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CLASS AND COLLECTIVE ACTIONS

Collective actions in the EU: the past, the present, the future

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Historical caution fuelled by the situation in the US

Collective redress has been a recurring source of assessment and initiatives in the EU in the past couple of decades. However, the main takeaway of these initiatives was the concern that such a system would overburden national judicial systems and businesses with frivolous litigation of the kind seen across the Atlantic.

Initiatives from DG Competition

White paper and staff working paper on damages actions. On 2 April 2008, the Directorate General for Competition (DG Competition) published a white paper on damages actions for breach of the EU anti-trust rules (*COM(2008) 165*) in which it laid out a proposal for collective redress actions. The European Commission suggested two complementary mechanisms:

- Representative actions brought by qualified entities (such as consumer associations, state bodies or trade associations) on behalf of identified or, in restricted cases, identifiable victims. Such entities would be either designated in advance or certified on an ad hoc basis by a member state for a particular cross-border anti-trust infringement.
- Opt-in collective actions that would enable victims to expressly decide to combine their individual claims for damages into a single action.

The European Commission emphasised the importance of enabling victims of infringements to pursue individual actions for damages while preventing over-compensation for the same harm. The Commission elaborated on its proposal in further detail in a staff working paper (*SEC(2008) 404*) issued simultaneously with the white paper. In this working paper, the Commission focused on certain key issues, including:

- Funding for such collective actions.
- Definition and representation of the group that collectively pursues claims.
- Distribution of damages.

While it had approached the idea of collective redress with reluctance in the past (see resolution of 25 April 2007 on DG Competition's green paper on damages actions for breach of anti-trust rules), on 26 March 2009 the European Parliament issued a relatively favourable resolution on the DG Competition's white paper (*2008/2154(INI)*). The European Parliament was generally receptive to the idea of establishing mechanisms to improve collective redress, but it highlighted the importance of avoiding excessive litigation (*recital 4*), and suggested limitations on such mechanisms. Specifically, the Parliament stated that measures at the EU level should not "lead to arbitrary or unnecessary fragmentation of procedural national laws and that, therefore, careful consideration should be given to whether, and if so to what extent, a horizontal or integrated approach should be chosen to facilitate out-of-court settlements and the prosecution of actions for damages". The Parliament further criticised the DG Competition's sectoral approach focused on competition law infringements and insisted on being involved in any legislative initiative in the area of collective redress. It demanded that the European Commission refrain from presenting any collective redress mechanism for victims of breaches of the EU competition rules without allowing the Parliament to participate in the adoption of such a mechanism under the co-decision procedure.

Proposal for a directive. In June 2009, the European Commission proposed a directive on anti-trust damages actions for breaches of EU competition law that contained a set of rules to implement the ideas articulated in the DG Competition's white paper. However, political headwinds from the European Parliament and the Commission's end of term coincided to prevent the initiative, and the directive was never officially published.

The Commission's efforts to impose collective redress mechanisms as a supplement to individual actions for the enforcement of EU competition rules were ultimately unsuccessful. Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive), signed into law on 26 November 2014, explicitly provides that member states are not required to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (*recital 13*).

Initiatives from DG Health and Consumer Affairs

In parallel, the Directorate General for Health and Consumer Affairs (DG Health and Consumers) began its own initiative with a green paper on consumer collective redress (*COM(2008)794 final*). This paper explicitly excluded breaches of competition laws, as these were covered by the DG Competition initiatives (*recital 5*).

The primary purpose of the paper was to assess the current state of redress mechanisms for consumers in the EU (*recital 4*). It concluded that options for consumer redress in the EU at that time were unsatisfactory and prevented large numbers of consumers affected by a breach of law from obtaining redress and compensation (*recital 19*). Only 13 member states (France, Germany, Finland, Sweden, Denmark, Bulgaria, Greece, The Netherlands, Italy, Spain, Portugal, Austria and the UK) had introduced collective redress schemes into their legal systems, some of which were in their infancy.

DG Health and Consumers proposed several solutions, some of which involved a significant role for the EU. For example, promoting co-operation between member states to extend national collective redress systems in member states with such systems to consumers in member states without such systems. Alternatively, a mix of policy instruments could be introduced to strengthen consumer redress, including:

- Collective consumer alternative dispute resolution mechanisms.
- A power for national enforcement authorities to request traders to compensate consumers.
- Extending small claims to address mass claims.

DG Health and Consumers also suggested binding and non-binding measures for collective redress judicial proceedings to exist in all member states.

DG Health and Consumers received more than 100 responses to its green paper. Based on those responses, it issued a follow-up consultation paper in which it addressed the replies and presented an analysis of their potential impact. In May 2009, the DG held a public hearing. Interested parties, including the European Parliament, criticised the sectoral approach, which focused on consumers' actions, as incoherent and inconsistent. The European Parliament expressed its concern that uncoordinated EU initiatives in the field of collective redress would result in a fragmentation of national procedures and damages legislations, which would in fact weaken access to justice within the EU. The stakeholders argued in favour of a more inclusive regime, and questioned the need for a new regulation in light of the collective redress mechanisms already in place in several member states.

Ultimately, this initiative suffered a similar fate to the ones from DG Competition and did not lead to any legislative proposal.

Joint initiatives from DG Competition, DG Health and Consumers, and DG Justice

After the individual efforts of DG Competition and DG Health and Consumers had failed, the European Commission launched a concerted initiative. The Commissioners for DG Competition, DG Justice and DG Health and Consumers underlined in their joint information note of 5 October 2010 (*SEC(2010) 1192*) the need for a coherent European approach to collective redress and further identified a set of core principles that could form part of a European framework for collective redress.

The Commissioners expressly stated that they unanimously and firmly opposed introducing US-style class actions in the EU as that system tended to foster abusive litigation. The Commissioners made clear that any European approach to collective redress would have to include procedural safeguards to minimise the risk of abuse. (The joint information note is available at: *https://ec.europa.eu/competition/antitrust/actionsdamages/Commission_2010_information_towards_european_collective_redress.pdf*.)

Following this initiative, in 2011, the European Commission published the public consultation paper Towards a Coherent European Approach to Collective Redress (*SEC(2011)173*). The purpose of the consultation was to identify the forms of collective redress that could fit into the EU legal system and the legal frameworks of the member states.

In June 2013, based in part on the public response to the 2011 consultation, the European Commission published the Collective Redress Recommendation, which:

- Encouraged member states to implement collective redress systems to allow groups of natural and legal persons to seek injunctive and compensatory relief for infringements of rights granted under EU law.
- Set out common principles for member states to follow in designing or modifying their collective redress systems.

The European Commission explained these principles in greater detail in a communication published in connection with the recommendation (Towards a European Horizontal Framework for Collective Redress (*COM(2013) 401/2*)).

Although the recommendation was not legally binding, it has been highly significant in practice, with several countries adopting new rules to implement it (including the UK, through the Consumer Act 2015).

Current regulation: sector-specific protection

As of yet there is no fully-fledged EU collective redress system. However, several individual texts currently in place aim to protect EU citizens in specific areas such as consumer protection, data protection, environmental protection, and so on.

Consumer protection

Consumer protection injunctions. Directive 2009/22/EC on injunctions for the protection of consumers' interests (Injunctions Directive) requires member states to grant qualified entities standing to seek court orders requiring the cessation or prohibition of violations of EU consumer regulations. In the event of a cross-border infringement, the Injunctions Directive provides that qualified entities from one member state have legal capacity to bring an action before legal or administrative authorities of the member state where the infringement originated. This directive applies to infringements related to:

- Distance selling (Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC on the protection of consumers in respect of distance contracts).
- Consumer credit (Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit).
- Television broadcasting (Directive 89/552/EEC on the co-ordination of certain provisions concerning the pursuit of television broadcasting activities).
- Package holidays (Directive 90/314/EEC on package travel, package holidays and package tours).
- Unfair contractual terms (Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive); Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive)).
- E-commerce (Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (E-commerce Directive)).
- Medicinal products for human use (Directive 2001/83/EC on the Community code relating to medicinal products for human use (Code for Human Medicines Directive)).
- Consumer financial services (Directive 2002/65/EC on distance marketing).
- Long-term holiday products (Directive 2008/122/EC on certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Long-term Holiday Products Directive)).
- Consumer goods and services (Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2006/123/EC on services in the internal market).

In its application so far, the Injunctions Directive has proven more useful to prevent future harm rather than to correct past damages. In its reports concerning the application of the directive (*https://ec.europa.eu/info/sites/info/files/study_on_injunctions_directive_final_report-18_12_2011_en.pdf*), the EC found that injunctions were successful tools for policing markets and ensuring fair contractual terms but, as the length of an injunction procedure often amounted to years, the consumer could be prevented from relying on a favourable ruling to obtain compensation (for example, by a statute of limitation). At the same time, the procedures provided for by the directive have proved to be more successful for national infringements than for cross-border ones. This is mostly due to the cost and complexity of taking an action in another member state.

Anti-trust damages. The Anti-trust Damages Directive expressly provides that member states are not obligated to introduce a collective redress mechanism for the enforcement of Articles 101 and 102 of the TFEU. However, if they do choose to have such a mechanism in place, the directive lays out the rules to be followed.

The main aspect covered by the directive relates to information disclosure. It grants national courts a large amount of discretion in

determining the appropriate level of disclosure of evidence. The directive further establishes that courts can order a defendant or third party to disclose relevant evidence that is within its control. Conversely, the court can limit the disclosure to evidence that it considers proportionate in light of the legitimate interests of all the parties, including third parties (*Article 5(1), Anti-trust Damages Directive*). The power of the courts to order the production of evidence includes evidence containing confidential information but is limited to documents that are not protected under any legal professional privilege.

The Anti-trust Damages Directive introduces a distinction between documents categorised as:

- Never disclosable. Documents that are never disclosable in the context of actions for anti-trust damages include leniency statements and settlement submissions from the parties (*Article 6(6), Anti-trust Damages Directive*).
- Disclosable once the competition proceedings are closed. Documents prepared for the purposes of proceedings in front of a competition authority, information circulated by the authority and settlement submissions that have been withdrawn can only be disclosed once the competition authority has adopted a decision or otherwise closed its proceedings (*Article 6(5), Anti-trust Damages Directive*).
- Fully disclosable. National courts can order the disclosure of any information not included in the two categories above (such as documents created in the ordinary course of business).

Another major point covered by the Anti-trust Damages Directive relates to limitation periods. National statutes of limitations used to apply, subject to the EU law principles of effectiveness and equivalence, for claims related to the violations of rights granted under EU law, where an EU legal instrument created an individual or collective right but did not define the applicable time limit.

The Anti-trust Damages Directive now harmonises national rules on limitation periods in relation to competition law violations. Actions are now subject to a minimum five-year limitation period (*Article 10, Anti-trust Damages Directive*). In a follow-on action, the limitation period is suspended until at least one year after the infringement decision has become final or proceedings have been otherwise terminated.

Unfair interest rates. Directive 2011/7/EU on combating late payments in commercial transactions (Late Payment Directive) requires member states to provide "adequate and effective means" to prevent the continued use of contractual terms and practices that are grossly unfair in relation to interest rates. This directive specifies that "adequate and effective means" encompass the right of organisations that are officially recognised as representing undertakings, or organisations that have a legitimate interest in representing undertakings, to take measures before the national courts to prevent the continued use of unfair contractual terms.

However, in practice, national courts in some member states have taken a restrictive approach. For example, in a judgment from 9 November 2017, the Paris Court of Appeal refused to allow an action brought by the French National Tenant's Association against penalty clauses for late payments in residential leases, on the ground that the contract (a residential lease) was outside the scope of consumer protection.

Another example occurred when a number of consumers attempted to assign their rights to another person, who was not party to the consumer contract, to allow him to bring an action in their consumer forum. In *Maximilian Schrems/facebook Ireland Limited*, 25 January 2018 (*C-498/16*), the European Court of Justice (ECJ) ruled that that person could not use the forum of the consumers whose rights were assigned to him to bring the action because the consumer forum rule was only in place to facilitate the bringing of an action by the consumer personally. With this ruling, the ECJ limited the possibilities for consumers from different member states to act jointly.

In summary, these directives grant various rights to EU citizens as consumers. Nevertheless, group actions for compensation remain limited and difficult to access.

Data protection

Article 80 of the Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) requires member states to set up a collective redress mechanism to allow "representative entities" to act on behalf of data subjects.

The representative entity can either receive mandate from the data subjects it aims to represent or be granted permission by a member state to bring an action directly. The latter option prevents potential compensation for data subjects.

The GDPR imposes some conditions for entities wishing to bring a representative action on behalf of data subjects. Such entities must:

- Be properly constituted under the law of a member state.
- Have a not-for-profit status.
- Have the safeguard of public interest as their statutory objective.
- Be active in the data protection sector.

Environmental protection

The EU is a signatory to the United Nations Economic Commission for Europe, Convention on Access to Information, Public participation in decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which has been binding on the EU and all the member states since Council Decision 2005/370/EC in 2005. The Aarhus Convention provides that members of the public must have access to a review procedure to challenge decisions affecting the environment. More specifically, it requires signatory states to set up a procedure for qualified members of the "public concerned" to challenge decisions if they can prove sufficient interest or the impairment of their rights.

However, the ECJ has ruled that Article 9(3) of the Aarhus Convention was not directly applicable in the legal order of the EU (*Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe, C-404/12*) and therefore could not be relied on by non-governmental organisations to bring legal actions.

Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (Public Participation Directive) has also inserted mechanisms similar to those in the Aarhus Convention into:

- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive).
- Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive).

However, these mechanisms do not apply outside the scope of these directives and there is no general provision on access to justice covering all environmental matters.

Proposal for a directive on representative actions

Based on a proposal from the European Commission, the European Parliament and the Council of the EU adopted in November 2019 a draft directive (Document No 14600/19) that aims to reinforce consumer rights through, among other things, a collective redress mechanism. This directive stems from a proposal from the European Commission in the previous year and will now be discussed between the three institutions in order to reach an

agreement on the final text. Once the directive is adopted and enters into force, member states will be required to implement its provisions within a specific timeframe. The Council is proposing 30 months.

The directive would replace the Injunctions Directive, as well as compel member states to create new collective redress mechanisms. However, member states with a pre-existing collective redress mechanism would be allowed to either update that system or keep it and create a new regime operating in parallel (leaving the type of action to the choice of the entity bringing the suit). However, it remains unclear how two separate collective redress regimes would interact within one member state.

The directive is limited with respect to its scope and imposes restrictive safeguards on the availability of the collective redress mechanism, echoing the fear of an over-broad US-style regime. The draft also reflects the importance of increased and structured cross-border co-ordination necessary for a more unified European single market.

Scope of application

The directive requires member states to ensure that a collective redress mechanism is available in a number of areas of consumer protection under European law including:

- General consumer law such as:
  - liability for defective products (Directive 99/34/EC on liability for defective products);
  - unfair terms in consumer contracts (Unfair Contract Terms Directive);
  - sale of consumer goods and associated guarantees (Directive 2011/83/EU on consumer rights);
  - contracts for the supply of digital content and digital services (Directive (EU) 2019/770 on contracts for the supply of digital content and digital services);
  - contracts for the sale of goods (Directive (EU) 2019/771 on contracts for the sale of goods);
  - general product safety (Directive 2001/95/EC on general product safety);
  - unfair commercial practices (Unfair Commercial Practices Directive);
  - misleading and comparative advertising (Directive 2006/114/EC concerning misleading and comparative advertising);
  - unjustified geo-blocking and discriminations based on nationality or place of establishment (Regulation (EU) 2018/302 on unjustified geo-blocking).
- Product information and labelling in relation to:
  - substances and mixtures (Regulation (EC) 1272/2008 on the classification, labelling and packaging of substances and mixtures);
  - fuel efficiency (Regulation (EC) 1222/2009 on the labelling of tyres with respect to fuel efficiency);
  - food information (Regulation (EU) 1169/2011 on the provision of food information to consumers);
  - the EU Ecolabel (Regulation (EC) 66/2010 on the EU Ecolabel); and
  - energy (Regulation (EU) 2017/1369 setting a framework for energy labelling).
- Passenger rights with respect to rail and air transport (Regulation (EC) No 2027/97 on air carrier liability or Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, among others).
- Tourism, in relation to:
  - long-term holiday products (Long-term Holiday Products Directive);
  - package travel (Directive (EU) 2015/2302 package travel and linked travel arrangements).
- Health, in relation to:
  - medicinal products for human use (Code for Human Medicines Directive);
  - cosmetic products (Regulation (EC) No 1223/2009 on cosmetic products);
  - medical devices (Regulation (EU) 2017/745 on medical devices); and
  - in vitro diagnostic medical devices (Regulation (EU) 2017/746 on in vitro diagnostic medical devices).
- E-commerce, including media, online content and information society services (E-commerce Directive; Directive 2010/13/EU on the coordination of member states concerning the provision of audiovisual media services; Regulation (EU) 2017/1128 on cross-border portability of online content).
- Telecommunication (electronic communication networks and services, roaming and internet access) (Directive (EU) 2018/1972 establishing the European Electronic Communications Code; Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union; Regulation (EU) 2015/2120 laying down measures concerning open internet access).
- Personal data rights (Directive 2002/58/EC on the protection of privacy in the electronic communications sector; GDPR).
- Energy market in relation to:
  - electricity (Directive 2009/72/EC on the common rules for the internal market in electricity);
  - natural gas (Directive 2009/73/EC on the common rules for the internal market in natural gas);
  - eco-design for energy-related products (Directive 2009/125/EC establishing a framework for the setting of eco-design requirements); and
  - energy efficiency in general (Directive 2012/27/EU on energy efficiency).
- Dispute resolution for consumers (Directive 2013/11/EU on alternative dispute resolution for consumer disputes; Regulation (EU) 524/2013 on online dispute resolution for consumer disputes).
- Financial services, including:
  - investment and fund management (Directive 2002/65/EC on distance marketing; Regulation (EU) 1129/2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; Regulation (EU) 2017/1131 on money market funds; Directive 2009/65/EC on undertakings for collective investment in transferable securities; Directive 2011/61/EU on alternative investment fund managers; Directive 2014/65/EU on markets in financial instruments);
  - European long-term investment funds (Regulation (EU) 760/2015 on European long-term investment funds);
  - insurance-based investment products and reinsurance (Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products; Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance; Directive 2016/97/EU on insurance distribution);

- consumer credit (Directive 2008/48/EC on credit agreements for consumers; Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property);
- e-money and payment services (Regulation (EC) No 924/2009 on cross-border payments Directive 2009/110/EC on electronic money institutions; Regulation (EU) No 260/2012 establishing technical and business requirements for credit transfers and direct debits in euro; Directive 2014/92/EU on the comparability of fees related to payment accounts; Directive (EU) 2015/2366 on payment services).

However, while these cover a wide range of sectors, competition law-related claims and environmental claims are not included in the draft directive.

The application of the draft directive would therefore be broader than the Injunctions Directive, which it intends to repeal, since new areas such as financial services, data protection and energy are now covered.

Safeguards

While the scope of application of the draft directive is broader, the legislators have attempted to mitigate the potential for frivolous and over-abundant litigation by imposing or recommending various provisions within the new mandatory collective redress system.

Strict requirements for the entity bringing the action. An entity wishing to bring a collective action under the mechanism provided for in the draft directive, must apply for the status of "qualified entity" either:

- In the member state where it intends to bring the action (domestic representative actions) according to national law.
- In a member state other than the one where it intends to act (cross-border representative action).

To obtain the status of "qualified entity" an entity must:

- Be a legal person properly constituted under the law of the member state of application at least 18 months before the application.
- Be able to demonstrate at least 12 months of actual activity in consumer protection.
- Have a legitimate interest in safeguarding one of the protected consumer interests (*see above, Scope of application*).
- Have a non-profit quality.
- Have knowledge and skills in the field relevant to the collective action.
- Have a sound and stable financial situation.
- Be independent from influence of any third party with an economic interest in the suit, other than consumers (such as a competitor).
- Disclose publicly (such as on its website) all the above information as well as the source of its funding.

In cross-border representative actions, once the member state grants the status of "qualified entity", it must communicate the information to the European Commission and establish a list of qualified entities, which must be available publicly and updated on a regular basis. The status of the entity will be reassessed periodically (at least every five years) by the relevant member state to ensure that the entity complies with the criteria above.

These stringent requirements are aimed at preventing competitor-funded or claimant law firm-funded litigation and ensuring that the entities bringing the actions are genuinely attempting to protect consumers with no other ulterior motive.

Consumer involvement mechanisms. The draft directive requires member states to provide for a specific way for consumers interested in a collective action to express their will to be represented by the qualified entity in the specific action. It further details the different possibilities available to member states, such as an:

- Opt-in system (where consumers must express their will to be represented by the qualified entity in the context of the action).
- Opt-out system (where consumers must express their will not to be represented by the qualified entity in the context of the action).
- Hybrid system.

However, for consumers located outside the member state where the action is brought, the draft directive imposes an opt-in requirement.

Member states must also set a specific timeframe within which consumers can exercise their right to opt-in or out of the proceedings as applicable.

Procedural costs. The directive allows member states to establish or maintain their own national rules on procedural costs, including provisions assigning such costs to the losing party (the "loser pay" principle). If such rules are implemented, they would likely constitute an additional deterrent to frivolous litigation.

Settlement system under judicial oversight. While the directive provides for a settlement system to be implemented, any agreement between the qualified entity and the trader (the actual or potential defendant) in the representative action is subject to the approval of the court of the member state where the action has or would have been brought. This settlement system will alleviate the caseload of the courts in the sectors covered by the directive. However, it may facilitate the creation of a "suit for settlement" culture, much like in the US, where consumers bring actions looking for a quick monetary compensation because the trader does not want bad publicity or to waste time and resources on actual judicial proceedings.

Prohibition of punitive damages. The draft directive also warns against member states allowing punitive damages to be awarded within the context of the collective redress mechanism "to prevent the misuse of representative actions" (*recital 4*). The directive further emphasises that it is not its aim to promote the award of punitive damages or to otherwise overcompensate consumers. So far, punitive damages are forbidden in nearly all the member states (with the exception of the Republic of Ireland) (note that there is no such prohibition in the UK as well) and seen as particularly incentivising frivolous litigation. If this trend remains and member states follow the directive's guidance on this topic, consumers will only be entitled to recover their actual losses, which will allow the representative entities to approach cases with a selective approach, balancing the various interests at stake.

Discretion has therefore been broadly left to each member state to establish a fair regime balancing both consumer and business interests. Nevertheless, some further safeguards would have most likely been welcomed by traders, such as the need to limit lawyers' ability to recover contingency fees, which is so far not harmonised throughout the EU. It remains to be seen what exact procedure each member state will put in place and whether it will adequately limit the risk of frivolous litigation.

Cross-border co-ordination

With the implementation of this draft directive, a specific push is given to information sharing and co-ordination both between qualified entities and between member states.

Information sharing. The draft directive promotes communication between member states as it requires them to designate a national contact point to facilitate other member states' investigations into the status of an entity bringing a representative action in their

territories. The contact point must be provided to the European Commission, which will compile a list of contact points and communicate them to all member states.

Member states must also provide for a way for qualified entities from different member states to act together in one action, although the precise mechanism to be put in place is not specified any further.

Finally, as consumers across the EU should be made aware of a representative action that could affect them, the draft directive calls on member states to ensure that consumers are informed about the action in a timely manner. However, once again there is no clear instruction or recommendation for member states on the procedure to implement. In addition, once a decision or settlement has been issued, the trader will bear the cost of informing the affected consumers.

Judgment recognition. Through the creation of this new redress mechanism, the draft directive also prevents consumers who have expressly or tacitly opted-in or out of a representative action from bringing an individual action in another forum or from joining another representative action for the same cause and the same remedies. The directive expressly provides that consumers represented in an action can neither be represented in another action nor bring an individual action with the same cause of action against the same trader.

In addition, a final decision of infringement can be evidence of an infringement in another redress action against the same trader for the same infringement in another member state but is not conclusive evidence of liability, limiting the incentive for claimant lawyers to forum shop. The European Commission had initially proposed the creation of an irrebuttable presumption of infringement for final decisions, but the European Parliament and Council limited the provision to mere evidence of infringement.

There are still several uncertainties regarding the final content of the directive, which should be clarified in 2020. It remains to be seen how member states will receive and implement such a system and whether they will attempt to harmonise to prevent forum shopping.

Practical Law **Contributor profiles**

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Recent transactions.

- Representing General Cable in its appeal before the European Court of Justice against the ruling of the European Court upholding the Commission's decision to fine the company for its alleged participation in the power cables cartel.
- Assisting the European Commission's Legal Service in several proceedings before theneral Court regarding the opening of a formal state aid procedure against the German Renewable Energies Act (EEG).
- Representing a French private equity house Wendel Investissements as intervening party in support of the European Commission against the actions brought by Odile Jacob in the context of the Lagardère/Natixis/VUP merger saga.
- Representing Orange Poland before the European General Court in its appeal against the European Commission's decision fining the company for an alleged abuse of dominance on the wholesale broadband markets in an Eastern European member state.
- Representing major French banks before the European General Court in an action for annulment against a decision of the European Central Bank in the area of financial regulation.
- Advising a Franco-Belgian entity on conducting business in the Republic of Congo and the North Korea in relation to EU sanctions.
- Advising CMA-CGM, in a price-signalling investigation before the European Commission, which was ultimately settled by commitments.
- Regularly advising a large pharmaceutical company on various business agreements and anti-trust compliance throughout Europe.
- Advice to a French aero-space parts supplier on compliance with EU-Russia trade sanctions.
- Regularly advising a large French consumer goods manufacturer on EU competition rules.

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Publications.

- *2019 - Big Data, Privacy, and Competition Law.*
- *2019 - EU Adopts First Foreign Direct Investment Regulation.*
- *2019 - Intel, iiyama, Power Cables: A Revolution in the Treatment of Territoriality and Jurisdiction in EU Competition Law?, Journal of European Competition Law & Practice, Vol. 10, Issue 2.*
- *2018 - CMA Proposes Changes to Investment Consultancy and Fiduciary Management Services.*

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Areas of practice. Anti-trust & competition law; EU law; litigation; EU regulatory.

Recent transactions.

- Representing a titanium dioxide manufacturer in the context of a European Commission Phase I and Phase II investigations into its acquisition by another chemicals manufacturer. Providing assistance on integration planning.
- Regularly advising a large medical devices company on EU competition law compliance matters as well as merger control filings
- Advising a Belgium Banking Institution on EU financial services regulations and compliance matters.
- Advising a large telecommunications company on antitrust compliance matters and multi-jurisdictional merger control.

Languages. English, French, Spanish