

EU litigation landscape reshaped by new class action system

March 2021

In the European Union (EU), we can legitimately expect a significant increase of collective actions in the coming years for two main reasons: the quick introduction of new connected products on the market in the context of the pandemic, and the new European collective actions legislation.

On 24 November 2020, the European Parliament endorsed the new European collective actions legislation, Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (the ‘[Directive](#)’). It will take until 2023 for the new procedures to be actually implemented: Member States are required to adopt implementing measures by 25 December 2022 and the measures will apply from 25 June 2023.

Regulating the development of collective redress mechanisms has been in the European Union's line of sight for a while. The adoption of the Directive therefore marks the conclusion of one of the European Commission long-standing objectives.

Interaction with the existing or future national mechanisms for collective redress

Member States do not have a uniform approach when it comes to collective redress. Compensatory collective redress is available in a majority of Member States, but in some of them, it is limited to specific sectors. And some Member States still do not provide for any possibility to collectively claim compensation in mass harm situations.

The new Directive imposes an EU class action system and sets minimum requirements below which Member States must not fall.

The Directive does not require Member States to scrap their existing mechanisms : ‘*This Directive does not prevent Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level*’ (Article 1(2)).

Consequently, some Member States will have to introduce at least one representative action procedure for injunction and redress measures while others will amend their existing procedural mechanisms, allowing for some optional choices.

However, doubts remain about how this European collective redress mechanism will interact with the existing or future national mechanisms, for instance the data class actions created by the General Data Protection Regulation.

New procedural mechanism

The Directive enables representative actions against infringements by traders of a variety of EU directives and regulations, including the General Product Safety Directive, the Product Liability Directive, the General Data Protection Regulation, the General Food Law Regulation, the Sale of Goods Directive, the Regulations on medicinal products for human use and the Medical Devices Regulations.

The Injunctions Directive (2009/22/EC), which is to be repealed by the new Directive, already provided for certain injunction measures. The mandatory redress measures Member States should have in place is thus the real game changer.

These are the main features of the EU class action system:

- Actions can be brought only by 'qualified entities' designated by a Member State;
- 'Qualified entities' have to meet standardized criteria to have standing to sue;
- Certain 'Qualified entities' designated for cross-border representative actions can act as plaintiffs across Member States' borders;
- Several 'qualified entities' from different Member States are allowed to jointly bring a single representative action in one Member State where the alleged infringement affects or is likely to affect consumers from different Member States;
- 'Qualified entities' may choose to apply for an injunction or to seek compensation (redress measures);
- Redress measures may include compensation, repair, replacement, price reduction, contract termination, or reimbursement of the price paid;
- Member States can decide whether to establish an 'opt-in' system or an 'opt-out' system;
- Consumers can opt to be bound by the outcome of an action for redress;
- An 'opt-in' system is required for any consumer living outside the relevant Member State to join the action;
- Final decisions have cross-border effects.

Safeguards

In a [2 February 2012 Resolution](#), the European Parliament took a position on the use of collective redress mechanisms for the protection of European protected rights and recalled that "*safeguards must be put in place within the horizontal instrument in order to avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings*". The European Parliament stressed that "*Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions*".

The Directive notably sets the following safeguards to avoid abusive lawsuits:

- Strict rules on the designation and funding of 'qualified entities' to prevent misuse of representative actions.
- The unsuccessful party pays the proceeding's costs for the winning party (loser-pays principle).

- Third parties may fund representative actions in accordance with national law and subject to measures ensuring that no conflict of interests or undue influence exists.
- Prohibition of punitive damages.

What's next?

Member States have latitude when implementing certain features of the Directive. The next 24 months will therefore be decisive for the shape of the collective proceedings in the Member States and some jurisdictions may emerge as enabling these representative actions with fewer options than others.

Given the possibility of cross-border representative actions, we may see some venues becoming (even) more popular for collective redress. While the Directive promises safeguards against abusive lawsuits, it will be crucial that defendants' rights and fairness of procedure are going to be maintained in practice.

What you should do to prepare

The Directive raises the risks of actions seeking collective redress in the EU. Here are a few things to keep in mind:

1. Without delay, anticipate increased cross-border litigation in the EU with stronger consumer participation.
2. Monitor local consumer regulations for inclusion in the scope of the Directive.
3. Anticipate that potential plaintiffs will shop around to find the 'best' forum, or national courts, to launch collective actions, if you have multiple establishments and subsidiaries.

Contacts



Christine Gateau
Partner, Paris
T +33 1 5367 1892
christine.gateau@hoganlovells.com



Pauline Faron
Senior Associate, Paris
T +33 1 5367 2289
pauline.faron@hoganlovells.com



Anne-Laure Morise
Senior Knowledge Lawyer, Paris
T +33 1 5367 3875
anne-laure.morise@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2021. All rights reserved.