The European Commission (the “Commission”) published its non-binding Recommendation encouraging member states to introduce collective redress procedures for consumers in June 2013. However, responses have been limited. A draft directive, adopted by the European Parliament and Council in late 2019, may finally see the introduction of effective and affordable redress mechanisms for mass claims across Europe.

Collective redress
Within the European Union

In February 2011 the Commission published a consultation paper, “Towards a coherent European approach to collective redress”, identifying a first set of common legal principles which should apply to any new initiative in this area. Response to that consultation was mixed. The European Parliament initially expressed doubt that the Commission had put forward convincing evidence that action was needed at EU level and questioned the legal basis on which the Commission was proposing to found measures in this area. However, the Parliament’s formal resolution of February 2012 adopted a much more positive tone than in its previous response report, opening the way for the Commission to reformulate its collective redress proposals.

The Commission’s much-anticipated proposal was finally published on 11 June 2013 by way of a non-binding recommendation (the “Recommendation”), which aimed to ensure “a coherent horizontal approach to collective redress in the European Union without harmonising Member States’ systems”. Member states were asked to implement appropriate measures within two years, so by 26 July 2015.

The Recommendation’s provisions
The Recommendation set out principles for an opt-in procedure, with limits on the damages that may be awarded, the disclosure of evidence and how such actions may be funded. Member states were invited to implement domestic procedures to provide a mechanism enabling consumers

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and businesses suffering loss and/or damage as a result of the infringement of rights granted by EU law, to bring collective proceedings against defendants, which should be "fair, equitable, timely and not prohibitively expensive". The Recommendation also identified a number of areas in which collective actions would be particularly valuable, including consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.

The Recommendation suggested that collective actions may be commenced by a number of different litigants, ranging from a group of two or more natural or legal persons who have suffered harm acting together, to officially designated representative entities and public authorities. It proposed that collective actions within the EU should be available on an opt in basis only, leaving it to member states to determine how would-be claimants were informed of the litigation, any qualifying criteria and the identity of organisations who could commence a representative action on the claimants’ behalf. While both compensatory relief and injunctive relief should be available, compensation should be limited to actual loss or damage suffered; punitive damages are expressly prohibited. How the collective action was being funded should be declared, and the Recommendation advocated that third party funding should only be permissible in certain controlled circumstances. Costs should be awarded on the "loser pays" principle although, again, the detail was left to member states to finalise. Contingency, or damages-based, fees should not be permitted if they created or risked creating an incentive to undertake unnecessary litigation which was not in the interests of the parties. Where national law did permit them, they should be regulated by domestic legislation.

While procedure was left to member states, under the Recommendation, "intrusive pre-trial discovery procedures" should generally be avoided. The Recommendation noted that such disclosure is foreign to the legal traditions of most member states in any event. Disclosure along civil jurisdiction principles, which is traditional in the vast majority of EU member states, can be significantly narrower than under common law disclosure principles as operated in the UK, for example.

The recent review – a disappointing response
Built into the Recommendation was a review process requiring the Commission to assess, by 26 July 2017, the implementation of the Recommendation on the basis of practical experience and to consider whether further measures should be proposed. To that end, in May 2017 the Commission issued a Call for Evidence on how the Recommendation was being implemented in practice, looking not only at experiences of collective actions but also at situations where collective action could have been appropriate but was not sought, in order to obtain views on the effectiveness and efficiency of collective actions procedures.

The Commission’s report was published at the end of January 2018 and will have been disappointing reading for the advocates of a consistent approach across the EU. Although compensatory collective redress was found to be available in 19 member states, in over half of them it is limited to specific sectors, and mostly to consumer claims. Only Belgium, Denmark, Lithuania, the Netherlands, Portugal and the UK have taken a horizontal approach in their legislation, allowing for collective compensation proceedings across all areas, while nine member states do not currently provide any means by which claimants may collectively claim compensation in mass harm situations as defined by the Recommendation. The Commission therefore considered that although the Recommendation had achieved its aim of inspiring discussions across the EU about collective redress, it had resulted in only limited development of new legislation and access to collective redress mechanisms remains very unevenly distributed across the EU.

A New Deal for Consumers: “Representative action, the European way”
Against this background, in April 2018 the Commission proposed new legislation to bolster consumers’ rights within the EU, including a new directive ("Directive on representative actions for the protection of the collective interests of consumers" (2018/0089 (OCD)) (the “draft directive”), which would effectively introduce a right of collective redress across the EU. The draft directive will allow “qualified representative entities” (“QREs”) to bring collective actions on behalf of groups of EU consumers harmed by illegal practices and seek compensation.

The proposed rules will permit QREs to bring representative actions to stop or prohibit infringements of European laws, such as consumer rights, data protection, financial services, travel and tourism, energy, telecommunications, environment and health, and to seek compensation for losses sustained as a result of breaches, on behalf of consumers across member states. QREs must be non-profitmaking organisations, such as public authorities or consumer organisations, properly constituted according to the law of a member state and with a legitimate interest in ensuring provisions of EU law are complied with. Member states are not allowed to impose criteria on QREs that go beyond those established in the draft directive, according to its recitals. However, each member state must designate at least one QRE for the purpose of bringing representative actions and will have to maintain a publically available
list of QREs in that state. The draft directive sets out that QREs must be independent of market operators and law firms, financially and otherwise. The source of their funding, including any third party funding arrangements, must be transparent, public and free from conflicts of interest. Contingency fees are to be avoided. Where they are permitted nationally, member states must ensure that payment of those fees does not impact on the compensation obtained by consumers as a result of the collective action. There is provision for member states to provide legal aid or public funding to QREs where this would facilitate access to justice.

The draft directive imports the “loser pays” principle with regard to costs (with the exception of costs incurred unnecessarily or disproportionately), to deter potential frivolous actions and encourage justified collective actions. It also sets out a number of provisions relating to the conduct of representative actions, including in relation to the publication of information about proposed representative actions and the (proportional) disclosure of evidence by parties. It is proposed that the submission of a representative action to the court will have the effect of suspending or interrupting any relevant limitation periods for other redress actions by individuals. In other respects, procedure is left up to individual member states. Furthermore, nothing in the draft directive would prevent member states from adopting or maintaining any other provisions aimed at protecting collective consumer interests at a national level; the text states that it aims to provide a “minimum harmonisation” and not to replace existing collective redress mechanisms. In this context it seems that the risk of forum shopping has not been fully considered, both for a forum with the lowest requirements for a QRE and for a forum with the lowest procedural conditions for initiating a collective action.

Under the terms of the draft directive, where a representative action is seeking an injunction to prevent the continuation of offending conduct, individual domestic consumers would not have to opt in – the claim could be commenced on their behalf without their specific mandate. Consumers living outside the member state in which the collective action is initiated would still be required to opt in. In other cases, such as where the action is seeking redress such as repair, reimbursement or compensation for damage suffered, member states would be able to require individual consumers to consent to a collective action being brought on their behalf, but it is not obligatory.

Punitive damages and the over-compensation of claimants are not permitted. The Commission envisages that the new collective action procedure would be appropriate in cases such as the recent Volkswagen “Dieselgate” emissions scandal, by allowing numerous consumers to obtain remedies collectively through a representative action, something which has not previously been available under EU law.

The draft directive was adopted by the Parliament in March 2019 and by the Council in November 2019. It is anticipated the necessary legal processes will all have been completed by June 2020. Once the draft directive has been formally agreed, member states will have a set period of time, typically 18-24 months, in which to give effect to the new measures.

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