Exchange with the Consumer Affairs committee

27/05/2020 14:30-15:30

Briefing for DHoC I. Perignon &

Conference call with AmCham EU

on

Consumer policy topics

Scene setter

- AmCham asked for an exchange on RAD and the new Consumer Agenda.
- AmCham has been a vocal opponent to the Commission proposal for a Directive on Representative Actions (RAD), also lobbying hard the co-legislators against it.
- AmCham claims that RAD will pave the way for abusive litigation to the detriment of traders and encourage 'forum shopping', and constantly calls on the European Parliament and the Council to add more safeguards in particular regarding the criteria for the designation of qualified entities and third-party litigation funding.
- Constant exchanges between AmCham and the Commission (DG JUST services, Cabinet and Commissioner) have taken place since the adoption of the Commission proposal in 2018. The last one was a panel discussion on RAD organised by AmCham on 15 October 2019. Therefore, there are no new substantive issues to be discussed indepth at this stage.
- Legislative negotiations on RAD are ongoing but have been delayed by the COVID-19 outbreak. The Commission's objective is still to finalise the negotiations under the Croatian Presidency, with a political trilogue scheduled for June (concrete date to be confirmed).

Objectives

Forward-looking exchange of views on a possible future co-operation with AmCham for the benefit of the Consumer Agenda

Factual update about the state of play of RAD

Lines to take

CONSUMER AGENDA

 We need to respond to the immediate challenges brought forward by the impact of COVID-19 and ensure that European consumers continue to enjoy the highest level of protection.

- For instance, the recent action of the Consumer Protection Cooperation Network against **rogue traders**, which resulted in the removal of millions of COVID-19 related and potentially misleading offers from online platforms, revealed once more what an effective dialogue with businesses can achieve.
- The Commission is working with the Member States when it comes to the way to recovery.
- Consumers should contribute to a sustainable recovery, making full use of digital opportunities. But this has to happen in full respect of strong consumer rights that protect in particular the vulnerable ones.
- This is not only the right thing to do, but it is also in the economic interest of us all as the economic recovery will depend on the confidence of consumers and their private spending.
- At the same time, more than ever before, we should not impose an undue heavy burden on companies!

- But, we have also to ensure in the **longer term** that our consumer policies reflect the profound changes that the corona crisis has on our economies and societies.
- The New Consumer Agenda will address these challenges from a strategic perspective in all key EU consumer policy issues faced by the EU at present: consumer empowerment in both the green and the digital transitions; consumer vulnerabilities (including in financial services); enforcement of EU law; and international cooperation on consumer protection and rights.
- An **Open Public Consultation** to gather the views on the Consumer Agenda from all stakeholders will be launched before the summer until September.
- Apart from this **consultation**, other stakeholder consultation actions are planned and will be launched as soon as the situation allows.
- Hopefully you will participate in this consultation and encourage your individual members to do likewise.
- The specific issues of Green Deal/sustainability will be one of the key aspects of the new Consumer Agenda:

the green transition is already happening today. Businesses want to sell "green" and consumers want to buy "green". The green market has a huge potential but also comes with risks for businesses and consumers alike.

- It is not enough that goods are made sustainably, we need consumers to find them and choose them. Consumers **need better information** on which products are truly sustainable and better protection against misleading green claims. Businesses need legal certainty when they use green logos or schemes popping up in our markets.
- Besides legislative changes in consumer law to ensure better information for consumers, Green Consumption
 Pledges is an area with great potential: any policy action cannot rely only on legislation.
- Several brands are already trying to nudge people to adopt healthier and more sustainable lifestyles. In this same spirit, we are considering to work with the industry to launch a series of "Green Consumption Pledges", as voluntary partnerships with business that are committed

to achieve a real long-term change in corporate practices to support more massively green consumption practices.

- Any such pledge would entail commitments by the affiliated companies, for example, to improve the sustainability of their supply chains and select products that are more sustainable, durable and repairable
- The pledges may aim at helping consumers select more sustainable products from their catalogues and stores by making it easier for them to identify and purchase such products.
- Such a pledge should be based on **solid governance** and monitoring of the achievement of pledges. Trust is key! The Commission is available to engage in a discussion with companies on how we could work together to make this a reality for big brands companies

REPRESENTATIVES ACTIONS DIRECTIVE

- Representative Actions Directive continues to be a top priority for the Commission.
- The COVID-19 crisis has caused delays and the cancellation of several trilogues. Nevertheless, the

Commission, the European Parliament and the Council have continued to work at technical level through written exchanges.

- This technical work is paving the way for the third trilogue in June.
- Thus, despite the delays, our objective remains to try to reach an agreement under the Croatian Presidency. We believe this is a shared objective with the Presidency and European Parliament.
- We get every day fresh evidence about the need for this instrument. For example, we know that, in the situation created by the COVID-19 pandemic, consumers are struggling. They are confronted to rogue traders resorting to unfair commercial practices that take advantage of widespread coronavirus fears. Also massive cancellations of flights and other travel arrangements without the rights of consumers to be reimbursed being honoured. And these are just a few examples.

• The swift adoption of the Directive is therefore more relevant than ever. It would allow for the protection of the weaker members of our societies through collective redress in similar circumstances in the future.

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BACKGROUND - REPRESENTATIVES ACTIONS DIRECTIVE

The first trilogue took place on 14 January 2020 and concluded with commitments from both co-legislators and the Commission to reach a political agreement under the Croatian Presidency. Subsequently, 5 technical meetings took place in January and February, during which the majority of the provisions of the proposal were discussed. The second trilogue took place on 2 March 2020 and enabled both co-legislators to clarify their priorities in order to identify the scope for compromise on key diverging issues. The Parliament set out its key demands in order to accept the main demand of the Council, which is the "split" of criteria for designating qualified entities in domestic and cross-border actions. Following the second trilogue, one technical meeting took place on 5 March 2020. The Croatian Presidency proposed a partial compromise on some provisions (Coreper revised mandate from 26 February 2020) and continues to work with the Member States in order to identify their scope for flexibility and their respective red lines.

All subsequent meetings and trilogues were cancelled due to the outbreak of the COVID-19 crisis. Work continues through written exchanges in April and May. The co-legislators have agreed that the next trilogue will take place in June 2020 - concrete date to be confirmed depending on room availability on the COVID-19 context. It may still be possible to reach a political agreement under the Croatian Presidency, provided that sufficient progress is made at technical level towards a compromise package.

AmCham position on the Council General Approach of 28 November 2019:

"The American Chamber of Commerce to the EU (AmCham EU) has been closely following the developments of the European Commission's New Deal for Consumers package which includes the Proposal for a Directive on Representative Actions. We welcome and acknowledge efforts made by the Council of the European Union to facilitate access to justice and guarantee a high level of consumer protection. However, we are concerned that the adopted general approach will fail to meet the overall objective of protecting consumer rights and may in fact be detrimental to consumers and businesses while encouraging 'forum shopping'.

AmCham EU remains disappointed by the lack of safeguards applying to domestic actions as well as Third Party Litigation funding. Bearing in mind the above, we would like to put forward the following key priorities and concerns ahead of the trilogue discussions:

1. Qualified entities for the purpose of cross-border representative actions

As defined in the council text, 'cross-border' actions will be subject to the safeguards set out in the Directive, but actions defined as 'domestic' will not. Such domestic actions will only be governed by national safeguards, should they already exist, while cross-border collective actions would be subject to harmonised EU safeguards.

The definition of a 'domestic' case is one filed in the Member State in which a qualified entity (QE) is designated. This definition would allow for actions including QEs from a Member State suing a company from another Member State on behalf of consumers from various Member States to be defined as 'domestic'. In practice these actions would not have the sufficient safeguards applied as in relation to 'cross-border' actions. This means that the

Directive will apply no consumer protection safeguards to certain cases involving consumers from multiple Member States. Thus, common minimum standards must be applied to both domestic and cross-border action to facilitate an effective collective redress system.

2. Limitations on the provision of third-party litigation funding

It is essential that funding agreements and criteria applicable to all cases be disclosed to all parties involved and to the Court, so that said agreements are appropriately managed and ensure that funders are paid only after consumers have received their redress.

Moreover, there should be limitations applied to third-party litigation funding to protect consumers from having their prospective compensation from an EU collective redress system placed into the hands of lawyers and third-party litigation entities. Such limitations are an essential safeguard and should be applied to both domestic and cross-border actions as mentioned above."

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BACKGROUND - CONSUMER AGENDA

The new Commission, the new legislature as well as a new multi-annual financial framework call for a new strategic outlook for the EU's consumer policy. It should reflect the new policy priorities and respond to the calls of the European Parliament, Member States and other stakeholders for a new comprehensive vision on the role of consumers given the top priorities of the Commission. Inevitably, the Commission's position on the effect of the COV-19 epidemic and its aftermath's impact on European citizens as consumers in EU's internal market will also be of considerable influence.

In accordance with the above, a Commission Communication on a new Consumer Agenda is proposed for adoption by the College in the fourth quarter of 2020. Being a strategic, non-legislative document, the new Consumer Agenda will address several key priority areas:

- consumer empowerment in both the green and digital transitions;
- protecting vulnerable consumers;
- enforcement of consumers rights; and
- international cooperation.

Emphasis will be put on providing better information to consumers and fighting misleading information, ensuring consumers' safety and establishing clear responsibilities. The need for a new governance system with regard to consumer policy will also be addressed. International cooperation will be further enhanced to reflect the fact that consumer protection and product safety challenges have become more global.

This strategic Commission Communication will also serve as the chapeau for several legislative proposals which will be made reference to in the Communication and adopted at the same time or at a later stage if deemed more appropriate:

1. Revision of Directive 2001/95/EC on general product safety (GPSD)

The aim of the revision is to ensure all non-food consumer products on the EU market are safe and to ensure a level-playing field for all businesses online and offline. This would allow to maintain the "safety net role" of the Directive. Among other aspects, it aims to address product safety issues linked to new technologies, such as Artificial Intelligence and product safety challenges in online sales. The revision also aims at making product recalls more effective to keep unsafe products away from consumers and at enhancing market surveillance.

2. Revision of Directive 2008/48/EC on consumer credit (CCD)

In 2019 an evaluation of this Directive showed that it does not fully ensure high standards of consumer protection across the EU. The objective to foster a well-functioning internal market has only been partially achieved. The revision will extend consumer protection to new (non-bank) operators (e.g. peer-to-peer lending platforms) and new products (e.g. short-term high-cost loans), which can lead to over-indebtedness. It will also update the information disclosure requirements to reflect the effects of digitalization and shift to online contracts. It

will strengthen the effectiveness of creditworthiness assessment rules which currently do not work in the interest of the consumer (as required by the Court of Justice). These revisions should provide for a more effective prevention of misusing consumer vulnerabilities in the financial sector.

3. New legislative initiative to empower consumers in the green transition

This initiative, announced in the Green Deal and Circular Economy Action Plan, aims to ensure that consumers are provided with more accurate, clearer and more reliable information in order to choose durable, repairable and sustainable products. In order for consumers to actively participate in the green transition, they need trustworthy information on the expected lifespan and reparability of products, on their sustainability and environmental impact

The scope and content of this legislative proposal will build on synergies with various work-streams that are under way in different Commission services (ENV, GROW, CNECT) in response to the Green Deal and the new Circular Economy Action Plan, notably on product standards on material efficiency (durability/reparability) and technical methodologies (e.g. Product/Organisational Environmental Footprint).

Next steps

The presentation of the new Consumer Agenda and of the above described accompanying legislative proposals will be aligned into one package whose timing will run parallel with the priorities of the Commission Work Programme. This will take due regard of the schedule of the Council Presidency and the European Parliament's planning.

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BACKGROUND – EU-US AGREEMENT

In the area of consumer law enforcement, the Commission has an ongoing good cooperation with our US counterpart, the Federal Trade Commission (FTC).

The Commission is currently waiting for a clear sign from U.S. authorities that they are willing to resume the negotiations of the agreement on cooperation in the enforcement of consumer protection laws between the EU and the U.S. The Commission has a Council mandate to negotiate such an agreement since 2009 under the Consumer Protection Cooperation (CPC) legal framework. Last year, we had fruitful service-level exchanges on the potential reopening of the negotiations. No official statements have been made on the reopening so far and the service level exchanges remain confidential. The expected timeline has been disrupted in the current situation.

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PRODUCT SAFETY COOPERATION

We have close and regular working relations with the US Consumer Product Safety Commission (CPSC). Despite having a negotiation mandate since 2009, we could not conclude a formal product safety information exchange agreement. This is because some impediments in the US legislation that would not allow reciprocity in sharing confidential information. In the absence of a legislative solution on the US side which is quite unlikely to happen any time soon), for the time being we focus on informal cooperation with the US and on trilateral cooperation that includes China. The next high-level trilateral EU-US-China Product Safety Summit is planned to take place in Brussels (if possible, otherwise it could be done remotely) in October this year. We also cooperate with the US CPSC in the framework of the OECD Working party on product safety and the UNCTAD Working group on product safety.

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DEFENSIVES

Does RAD provide for sufficient safeguards against abusive litigation?

- First of all, it must be stated that the Commission evaluations conducted before the adoption of the COM proposal (COM 2017 Fitness Check of EU consumer law and the evaluation of the COM 2013 Recommendation on collective redress) have not identified abuses of the exiting national mechanisms of representative actions.
- Still, given fears expressed by the business sector, strong safeguards are present in the RAD proposal, such as the independence and transparency of qualified entities, the control of third party funding and strict scrutiny by the courts or administrative authorities of the collective settlements.
- The European Parliament and the Council aim at maintaining this appropriate balance between access to justice and sufficient safeguards against the development of a litigation business model.

Would the "split" of the designation criteria introduced by the Council General Approach lead to a lack of safeguards in domestic cases?

- Within the model proposed by the Commission, it is imperative that the qualified entities meet certain reputability requirements in order to represent the best interests of consumers.
- All three institutions agree on the importance of these criteria. Both co-legislators have proposed to strengthen the criteria and add new criteria, which the Commission is ready to discuss.
- Importantly, the Council has made it clear that the split only concerns the designation criteria and that all other elements of the Directive would still apply to both domestic and cross-

border actions.

- Therefore, as a matter of principle, the "split" of the criteria does not fundamentally endangers or undermines the main objectives of the Commission's proposal.
- The colegislators are willing to provide appropriate guarantees in the text in order to ensure an effective level of consumer protection and safeguards from abusive litigation in **both domestic and cross-border** representative actions. This concerns in particular rules on transparency and absence of conflict of interest in respect of third party funding.

Would the definitions of 'domestic' and 'cross-border' actions in the Council General Approach lead to forum shopping?

- The Commission can support the definitions of 'domestic' and 'cross-border' representative actions from the Council General Approach. In its proposal, the Commission did not propose such definitions. However, they are in line with spirit of the Commission's original proposal (Article 16 is also based on the notion of cross-border actions for the purpose of mutual recognition of legal standing of designated qualified entities).
- The definitions do not affect the EU rules of private international law, which limit the grounds conferring competence to courts. These rules allow consumers from different Member States to bring an action or to join a collective redress action brought against a trader in the courts of the Member State of its domicile.
- This possibility exists today in those Member States that have mechanisms of collective redress, regardless of who brings the action. It can be any entity or person that complies with the applicable national rules.
- The definitions also do not undermine the level of consumer protection. To the contrary, modifying and restricting those

- definitions could deprive consumers from possibilities that they already have nowadays.
- There is **no risk of forum shopping**. Both the Parliament and the Council have introduced clear and strong safeguards regarding the way in which consumers can join a collective redress action brought in a Member States where they do not reside. Such consumers would always need to explicitly **opt in** to that action. This addresses the possible risk of parallel actions against the same trader.
- Therefore, the Commission does not consider it necessary to change the definitions of domestic/cross-border actions proposed in the Council General Approach. Moreover, any definition that would downgrade current redress possibilities for consumers is not acceptable.

Do the rules on the competent jurisdictions protect against forum shopping and abusive litigation across the EU?

• RAD does not make any changes to the EU Private International Law regime. The existing rules are clear - there is no freedom to "forum shop" all the jurisdictions. Only specific courts will have jurisdiction. It would be, depending of the choice made by the claimant: (1) the courts of the trader's domicile or (2) the courts where the harmful event or the harm occurred (generally the consumer's Member State of residence). Both jurisdictions are favourable to the trader who knows their legal systems since he operates within those markets.

Are there sufficient limitations regarding the funding / lawyers' fees / loser pays principle?

• Funding is a key factor that will impact the effective functioning of the Directive. The Commission proposal's Article 7 focused on ensuring full transparency and avoiding conflicts of interest in relation to the funding of representative actions.

- The **control of third party funding** is an important safeguard against abusive litigation and it should apply to both domestic and cross-border actions.
- The Commission shares the objective of the Parliament of ensuring that the Directive does not create a "litigation industry". The objective is to protect the rights of consumers, not to promote new business models.
- However, the Commission does not consider it appropriate to regulate **lawyers' fees** in a sectoral EU law instrument.
- The Commission also acknowledges that the 'loser pays' principle is an important safeguard against frivolous litigation that exists in all Member States, albeit with different modalities. The principle is fully in line with the Commission proposal. The concrete modalities should ensure the effectiveness of the procedure and respect the principle of procedural autonomy.

Would a pan-European collective redress actions be possible under RAD?

- Representative actions where a qualified entity from one Member State could represent consumers from several or all EU Member States would be possible, if the trader's infringement concerns consumers from those countries.
- But, such an action under the EU rules on competent jurisdiction and relevant CJEU case-law would be possible <u>only</u> in the Member State where the defendant trader has its domicile or from where the harmful event originated. Both jurisdictions are favourable to the trader in the sense that he knows their legal systems since he operates within these jurisdictions.
- In addition, according to the General Approach of the Council and the European Parliament amendments to RAD proposal, all consumers domiciled in another Member State than the one in which the action is brought would need to explicitly join the action ("opt in"). Accordingly, no qualified entity could

represent consumers from other Member States without these consumers' explicit consent, and one consumer could not be represented in more than one representative action.

DEFENSIVES

CPC Coordinated Action on Rogue Traders

What have the Commission and national consumer protection authorities done so far to address COVID-19 consumer scams?

- On 12 March the Commission activated the network of consumer protection (CPC) authorities of the Member States to look into the emerging issue of COVID-19 related scams, which may breach the Unfair Commercial Practices Directive. On 20 March 2020, this network endorsed a CPC common position on the most reported scams and unfair practices in this context.
- On 23 March 2020, Commissioner Reynders <u>asked</u> Allegro, Amazon, Alibaba/Aliexpress, CDiscount, Ebay, Facebook (i.e. Facebook, Facebook Marketplace and Instagram), Microsoft/Bing, Google (i.e. Google ads and YouTube), Rakuten, Wish and Verizon Media/Yahoo to cooperate closely with the CPC authorities to take strong measures to limit fraudulent practices taking place on their platforms. All of the platforms replied and the Commission published these replies on its website, and a summary of them, on 3rd April 2020 together with a press communication.
 - On 22 April Commissioner Reynders <u>wrote</u> again to these platforms, asking them to remain on a high alert but also asked them to be vigilant on food and food supplements, fake medicines and fake or falsely accredited medical devices (chirurgical masks, Covid tests). He has also invited them to further refine their measures to fight predatory practices and follow market-trends and to continue the cooperation with relevant national authorities.
- The Commission **welcomed** the <u>measures</u> platforms already took but we will need to make sure that they continue their efforts regarding consumer protection and safety issues related to the COVID-19 outbreak.

• The Commission has also provided <u>advice</u> to consumers and traders to avoid misleading practices related to the COVID-19 pandemic. These advices are translated into all EU languages. They are relayed by the <u>ODR platform</u> home page and by the national <u>European Consumer Centres</u>.

Have the main internet platforms already removed products/offers/ads?

- Platforms replied positively for Commissioner Reynders's call for cooperation and reported that, as a result of their proactive actions, they have removed millions of COVID-19 related potentially misleading offers from their online platforms. For example:
 - o Amazon removed millions of product offers for making potentially misleading COVID-19 claims. For the past five weeks, they have seen significant decreases, approximately 70%, in the weekly number of new product listings attempting to make COVID-related claims as a result of their proactive measures taken.
 - eBay blocked or removed more than 15 million listings violating their COVID-19 policies.
 - o Cdiscount removed 1,104 million problematic offers.
 - o Alibaba/Aliexpress removed over 250,000 suspicious listings alone in March.
 - Rakuten removed around 2870 product pages due to price gauging and misleading claims.
 - Wish has reviewed more than 2.8 million listings featuring unsupported medical claims and, since the first letter (23 March), more than 1.8 million COVID-19 related listings for potential price gouging, which resulted in the removal of a number of items, including face-masks, hand sanitizers and oxygen machines.

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• The detailed replies of the platforms are published on the Commission's website. Commissioner Reynders asked platforms to continue with implementing their measures and keep the Commission regularly informed about their latest statistics.

What is the Commission planning to do next to address COVID-19 consumer scams?

- We keep working together with the national consumer protection authorities to address consumer scams:
- o Firstly, we need to continue our dialogue with platforms to make sure they fully enforce their new policies and offer more evidence that their measures are working to fight constantly evolving predatory practices.
- o Secondly, we also monitor closely harmful practices taking place outside of marketplaces. The CPC network, with the coordination of the Commission recently carried out a **sweep** a coordinated consumer law compliance check targeting a broad number of e-shops, online platforms and other websites with prominence of advertisement.
- O Preliminary assessment of **sweep results** confirms that the measures platform took have already delivered results. Nevertheless, there are still certain issues where platforms could improve further. Therefore, we are planning to provide a bilateral feedback to the main internet platforms. The replies also showed that rogue traders found **new ways for their predatory practices**, which makes it more difficult to monitor them: for example they often use implicit claims by way of pictures or graphic illustrations implying that the product cures or prevents a COVID-19 infection, or they use intentional misspellings to avoid being filtered by automatic searches.
- o The Commission services are also in contact with trade associations, representing platforms and advertisers, who are engaging with their members to better protect consumers from

scams and unfair advertisement. In addition, the Commission seeks to facilitate a further enhanced cooperation between CPC authorities and domain registers.

What will the Commission do if platforms no longer cooperate, or if online traders do not stop harmful practices?

- The European Commission has no direct enforcement power in consumer law (unlike in competition law). However, we do have a strong coordination role and we can alert national authorities and ask them to take action. If there is sufficient evidence to support a case, national authorities are obliged to react and coordinate their enforcement measures.
- In the COVID-19 context, millions of misleading business practices have been detected by platforms. In such a context, enforcement actions against individual traders at the EU level would make sense only in case of a massive infringement that would have been made by one clearly identified EU level trader (and this is currently not the case).
- In case of non-satisfactory compliance by platforms, national authorities may eventually have to adopt enforcement measures (e.g. impose fines).

But what can be done to protect consumers against disproportionally high prices (e.g. up to 600%) for masks, sanitizers etc.? Businesses are free to set up prices!

- Traders are well aware of consumers' fears linked to the current crisis and the shortage of personal protective equipment, such as masks or sanitizers.
- Where traders exploit this situation by misleading consumers that those products are difficult to find due to the increased demand in order to charge prices that are much higher than the average price, this can be considered as an unfair commercial

- practice that is prohibited under EU consumer law (the Unfair Commercial Practices Directive).
- Platforms have implemented some automatic checks to prevent price hikes, which seem out of the average according to the developments in the market. And certain practices have been sanctioned as unfair in certain Member States.
- Some Member States (e.g. France) have, as part of national emergency measures, opted for national regulation of prices for certain products in high demand.