BRIEFING

EU Legislation in Progress

European Parliament

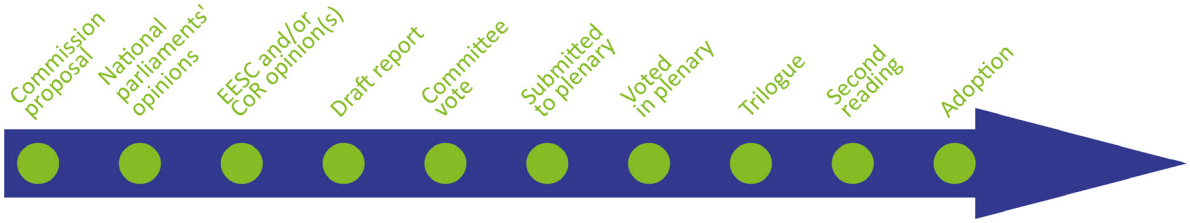
Representative actions to protect the collective interests of consumers

A new deal for consumers

OVERVIEW

On 11 April 2018, the European Commission published a proposal for a new directive on representative actions for the protection of the collective interests of consumers. Currently, consumer organisations or independent public bodies can bring actions in the name of consumers in courts or before administrative authorities to stop infringements of consumer legislation. According to the proposal, they would be able to demand compensation for consumers as well. The co-legislators adopted a new directive in November 2020. According to that directive, Member States will decide themselves the criteria for the designation of qualified entities for domestic actions, while the criteria for cross-border actions will be common across the whole of the EU. A loser-pays principle will be introduced, requiring the defeated party to pay the costs of the proceedings for the successful party. The Commission is required to evaluate, within five years, whether a European ombudsman for collective redress for consumers is necessary.

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		
Committee responsible:	Legal Affairs (JURI)	COM(2018) 184 11.4.2018
Rapporteur:	Geoffroy Didier (EPP, France)	2018/0089(COD)
Shadow rapporteurs:	Lara Wolters (S&D, the Netherlands) Liesje Schreinemacher (Renew, the Netherlands) Heidi Hautala (Greens/EFA, Finland) Gilles Lebreton (ID, France), Raffaele Stancanelli (ECR, Italy), Manon Aubry (GUE/NGL, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Procedure completed.	Directive (EU) 2020/1828 OJ L 409, 4.12.2020, pp. 1–27	



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Introduction

On 11 April 2018, the Commission published a proposal for a new directive on representative actions for the protection of the collective interests of consumers. Presented as part of the 'New Deal for Consumers' package, the proposal would enable consumers across the EU to use representative actions to collectively demand compensation from companies that infringe their rights. Together with the proposed directive on the modernisation of EU consumer protection rules, which is also part of the package, the proposed directive aims to improve compliance with consumer protection rules and serve as an effective deterrent against infringements.

The proposal is a follow-up to the Commission's 2017 fitness check of EU consumer and marketing law, which showed that, due to globalisation, the rise of cross-border trading and e-commerce, the risk of infringements affecting large numbers of consumers is increasing. It came in the wake of the 2015 Volkswagen emissions scandal (Dieselgate) and the 2017 mass cancellation of Ryanair flights, which showed that even when faced with mass harm situations, EU consumers were having difficulties accessing remedies such as repair or compensation.[1]

Existing situation

When faced with infringements of consumer law, EU consumers can get redress[2] in a number of ways, which vary between Member States. **Individual consumers** can ask the seller directly to remedy the situation, use official alternative dispute resolution (ADR) mechanisms (including mediation, consumer ombudsmen, online dispute resolution (ODR) platforms), or seek help from European consumer centres (ECC). They can also file a lawsuit in court (although judicial redress can be very costly) or use the European small claims procedure.

Collectively, consumers benefit from **public enforcement** of consumer law: public authorities can stop or prohibit an infringing practice, and in some cases, after their investigations have shown a breach of law, order compensation for affected consumers. Once the new Consumer Protection Cooperation (CPC) Regulation becomes applicable in 2020, consumer protection authorities in all Member States should have the power to obtain commitments from traders that they will cease the infringements they are responsible for and offer adequate remedies to the consumers that have been affected by such infringements. With regard to **private enforcement**, consumers can in some Member States request redress by taking companies infringing consumer rights to court (or start proceedings before an administrative authority).

When consumers who are affected by an infringement bring a lawsuit themselves as a group of individuals, the Commission calls this a **'group action'** and distinguishes it from a **'representative action'**, where the lawsuit or the administrative procedure is initiated *in the name* of the affected consumers, but not by the consumers themselves. Representative actions can be brought in the name of all affected consumers, with a possibility that individuals **opt out** of the action, or in the name of only those consumers that decide to **opt in**, or join the action. With regard to representative actions, Member States are required currently to have procedures only for stopping or prohibiting infringing practices, but not for obtaining consumer redress.

Injunctions Directive

The principal EU-level legislation on collective legal actions for consumers is the 2009 Injunctions Directive, which requires Member States to put in place procedures for stopping infringements of EU consumer rights. The directive applies only to infringements of the 16 directives and regulations listed in Annex I,[3] including the Unfair Commercial Practices Directive, the Consumer Sales and Guarantees Directive, the Unfair Contract Terms Directive and the Consumer Rights Directive. Proceedings aimed at protecting the collective interest of consumers can be initiated before the competent courts or administrative authorities.[4] Such proceedings can have as their aim:

- an order to stop or prohibit an infringement;

- measures, such as the publication of the injunctions orders and corrective statements (as a deterrent to traders who fear for their reputation);
- fines in situations where non-compliance persists despite there being an injunctions order, either as a fixed amount or an amount for each day's non-compliance or any other amount (but only in so far as the legal system of the Member State permits this).

Only 'qualified entities' that have a legitimate interest in the protection of the collective interest of consumers can initiate injunctions proceedings. Member States can decide that these qualified entities can either be independent public bodies (such as consumer ombudsmen), or organisations whose purpose it is to protect the collective interest of consumers (such as consumer associations), or a combination of the two. Qualified entities can file for an injunction to protect consumers in their Member State before the competent courts or administrative authorities in another Member State (if an infringement originates there). Such courts and administrative authorities in the other Member State are required to accept the legal standing of the qualified entity, but still have a right to examine whether the purpose of the qualified entity justifies it to take action in a specific case. Every six months, the Commission is required to publish an official list of all qualified entities in the EU in the Official Journal of the EU.[5]

Member States are allowed to require that the party that intends to seek an injunction can do so only after prior consultation with the defendant, in order to give the defendant an opportunity to bring the infringement to an end. If this does not happen within two weeks of the request for consultation, the action can go ahead. Member States can require that the independent public body tasked with protection of the collective interest of consumers take part in the consultation.

Commission recommendation

In 2013, the Commission issued a recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States. The non-binding document goes beyond infringements purely of consumer law, to cover violations of all rights granted to both natural and legal persons under EU law. Notably, it suggests that all Member States should have collective redress mechanisms in mass harm situations for injunctive relief (which provides a possibility to demand an end to illegal behaviour), and for compensatory relief (which provides a possibility to claim compensation).

The recommendation suggests that Member States should put in place strict rules regarding the funding of collective redress actions. It also suggests a number of safeguards against abusive litigation, such as prohibition of punitive damages; loser-pays principle, ensuring that the party that loses a collective redress action reimburses the necessary legal costs of the winning party; and ensuring that the lawyers' remuneration does not create an incentive to litigation, especially by prohibiting contingency fees (the sum that is paid to the lawyers only if they win the case). It also recommends that the claimant party should be formed on the basis of the 'opt-in' principle, requiring the express consent of the natural or legal persons claiming to have been harmed. At any time before the final judgment or settlement, persons who have suffered harm should be able to join a claimant party and leave it. Furthermore, it was recommended that Member States implement these principles by 26 July 2015. However, a 2017 report showed that Member States had implemented the recommendation only to a limited extent. It warned of vast differences in the way representative actions work across the EU, including the fact that only 19 EU Member States had compensatory collective redress in place.

Parliament's starting position

The European Parliament has long been advocating that EU consumers should have an effective system for collective redress at their disposal, not necessarily limited to infringements of consumer law. Even before the adoption of the Injunctions Directive, in its resolution of 25 April 2007 on the Green Paper – Damages actions for breach of the EC antitrust rules, Parliament expressed the

opinion that consumers should be able to bring collective actions in the area of competition law 'either directly or via organisations'.

Several Parliament resolutions – of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress'; of 2 February 2012 on the Annual report on EU competition policy; and of 11 June 2013 on A new agenda for European consumer policy – called for an EU-level system that would allow consumers to seek compensation on the basis of the opt-in principle. They furthermore called for stricter rules for qualified entities, prohibition of punitive damages and contingency fees, and a restriction or ban on third-party financing.

More recently, in its recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector, Parliament called on the Commission to put forward a legislative proposal for the 'establishment of a collective redress system in order to create a harmonised system for EU consumers, thus eliminating the current situation in which consumers lack protection in most Member States'. In its resolution of 26 October 2017 on the application of the Environmental Liability Directive, it asked the Commission to assess the possibility of introducing collective redress mechanisms for breaches of EU environmental law.

Preparation of the proposal

The Commission's above-mentioned 2017 fitness check of EU consumer and marketing law covered six consumer directives, including the Injunctions Directive. In the context of the fitness check, between 2016 and 2017 the Commission organised public consultations with stakeholders, a call for evidence on collective redress and targeted consultations with the relevant networks of Member State authorities, legal practitioners, consumer and business organisations.

The fitness check concluded that, while the Injunctions Directive had contributed to enforcing EU consumer law at national level, its use to stop cross-border infringements had been minimal. It argued that the injunctions procedure should be made more uniform and more effective across the EU and that a number of shortcomings need to be addressed, including the directive's limited scope, the limited effects of injunction decisions on redress for harmed consumers and the cost and length of proceedings. In 2018, the Commission also published a report on the implementation of its recommendation on collective redress mechanisms. It concluded that the willingness of the Member States to turn the 2013 recommendation into legislation had been rather limited and that the availability of collective mechanisms enabling consumers to seek compensation and the implementation of such a mechanism was still very uneven across the EU.

The Commission published an impact assessment (see executive summary)[6] that covered both legislative proposals under the 'new deal for consumers'. The impact assessment suggested that the risk of harm to the collective interest of consumers was increasing because of globalisation and digitalisation; it furthermore identified ineffective mechanisms for consumer redress in mass harm situations as being among the drivers of consumer legislation infringements.

It considered three options for improving compliance with EU consumer law: 1) improving enforcement to stop and deter infringements; 2) providing individual remedies for victims of unfair commercial practices in addition to measures in option 1; and 3) applying the measures under options 1 and 2, and, in addition, improving mechanisms for collective redress in mass harm situations. Option 3 was selected as the preferred option, as it was estimated that it would reduce consumer detriment and increase consumer trust, while promoting fairer competition to the benefit of compliant traders.

In April 2018, EPRS published an implementation appraisal of the consumer law directives, including injunctions. In July 2018, it also published an initial appraisal of the Commission's impact assessment, citing the narrow range of options and issues with the presentation of data as its main methodological weaknesses.

The changes the proposal would bring

On 11 April 2018, the Commission published a proposal for a directive on representative actions for the protection of the collective interests of consumers, that would repeal the Injunctions Directive. It takes into account some elements of the 2013 recommendation, but not all of them.

The proposal has the following aims:

- **Scope**: While the Injunctions Directive is applicable to infringements of 16 directives and regulations, the scope of the new directive would be greatly expanded. It would now include 59 legislative acts (listed in Annex I), among which horizontal and sector-specific EU instruments relevant to the protection of collective interests of consumers in different economic sectors such as financial services, energy, telecommunications, health and the environment. The proposal does not, however, follow the 2013 recommendation to allow representative actions for infringements of the rights under all EU law, but only under consumer law.
- **Qualified entities**: The proposal keeps the approach of the current Injunctions Directive, according to which only 'qualified entities' would be able to bring representative actions on behalf of consumers. However, it would require Member States to ensure that 'in particular, consumer organisations and independent public bodies' are eligible for such status. Currently, Member States can decide that qualified entities can be consumer organisations, independent public bodies, or both. Member States would be able to designate qualified entities on an ad hoc basis and would be required to place qualified entities on a publicly available list, assess on a regular basis whether they continue to meet the requirements and strip those that do not of their status. The proposal also adds a requirement that the qualified entities need to have a non-profit-making character.
- **Cross-border representative actions**: Any qualified entity would be allowed to bring actions in any other Member State. Several qualified entities from different Member States would be allowed to jointly bring a single representative action in one Member State.
- **Financing of qualified entities**: At an early stage in a representative action, qualified entities would have to declare the source of their funding in general, as well as the funds that support a particular representative action. Third parties funding representative actions for redress would be prohibited from influencing decisions of the qualified entity or from providing financing for collective actions against competitors. Member States would be required to ensure that procedural costs related to representative actions do not present financial obstacles for qualified entities. To ensure this, Member States would be required to take measures such as limiting applicable court or administrative fees, granting qualified entities access to legal aid or public funding.
- **Injunctive redress measures**: Qualified entities would be able to request interim injunction orders or injunction orders establishing that the practice constitutes an infringement of the law. Both could be used to stop an existing practice or prohibit an imminent practice.
- **Compensatory redress measures**: The proposal would introduce a requirement for Member States to put in place procedures for obtaining a redress order, which could include compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. However, qualified entities would be allowed to seek redress order only after an injunction order establishing that the practice infringes the law has been issued (article 5(3)). In cases where the quantification of individual redress is complex, Member States would be able to allow courts or administrative authorities to issue a declaratory decision instead of a redress order. However, declaratory decisions would not be allowed when consumers concerned are easily identifiable or when they have suffered an amount of loss that is so small that distributing it to the consumers

would be disproportionate. In such cases, the mandate of individual consumers would not be required, and the redress would be directed to a public purpose serving the collective interests of consumers.

- **Opt-in and opt-out**: For injunction orders, an opt-out system would be introduced, whereby qualified entities would not be required to obtain the mandate of the individual consumers concerned (article 5(2)).[7] However, in case of redress measures, Member States would be able to choose between an opt-out or an opt-in system (article 6(1)).
- **Settlements**: The proposal promotes collective out-of-court settlement, subject to court or administrative authority scrutiny. Member States would have to ensure that the court or administrative authority can at any moment during the representative action invite the qualified entity and the trader to reach a settlement within a set time limit. They could also allow for the qualified entity and the trader to reach a settlement on their own and have it approved by the court or administrative authority. Scrutiny of the court or administrative authority would be required to assess the legality and fairness of the settlement, taking into consideration the rights and interests of all parties.
- **Penalties**: Non-compliance with final decisions within the representative action would result in penalties, including in the form of fines.
- **Evidence and procedures**: Member States would have to ensure 'due expediency' of procedures and treat actions seeking interim injunction measures by way of an accelerated procedure. Courts and administrative authorities would be able to order that evidence to support a representative action be presented by the defendant, subject to the applicable EU and national rules on confidentiality. A final court or administrative authority decision establishing an infringement harming collective interests of consumers would be considered as irrefutably establishing the existence of the infringement for the purposes of seeking redress for the same infringement. A final court or administrative authority decision establishing an infringement harming collective interests of consumers in another Member State would be considered a rebuttable presumption of the existence of the infringement. The submission of a representative action would suspend or interrupt limitation periods applicable to any redress actions.
- **Informing consumers**: An infringing trader would be required to inform affected consumers at its own expense about the final decisions regarding injunctions, redress actions and approved settlements, including, if appropriate, by notifying concerned consumers individually.
- **Reporting**: After the directive has been in application for five years, the Commission would be required to evaluate it, especially its scope, and report the findings to the Parliament, the Council and the European Economic and Social Committee (EESC). One year after the directive's entry into force, the Commission would be required to evaluate whether the rules on air and rail passenger rights should be covered by the directive, with a possibility to propose their deletion.
- **Transposition**: Member States would have 18 months from the date of the directive's entry into force for transposing it into their national legislation, and would be required to start applying its provisions six months after the transposition deadline.

Advisory committees

In its opinion on the proposal, adopted on 20 September 2018, the EESC pointed out that consumer or civil society organisations should be able to receive adequate funding and legal advice to claim redress, and that Member States should support the creation of specific funds that would help qualified entities to pay for legal counsel. It also suggested that the directive should allow consumers to freely decide if they wish to opt in or opt out from a representative action.

The Committee of the Regions (CoR) adopted its opinion on the proposal on 10 October 2018. The CoR called for extending the scope of the directive to cases of mass harm of any rights granted under EU law, not just consumer rights. The scope would therefore include, for instance, mass environmental damage, harm done to common goods and violations of employment rights. It also opposed the possibility for the Member States to derogate in the case of complex quantification of the damage.

National parliaments

The deadline for the national parliaments' submission of reasoned opinions on the grounds of subsidiarity was 10 July 2018. Two reasoned opinions were submitted. The Austrian Bundesrat took issue with the definition of 'qualified entities', and with what it perceived as the introduction of an opt-out system. It also considered that that the scope of the directive should be limited to cross-border cases. The Swedish Riksdag had objections regarding the instructions given on how Member States should allocate revenues from fines or equivalent financial penalties, as it considered that they go beyond what is necessary to achieve the set objectives.

Stakeholder views[8]

The European Consumer Organisation (BEUC) strongly supported the Commission's proposal because it would 'plug a huge gap in the enforcement of EU consumer rights'. However, it suggested that the scope of the directive should be further extended to protect consumer interests against violations of all EU law, and especially infringements of competition law. It also called for a clear indication that the directive requires minimum-level harmonisation and that it allows Member States to have a higher level of consumer protection. BEUC also argued, among other things, that it should be possible to introduce claims for redress measures before the injunction order is final; Member States should be required to ensure that, in particular, consumer organisations are eligible for the status of qualified entity and public body where applicable; provisions on third-party financing should be deleted; requests for redress measures should be allowed for both economic and non-economic damages; and the possibility to derogate from collective redress by issuing declaratory decisions should be removed.

The proposal triggered a large number of reactions from the business community, with their associations warning of insufficient safeguards against abusive litigation. A joint statement by associations, including Business Europe, EuroCommerce, EuroChambres and AmCham EU, expressed concerns regarding the ability of the proposal to create a fair and balanced civil justice system with effective enforcement of consumer rights. It said that the proposal would lead to 'unnecessary and wasteful litigation in Europe' and called, among other things, for prohibiting contingency fees and punitive damages, strengthening the loser-pays rule, preventing overlapping claims and introducing the opt-in principle. A joint statement by associations, including the Airlines International Representation in Europe (AIRE), Airlines for Europe, Community of European Railway and Infrastructure Companies (CER) and Digital Europe, warned that the proposal 'risks undermining civil justice systems to the detriment of consumers across Europe'. It said that the proposal would lead to 'uncontrolled national and cross-border competition between private and public enforcement bodies' and would disrupt the effective systems that have already been implemented in many Member States. It criticised the absence of the safeguards that featured in the 2013 recommendation. ECommerce Europe criticised the proposal because it 'focuses too much on the collective litigation model and creates conflicts with existing and functioning national collective redress systems'. It also noted that the proposal provides for 'counterproductive and undesired' rules on settlements; that the final redress order is not fit for mass compensation for loss or damages; that there is no proven need for fines in a collective redress system; and that it is not clear whether consumers can opt-in or opt-out of a representative action. The European Savings and Retail Banking Group (ESBG) also expressed a concern that the proposal would allow for abusive litigation. Among the numerous proposals it made was to define a minimum number of consumers required for a representative action; introduce a minimum period of existence for the qualified entities and

require them to disclose the shareholder or member structure; prohibit lawyers and litigation funders from being direct or indirect members of such entities; remove the possibility of interim injunctions; and introduce a mandatory opt-in system for obtaining the mandate of the individual consumer.

The Council of Bars and Law Societies of Europe (CBBE) suggested that the restriction of collective actions in favour of qualified entities is 'likely to impede access to justice'. It argued in favour of a wider pool of potential representatives. It further said that an 'opt-in' procedure for getting a mandate from consumers would be appropriate.

Legislative process

Within the European Parliament, the proposal was referred to the Committee on Legal Affairs (JURI). On 22 May 2018, the JURI committee appointed Geoffroy Didier (EPP, France) rapporteur for the file. The Committee on the Internal Market and Consumer Protection (IMCO) was designated as associated committee under Rule 57 of the European Parliament's Rules of Procedure (rapporteur Dennis De Jong, GUE/NGL, the Netherlands, replaced in the new term by Kateřina Konečná, GUE/NGL, Czechia). IMCO adopted its opinion on 23 November 2018.

The rapporteur presented his draft report to the JURI committee on 12 October 2018 and the committee adopted the report on 7 December. Although the committee's mandate to enter into interinstitutional negotiations with the Council was confirmed in plenary on 12 December 2018, as the Council had not reached a general approach, Parliament adopted its legislative resolution at first reading on 26 March 2019.

The legislative resolution proposed the following:

- **Scope**: The definition of the collective interests of consumers in article 3 would be extended to include data subjects as defined by the General Data Protection Regulation (GDPR). The directive would apply to cases of non-compliance with six additional directives and regulations, including the General Product Safety Directive (annex I);
- **Qualified entities**: Member States or their courts would be required to name at least one qualified representative entity that can bring representative actions. The criteria for the designation of qualified representative entities would be further specified to require from them, among other things, not to have financial agreements with plaintiff law firms beyond a normal service contract and to disclose publicly how they are financed, organised and managed. Member States would be required to maintain a public list of qualified representative entities and to communicate it to the Commission, which would publish the list of qualified entities from all Member States on a publicly accessible online portal. Member States would not be allowed to designate qualified entities on an ad hoc basis (article 4);
- **Procedure**: A final injunction order would not be required before seeking a redress order (article 5(3));
- **National register**: Member States would have a possibility to set up a national register for representative actions, which would be interlinked with other national registries (article 5a). Their national competent authorities would also be required to keep a publicly accessible register of unlawful acts that have been subject to injunction orders in accordance with the directive;
- **Opt-in for redress order**: Member States that do not introduce an opt-in system for representative actions seeking a redress order would still be required to introduce an opt-in system for consumers who do not usually reside in the Member State where the action occurs (article 6(1)(1a)). Member States would have a possibility to require an individual mandate from residents too (article 16(2a));
- **Declaratory decisions**: The provision allowing Member States to allow courts to issue a declaratory decision instead of a redress order would be deleted (articles 6(2) and 6(3);

- **Unclaimed amounts**: In case there is an unclaimed amount left from the compensation, the courts would be required to decide on the beneficiary, which cannot be the qualified entity or the trader (article 6(4a));
- **Safeguards**: The resolution suggests an explicit prohibition of punitive damages, (article 6(4b)) and contingency fees (article 15a). It would also require Member States to introduce the loser-pays principle (article 7a);
- **Financing**: At the beginning of a representative action seeking redress, qualified entities would be required to disclose to the court all details of their financing to demonstrate that they are not in a conflict of interest. Courts would be allowed to declare a representative action inadmissible if it is funded by a third party and if that funding would influence decisions of the qualified representative entity, including its decision to initiate a representative action, and if the defendant is a competitor of the fund provider (article 7(2));
- **Double compensation**: The resolution would explicitly prohibit a possibility for consumers to be compensated more than once for the same damage (article 10(1)).
- **Revenue from fines**: Member States would be allowed to allocate the revenues from fines for non-compliance with the final decisions on representative actions to a fund for financing representative actions (article 14(3));
- **Assistance for qualified entities**: Member States would be encouraged to ensure that qualified entities have sufficient funds available for representative actions;
- **Reporting**: The Commission would be required to assess, within three years, if there is a need to establish a European ombudsman for collective redress. The Commission would not have a possibility to remove rules on air and rail passenger rights from the scope of the directive.

Work within the Council started in April 2018. After numerous meetings of the working party on consumer protection and information during the Bulgarian, Austrian, Romanian and Finnish Presidencies, on 28 November 2019, the Competition Council endorsed a general approach.

The general approach proposed the following:

- **Distinction between domestic and cross-border representative actions**: This is the biggest change proposed in the general approach. Domestic representative actions would be defined as those 'brought by a qualified entity in the Member State in which the qualified entity is designated', while cross-border actions would be 'brought by a qualified entity in a Member State other than that in which the qualified entity is designated' (article 3). Member States would decide on the criteria for designation of qualified entities for domestic representative actions by themselves (article 4(3)), while the criteria for the designation of qualified entities for cross-border actions would be decided at EU level, under the proposed directive (article 4a). Ad hoc designation would be possible only for domestic actions (article 4(4b));
- **Criteria for designation of qualified entities in cross-border actions**: Qualified entities would have to prove that they had existed at least 18 months prior to the designation request and would have to demonstrate 12 months of actual public activity in the protection of consumers' interest. They would have to have a non-profit character, and the knowledge and skills necessary for bringing cross-border representative actions. They would also need to show that, in bringing 'any representative action', they are not influenced by companies having an economic interest, including those offering third-party funding. They would be required to publicly disclose information on the source of their funding in general (article 4a(3));
- **National contact points**: Each Member State would have a national contact point with which the Commission or other Member States could register their concerns regarding the compliance of qualified entities in that Member State. As also proposed by the

Commission, such complaints could lead to an investigation and possible revocation of the designation (article 4a);

- **Third-party funding**: Member States would be able to allow courts or administrative bodies to reject the legal capacity of a qualified entity designated in another Member State if it is found to be funded by a third party having an economic interest in the outcome of the action (such as a competitor company) (article 4b);
- **Declaratory decision**: Courts would not have the possibility to issue a declaratory decision instead of a redress order (deletion of article 6);
- **Flexible opt-in for redress actions**: Member States would have to decide on how and at what stage individual consumers can opt in to or opt out of a representative action for redress and be bound by the outcome of the action. Similarly to Parliament's proposal, consumers from another Member State would be required to opt in (article 5b);
- **Simultaneous injunctions and redress actions**: Representative actions for redress would be possible without the condition of the prior establishment of an infringement by a court through separate proceedings (article 5b(8)). Member States would be allowed to enable a representative action to simultaneously seek an injunction and redress (article 5(4));
- **Evidence and procedures**: The final decision of a court of any Member State establishing an infringement would be used as neither 'irrefutable 'or 'rebuttable' evidence for the purposes of any other actions seeking redress, but simply as 'evidence' of the existence of that infringement that can still be evaluated by a court (article 10);
- **Assistance for qualified entities**: Instead of being required, as proposed by the Commission, to take 'necessary measures' to ensure that procedural costs do not constitute financial obstacles for qualified entities, Member States would be required to take measures 'aiming to ensure' that such costs do not become 'insurmountable obstacles' for qualified entities. The Commission's examples of such measures – limiting applicable court or administrative fees, access to legal aid or public funding for qualified entities – have been deleted (article 15);
- **Outstanding amounts**: Member States would be allowed to lay down rules on the time limits for individual rules to benefit from the redress measures and on the destination of any unclaimed redress funds (article 5b(6)). The Commission's proposal for small amounts of financial compensation to be redirected to public purposes serving consumer protection would be deleted;
- **Consumer fees**: Only in exceptional circumstances in accordance with national law could consumers bear the cost of the proceedings, but Member States could allow modest entry fees or similar participation charges (article 5(4a));
- **Application to existing infringements**: The directive would apply to representative actions brought after the date of application, even to infringements that occurred before that date, provided that the limitation periods applicable at the time of the infringement have not expired (article 20);
- **Transposition**: The application of the directive would be put back by a year and a half compared to the Commission's proposal (article 19).

On 9 January 2020, the JURI committee voted to open negotiations on the basis of the Parliament's first-reading position. A first informal trilogue meeting took place on 14 January and a second on 2 March. During the third round, on 22 June, the co-legislators reached a provisional agreement. Council adopted it as its first-reading position on 4 November 2020, and Parliament then adopted the agreed text at second reading on 24 November. The final act was signed on 25 November 2020 and was published in the Official Journal on 4 December 2020. It includes the following elements:

- **Designation of qualified entities**: Although the it will apply to both domestic and cross-border representative actions, the directive will lay down the criteria for the designation of qualified entities only for cross-border actions as proposed by the Council. The designation criteria for domestic actions will be left to Member States and their national legislation, provided they are consistent with the directive's objectives. For cross-border representative actions, qualified entities will have to demonstrate, among other things, at least 12 months of actual public activity in the protection of consumer interests. Ad hoc designation will also be allowed, but only for domestic representative actions (Article 4);
- **Scope**: Representative actions, both domestic and cross-border, will be possible for infringements of a large body of EU consumer protection legislation, including the General Data Protection Regulation and the Product Liability Directive (annex I);
- **Simultaneous injunctions and redress actions**: A final injunction order will not be required before seeking an action for a redress order (Article 9(8));
- **Opt-in or opt-out for redress actions**: Member States will decide whether an opt-in or an opt-out system will apply for representative actions seeking redress (Article 9(2)). For consumers residing outside the Member State in which the action is brought, an opt-in system will be mandatory (Article 9(3));
- **Outstanding amounts**: The rules for any unclaimed redress funds will be decided by the Member States (Article 9(7));
- **Third-party funding**: Member States will have to ensure that the decisions of qualified entities in a representative action are not influenced by third-party funding in a way that would be detrimental to the collective interests of consumers concerned by the action. The funding for a representative action will also not be allowed to come from a competitor. Courts will be empowered to assess compliance regarding the third-party funding in case of justified doubts (Article 10);
- **Loser-pays principle**: The defeated party will be required to pay the costs of the proceedings for the successful party, as suggested by Parliament (Article 12);
- **Assistance for qualified entities**: Member States will have to take measures 'aiming to ensure' that procedural costs do not prevent qualified entities from initiating representative actions. Such measures can include public funding, limitation of court or administrative fees or access to legal aid. Member States will be able to also allow qualified entities to require 'modest' entry fees from consumers for participating in a representative action (Article 20);
- **European ombudsman**: As requested by Parliament, by June 2028, the Commission is required to carry out an evaluation on whether a European ombudsman for collective redress should be established (Article 23).

Directive (EU) 2020/1828 entered into force on 24 December 2020. Member States have two years to transpose it and are required to apply it from 25 June 2023.

EP SUPPORTING ANALYSIS

EPRS implementation appraisal: Revision of consumer law directives (including injunctions): the 'New Deal for Consumers', April 2018.

EPRS initial appraisal of the Commission impact assessment: EU consumer protection rules, July 2018.

European Parliament's Department for Citizens' Rights and Constitutional Affairs study on Collective redress in the Member States of the European Union, October 2018.

OTHER SOURCES

Representative actions for the protection of the collective interests of consumers, European Parliament, Legislative Observatory (OEIL).

Biard A., Collective redress in the EU: a rainbow behind the clouds?, ERA Forum, June 2018, Volume 19, Issue 2, pp. 189–204.

Cortes P., The Law of Consumer Redress in an Evolving Digital Market, Cambridge University Press, 2018.

Hodges C., Collective redress: The need for new technologies, Journal of Consumer Policy, March 2019, Volume 42, Issue 1, pp. 59–90.

ENDNOTES

1 For instance, according to the European consumer organisation BEUC, Dieselgate affected over 8 million EU consumers, yet only in four Member States were consumer organisations able to demand compensation on a collective basis, because the remaining Member States lacked functioning collective redress tools.

2 Redress refers to various types of remedies, including compensation, repair, replacement, price reduction, reimbursement.

3 For the list, see Annex I of the consolidated version of the directive.

4 According to the fitness check, the injunction procedure involves the courts in Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Finland, Germany, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Spain, Sweden and the UK; an administrative procedure in Latvia, Malta, Poland and Romania; and both types of procedure in Estonia, France, Hungary and Slovakia.

5 According to the article on Collective redress: The need for new technologies (author C. Hodges cited above), this does not necessarily happen.

6 The Regulatory Scrutiny Board (RSB) gave a negative opinion to the impact assessment in December 2017, largely as a result of insufficient analysis of the implementation and policy options related to collective redress. In January 2018, the impact assessment received a positive opinion, but it included a recommendation to better explain the need for EU-level legislative action on collective redress.

7 In addition, they would not be required to provide proof of actual loss or damage on the part of the consumers or of intention or negligence on the part of the trader.

8 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

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