

## The Commission's New Deal for Consumers

The EU has been focusing on improving and strengthening the consumer protection rules following market developments. In April 2018, the European Commission proposed new rules as part of the "New Deal for Consumers." This new deal aims to strengthen consumer rights online, give consumers the tools to enforce their rights, introduce effective penalties for violations of EU consumer law, track dual quality of consumer products and improve conditions for businesses.

As part of the aim of providing consumers with the tools to enforce their rights, on 24 November 2020, the European Parliament endorsed a [directive on representative actions](#) in order to introduce the possibility for consumers to bring a collective action.

## The New Mechanism

The new rules introduce a harmonised model for representative action in all member states that guarantees that consumers are protected against "mass harm", whilst ensuring protection for businesses against abusive lawsuits.

This directive comes after some back and forth on the drafting, with previous criticisms including that it did not provide enough legal certainty for businesses.

Under the new directive, collective actions can be brought against traders if they have allegedly violated EU law in areas such as data protection, travel and tourism, financial services, energy and telecommunications.

Actions may be brought even if the infringement has ended, as the directive can be used to ban or prevent the practice recurring.

## Qualified Entities

Member states must implement at least one effective procedural mechanism that permits qualified entities to bring lawsuits to the court to obtain an injunction or redress. This means that only qualified entities may bring lawsuits to represent consumers. For cross-border actions, qualified entities must comply with the following EU criteria: the qualified entity must (1) have a certain degree of stability, (2) have a public activity and (3) be a not-for-profit organisation.

Note that there may be different requirements in national laws for domestic actions.

## Safeguards

The mechanism also brings in some level of protection against abusive lawsuits with various safeguards. It carries the principle "loser pays", so the unsuccessful party will pay the costs of the successful party. Qualified entities must also establish procedures to avoid conflicts of interest and external influence, which may arise with third-party funding.

The directive will enter into force with the following timeline:



## Implications for Competition Law

The European Commission had previously emphasised the need for collective redress in relation to competition law, and several member states already allow collective damage actions for competition law infringements.

It remains to be seen the effect this new directive will have on competition law, as the infringement must relate to a limited set of European directives and regulations contained in Annex I. Notably, none of these instruments relate directly to competition law. However, several instruments contain references to the need to preserve competition. For example, Annex I includes Council Directive 93/13/EEC of 5 April on unfair terms in consumer contracts and this directive states in its preamble the risk of unfair contract terms and distorting competition. However, as it stands, competition law is not explicitly included in the list of instruments that the collective action must relate to.

## The UK Experience in Competition Law

The UK already has various options for collective action. The most commonly used is a Group Litigation Order where litigants with a common claim will use this procedure to manage the cases efficiently.

However, the Consumer Rights Act 2015 introduced a system of collective redress specifically in relation to competition law to allow claimants to bring actions for infringements prohibited by the Competition Act 1998 or EU law. Notably, this procedure introduced an "opt-out" regime, which means that claimants are included in the group unless they expressly opt-out.

In order to use this procedure, the proposed representative and the action must be approved by the Competition Appeals Tribunal (CAT) before it can proceed. The CAT will certify claims as eligible for collective proceedings where the claims are brought on behalf of an identifiable class, raise common issues and are suitable.

Only a small number of cases have been brought under this procedure. Notably, the Supreme Court has just handed down its decision in the *Mastercard v Merricks* case. This case concerned a collective action in relation to Mastercard charging unlawfully high multilateral interchange fees. The CAT rejected Mr Merrick's application to bring an opt-out collective action on behalf of an estimated 46.2 million people as it did not meet the suitability test. However, the Court of Appeal found in his favour, which Mastercard appealed to the Supreme Court. The Supreme Court has dismissed the appeal, and the action can now proceed to the next stage.

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