

Directive (EU) 2020/1828 on representative actions

Key Principles

Olivier DUGARDYN
ETOA / ECTAA webinar
23 March 2022



CLASS ACTION

What is a representative action ?

- Under the RA Directive, a representative action (or class action) =
 - a legal action that is brought by a qualified entity on behalf of a group of consumers whose collective interests have been violated by a trader, with the aim of seeking an injunctive measure, a redress measure, or both
 - Injunctive measure** = seeking to stop a particular unfair trading practice, abusive contract terms...
 - Redress measure** = seeking to obtain compensation/damages (or a price reduction, reimbursement,...)

Purpose of the Directive

- Today 18 out of 27 Member States have “some form” of class action in their legal system but the rules vary **heavily**. 9 Member States have **no** collective redress mechanism at all.
- Class actions have limited success : little case-law, only cases at national level, no cross-border actions
- Dieselgate has demonstrated the vulnerability of consumers -> no equal access to justice across Europe
- The primary goal of the Directive = to ensure that there is in every Member States at least one procedural mechanism that allows representative actions + to facilitate cross-borders class actions

Minimum harmonisation !!

- **Important** = the Directive does not impose a new common EU mechanism for representative actions.
- It sets out minimum standards for procedural rules for class actions in Member States (it does not affect the principle of procedural autonomy of the national Member States)

Consequence

-> a wide margin for transposition of the Directive by national authorities

-> a considerable risk that national redress mechanisms will remain very different and that the Directive will miss its goal (importance of the implementation phase !)

Some key principles

- Class actions can only be initiated on behalf of consumers

consumer' means any natural person who acts for purposes which are outside that person's trade, business, craft or profession;

Business travel excluded...

Some key principles

- Class actions can only be initiated against violations of EU consumer laws listed in annex 1
 - > covers a large variety of areas such as product safety, financial services, telecommunication, environment, data protection... but also specifically **travel and tourism**
 - > *Member States can extend to other areas*

Some key principles

- There must be an infringement of the **collective** interests of consumers

-> Class actions require a group of consumers

« collective interests of consumers' means the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers »

-> Member States can define what constitutes a "group"

- Obviously an action can only be brought against one clearly identified infringement (one cause of action / same trader)

Some key principles

- Class action can only be brought by **Qualified Entities**, recognized by Member States

-> Purpose : to avoid abusive litigation / US style class actions suits

-> QE's must meet a certain number of criteria

Domestic QE's : *Member States set the criteria*

Cross-border QE's : *Member States set the criteria but minimum harmonised criteria (ex. non-profit, independent, 12 months activity minimum in consumer protection,...)*

-> Quite **exceptional in law** : QE's are the claimants, the consumers are entitled to benefit from the measures granted but are NOT party to the case

Some key principles

- Opt in / Opt Out /or both for redress measures ?

-> this is a crucial choice that (again) *Member States* must make

opt-in mechanism = the consumers have to agree to be represented

opt-out mechanism = the consumers are automatically included unless they mention that they do not want to be represented by the "qualified entity"

opt-in mechanism = mandatory for consumers domiciled in a Member State other than the state in which the representative action is brought.

Some key principles

- Fear for US-style class actions ?
 - > The Directive keeps repeating that abusive litigation must be avoided... (cfr recitals)
 - *Only Qualified Entities can bring actions*
 - *The party who loses the case will have to pay the costs (adverse costs rules : capped/uncapped?)*
 - *Punitive damages on the trader should be avoided*
 - *Directive allows third-party funding but sets certain parameters to avoid conflicts of interests and diversion of the goal of class actions (consumer protection)*

Room for national implementation...

- Some examples (at random & not exhaustive) of matters where the Directive gives Member States a large leeway to decide
 - ✓ *On material scope of the Directive (extend to other areas of consumer protection ?)*
 - ✓ *On the designation criteria of domestic (and cross-border) qualified entities + the right of the judge to reject a qualified entity*
 - ✓ *On the definition of a “group” of consumers*
 - ✓ *On the opt-in or opt-out mechanism + the timing for a consumer to opt in or out*
 - ✓ *On the competent court : administrative or judicial ? / exclusivity of one court per country or all national courts ?*
 - ✓ *On the “prima facie” admissibility of the claim (is there a “prima facie” assessment of the court / at what stage / possibility to appeal ?)*
 - ✓ *On a mandatory “cooling off” / negotiation period*
 - ✓ *On the procedure itself : ex. how to provide evidence, how to organize courts for mass actions, what about the delays and level of urgency of the proceedings,...*
 - ✓ *On the third-party funding (allowed or not / what criteria ?)*
 - ✓ *On the legal costs to be paid by the losing party (usually limited in Europe, but what about class actions ?)*

Olivier Dugardyn
Partner
Auxiliary Justice Delegated to the Brussels Court of Appeal and the Belgian Market Court
od@d-lawfirm.be