

# New Era of Collective Actions in Europe?

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Despite 20 years of robust legislative activity in the field of consumer protection and the [2013 European Commission recommendation](#) on collective redress mechanisms, a harmonized approach to collective redress such as group or class actions does not exist throughout the European Union. That may change if the European Commission's "New Deal for Consumers" is adopted; the legislative package, published on April 11, 2018, introduces, in a [proposal for a directive](#), an EU-wide compensatory redress mechanism to protect the collective interests of consumers. The proposed directive is currently being discussed by the European Council, in particular its Working Party on Consumer Protection and Information, and member states are providing their opinions.

The Commission cited large-scale cross-border infringements of EU consumer law such as the Volkswagen diesel emissions case — which reportedly affected over 8 million consumers across various EU member states and saw compensation offered to U.S. but not EU consumers — and the rise of economic globalization and digitalization as examples of the difficulties consumers face when seeking to claim collective redress across unharmonized redress regimes in the 28 EU member states.

## Background

The EU has a comprehensive set of consumer rights in place, and all member states have collective redress available for infringements of consumer law in the form of injunctive relief under the [Injunctions Directive 2009/22/EC](#). However, compensatory collective redress (*i.e.*, damages) is not presently available in all member states, and where it is an option, it is often limited to specific sectors (generally those where claims are made by consumers). The European Commission's January 2018 report on the subject concluded that where collective redress was available, it was underused, including due to rigid conditions set out in national legislation, the lengthy nature of procedures and the perceived excess in costs in relation to the expected benefits.

Each member state has its own approach. In the United Kingdom, for example, individual consumers might together seek a "group litigation order" (as car owners suing Volkswagen did in connection with the so-called "Dieselgate" emissions litigation) or, for a competition law claim, a collective proceedings order from the Competition Appeal Tribunal (as is currently being pursued in connection with a finding of cartel activity in the European trucking industry). Meanwhile, in Germany, no general procedural mechanism for collective actions exists, though an act governing representative actions for consumer claims will come into force in November 2018. Currently, special collective mechanisms are available for certain types of disputes, such as those that are subject to the Capital Markets Model Case Act (KapMuG).

## Proposed Directive

The New Deal includes a suite of changes to existing directives and the proposed directive on representative actions that would mandate a single approach across the EU, replacing the Injunctions Directive. The proposed features of the new representative action proposal include:

- A wide scope, encompassing infringements of provisions of EU law that harm or may harm the collective interests of consumers, including in the financial services, energy, telecommunications, health and environment sectors;
- Standing restricted to "qualified entities" that are designated by member states and meet minimum reputational criteria (such as being a nonprofit and having transparent funding arrangements);

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- A variety of possible remedies in addition to injunctive relief (which is already available), in particular compensatory relief, declaratory relief (*i.e.*, establishing an infringement but not granting relief) and court-approved settlements;
- Baseline procedural features such as permitting opt-out actions where consumers may benefit from relief without having to individually opt in, and the ability for consumers to seek disclosure of certain types of documents from the defendant; and
- Streamlined proceedings, with final decisions serving as irrefutable evidence of consumers' entitlement to redress within the member state where the case was brought and as a rebuttable presumption of infringement in other member states; declaratory decisions upon which litigants can directly rely in subsequent redress actions; and mutual recognition of qualified representative entities, enabling EU-wide infringements to be pursued in a single member state.

The proposed directive will need to pass through the European Parliament and European Council, and the co-legislators will need to agree on the final text before it becomes law, a process that could take months or even years. This process may lead to amendments of the present text or even abandonment of the project. If the proposed directive is finalized and becomes law, member states will have at least 18 months to ensure that its provisions are reflected in their local laws.

## 'The European Way'

One focus of the legislative process may be whether the proposed directive delivers on its promise to provide increased legal certainty and adequate safeguards for companies against the type of litigation that is often criticized as abusive in U.S.-style class actions. The availability of punitive damages, absence of limitations when it comes to standing, possibility of funding using contingency fees and wide-ranging discovery are "U.S.-style" features that the European Commission has singled out in its joint information note "[Towards a Coherent European Approach to Collective Redress: Next Steps](#)" as "*not compatible with the European legal tradition.*" Věra Jourová, the commissioner for Justice, Consumers and Gender Equality promised in an [April 11, 2018, press release](#) that "representatives actions, in the European way, will bring more fairness to consumers, not more business for law firms."

What "the European way" might entail and whether it will deliver on the promise of fairness will only become clear once the proposed directive completes its long legislative journey and is tested in the courts of the member states.

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