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ASIWY/55001

Comments on the Proposal for 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

11 June 2018

1. zeiler.partners is an Austrian law firm, which specialises in dispute resolution, including litigation before Austrian courts.

2. We note the efforts of the European Commission to ensure the adherence to European (consumer protection) law by introducing the possibility of collective redress against infringements of such law by traders. The Proposal for 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 (the "Proposal"), which is designed to implement these efforts, however, would benefit from clarification on certain, vital, points.

1. REPRESENTATIVE ACTIONS

3. Article 5(2) of the Proposal[1] provides for two measures that qualified entities can ask for before courts of member states: an injunction order as an interim measure stopping or prohibiting a practice (article 5(2)(a)) on the one hand and a (final) injunction order establishing that a practice constitutes an infringement and stopping or prohibiting the practice on the other hand (article 5(2)(b)).

4. Article 5(3) establishes that qualified entities may bring representative actions seeking measures "*eliminating the continuing effects*" of these infringement (as opposed to the injunctions stopping the practice under article 5(2)). Such measure can only be sought on the basis of a "*final decision*" establishing a violation of Union law, including a final injunction under article 5(2)(b).

5. Under article 3(6), a final decision is a decision of a court of a member state that cannot be appealed.

6. The representative action under article 5(3) is further detailed in article 6, which provides that "*for the purposes of article 5(3)*", member states shall ensure that qualified entities can bring representative actions asking for, inter alia, compensation, repair or the like.

7. Article 6(2) then stipulates that instead of one of the remedies under article 6(1), member states may empower the court or administrative body to issue a declaratory decision regarding the liability of the trader in cases in which the quantification of the individual loss of the consumer is complex to calculate.

8. The relationship of these provisions to one another is unclear and contradictory.

9. First, under article 5(4), qualified entities shall be entitled to seek measures eliminating the continuing effect of the infringement under article 5(3) and 6

[1] All further references to individual articles in the following text refer to the Proposal if not explicitly indicated otherwise.

together with the measures under 5(2). According to article 5(3), however, a measure eliminating the continuing effects of the infringement must be sought "*on the basis*" of a final decision establishing an infringement, including a final injunction under 5(2)(b). Under article 3(6), a final decision is such that cannot be appealed. Assuming that in practice the "*final decision*" sought before proceedings under article 5(3) and 6 are initiated will often be a final injunction under article 5(2)(b), it will not be possible to combine the claim for a final injunction under article 5(2)(b) with a claim for a measure eliminating the continuing effects of the infringement under article 5(3) and 6. It would first be necessary to obtain a final decision by the highest available court on the claim for a final injunction under article 5(2)(b) in order thereafter to initiate proceedings under articles 5(3) and 6. Article 5(4), however, stipulates that these measures should be sought "*within a single representative action*". Hence, these provisions are self-contradictory.

10. Second, article 6 is unclear as to its scope of application. First, article 6(1) provides that qualified entities can ask for various remedies in the form of a redress order. Alternatively, article 6(1), second sentence, provides for the possibility of asking for declaratory relief. Such relief is, however, not enumerated in article 6(1). It can therefore only be assumed that this sentence is supposed to refer to article 6(2), where it would be better placed in the article. Further, it remains unclear what the added value of the declaratory relief referred to in article 6(2) would be. Under article 5(2)(b) and 5(3), a qualified entity would ask, in a first step, for a final injunction order "*establishing that the practice constitutes an infringement of law*" under article 5(2)(b) before it could bring a representative action under articles 5(3) and 6(2). It remains somewhat unclear from the text of the directive why a second claim under article 5(3) and 6(2) for declaratory relief would ever be sought in practice if a final injunction under article 5(2)(b) on largely the same matter has already been obtained and has binding legal force under article 10. The only, and marginal, difference between the two claims is that the measures under article 5(2)(b) establishes the infringement whereas under article 6(2) it establishes the liability deriving from this infringement. However, it seems rather doubtful that the interests of the consumers served from a declaratory decision under 6(2) outweigh the disadvantages of traders facing largely duplicative proceedings under article 5(2)(b) and 5(3) and 6 only to obtain two largely identical declaratory decisions. It remains unclear why individual consumers in "*cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex*" cannot proceed against the trader on the basis of a final injunction under article 5(2)(b).

11. Third, it should be clarified that the "*additional rights*" referred to in article 6(4) do not entitle consumers to double compensation, *e.g.* that they are not entitled to

repair of defective goods in cases in which the qualified entity has asked for compensation for the reduced value of the same defective goods. The wording of article 6(4) leaves open how the "*additional rights*" of consumers relate to the remedies which the qualified entity can obtain under article 6(1) and 6(2).

2. SETTLEMENTS

12. Under article 8, qualified entities and traders can settle claims under article 5(3). Article 8(6), however, reverses the advantages of a settlement for a trader, as individual consumers can either refuse the settlement altogether or can accept it and then raise additional claims against the trader. Any trader settling a claim of a qualified entity under article 5(3), therefore, is not settling the matter but remains exposed to a plethora of individual claims of consumers. This shortcoming is a direct consequence of the attempt to introduce a reduced form of class action, however, disregarding the possibility of a global settlement of all claims of the members of the class as is provided for under US law (*cf.* Rule 23(e) of the Federal Rules of Civil Procedure). Hence, the possibility to settle under article 8 will be unattractive for traders even in cases in which a settlement of a dispute may be the most cost-efficient way to proceed for all parties.

3. EFFECTS OF FINAL DECISIONS

13. Article 10(1) establishes the binding effect of a final decision establishing an infringement in a domestic setting for any redress actions before national courts against the same trader for the same infringement. The provision would benefit from clarification as to which final decisions are included. While the provision refers to final decisions establishing infringements "*harming collective interests*", it would not, by its wording, exclude the possibility of including final decisions in individual actions of individual consumers which establish an infringement which would affect a number of consumers (which is all that is needed to harm collective interests under article 3(3)). In such a case, however, there is a significant risk for traders confronted with any individual claim of a single consumer that a final decision may create a binding precedent for an unclear number of future cases. In practice, however, it may well be that a trader is unaware of the importance of an individual case for further actions, such as where the trader is unaware that a defect in an individual product subject an individual claim affects an entire product line and may therefore give rise to a multitude of claims. Article 10(1) would then require a cautious trader to treat any individual claim of a consumer as potentially prejudicial for an unknown number of claims with potentially devastating financial consequences. This would, however, have the consequence that traders would

invest significant costs and efforts in refuting any claim of an individual consumer increasing the costs and risks for any such consumers, while at the same time creating completely incalculable risks for traders. Hence, it would be purposeful to explicitly limit the binding force of final decisions for actions of third parties in article 10(1) to decisions issued on representative actions.

14. Article 10(2) requires clarification to the extent that is establishes a rebuttable presumption "*that an infringement has occurred*". A rebuttable presumption, however, can logically only refer to questions of fact. The question of whether an infringement has occurred is, however, a legal qualification of facts and hence cannot be subject of a rebuttable presumption. The wording of article 10(2) should therefore be amended to provide clarity on this point.

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