

The Consumer Voice in Europe

REASONS TO ADD THE CYBER RESILIENCE ACT TO THE REPRESENTATIVE ACTIONS DIRECTIVE



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The Cyber Resilience Act should be enforceable under the Representative Actions Directive

The European Union took a significant step by adopting the Representative Actions Directive (RAD)¹, which has become applicable since 25 June 2023. The directive is a keystone of the 'New Deal for Consumers' initiated by the European Commission in April 2018², aiming to strengthen and modernise consumer protection across the EU.

The RAD was designed to empower consumers and make it easier for them to stand up for their rights. It allows consumers to take legal action collectively through injunctive and/or collective redress measures³, either to stop businesses from engaging in illegal and harmful practices or to seek compensation for any harm caused.

Representative actions can be used in various sectors and under different EU laws, which are all listed in the Annex I of the RAD. This means that consumers now have more options when it comes to holding businesses accountable and seeking justice. Moreover, this directive is future proof, as this annex is subject to continuous revision and expansion. Indeed, recital 17 of the RAD establishes that "each time that a new Union act that is relevant to the protection of the collective interests of consumers is adopted, the legislator should consider" adding it to the RAD.

One important aspect of the RAD is the use of injunctions. These are legal orders that can force businesses to stop illegal practices. They play a crucial role in cleaning up the market, especially when products do not meet the requirements of the Cyber Resilience Act (CRA). Furthermore, in cases where a mass production product causes mass harm to a greater number of people, affected individuals can join an injunction without filing an individual legal action. Consumers have every right to use all available legal means to seek justice and compensation, and this is a key instrument to ensure the effective use of these rights.

Unfortunately, the Commission did not include the RAD in the CRA proposal. This is despite the necessity for cybersecurity legislation being referenced as a priority under the European Commission's 2020 Consumer Agenda⁴ and having been included by the European Commission in other important proposals covering the digital environment, such as the proposals for a Digital Services Act (DSA)⁵ and a Data Act⁶. Even where the European Commission has failed to include the RAD, the EU co-legislators have made sure to step in to ensure a higher degree of consumer protection, with co-legislators recently recognising the critical importance of adding the Digital Markets Act (DMA) to the RAD.⁷

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.), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1828>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0183>

³ The RAD brings about an important obligation for all EU countries to establish procedures for representative actions. It also requires that non-profit entities, especially consumer associations, meet specific criteria and are given the legal standing to bring these actions on behalf of consumers. Once designated, these entities will have the power to represent consumers both in court and before administrative authorities. They will be empowered to initiate actions, both domestically and across borders, with the aim of seeking injunctions or redress for the affected consumers. This provision ensures that consumers have a strong support system and effective means to enforce their rights in a collective manner.

⁴ https://ec.europa.eu/info/sites/default/files/com-2020-696_new_consumer_agenda.pdf

⁵ Art. 90, [DSA regulation](#).

⁶ Art. 37 of the proposed [Data Act](#)

⁷ Art. 52, [DMA regulation](#).

Therefore, it is crucial to add the CRA to the Annex of the RAD. This action would strengthen consumer rights, help fight against illegal practices, and align the RAD with the broader EU digital legislative framework. Ultimately, this would create a fairer and more just digital environment for consumer protection in the European Union.

In detail, we consider that the CRA should be added to the Annex of the RAD for the key reasons below:

1. It would ensure the full effectiveness of the Cyber Resilience Act

The RAD would allow consumers to collectively seek injunctive measures. Private enforcement acts as a deterrent against infringements, incentivising all relevant economic operators (e.g. manufacturers, distributors and importers of connected products) to fully comply with the CRA and avoid legal action, thus improving the overall level of protection for consumers. Moreover, it actively provides for greater accountability and higher standards of conduct across industries, pushing rogue actors out of the market and fostering a level-playing field for fair and free competition.

2. It would ensure more effective enforcement

Private enforcement using injunctive measures offers a complementary approach to public enforcement, extending its reach and effectiveness. A 'dual enforcement approach' would allow regulatory authorities to concentrate their limited resources on addressing the most serious infringements, while empowering private citizens and/or organisations representing them to address other violations which concern them directly through injunctive measures.

This complementarity would strengthen the regulatory framework by ensuring more effective protection and prevention of harm on a systemic level. The RAD unlocks the untapped potential of civil society and enables it to actively contribute to overall enforcement efforts.

3. It would allow consumers to be represented by consumer organisations in the exercise of their rights⁸

Cybersecurity attacks on connected products have the potential to harm large groups of persons. Given the complex nature of cybersecurity requirements and of the measures that manufacturers must deploy to keep their connected devices safe, there is a substantial power imbalance and information asymmetry, which leaves consumers extremely vulnerable.

Only representative actions can effectively bridge this gap and help reduce such power imbalances and information asymmetries to the benefit of consumers. Without such option, consumers who suffer the consequences of the unlawful conduct of rogue actors would have to pursue legal action against them individually. However, the often-disproportionate costs and risks involved leave consumers hesitant to take matters further, making it extremely unlikely for consumers to bring cases to court individually. Representative actions are therefore the only realistic possibility for vulnerable consumers to seek redress.

4. It would ensure coherence with other recent EU digital legislation

Adding the CRA to the RAD would ensure greater coherence and alignment with other recent EU digital legislation (such as the Digital Services Act, Digital Markets Act,

⁸ The right to representation is proposed in the latest Council compromise position (see Art. 54a, 54b).

General Product Safety Regulation, Data Act) which have also been added to Annex I of the RAD.

There is no valid reason to distinguish the CRA from these other digital legislations when it comes to consumer access to redress mechanisms. Access to redress mechanisms is a fundamental aspect of ensuring consumer protection in the digital age, which 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.⁹

Moreover, it is also important to note that the Opinion of the European Parliament's Internal Market and Consumer Protection Committee recommends the inclusion of the CRA in the Annex of the RAD.¹⁰ This endorsement by legislators underscores the importance to ensure a consistent and coherent legislative approach by incorporating the CRA within the framework of the RAD.

The arguments against enforceability under the RAD are not convincing

1. "The proposed Product Liability Directive (PLD) is added to the RAD, we do not need to add the CRA."

The CRA should be added to the RAD because the RAD does not only allow consumers to claim compensation, similar as under the PLD, but also allows to claim injunctive relief, as highlighted earlier. Adding the CRA to the RAD would therefore allow consumers not only to claim compensation for damage but would also allow them to claim a cease and desist of any infringement of the CRA in order to prevent damage in the first place.

Additionally, it is important to consider that the PLD will most likely not cover all the cybersecurity requirements set out by the CRA proposal, but only those that have a safety relevance.¹¹ Consequently, not all infringements of the CRA that cause harm would trigger liability under the revised PLD. In order to avoid potential legal uncertainties and ensure comprehensive consumer protection, it is imperative to explicitly add the CRA to the RAD's Annex I. By doing so, consumers can benefit from all the available legal safeguards and redress mechanisms provided by the CRA.

The inclusion of the CRA in Annex I of the RAD is therefore crucial for ensuring clarity and certainty in consumer rights. The rights enshrined in the CRA are distinct and go beyond what is currently covered by the PLD. Explicitly referencing the legal basis of the CRA avoids any ambiguity to guarantee that consumers are empowered to access and assert to the full spectrum of legal protections and remedies available to them.

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

The CRA is a consumer protection instrument. Enabling "consumers to use products with digital elements securely" is one of the specific objectives of the CRA. What is more, the commitment of the European Commission has been clear from the start: the CRA is "to protect consumers"¹² from cybersecurity risks, including those most vulnerable, such as

⁹ 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

¹⁰ See proposed Art. 54(2), IMCO Opinion on the Cyber Resilience Act.

¹¹ For more information, see BEUC Position Paper on the Cyber Resilience Act proposal, pp. 22-23: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-006_The_Cyber_Resilience_Act_Proposal.pdf

¹² https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5374

minors¹³, whilst the European Commission’s Consumer Agenda of 2020 states that the “[r]ules should be adapted to the connected environment to ensure that, for example, smart home devices are not subject to cybersecurity risks”.¹⁴

The CRA is meant to protect consumers and the fact that it covers aspects beyond consumer protection does not prevent its inclusion in the Annex I of the RAD. The very definition of “consumer” under the RAD is purposely broad in order to safeguard the interests of consumers “regardless of whether those consumers are referred to as consumers, travellers, users, customers, retail investors, retail clients, data subjects or something else”.¹⁵ Regardless of the specific aspects covered by a legislation or the different labels it uses to refer to consumers, the interests of consumers harmed by infringements of EU law should be protected. There are no substantial legal pre-conditions which would impede such inclusion and that is the approach undertaken by other laws that do not only cover consumer aspects, such as the DMA or the Data Act. The CRA provisions that do not concern consumer protection would in practice not be concerned by the RAD.

3. “The CRA should only be subject to public enforcement as private enforcement in cybersecurity is too complex.”

Private enforcement can be complex (multiple plaintiffs and quantifications of damages, for example). However, if one accepted this argument, the RAD would not exist today and its annex would not cover such a large scope of EU laws across industries – especially the extremely complex digital regulations.

Regardless of the complexities involved, representative actions are crucial for ensuring that consumers have access to justice and redress. The existence of the RAD itself acknowledges the importance of representative actions in overcoming barriers to justice and providing a fair means for consumers to seek legal remedies collectively. Embracing these complexities is therefore essential to empower consumers and uphold their rights effectively.

BEUC Recommendation: adding the CRA to the RAD

The following amendment must be introduced to the CRA proposal:

CRA 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>‘Regulation xxxx/xxxx of the European Parliament and of the Council of DD MMM YYYY on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020.’</p>

¹³ Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020. ‘Cyber Resilience Act’, recital 8: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0454>

¹⁴ Communication from the Commission to the European Parliament and the Council - New Consumer Agenda Strengthening consumer resilience for sustainable recovery, COM/2020/696 final, p. 10. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0696>

¹⁵ Recital 14, [RAD Directive](#).

<i>New recital</i>	Recital XX Consumers shall be entitled to enforce their rights in relation to the obligations imposed on economic operators and users under this Regulation through representative actions in accordance with Directive (EU) 2020/1828.
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