Department for Business, Energy & Industrial Strategy

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Department for Business, Energy & Industrial Strategy

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Lord Boswell of Aynho
Chair, European Union Committee,
House of Lords
London, SW1A 0AA

6 November 2018

Dear Lord Boswell,

- **7875/18: Commission Communication: A New Deal for Consumers**
- **7876/18: Proposal for a Directive amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (the "Omnibus Directive")**
- **7877/18: Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC**

Thank you for your letter dated 16th October 2018, in reply to my letter of 4th September 2018.

Since the letter of 4th September there have been two further working groups in Brussels, one on each of the two separate files that are contained in the New Deal for Consumers proposal. The first set of written comments on the file which proposes targeted amendments to existing EU consumer law (the 'Omnibus Directive') have been submitted by Member States, some of which were reviewed at a working group on 10th October. Another working group on that file has been arranged for 16th November where I anticipate that the written comments will be discussed further. As I mentioned in my previous letter, progress on the proposed Directive on representative actions has been slower than that on the Omnibus Directive, however the first line-by-line read through has now been completed. Member States have been asked to provide written comments on Articles 1-4, 7 and 15 by the 31 October, followed by comments on the remaining Articles by 23rd November which I would expect to be reviewed at a working group scheduled on 4th December.

In my previous letter I highlighted that many Member States had concerns about the impact the proposal on representative actions could have on their existing national legal

systems. You have asked the following specific question in your letter in response to this:

We ask that you provide us with a detailed analysis of the Member States' concerns.

As I mentioned above the first line-by-line read through on this proposal has just been completed and Member States are now compiling their first set of written comments. It is therefore too early to provide a detailed analysis of the Member States concerns as the concerns raised so far have generally been provisional comments. In addition, many of these provisional comments were made with a scrutiny reservation in place so I cannot guarantee that these comments will stand after Member States have cleared their positions in their respective capitals. Although I cannot provide a detailed analysis at this stage, I have provided a summary of key themes and issues that have emerged so far in discussions.

Minimum harmonisation approach

The European Commission (the Commission) has left it to the discretion of Member States whether to integrate existing national collective redress systems for consumers into the mechanism they envisage, or to put in place an additional system alongside existing national systems to comply with the Directive (i.e. it is being set at minimum harmonisation). They explained that their intention is to ensure that at least one collective redress system is in place in each EU Member State. When this was discussed, Member States (including the UK) were supportive of the minimum harmonisation approach, adding that they would strongly oppose maximum harmonisation as this would conflict with existing national systems, or systems currently being put in place nationally. Despite support of the minimum harmonisation approach, concerns were still raised about how the new system being proposed could co-exist with national systems.

Qualified entity criteria

There have been general concerns raised about the criteria being proposed to determine who can be designated as a qualified entity under the proposal, and therefore able to bring forward representative actions. The current drafting of the proposal says that Member States must designate an entity as a qualified entity if it is properly constituted according to national law, not-for-profit and has a legitimate interest in compliance with relevant EU law (Article 4(1)). The proposal sets out that the new collective redress scheme should contain "appropriate safeguards to avoid abusive litigation" (Article 1(2)) and the Commission has made clear that their intention is to avoid the potential for abusive litigation under the instrument. However, a number of Member States (including the UK) have commented that they have more stringent criteria for enforcers in their domestic laws and feel that the criteria proposed is not sufficient and is open to abuse. There has therefore been a push for more stringent criteria to be developed which the Commission is currently considering. Furthermore,

the same group of Member States were unhappy that the criteria had been set at maximum harmonisation, despite the general minimum harmonisation approach to the Directive, meaning that they could not introduce or retain additional criteria domestically to align with their existing national laws. I expect the minimum/maximum harmonisation character of this element of the proposal to be a key issue as discussions progress.

Qualified entity funding

Alongside the criteria that qualified entities must meet, the Commission has included an additional safeguard in the proposal requiring qualified entities to declare at an early stage of an action seeking redress whether it has adequate resources to support the action, and to be fully transparent about the source of funding used for its activity in general. In particular, qualified entities are required to be fully transparent about any funding they get from a third party for a particular case to enable courts or administrative authorities to assess whether there may be a conflict of interest so as to avoid abusive litigation between competitors. A lot of Member States are concerned about the additional burden on courts and/or administrative authorities to assess a qualified entities funding for each redress order being brought forward. In addition, where funding is public, some Member States argue against the need for lengthy procedures to ensure funding is adequate for the action and argue that the risk of abuse is non-existent, so verification of the risk by the court should not be needed.

Low-value cases

Another issue which has proved to be controversial and has been opposed by most Member States is the proposal on 'low-value cases'. The Commission has proposed that where consumers have suffered such a small amount of loss that it would be disproportionate to distribute the redress back to the consumers, any funds awarded as redress should instead be directed to a public purpose serving the collective interest of consumers, such as awareness raising campaigns (Article 6(3)(b)). A lot of Member States disagreed fundamentally with the redress funds not going directly to affected consumers, with some again commenting that it raised legal and constitutional issues for them. Some felt that the provision is not in spirit with the intentions of the Directive and is essentially a fine rather than redress. Others commented that the consumer should at least be given the option to decide whether they would like to receive the fund, or if they endorse them going to a public purpose. My officials highlighted that the UK has measures similar to this available to enforcers as part of the 'Enhanced Consumer Measures' in Part 8 of the Enterprise Act.

Effects of final decisions

The Commission has made it clear that they want to leave it to the discretion of Member States to decide whether representative actions can be brought in judicial or administrative proceedings, or both. As they have elaborated in Recital 12 of the proposal, the Commission believes that both procedures may effectively and efficiently serve the protection of the collective interests of consumers. In addition, discussions in

the working groups have suggested that the Commission feels that giving Member States the choice of one or both is important to allow the proposed mechanism to be effectively implemented across the EU. This has caused some concern amongst Member States however when considering Article 10 (1) of the proposal which establishes that if a decision by an administrative authority or court has become final, it should be irrefutable evidence in any subsequent redress action in the same Member State. A number of Member States highlighted that their national systems do not allow an administrative decision to be final, and that courts cannot be bound by an administrative authority. This issue is compounded by Article 10 (2) which requires a final decision taken in one Member State by an administrative authority or court to be recognised by an administrative authority or court in another Member State as a 'rebuttable presumption' that an infringement has occurred. Some Member States highlighted that these two provisions raised serious constitutional issues for them.

I will continue to keep the Committee updated regularly on the progress of the negotiations and the UK's objectives. I am copying this letter to Sir William Cash, Chair of the House of Commons European Scrutiny Committee, Les Saunders (DExEU), and Callum Gray (BEIS Scrutiny Coordinator).

Yours sincerely

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Minister for Small Business, Consumers & Corporate Responsibility