

## BROADENING THE PRIVATE ENFORCEMENT OF CONSUMER LAW



The EU's proposed directive on representative actions.

As part of the 'New Deal' for consumers announced in the wake of the so-called Dieseltgate scandal, the Commission have proposed the replacement of the existing Injunctions Directive with a new Directive on representative actions for the protection of the collective interests of consumers. As this proposal awaits its first reading before the European Parliament, Hausfeld examine the content of the draft Directive and its likely impact on the private enforcement landscape in Europe.

The so-called Dieseltgate scandal – German carmaker Volkswagen's attempted cheating of emissions tests – which hit the headlines worldwide in September 2015, looks to have been the impetus that European lawmakers needed to offer EU consumers new rights to collective redress. When, in April last year, the Commission published their 'New Deal' for consumers, the Commission referred

specifically to Dieseltgate as an example of consumers being unable to enforce their legal rights.<sup>1</sup>

Whilst the New Deal package contained a series of important proposals aimed at, *inter alia*, improving consumers' rights online and ensuring better protection from unfair commercial practices, a key element of the plan was the Commission's proposal for a directive on representative actions (the Proposed Directive).<sup>2</sup>

The Proposed Directive is, at the time of writing, yet to become law – rather it is awaiting its first reading in the European Parliament and appears unlikely to be passed prior to the European elections in May 2019. We can therefore refrain from stating any firm conclusions as to exactly when the Proposed Directive might enter into force: however, it is worth examining the form of the Proposed Directive which emerged from the committee stages of the legislative process (following extensive debate in and reports from the JURI and IMCO committees) at the end of last year.

In short, the Proposed Directive would repeal the existing Injunctions Directive (Directive (2009/22/EC)) and, broadly speaking would allow 'qualified representative entities' to bring actions on behalf of a group of wronged consumers for

<sup>1</sup>[http://europa.eu/rapid/press-release\\_IP-18-3041\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3041_en.htm)

<sup>2</sup> Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC  
[https://ec.europa.eu/info/sites/info/files/proposal\\_for\\_a\\_directive\\_on\\_representative\\_actions\\_for\\_the\\_protection\\_of\\_the\\_collective\\_interests\\_of\\_consumers\\_0.pdf](https://ec.europa.eu/info/sites/info/files/proposal_for_a_directive_on_representative_actions_for_the_protection_of_the_collective_interests_of_consumers_0.pdf)

compensation or other relief. QREs would have to meet various criteria to be eligible for designation, such as a requirement that they must be not-for-profit.

The Proposed Directive would be one of minimum, as opposed to maximum, harmonisation – that is to say that the intention is not to precisely harmonise the standards which operate in all Member States but rather to set a minimum standard below which Member States must not fall. In this respect, where some Member States already possess good and high standards of collective redress (such as the UK's opt-out regime for breaches of competition law), such standards will not be altered – instead, those Member States with lower standards will be required to 'level up' and to ensure that representative actions are an option in a number of areas of potential consumer harm, including in relation to breaches of laws concerning, *inter alia*, data protection, financial services, travel, energy, telecommunications, the environment and health.

Importantly, the Proposed Directive acknowledges that many instances of consumer harm do not pay heed to national borders and that, as a corollary, mechanisms which facilitate transnational justice are required. In this respect: (i) a regulatory decision in one Member State would constitute a rebuttable presumption of infringement before other Member States' courts; (ii) QREs from different Member States would be able to group together to bring an action before the courts of a single Member State where consumers from a number of countries are victims of the same conduct; and (iii) QREs designated in one Member State will be able to apply to bring actions before the courts or administrative authorities of all other Member States.

Whilst the Proposed Directive is not perfect in a number of aspects - it could, to take one example, be improved by applying to individuals in their capacity as citizens and to SMEs, as well as to citizens in their capacity as consumers - it is nevertheless very welcome recognition from European lawmakers that European consumers require a strengthened enforcement toolkit in order for their rights to apply in practice as well as in theory. This step forwards is all the more positive when viewed in the context of the heavy industry lobbying which has surrounded recent attempts to facilitate collective redress in Europe, much of which has focussed upon a misplaced fear of Europe somehow importing the perceived excesses of US-style class actions – a prospect that is neither being proposed nor possible in any event.

We will wait and see when and in what form the Proposed Directive is passed in to law but, at this stage at least, it appears that Dieselgate may have had one positive consequence after all.

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