

Compromise on EU class action system to be approved by European Parliament

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Directive on representative actions for the protection of the collective interest of consumers is a game changer for collective redress

About three years after the European Commission presented [options for a revision of the Injunctions Directive, adding in particular a collective redress option](#), the European Parliament is going to vote on a compromise on the Commission's proposal for a Directive on representative actions for the protection of the collective interest of consumers. The [European Commission's initial proposal from April 2018](#) was amended in the legislative process, but the concept of going beyond injunctive measures against traders by including collective redress measures has prevailed.

It is fair to say that the Directive on representative actions for the protection of the collective interest of consumers (Representative Actions Directive) is a game changer for collective redress is going to impose an EU class action system by compelling the Member States to introduce redress actions in the collective interest of consumers. It is important to note that the class of consumers concerned by an action cannot be represented by one or more of the concerned consumers but by designated plaintiffs – e.g. consumer associations registered as so-called Qualified Entities. Consumers can join the action by either opt-in or opt-out mechanisms, depending on the Member State's procedure. There is also a strong cross-border angle, as consumers can join actions in other Member States by opting in and Qualified Entities designated for cross-border representative actions can act as plaintiffs across Member States' borders.

Background is that there is no uniform approach to collective redress in the Member States and the lawmakers want to make sure that in all of the Member States there is at least one representative action procedure available for injunction and redress measures. The new system is not intended to replace existing national procedural mechanisms and the Qualified Entities may choose the procedure most appropriate for reaching their goal. Also, there are several possibilities for deviation provided for by the Representative Actions Directive and many questions shall be dealt with under the relevant national procedural laws. The lawmakers are also convinced to have implemented sufficient safeguards to avoid abusive litigation.

Once the Representative Actions Directive enters into force, Member States will have 24 months to adopt and publish the laws, regulations and administrative provisions necessary for

transposing it. The new provisions shall be applicable 30 months after the Representative Actions Directive entered into force.

Procedural mechanism

The Representative Actions Directive shall apply to infringements by traders of provisions of certain Union law, also as transposed into national law. The annex currently includes a list of 66 EU laws. The long list includes, amongst others, directives and regulations concerning liability for defective products and product safety, data protection [GDPR], unfair terms in contracts, unfair business-to-consumer commercial practices, passengers' rights, distance marketing of consumer financial services and credit agreements for consumers.

Only the Qualified Entities can bring a representative action against a trader under the Representative Actions Directive. The broad term of trader means any natural person or any private or public legal person who is acting for purposes relating to that person's trade, business, craft, or profession.

The plaintiff can seek at least injunction measures or redress measures. A combination of both shall be possible where this is provided for by the relevant Member State. Member States are required to set up publicly available national electronic databases in the form of websites providing for information on Qualified Entities designated in advance for the purpose of bringing domestic and cross-border actions. The database shall provide general information on pending and concluded representative actions.

Many procedural aspects must be dealt with by the national procedural law. For instance, it is for each Member State to determine which of its courts will have jurisdiction over the new representative action. However, all Member States must ensure that the defeated party in a representative action for redress pays in principle the costs of the proceedings borne by the successful party, in accordance with the conditions and exceptions provided for in national law applicable to court proceedings in general. Exceptions may arise under the Representative Actions Directive where costs were caused by negligence.

Closer look: Redress measures and consumer participation

While the Injunctions Directive (2009/22/EC), which is to be repealed by the Representative Actions Directive, already provided for certain injunction measures, the mandatory redress option for all Member States is the real game changer. Redress measures in the scope of the Representative Actions Directive may include compensation, repair, replacement, price reduction, contract termination, or reimbursement of the price paid, as appropriate and as available under Union or national law.

Consumers can opt to be bound by the outcome of the action. The Representative Actions Directive leaves it to the Member States to establish rules on how and at which stage of the representative action for redress measures the individual consumers concerned by the action may express their will to be bound by the outcome of the action. The "class" is generally formed by the consumers concerned by the action who express their will, explicitly or tacitly – depending on the Member State's choice, to be bound by outcome of the action for redress measures. Consumers residing in a Member State different from the venue of the action cannot be bound to the action by an opt-out solution but only by an opt-in solution. The procedural mechanism does foresee the status of a party for the consumers.

Member States are further required to ensure that the redress measure entitles the consumers to seek recovery of the damages without the need to bring a separate action.

Cross-border aspects and publicity

In addition to cross-border consumer participation, there are other important cross-border and publicity aspects. The Qualified Entities and the Member States are requested to provide certain information on actions to the public. What is more, the court or administrative authority can require the trader to inform, at its expense, the consumers concerned by the representative action about the final injunction and/or redress measures or approved settlement - if the consumers concerned are not informed of the final decision or approved settlement in another way. The same applies vice versa to the Qualified Entity if it lost the case.

Standing to sue is not limited to Qualified Entities resident in the Member State of the court or administrative authority. Rather, certain Qualified Entities may bring such representative actions also in other Member States. The Representative Actions Directive considers "domestic" and "cross-border" actions. Also, several Qualified Entities may bring a joint action.

Member States will have to ensure that a final decision of a court or an administrative authority of any Member State on the existence of an infringement harming collective interests of consumers can be used by both parties as evidence in the context of any other actions seeking redress before their national courts or administrative authorities against the same trader for the same infringement, in accordance with national law on evaluation of evidence.

Fishing expedition by law

The Representative Actions Directive also includes a provision on the "disclosure of evidence." The Member States shall ensure that, at the request of a Qualified Entity that has presented reasonably available evidence sufficient to support the representative action, and has indicated further evidence which lies in the control of the defendant or a third party, the court or administrative authority may order, in accordance with national procedural rules, that such evidence be presented by the defendant or the third party, subject to the applicable Union and national rules on confidentiality and proportionality.

But the Member States shall ensure that a court or an administrative authority is able, upon request of the defendant, to equally order the Qualified Entity or a third party to disclose relevant evidence, in accordance with national procedural rules.

International aspects and Brexit

The Representative Actions Directive does not amend the Union's rules on private international law, e.g. on jurisdiction, on recognition and enforcement of judgments and on the law applicable to contractual and non-contractual obligations. This relates to inter-Member States topics as well as to third countries.

So, what does this mean for the UK?

The end of the Brexit transition period is 31 December 2020 and the agreed deadline for extending this transition period has passed, meaning it is very unlikely that it will be extended. As the Representative Actions Directive still needs to be approved by the European Parliament and

the Council, there is a (very small) possibility that it will not come into force before the end of the transition period. In any case, once it comes into force, there are still the transposition and application periods: this means that, unless the Brexit transition period is very significantly extended, the UK will not be required to implement or apply the Representative Actions Directive. It also means that, by the time national implementing measures are being applied throughout the EU, it is extremely likely that the UK will be a third country for the purpose of this regime. Collective redress appears unlikely to form part of any trade deal based on the EU [and UK's] position papers; if that is the case (or there is no deal) the UK will be treated the same way as other third countries. However, collective redress (including representative actions) are already available and remain a hot topic in the UK, so it will be interesting to see whether the implementation of this regime in the EU will increase pressure to reform the existing UK system.

Outlook

The Representative Actions Directive adds a new layer of litigation to the aggregate of actions traders are often facing across Europe. Given the different possibilities for deviations and the "procedural autonomy" quoted in the recitals to the Representative Actions Directive, it is necessary to take a close look at the laws and regulations to be adopted by the Member States. The Representative Actions Directive could ignite a competition for attracting litigation. There should be safeguards against a "race to the bottom" regarding procedural rights and defenses.

While the Representative Actions Directive refers to procedural autonomy, it could instead lead to review of Member States' procedural laws and regulations by the Court of Justice of the European Union. Procedural laws infringing the Representative Actions Directive could be declared inapplicable by the Court.

As choices will have to be made by the Member States when transposing the Representative Actions Directive into national laws and regulations, there will certainly be discussions regarding the same in the months to come after the Representative Actions Directive was passed in Parliament.

We are available to provide you with an in-depth analysis of the Representative Actions Directive and its impact on consumer litigation at your request.

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