Strength in numbers: new rules for collective action in the EU

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This report examines the key features of the Directive of the European Parliament and of the European Council on representative actions for the protection of the collective interests of consumers and its wider impact on consumer-led litigation across Europe, including comparative insights into national class action mechanisms in the United Kingdom, Belgium, Denmark, France, Portugal, Spain and Ireland.

EU collective redress

Over the last decade, the European Commission (the Commission) has worked towards providing the means by which all EU consumers can bring collective actions in respect of infringements of EU law, referred to as 'collective redress'.

In June 2013, the Commission issued a non-binding recommendation encouraging member states to implement appropriate collective redress measures within a two year period to ensure "*a coherent horizontal approach to collective redress in the European Union without harmonising member states' systems*".

A review of the implementation of the recommendation by the Commission in January 2018 revealed collective redress mechanisms were inconsistent across EU member states. Moreover, nine member states still had no compensatory collective redress mechanisms in place.

Public and legal pressure on the EU to progress matters intensified in light of the rise of high-profile mass tort litigation in the EU, including the 2012 PIP breast implants scandal and the 2015 Volkswagen emissions litigation, as well as recognition of the risk of infringement of consumer rights on a large scale due to globalisation, increased cross-border trading data-collection and e-commerce.

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These factors were the driving force behind the Commission's "*New Deal for Consumers*" published in April 2018, a legislative package focused on enhancing the protections generally afforded to consumers in the EU, which included a proposal for the 'Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers' 2020/1828 (the Directive).

The Directive will repeal the existing Directive on injunctions for the protection of consumers' interests which affords limited protection for consumers in the context of collective consumer interests.

The Directive

The Directive is designed to promote access to justice for citizens and companies but without the perceived excesses of US-style class actions, and is shaped around the increasingly digitalised consumer market, covering areas such as data protection, financial services, travel and tourism, energy and telecommunications.

Since its publication in April 2018, the Directive has been subject to extensive debate by the European Parliament, European Council and Commission. Following a series of inter-institutional negotiations, a joint text was agreed on 17 June 2020 and endorsed by the European Parliament on 24 November 2020. The Directive was published in the Official Journal of the EU on 4 December 2020 and entered into force on 24 December 2020. Member states will have 24 months to transpose the Directive into their domestic legislation and an additional six months to apply the legislation.

The Directive will empower qualified representative entities to bring collective actions and seek injunctive relief and/or redress on behalf of groups of EU consumers who have been harmed by 'illegal practices' that breach European laws.

It will supplement but not replace existing national procedural mechanisms aimed at the protection of individual or collective consumer interests. Member states are empowered to implement their own rules governing representative actions, e.g. they will have autonomy to decide on the required degree of similarity of individual claims or the minimum number of consumers required, for the purpose of a case being admitted as a representative action.

Key features

Qualified Representative Entities (QREs)

- QREs, such as public authorities or consumer organisations, are empowered to bring representative actions on behalf of groups of EU consumers seeking redress and/or injunction.
- Distinction is drawn between QREs for domestic and cross-border representative actions:
  - A domestic representative action is one in which a QRE brings a representative action in the member state where it is designated, even if the action is brought against a trader domiciled in another member state and/or on behalf of consumers domiciled in other member states.
  - A cross-border action is one in which a QRE brings a representative action in another member state other than the one of its own designation.
- Member states can set their own criteria for the designation of QREs for domestic actions whereas the criteria for the designation of QREs for cross-border actions are to be common across the EU.
- Specifically for cross-border representative actions, QREs must:
  - Be non-profit making and have a legitimate interest in protecting consumer interests as provided by EU law covered by the Directive.
  - Have a certain degree of permanence and 12 months of public activity in the protection of consumer interest prior to its designation request.
  - Be financially sound and stable.
  - Disclose publicly (e.g. on their website) information demonstrating compliance with the designation criteria and general information about the sources of its funding in general, its organisational, management and membership structure, objectives and activities.
  - Act independently and not be influenced by any third party e.g. traders or third party funders and have established procedures preventing any such influence as well as any conflict of interest between itself, its funders and consumer interests.

Opt-in/opt-out procedures

- EU member states can choose between either an opt-in or opt-out system, or a combination of both. In practice, consumers in an opt-in system will be required to express their wish to be represented by the designated QRE, whereas consumers in an opt-out system will automatically be represented by the QRE unless they expressly state that they do not wish to be.
- The Directive does not explicitly set out any limits to the potential value of possible claims, nor consider whether this will affect the ability of certain claimants to "opt-in" to a collective action under the Directive.

Settlement

- Collective settlements should be encouraged within a representative action seeking redress measures.
- Settlements are subject to court or administrative approval. Once approved, the settlement shall be binding upon the QRE, the trader and the individual consumers concerned.

Costs

- The losing party is to pay the winning party's costs of the proceedings in accordance with the conditions and exceptions provided for in national law. However, a losing party will not be ordered to pay the costs to the extent that they were unnecessarily incurred.
- Individual consumers should not bear the costs of the proceedings, those of the QRE or the trader save where, as provided by national law, the consumer has deliberately or negligently caused unnecessary legal costs, e.g. unlawful conduct.

Remedies

QREs are empowered to seek injunctive relief (i.e. to stop or prohibit an infringement) and seek redress – such as compensation, repair, replacement, price reduction, contract termination or reimbursement as appropriate, and as available under EU or national law.

The Directive states that the awarding of punitive damages should be avoided in order to prevent the misuse of representative actions.

In order to avoid the risks of "*abusive litigation*", member states are to ensure that courts or administrative authorities have the power to "*dismiss manifestly unfounded*" cases at the earliest possible stage of the proceedings in accordance with national law.

> "While collective redress mechanisms and TPLF are meant to have a positive impact for consumers in facilitating the access to justice, there is the risk – if no sufficient safeguards exist –, that funders' economic interests may be disconnected from – or even opposed to – consumer interests. More transparency and independent control is needed. That starts with the basic question which legal standards do cover/characterise this type of business and who is supervising it."
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> ***Ekkart Kaske, Executive Director, European Justice Forum***

Impact on consumers and businesses

The new Directive is undoubtedly a welcome development for consumers and consumer groups, particularly in those member states that do not have domestic collective action procedures in place. It is naturally advantageous to consumers, removing the burden of potentially significant legal fees which are typically a barrier to seeking injunctive relief and/or redress, and placing them on a fairer footing with larger corporations.

Nevertheless, there are concerns that the provisions do not adequately protect consumers from the dynamics of a developing litigation 'market' and will increase costs for businesses exposed to claims.

In particular, the proposed distinction between the criteria for QREs bringing domestic and cross-border actions may give rise to QREs forum shopping, enabling them to bring representative actions in jurisdictions which are seen to be more advantageous or beneficial to claimants and/or their litigation funders.

Further, the not-for-profit criteria for QREs may also prove problematic given that the resourcing and competence of consumer associations can vary dramatically. There may be a risk that litigation will be based on an ill-informed understanding of the law, be pursued in the interest of the 'profile' of the organisation, or be pursued by an organisation who lacks sufficient capacity and experience. Concerns have also been raised that opportunistic and rapacious claims management organisations (e.g. UK credit hire) will be able to create front organisations that meet the not-for-profit criteria.

As to funding, reservations still remain that there are insufficient protections in place to ensure transparency of funding and to safeguard consumers from abusive litigation. For example, there is no express prohibition of contingency fees for lawyers or third party litigation funders. Furthermore, the power to address the economic interests of third party litigation funders appears to lie with the national courts, rather than the EU bodies.

Most significantly, the Directive is widely expected to result in the proliferation of collective actions brought against businesses across the continent, already fuelled by the influence of US class action law firms and third party litigation funders setting up shop in the European market.

The increasingly digitalised and technological global market within which businesses are operating is particularly conducive to collective actions, as evidenced by the recent group proceedings brought against EasyJet and BA. The Directive will provide a direct platform for future similar actions that could potentially involve thousands, if not millions of consumers, particularly if such actions are brought on an opt-out basis.

As the Directive has only recently come into force, it will still be some time before it is implemented into member states' domestic legislation. It is therefore unlikely to be available as a mechanism for consumers currently seeking compensation in respect of any losses arising from the COVID-19 pandemic, for example, in respect of cancelled holidays. However, given the likely long-term impact of COVID-19, the Directive is likely to provide some comfort to consumers who will be seeking redress in the future.

> "With the transposition of the Directive on Representative Actions into national law, there is the chance to improve access to justice. This does, however risk bringing unintended and unwanted consequences. We need to seek solutions that balance these tensions. Areas like opt-in/opt-out, undistributed proceeds, funding and QRE criteria should be given specific attention."
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> ***Moya Stevenson, Chair, European Justice Forum***

A spotlight on domestic collective action regimes in Europe

The United Kingdom

As the Directive forms part of a EU legislative package, it will not be implemented into UK national law due to the UK having officially cut all ties with the EU on 31 December 2020 when the Brexit transition period ceased.

Nonetheless, it would appear that the UK is following the same direction of travel as that of the EU, there being an increase in group actions as well as a drive towards implementing 'opt-out' collective action regimes.

The UK is certainly seeing an increase in group litigation as well as a drive towards implementing 'opt-out' collective action regimes. In the English case of *Lloyd v Google* [2019] which concerned a large scale data breach, the Court of Appeal permitted the use of the opt-out representative action procedure, reversing the lower court's decision that the action had not met the requirements of a representative action.

Most notably, focus has been on the recent Supreme Court judgment handed down in *Merricks v Mastercard* [2020]. Mr Walter Merricks, a former financial services ombudsman, had applied to the Competition Appeal Tribunal (CAT) on behalf of the group for a Collective Proceedings Order (CPO) under the Consumer Rights Act 2015. In 2019, the Court of Appeal overturned the CAT's decision not to grant the CPO. Mastercard appealed Mr Merricks' application following claims it broke competition law. On 11 December 2020, Mastercard's appeal was dismissed by the Supreme Court, which largely agreed with the Court of Appeal, and the application will now go back to the Tribunal to be re-considered in line with the legal direction by the Supreme Court. This landmark decision is a step closer to the granting of what would be the largest group action in the history of England & Wales.

Scotland has also seen the introduction of The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 which introduces a framework for group actions on an 'opt-in' basis. The legislation came into force on 31 July 2020. The rules contain qualifying criteria for raising group actions although the bar is exceedingly low, requiring only two or more people with the same, similar or related claims (by issues of fact or law) to pursue court proceedings in a single action.

Whilst there is no formal class action regime in Northern Ireland, Order 15 of the Court Rules provides that representative actions can be brought by one party representing plaintiffs who have the same interest in a claim. Like Scotland, these representative actions operate on an 'opt-in' basis only and judgment is binding on all parties represented by the claimant.

Belgium

Following the Commission's invitation to member states to introduce judicial mechanisms for collective redress in their respective legal systems, Belgium adopted legislation on 28 March 2014, introducing collective redress under certain conditions.

The legislation, which entered into force on 1 September 2014, permits an action for collective redress to be brought against an undertaking which caused harm to consumers and, since 2018, to certain small and medium sized enterprises (SMEs), by violating its contractual obligations or specific EU and national laws concerning, for instance, pharmaceuticals, insurance, travel, income tax and competition.

Similar to the provisions of the Directive, a collective action may be brought only by entities fulfilling certain conditions. For instance, consumers can be represented by an association for the defence of consumer interests or associations approved by the Minister of Economy, whose corporate purpose is directly related to the damage suffered by the group and which does not pursue a profit-making goal. SMEs can, for instance, be represented by an inter-professional organisation for the defence of the interests of SMEs. The court will assess whether a collective action is appropriate on a case-by-case basis, having regard to criteria such as the complexity of the action or whether the existence of individual damage is sufficiently linked to the collective damage.

The representative association can choose between either an opt-in or opt-out mechanism and is subject to court approval. An opt-in mechanism is mandatory for actions brought for consumers if the action aims at the indemnification of a collective body or moral injury and if the consumers do not have their habitual residence in Belgium.

In 2018, the Brussels Commercial Court and the Brussels Court of Appeal were granted exclusive jurisdiction over collective redress actions.

In February 2020, the Federation of Enterprises of Belgium, which was originally against the introduction of collective redress in Belgium, obtained an authorisation from the Minister of Economy to be a representative of SMEs. It did so as a precautionary measure, to be ready to act in the event that a group of SMEs deemed a collective action useful.

Nine class actions have been instigated in Belgium so far, eight of them by 'Test Achat', the biggest association for the defence of consumer interests. Several class actions concerned transportation, including flight delays and cancellations and disruption caused by the suspension of train services.

Denmark

Denmark introduced legislation on collective redress in 2010, but the Danish courts have not adjudicated many collective redress actions since. One of the reasons for this is that, in order to hear and process a collective redress action, the Danish courts themselves have to agree that a collective redress action is the most suitable way to address the claims. However, collective actions are increasing steadily in number and are often used by investors when filing actions against large companies in respect of security claims.

The adoption of the new Directive will have very little consequence for Denmark on the legislative front since its provisions are very similar to the current Danish legislation on collective redress. The current legislation already allows the Danish Consumer Ombudsman to act as a representative on behalf of a group of consumers in a collective redress suit, cf. Section 254c, Section 1, no. 3 of the Danish Administration of Justice Act. It also permits public authorities appointed by law to act as a representative, but to date, only the Consumer Ombudsman has been appointed.

In general, the Danish Government is pleased with member states' wide margin to interpret the Directive as it allows the government to maintain the current collective action legislation as much as possible. In particular, it is pleased that the Directive permits member states to prescribe the criteria an organisation must fulfil in order to represent consumers as it ensures that the Consumer Ombudsman retains its position as the representative of consumers in Danish collective redress actions.

The Directive's lack of consequences for the Danish legal order is probably why the Directive has barely been discussed in legal circles and not at all in the general public. However, it is possible that the

adoption of the Directive might increase the general public awareness of the possibility of collective actions, thereby increasing the number of such law suits in general.

One of the Danish Government's primary concerns is that the Directive will expand consumers' access to collective redress to such an extent that companies will be or are in danger of being dragged into a large number of unnecessary suits, thereby diminishing these companies' legal rights. This hesitation is shared by a number of organisations, most notably the Confederation of Danish Industry and the Danish Chamber of Commerce. This relates to the currently bigger discussion in Denmark regarding whether third party funding should be allowed as the arguments for and against are basically the same; it increases non-professionals' access to the courts but might, at the same time, expose companies to unnecessary and unfair lawsuits, thereby incurring unjust costs for companies.

France

French group actions have been a mixed success since their implementation in 2014. Despite the incremental broadening of their scope, they have not yet led to a significant change of the judicial and procedural landscape, as can be illustrated by the filing of just 21 group actions since 2014.

This led to a review of the existing group actions regime by an official working group which submitted a report to the French National Assembly in June 2020. The report recommended changes to certain aspects of the current legislation, some of which are in line with the Directive, with a view to simplifying and unifying the existing group action regimes. These include:

- A common framework be set out in the French Code of Civil Procedure for all group actions in civil matters, regardless of the legal basis of the action.
- The conditions that need to be met by associations in order to bring group actions be lightened.
- Associations be entitled to advertise that a future group action is envisaged in order to better reach and identify people impacted by the alleged wrongdoing.
- All losses be subject to the potential award of damages, regardless of their nature.
- "Punitive damages" may be ordered, the objective being to "confiscate" the profits generated by the defendant thanks to its unlawful behaviour.
- Special Courts be given jurisdiction over class actions.
- Legal entities be allowed to join group actions.
- Courts being able to hand down interim relief injunctions, within group action proceedings, compelling defendants to stop the unlawful activities at issue.
- A register listing all the ongoing group actions be established by the Ministry of Justice and the Bar Association.

It is expected that some of the working group's recommendations will lead to draft legislative proposals for the National Assembly to consider.

Portugal

Portuguese law and the Constitution determines that parties are generally allowed to file a claim together with other parties, provided that their requests are all based on the same facts. If these requirements are met, the subsequent joining of several actions is also allowed.

The Law No. 83/95 of 31 August 1995 also provides a specific form of class/collective action where either individuals or a group of individuals, associations, foundations, local authorities or, in respect of certain matters, the Public Prosecutor and the Consumer Protection Directorate, are allowed to bring an action on behalf of a larger group of persons. This action is called "*acção popular*".

These proceedings are aimed at preventing infringements against public health, consumer rights, unqualified investor rights regarding financial instruments, quality of life, environment, state property (or property of the Autonomous Regions or of the local authorities) and cultural heritage, or any other areas where supra-individual material interests may be at stake.

Where applicable, compensation for damages can be obtained although punitive damages are not claimable under Portuguese law.

Collective proceedings are not frequently commenced in Portugal. However, there have been a number of proceedings regarding financial instruments filed by investors and organisations representing consumers (DECO) against the bank Banco Espírito Santo and its Board of Directors, the audit company of that bank (KPMG), the Portuguese bank supervision authority (Banco de Portugal), the Portuguese Securities Market Commission (CMVM) and the Portuguese State relating to investments made in and through Banco Espírito Santo and the measures taken to wind down the bank.

Spain

Collective action mechanisms have been established in Spanish law since 2001 by virtue of the Spanish Civil Procedure Act (the Act) although they are limited to the protection of consumer rights and interests. The Act permits consumers to bring two types of collective action:

- Actions to defend the "*collective interests*" of consumers where the members of the affected group can be identified. The consumers may bring the action themselves, or be represented by a consumer association or a legal entity.
- Actions to defend "*the widespread or diffuse interests*" of consumers where the members of the affected group cannot be easily identified. In these types of actions, the consumers must be represented by an authorised representative consumer association.

Apart from the above, the Act provides that the judgment in proceedings filed by a consumer association needs to determine those consumers who benefit from the judgment, if that is possible, otherwise it will determine the details, features and requirements to seek payment or enforce the judgment. The Public Prosecutor is also entitled to request enforcement of the judgment in favour of the affected consumers. Furthermore, in these sort of proceedings, the effects of a judgment passed in a case filed by consumer associations or groups of affected consumers will extend positively or negatively to later proceedings with the same claim, although they have not been a party to the first proceedings.

In addition, the Law of the General Conditions in Contracts (the Law) sets forth the right to (i) claim that a defendant cease using specific clauses in the General Conditions, and (ii) claim reimbursement of anything paid by virtue of those specific clauses as well as compensation for damages. As eligible claimants, the Law provides that the association of companies, professionals and farmers, which have the right to defend the interests of its members, the associations of consumers and users, the National Institute of Consumers, the professional associations, the Public Prosecutor and authorised entities of other EU member states, can bring collective proceedings on behalf of affected consumers.

Ireland

In contrast to the jurisdictions above, there is currently no legislative framework or legal procedure in Ireland to allow collective redress or class actions. Currently in Ireland, the Rules of Court provide for analogous procedures by way of (i) representative actions, where a named individual(s) represents a class of persons interested in the same matter; and (ii) test cases.

In order to bring representative actions, the court must be satisfied that each individual member of the class has authorised the named representative party and that the parties have the same interest, rather than merely a common or similar interest. This latter requirement is interpreted very strictly by the court. Representative actions cannot be used in actions founded on tort and the remedies available are limited to injunctive and declaratory relief. Damages cannot be awarded. Given the strict limitations, representative actions are not commonly brought and test cases are generally the preferred approach in Ireland. A test case can be used where numerous separate claims arise out of the same set of circumstances but only a single case is run, which then sets a precedent by which the remaining cases are resolved. There are no formal rules governing test cases.

However, class actions have been on the agenda in Ireland for quite some time:

- In 2005, the Law Reform Commission published a report recommending that a formal procedural structure be set out in the Rules of Court to deal with multi-party litigation although the recommendations were not implemented.
- In 2017, the Multi-Party Actions Bill 2017 was introduced and debated in the Dáil (the lower house of the Irish Parliament). While the bill was opposed by government, the issue of class action lawsuits was considered by one of Ireland's key judges, Mr Justice Peter Kelly, as part of the Review of Civil Justice Administration. The review group's report (the RG Report), which includes recommendations/proposals on reform in the area of multi-party litigation, was produced to the Minister for Justice in October 2020. A decision on whether the recommendations put forward will be adopted is yet to be made.
- In January 2020, a report assessing whether the lack of third-party litigation funding (TPLF) and class actions in Ireland is a barrier to litigation was launched by Chief Justice Frank Clarke. Currently, the torts of maintenance and champerty prohibit TPLF in Ireland. The report recommends that proper provision be made for class actions in Ireland and highlights how TPLF could be used to promote access to justice in situations where the less financially viable party may run out of funds and be forced to discontinue proceedings. The report also

recommends that adequate provision is made in law for clear guidelines for TPLF to be accessible, while ensuring clarity and protection for all parties involved. The RG Report also touches on the issue of litigation funding in Ireland, however, it recommends awaiting the outcome of a Law Reform Commission examination of the area before its proposals are put forward.

Demand for a class action procedure is particularly strong in the public interest law sector, where it is felt that the current lack of a legislative framework or legal procedure in Ireland for multi-party or class actions has negative implications for access to justice. The existing momentum towards collective redress, and the impending implementation of the Directive across member states, means that change is on the horizon in Ireland.

As to the potential impact of the Directive in Ireland:

- Ireland tends to closely follow the language of directives adopted. As the Directive leaves member states the task of determining the meaning of QRE's capable of bringing representative actions in the member state, and as Ireland does not have a regime for representative actions in the manner set out under the Directive, it could take a considerable period of time to agree upon, and draft, such a definition.
- The Directive provides that member states must ensure that procedural costs are not a financial obstacle for qualified entities to exercise their rights, but that national rules concerning the allocation of procedural costs should not be affected. Given that there is very limited civil legal aid available to litigants in Ireland, this may be a significant development.
- If the proposals and recommendations contained in the RG Report are implemented without delay, significant changes to the administration of justice in Ireland may take effect sooner rather than later. This in turn would assist Ireland in paving the way to implement the Directive.

Kennedys is a member of the European Justice Forum (EJF), a coalition of businesses, individuals and organisations that are working to promote fair, balanced, transparent and efficient civil justice laws and systems in Europe. EJF's aim is to ensure that the legal environment in Europe protects both consumers and businesses alike, and that those with a legitimate grievance have access to justice.

Through its membership and its office in Brussels, EJF engages in an open dialogue with opinion leaders in EU Institutions, national governments and other relevant stakeholders. EJF develops position papers and other outreach materials, organizes expert debates and participates in factual events.

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To find out more about our services and expertise, and key contacts, go to: **kennedyslaw.com**

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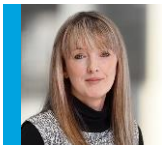

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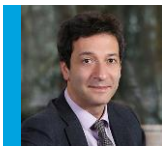

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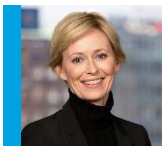

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