CONSUMERPRO

BOOSTING PROFESSIONALS
IN CONSUMER PROTECTION

Collective Redress

Theoretical background document

2022- 2023

European Commission

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INTRODUCTION TO THE THEORETICAL BACKGROUND DOCUMENT

Dear Reader,

This theoretical background document is part of the training resources developed for Consumer Pro, an EU initiative that aims at making consumer organisations and other actors in consumer policy better equipped to protect consumers in their country.

The goal of this document is to provide you and your teams with useful and relevant information on digital rights. Its content has been prepared by BEUC policy experts in Collective Redress, from a European perspective, in order to provide you with the keys to:

- Quickly train your teams of practitioners,
- Easily find pertinent information,
- Enable your staff to better inform consumers about their rights, and,
- Raise the awareness of your national ministries and authorities about Collective Redress.

This theoretical background document forms part of a series of training resources that are intended to be adapted to national specificities when they exist. There are complementary theoretical background documents accessible upon request or online, on the topics of Digital Rights and General Consumer Law, in English as well as in many other European languages.

About Consumer PRO

Consumer PRO is an initiative of the European Commission under the European Consumer Programme and implemented by BEUC – the European Consumer Organisation. Its aim is to build capacity of European consumer organisations and other actors in consumer policy through non-formal education. The project covers the EU Member States, Iceland and Norway.

For more information, please write to Info@consumer-pro.eu.

1. INTRODUCTION: DEFINITIONS & A BRIEF HISTORY OF COLLECTIVE REDRESS

1.1. Definition

- ***What does the term "collective redress" refer to?***

Collective redress is a generic term referring to all types of procedural mechanisms enabling groups of individuals to act collectively to seek the cessation of an illegal practice and/or to seek redress measures, including compensation, for the harm collectively suffered. Since the 2010s, EU policymakers have preferred the term "collective redress" over the U.S.-centric notion "class action". The objective was to clearly distinguish the European approach from the U.S. model as the latter is often negatively tainted and suffers from a bad reputation.

The U.S. class action: a "Frankenstein Monster", really?

The US class action has sometimes been described as a "Frankenstein Monster", which would lead to abuses, such as blackmailing and frivolous litigation, and would put markets and economies at risk. In reality however, the excesses of the U.S. class action have been limited. As an American scholar highlighted, "much of the controversy has been highly emotional and individual cases have been transmogrified over the years into cosmic anecdotes".*

In 2008, the European Commission stressed that the knot of the problem may not lie in class actions as such but rather in a "toxic cocktail" mixing class actions, punitive damages, contingency fees and pre-trial discovery, which are specific to U.S. procedural law.

- ***"Representative action", "group action", "collective action" and other terminology***

Directive (EU) 2020/1828 (the "Representative Action Directive" or "RAD") uses the term '**representative action'** for the type of collective redress that the Directive requires to be available in all EU Member States. Under the Directive, the representative action is one of the procedural mechanisms for delivering collective redress. It refers to a situation where one or several "qualified entity(ies)" bring a claim before a court or an administrative authority on behalf of consumers, for the protection of the collective interests of consumers, to seek an injunctive measure, a redress measure, or both.

*A.H. MILLER, 'Of Frankenstein Monsters and Shining Knights: Myths, Reality and the Class Action Problem', (92) *Harvard Law Review*, 1979, n°3, pp.664-694

At national level, it is noteworthy that collective redress mechanisms may have different names, including, for example, *"group action"* (in France), *"collective action*" (in Belgium) or *"popular action"* (in Portugal).

1.2. A brief history of collective redress

- ***The worldwide spread of collective redress***

Contrary to a common belief, collective redress mechanisms are neither recent nor originated from the United States. Early forms of collective redress mechanisms can be traced back as early as to medieval England and they already enabled groups of peasants or people belonging to a community to act collectively to vindicate their rights. The modern forms of collective redress developed in the United States in the 1960s, and afterwards in several common law jurisdictions (e.g., in Australia and Canada in the 1990s). Several waves of collective redress finally reached the shores of Europe in the early 2000s, 2010s and 2020s.

The reasons that explain the spread of collective redress are manifold, complex, and often shaped by domestic considerations. In some countries, the adoption of collective redress mechanisms was encouraged by the courts themselves and triggered by a willingness to resolve mass claims in a cost-effective manner and to find practical solutions to the resolution of complex cases potentially involving hundreds of claimants. In other countries, the adoption of collective redress mechanisms has been the consequence of the ever-increasing numbers of mass harm situations and the fact that tools for compensating injured individuals were often still lacking.

- ***At the European Union level***

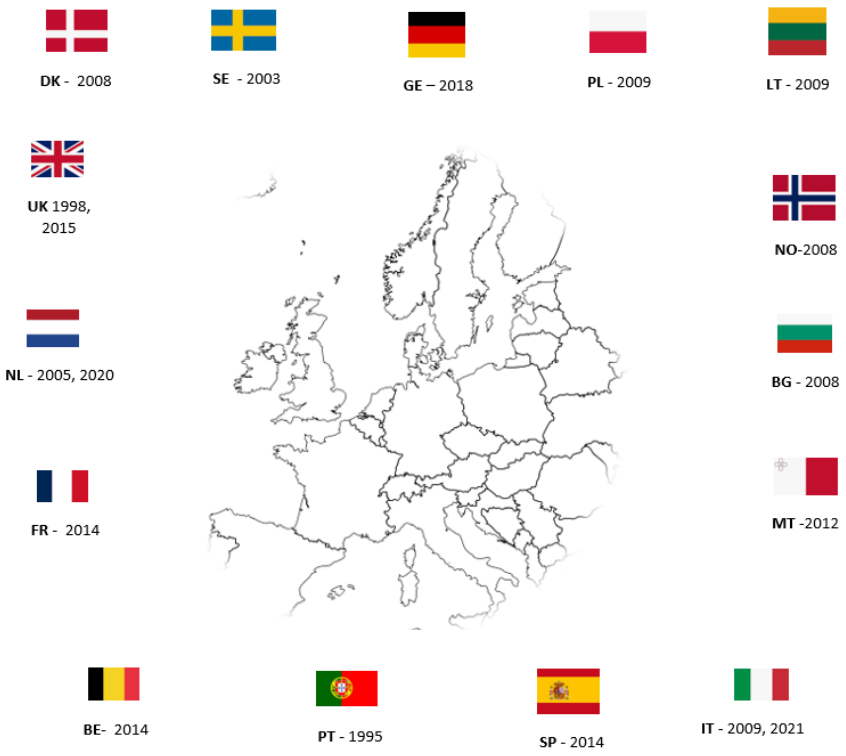
At the European level, the road towards collective redress has been a long and tortuous one. The European policymakers have sought to strike a balance between, on the one hand, a need to ensure access to justice in mass harm situations for all harmed individuals and, on the other hand, a willingness to implement the sufficient safeguards to avoid abusive litigation. In 2013, the European Commission adopted a Recommendation setting down eleven non-binding principles for collective redress. The Recommendation intended to trigger some law-making at national levels and to guide Member States when implementing collective redress mechanisms into their national legal systems. In January 2018, the European Commission published a report assessing the impact of the 2013 Recommendation at Member States level. Among other things, the report highlighted a persisting diversity in collective redress mechanisms across the EU. The European Commission also noted that collective redress mechanisms were still unavailable in several countries. At the same period, the Dieselgate (where certain car manufacturers installed technology in their cars to cheat emission tests) hit Europe. While U.S. consumers received compensation in only a few months, most of EU

consumers were left empty-handed, a situation which was felt as a “cold shower” in Europe following the words of former EU Justice Commissioner Vera Jourova. The Dieselgate ultimately highlighted the lack of tools in most European countries to ensure compensation for consumers in mass harm situations.

It is in this context that the European Commission launched in April 2018 the so-called “New Deal for Consumers” package. This legislative package included two directives. One of them was a proposal for a directive on representative actions for the protection of the collective interests of consumers, which intended to build on and to modernize the existing ‘Injunctions Directive’ (Directive 2009/22/EC). On 25 November 2020, the EU finally adopted the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers. Member States have until December 2022 to transpose it into their national systems. The rules will then enter into application as from June 2023.

- ***At Member States’ level***

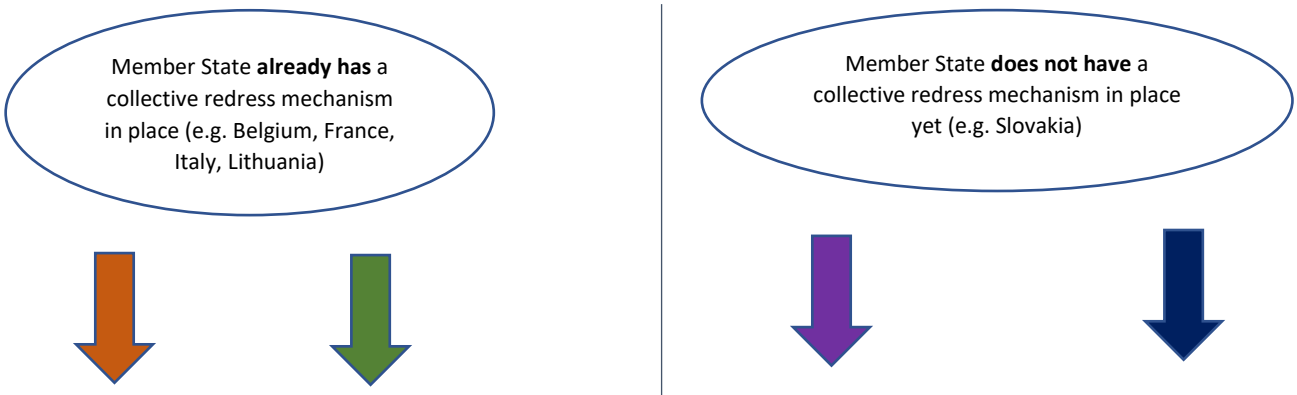
In parallel, since the 1990s-2000s and as shown on the map below, many Member States have also adopted collective redress mechanisms at national level. These mechanisms differ significantly in their procedural design and scope.



1.3. How does the EU Representative Actions Directive interact with the existing national collective redress mechanisms?

The objective of the Representative Actions Directive is to ensure that all Member States have at least one representative actions mechanism allowing for injunctive and redress measures. The Directive does not intend to replace nor to eliminate the existing national mechanisms. When transposing the Directive into their national systems, Member States have the possibility to adapt their pre-existing mechanisms to ensure that they comply with the requirements of the Directive, or they may decide to set up a new procedural mechanism, alongside the existing one(s). Moreover, Member States that do not have a collective redress mechanism may, in the future, provide for a national collective redress mechanism next to the one transposing the Representative Actions Directive, if they would consider it to be necessary.

Ultimately, **at least one national procedural mechanism for representative actions should comply with the requirements of the Directive**. The qualified entities will be able to choose between the available options (set under the Directive or already existing) to protect the collective interests of consumers.



scenario 1: where needed, Member State adapts its existing procedural mechanism to match the requirements of the RAD.

scenario 2: the existing national collective redress mechanism is left unchanged. In parallel, the Member State adopts a separate instrument in line with the requirements of the RAD.

scenario 3: Member State adopts a new mechanism fulfilling the criteria of the RAD

scenario 4: Member State adopts a new mechanism fulfilling the criteria of the RAD and, later, also adopts another national collective redress mechanism.

1.4. The place of collective redress within the EU consumer law enforcement toolbox

Collective redress is one of the tools available in the consumer law enforcement toolbox, which *inter alia* also comprises public enforcement by authorities, consumer out-of-court/alternative dispute resolution (ADR/ODR) and other court actions. In some Member States, there may be bridges between the different tools. For example, in Belgium or in Denmark, some consumer ombudsmen are entitled to bring collective redress actions to the courts on behalf of consumers.

THE EU ENFORCEMENT TOOLBOX			
type of enforcement	**Public enforcement**	**Private enforcement**	**out-of-court/alternative dispute resolution**
Legislation	Regulation 2017/2394 (*CPC regulation*)	Directive 2020/1828 *(Representative actions for the protection of the collective interests of consumers)* Directive 2009/22 *(Injunction Directive - to be replaced by RAD in June 2023).* Regulation 861/2007 *(European Small Claims Procedure*) Regulation 1896/2006 *(European Payment Order)*	Directive 2013/11 *(Consumer ADR Directive)* Regulation 524/2013 *(ODR Regulation)*
Key actors	Public enforcement authorities	Qualified entities (such as consumer organisations or public bodies etc.) bringing the actions. Courts or administrative authorities in charge of handling of the injunctions or representative actions	Ombudsmen and/or ADR entities of various nature

2. WHY COLLECTIVE REDRESS MATTERS

2.1. TO CONSUMERS

Studies have shown that consumers usually decide not to take any legal action when they believe this will take too long (41%)[2], when the sums involved are too small (35%), when a complaint will not lead to a satisfactory solution (34%), or when they don't know where and how to address their complaint (20.1%). Many consumers are also deterred from bringing claims against multinational companies that many see as lost or unbalanced battles from the very beginning. Put simply, in many cases, consumers may not have the sufficient incentives to vindicate their right as they expect the outcome of the litigation to be too resource-demanding and/or time-consuming, and ultimately not worth the effort. This situation is particularly problematic in cases where the total loss for all the concerned consumers is significant but where each single consumer only suffers small harm individually. In such situations, no one is eager to bring a claim, allowing some traders to realize important illegal profit. Hence, collective redress mechanisms facilitate consumers' access to justice, enable them to pool information and facilitate economies of scale, while contributing to levelling the playing field with traders.

2.2. TO JUDGES AND JUDICIARY

In mass harm situations, the multiplication of many similar individual claims can put the functioning of the whole judicial system at risk. For example, in Germany, the Deutsche Telekom case gathered more than 15,000 individual claimants and more than 700 counsels and overwhelmed the Frankfurt Trial Court. In the United States, a judge involved in the management of a class action in the 1970s calculated that adjudicating separately and individually all pending cases would approximately require 182 years of his time. The detrimental consequences associated with the treatment of similar lawsuits generally focus on courts' congestion and waste of human, material, and financial resources in already-tight budgets.

> *(…) 'It takes little mathematical calculation to determine that if each of over 1100 cases were tried separately for 38 trial days a substantial number of the District Judges in this country could do nothing for a year but try Bendectin cases')*
>
> *Judge C.B. RUBIN, in In Re Richardson-Merrell, Inc., 624 F, Supp.1212, 17 September 1985*

[2] see for example Consumers' Attitudes towards cross-border trade and consumer protection, 2018.

2.3. To traders

Contrary to a common belief, collective redress mechanisms can also be beneficial to defendant traders as they avoid a multiplication of individual claims and allow traders to clarify or resolve litigious situations. Such a pooling of claims can be beneficial and may help them meet their legal obligations imposed notably by company law (such as, for example, providing information to shareholders) or to avoid additional coordination costs.

The collective settlement of mass claims in the Netherlands: a tool responding to traders' needs

In 2005, the Netherlands adopted rules on the collective settlement of mass claims as a practical and emergency solution to the *diethylstilbesterol* (DES) case. After a 1992 decision where the Dutch Supreme Court held some pharmaceutical companies jointly and severally liable, all individual claimants had to individually step forward to obtain compensation. In parallel, traders had to deal individually with thousands of individual claims. This situation led the Ministry of Justice and the industry to call for the implementation of a new procedural tool combining justice and efficiency. The so-called "WCAM" procedure ("*Wet Collectieve Afwikkeling Massaschade*") therefore enabled all claimants and the defendants to settle all the pending claims once and for all.

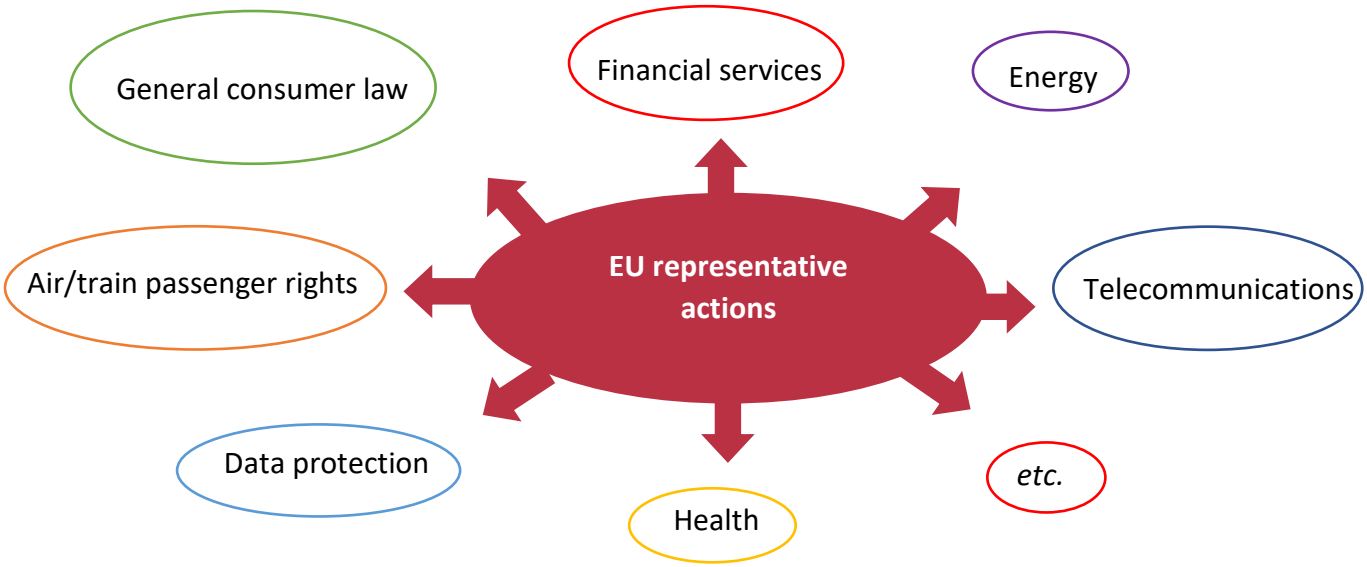
3. COLLECTIVE REDRESS: IN WHICH SECTORS, FOR WHAT TYPE OF DAMAGE AND FOR WHICH REMEDY

3.1. Scope

- ***The Representative Actions Directive***

The scope of application of the EU Representative Actions Directive covers business-to-consumer relations regulated by Union law listed in Annex I to the Directive *(Art. 2 RAD).* Member States may, if they wish so, make the mechanism adopted to transpose the Directive applicable to the protection of the rights of groups other than consumers, including businesses.

Representative actions are not limited to general consumer law but can be initiated for infringements of the rules in a wide range of sectors, including for example financial services, data protection, travel and tourism, energy, or telecommunications insofar as the rights of consumers are at stake. Consequently, it does not matter whether consumers are referred to as "travellers", "users", "retail investors", "retail clients", "data subjects" or others. All the legislative acts covered by the Directive are listed in Annex 1.



It is noteworthy that, depending on the legislative acts listed in Annex 1, **not all the provisions of the concerned acts will fall within the remit of the Directive**. The Directive will only apply to the provisions that are relevant for the protection of the interests of consumers. For each legislative act listed in Annex 1, it is essential to verify the provision(s) that are covered by the Directive.

Example*:* According to Annex 1 of the RAD…

- **All the provisions** of Directive 2005/29 on unfair commercial practices are covered under the RAD.
- **Only some provisions** of Directive 2001/83 on medicinal products for human use are covered under the RAD (namely its Art. 86-90, 98 and 100).

- ***Collective redress at national level***

At Member States level, collective redress may be available horizontally or in a few sectors only. For example, in France, collective redress is possible in the areas of consumer protection, competition, health, discrimination and environmental matters, while in Belgium only consumer claims can be pursued collectively

3.2. Damage and available remedies

Under the Representative Actions Directive, representative actions may be brought for both injunctive measures and/or redress measures.

- **Injunctive measures** may be sought irrespective of whether any actual loss or damage is suffered by the individual consumers. It does not matter whether the trader committed the practice intentionally or as a result of negligence. The injunctive measure may for instance require the traders to remove unfair terms, to provide the missing information or to publicly disclose the decision of the court or the administrative entity. The individual consumers harmed by the practice subject of the injunctive measure remain free to bring individual actions for redress measures.

- **Redress measures** can be sought in the form of compensation, repair, replacement, price reduction, reimbursement of the price paid, or contract termination, as appropriate and as available under Union or national law, depending on the circumstances of each case.

It is also noteworthy that the Representative Actions Directive covers not only the ongoing infringements but also those that have ceased before the representative action is brought or is concluded (subject to the limitation periods in accordance with the national law). Importantly, initiation of a representative action for injunctive or redress measures has, under relevant conditions, the effect of interrupting applicable limitation periods for the consumers concerned by that action.

Are collective redress actions possible for all types of damage, including material and immaterial harm?

The Directive is silent on the type of harm covered. At national level, certain Member States have limited the use of collective redress actions to certain harm. For example, in France, collective redress actions in the area of consumer law can only be used to seek compensation for the material harm suffered by consumers. Conversely, actions brought in the area of data protection may be sought for immaterial harm.

Are "punitive damages" possible through collective redress actions?

Punitive damages are amounts of money awarded in addition to the compensatory damages. They aim at punishing the defendant for an outrageous conduct. Although punitive damages are well-known in the U.S., they remain very limited in Europe. Only a very limited number of European countries allow for some form of punitive damages (e.g., the UK, Ireland). The Representative Actions Directive provides that "the awarding of punitive damages should be avoided" at Member States level.

3.3. Where to bring collective redress actions?

Identifying the court or the authority in charge of handling the collective redress action raises two questions: first, before which entity (court or others) should the action be brought? Second, what is the authority that is geographically competent?

- ***Before which entity should collective redress actions be brought?***

The Representative Actions Directive leaves discretion to Member States on whether the representative actions should be brought before courts or administrative authorities, or both, depending on the relevant area of law or the relevant economic sector *(Art.7(1) RAD)*.

Specialised courts for collective redress actions?

At national level, some Member States have set up specialised courts for the purpose of handling national collective redress actions. The objective is to develop specific expertise and knowledge in the area, and to ensure that the court is adequately staffed and equipped to deal with mass claims.

For example, in Belgium, the Brussels Commercial Court has exclusive competence in first instance to deal with collective redress actions ("*action collective*") and the Brussels Court of Appeals as exclusive jurisdiction in appeal.

- ***What is the entity geographically competent for handling collective redress actions?***

The Representative Actions Directive does not provide for specific rules to determine the court or the authority that is geographically competent. Rules will therefore be different depending on Member States. Some Member States may decide to set up specialised courts to deal with collective redress actions (see above), while others may rely on their pre-existing rules of civil procedure which often may provide that the competent court is the one where the defendant trader is domiciled.

Identifying the geographically competent court: the example of France

In line with the French rules of civil procedure, the competent jurisdiction to deal with collective redress actions ("*action de groupe*") in France is the one where the defendant trader is domiciled. For example, this means that if the trader is domiciled in the city of Marseille, the geographically competent court will be the court of the city of Marseilles. However, there is one exception to this rule: the Paris court has exclusive jurisdiction when the trader is located outside France or when its domicile is unknown.

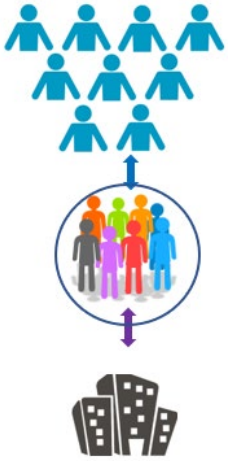
For representative actions having cross-border elements or implications, the EU and national rules on private international law apply (see below Section 11).

4. LEGAL STANDING: WHO CAN START COLLECTIVE REDRESS ACTIONS?

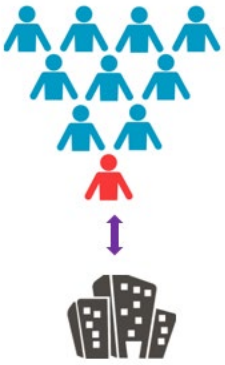
4.1. A European model based on representative entities

The representative action established by the Directive - and most of the procedural mechanisms already in place at Member States' level - follow a similar model based on representative entities. This refers to a situation where an entity (e.g., a consumer organisation) initiates an action on behalf of a group of represented consumers who themselves are not parties to the proceedings. This approach is different from the US model where one or several "named plaintiffs" who are also part of the claimant group litigate in court for themselves and on behalf of the entire class.

The representative entity-based model in the EU



The named-plaintiff model in the U.S.



4.2. What is a "qualified entity" and who is eligible to apply for this status?

Under the Representative Actions Directive, 'qualified entity' means any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions in accordance with the Directive (including consumer organisations representing members from more than one Member State) *(Art. 3(4) and 4 RAD)*.

Ad hoc organisations, which are legal entities set up in the aftermath of a specific event (e.g., an accident) and possibly gathering individuals harmed by that specific mass harm situation may be designated as qualified entities for the purpose of bringing domestic representative action if a Member State provides for such a possibility in its law transposing the Directive *(Recital 28 and Art. 4(6) RAD)*. *Ad hoc* organisations cannot be designated for the purpose of bringing cross-border representative actions.

4.3. Qualified entities for the purposes of bringing domestic and cross-border representative actions

The Representative Actions Directive introduces a distinction between qualified entities designated for the purpose of bringing **cross-border** representative actions and those designated for the purposes of bringing **domestic** representative action *(Art. 3 (6) and (7) RAD).*

Domestic representative action	Cross-border representative action
Representative action brought by a qualified entity in a Member State in which the qualified entity is designated. *e.g., a qualified entity is designated in **Spain** and brings an action in **Spain**.*	Representative action brought by a qualified entity in a Member State different from that in which the qualified entity is designated. *e.g., a qualified entity is designated in **Slovakia** and brings an action in **Lithuania**.*

Where a qualified entity brings a representative action in the Member State in which it is designated, that representative action should be considered a domestic representative action even if it is brought against a trader domiciled in another Member State and even if consumers from several Member States are represented within that representative action. **Ultimately, the Member State in which the representative action is brought should be the deciding criterion for determining the type of representative action that is brought** (*Recital 23 RAD*).

4.4. Becoming a qualified entity

Member States designate qualified entities for both domestic and cross-border actions (*Art. 4(1), (2) RAD*). However, the Representative Actions Directive only sets out requirements for qualified entities designated for the purpose of bringing cross-border representative actions (*Article 4(3) RAD*).

In parallel, Member States remain free to set specific requirements for qualified entities bringing domestic representative actions provided that these requirements are consistent with the objectives of the Directive (*Art. 4(4) RAD*).

Checklist to become a Qualified Entity for the purposes of bringing CROSS-BORDER representative actions

✓ **Requirements applying to the STRUCTURE of the qualified entity:**

- They must be a legal person constituted in accordance with national law of the Member State of its designation *(Art. 4(3)a RAD).*
- They must have a non-profit character *(Art. 4(3)c RAD).*

✓ **Requirements applying to the ACTIVITIES of the qualified entity:**

- They must demonstrate 12 months of actual public activity in the area of consumer protection prior to the request for designation *(Art.4(3)a RAD).*
- Their statutory purposes must demonstrate a legitimate interest in protecting consumer interests *(Art. 4(3)b RAD).*
- They cannot be subject to insolvency proceedings or be declared insolvent *(Art. 4(3)d RAD).*

✓ **Requirements applying to the INDEPENDENCE of the qualified entity:**

- They must be independent and not influenced by other persons than consumers *(Art. 4(3)e RAD).*
- They must establish procedures to prevent conflict of interest between themselves, the interest of consumers and the third-party funders *(Art.4 (3)e RAD).*

✓ **Requirements applying to the TRANSPARENCY of the qualified entity:**

- They must make publicly available, in plain and intelligible language (in particular on their websites), information showing that they comply with the criteria listed above, as well as information about their sources of funding, their organisational management, membership structure, statutory purposes, and activities *(Art. 4(3)f RAD).*

Checklist to become a qualified entity for the purpose of bringing DOMESTIC representative actions:

The list of requirements to be designated as a qualified entity for the purpose of bringing domestic actions are **set at national level**. The Representative Actions Directive gives Member States the possibility to apply the same requirements as those applying to qualified entities bringing cross-border representative actions or to set different requirements. In the latter case, these requirements must however be consistent with the objectives of the Directive (*Art. 4(4) RAD*).

Requirements for qualified entities bringing domestic representative actions		
Less stringent than the ones applying to qualified entities bringing cross-border representative actions.	**More stringent** than the ones applying to qualified entities bringing cross-border representative actions. *e.g., Member States may decide that the qualified entities should have a certain number of paid-up members*	**Same** as the ones applying to qualified entities bringing cross-border actions (see above).
Obligation for Member States to ensure that the requirements remain consistent with the objectives of the RAD.		

4.5. What are the consequences of being designated as a qualified entity?

Following the principle of mutual recognition under the Representative Actions Directive, the qualified entities designated in advance in a Member State for the purpose of bringing cross-border representative actions shall be recognized in the other Member States (*Art. 6 RAD*).

During the proceedings, the qualified entities have the rights and obligations of the claimant party. Individual consumers will benefit from the actions brought by the qualified entities without being themselves parties to the proceedings (*Art. 7(6) RAD*).

Can consumers interfere during representative actions?

Individual consumers concerned by the representative action are not claimant parties during the proceedings. Therefore, individual consumers may not interfere with the procedural decisions taken by the qualified entities or may not individually request evidence within the proceedings. However, Member States remain free to provide those individual consumers concerned by the representative action with certain rights (for example the possibility to appeal the final decision only as far as their own individual claim are concerned).

4.6. Is information about designated qualified entities public?

Members States must draw up a list of all qualified entities designated for the purposes of bringing cross-border representative actions and include information about their name and their statutory purposes. The list must be publicly available. The European Commission compiles the information for all Member States and makes the list of all the qualified entities designated for cross-border actions publicly available. The European Commission also updates the list whenever the Member States inform about changes concerning the qualified entities *(Art. 5(1) RAD).*

In parallel, Member States will ensure that information about the qualified entities designated in advance for the purpose of bringing domestic representative actions is also made publicly available (*Art. 5(2) RAD)*.

4.7. Are qualified entities monitored? Can they lose their status?

A Member State or the European Commission may raise concerns about the compliance by a qualified entity enabled to bring cross-border actions with the criteria set in the Directive. In such a case, the Member State which designated the qualified entity must investigate the concerns. The Member State may revoke the designation if the qualified entity does not or no longer complies with the requirements. Moreover, Member States must also assess at least every five years whether the qualified entities continue to comply with the criteria listed in Art 4(3) RAD *(Art. 5(3) and (4) RAD).*

In parallel, defendant traders in a specific representative action may also raise justified concerns to the court or the administrative authority as to whether the qualified entity designated for cross-border actions comply with the criteria *(Art. 5 (3) RAD).*

5. GROUPS OF CONSUMERS CONCERNED BY COLLECTIVE REDRESS: WHEN AND HOW ARE THEY FORMED?

5.1 Groups of consumers for whom the actions are brought

The qualified entity must decide for **which group of consumers** it brings a specific representative action. **The Representative Actions Directive allows for various configurations**.

Consider for example a Dieselgate-like situation where concerned consumers are located in many different countries. Different options are possible for the qualified entity:

- **A pan-European representative action will be possible**. It means that a consumer organisation, if designated as qualified entity, will be able to bring a single action for the protection of all European consumers concerned by the given infringement. This, as far as the EU and national rules of Private International Law will allow for it (see below Section 11).

- Alternatively, the **same organisation could decide,** in case of the same infringement, for different strategical reasons, **to represent in the representative action only consumers from one Member State or two Member States**.

- Alternatively, **various organisations** from different Member States will be also able to cooperate and bring a single action - or parallel actions for different groups of consumers - in the same case.

It is also important for the qualified entity to decide whether it intends to bring a representative action for injunctive measures, for redress measures or both. If the action is brought only for injunctive measures, the opting-in or opting-out of the concerned consumers described under 5.1 will not apply.

5.2. Opt-in & opt-out

Constituting the group of consumers concerned by the collective redress action is a pivotal issue. To do so, there are two main procedural mechanisms:

- ***The opt-in mechanism*:** the harmed consumers are **by default not included into the group for which the action has been brought**. They must **actively step in if they want to be part** of the group benefiting from the action. In this model, consumers must explicitly express their intent to be included into the group.

- ***The opt-out mechanism***: All harmed consumers are **by default presumed to be part of the group for which the action has been brought. They must actively step in if they want to be excluded from the group** benefiting from the action.

In simple words, the opt-in system requires plaintiffs to express their wish to be included into the group, whereas the opt-out system requires them to express their wish to be excluded from it. The difference between the opt-in and opt-out models can be summarized as follows:

5. 2 Why does this matter?

The pros and cons of the two mechanisms (opt-in and opt-out) have been discussed extensively. Some studies have shown that groups are usually larger in opt-out compared to in opt-in systems. This is because a few people usually leave the group. Some experts working in the area of collective redress have argued that the opt-in model is not efficient since it is costly, lengthy and faces consumers' apathy, the same that prevents them from bringing legal actions on their own. In parallel, the opt-out system is sometimes depicted as being contrary to procedural rules (such as for example in France the rule forbidding legal standing for absent and unknown plaintiffs, known as '*nul ne plaide par procureur')*.

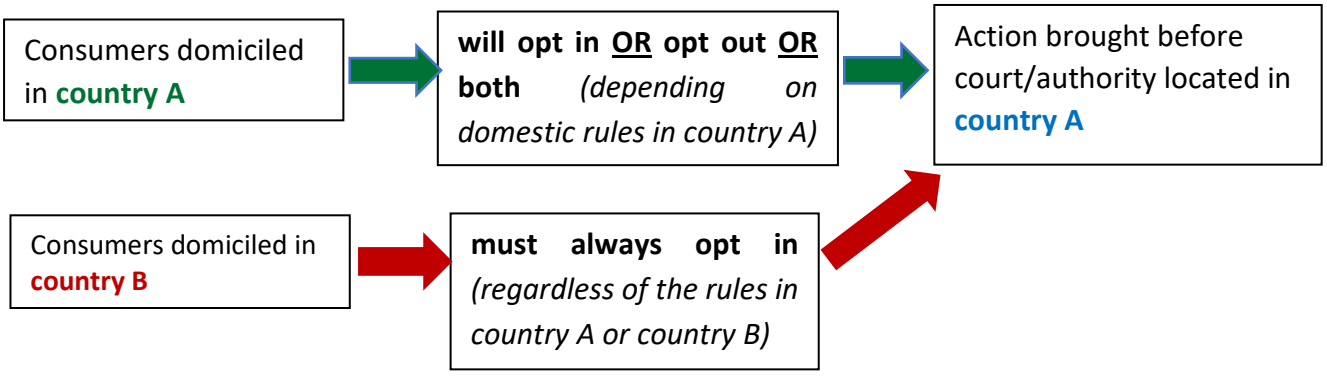
5.3. Who decides between opt-in and opt-out?

- ***The Representative Actions Directive***

The Representative Actions Directive leaves Member States the possibility to choose either the opt-in mechanism, the opt-out mechanism, or a combination between the two *(Art. 9(2)-(4)) RAD).* For example, Member State may decide that one mechanism will apply for representative actions brought in certain areas of law or for a certain type of harm and that another one will apply for other categories of cases. They may also decide to rely only on one mechanism for all types of cases. Finally, Member States may decide to give to judges the possibility to rely either on an opt-in mechanism or on an opt-out mechanism depending on the specificities of the case.

However, under the Representative Actions Directive, the opt-in mechanism always apply for consumers who are not domiciled in the same country as the one of the court or the administrative authority before which the representative action is brought.

Example:



- ***Opt-in and opt-out in national collective redress mechanisms***

As shown in the table below, Member States have chosen different mechanisms for their national collective redress mechanisms.

Country			
Mechanism	Opt-in only	Opt-out	Opt-in *OR* Opt-out
Who decides?	Provided for in the law	Provided for in the law	Law leaves some margin of manoeuvre to judges (see below)

Opting in or opting out in Belgium? For the court to decide

In Belgium, judges have the possibility to decide on the opt-in mechanism or the opt-out mechanism. The judge decides once the claim has been lodged depending on the specificities of the case. There are however some exceptions to this rule.

- First, when the collective action seeks reparation for physical or moral harm, the procedure **is always opt-in.**
- Second, for group members who are not domiciled in Belgium the procedure is **always opt-in**.

5.4. When do consumer have to opt-in or opt-out?

- ***The Representative Actions Directive***

The Representative Actions Directive leaves to Member States the possibility to decide at which stage of the proceedings individual consumers can opt-in or opt-out of the representative action *(Art 9(2) RAD)*. However, in principle they should do so only after a specific action has been brought to the court or the administrative authority.

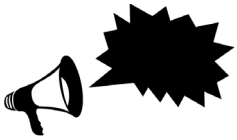
- ***National collective redress mechanisms***

Several models have been coexisting in Europe. For example, France has established a *"late opt-in system".* First, the claimant entity starts the group action solely on the basis of a few individual cases. At this stage, there is no group of consumers involved. Second, based on the analysis of the individual cases, the court decides on the liability of the defendant trader and establishes in its decision the criteria and deadlines that individual consumers have to meet to be included into the group. Third, once the decision of the court has become definitive, individual consumers may opt-in and join the group.

6. INFORMING INDIVIDUAL CONSUMERS DURING COLLECTIVE REDRESS ACTIONS

6.1. Who should inform consumers and when should consumers be informed?

Informing consumers about collective redress actions is essential as it is necessary to ensure that consumers are aware of the launch of the action and then remain adequately informed about its progress.



- ***The Representative Actions Directive***

According to the Representative Actions Directive, the qualified entities must provide, on an ongoing basis and in particular on their websites, the information about the representative actions they bring before a court or an administrative authority. Afterwards, they must continue to provide information about the status and the outcomes of those actions (*Art.13(1) RAD*).

On the top of the general information obligations described above, the Directive foresees specific information requirements concerning the ongoing actions and final outcomes of the proceedings.

It is important for consumers concerned by a representative action for redress measures to be informed in an adequate and timely manner to be able to make an informed decision as to whether they want to be represented during the action and to exercise their right to opt in or opt-out Member States lay down specific rules in this regard (*Art.13(2) RAD*).

In addition, the court or the administrative authority in charge of handling the representative action should in principle require the defendant trader(s), at their own expenses, to inform the concerned consumers about the final outcomes of the representative action, including, where appropriate to inform all the concerned consumers individually. Member States may lay down rules under which the trader would only be required to provide such information to consumers if requested to do so by the qualified entity.

Moreover, Member States may still decide in their national legislation that it will not be for the losing trader to provide for information about the final outcome of the action and that consumers will be informed in another manner. Finally, the decision on the manner consumers should be informed may also be left to the courts or administrative authorities dealing with the specific actions (*Art. 13(3), Recital 62RAD)*.

The information requirements also apply to qualified entities concerning final decisions on the rejection or dismissal of representative actions for redress measures *(Art. 13(4) RAD).* Member States also ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action *(Art. 13(5) RAD).*

Ultimately, Member States may decide to set up national electronic registers or database with information about the ongoing and concluded representative actions (*Art.14 RAD*).

- ***National collective redress mechanisms***

The rules on informing consumers and who should bear the costs entailed by the dissemination of information differ among Member State. For example, in France, under the existing group action framework, the claimant organisation may only advertise the claim once the court has handed down its decision on liability and the decision has become definitive.

Furthermore, some Member States have already set up registers with information about collective redress actions. In the Netherlands, a register with all collective actions is available on the website of the *Rechtspraak*: *www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen/*. In Germany, a register is available on the website of the Federal Justice Ministry (Bundesamt für Justiz): *www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Bekanntmachungen/Klagen_node.html*

6.2. How should consumers be informed about collective redress actions?

- ***The Representative Actions Directive***

Following Recitals 58 to 63 of the Directive, the information communicated to consumers should be proportionate to the circumstances of the case. The information may be provided via different venues, including via:

- the qualified entities' and/or the trader's websites
- local or national newspapers
- social media, and others.

- ***National collective redress mechanisms***

The rules differ across Member States. In the past, some consumer organisations have shown creativity to inform consumers about collective redress actions. For example, as part of its collective action against *Trenord* in 2014, the Italian consumer organisation Altroconsumo organised several live events, including a flash mob at the entrance of several railway stations in the Lombardy Region, Italy. The objective was to increase the signing up of consumers to the action. As a result, more than 6.000 consumers joined the action.

7. ADMISSIBILITY OF COLLECTIVE REDRESS ACTIONS

7.1. Why admissibility requirements for collective redress actions?

The verification of the admissibility of collective redress claims responds to two main objectives. First, it aims to discard the manifestly unfounded cases at early stages in order to avoid abusive litigation. Second, it intends to identify cases that may not be suited to proceed as collective redress actions.

The admissibility phase may also have some down sides as this contributes to make the procedure lengthier and more cumbersome. Experience in several countries has shown that defendants usually spend a lot of time and resources to challenge the admissibility of the actions at their very early stages, hence importantly postponing the discussions on the merits of the claim.

7.2. What may be the requirements for collective redress actions to be able to proceed?

- ***The Representative Actions Directive***

The Representative Actions Directive provides for general principles as regards the admissibility of the representative actions *(Art. 7(3), (7) and Recitals 12, 31, 34, 39, 43, 49 and 52).*

The Directive gives Member States some leeway to decide on the conditions under which representative actions are allowed to proceed (*Recital 12 RAD*). Member States may rely on their general civil procedural rules or may decide to establish specific rules regulating the admissibility of representative actions. For example, Member States may decide to impose a minimum number of individual consumer complaints to start a representative action and/or may impose rules on the required degree of similarity between the individual claims. Those admissibility requirements should however not hamper the functioning of representative actions. Furthermore, following the principle of non-discrimination, the admissibility requirements applicable to cross-border representative actions should not differ from those applicable for specific domestic representative actions.

- ***National collective redress mechanisms***

At national level, some Member States have imposed admissibility requirements in their national collective redress mechanisms, including (*inter alia*):

- A *commonality requirement*: the individual claims should be homogeneous enough and raise similar or related issues of fact and/or law. This requirement exists in most Member States where collective redress is available.

- A *superiority requirement*: bringing a claim as a collective redress action should be more efficient than through individual litigations. This requirement for example applies to collective redress actions in Belgium, Denmark, Finland, Italy, or Lithuania.

- A *numerosity requirement*: the representative action is admissible if a certain number of individual complaints can be brought forward to support the collective claim. This requirement for example applies in Lithuania or France.

7.3. Who is charge of reviewing the admissibility requirements?

Depending on the Member States, the court or the administrative authority may assess the admissibility of representative actions. The Representative Actions Directive provides that a possible decision to declare a representative action inadmissible should not affect the rights of the consumers concerned by the action. Therefore, the individual consumer can still initiate an individual action before a court on the matter which was subject of the inadmissible representative action. The individual consumer may also be represented in another collective action.

8. FUNDING AND FINANCING REPRESENTATIVE ACTIONS

Collective redress actions tend to be very expensive. Due to their nature of representing thousands or even hundreds of thousands of consumers, high aggregate damages and complex legal questions, the cost of such actions often goes into hundreds of thousands of euros.

In Italy, in the collective redress action against Volkswagen, the Italian consumer organisation Altroconsumo spent around 200.000 euros just on informing consumers and inviting them to register to the case.

Here, the Representative Actions Directive comes into play. It provides that European countries should ensure that the costs of the proceedings do not prevent the qualified entities from bringing the actions (*Art. 20 RAD*). Indeed, it is possible, through the legislation, to reduce some of the direct court costs and to make collective actions cheaper for claimant organisations. For example, there is a provision in the Portuguese civil procedural code saying that for the calculation of court fees the value of a class action is limited to 66.000 euros. This considerably lowers court fees, as in the instances where the aggregate damage is much higher (it can go up to several million of euros), the court fees are only based on the limit of 66.000 euros. In Germany, there is also a similar provision, even if with the higher limit of 250.000 euros. The RAD also allows to set modest entry fees to be paid by consumers in order to participate in the representative action.

However, even with these adaptations, the costs of the collective actions may still be prohibitive for non-profit entities, such as consumer associations. The lawyers' fees will be high, especially if the case goes through all stages of appeal (or even cassation). There can be a necessity for expert opinions, laboratory tests or other expensive evidence.

In short, some form of financing of collective actions is necessary. Among the most common options are state funding, special collective redress funds, legal insurance, and commercial third-party funding. Each of these options may have shortcomings, so the best would be to have a combination of available funding sources.

One of the most controversial funding sources is commercial third-party funding. As these funders take a commission for their investment, it can mean that consumers will not receive the full amount of their compensation, unless that commission is recovered from the trader in addition to the compensation due to consumers (e.g., in application of the 'loser pays' principle). However, it is still useful to have this option for very big and expensive cases, that

cannot be brought otherwise. In addition, third-party funders carefully evaluate the case and its chances for success, so their analysis might also be helpful. The Representative Actions Directive regulates third-party funding and introduces safeguards for the use of such funding (*Art. 10 RAD*). This article obliges EU Member States to ensure that where a representative action for redress measures is funded by a third party, insofar as allowed in accordance with national law, conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers. In particular, Member States must ensure that where the third-party funding is used, the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers. In addition, third party funders cannot finance actions that are brought against their competitors or companies on which the funder is dependant. The courts will check if there are no such circumstances and can oblige the legal entity to reject the funding or even reject the legal standing of the qualified entity.

9. AMICABLE SOLUTIONS AND COLLECTIVE SETTLEMENTS

9.1. Prior consultations for reaching amicable solutions

- ***The Representative Actions Directive***

The Representative Actions Directive provides that Member States may require that a qualified entity undertake a prior consultation before bringing a representative action for injunctive measures before the court or the administrative entity (*Art. 8(4) RAD*). Such a possibility may be foreseen also for the actions seeking redress measures (*Recital 41 RAD*). The length of such as prior consultation with the defendant trader should not exceed two weeks after the request is received. If the infringement has not ceased after this two-week period, the qualified entities are entitled to immediately bring the representative action before the court or the administrative entity.

- ***National collective redress mechanisms***

Such a prior consultation is already required in certain national collective redress procedures.

In some Member States, prior consultation may also happen once the claim has been filed and this step is mandatory for the case to be able to proceed. For example, under the rules of the Belgian collective action, after the court has verified the admissibility of the claims, the claimant organisation and the trader must enter into negotiations with a view to reach a collective settlement agreement. This period is fixed by the judge and is comprised between 3 and 6 months (renewable once). If the parties do not reach an agreement, the court decides on the merits of the case.

9.2. Redress settlements and their scrutiny

- ***The Representative Actions Directive***

At the EU level, the Representative Actions Directive provides that "collective settlements aiming at providing redress to consumers that have suffered harm should be encouraged in representative actions for redress measure" *(Recital 53 RAD)*. The qualified entity and the defendant trader may jointly propose to the court or the administrative authority a settlement with the view of providing redress to the concerned consumers. Alternatively, the court or the administrative authority may invite the qualified entity and the trader to reach a settlement agreement within a reasonable timeframe (*Art. 11(1) RAD*).

The court or the administrative authority should scrutinise the proposed settlement agreements agreed by the parties *(Art. 11 (2) RAD).* It will in particular verify whether the settlement agreement is contrary to mandatory provisions of national law (e.g., a settlement agreement which would leave unfair contract terms unchanged). Furthermore, if the Member States provide for such a possibility, the court/the administrative authority will also review the fairness of the settlement agreement. When doing so, the court/the administrative authority should closely consider the interest of the represented consumers.

The review of the settlement agreement will have two possible results (*Art. 11(3) RAD*):

- the court/the administrative authority **rejects** the proposed settlement. In this case, the representative action will continue to proceed.
- the court/the administrative authority **approves** the proposed settlement. In this case, it shall be binding upon the qualified entity, the traders and the individual consumers concerned. Member States may lay down rules giving the concerned individual consumers the possibility of accepting or refusing to be bound by the agreed settlement agreement.

- ***National collective redress mechanisms***

At the national level, already 10 Member States have adopted rules applying to collective settlements of mass claims,[3] and most of them give important roles to judges when it comes to ensuring the fairness of the proposed settlement agreements.

[3] In Belgium, Bulgaria, Denmark, France, Germany, Italy, Lithuania, Netherlands, Poland, Portugal.

The judicial review of collective settlements agreements

In the Netherlands, the court must assess whether the compensation amount awarded to the consumers is reasonable and whether the interests of the represented parties are sufficiently protected. When doing so, the court may request the assistance of experts to help review the content of the settlement agreement.

Depending on cases, assessing the fairness of settlement agreement may be a complex task for judges. In the U.S., the "*Pocket Guide for judges*" managing class action litigation lists several "hot button indicators" likely to show the potential unfairness of collective settlements and to which judges should give particular attention.

10. ENFORCEMENT OF FINAL DECISIONS AND OUTSTANDING AMOUNTS

The Representative Actions Directive provides that Member States must ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action. Member States must lay down rules on time limits for individual consumers to benefit from those redress measures *(Art. 9 (6) and (7) RAD).*

The Directive is silent on the way the redress measures should be executed. Rules may thus differ at national level depending on the procedural choices made by the Member States. For example, in some Member States (e.g., Belgium, France), the court may appoint liquidators or collective claim settlers to facilitate the distribution of damages to individual consumers. Conflicts during the award distribution should be solved by the court.

If there remain amounts not collected by consumers at the end of the set timeframe, Member States are entitled to decide where these amounts should go to. *(Art. 9(7) RAD).* They may for instance decide that the money will go to a dedicated fund set up for financing future representative actions or to finance other activities.

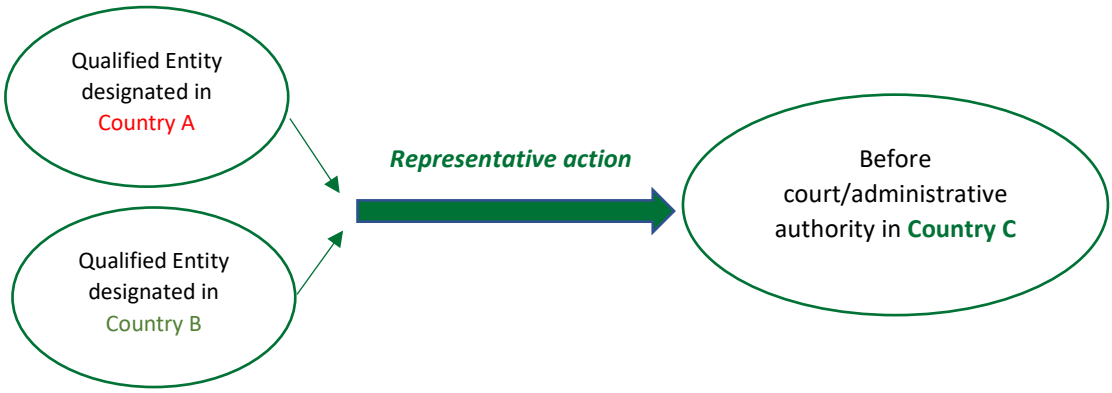
Use of the non-collected amounts: the example of the Canadian Province of British Columbia

Following the rules regulating class actions in the Canadian Province of British Columbia, in the event of undistributed amounts, the court must order that 50% of the undistributed amounts goes to the Law Foundation of British Columbia, a non-profit organisation supporting projects relating to access to justice.

11. BRINGING CROSS-BORDER COLLECTIVE REDRESS ACTIONS

11.1. Qualified entities bringing joint representative actions

Following the principle of mutual recognition, qualified entities designated in advance in a given Member State for the purpose of bringing cross border representative actions should be allowed to bring actions in other Member States (*Art. 6(1), 6(3) RAD*). In addition, qualified entities from different Member States may join forces within a single representative action in a single forum (*Art. 6(2) RAD)*.



11.2. Private international rules applicable to collective redress actions

With the ever-increasing internationalisation of goods and services, more and more mass harm situations have an international element. This may be because the group of concerned consumers is spread over different countries (e.g., the Dieselgate), because the harm has materialised in several locations, etc.

The EU has set down a complex private international law framework, which includes in particular:

- Regulation 1215/2012 ("*Brussels 1 bis*") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- Regulation 593/2008 ("*Rome 1*") on the law applicable to contractual obligations.
- Regulation 864/2007 ("*Rome 2*") on the law applicable to non-contractual obligations.

However, the EU private international rules were drafted with a view to individual proceedings and build on the "one-on-one" model of litigation. Therefore, their application

raises many questions in the context of mass claims, which are poly-centred and may involve thousands of parties located in several countries.

The Representative Action Directive is without prejudice to the existing private international law framework. This means that there are currently no specific private international rules applying to cross-border mass claims.[4] As such, the qualified entities must continue to rely on the Brussels 1 bis regulation to identify the competent jurisdiction before which their action must be brought.

The Court of Justice of the EU and the application of EU private international rules in mass claims

In several decisions, the Court of Justice of the European Union provided some guidance on the application on EU private international rules in the context of mass claims. For example, in a decision C-343/19 of 9 July 2020, the CJUE interpreted Art. 7(2) of the Brussels 1 bis Regulation in the context of the Dieselgate litigation and allowed consumers harmed by the Volkswagen Dieselgate to file claims before the jurisdiction of their country of residence.

12. FURTHER RESOURCES AND REFERENCES

- The Representative Actions Directive
- New Deal for Consumers package
- European Parliament briefing on the adoption of the Representative Actions Directive (2020)
- Report on the implementation of collective redress mechanisms by Member States (2018)
- Study on the State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation (2017)
- Study on Collective redress in the Member States of the European Union (2018)
- Commission Recommendation on collective redress and its implementation (2013)
- Consumer Justice Enforcement Forum (CoJEF)
- Background documents, discussion papers and reports prepared by the European Commission services in the context of the Workshop on the Representative Action Directive which took place in November 2021.

[4] see also case 167/00 VKI v Henkel, 1 October 2002 (ECLI:EU:C:2002:555).