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NOTE

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Subject:	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 - Preparation for the trilogue

I. INTRODUCTION

1. On 11 April 2018, the Commission transmitted the above-mentioned proposal to the European Parliament and to the Council. This proposal is part of the 'New Deal for Consumers' package which consists of two Directives¹ and a horizontal Communication² and aims to ensure that consumers fully benefit from their rights under Union law and compliant traders from fairer competition conditions.

¹ Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019).

² Cf. doc. 7875/18.

2. This draft directive proposes to modernise and replace the Injunctions Directive³ by providing redress measures as well as injunction measures in case of infringements of Union law affecting a group of consumers. More specifically, the proposal allows qualified entities to defend the collective interests of consumers through the bringing of representative actions against infringing traders, including traders domiciled in another Member State. The proposal provides for redress measures which include financial compensation and also introduces safeguards against the risk of abusive litigation (e.g. by requiring qualified entities to be transparent on sources of funding).
3. The European Economic and Social Committee issued its opinion on 20 September 2018.⁴
4. The responsible committee in the European Parliament is the Committee on Legal Affairs (JURI). Mr Geoffroy Didier (EPP – FR) is the rapporteur. The European Parliament adopted its position at first reading on 26 March 2019⁵ and confirmed the decision to enter into interinstitutional negotiations on 14 of January 2020.
5. The proposal was examined during the Bulgarian, the Austrian and the Romanian Presidencies. The Finnish Presidency submitted a compromise package to the Council (Competitiveness) on 28 November 2019 that was adopted as a general approach. The main changes to the Commission proposal were a clear distinction between domestic and cross-border representative actions and a better safeguarding of the principle of procedural autonomy.

II. PARTIAL PRESIDENCY COMPROMISE

6. The negotiations with the European Parliament began on 14 January 2020 with an opening trilogue and five technical meetings were held since. The next trilogue will take place on 2 March 2020. On 13 January 2020 the Presidency examined the EP position at a meeting of the Working Party on Consumer Protection. At the Working Party meeting of 27 January 2020 delegations were debriefed on ongoing negotiations with the EP. At the Working Party meeting of 18 February 2020 the Presidency presented a partial compromise that was generally well received by delegations.

³ Directive 2009/22/EC on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009).

⁴ EESC INT/853.

⁵ P8_TA(2019)0222.

7. The partial compromise aims at modifying the general approach on articles 4, 4a and 7 on qualified entities and their funding. The aim is to meet some of the EP concerns reflected in their first reading opinion such as general criteria for qualified entities and harmonised safeguards on the funding of such entities to avoid abusive litigation. The changes proposed by the Presidency also aim at bringing the text structure closer to the Commission proposal in an effort to facilitate ongoing negotiations with the EP.
8. To this end, the Presidency proposes the following changes:
- streamlining article 4 to cover qualified entities in both domestic and cross-border actions. Since this article now covers the provisions of article 4a of the general approach, such article 4a would be deleted.
 - a new article 4-a containing the provisions on information and monitoring of qualified entities that were previously in article 4 of the general approach (to avoid a long article 4 after the new additions).
 - reintroducing article 7 of the Commission proposal on funding of qualified entities (deleted in the general approach). This article aims at preventing conflicts of interest and minimising the risk of abusive litigation in actions for redress when third party funding is involved.

IV. CONCLUSION

9. The Presidency partial compromise text set out in the annex reflects the continuous efforts of the Presidency and the Member States at bringing the text of both colegislators closer on the above provisions without compromising the principles defended in the general approach. The Presidency partial compromise text is in the 4th column of the tables in the annex and the changes compared to the Commission proposal are highlighted in **bold** and ~~striketrough~~.
10. Consequently, the Permanent Representatives Committee is invited to examine and endorse the Presidency partial compromise text as set out in the annex to this note with a view to adapt the negotiating mandate for the incoming informal trilogues with the European Parliament.

Articles 4 and 4-a and recitals 10c and 11e

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
Article 4				
75	Article 4 Qualified entities	Article 4 Qualified <u>representative</u> entities AM 41	Article 4 Qualified entities for the purpose of domestic representative actions	Article 4 Qualified entities
Article 4(1), first subparagraph				
76	1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list.	1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list <u>or their 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).</u> AM 42	1. Member States shall ensure that domestic representative actions can be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list.	1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the by Member States in advance for this purpose and placed in a publicly available list.
76a				

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
				2. Member States shall ensure that entities, in particular consumer organizations, including those representing members from more than one Member State, are eligible to be designated for the status of qualified entity for the purpose of bringing domestic actions or cross-border representative actions, or both.
Article 4(1), second subparagraph, introductory part				
77	Member States shall designate an entity as qualified entity if it complies with the following criteria:	Member States shall designate an entity as qualified <u>representative</u> entity if it complies with <u>all of</u> the following criteria: AM 42	deleted Moved to Article 4a, paragraph 3	3. Member States shall designate an entity, at its request, as a as-qualified entity for the purpose of bringing cross-border representative actions, if it complies with all of the following criteria:
Article 4(1), second subparagraph, point(a)				
78	(a) it is properly constituted according to the law of a Member State;	(a) it is properly constituted according to the law of a Member State;	deleted Moved to Article 4a, paragraph 3	(a) it is a legal person properly constituted according to the law of at the Member State of its designation 18

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				months prior to the designation request and can demonstrate 12 months of actual public activity in the protection of consumers' interest;
Article 4(1), second subparagraph, point(b)				
79	(b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with;	(b) it has a <u>its statutes or another governance document and its continued activity involving the defence and protection of consumers interests demonstrate its</u> legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with; AM 43	deleted Moved to Article 4a, paragraph 3	(b) its statutory purpose and its continued activity demonstrates that it has a legitimate interest in ensuring that provisions of protecting consumer interests as provided by Union law covered by this Directive are complied with;
Article 4(1), second subparagraph, point(c)				
80	(c) it has a non-profit making character.	(c) it has a non-profit making character.	deleted Moved to Article 4a, paragraph 3	(c) it has a non-profit making character-;
Article 4(1), second subparagraph, point(ca)				
80a				

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
		<u>(ca) 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;</u> AM 44		
80aa				(d) it is in a sound and stable financial situation;
Article 4(1), second subparagraph, point(cb)				
80b		<u>(cb) it does not have financial agreements with plaintiff law firms beyond a normal service contract;</u> AM 45		
Article 4(1), second subparagraph, point(cc)				
80c		<u>(cc) it has established internal procedures to prevent a conflict of interest between itself and its funders;</u>		(e) it has established procedures for preventing influence by persons, other than consumers, who have an economic interest in the

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		AM 46		bringing of any representative action, in particular by traders, including in case of funding by third parties, and preventing any conflict of interest between itself and its funders;
Article 4(1), second subparagraph, introductory part a				
80d		<u>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 organisational and management structure, its objective and its working methods as well as its activities.</u> AM 47		(f) it discloses publicly by any appropriate means, in particular on its website, in plain and intelligible language, information demonstrating compliance with the above listed criteria and information about the sources of its funding, its organisational and management structure, membership, objectives and activities.
80da				4. Member States may establish criteria for the designation of qualified entities for the purpose of bringing domestic

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				representative actions, provided that these criteria do not hamper the effective functioning of representative actions as set out by this Directive.
80db				Member States may decide that the criteria set out in paragraph 3 apply also to the designation of qualified entities for the purpose of bringing domestic representative actions.
80dc				5. Compliance by a qualified entity with the criteria referred to in paragraphs 3 and 4 shall be without prejudice to the right of courts or administrative authorities to examine whether the statutory purpose of a qualified entity justifies it bringing representative action in a specific case.
Article 4(1), third subparagraph				

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
81	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.	Member States shall assess on a regular basis whether a qualified <u>representative</u> entity continues to comply with these criteria. Member States shall ensure that the qualified <u>representative</u> entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph. AM 47	deleted Moved to Article 4a, paragraph 4	deleted
Article 4(1), third subparagraph a				
81a		<u>Member States shall establish a list of representative entities complying with the criteria listed in paragraph 1 and make it publicly available. They shall communicate the list to the Commission updated where necessary.</u> AM 47		
Article 4(1), third subparagraph b				
81b		<u>The Commission shall publish the list of representative entities received from the Member States</u>		

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
		<u>on a publicly accessible online portal.</u> AM 47		
Article 4(1a)				
81c		<u>1a. Member States may provide that public bodies already designated before the entry into force of this Directive in accordance with national law shall remain eligible for the status of representative entity within the meaning of this Article.</u> AM 48		
Article 4(2)				
82	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.	deleted AM 49	deleted Moved to paragraph 4b	26. Member States may designate a qualified entity, at its own request, on an ad hoc basis for a particular domestic representative action, at its request, if it complies with the criteria referred to in paragraph 1 for qualified entities as provided for in national law.

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Article 4(3)				
83	3. Member States shall ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State.	3. Member States shall ensure that <u>consumer organisations meeting the criteria listed in paragraph 1 and</u> in particular consumer organisations and independent public bodies are eligible for the status of qualified <u>representative</u> entity. Member States may designate as qualified entities consumer organisations that represent members from more than one Member State. AM 50	3. Member States shall ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entity, including those representing consumers from more than one Member State may designate as qualified entities consumer organisations that represent members from more than one Member State, are eligible to apply for the status of qualified entity in accordance with national law.	37. Member States shall ensure that in particular consumer organisations and independent Notwithstanding paragraphs 3 and 4, Member States may designate public bodies already designated as qualified entities for the status of qualified entity purpose of bringing representative actions. Member States may designate provide that public bodies already designated as qualified entities consumer organisations that represent members from more than one Member State in the meaning of Directive 2009/22/EC shall remain eligible as qualified entities.
Article 4(4)				
84	4. Member States may set out rules specifying which qualified entities may seek all of the measures referred to in Articles 5 and 6, and which qualified entities	deleted AM 51	deleted	deleted

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
	may seek only one or more of these measures.			
Article 4(4a)				
84a			(4a) Member States may designate public bodies as qualified entities.	
Article 4(4b)				
84b			(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. Moved from paragraph 2	
Article 4(4c)				
84c			(4c) Information on qualified entities designated in advance for the purpose of any representative action shall be made available to the public.	
Article 4(5)				
85				

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
	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).	5. The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the right <u>duty</u> 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 <u>4 and Article 5(1).</u> 5(1). AM 52	deleted	deleted
Article 4-a				
85-a				Article 4-a Information and monitoring of qualified entities
85-b				1. Member States shall communicate to the Commission a list of the qualified entities designated in advance for the purpose of bringing cross-border representative actions, including the name and purpose of those qualified entities no later than on... [one year after the date of

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
				transposition] and whenever there are changes to that list. Member States shall make that list publicly available.
85-c				The Commission shall make a compiled list of these qualified entities publicly available. The list shall be updated annually and whenever changes are communicated to the Commission.
85-d				2. Member States shall ensure that information on qualified entities designated in advance for the purpose of bringing domestic representative actions is made available to the public.
85-e				3. Member States shall assess at least every five years whether qualified entities continue to comply with the criteria referred to in Article

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				4(3). Member States shall ensure that the qualified entity loses its status if it no longer complies with one or more of the criteria.
85-f				4. If a Member State or the Commission raises concerns regarding the compliance by a qualified entity with the criteria laid down in Article 4(3), the Member State that designated that entity shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with.
85-g				5. Member States shall designate national contact points for the purpose of paragraph 4 and communicate the name and contact details of those contact points to the Commission. The Commission shall compile a list of designated contact

	Commission Proposal	EP Mandate	Council General Approach	Partial Presidency compromise
				points and make that list available to the Member States.

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Recital 10c				
19c			(10c) Member States could set out rules to limit the right of a qualified entity to bring a cross-border representative action to the area of activity of that entity. The rules could provide, for example, that qualified entities protecting consumer interests in the field of food safety or passenger rights could only bring cross-border representative actions that are related to these purposes.	deleted and moved partly to recital 11e
Recital 11e				
20e			(11e) The mutual recognition of the legal capacity of qualified entities designated for the	(11e) The mutual recognition of the legal capacity of qualified entities

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
			purpose of cross-border representative actions should be ensured. The identity of these organisations and public bodies should be communicated to the Commission and the Commission should make that list publicly available. Inclusion on the list should serve as proof of the legal capacity of the organisation or public body bringing the action. This should be without prejudice to the right to examine whether the purpose of the qualified entity justifies the action in a specific case.	designated for the purpose of cross-border representative actions should be ensured. The identity of these organisations and public bodies should be communicated to the Commission and the Commission should make that list publicly available. Inclusion on the list should serve as proof of the legal capacity of the organisation or public body bringing the action. This should be without prejudice to the right to examine whether the purpose of the qualified entity justifies the action in a specific case, for example, that qualified entities protecting consumer interests in the field of food safety or passenger rights could only bring representative actions that are related to such purposes.

Article 7 and recital 25

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
Article 7				
102	Article 7 Funding	Article 7 Funding <u>Admissibility of a representative action</u> AM 68	deleted	Article 7 Funding of representative actions for redress
Article 7(1)				
103	1. The qualified entity seeking a redress order as referred in Article 6(1) shall declare at an early stage of the action the source of the funds 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.	1. The qualified <u>representative</u> entity seeking a redress order as referred in Article 6(1) shall <u>submit to the court or administrative authority at the earliest</u> declare at an early stage of the action <u>a complete financial overview, listing all sources of the</u> source of the funds used for its activity in general and the funds that it uses to support the action <u>in order to demonstrate the absence of conflict of interest</u> . 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.	deleted	deleted

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		AM 69		
Article 7(2), introductory part				
104	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:	2. Member States shall ensure that in cases where a <u>The</u> representative action for redress is funded by a third party, it is prohibited for <u>may be declared inadmissible by the national court if it establishes that the funding by</u> the third party <u>would</u> : AM 70	deleted	21. 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 <u>insofar as allowed in accordance with national law, conflicts of interests are prevented, including with regard to decisions on settlements.</u>
104a				2. To that end, Member States shall in particular ensure that:
Article 7(2), point(a)				
105	(a) to influence decisions of the qualified entity in the context of a representative action, including on settlements;	(a) to influence decisions of the qualified <u>representative</u> entity in the context of a representative action, including <u>the initiation of representative actions and decisions</u> on settlements;	deleted	(a) to influence decisions of the qualified entity <u>entities</u> in the context of a representative action are not unduly influenced by a third party in a way that would be

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
		AM 71		detrimental to the collective interests of consumers concerned by the action, including decisions on settlements;
Article 7(2), point(b)				
106	(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;	(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;	deleted	(b) to provide financing for a collective action that representative action is not brought against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;
Article 7(3)				
107	3. Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 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.	3. Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances <u>assess the absence of conflict of interest</u> referred to in paragraph 2 and <u>accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case</u> <u>1 and the circumstances referred to in</u>	deleted	3. Member States shall ensure that courts and administrative authorities are empowered to assess compliance with paragraphs 1 and 2 at the start of the action and at any later stage of the proceedings in case any justified doubts arise in that regard. To that end, qualified entities shall disclose to the court or administrative authority a

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
		<u>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.</u> AM 72		financial overview listing all sources of funds used to support the actionthe circumstances referred to in paragraph 2 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.
Article 7(3a)				
107a		<u>3a. 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.</u> AM 73		
107aa				4. Member States shall ensure that courts and administrative authorities are empowered to take appropriate measures when acting in accordance with paragraphs 1 and 2. If the legal standing of the

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				qualified entity is rejected in a specific action, such a rejection shall not affect the rights of the consumers concerned by the action.

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Recital 25				
34	(25) Qualified entities should be fully transparent about the source of funding of their activity in general and regarding the funds supporting a specific representative action for redress in order to enable courts or administrative authorities to assess whether there may be a conflict of interest between the third party funder and the qualified entity and to avoid risks of abusive litigation as well as to assess whether the funding third party has sufficient resources in order to meet its financial commitments to the qualified entity. The information provided by the qualified entity to the court or administrative authority overseeing the representative	(25) Qualified <u>representative</u> entities should be fully transparent about the source of funding of their activity in general and regarding the funds supporting a specific representative action for redress in order to enable courts or administrative authorities to assess whether there may be a conflict of interest between the third party funder and the qualified entity and to avoid risks of abusive litigation as well as to assess whether the funding third party <u>qualified entity</u> has sufficient resources in order to <u>represent the best interests of consumers concerned and to support all necessary legal costs should the action fail</u> meet its financial commitments to the	deleted	(25) Qualified entities should be fully transparent about the source of funding of their activity in general and regarding the funds supporting a specific representative action for redress in order to enable courts or administrative authorities to assess whether there may be a conflict of interest between the third party funder and the qualified entity and to avoid risks of abusive litigation as well as to assess whether the funding third party has sufficient resources in order to meet its financial commitments to the qualified entity . The information provided by the qualified entity to the court or administrative

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
	action should enable it to assess whether the third party may influence procedural decisions of the qualified entity in the context of the representative action, including on settlements and whether it provides financing for a representative action for redress against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant. If any of these circumstances is confirmed, the court or administrative authority should be empowered to require the qualified entity to refuse the relevant funding and, if necessary, reject standing of the qualified entity in a specific case.	qualified entity. The information provided by the qualified entity <u>at the earliest stage of proceedings</u> to the court or administrative authority overseeing the representative action should enable it to assess whether the third party may influence procedural decisions of the qualified entity <u>in general and</u> in the context of the representative action, including on settlements and whether it provides financing for a representative action for redress against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant. If any of these circumstances is confirmed, the court or administrative authority should <u>must</u> be empowered to require the qualified entity to refuse the relevant funding and, if necessary, reject standing of the qualified entity in a specific case. <u>Member States should prevent law firms from establishing qualified representative entities. Indirect financing of the action through donations, including traders donations in the framework of a corporate social responsibility</u>		authority overseeing the representative action should enable it to assess whether the third party may unduly influence procedural decisions of the qualified entity in the context of the representative action, including on settlements in a way that would be detrimental to the collective interest of consumers concerned and whether it provides financing for a representative action for redress against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant. If any of these circumstances is confirmed, the court or administrative authority should be empowered to require take appropriate measures, such as requiring the qualified entity to refuse or change the relevant funding and, if necessary, reject rejecting the legal standing of the qualified entity in a specific case action. Such a rejection should not affect the rights of the consumers concerned by the

	Commission Proposal	EP Mandate	Council General Approach	Parcial Presidency compromise
		<u><i>initiatives, shall be eligible for third party financing provided that it complies with the requirements on transparency, independence and absence of conflict of interest listed in Article 4 and Article 7.</i></u> AM 18		action.