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EU-wide collective redress rules draw near adoption: potential impact in Bulgaria and for EU cross-border business

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July 2020

Introduction

Following protracted negotiations, the European Parliament and the Council of the EU reached an agreement on 22 June 2020 on a new 'Representative Actions Directive'[1] that aims to introduce EU-wide rules on collective redress. It requires each Member State to implement a mechanism for an EU-style class-action scheme that would allow qualified entities to claim injunctive relief and damages for infringements of consumer protection laws before national courts or administrative authorities. The proposal for the directive was first introduced in April 2018 as part the European Commission's New Deal for Consumers[2] aimed at strengthening the enforcement of EU consumer law in light of the growing risk of EU-wide infringements and at modernising consumer protection rules in relation to market developments.

The push for uniform regulation on class action was a response to recent high-profile cross-border cases, such as the 2015 'Dieselgate' scandal involving German carmaker Volkswagen, which allowed consumers in the United States to seek collective redress while Europeans were left largely without compensation.

Main elements of the 'Representative Actions Directive'

- Every Member State must establish at least one representative action procedure available to consumers for injunction and redress measures for national as well as for cross-border cases.
- Qualified entities (consumer protection organisations or public bodies) will be empowered and financially supported to launch actions on behalf of groups of consumers.
- Uniform designation criteria for qualified entities are set for cross-border cases. The entities must: demonstrate 12 months of activity in protecting consumers' interest prior to case initiation; have a non-profit character; and ensure they are independent from third parties (other than the relevant consumers) who might have an economic interest in the outcome of the case, in particular from market operators. For domestic actions, Member States are free to set out own criteria consistent with the objectives of the directive, which could be the same as those set out for cross-border actions.
- Members States must ensure that each qualified representative entity discloses publicly in plain and intelligible language how it is financed, its organisational and management structure, its objective and working methods, as well as its activities.
- Based on input from Member States, the Commission shall publish a list of representative entities that comply with the criteria. Entry into the list does not guarantee standing and the court or administrative authority reviewing the relevant claim will be obliged to examine whether the purpose of the qualified entity justifies taking action in the specific case.
- Redress obtained through a court-approved settlement shall be binding upon all parties, thus removing the possibility for consumers to accept or refuse being bound by a settlement negotiated by the qualified entity.

[1] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC
[2] A New Deal for Consumers (COM/2018/0183 final)

The importance of potential class action rises proportionately with the number of consumer transactions and the volume of data processed.

Who is affected?

The Representative Actions Directive is intended to have a sectoral approach and will only regulate the bundling of consumer protection claims. Despite attempts during the legislative process to carve out certain areas, the scope of collective action remains broad. All consumer-facing industries would be affected in some way. Some of the most obvious areas are violations related to data protection, financial services, travel and tourism, energy, telecommunications, the environment and health, as well as air and train passenger rights, in addition to general consumer law. Other legal domains where clear uniform rules on class action would have been welcomed, such as competition law violations or environmental damage, remain unaffected.

Naturally, the importance of potential class action rises proportionately with the number of consumer transactions and the volume of data processed. Fast-scaling companies would be especially exposed to dangers where their operating procedures lag behind and do not ensure adequate compliance with consumer protection rules. The express inclusion of data protection violations in the scope of application will provide data breach victims with additional leverage when seeking compensation, which further reinforces the need for strict GDPR compliance.

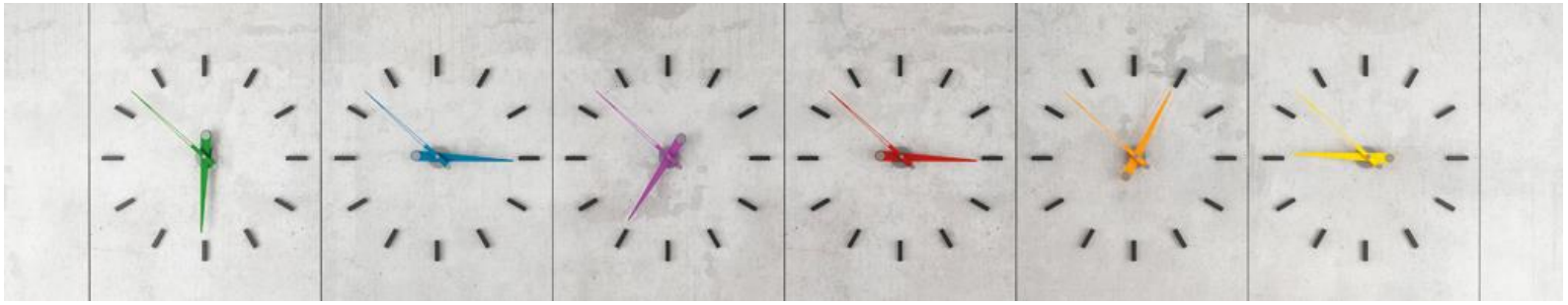
Behind the decision-making process

The directive's scope of application was restricted during the legislative process. In its original proposal the Commission wanted to permit 'qualified entities or any other persons concerned' to bring representative action. Following lengthy discussions with interested parties, however, Member States agreed to give legal standing only to qualified entities and public bodies. The possibility for an ad hoc designation of a representative entity was also removed.

Procedurally, the directive evades the dilemma of opt-in and opt-out by leaving this choice to Member States. The obligation of Member States to allow seeking injunctions and redress within a single representative action was scrapped.

The 'loser pays' rule was expressly reinstated and any financial incentives, such as contingency fees and punitive damages, prohibited. This amendment was rightly criticised by the Commission as unjustified interference with the Member States' procedural traditions. It was introduced to mitigate industry fears of US-style litigation, but with the effect of reducing the effectiveness of class action. Qualified entities would be prohibited from having any financial agreements with plaintiff law firms that go beyond a normal service contract.

Another gain for industry is the limitation on compelled presentation of evidence so that all disclosure requests should be formulated 'as narrowly as possible on the basis of the reasonably available facts'. This places a higher burden on plaintiffs seeking discovery. Furthermore, Member States shall be obliged to ensure that the court or administrative authority have the power to dismiss manifestly unfounded cases at the earliest stage of the proceedings. The rule favours defendants by permitting them to seek summary judgment against claims that are not backed by proper evidence.



What is the actual impact on cross-border litigation?

The directive contains many provisions that aim to reinforce cross-border litigation. One of them is the requirement for reciprocal recognition of qualified status – a qualified representative entity designated in one Member State may apply to the courts or administrative authorities throughout the EU. Where the infringement affects or is likely to affect consumers from different Member States, the representative action may be brought by several qualified entities from different Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different Member States.

Certain provisions will have two-way effect either benefiting or restricting cross-border litigation, depending on the specific circumstances. For example, a decision establishing the existence or non-existence of an infringement will have the effect of a rebuttable presumption with respect to the relevant facts in another Member State. In combination with the new cross-border *lis pendens* rule,[3] this places a higher value on pilot cases, as the related judgment would either enable chain litigation in other Member States or effectively close the door to all EU consumers in the relevant class. Since the directive does not change the rules on jurisdiction and applicable law, these new rules create fertile ground for forum shopping.

Finally, several provisions introduced during the legislative process would probably undermine the efficiency of cross-border litigation. This is the case with the express prohibition of opt-out schemes for consumers resident in other Member States. In cross-border cases, the plaintiff will be required to provide a consolidated list of all non-domestic consumers who have chosen to opt-in to the court and the defendant at the beginning of an action.

Next steps

The political agreement reached on the text in the conciliation procedure will require the formal confirmation of the EU Parliament and Council. Once adopted, Member States will have 24 months to transpose the directive into their national laws and an additional six months to start applying it in practice.

According to a recent study by Nagy (2019)[4], 17 out of 28 pre-Brexit Member States permit collective actions. Ten of them have a system based, at least partially, on the opt-out principle (Belgium, Bulgaria, Denmark, France, Greece, Hungary, Portugal, Slovenia, Spain, and the United Kingdom). The remaining seven follow the more conservative opt-in principle (Finland, Germany, Italy, Lithuania, Malta, Poland, and Sweden). As most national collective action schemes already comply with the requirements set by the latest draft of the Representative Actions Directive, its transposition would not lead to a wide-sweeping reform. Its major virtue

[3] Art. 5 (1)(3) – Member States shall ensure that no other ongoing action has been brought before a court or an administrative authority of a Member State regarding the same practice, the same trader and the same consumers.
[4] Nagy, Csongor István. (2019). Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis. Springer, Cham. Available at SSRN: https://ssrn.com/abstract=344055.

is the introduction of consumer collective actions in those Member States where this mechanism is still not available at all.

Class action in Bulgaria

Bulgaria introduced a class action scheme with the Code of Civil Procedure ('CCP') of 2008.[5] Claims for protection of collective interests can pursue discontinuation of an infringement, rectification of its adverse consequences or indemnification.[6] Provincial courts are competent to review class-action cases in first instance and territorial competence is determined in accordance with the ordinary rules of procedure.[7] The procedure is formally based on the opt-out principle,[8] but as courts apply high requirements on class formation and representation, in practice it is applied as an opt-in system. The only exception is where the plaintiff is a public authority (the Commission on Consumer Protection) or a representative consumer association pursuing injunctive measures.[9] In other words, standing is primarily given to 'qualified entities', which is exactly what the Representative Actions Directive is aiming at.

Class action had a difficult start in Bulgaria, partly because of the higher hurdles for the admissibility of class claims and the constitution and representation of a 'class', but also because of the high initial funding requirements. There are no special exemptions for class actions, thus the general rules for court fees apply, meaning that 4% of the value for which an award is sought must be paid upfront upon the submission of a claim. Ensuring publicity can lead to additional expenses, which can be quite substantial – courts normally require dozens of TV and radio spots as well as publications in major national printed media, and non-compliance would bar the development of the case.[10]

A class action lawsuit may be initiated by one or several persons having suffered direct harm from an illegal conduct or by an organisation representing the entire harmed class.[11] The formal claimants have the capacity of procedural substitutes for all class members, but their representative authority is limited to those affected parties who were expressly admitted to the class.[12] The CCP requires that the statement of claim specify the criteria which objectively define the affected collective interest, as this determines active standing, as well as the circle of persons affected by the infringement whose right of claim is exercised by the substitutes. In addition, the claimants must propose a mode for publicising the class action initiation, which is subject to confirmation by the court.[13]

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[5] Chapter 33, Art. 379-388 CCP.
[6] Ruling no. 184 of 30.03.2009 on case no. 164/2009 of the SCC, Commercial Division, 2nd Chamber.
[7] Art. 380(1) CCP.
[8] Art. 383 CCP.
[9] Markova, T. (2015). Collective claims: ex ante analysis of claim submissions in Bulgaria (Колективните искове: екс анте анализ на предявяването им в България). Economic and Social Alternatives (Икономически и социални алтернативи), 1, 142-152.
[10] Ruling no. 334 of 30.06.2015 on case no. 859/2015 of the SCC, Civil Division, 1st Chamber.
[11] Art. 379(2) CCP.
[12] Ruling no. 603 of 20.10.2011 on case no. 298/2011 of the SCC, Commercial Division, 2nd Chamber.
[13] Art. 383 CCP.

Impact of the directive on class action in Bulgaria

The Representative Actions Directive will not significantly change access to legal redress for breaches of consumer protection rights in Bulgaria. However, it will provide new options for consumers. For example, although it takes the same approach as the Injunctions Directive[14] (which it will replace) in that only 'qualified entities' in each Member State are able to bring representative actions on behalf of consumers, the Representative Actions Directive makes it possible for a Bulgarian qualified entity (the Commission on Consumer Protection or a representative consumer organisation) to bring an action in another Member State – by itself or jointly with local organisations. This could potentially allow more efficient prosecution of cross-border offences.

Some changes in the NGO landscape can also be expected. The new directive provides consumer organisations with a new funding channel. It remains to be seen what conditions the national government will impose for the selection of 'qualified entities' that will have access to support for bringing collective redress cases.

Conclusion

Despite the fact that industry concerns have largely been addressed by limiting the risk of frivolous actions by consumers, the new 'extraterritorial' competence should enhance both coordination and competition among consumer organisations across the EU. Cross-border businesses in consumer-facing industry sectors should follow closely the adoption of the directive and its implementation across Member States in the next couple of years, while ensuring that internal compliance policies are in line with consumer protection rules. Once the directive is implemented, cross-jurisdictional collective action could become a real concern and therefore steps must be taken to minimise risk and prevent damage from litigation.

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[14] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests