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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of 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
– Draft statement of the Council's reasons

I. INTRODUCTION

On 12 April 2018, the Commission transmitted to the Council the above proposal¹ based on Article 114 of TFEU as well as a communication on ‘A New Deal for Consumers’ and another proposal for a Directive on the modernisation of consumer protection rules² (which was adopted in 2019).

This proposal for a Directive modernises and replaces the Injunctions Directive³ by providing redress measures as well as injunction measures in case of infringements of Union law affecting a group of consumers.

The Economic and Social Committee issued its opinion on 20 September 2018⁴. The European Committee of the Regions also issued its opinion on 10 October 2018⁵.

The European Parliament (EP) adopted its position at first reading in March 2019⁶, proposing 108 amendments to the Commission proposal. After the 2019 EP elections, the rapporteur, Geoffroy DIDIER (EPP, FR) was reappointed. The JURI Committee, responsible for the proposal, decided on 9 January 2020 to open negotiations with the Council on the basis of the EP's first reading position.

Examination of the proposal by the Working Party on Consumer Protection and Information (WP) began in April 2018. The Commission's impact assessment was examined during the first WP on this dossier. This examination showed that delegations were broadly satisfied with the methods and criteria applied by the Commission in its impact assessment.

At its meeting on 28 November 2019, the Council (Competitiveness) agreed on a general approach⁷, thus providing the Presidency with the mandate to negotiate with the EP.

¹ Docs. 7877/18 + ADD 1 - 5.

² Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p.7).

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

⁴ OJ C 440, 6.12.2018, p.66.

⁵ OJ C 461, 21.12.2018, p.232.

⁶ Doc. 7714/19.

⁷ Doc. 14210/19 + ADD 1.

Three informal trilogues were held on 14 January, 2 March and 22 June 2020. At the last trilogue, an overall compromise package was provisionally agreed between the co-legislators.

Following the adoption of the general approach, the Permanent Representatives Committee was informed of the progress of negotiations by the Presidency on 15 January, 26 February, 4 March, 17 and 24 June 2020. On 30 June 2020, after analysis of the final compromise text with a view to an agreement, the Permanent Representatives Committee confirmed the political agreement⁸ reached on 22 June 2020 between the co-legislators.

On 7 July 2020, the EP's JURI Committee endorsed the text. On the same day, the Chair of the JURI Committee sent a letter to the Chair of the Permanent Representatives Committee indicating that, subject to legal-linguistic verification by both institutions, he would recommend that the JURI Committee and the Plenary approve at second reading the Council's first reading position without amendments.

On this basis, on 22 July 2020 the Permanent Representatives Committee advised the Council to approve the political agreement⁹, which was confirmed on 21 September 2020 by the Council (Agriculture and Fisheries).

II. OBJECTIVE

This Directive aims to reinforce consumer and business confidence in the internal market by ensuring fairer competition and strengthening the effective enforcement of Union law in the field of consumer protection. More specifically, the proposal enables qualified entities, designated by the Member States, to bring representative actions for the purpose of both injunctive and redress measures in case of infringements of Union law affecting a group of consumers. It replaces the current Injunctions Directive and responds to the need for a horizontal EU approach to collective redress, based on a common set of principles respectful of national legal traditions and providing safeguards against possible risks of abuse.

⁸ Doc. 9059/20.

⁹ Doc. 9592/20 + COR 1 + ADD 1.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

1. Subject matter and scope (Articles 1 and 2, as well as Annex I)

The subject matter of the Directive, which is to ensure that representative actions aiming to protect the collective interests of consumers are available in all Member States, is clarified, as well as its relation with existing rules of private international law. The Council supported the EP's safeguard that the Directive should not constitute grounds for reducing consumer protection in the fields covered by the legal acts listed in Annex I. That list was updated and covers areas such as financial services, travel and tourism, energy, health, telecommunications and data protection.

2. Distinction between domestic and cross border actions (Articles 4 and 6, as well as the corresponding definitions in Article 3)

For the Council it was important to introduce common and stricter criteria for designating qualified entities for the purpose of cross border actions and ensuring their mutual recognition. In line with the EP's suggestions, the criteria for designating qualified entities for the purpose of domestic actions have to be consistent with the Directive's objectives.

3. Funding of representative actions (Articles 4 and 10)

The EP had concerns as to the transparency of the funding of qualified entities and also aimed to reinforce the rules on the prevention of conflicts of interest. This led to changes agreed by the Council on more detailed designation criteria and on third-party funding of actions for redress. Consequently, Member States have to ensure that conflicts of interest are prevented and that funding by third parties does not divert the representative action away from the protection of the collective interests of consumers. In case of justified doubts, qualified entities may have to disclose a financial overview of their funding to the court or administrative authority.

4. Functioning of representative actions (Articles 7, 8, 9 and 12)

For the Council, it was important to further clarify the functioning of representative actions in order to facilitate the transposition and application of the Directive, namely by introducing a separate article on injunctive measures. For the EP, the loser-pays principle was key to preventing abusive litigation. A number of changes and clarifications were made in this sense, including the removal of the need for a prior final decision on injunction for issuing redress measures.

5. Information on representative actions (Article 13)

For the EP, it was important to reinforce the provisions on information addressed to consumers regarding representative actions. The Council supported this objective and considered that such reinforcement should be done in a proportionate manner. These provisions were adapted accordingly.

6. Assistance for qualified entities (Article 20)

For the EP, it was crucial to strengthen and detail the provisions on the assistance available for qualified entities. The Council agreed that Member States would take measures aiming to ensure that costs do not prevent qualified entities from seeking injunctive or redress measures.

7. European ombudsman (Article 23(3))

As requested by the EP, the text requires the Commission to carry out an evaluation of whether cross-border representative actions could be best addressed at Union level by establishing a European ombudsman for representative actions for injunctive measures and redress measures.

8. Deadlines for transposition and application of the directive and transitional provisions (Articles 22 and 24)

Given the complexity of the proposal, in particular for the Member States that do not have a system for representative actions in place, it was important for the Council to allow Member States more time to transpose and apply the Directive (24 and 30 months respectively).

IV. CONCLUSION

The Council's position at first reading reflects the fair and balanced compromise reached in the negotiations between the Council and the European Parliament, facilitated by the Commission. After long discussions on a collective redress mechanism at European level, consumers and traders have finally been provided with an EU-wide framework that will improve compliance with consumer protection rules and contribute to a level playing field among businesses.
