THE EUROPEAN UNION'S NEW COLLECTIVE REDRESS DIRECTIVE: IMPLICATIONS FOR THE FUTURE OF CIVIL LITIGATION

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I. INTRODUCTION

The Council of the European Union (the Council) recently proposed a directive that seeks to expand the availability of compensation for groups of consumers.[1] The proposed directive mandates what the commission previously suggested in a nonbinding 2013 recommendation that encouraged European members states to allow more collective actions.[2] It would require all member states to authorize at least one collective redress procedure, if they do not have one already,[3] to allow many consumers to recover damages or injunctive relief through a consolidated lawsuit against a small number of common defendants. The European Union already authorizes collective injunctive relief in all member states,[4] but this proposed directive would add a compensatory regime for European consumers.[5]

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1. Proposed Council Directive 2018/0089 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, ¶ 2, 2020 O.J. (C 104).

2. *Collective Redress and Competition Damages Claims*, EUR. L. INST., https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/collective-redress/ [https://perma.cc/SM3K-BQYR] (last visited Nov. 21, 2020).

3. Proposed Council Directive 2018/0089, *supra* note 1,¶ 2b.

4. Council Directive 2009/22, 2009 O.J. (L 110) 1.

5. Proposed Council Directive 2018/0089, *supra* note 1, ¶ 2c.

The proposed directive would also leave great deference to member states' existing collective redress procedures,[6] specifically prescribing that its procedures would only take precedence in cross-border actions within the European Union.

The proposed directive cites globalization, the rise of information technology, and the need for efficient resolution of controversies as reasons for mandating collective redress procedures in member states.[7] The proposal comes in the wake of the Volkswagen "Dieselgate" emissions scandal, in which American consumers were able to obtain damages from the German automotive corporation through the U.S. class action procedure, while European consumers largely went without compensation due to the lack of a uniform collective redress procedure.[8] The American class action procedure is famous, perhaps notoriously so, for authorizing large collective lawsuits with damages claims in the millions of dollars.[9] The vast majority of these cases end in settlement, and class action attorneys can also claim a percentage of the awards through contingency fees.[10]

It may seem that this proposed directive brings the European Union closer to authorizing U.S.-style class action litigation, but a closer analysis of the directive reveals that it stops short of authorizing full-scale private enforcement of class action suits for civil damages. This annotation argues that the proposed E.U. directive mandating collective redress is unlikely, on its own, to change the landscape of collective civil litigation in Europe. It is, however, indicative that European lawmakers have become more receptive to collective civil litigation and that further developments in this area could one day bring collective redress in the E.U. closer to the U.S. class action mechanism.

II. ABUSE SAFEGUARDS: COMPARISON TO U.S. CLASS ACTIONS

The Council included procedural safeguards in the proposed

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6. *See id.* ¶ 4b ("In line with the principle of procedural autonomy, this Directive should not contain provisions on all aspects of proceedings in representative actions. Consequently, it is for the Member States to set down rules, for instance, on admissibility, evidence or means of appeal applicable to representative actions").

7. *Id.* ¶ 6.

8. Melissa Heikkilä, *Europe's Landmark Deal on Collective Redress, Explained*, POLITICO (June 23, 2020), https://www.politico.eu/article/europes-landmark-deal-on-collective-redress-explained/ [https://perma.cc/RF8Q-L9FC].

9. *See* FED. R. CIV. P. 23 (authorizing class action suits on behalf of numerous plaintiffs with common claims); *See generally* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010) (describing class action claims and settlements worth millions of dollars).

10. Fitzpatrick, *supra* note 9, at 812.

directive to prevent "abusive litigation" from unduly harming European businesses.[11] The directive states, for example, that, "elements such as punitive damages should be avoided."[12] This is a stark difference from American class actions, which sometimes allow treble damages for the harm incurred.[13] E.U. collective redress would also adopt a loser pays principle,[14] which would deter parties from initiating and incurring costs for cases with questionable merits.

The proposed directive also has numerous financial safeguards. It stipulates that collective litigation on behalf of consumers should not be for profit.[15] It also requires that only qualified entities meeting certain specifications be allowed to pursue cross-border collective redress suits.[16] Qualified entities must not be influenced by any third-party funding litigation, such as a hedge fund or other financial institution.[17] This is a far cry from American class action litigation, which third parties regularly finance.[18]

Prescribing abuse safeguards is a double-edged sword. The restrictions will likely deter litigation that lacks merit, but it does so in a way that deters collective litigation altogether. The Council has impliedly accepted the tradeoff between adopting these safeguards and deterring at least some meritorious litigation. A qualified entity takes a risk by bringing a collective redress suit because of the proposed directive's "loser pays" principle, which requires that the loser of a suit pay the winner's litigation costs.[19] Entities would also not profit off of these suits, so the abuse safeguards are likely to make entities more selective in the suits they bring. It should be noted, though, that many individual member states maintain more permissive collective redress

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11. Proposed Council Directive 2018/0089, *supra* note 1, ¶ 4.

12. *Id.*

13. Treble damages are available in civil antitrust suits. Clayton Antitrust Act of 1914 § 4, 15 U.S.C. § 15 (2020).

14. *See* Proposed Council Directive 2018/0089, *supra* note 1, ¶ 13c ("In representative actions for redress the defeated party should pay the costs of the proceedings borne by the successful party").

15. *See id.* ¶ 10 (requiring qualified entities to have a "non-profit making character and have a legitimate interest, in light of their statutory purpose, in protecting consumer interests as provided by relevant Union law.").

16. *See id.* (listing legal personhood, permanence, public activity, independence, and financial health as requirements for qualified entities).

17. *Id.*

18. *See generally* Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499 (2014) (Detailing the regime of third party financing of tort and commercial damages claims in the United States).

19. Proposed Council Directive 2018/0089, *supra* note 1, ¶ 13c.

regimes than the proposed directive currently espouses.[20] The proposed directive will allow member states to maintain these more permissive procedures for suits that arise under national law and within national borders.[21] It is therefore unlikely that the proposed directive will reduce the attractiveness of collective actions in the E.U. member states that already provide for them.

III. THE STATE OF COLLECTIVE CIVIL LITIGATION IN MEMBER STATES

Most E.U. member states already authorize collective actions in civil litigation for damages or injunctive relief.[22] Some member states have rules that make collective redress claims arising within their borders more attractive than cross-border claims. The Netherlands, for example, is particularly permissive, allowing almost any individual or entity to bring a claim for collective redress through "claims foundations" so long as the foundations do not make a profit.[23]

Collective litigation can generally be characterized as either opt-in, where claimants must affirmatively indicate their willingness to take part in the action, or opt-out, where claimants are not required to consent to being represented in the litigation, but may choose to opt out of it. American class actions have an opt-out character; members of an American class action may not know they are being represented in a legal proceeding until they receive a check for damages (or more likely, a payment as part of a settlement).[24] Most E.U. member states only authorize opt-in collective litigation, but Belgium and the United Kingdom authorize opt-out class actions at least in part.[25] The Dutch

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20. *See generally* KEN DALY, U.S. CHAMBER INST. FOR LEGAL REFORM, THE GROWTH OF COLLECTIVE REDRESS IN THE EU: A SURVEY OF DEVELOPMENT IN TEN MEMBER STATES (Mar. 2017) (outlining various member states' procedures on collective civil actions).

21. Proposed Council Directive 2018/0089, *supra* note 1, ¶ 4a.

22. DALY, *supra* note 20, at 18.

23. *Id.* at 22.

24. *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that notice of the pendency of an action on class members' behalf as well as the opportunity to opt out satisfied minimal due process requirements due to class members).

25. POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFF., COLLECTIVE REDRESS IN THE MEMBER STATES OF THE EUROPEAN UNION 25 (2018) ("Two Member States provide for a mixed system: Belgium and the United-Kingdom (albeit only for one of its instruments) offer both possibilities. Belgium allows the courts to choose whether claimants should opt-in or out of the group having considered the demand of the representative entity and which is most appropriate in the case at hand. . .The UK mechanism provided for under the Competition Act was reformed to be both opt-in or opt-out depending on how the CAT certifies the proceeding").

legal system is again permissive on this front, as collective actions there are all opt-out.[26]

Fee arrangements in E.U. member states also vary significantly, though almost all member states adopt the loser pays rule.[27] This rule is not absolute, as judges in many nations may use their discretion to waive the rule in some form for consumer plaintiffs.[28] Most member states prohibit contingency fee arrangements where attorneys' fees are dependent on the sum of damages awarded or settlements.[29] Estonia, Poland, and Spain allow contingency fees, subject to regulation.[30]

Funding litigation through third parties is not a developed practice in E.U. member states, likely due to abuse safeguards that render collective litigation a relatively high-risk investment.[31] Most member states therefore do not have safeguards against third-party litigation funding,[32] and the strict nonprofit character of the new directive makes it unlikely that more such safeguards would be necessary.

Member states that authorize collective redress within their own borders impose certain restrictions on those suits, but the proposed directive includes far more. It is therefore unlikely that a class of plaintiffs from the same nation would bring a claim against a defendant operating in that nation under the proposed directive's rules. If the directive is ratified, however, cross-border E.U. claims will be subject to those additional procedural rules, including blanket bans on punitive damages, third-party funding, and profit-making for qualified entities.

IV. IMPLICATIONS FOR THE FUTURE OF EUROPEAN LITIGATION

Business groups are wary of how the proposed directive may affect the landscape of E.U. civil litigation in the future.[33] There is

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26. *Id.*

27. *Id.* at 34–35

28. DALY, *supra* note 20, at 35–36 (noting such judicial discretion or other limiting principles in Italy, Spain, France, the Netherlands, the United Kingdom, Belgium, and Germany).

29. POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFF., *supra* note 25, at 34.

30. *Id.*

31. *See id.* at 37 ("[T]hird party funding is still very little used and given the lack of incentive for third-party funders to implicate themselves in collective redress actions this is not likely to change yet.").

32. *Id.*

33. *See, e.g.*, DALY, *supra* note 20, at 3 (reflecting the concern of the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, that "all of the same incentives and forces that have led to mass abuse in other jurisdictions are also gathering force in the EU.").

concern that the Netherlands could become a magnet for numerous collective action cases, only some of which may have merit.[34] It is unlikely that the directive will encourage more forum-shopping than already occurs, however, because the Netherlands will keep its own domestic procedures and cross-border E.U. claims will be subject to the proposed directive's many restrictions that make pursuing questionable claims a risky endeavor.

The proposed directive will also potentially increase the status of nonprofit consumer groups in member states. It will lead to more funding for qualified entities,[35] expanding their ability to bring suit in collective redress, which in turn will increase legal liability for businesses operating in the European Union. The proposed directive will also require nations without collective redress procedures (like Latvia, Estonia, and Luxembourg) to designate at least one consumer group or other entity to bring collective actions on behalf of consumers.[36] Furthermore, the proposed directive may allow suits based on ongoing events that began before the directive was passed, so long as the plaintiffs make their claims after the directive's ratification.[37]

The proposed directive also has potential to change representative entities' litigation strategies. Cross-border claims will be subject to the directive's many regulations, so plaintiffs bringing suit in Dutch court, for example, may choose to exclude affected individuals from outside the Netherlands in order to avoid the stricter E.U. collective redress directive. This issue is mostly speculative, because it is impossible to know which potential plaintiffs representative entities have willfully excluded if those plaintiffs were never involved in a suit. It should at least be noted, though, that the proposed directive would not solve this issue of arbitrary plaintiff selection, if it exists at all.

Importantly, consumer plaintiffs would have more incentive to pursue cross-border claims under the proposed directive than they would otherwise. Plaintiffs in cross-border collective actions could

34. Heikkilä, *supra* note 8.

35. *See id.* ("Consumer defense groups in many countries are chronically underfunded. As part of the new collective redress law, the European Parliament obtained demands for additional funding and support for so-called qualified entities, or consumer groups that bring collective redress cases going forward").

36. *Id.*

37. *See id.* ("When implemented in a few years' time, the new directive could allow consumers to file class actions suits over ongoing matters such as booking cancellations linked to the coronavirus pandemic or breaches of privacy rights, as long as they are brought forward after the directive has been applied").

previously only win injunctions against defendants,[38] but the proposed directive puts compensation on the table. It would also force nations without a compensatory damages regime to adopt one, giving consumers in those nations a vehicle to claim compensatory relief.[39]

V. CONCLUSION

Although the proposed directive is a modest step in collective actions that does not come close to sanctioning the for-profit class actions of the United States, it is indicative of a trend in the European Union of emulating aspects of the American class action system. The proposed directive is a sign that the Council would like to facilitate consumer recovery against defendants that serve large portions of the European population, but it also shows that the Council is skeptical of opening the door to mass litigation. The restrictions on punitive damages and contingency fees, for example, make the directive's procedures less attractive to plaintiffs than those of some of the individual E.U. member states, like the Netherlands. Certain qualified entities may thus exclude potential cross-border plaintiffs from claims simply because a cross-border claim would be subject to more restrictions than a domestic claim in some member states. Nevertheless, if enacted, the directive will open the door to cross-border collective damages and injunctive claims that have not been available to E.U. consumers.

38. *See* Council Directive 2009/22, *supra* note 4 (authorizing collective claims for injunctive relief in cross-border actions between E.U. member states).

39. *See* Proposed Council Directive 2018/0089, *supra* note 1, ¶ 2b ("This Directive should therefore be aimed at ensuring that at least one representative action procedure for injunction and redress measures is available to consumers in all Member States, which allows for effective and efficient representative actions available at national and the Union level").