

Brussels, 20 November 2018

## Orgalime views on the European Commission proposal on Collective Redress

### EXECUTIVE SUMMARY

Europe`s Technology Industries have always been in favour of developing and fostering a competitive environment in the European Union. As existing systems of redress already provide an effective legal framework at national level, we do not see the need for the European Union to create an additional mechanism.

Orgalime calls upon the European institutions to avoid adopting a Directive that will have a major impact on the legislative frameworks of the Member States and which could create uncertainty for European companies, in particular small and medium-sized ones.

Orgalime herewith provides our comments regarding the Directive on representative actions for the protection of the collective interests of consumers [COM\(2018\) 184](#):

- Orgalime **fears** that the current proposal would lead to **abusive litigation** practices and would only provide commercial opportunities for large law firms specialised in litigation. Under normal circumstances, most European companies - the small and medium-sized enterprises - would not have the capacity to cope with the threat of collective redress actions. As a result, these companies would probably be obliged to reach a settlement of the lawsuit to avoid reputation risk or endless court proceedings. This means that the claiming organisation has the power to put undue pressure on companies and could abuse of this power. A collective redress system needs to take this aspect into account.
- Orgalime is **concerned by the opt-out system** foreseen in the current proposal<sup>1</sup>. Under the current proposal, a qualified entity could start a lawsuit in the name of the consumers without their consent, without them even knowing that the case is on-going and perhaps despite their own will. The excesses of the US class action system must be avoided.
- Orgalime **does not support the exception to the “loser pays” principle** as it could lead to frivolous claims. The provision on economic assistance for qualified entities<sup>2</sup> in the current proposal should be amended. The aim is to avoid litigation skyrocketing and that private law firms under the guise of qualified entities receive public funding.
- Orgalime supports the idea that **only qualified entities**<sup>3</sup> such as consumer organisations and independent public bodies fulfilling all the requirements specified below can start a collective redress proceeding. Nonetheless, it is important to make sure that behind a collective redress action there are no

<sup>1</sup> See article 5, paragraph 2 of the current proposal.

<sup>2</sup> See article 15 of the current proposal.

<sup>3</sup> See article 8 of the current proposal.

*Orgalime, Europe`s Technology Industries, speaks for 45 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 23 European countries. The industry employs nearly 11 million people in the EU and in 2017 accounted for some €2,000 billion of output. The industry represents over a quarter of the output of manufactured products and over a third of the manufactured exports of the European Union*

private law firms or an “ad hoc” organisation purely pursuing revenue. We strongly support the idea that such a qualified entity needs to fulfil certain requirements. The current European Commission proposal does not provide the necessary safeguards in this respect and should therefore be amended<sup>4</sup>. The following requirements should all be introduced in the proposal and be complied with as well:

- a. has EU-wide activities;
- b. has previous proven experience in legal disputes;
- c. has received in advance the mandate from the majority of its members.

The fulfilment of all these requirements will have to be proven by the organisation claiming to fulfil them and should be monitored constantly by the competent European and national authorities. We also question whether the transparency requirements for qualified entities set out in article 7 (Funding) are sufficient.

- Europe`s Technology Industries do not agree with **a shift from a public to a private enforcement system in Europe**. In our view, public authorities are primarily responsible for the prosecution of breaches of European and national law. Physical persons should only be entitled to claim their actual damage; they should not substitute public authorities through redress procedures, which is regrettably exactly what is foreseen in article 6, paragraph 3b<sup>5</sup>.
- We question the legitimacy of the provision<sup>6</sup> foreseeing that if a qualified entity indicates that further evidence lies in the control of the defendant, the court or the administrative authority may order that such evidence is presented by the defendant. This goes against the basic principle that the party making a claim needs to support it.
- **We do not support** the current proposal<sup>7</sup> regarding the **effects of the final decision** that foresees that: “the infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement”. This goes against the principle that a final decision (*res judicata*) is relevant only between the parties and not to anybody else (*erga omnes*).
- All **damages**, including physical damage, seem to be covered by the proposed Directive. This is **problematic** as each physical injury is different from another and the expertise of a specialised doctor is normally needed to quantify the injury.
- We question whether national courts have the **capacity** to deal with a rise in litigation which would consequently emerge if the proposal were to be adopted as it currently stands.
- Orgalime believes that **Alternative Dispute Resolutions systems**, such as mediation and arbitration, should be further developed. Existing litigation systems at national level should be improved before putting forward a new redress mechanism at European level.

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<sup>4</sup> See article 4 of the current proposal.

<sup>5</sup> See article 6 paragraph 3b of the current proposal: consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, Member States shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers.

<sup>6</sup> See article 13 of the current proposal.

<sup>7</sup> See article 10 paragraph 1 of the current proposal.