Background paper

Summary

Judges are expected to play an important role for the handling of collective redress actions and their tasks will be essential in the context of Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (the "Representative Actions Directive")[1]. The Directive allows for qualified entity(ies), such as consumer protection organisations or other eligible entities, to bring a claim before a court or an administrative authority on behalf of consumers to seek an injunctive measure, a redress measure (such as compensation, repair or price reduction) or both.

Already in 2013, the European Commission highlighted in its Recommendation on collective redress that "a key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively".[2] During the 2011 public consultation, stakeholders almost "unanimously agree(d) that the judge should have a central role as a case manager and gatekeeper".[3] In the context of U.S. class actions, the Pocket Guide to assist judges when dealing with class actions highlights that judges "play a unique role: the high stakes of the litigation heighten [their] responsibilities".[4] The same observation holds for the judiciary in Europe in the context of collective redress actions.

The Directive will come into application in June 2023 and the Member States have leeway to transpose the Representative Actions Directive at national level. Although the procedural design of collective redress actions may differ nationally after the transposition period, the Directive lays down several common key principles constituting what can be described as the backbone of the intervention of judges in collective redress actions.[5]

[1] 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
[2] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms (Recital 21).
[3] *Evaluation of Contributions to the Public Consultation and Hearing: Towards a Coherent European Approach to Collective Redress*', ref. Just/2010/JCIV/CT/0027A4, 2 October 2012, p.12,
[4] B. Rothstein & T. Willging, Managing class action litigation: a pocket guide for judges, U.S. Federal Judicial Center, 2009
[5] Directive (EU) 2020/1828 leaves to the Member States discretion on whether the representative actions could be

The purpose of this background paper is to provide judges and administrative authorities with general information about collective redress and the Representative Actions Directive through the main topics and questions likely to be raised in this context.

1. **Judges as filters and gatekeepers**: judges may be required to check the admissibility of the actions, to filter frivolous actions, and to engage with entities representing the interest of the concerned consumers.

2. **Judges as active case managers**: when managing mass claims, judges may be asked to perform tasks which may importantly differ from their traditional practice. As Lord Woolf highlighted when commenting on the British experience with multi-party actions, "the need for imagination and creativity in dealing with such litigation is attested to by every judge who has tried such a case."[6]

3. **Judges as mass claims resolvers**: where relevant, the concerned consumers must receive the appropriate compensatory measures. For judges, this means deciding on compensation amounts, fixing damages scheduling and supervising distribution processes. In some cases, this may also mean reviewing the fairness of settlement agreements.

brought before courts or administrative authorities or both depending of area of law or economic sector (Art. 7(7) of Directive (EU) 2020/1828). If a Member State decides that the representative actions should be pursued as administrative actions, clarifications as regards the role ofjudges in collective redress should be considered to the possible extent in relation to administrative authorities overseeing the representative actions.

[6] Lord Woolf, *Final Report on Access to Civil Justice*, *chap. XVII "Multi-Party Actions", 1996.*

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Introduction: opportunities & challenges of collective redress for the judiciary

Collective redress actions can be a double-edged sword for the judiciary. On the one hand, the multiplication of similar individual claims in mass harm situations puts the functioning and viability of the judiciary at risk. For example, the Deutsche Telekom case in Germany gathered more than 15.000 individual claimants and hundreds of lawyers and had consequences on the functioning of 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.[7] The risks associated with the treatment of many similar individual lawsuits include *inter alia* courts' congestion, and the waste of human, material, and financial resources in tight budgets. On the other hand, the managing of collective redress actions can also be complex and burdensome for courts. For example, in the context of the Dieselgate-related collective action in Italy, the court of Venice received hundreds of faxes and other documents and went close to paralysis.[8]

1. JUDGES ACTING AS FILTERS AND GATEKEEPERS

1.1. Reviewing the admissibility of collective redress actions

What EU rules provide for: *Directive (EU) 2020/1828 provides for general principles as regards the admissibility of the representative actions in Article 7(3) and (7) accompanied by recitals 12, 31, 34, 39, 43, 49 and 52. For more detail on how the Directive approaches the question of admissibility, please see the discussion paper prepared by the European Commission services for the Workshop on 26 November 2021 and available here.*

Supervising the admissibility of collective redress actions responds to several objectives. First, it aims to discard cases which may not be suited to proceed as collective redress actions, including manifestly unfounded cases. Thereby, it intends to preserve resources for all the concerned parties. Second, it allows the courts to determine whether they are competent to deal with the case at stake. However, the admissibility phase may also raise important concerns with regards to the economy of procedure and possible delays. Experience in several countries tends to show that defendants usually spend a lot of time and resources to challenge the admissibility of collective redress actions, hereby causing delays.

At the EU level, the Representative Actions Directive gives Member States leeway to decide on the conditions under which representative actions are allowed to proceed. 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 on a minimum number of consumers concerned by an action for redress measures in order for the case to be heard as a representative action. Member States may also impose rules on the required degree of similarity between the individual claims. In any event, the admissibility requirements should not hamper the functioning of representative actions.

At national level, some Member States have already imposed admissibility requirements for their national collective redress mechanisms, such as notably a *commonality requirement* (i.e., the individual claims should be homogeneous enough and raise similar or related issues of fact and/or law. This requirement exists in almost all jurisdictions where collective redress mechanisms already exist); a *superiority requirement* (i.e., bringing a claim as a collective redress action should be

[7] *Judge Rubin, in In Re Richardson-Merrell, Inc., 624 F, Supp.1212, 17 September 1985.*
[8] https://corrieredelveneto.corriere.it/veneto/notizie/cronaca/2017/23-agosto-2017/venezia-class-action-il-dieselgate-tribunale-imprese-intasato-240193969817.shtml

more efficient than through individual litigations. This requirement for example applies to collective redress actions in Belgium, Denmark, Finland, Italy, or Lithuania), or a *numerosity requirement* (the representative action is admissible only if a certain number of individual complaints can back up the collective claim. This requirement for example applies in Lithuania).

1.2. Engaging with representative entities

What EU rules provide for: *Directive (EU) 2020/1828 addresses the designation of qualified entities in Art. 3(4) and 4; the role of the qualified entities within the representative actions in Art. 7, 8, 9; the assistance to qualified entities in Art. 20; Third-party funding, the procedural costs and assistance to qualified entities in Articles 10, 12 and 20. See also the discussion paper prepared by the European Commission services for the Workshop on 26 November 2021 and available here.*

European collective redress mechanisms mainly rely on representative entities-based models. This refers to situations where a representative body starts an action on behalf of a group of concerned consumers who themselves are not parties to the proceedings. This approach is different from the U.S. 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.

At the EU level, the Representative Actions Directive provides that representative actions may be initiated by "qualified entities" which are bodies such as consumer organisations or public bodies representing consumers' interests, and which Member State have designated as such. *Ad hoc* organisations may also be designated as qualified entities for the purpose of bringing domestic representative action if a Member State allows for such a possibility in its law transposing the Directive. *Ad hoc* organisations cannot be designated for the purpose of bringing cross-border representative actions. Pursuant to the Directive, the qualified entity will act as a claimant party, with all relevant rights and obligations such as deciding on the group of consumers for which it will bring the specific action, substantiating the claim and if there is a need, advancing the procedural costs. Finally, qualified entities should not be prevented from bringing representative actions due to the costs associated with the procedures. To this end, the Member State may grant qualified entities access to legal aid or limit the court fees. The Directive also regulates third party funding that could help qualified entities in bringing actions.

2. JUDGES AS ACTIVE CASE MANAGERS

2.1. Structuring the group of concerned consumers

What EU rules provide for: *the Directive provides for rules on the opt-in and/or opt-out system in Art.9. For more detail on how the Directive approaches the question of the representation of consumers, please see the discussion paper prepared by the European Commission services for the Workshop on 26 November 2021: https://prod5.assets-cdn.io/event/7409/assets/8362336739-90b9437137.pdf*

Constituting the group of consumers concerned by collective redress actions is pivotal. Two procedural models are usually used. Under the so-called, *opt-in mechanism* the harmed consumers are by default not included into the group represented by the claimant entity. Consumers must actively step in if they want to be part of the group benefiting from the action. Under *the opt-out mechanism*, all consumers concerned by an infringement and who the claimant seek to represent in the action are by default presumed to be part of the group benefiting from that action. They must actively step out if they want to be excluded from the group benefiting from the action.
At the EU level, the Representative Actions Directive leaves Member States the possibility to choose between either the opt-in mechanism, the opt-out mechanism, or a combination between

the two. 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 another one will apply for other categories of cases. They may also decide to rely only on one mechanism for all type 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. In Belgium for example, aside for some exceptions, judges have the possibility to decide on the opt-in mechanism or the opt-out mechanism.

2.2. Informing consumers and managing the information flows

What EU rules provide for: *the Directive provides for rules on consumer information in Articles 13 and 14, accompanied by Recitals 58-63. For more detail on how the Directive approaches the question of consumer information, please see the discussion paper prepared by the European Commission services for the Workshop on 26 November 2021 https://prod5.assets-cdn.io/event/7409/assets/8362336739-90b9437137.pdf*

Informing consumers about collective redress actions is essential to ensure that consumers are aware of the launch of the action, can decide to opt-in or opt-out, and then remain informed about its progresses until the final outcome. Judges play an important role when it comes to managing information flows. This information should be adapted to the circumstances of the case.

The Representative Actions Directive provides for several rules on how the consumers concerned by the representative action should be informed about it. It lays down the obligations for the qualified entities to provide consumers with a general information on future, ongoing and closed actions. It also requires that Member States set up additional rules on the information on the ongoing and closed actions. For instance, in principle, the court in charge of handling representative actions should require the defendant trader(s), at its expenses, to inform the concerned consumers about the final outcomes of the representative action, including, where appropriate informing all the concerned consumers individually)

2.3. Ensuring the active management of collective redress actions

What EU rules provide for: *the Directive addresses the management of the actions in Art. 18 and recital 68.*

Judges may have to deal with the litigation at different levels when dealing with collective redress actions. First, they should be able to identify the generic issues which can be solved for group as a whole but also consider issues which may be applicable to certain individuals only and which need to be decided separately. The need to deal with mass claims' multiple geometry raise concerns. When commenting on the British experience, Lord Woolf for example observed that 'the effective and economic handling of group actions requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole'.

In parallel, judges may need to rely on innovative case management techniques. Judges may decide to segment the claims by organising subgroups and adjudicating specific issues. They may organise "test cases" or "bellwether trials" where the resulting verdicts will not be binding upon the whole group but will merely provide the parties with information about their claims. They may rely on court- appointed experts to cope with the massive amounts of evidence and the number of involved parties.

The management of collective redress actions also questions the need to set up specialised courts. 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.

At EU level, the Representative Actions Directive leaves to judges' discretion the management of representative actions. Still procedural modalities set up by the Directive serve the effectiveness and efficiency of the representative actions. For instance, judges will be able, under certain conditions, to ask for disclosure of evidence relevant for a specific action.

3·JUDGES AS MASS CLAIMS RESOLVERS

3.1. Promoting out of court amicable solutions

What EU rules provide for: *the Directive addresses amicable settlements in Art. 8(4) and recital 41.*

At the EU level, the Representative Actions Directive provides that Member States may require that a qualified entity undertakes 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 a 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 authority.

3.2. Reviewing redress settlements

What the rules provide for: *the Directive addresses the review of settlement agreements in Art. 11 and recital 53.*

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

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 in a reasonable time limit (*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 unchanged an unfair contract terms). Furthermore, if the member states provide for such condition, the court/the administrative authority will also review the fairness of the settlement agreement. When doing so, the court/the administrative authority should in particular 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.

3.3. Award distribution

What EU rules provide for: *The Directive addresses damages distribution in Art. 9*

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. Moreover, Member States must lay down rules on time limits for individual consumers to benefit from those redress measures and may lay down rules on the destination of any outstanding redress funds not recovered by consumers within the established time limits. (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.

Additional resources:

- 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 prepared by the European Commission in the context of the Workshop on the Representative Action Directive which took place in November 2021.