On 11 April 2018, the EU Commission published a new legislative proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (the Proposal). In light of increasing cross-border trade and EU-wide commercial strategies, the Proposal aims to facilitate redress for consumers where there are widespread infringements of their rights in more than one EU Member State.

Under Directive 2009/22/EC, it was possible for qualified entities designated by EU Member States, such as consumer organisations or independent public bodies, to bring representative actions with the aim of stopping both domestic and cross-border infringements of EU consumer law. However, the aim of the Proposal is to extend this possibility in order to allow consumers to obtain redress, such as compensation, repair, replacement, price reduction, contract termination, or reimbursement of the price paid.

According to the EU Commission, the proposed model for representative actions incorporates numerous safeguards in
order to prevent it from being misused.

Firstly, representative actions may only be taken by qualified entities. These 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 the relevant EU law. EU Member States will be required to monitor on a regular basis whether a designating qualified entity continues to comply with the criteria and failure to do so will lead to the loss of the status of qualified entity.

Secondly, representative actions for redress will only be possible if based on a final decision of a national court or authority which establishes that the trader has breached the law. This prevents frivolous and vexatious claims.

Thirdly, no punitive damages should be awarded and compensation for consumers will be limited to actual harm suffered.

Finally, qualified entities must be transparent about their sources of funding in order to enable the court or administrative authority to ensure that there are no conflicts of interest or risks of abuse in a given case and to assess whether the third party has sufficient resources in order to meet its financial commitments to the qualified entity should the action fail.

The Proposal further provides that the infringing trader is, at its own expense, required to inform affected consumers about any final decision (injunction, redress or settlement), its legal consequences and, if relevant, the subsequent steps to be taken by the consumers concerned.

In relation to cross-border representative actions, the Proposal establishes that the representative action may be brought to the competent court or administrative authority of a EU Member State by several qualified entities from different
EU Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different EU Member States. The Proposal appears, however, silent on rules on jurisdiction and parallel litigation in cases where entities bring different representatives actions before the courts of different Member States.

Finally, the interaction between the Proposal and the Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms (Recommendation 2013/396/EU) remains unclear. According to the Explanatory Memorandum provided for in the Proposal, the “[P]roposal takes into account [Recommendation 2013/396/EU]”. However, the Explanatory Memorandum also explains that not all the procedural elements from Recommendation 2013/396/EU have been reproduced in the Proposal. According to the Explanatory Memorandum, Recommendation 2013/396/EU lays down a set of common principles for collective redress mechanisms that apply to all breaches of Union law across all policy fields, while the Proposal, however, is “limited to infringements that may affect the collective interests of consumers, and the pre-existing features of the representative action model in the current Injunctions Directives“.

The Proposal will follow the ordinary legislative procedure, which means that the Proposal will need to be adopted by both the European Parliament and the Council of the European Union.