

EU Class Actions in the Making

IN SHORT

The Situation: Currently, European law provides only for representative actions to stop or prohibit infringements of EU consumer law, but not for collective redress. As a result, significant differences exist in the protection of the collective interests of consumers throughout the European Union, as some Member States have introduced actions for collective redress, whereas others have not.

The Plan: The European Commission has tabled a Proposal for a Directive on representative actions for the protection of the collective interests of consumers ("Proposal"), currently under review by the European Parliament. If the potential Directive enters into force, the EU Member States will have 18 months to implement it into their respective national laws.

Looking Ahead: If it is implemented, the Proposal is expected to lead to an increase in the number of enforcement and court cases seeking collective redress. As a collateral effect, liability insurance premiums and costs for legal expenses insurance will rise, if they are offered at all.

Currently, all Member States in the European Union provide for representative actions to stop infringements of EU consumer law, in accordance with EU Directive no. 2009/22/EC ("Injunctions Directive"). By contrast, collective redress is available in only 19 Member States, with [Germany planning to implement a mechanism offering declaratory relief](#). In addition, only six of these Member States opted to implement the full set of measures called for by European Commission in 2013, and consumers must regularly prove the infringement of their rights anew even if one court has already found for another consumer.

The limited impact of the 2013 Recommendation in recent consumer right cases prompted the Commission [to announce a "New Deal for Consumers,"](#) proposing to revise the EU consumer law directives and to strengthen representative actions. The primary goal of the draft legislation is to ensure that consumers throughout the European Union can obtain collective redress in mass harm situations. This is a private action enforcement mechanism as a corollary to [government enforcement allowing authorities to levy fines of up to 4 percent of a company's turnover](#).



Most importantly, the Proposal covers data privacy and additional economic sectors such as financial services, energy, telecommunications, and environment.



The Proposal

Through the Proposal, the Injunctions Directive would be amended by a collective redress procedure to create a one-stop-shop framework for both injunctive and compensatory redress.

The scope of the Proposal is considerably broader (covering 59 instruments) than that of the Injunctions Directive (covering only 15 instruments), as it has been expanded to cover the scope of the Regulation on Consumer Protection Cooperation, which was revised in 2017 to step up public enforcement of EU Law. Most importantly, the Proposal also covers data privacy and additional economic sectors such as financial services, energy, telecommunications, and environment. The Proposal is without prejudice to existing redress schemes, such as those applicable to damages from competition law infringements (competition law remaining outside the scope of the Proposal).

The main aspects of the Proposal are:

- Actions can be brought by qualified entities designated in advance by the Member States *or created on an ad hoc basis for a specific action*. These entities will be required to fulfill certain criteria, including nonprofit and transparency requirements in relation to funding, in an effort to avoid conflicts of interest and abusive litigation.
- The national court in an EU Member State will be able to issue injunction orders as well as redress orders in the form of monetary compensation, repair, replacement, price reduction, contract termination or reimbursement, but not punitive damages.
- The Proposal applies an opt-out principle to injunction orders, while opting out or opting in to redress orders is left to the discretion of the Member States.
- Member States should—where consumers suffered comparable harm—consider the possibility of

enabling consumers to directly benefit from a redress order after it was issued without being required to give their individual mandate beforehand.

- Companies may be required to produce evidence contrary to their case, subject to rules on confidentiality.
- The limitation period for all potential redress actions would be suspended by the filing of a representative action.
- If a court-approved collective settlement is reached, consumers concerned could accept or reject it.
- Companies may be required to widely publicize final injunctive or compensatory decisions and to reach out to consumers individually to inform them of subsequent steps to take.
- Final decisions would be considered as irrefutable evidence that an infringement occurred in the same Member State and would benefit from a rebuttable presumption in actions brought in another Member State.

Assessment

Collective redress is a growing trend both in terms of volume and value of cases filed. Considering the breadth of the Proposal, this trend is likely to be reinforced. In areas such as data privacy, where recent global data breaches have already vividly illustrated the legal implications under the existing frameworks, EU consumers will now have the legal tool to bring cross-border class actions against tech companies.

In contrast to, for example, the German approach, the Proposal suggests that for certain cases, Member States should not even require consumers to give a specific mandate to the qualified entities for them to bring actions. That would open the possibility for collaboration between plaintiff law firms, qualified entities, and litigation funders to create a business model of consumer collective redress in Europe.

It is still unclear to what extent pre-trial disclosure requirements would be implemented, but there is a significant risk that they will be expanded at least in those Member States that currently only know limited disclosure.

Furthermore, the possibility for consumers to reject settlements on collective redress and seek redress in individual proceedings instead, added to the fact that the Proposal is without prejudice to existing redress avenues, creates an environment in which each infringement may lead to a plethora of actions, in plain contradiction to the rationale of the Commission.

The discretion given to consumers in this respect, coupled with the contemplated opt-out system where the number of claimants is not known, makes any risk assessment very difficult for companies. This necessarily has an impact on defense strategy, in particular on whether or not these representative actions should be settled.

THREE KEY TAKEAWAYS

1. In the midst of several mass harm scandals, the Proposal aims to endow EU consumers with the first horizontal collective redress tool under EU law. Consumers will be given the ability to seek injunctive and compensatory relief in any area in which they have suffered harm.
2. The low threshold to bring cases, in particular without specific mandates of consumers concerned, opens the door to a class action litigation industry in the European Union.
3. While the Commission's Proposal is under review by the European Parliament and the Member States, companies may want to make their voice heard in the legislative process, to point out the imbalances and uncertainties of the Proposal, which may leave both companies and consumers worse off.



Eileen Lagathu
Paris



Anna Masser
Frankfurt



Christian B. Fulda
Munich



Ozan Akyurek
Paris

[All Contacts >>>](#)

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[German Government Releases Draft Act](#)



[Be Sued or Be Fined: European](#)



[EU Consumer Rights Enforcement—](#)

[on Class Actions in
Germany](#)

[Commission
Proposes Consumer
Protections
Expanding Class
Actions and
Enforcement Powers](#)

[Penalties Ahead](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113