



New EU mechanisms for domestic and cross-border representative actions

By Prashant Popat KC and Christopher Adams

EU Member States (“MSs”) are due to publish new domestic law provisions putting in place mechanisms for domestic and cross-border representative actions by 25 December 2022. The new laws will implement the EU Representative Actions Directive¹ (“the Directive”) and come into force from 25 June 2023.² Against a background of an increased risk of large numbers of consumers across the EU being affected by breaches of EU and national consumer protection laws as a result of globalisation and digitalisation, the Directive seeks to ensure that an effective representative action mechanism is available in all MSs whilst providing appropriate safeguards to avoid abusive litigation.³ MSs will not be prevented from adopting or retaining procedural means for the protection of collective consumer interests at national level, but they must ensure that at least one procedural mechanism for bringing representative actions complies with the Directive.⁴

SCOPE OF THE DIRECTIVE

I. To comply with the Directive MSs must ensure that ‘qualified entities’ (“**QEs**”) can

¹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

² Article 24(1).

³ Article 1(1).

⁴ Article 1(2).

bring representative actions before their courts or administrative authorities (hereafter ‘courts’) against infringements by traders of any one of 66 different EU Directives and Regulations⁵ and the corresponding national law provisions which implement those Directives and Regulations (“**the relevant provisions**”) that harm or may harm the collective interests of consumers.⁶ The Directive covers a wide range of areas including defective products, unfair terms in consumer contracts, medicinal products for human use, medical devices, general product safety, data protection, financial services, energy and telecommunications.

2. The new mechanisms will apply to domestic and cross-border infringements, including those which cease before the representative action is brought or concluded.

QUALIFIED ENTITIES

3. Any organisation or public body representing consumers’ interests, including those that represent members from more than one MS, will be able to act as a QE if they have been designated by a MS for that purpose.⁷ Domestic representative actions will be those brought by a QE in the MS in which the QE was designated, whilst cross-border representative actions will be those brought by a QE in a different MS.⁸
4. In order for a QE to be designated for the purpose of bringing cross-border representative actions (i.e, as a “**cross-border QE**”) the following, and other, criteria must be satisfied:

(A) It must be a legal person constituted in accordance with the national law of the MS of its designation, and able to demonstrate 12 months of actual public

⁵ Listed in Annex I to the Directive.

⁶ Article 2(1).

⁷ Article 3(4).

⁸ Article 3(6) and 3(7).

activity in the protection of consumer interests prior to its request for designation;

(B) its statutory purpose must demonstrate that it has a legitimate interest in protecting consumer interests as provided for in the relevant provisions;

(C) it must have a non-profit-making character; and

(D) it must be independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and have established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers.

5. MSs have a degree of flexibility in setting criteria for the designation of QEs for the purpose of bringing domestic representative actions: they may apply the above criteria⁹ or set their own, subject to the criteria used being consistent with the objectives of the Directive.¹⁰ MSs can designate a QE for the purpose of bringing a particular domestic representative action on an ad hoc basis if the entity complies with the relevant criteria as provided for in national law, though such QEs should not be allowed to bring cross-border representative actions.¹¹

REPRESENTATIVE ACTIONS

6. Under the new laws QEs will be able to seek against infringing traders at least (a) provisional or definitive injunctive measures and (b) redress measures such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (as appropriate and as available under EU or national law). Definitive injunctive measures may include, if provided for in national law, (a) a

⁹ Article 4(5).

¹⁰ Article 4(4).

¹¹ Recital (28) to the Directive.

measure establishing that the practice constitutes an infringement and (b) an obligation to publish the decision on the measure in full or in part, in such form as the court considers appropriate, or an obligation to publish a corrective statement.¹²

7. Upon bringing a representative action, a QE must provide the court with sufficient information about the consumers concerned, and the court must assess the admissibility of a specific representative action in accordance with the Directive and national law. The class of consumers concerned will be entitled to benefit from the injunctive or redress measures (or both) sought by the QE in the proceedings.¹³ Courts will be able to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law.¹⁴

Cross-border representative actions

8. Cross-border QEs will be able to bring representative actions before each MS's courts, and where the alleged infringement of EU law affects or is likely to affect consumers in different MSs, the action can be brought before the court of one MS by several QEs from different MSs. Lists of cross-border QEs must be communicated by each MS to the Commission, made publicly available and updated as necessary, and MSs must assess at least every 5 years whether the cross-border QEs they have designated continue to comply with the relevant criteria.

Injunctive measures

9. In order for a QE to seek an injunctive measure, individual consumers will not be required to express their wish to be represented by that QE, and the QE will not have to prove (a) actual loss or damage on the part of the individual consumers

¹² Article 8(2).

¹³ Article 7(6).

¹⁴ Article 7(7).

affected by the infringement, or (b) intent or negligence on the part of the trader.¹⁵

10. MSs have the option of introducing or retaining national law provisions under which a QE will only allowed to seek a definitive injunctive measure after it has entered into consultations with the trader concerned, with the aim of having that trader cease the infringement. In those cases, the QE will be able to bring a representative action for an injunctive measure immediately if the trader does not cease the infringement within 2 weeks of receiving a request for consultation. MSs must notify the Commission of any such national law provisions, and the Commission must ensure that that information is publicly available.¹⁶

Redress measures

11. MSs must lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned explicitly or tacitly express their wish to be represented or not by the QE in that action and to be bound or not by the outcome of the action.¹⁷ However, individual consumers who are not habitually resident in the MS of the court before which a redress action has been brought will have to explicitly express their wish to be represented in that action in order for them to be bound by the outcome of that action.¹⁸ Consumers who have explicitly or tacitly expressed their wish to be represented in an action cannot be represented in other representative actions nor bring an action individually with the same cause of action and against the same trader, nor will they be able to receive compensation more than once for the same cause of action against the same trader.¹⁹

12. Where a redress measure does not specify individual consumers entitled to benefit

¹⁵ Article 8(3).

¹⁶ Article 8(4).

¹⁷ Article 9(2).

¹⁸ Article 9(3).

¹⁹ Article 9(4).

from the relevant remedies, it must at least describe the group of consumers so entitled. A redress measure will entitle the relevant consumers to benefit from the remedies provided without the need to bring a separate action.²⁰ There will be rules on time limits for individual consumers to benefit from redress measures, and each MS may lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits.²¹

Funding of redress actions

13. Where a redress action is funded by a third party, insofar as allowed in accordance with national law, conflicts of interest must be prevented and funding by third parties with an economic interest in the bringing or the outcome of the redress action must not divert the action away from the protection of the collective interests of consumers.²² In particular, (a) the decisions of QEs in the context of a representative action, including decisions on settlement, must not be unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned, and (b) the action must not be brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.²³
14. Courts will be empowered to assess compliance in cases where any justified doubts arise, and to that end QEs must disclose to the court a financial overview that lists sources of funds used to support the action.²⁴ Courts will be able to take appropriate measures, such as requiring the QE to refuse or make changes in respect of the relevant funding and, if necessary, rejecting the legal standing of the QE in a specific

²⁰ Article 9(6).

²¹ Article 9(7).

²² Article 10(1).

²³ Article 10(2).

²⁴ Article 10(3).

action.²⁵

Redress settlements

15. In a redress action (a) the QE and the trader will be able jointly to propose to the court a redress settlement for the consumers concerned, or (b) the court, after having consulted the QE and the trader, may invite the QE and the trader to reach a redress settlement within a reasonable time limit.²⁶ Such settlements will be subject to the scrutiny of the court, which may refuse to approve a settlement contrary to mandatory provisions of national law or which includes conditions which cannot be enforced.²⁷ Approved settlements will be binding upon the QE, the trader and the individual consumers concerned, though MSs may give the individual consumers concerned by an action and subsequent settlement the possibility of accepting or refusing to be bound by the settlements.

Allocation of costs of a redress action

16. The unsuccessful party in a redress action will be required to pay the costs of the proceedings borne by the successful party, in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general. Individual consumers concerned by a redress action will not have to pay the costs of the proceedings except, in exceptional circumstances, where they may be ordered to pay such costs that were incurred as a result of the individual consumer's intentional or negligent conduct.²⁸

²⁵ Article 10(4).

²⁶ Article 11(1).

²⁷ Article 11(2).

²⁸ Article 12.

Information on representative actions

17. QEs will have to provide information about the representative actions they have decided to bring, the status and the outcomes of those actions. Consumers concerned by an ongoing representative action must be provided with information about it in a timely manner and by appropriate means, in order to enable them to explicitly or tacitly express their wish to be represented in that action. The court will require the trader to inform the consumers concerned, at the trader's expense, of any final decisions providing for injunctive or redress measures and any approved settlements, by means appropriate to the circumstances of the case and within specific time limits, including, where appropriate, informing all consumers individually. Individual MSs may require that the trader would only be required to provide such information to consumers if requested to do so by the QE. QEs must inform consumers of final decisions on the rejection or dismissal of redress actions. The successful party will be able to recover the costs related to providing information to consumers in the context of the representative action.²⁹ MSs will be able to provide information on QEs and general information on ongoing and concluded representative actions by setting up publicly accessible national electronic databases.³⁰

Final decisions

18. The final decision of a court of any MS concerning the existence of an infringement harming collective consumer interests will be able to be used by all parties as evidence in the context of any other redress actions before their national courts against the same trader for the same practice, in accordance with national laws on evaluation of evidence.³¹

²⁹ Article 13.

³⁰ Article 14.

³¹ Article 15.

Limitation

19. In accordance with national law, a pending injunctive action will have the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned, so that they are not prevented from subsequently bringing a redress action concerning the alleged infringement because the applicable limitation period expired during the injunctive action. Similarly, a pending redress action will have the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that action.³² Laws, regulations or administrative provisions on suspension or interruption of limitation periods shall only apply to claims for redress based on infringements that occurred on or after 25 June 2023. This shall not preclude the application of national provisions on suspension or interruption of limitation periods which applied prior to 25 June 2023 to claims for redress based on infringements that occurred before that date.³³

Disclosure of evidence

20. Where a QE has provided reasonably available evidence sufficient to support an action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by the QE the court will be able to order that such evidence be disclosed by the defendant or third party in accordance with national procedural law, subject to EU and national rules on confidentiality and proportionality. Courts will similarly be able to order the QE or a third party to disclose relevant evidence if requested by the defendant.³⁴

³² Article 16.

³³ Article 22.

³⁴ Article 18.

Penalties

21. Effective, proportionate and dissuasive penalties, such as fines, will apply to failure or refusal to comply with injunctive measures or obligations to provide information to consumers or disclose evidence.³⁵

Assistance for QEs

22. MSs are required by the Directive to put in place measures to ensure that the costs of representative actions proceedings do not prevent QEs from effectively exercising their right to seek injunctive and redress measures, such as public funding, structural support for QEs, limitation of applicable court fees or access to legal aid. Individual MSs can legislate to allow QEs to require consumers who have expressed their wish to be represented by a QE in a specific redress action to pay a modest entry fee or similar charge in order to participate in that action. MSs and the Commission are required to support and facilitate cooperation between QEs and the exchange and dissemination of their best practices and experience.³⁶

COMMENT

23. The new representative actions mechanisms will apply across all 27 EU MSs in relation to a wide range of laws, and it seems inevitable that businesses operating in the EU will be exposed to an increased risk of litigation as a result. This is particularly so because QEs designated in different MSs will be able to coordinate in bringing proceedings before the same court or administrative authority in one MS, assisted by the limits on the costs of such proceedings and the fact that third party funding is expressly permitted insofar as it is allowed as a matter of national law. Claims involving large numbers of consumers where the individual redress is low would seem

³⁵ Article 19.

³⁶ Article 20.

to be much more viable as a result of the new mechanisms. Further, there would appear to be nothing to prevent QEs from bringing test cases in whichever MS has the most favourable laws and then using any final decision as evidence in proceedings in other MSs.

24. MSs are left free to legislate for opt-in or opt-out representative action mechanisms as they choose, subject to the requirement that consumers not habitually resident in the MS where a representative action is brought must explicitly opt in in order to be bound by the outcome. There is therefore potential for a significant degree of variation between the measures adopted in each MS, and larger companies trading across multiple EU MSs will need to ensure that they are well-informed as to the applicable regime in each country.
25. Each MS will publish the relevant national law provisions by Christmas Day at the latest, leaving those likely to be affected (and their lawyers) 6 months to take stock and assess any increase in litigation risk before the provisions come into force on 25 June 2023.

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October 2022