

European Commission Launches “New Deal” Consumer Legislation Covering Digital Services

Proposed new consumer legislation raises regulatory risks for businesses, creating new rights for consumers and introducing potentially increased collective litigation and fines for businesses.

The European Commission today presented an important proposed legislative package, which the European Commission calls a “new deal for consumers”. This package consists of a proposed directive on collective redress, and an omnibus directive making targeted amendments to four consumer directives.

1. Collective redress

The Commission has proposed a revision of Directive 2009/22/EC on injunctions for the protection of consumers’ interests. This Directive allows consumer organizations and other “qualified entities” to seek injunctions from Member State courts to stop infringements harming consumers’ collective interests both in domestic and cross-border cases. In practice, injunctions have been used mostly in domestic cases. The European Commission considers that the existing Directive does not sufficiently address the challenges for the enforcement of consumer law, in particular that existing individual redress mechanisms are not sufficient in “mass harm situations”.

The European Commission has now published a [proposed directive](#) “on representative actions for the protection of the collective interests of consumers” that will replace Directive 2009/22/EC.

Key proposed changes to the current regime are as follows.

- **Extension of scope**
 - The European Commission is proposing to extend the scope to new areas including financial services, energy, telecommunications, health, and the environment. A list of all EU legislative acts covered is contained in the Annex to the Directive.
- **Qualified entities**
 - Member States must ensure that consumer organizations and independent public bodies are eligible for the status of qualified entity. Qualified entities from different Member States should be able to join forces within a single representative action in front of a single forum. One qualified entity should be able to bring a representative action in the name of other qualified entities representing consumers from different Member States.
- **Monetary compensation in addition to injunctions**

- The European Commission aims to allow qualified entities to seek an injunctive order to stop and prohibit the infringing practices, but also a “redress order” as a “one-stop-shop” to stop the breach and ensure redress for the victims. This could include the recovery of monetary compensation on behalf of large classes of consumers. No punitive damages should be awarded.
- **Penalties for non-compliance**
 - Member States should lay down effective, proportionate, and dissuasive penalties for non-compliance with the final decision issued within a representative action. Further, that Member States should ensure that the penalties may take the form of fines.
- **Proof**
 - If an administrative authority or a court adopts a final decision on infringements harming collective interests for consumers, this shall be considered as irrefutably establishing the existence of the infringement for the purposes of a redress claim. Member States will also be under an obligation to ensure that if a final decision has been taken in another Member State, that final decision shall be considered by the national courts or administrative authorities as a rebuttable presumption that an infringement has occurred.
- **Evidence**
 - Qualified entities should be entitled to request traders for disclosure of evidence relevant to the claim. Qualified entities will not need to specify individual items of evidence. The European Commission has included this requirement to address what it sees as an “information asymmetry” in business-to-consumer relationships, in case the necessary information is held exclusively by the trader.
- **Suspension effects**
 - The submission of a representative action shall have the effect of suspending or interrupting the limitation periods applicable to any redress actions for the consumers concerned.
- **Source of funding**
 - The qualified entity must declare the source of the funds that it is going to use to support the action at an early stage.
- **Individual consumer opt-in / opt-out**
 - The proposal leaves the freedom to Member States to choose between opt-in or opt-out systems in order to allow consumers to be represented by the action. An opt-in system enables consumers to choose whether or not to join an action; an opt-out automatically includes affected consumers, who then have to remove themselves.

2. A proposal “as regards the better enforcement and modernization of EU consumer protection rules”

The [proposal](#) amends four EU directives:

- The Unfair Commercial Practices Directive 2005/29/EC
- The Consumer Rights Directive 2011/83/EU

- The Unfair Contract Terms Directive 93/13/EEC
- The Price Indication Directive 98/6/EC

The proposal:

- Sets common criteria for the assessment of the gravity of the consumer law infringements.
- Introduces fines as a mandatory element of penalties for widespread consumer law infringements. In these cases, the maximum fine should be at least 4% of the trader's turnover.
- Extends the Consumer Rights Directive 2011/83/EU to digital services for which consumers provide personal data, instead of monetary payment (e.g., cloud storage, social media, email). Consumers will have the same right to pre-contractual information and to cancel the contract with a 14-day right of withdrawal period.
- Creates additional information requirements for online marketplaces and search engines. Such as, to clearly inform consumers when content or search results are "paid placements", about the criteria used when ranking different offers, whether the contract is concluded with a trader or an individual, and whether consumer protection legislation applies.
- Provides that consumers should have the right to individual remedies when they are harmed by unfair commercial practices, such as aggressive marketing. This includes the right to terminate the contract and the right to compensation for damages.
- Allows Member States to adopt provisions restricting unsolicited visits by traders to consumers' homes and commercial excursions. Member States must justify such provisions on grounds of public policy or protection of private life and shall notify such provisions to the Commission, which will monitor if they are proportionate.

Next steps

The draft directives will now be submitted to the European Parliament and to the Council for adoption. If adopted, these proposals will entail important changes in how companies shape their relationship with consumers. The rights of redress granted to consumers, both at an individual and at a collective level, will in fact need to be factored into any business model.

Latham will closely monitor this space and provide updates on developments.

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