

THE REPRESENTATIVE ACTIONS DIRECTIVE: GET SET FOR A NEW WAVE OF EUROPEAN CLASS ACTIONS

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Legal Briefings

Despite fears of importing US litigation culture, the EU takes a major step to help consumers mount collective claims against business

After years of torturous debate, Europe is about to see its first regional regime for group action claims, ushering in collective redress procedures for consumers at an EU-wide level. Member States have until December 2022 to amend their domestic law to meet the minimum requirements under the EU Directive 2020/1828, "*Representative actions for the protection of the collective interests of consumers*", which was adopted in late 2020.

Developing these rules, legislators focused on the clear failure of the majority of collective action systems in EU nations (in contrast to more successful US and UK counterparts); the current fragmentation of EU legal regimes; and the growing importance of consumer protection in many sectors.

While much remains unresolved in how Member States implement the directive, wider momentum behind tougher consumer protection and class action claims makes this legislation significant for business. Proper preparation and risk management to meet this more muscular breed of collective actions, especially in jurisdictions already attracting substantial consumer litigation, will be key. Moreover, forum shopping will be an increasingly present risk, while companies operating across multiple countries should be prepared to face parallel actions.

This note considers the key aspects of the directive and its likely impact on business in the EU.

THE DIRECTIVE AT A GLANCE:

- *Scope*

The directive has wide application in EU consumer law, being applicable to 66 harmonised consumer-focused European legal acts. The new rules apply to infringements of EU law harming the collective interest of consumers beyond general consumer law, covering a wide range of fields such as data protection, product liability, financial services, travel and tourism, energy, telecommunication, environment, health and air and rail travel. The core aim is to create a minimum level of comprehensive protection for EU consumers within the internal market.

- *Qualified entities*

A key element of the regime is that only so-called "qualified entities" (QEs), which are designated by Member States, can bring proceedings on behalf of consumers. Alongside national discretion in classifying such entities, which will most likely be public authorities or consumer groups, QEs must comply with criteria on independence and transparency, operate on a non-profit basis and act for consumer interests.

Alongside domestic actions, QEs can file cross-border representative actions in other Member States where the infringement of EU laws affects consumers. QEs of different Member States can also join forces and sue a defendant in one specific (and likely more favourable) local court.

- *Redress and remedies*

The directive mandates representative actions seek at least two types of remedies, injunctive measures and redress. The former includes provisional or definitive orders to cease an infringement, and can be granted without proving any actual loss of any individual consumers or fault by negligence of the trader. Redress covers a range of remedies such as compensation, repair, replacement, price reduction, contract termination and reimbursement but, crucially, not punitive damages.

- *Opt in or Opt out*

Notably, Member States are free to choose whether to allow opt-in or opt-out models for representative actions. Rules will be required on how and at what stage of the proceedings individuals concerned can express their decision to be part of the action.

- *Dismissing unfounded cases*

To avoid vexatious litigation, national courts must be entrusted with powers to dismiss unfounded cases at early stages.

- *Loser pays*

The directive adopts the "loser pays" principle, ensuring the defeated party pays the costs of litigation, creating incentives against abusive lawsuits. However, Member States must ensure that costs do not prevent QEs from exercising their rights, likely via means such as legal aid or capped court fees.

- *External funding*

In another sign of the EU being wary of the excesses of US-style claims, the directive allows group actions to be funded by third parties such as litigation funds, but limits its use, stating that outside funding must not divert the action "away from the protection of the collective interests of consumers".

PRACTICAL TAKEAWAYS FOR COMPANIES

While it is far from clear the impact the directive will ultimately have on disputes across the region, wider trends favouring group claims, the growth of third-party funding and the vogue for more robust enforcement of consumer rights mean firms should take this move seriously.

It is key for companies active in Europe to consider their likely exposure to group and consumer actions across the region, including their risk profile at an industry and activity level.

Key steps through 2022 will include:

- Assessing where customers are located to have a clear idea of the jurisdictions in which your company could face claims. Some EU states have far more developed and favourable regimes for collective actions, greatly increasing potential exposure;
- Have a cross-border overview of your company: each local business unit must be able to quickly obtain information about customers and transactions in case of actions;
- Have a full overview of your primary contractual and business relationships;
- Strengthen precautions against injunctions and consider how your company might deal with them in case of a sudden interruption of production;
- Establish communication with the major local consumers associations;
- Make sure data flows in your company are transparent and comply with data protection rules, given its cross-border nature and increasing use in group claims;
- Have a EU legal team ready to assist with future EU class actions and to coordinate parallel pan-European cross-border class actions.

For more information on the changing dynamics of group actions, contact our EMEA class actions team. And click for [here](#) for our assessment of France's ongoing group litigation reforms

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