:</p> <p>(a) it is properly constituted according to the law of a Member State;</p> <p>(b) <i>its statutes or another governance document and its continued activity involving the defence and protection of consumers interests demonstrate its</i> legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with;</p> <p>(c) it has a non-profit making character;</p> <p><i>(c a) it acts in a way that is independent from other entities and from persons other than consumers who might have an economic interest in the outcome of the representative actions, in particular from market operators;</i></p> <p><i>(c b) it does not have financial agreements with plaintiff law firms beyond a normal service contract;</i></p> <p><i>(c c) it has established internal procedures to prevent a conflict of interest between itself and its funders;</i></p> <p><i>Members States shall provide that the qualified representative entities disclose publicly, by appropriate means, such as on its website, in plain and intelligible language, how it is financed, its</i></p>
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<p>Member States shall assess on a regular basis whether a qualified entity continues to comply with these criteria. Member States shall ensure that the qualified entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph.</p>		<p><i>organisational and management structure, its objective and its working methods as well as its activities.</i></p> <p>Member States shall assess on a regular basis whether a qualified <b>representative</b> entity continues to comply with these criteria. Member States shall ensure that the qualified <b>representative</b> entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph. (...)</p>
<p>2. Member States may designate a qualified entity on an ad hoc basis for a particular representative action, at its request, if it complies with the criteria referred to in paragraph 1.</p>	<p>Article 4</p> <p><b>4b. Member States may designate a qualified entity, at its own request, on an ad hoc basis for the purpose of a particular representative action.</b></p> <p>Note: as domestic action should not be differentiated</p>	<p><i>deleted</i></p>
<p>5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the right of the court or administrative authority to examine whether the purpose of the qualified entity justifies its taking action in a specific case in accordance with Article 5(1).</p>		<p>5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the <b>duty</b> of the court or administrative authority to examine whether the purpose of the qualified entity justifies its taking action in a specific case in accordance with <b>Article 4 and</b> Article 5(1).</p>
<p><b>Consumers' mandate (article 6; 5b Council text)</b></p>		
<p><i>Article 6</i> <b>Redress measures</b></p>	<p><i>Article 5b</i> <b>Redress measures</b></p>	<p><i>Article 6</i> <b>Redress measures</b></p>
<p>1. For the purposes of Article 5(3), Member States shall ensure that qualified entities are 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. A Member State may require the mandate of the individual consumers concerned before a</p>	<p><b>1. A redress measure shall oblige the trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.</b></p> <p><b>2. Member States shall establish rules on how and at which stage the individual consumers concerned by the action may explicitly or tacitly</b></p>	<p>1. For the purposes of Article 5(3), Member States shall ensure that qualified <b>representative</b> entities are 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. A Member State may <b>or may not</b> require the</p>

<p>declaratory decision is made or a redress order is issued. (...)</p>	<p><i>express their will within the appropriate time limits, after that action has been brought, to be or not to be represented by the qualified entity within the representative action for redress measures and to be bound by the outcome of the action.</i></p> <p><i>3. Notwithstanding paragraph 2, Member States shall ensure that individual consumers, who are not habitually resident in the Member State of the court or administrative authority before which the representative action has been brought, have to explicitly express their will to be represented in that action in order to be bound by the outcome of the action.</i></p>	<p>mandate of the individual consumers concerned before a redress order is issued.</p> <p><i>1a. If a Member State does not require a mandate of the individual consumer to join the representative action, this Member State shall nevertheless allow those individuals who are not habitually resident in the Member State where the action occurs, to participate in the representative action, in the event they gave their explicit mandate to join the representative action within the applicable time limit.</i></p>
<p><b>Funding (article 7)</b></p>		
<p>1. The qualified entity seeking a redress order as referred in Article 6(1) shall <b>declare at an early</b> stage of the action <b>the source of the funds</b> used for its activity in general and the funds that it uses to support the action. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.</p>	<p><i>deleted</i></p>	<p>1. The qualified <b>representative</b> entity seeking a redress order as referred in Article 6(1) shall <b>submit to the court or administrative authority at the earliest stage of the action a complete financial overview, listing all sources of funds</b> used for its activity in general and the funds that it uses to support the action <b>in order to demonstrate the absence of conflict of interest</b>. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.</p>
<p>2. Member States shall ensure that in cases where a representative action for redress is funded by a third party, it is prohibited for the third party: (a) to influence decisions of the qualified entity in the context of a representative action, including on settlements; (...)</p>	<p><i>deleted</i></p>	<p><i>2. The representative action may be declared inadmissible by the national court if it establishes that the funding by the third party would:</i> (a) to influence decisions of the qualified <b>representative</b> entity in the context of a representative action, including <b>the initiation of representative actions and decisions</b> on settlements; (...)</p>



<p>3. Member States shall ensure that courts and administrative authorities <i>are empowered to</i> assess the circumstances referred to in paragraph 2 <i>and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case.</i></p>	<p><i>deleted</i></p>	<p>3. Member States shall ensure that courts and administrative authorities <i>assess the absence of conflict of interest referred to in paragraph 1 and the circumstances referred to in paragraph 2 at the stage of admissibility of the representative action and at a later stage during the court proceedings if the circumstances only yield then.</i></p>
		<p><i>3 a. Member States shall ensure that the court or administrative authority have the authority to dismiss manifestly unfounded cases at the earliest possible stage of proceedings.</i></p>
	<p><b>Article 4b</b> <b>Bringing of cross-border representative actions</b></p>	
	<p><i>3. The courts or administrative authorities shall accept the list referred to in Article 4a(3b) as proof of the legal capacity of the qualified entity to bring a cross-border representative action, without prejudice to their right to examine whether the statutory purpose of the qualified entity justifies the action in a specific case.</i> <i>Notwithstanding the first subparagraph, Member States may set out rules according to which its courts or administrative authorities have the competence to examine whether the qualified entity bringing a cross-border representative action for redress is funded by a third party having an economic interest in the outcome of the action and if so, reject the legal capacity of the qualified entity for the purpose of that specific cross-border representative action.</i></p>	
	<p><i>4. When bringing a cross-border representative action, the qualified entity shall confirm to the court or the administrative authority before which the action is brought that it complies with the criteria listed in Article 4a(3). However,</i></p>	

	<i>Member States may take measures to ensure that the court or administrative authority has the competence to examine the compliance with the criteria if justified concerns are raised in that regard.</i>	
	<i>5. Member States shall take the necessary measures to address situations where the information referred to in paragraph 4 regarding compliance with the criteria is not correct. Those measures may include a possibility for the court or administrative authority to dismiss the action. Such a dismissal shall not affect the rights of the consumers concerned by the action.</i>	
	<i>6. The courts or administrative authorities before which the action is brought shall assess the admissibility of a specific cross-border representative action in accordance with national law.</i>	
<b>Contingency fees (article 15a European Parliament)</b>		
		<i>Article 15a Legal representation and fees</i>
		<i>Member States shall ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation, unnecessary from the point of view of the interest of any of the parties. In particular, Member States shall prohibit contingency fees</i>
<b>Settlements (article 8)</b>		
<i>6. Individual consumers concerned shall be given the possibility to accept or to refuse to be bound by settlements referred to in paragraphs 1, 2 and 3. The redress obtained through an approved settlement in accordance with paragraph 4 shall be without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law.</i>	<i>6. Member States may set out rules according to which individual consumers concerned by the action and by the subsequent settlement are given the possibility to accept or to refuse to be bound by settlements referred to in paragraph 2. The remedies obtained through an approved settlement in accordance with paragraph 4 shall be without prejudice to any additional remedies</i>	<i>6. The redress obtained through an approved settlement in accordance with paragraph 4 shall be binding upon all parties without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law.</i>



	<i>available</i> under Union or national law <i>which were not subject to that settlement.</i>	
<b>Effects of final decisions (article 10)</b>		
1. Member States shall ensure that an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order referred to in Article 5(2)(b), is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement.	1. Member States shall ensure that <i>a final decision of a court or an administrative authority of any Member State establishing</i> an infringement harming collective interests of consumers <i>can be used as evidence of the existence</i> of that infringement for the purposes of any other actions seeking redress before their national courts <i>or administrative authorities</i> against the same trader for the same infringement, <i>in accordance with national law on evaluation of evidence.</i>	1. Member States shall ensure that a final decision of an administrative authority or a court, including a final injunction order referred to in Article 5(2)(b), <i>considered as evidence establishing the existence or non-existence</i> of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same <i>facts providing that the same damage cannot be compensated twice to the same consumers concerned.</i>
<b>Broad impact of infringements (article 2: Scope)</b>		
1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that harm or may harm the collective interests of consumers. It shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded.	1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I, <i>also as transposed into national law</i> , that harm or may harm the collective interests of consumers. <i>This Directive is without prejudice to the Union law listed in Annex I.</i> It shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded.	1. This Directive shall apply to representative actions brought against infringements <i>with a broad consumer impact</i> by traders of provisions of the Union law listed in Annex I <i>that protect</i> the collective interests of consumers. It shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded.
<b>Punitive damages (article 6: Redress measures)</b>		
		<i>4b. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, shall be prohibited. For instance, the compensation awarded to consumers harmed collectively shall not exceed the amount owed by the trader in accordance with the applicable national or Union law in order</i>

		<i>to cover the actual harm suffered by them individually.</i>
<b>Loser pay principle (article 7a European Parliament)</b>		
		<i>Article 7 a Loser pay principle</i>
		<i>Member States shall ensure that the party that loses a collective redress action reimburses the legal costs borne by the winning party, subject to the conditions provided for in national law. However, the court or administrative authority shall not award costs to the unsuccessful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.</i>
<b>Information on representative actions (article 9)</b>		
		<i>2 b. Member States shall ensure that public communications by qualified entities about claims are factual and take into account both the right for consumers to receive information and defendants' reputational rights and rights to business secrecy.</i>
<b>Disclosures of evidence (article 13)</b>		
Member States shall ensure that, at the request of <i>a qualified entity</i> that has presented reasonably available facts and <i>evidence</i> sufficient to support <i>the representative action</i> , and has indicated further evidence which lies in the control of the <i>defendant</i> , the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by <i>the defendant</i> , subject to the applicable Union and national rules on confidentiality.	Member States shall ensure that, at the request of a qualified entity that has presented reasonably available facts and evidence sufficient to support the representative action, and has indicated further evidence which lies in the control of the defendant <i>or a third party</i> , the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by the defendant <i>or the third party</i> , subject to the applicable Union and national rules on confidentiality <i>and proportionality</i> . <i>Member States shall ensure that a court or an administrative authority is able, upon request of the defendant, to equally order the claimant or a</i>	Member States shall ensure that, at the request of <i>one of the parties</i> that has presented reasonably available facts and sufficient <i>evidence and a substantive explanation</i> to support <i>its views</i> , and has indicated further <i>specific and clear defined</i> evidence which lies in the control of the <i>other party</i> , the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by <i>this party, as narrowly as possible on the basis of reasonably available facts</i> , subject to the applicable Union and national rules on confidentiality. <i>The order must be adequate and proportionate in the respective case and must not</i>

	<p><i>third party to disclose relevant evidence, in accordance with national procedural rules.</i></p>	<p><i>create an imbalance between the two parties involved.</i></p>
		<p><i>1a. Member States shall ensure that the courts limit the disclosure of evidence to what is proportionate. To determine whether any disclosure requested by a representative entity is proportionate, the court shall consider the legitimate interest of all parties concerned, namely to which extent the request for disclosure of evidence is supported by available facts and evidence and whether the evidence the disclosure of which is requested contains confidential information.</i></p>