

The Consumer Voice in Europe

REASONS TO ADD THE AI ACT TO THE REPRESENTATIVE ACTIONS DIRECTIVE



Contact: Frederico Oliveira da Silva (digital@beuc.eu)

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND

Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu

EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2022-124 – 05/12/2022

Why the Artificial Intelligence Act should be enforceable under the Representative Actions Directive

The European Union adopted the Representative Actions Directive (RAD)¹ in November 2020 to strengthen consumers' ability to collectively enforce their rights both through injunctive and/or collective redress measures.² Representative actions can be used both to order traders to stop illegal and harmful practices and/or to claim compensation for harmed consumers. Representative actions are possible in many sectors and under various EU legislations which are listed in the Annex of the RAD.

Injunctions have an important function in stopping illegal practices. They serve to clean up the market in cases where AI systems do not comply with the requirements of the AI Act. Furthermore, in case of an AI system causing mass harm, consumers should be in a position to use all legal grounds and redress mechanisms available to them.

Unfortunately, the Commission did not include the RAD in the proposal for an AI Act. This is despite the legislation being a strategic measure under the European Commission's 2020 Consumer Agenda³ and the RAD having been included in the European Commission's proposals for a Digital Services Act (DSA)⁴ and a Data Act⁵. In the meantime, the RAD was also added to the Digital Markets Act (DMA).⁶

The AI Act should be added to the Annex for the reasons below.

1. It would ensure the full effectiveness of the AI Act by:

- Ensuring that AI operators are incentivised to fully comply with the AI Act to the benefit of consumers and competitors.
- Bringing about more effective enforcement: where the regulator must focus their resources on the most serious infringements of the AIA, the RAD would enable complementary private enforcement through injunctive measures.
- Ensuring that consumers can exercise their rights in relation to the obligations imposed on AI operators. The AI Act creates several rights for end users, including:
 - Right to be protected against harmful, forbidden AI practices, such as social scoring (Art. 5)
 - The right to be informed when interacting with an AI system (Art. 52 (1) AIA)
 - The right to be informed when being exposed to an emotion recognition system or a biometric categorisation system (Art. 52 (2) AIA)

¹ Representative Actions Directive (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, OJ L 409, 4.12.2020, p. 1–27.)

² The RAD obliges all EU countries to introduce procedures for representative actions, and to give legal standing to bring these actions to non-for-profit entities (in particular consumer associations), complying with certain criteria. Once designated, these entities will be able to represent consumers in court or in front of administrative authorities and to bring domestic and cross border actions seeking injunctions or redress

³ https://ec.europa.eu/info/sites/default/files/com-2020-696_new_consumer_agenda.pdf

⁴ The RAD was introduced in Art. 72 of the initial [DSA proposal](#). It is now in Art. 90 of the adopted [DSA regulation](#)

⁵ See Art. 37 of the proposed [Data Act](#)

⁶ See Art. 52 of the adopted [DMA regulation](#)

- Other rights are being discussed in the context of the institutional negotiations:
 - ▶ Right to complain to an authority when an AI system infringes the AIA⁷
 - ▶ Right to receive an explanation about how an AI system that impacts them works
 - ▶ Right to be represented by consumer organisations in the exercise of their rights

2. It would ensure greater coherence with other recent EU digital legislation (Digital Services Act, Digital Markets Act, General Product Safety Regulation, etc) which have been added to the scope of the RAD. There is no reason to treat the AI Act differently from these digital legislations. Access to redress mechanisms is essential to achieve one of the EU's key objectives: to create a Europe that is fit for the digital age and works for citizens.⁸

It is also important to note that the Opinion of the European Parliament's Legal Affairs Committee recommends that the AI Act is included the Annex of the RAD.⁹

3. It would allow consumers to act collectively, thereby helping to reduce asymmetries of power and information. As recent examples have shown¹⁰, AI has the potential to harm large groups of persons. Given the complexity and opacity of AI systems, the huge asymmetry of information and the vulnerability of consumers, it is unlikely that consumers will ever be able to bring cases to court individually. Representative actions are their only realistic possibility to get redress and seek justice.

Arguments against enforceability of the AI Act under the RAD are not convincing

1. "Now that the proposed AI Liability Directive is added to the RAD, we no longer need to add the AIA."

The RAD is more than only compensation claims for damages, it also includes injunctions which are essential as explained above. Furthermore, the proposal for an AI Liability Directive (AILD) might not be fully coherent with the AIA and come with restrictions that cannot be anticipated at this stage. The rights included in the AIA are not included in the AILD, thus the legal base of the AIA must be specifically mentioned in the RAD Annex, to avoid legal uncertainty and ensure consumers can use all the legal protections and redress mechanisms at their disposal.

⁷ The right to complaint to an authority was added to the latest Council's position (see Art. 63 (11)), which will be submitted to a vote in the Telecommunications Council on 6 December

⁸ State of the Union 2021 Letter of Intent:
https://ec.europa.eu/info/sites/default/files/state_of_the_union_2021_letter_of_intent_en.pdf

⁹ See AM 151 of the [JURI Opinion](#) on the AI Act

¹⁰ https://en.wikipedia.org/wiki/Dutch_childcare_benefits_scandal

2. "The AI Act is not pure consumer protection legislation and cannot therefore be included in the RAD."

The AIA is a consumer protection instrument. It is listed as a strategic consumer protection measure in the Commission's Consumer Agenda of 2020.

The AIA is meant to protect consumers and the fact that it reached beyond consumer protection does not prevent its inclusion in the RAD Annex, and there are no substantial legal pre-conditions which would impede such inclusion. The AIA provisions that do not concern consumer protection would in practice not be concerned by the RAD.

3. "The AIA should only be subject to public enforcement as private enforcement is complex."

Private enforcement can be complex (multiple plaintiffs and quantifications of damages, for example). But if one accepted this argument, the RAD would not exist. No matter how legally complex representative actions can be, they are essential to ensure consumers have access to justice and redress.

BEUC Recommendation: How to add the AI Act to the RAD

The following amendment must be introduced to the AI Act proposal:

AI Act proposal	BEUC proposed amendment
<i>New article</i>	<p>The following is added to Annex I of Directive (EU) 2020/1828 on Representative actions for the protection of the collective interests of consumers:</p> <p>'(67) Regulation (EU) 20XX/XXXX of the European Parliament and of the Council of DD MMM YYYY on laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain Union legislative acts.'</p>
<i>New recital</i>	<p>Recital XX</p> <p>Consumers shall be entitled to enforce their rights in relation to the obligations imposed on AI providers and users under this Regulation through representative actions in accordance with Directive (EU) 2020/1828.</p>

