The European Commission (the “Commission”) first published proposals for a European-wide collective redress procedure in November 2008. While anxious to avoid importing what it considered to be the excesses of the U.S. class action procedure into European law, the Commission had been keen to address perceived barriers faced by individual consumers in obtaining effective and affordable redress in the context of mass claims, both in national and cross-border contexts. Responses to these early proposals suggested that while member states acknowledged the existence of problems in this area, they were divided on how to tackle them.

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 again 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
Nine member states do not currently provide any means by which claimants may collectively claim compensation in mass harm situations.
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 proposed 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 publicly available list of QREs in that state. The proposed 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 proposed 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 proposed 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 proposed 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.

In its report, the Parliament deleted the option to opt into or out of settlement and instead stipulated that the redress obtained through a court approved settlement would be binding upon all parties.

Altogether, the European Parliament made a large number of changes, some of them substantial, to the draft originally published by the Commission in April 2018. The proposed directive as amended by the Parliament must still be approved by the Council, which may accept the Parliament’s position or propose further amendments. Once the proposal 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.

The proposed directive will allow groups of EU consumers... to bring collective actions.