# Class Actions Alert

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## An EU Approach to Class Action Litigation

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### Key Points

- A U.S.-style class action regime looms large in the European Union.
- The current draft legislation imports certain hallmarks of the system celebrated by U.S. plaintiffs' lawyers, but there is uncertainty over what safeguards will apply.
- While the timing of the European Council's review and the scope of any legislation remain to be seen, some form of classwide device appears all but certain in the EU. Businesses would be wise to stay abreast of developments in the coming weeks and months.

Multinational corporations operating in the United States and abroad encounter complex and dispositive legal frameworks that govern not only substantive rights, but also procedural rules that dictate who may assert such rights and, importantly, on whose behalf they may be asserted. Most businesses operating in the United States are, unfortunately, all too familiar with its class action device available in state and federal courts. Indeed, the 1966 amendments to the Federal Rules of Civil Procedure—the rules governing procedure in civil cases litigated in federal courts in the United States—brought with them the modern articulation of the procedural rule governing class actions: Federal Rule of Civil Procedure 23. And while state courts have adopted their own individualized class action procedures, they commonly look to federal law for guidance.

In the intervening five decades, class action filings increased exponentially in the United States, bulwarked by the potential for crushing aggregate monetary damages, classwide injunctive relief and significant attorneys' fees (while the Unites States generally does not have looser pay rules for attorneys' fees, successful class actions are one exception). These cases are often filed by individuals, such as consumers or employees challenging purported conduct on behalf of all others "similarly situated." The rise in litigation was met with judicial and legislative reformations in class action procedure. On the judicial side, federal courts have become increasingly vigilant in their efforts to ensure that plaintiffs strictly comply with the class Rule 23's certification requirements. As for legislation, Congress passed the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (CAFA), which relaxed some of the requirements defendants face to access federal courts, which are perceived to be


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better venues, in class action lawsuits. Nevertheless, enterprising plaintiffs' lawyers and their counsel leverage the class action device to put substantial pressure on businesses to consider settlement of claims, even where there are valid and potentially dispositive defenses. The defense costs alone can be significant, the potential exposure great and the sensitivities and disruption to the business that accompany litigation of this magnitude considerable.

Across the Atlantic, collective redress litigation has not yet taken hold in the same fashion, at least in part because there is serious disparity in the processes and procedures available in the different European Union Member States. But that may very soon be changing. At a time when lawmakers in the United States are increasingly focused on reeling in frivolous litigation, the EU is considering an overhaul and expansion of the current (very limited) Unionwide collective action regime. *See Proposal for a 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*, available here (the "*Proposal*"). The *Proposal* has gained increased momentum, with consumer groups, such as the Bureau Europeen des Unions de Consommateurs, endorsing it.

Further, on March 26, 2019, the Plenary (the whole EU Parliament) adopted its position of the *Proposal*. *See Representative Actions for the Protection of the Collective Interests of Consumers* ("*Parliament's Position*"). Now that the elections have concluded, the Council of the European Union next will consider the *Proposal* and *Parliament's Position*.

**The *Injunctions Directive*, the *Proposal* and the *Parliament's Position***

Since 1998, the European Union has required its Member States to make collective redress available through representative actions for injunctive relief brought by qualified entities designated by the Member States, such as consumer organizations or independent public bodies (pursuant to Directive 2009/22/EC (as amended), known as the "Injunctions Directive"). There has been no Unionwide regime for other forms of collective remedy such as damages by way of compensation, however, and so the Injunctions Directive has been regarded by the European Commission as inadequate for some time. Although a number of Member States (including, perhaps most notably, the U.K. and Netherlands) have their own established regimes for collective compensatory actions, there is a great divergence in the availability and nature of the regimes in each member state. In fact, some Member States have no compensatory regimes at all (and therefore no class actions comparable to those in the United States).

The *Proposal*, which was first issued in April 2018, passed by the European Parliament's Legal Affairs Committee just last December, and by the EU Plenary (in the *Parliament's Position*) in March 2019, seeks to "modernise and replace" the Injunctions Directive with a regime that will enhance the protection afforded to consumers under EU law. To that end, the collective action regimes already available in individual Member States will not be replaced. Instead, the legislation provides an expanded framework for specific representative actions that would be implemented at Member State level so that consumers in all Member States will benefit from at least one similar mechanism Unionwide. Under the *Proposal*, this Unionwide framework would:

I. Enable compensatory redress by empowering "qualified entities to bring representative actions seeking different types of measures as appropriate, depending on the circumstances of the case." *Id* at 3. "These include interim or definitive measures to stop and prohibit a trader's practice, if it is considered an infringement of the law, and measures eliminating the continuing effects of the infringement." *Id*. "The latter could include redress orders and declaratory decisions establishing the trader's liability towards the consumers harmed by the infringements." *Id*.

II. Expand the sectoral scope of the regime "to cover other horizontal and sector-specific EU instruments relevant for the protection of collective interests of consumers in different economic sectors such as financial services, energy, telecommunications, health and the environment." *Id*. at 2–3.

III. "[B]uild on the approach of the current Injunctions Directive" in respect of the "'qualified entities' designated by the Member States to bring representative actions." *Id*. at 3. "[T]hese qualified entities will have to satisfy minimum reputational criteria (they must be properly established, not for profit and have a legitimate interest in ensuring compliance with EU law)." *Id*. In addition, "[f]or compensatory collective redress actions, qualified entities would also be required to disclose to the courts or administrative authorities their financial capacity and the origin of their funds supporting the action." *Id*. And "courts and administrative authorities will be empowered to assess the arrangements for third party funding." *Id*.

IV. Require "Member States to ensure 'due expediency' of procedures and to avoid procedural costs becoming a financial obstacle to bringing representative actions." *Id*. Under the *Proposal*, this would be achieved by ensuring consumers are "adequately informed of the outcome of representative actions and how they will benefit from them." *Id*. The *Proposal* also "promotes collective out-of-court settlements, subject to court or administrative authority scrutiny." Finally, "[f]inal decisions of a court or authority establishing that a trader has infringed the law will be irrefutable evidence in redress actions (within the same Member State) or a rebuttable presumption that the infringement has occurred (for cases brought in another Member State)." *Id*.

The *Proposal* and the *Parliament's Position* are largely overlapping, although not identical. The *Proposal* explains that, "[a]s a rule, qualified entities should be entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate." *Id*.; *see also Parliament's Position*, No. 60 (similar). However, the *Proposal* also acknowledges that it will be "necessary to provide flexibility to the Member States in cases where the quantification of the harm of the consumers concerned by the representative action is complex due to the characteristics of their individual harm." *Id*. In such cases, under the *Proposal*, but not the *Parliament's Position*, Member States may be entitled to "empower courts or administrative authorities to decide whether to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law, which may be directly relied upon in subsequent redress actions." *Id*. Notably, however, the *Proposal* states that such "flexibility" would be inappropriate in so-called "'low-value cases' where a number of consumers have suffered such a small amount of loss that it would be disproportionate

or impracticable to distribute the redress back to the consumers." *Id*. In these cases, redress would be "directed to a public purpose to serve the collective interests of consumers." *Id*. The *Parliament's Position* omits these directives.

**Looking Ahead**

While the *Proposal/Parliament's Position* import from the United States the availability of class actions seeking monetary damages, it is not yet clear whether any of the associated procedural safeguards found in Rule 23 will be imported too—either by the EU in any final directive, or in national legislation when implemented by each Member State. Certainly, the *Proposal* and the *Parliament's Position* do not appear to consider many of the lessons that could be learned from class actions in the United States.

Specifically, Rule 23 requires plaintiffs to establish that their action is properly adjudicated as a class action before any questions regarding classwide liability are resolved. In every putative class action seeking monetary relief, plaintiffs must establish, among other things, (1) a numerous class that makes joinder impracticable; (2) "questions of law or fact common to the class"; (3) that the plaintiff's claims are "typical" of the class claims; and (4) that the plaintiff will "fairly and adequately protect the interests of the class." Rule 23(a)(1)-(4). In addition, the majority of putative class actions seeking monetary relief must also show "[1] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3).

As for counsel in class actions in the United States, they too are required to seek appointment from the court, which must also approve any payment of attorneys' fees. See Rule 23(g)-(h). Finally, class action settlements in federal courts in the United States include robust notice requirements that provide members of any putative class with rights to opt out of the proceedings and, where a class is settled, class members are permitted an opportunity to lodge objections to the agreement. *See* Rule 23(c)(2) and Rule 23(e). At every step, courts are required to vigorously enforce these requirements.

The EU, by contrast, is considering no such requirements (at least not expressly). Instead, the *Proposal* claims that the "qualified entity" requirement "is a strong safeguard against frivolous actions." *Proposal* at 4. The *Parliament's Position* includes no additional protections. And as many commentators have cautioned, the "qualified entity" requirement, like its predecessor, may do little more than serve a *pro forma* purpose, and that the requirement will not meaningfully deter, much less prevent attempts to abuse the collective action procedure.

Similarly, the *Proposal* says little about when consumers will need to be alerted to or involved in actions that might concern them. It does specify, however, that qualified entities would be able to seek injunctions ***without having*** "to obtain the mandate of the individual consumers concerned or provide proof of actual loss or damage on the part of the consumers concerned or of intention or negligence on the part of the trader" *Id*. at 28, Art. 5 ¶ 2; *accord Parliament's Position*, No. 55 (similar). And where "consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them" [i.e., "low-value cases"], Member States would be required to "ensure that the mandate of the individual consumers concerned ***is not required***." *Id*. at 29, Art. 6 ¶ 3(b) (emphasis added); *but see Parliament's Position*, No.

64 (deleting Art. 6 ¶ 3). Accordingly, unlike the strict requirements for notice and right to opt out of class actions in the United States, consumers in the European Union may in some instances (and depending on how any directive is ultimately implemented in each Member State) be represented by "qualified entities" regardless of the consumers' knowledge or consent to the action—and possibly without any proof of damage.

Finally, attorneys' fees in these collective actions is not meaningfully addressed. There are some restrictions proposed regarding third party funding, and qualified entities are required to be "not for profit," but it is not clear whether this operating status would have an impact on the ability of these entities to seek and recover significant fees in the prosecution of these actions. As for costs, the *Proposal* would not impact national rules regarding cost allocation, while the *Parliament's Position* would shift costs onto the unsuccessful party. *See Parliament's Position*, No. 4.

If implemented in its current form, there is a risk that the EU would only import what many believe to be the most frustrating aspect of the United States class action system: that often the true beneficiaries of the cases are the lawyers who file them. This is particularly notable in light of the fact that references to an excessive class action litigation environment in the United States were made while in committee. While the legislation awaits review and approval by the European Council, some form of the new directive is likely to be codified as law within the EU. Businesses would be wise to stay abreast of developments, in addition to amendments expected elsewhere in the European Union, as Member States continue to grapple with these important issues.

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