

A “New Deal for Consumers”: European Commission tables new consumer protection proposals with stronger collective redress potential

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Overview

The European Union has the strictest rules on consumer protection globally and consumer interests have been a central theme in a number of recent Commission initiatives, ranging from reform of mobile phone and data roaming charges to new emissions and fuel consumption tests for cars. Though the EU remains at the forefront of consumer protection, the Commission recognises that consumer policy challenges remain. In that vein, on 11 April 2018, the European Commission published proposals on a “New Deal”¹ expanding consumer rights, including individual remedies for unfair commercial practices and collective redress for consumer groups, as well as harmonising and strengthening national sanctions for infringements of consumer law. The Commission’s press statements have explained that while this initiative has been prompted by “Dieselgate”, the EU should avoid the pitfalls which characterise the US approach to class actions.

The proposed “New Deal”

The Commission’s “New Deal” aims to enhance consumer protection, through (i) higher sanctions for national consumer protection authorities; (ii) uniform individual remedies for consumers to address the idiosyncrasies of protections across Member States; and (iii) the first EU-wide class-action regime for the collective redress of consumers on a widespread and/or cross-border scale.

Increased Penalties for Violations of EU Consumer Law

The Commission’s proposals aim to harmonise national sanction mechanisms through the introduction of a common set of criteria for assessing the gravity of infringements and a requirement for fines to be available under national law for ‘widespread infringements’ and infringements affecting consumers across a number of Member States. The maximum fine must be at least 4% of the relevant trader’s turnover in the Member States affected by the infringements.

¹ The “New Deal” is comprised of two proposals for Directives; (1) a new Directive governing “representative actions for the protection of the collective interests of consumers” to replace the existing Injunctions Directive 2009/22/EC; and (2) a broader Directive amending and ‘modernising’ four existing consumer protection directives (the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU, the Unfair Contract Terms Directive 93/13/EEC, and the Price Indication Directive 98/6/EC).

Individual Consumer Remedies

The Commission's proposals also provide for the universal availability of individual remedies for consumers harmed by unfair commercial practices, such as misleading marketing, aiming to harmonise the levels of protection between Member States. Under the proposals, consumers would be afforded both contractual and non contractual remedies, including the right to terminate an infringing contract and compensation.

Collective Redress

Central to the proposed reforms is the Commission's report on the implementation of the 2013 Commission Recommendation on collective redress² which concluded that existing individual redress mechanisms are inadequate in 'mass harm situations' affecting large numbers of consumers in the EU. The Commission's statements on the reforms are expressly influenced by the events of "Dieselgate", and the perception that the EU should be seen to be responding in some way.

The "New Deal" proposes to replace the seemingly deficient 2009 Injunctions Directive (which makes provision for a court or administrative authority to injunct a practice violating consumer rights) and provide for collective redress in the form of both injunctive and compensatory relief across a broad range of fields including: financial services, product liability, travel, energy, telecommunications and the environment.

Counterbalancing the proposed collective redress reforms is the Commission's longstanding concern about abusive US style class actions, and so several restrictions have been proposed on the ability to bring collective redress. For example, consumers will not be able to seek collective redress in mass harm situations through private law firms, but rather only through 'qualified entities', such as consumer organisations and independent public bodies, subject to stringent eligibility criteria. Further, 'qualified entities' should be 'not for profit' and will be subject to strict obligations of transparency regarding the source of their funding.

A number of Member States already provide for collective redress mechanisms, including for private 'follow-on' damages actions for breach of EU competition law. The "New Deal" is intended to supplement, not replace, these existing mechanisms.

Comment

The Commission's proposed suite of measures is reflective of the Commission's view that effective enforcement of consumer rights requires a combination of public and private remedies. As demonstrated in the competition law sphere in recent years, the Commission is keen to facilitate private redress as a complement to its own enforcement activities and those of national authorities.³ The latest proposals on consumer protection enforcement introduce at the outset an ambitious framework for effective private enforcement through collective redress. That said, if the early experience of collective redress in competition law is anything to go by, potential claimant groups will face some significant obstacles to mounting claims; the recent experience of claimants in the interchange fee and mobility scooters collective actions in the United Kingdom demonstrate some of those difficulties.

It remains to be seen how widespread collective redress will become in the EU. Though some jurisdictions, for example, the Netherlands, are introducing new provisions to encourage collective actions, the Commission is evidently eager to avoid a move towards US-style class actions; indeed, even the current proposals are controversial among industry groups for fear of opening the door to what is perceived in some quarters as an abusive system of litigation. While welcoming the initiative, consumer groups have criticised it for introducing a system which will still be slow, and allow too much scope for discretion in how it is implemented nationally.

² Report on the implementation of the 2013 Recommendation on collective redress, COM(2018)40 of 25 January 2018.

³ Consider for example the EU Competition Damages Directive (2014/104/EU) which introduced a rebuttable presumption that cartels cause harm. See further [here](#).

Legislative Next Steps

The proposals will now begin the process for approval by the European Parliament and the Council of the European Union. If successfully adopted, Member States are required to incorporate the laws into their national legal systems and begin to apply them within 24 months.

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