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General Secretariat

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Subject: Draft 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 (2018/0089 (COD))
- Adoption of the Council's position at first reading and of the statement of the Council's reasons
- Outcome of the written procedure initiated by CM 4311/20

Delegations are informed that the written procedure, opened by CM 4311/20 of Wednesday, 28 October 2020 was completed on Wednesday, 4 November 2020 and that all delegations voted in favour of, except for Belgium, Estonia, Germany and Lithuania that abstained, the adoption of the Council's position at first reading on the draft 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, as set out in document 9573/20 and the statement of the Council's reasons as set out in the ADD 1 to that document.

The required qualified majority has been reached. Therefore, the above position of the Council at first reading and the statement of the Council's reasons are adopted.

The statements by Ireland and Estonia are reproduced in the Annex to this CM and will be included in the summary of acts adopted by the written procedure as statements to be entered in the Council minutes, in accordance with the third subparagraph of Article 12(1) of the Council's Rules of Procedure.

Statement by Ireland

Ireland has two main areas of concern with the text of the Directive.

Firstly, in relation to article 10.1 of the text which deals with funding of representative actions for redress by 3rd parties who are not necessarily associated with the request to launch a representative action. Funding of civil litigation by 3rd parties is not permitted in the Irish legal system and the introduction of this principle for representative actions presents us with significant legal challenges. We flagged our concerns with this issue during the discussions on the file both at the attaché working party meetings and at COREPER 1 on 17 June last. We indicated that we would have considerable difficulties with accepting this wording due to the nature of our common law system.

We now have to deal with these implications in applying this article as part of the transposition process. However, we would like this Committee to take note that the domestic challenges which we will face will require extensive analysis, consultation and making changes to our legal system in due course. These changes will not be completed quickly or easily, and it may well take longer than the transposition period allowed for in the text of the Directive. On a wider point, we believe that we are being placed at a disadvantage at EU level in the context of negotiations on legal instruments such as this Directive where we operate on a common law system rather than a codified judicial system. Such issues will arise again, and we would like to believe that our concerns with making fundamental changes to our common law system would be listened to by this Committee in the future.

Secondly, regarding article 20 of the Directive which deals with assistance for qualified entities. Ireland has difficulty accepting any proposal that obliges the Member State to provide certain types of assistance to 3rd party organisations, in this instance to qualified entities. Ireland has been consistent in registering its opposition to being legally obliged to apply such a provision thereby placing a burden on the public finances and creating a new precedent for funding organisations engaged in civil litigation. However, while the provisions in the current text of article 20.1 refers to ‘costs of the proceedings’ not preventing qualified entities seeking to exercise their rights under article 7, the text at article 20.2 further leverages this obligation on Member States. The text adds that this assistance may take the form of (1) public funding including structural support for the qualified entities, (2) the limitation of applicable court or administrative fees or (3) access to legal aid. These are significant structural interventions that are required of the Member State, and one which Ireland will find difficult to meet, particularly now with added pressures on our public finances. Ireland asks the Committee to take note of our opposition to the text at article 20.2 and our significant concerns that this will place pressures on our public finances that have not been accurately modelled, costed or assessed.

In relation to article 20.3, we believe that this is a regressive step. The legislative provision here provides for the Member State to allow qualified entities to require modest entry fees or similar participation charges from those consumers who have expressed their willingness to be represented by a qualified entity within a particular representative action. Ireland has indicated on several occasions that it does not support putting financial obligations on consumers who wish to participate in a representative action. The matter of accessing a representative action should be made as straightforward as possible for our consumers and the current text serves as a disincentive to that aim. We believe that consumers should be encouraged to get involved in representative actions where an infringement of their consumer rights has taken place and that no financial barriers should be put in the way. This will, we believe, make it more difficult to encourage consumers to exercise their new rights under this Directive and become involved in representative actions.

Throughout this process, we voiced real concerns about certain legislative provisions in this text, which were clearly not heard. This is not a conducive environment in which to encourage Member States and their officials to fully participate in the drafting of legislation which is designed to protect European consumers and ensure that all businesses are required to operate to the same standards of consumer protection.

Statement by Estonia

Estonia welcomes the aim of the Directive on representative actions for the protection of the collective interests of consumers to strengthen the mechanism for protection of collective interests of consumers in an increasingly globalised and digitalised marketplace.

Estonia, however, regrets that this sector specific Directive undermines Member States' civil procedural law and autonomy by introducing several rules that are horizontal in nature and exist already in all Member States. Such rules are, for example, the loser pays principle, *res judicata*, *lis pendens*, dismissal of an action. In our view, the procedural autonomy is of great value and should be respected when creating civil procedural law instruments.

Estonia is one of the Member States who supported the view that a Union procedure should cover cross-border situations, enabling the Member States to set up national systems themselves. We still believe that this would have been the proper approach. Union rules should be introduced only in situations where Member States cannot solve the problem on their own. In our view, the creation of a national system for representative actions is not such an issue.

Rules for funding of national qualified entities and its examination should be in the competence of a Member State. Unfortunately, the rules for funding in the final text are of horizontal nature. To this end, we would have preferred the General Approach, which concerned only the funding of cross-border qualified entities.

We are very concerned about the fact that the wording of Article 7 (1) does not distinguish between domestic and cross-border actions. Therefore, Estonia sees that the text does not preclude an interpretation according to which the forum Member State's national rules may make it impossible for a qualified entity of another Member State funded by a third party to file an action based only on the fact of a third party funding without even assessing the possible extent of the influence by funders. This is a result we cannot agree to. Such restriction is not in line with the objectives of the Directive and would make it unreasonably difficult and financially burdensome for small Member States to find cross-border qualified entities other than public bodies.

Estonia is of the view that determining the scope of a consumer law directive through a list of 68 instruments, including both directives and regulations, is unclear and overwhelmingly difficult to apply in practice. For example, we struggle to understand how to determine the scope in case of a minimum harmonising directive that has been transposed into national law where national rules go further than the ones in the Directive.

Furthermore, we are disappointed that the time for transposition and application of the Directive have been shortened substantially in comparison with the General Approach. The periods are not sufficient for a small Member State, such as Estonia, who does not have a system for representative actions in place, to set up this complex system.

Consequently, and again stressing its support to the aim of consumer protection, Estonia will abstain from voting on this Directive.