

Far-Reaching EU Consumer Class Action Proposal

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On April 11, 2018, the European Commission published a proposed new EU law as part of a package of consumer protection measures. The proposed new law would introduce the first Europe-wide consumer class action system, exposing companies in a broad range of industries to new risks with potentially huge financial implications.

The proposed new law would replace the 2009 Injunctions Directive. That directive aligned Member State laws on injunction procedures to stop violations of certain EU consumer protection laws. The proposed new law would go considerably further.

For example:

- It would substantially expand the list of EU laws the alleged violation of which could result in actions. In addition to typical consumer protection laws, the list would cover a wide range of subjects, including (among others) EU laws relating to product liability, healthcare, data protection, financial services, passenger rights, tourism, energy, the environment, telecommunications and media services.
- The representative actions could be brought against "traders," which are broadly defined as any natural or legal persons, whether publicly or privately owned, acting for purposes relating to their trade, business, craft or profession.
- A substantially wider range of entities would be able to sue on behalf of consumers than under the 2009 Injunctions Directive. Member States would have to approve all entities that are properly constituted, have a legitimate interest in ensuring compliance with the covered EU laws and have a non-profit making character (qualified entities). Qualified entities could include not only consumer protection bodies but also ad hoc litigation vehicles.
- Although the proposal prohibits third-party funders from influencing decisions of qualified entities in the context of an action, it does not include provisions preventing plaintiffs' lawyers and litigation investors from benefitting from claims through such entities.
- In addition to seeking injunctions, qualified entities could sue for damages arising from the breach of any of the covered laws. If redressing consumers directly would be disproportionate because they had individually suffered only a small loss, the damages would have to be awarded to "a public purpose serving the collective interest of consumers."
- In bringing actions for injunctions or damages, the qualified entities would determine the consumers they claim to represent, and in some cases will not need to obtain the consumers' agreement.
- The proposal gives Member States the possibility to provide that a qualified entity and a trader who have reached a settlement can jointly request a court or administrative authority to approve it.

In a 2013 recommendation calling on the Member States to introduce consumer class actions (which went largely unheeded), the European Commission identified a number of safeguards to protect against abusive litigation, including application of the "opt-in" principle for constituting the represented class, application of the "loser pays" principle, prohibition of punitive damages and others. The proposed new law does not incorporate many of the 2013 recommended safeguards and instead leaves their application to the discretion of the Member States.

Several Member States already have collective redress systems in place for certain types of actions, including actions seeking antitrust damages. The Commission's proposal would allow those systems to remain in place, with the new system coexisting alongside the existing systems. Moreover, the proposal does not prevent Member States from introducing new collective redress systems that would also coexist alongside the proposed new system.

The proposal will now pass through the EU's complicated legislative process for adoption by the European Parliament and the Council of the European Union. If the law is adopted, Member States would have 18 months in which to transpose the law's requirements into their national legal systems and another six months to start to apply them.

Anne Robert is an associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.