



Thematic debate on consumers' information, consumers' participation in actions and redress distribution

This discussion paper describes the interlinked topics of consumers' information on the representative actions, consumers' participation in the representative actions and distribution of redress sought within these actions, as regulated by the Directive on Representative Actions¹ (hereinafter 'the Directive').

The paper identifies the obligations for the European Union Member States and for other actors involved in the implementation of the Directive and the regulatory choices (options) provided by the Directive regarding these obligations.

The objective of the debate is to draw a clear picture of the concrete measures that would serve an effective fulfilment of these obligations and support efficient implementation of the options.

To help the discussion, this paper proposes questions that the rapporteur and panellists will aim at responding to within the thematic debate. All other participants at the debate will be able to express their views and ask further questions within the 'Questions & Answers' session.

1. Consumers' information

Ensuring that consumers are well informed about the representative actions is crucial to the success of these actions. The consumers concerned should be informed of upcoming and ongoing representative actions in order to take a conscious choice whether they wish to be represented and subsequently benefit from the outcome of these actions. They need to know what are the steps to take in order to be represented. The consumers concerned by the infringing practices need to be aware that those practices are unlawful. As underlined in Recital 60 of the Directive, the reputational risks associated with disseminating information about the infringement are also important in relation to deterring traders from infringing consumer rights.

1.1. Information to be provided by the qualified entities

Obligations:

Pursuant to Article 13(1) of the Directive, the European Union Member States shall ensure that qualified entities provide information about the representative actions they have decided to bring before a court or administrative authority, the status of the representative actions they have brought before a court or administrative authority, and the outcomes of the above-mentioned representative actions. This information should be provided in particular on the qualified entities' website.

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 (Text with EEA relevance) *OJ L 409*, 4.12. 2020, p. 1–27 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG



This obligation is applicable to both injunctions and redress actions. According to Article 8(3), in order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity. Still, consumers concerned should be informed about the outcome of the action seeking injunctive measures, as well as about the possibility to bring individual or collective follow-on redress actions, against the same trader for the same practice, as indicated in Article 15 of the Directive.

As explained in Recital 58 of the Directive, the information that the qualified entities are required to provide to consumers should include, as relevant and appropriate:

- *an explanation, in intelligible language, of the subject matter and of the possible or actual legal consequences of the representative action,*
- *a description of the group of consumers concerned by the representative action, and*
- *the necessary steps to be taken by the consumers concerned, including the safeguarding of necessary evidence, in order to be able to benefit from the injunctive measures, redress measures or the approved settlements as provided for in the Directive.*

Such information should be adequate and proportionate to the circumstances of the case.

Questions for discussion:

- *What are the communication strategies to be used by qualified entities to best inform consumers? What other means can they use apart from their website?*
- *How to ensure appropriate funding of the information obligations by qualified entities?*

1.2. Information on the ongoing representative actions for redress

Obligations:

Pursuant to Article 13(2) of the Directive, Member States shall lay down rules to ensure that the consumers concerned by an ongoing representative action for redress measures are provided with information about the representative action in a timely manner and by appropriate means, in order to enable those consumers to explicitly ('opt-in') or tacitly ('opt-out') express their wish to be represented in that action.

Options:

As explained in Recital 59 of the Directive, it is for the Member States to decide who should be responsible for disseminating the information about the ongoing actions. Member States have also discretion to determine at which stage of the action the information will be disseminated. The latter may depend on the mechanism under which consumers would participate in the action ('opt-in' or 'opt-out').

Measures:

As explained in Recital 61 of the Directive, to be effective, the information about ongoing representative actions should be adequate and proportionate to the circumstances of the case. Such information could be provided, for example, on the qualified entity's or the trader's website, in national electronic databases, on social media, on online marketplaces, or in popular newspapers, including newspapers that are published exclusively by electronic means of communication. Where possible and appropriate, consumers should be informed individually by letter transmitted electronically or in paper form. Such information should be provided upon request in formats that are accessible to persons with disabilities.



Questions for discussion:

- *Who should inform consumers about the ongoing representative action and when? Should it be decided by the law or by courts or administrative authorities on case-by-case basis?*
- *What circumstances of specific cases should be taken into account when deciding about the modalities and the content of the information?*

1.3. Information on the final decisions issued within the representative actions

Obligations:

According to Article 13(3) of the Directive, the court or administrative authority shall require the trader to inform the consumers concerned by the representative action, at the trader's expense, of the final decisions providing for injunctive and redress measures and approved settlements. Consumers should be also informed of any subsequent steps to be taken by them, particularly in relation to obtaining redress.

The means used to provide this information should be appropriate to the circumstances of the case including, where appropriate, informing all consumers concerned individually and within specific time limits.

According to Article 13(4) these information requirements shall apply *mutatis mutandis* to qualified entities concerning final decisions on the rejection or dismissal of representative actions for redress measures.

Options:

Member States may decide that these information obligations by the losing party do not apply if the consumers concerned are informed of the outcome of the action in another manner. As indicated in Recital 62 if, under national law, the qualified entity or the court or administrative authority is to provide the information concerning final decisions and approved settlements to the consumers concerned by the representative action, the trader should not be required to provide that information a second time.

Member States may also lay down rules under which the trader would only be required to provide the information to consumers under Article 13(3) if requested to do so by the qualified entity.

As foreseen by Article 13(5) of the Directive, Member States shall ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action.

Measures:

As explained in Recital 61, to be effective, the information about the outcomes of the representative actions should be adequate and proportionate to the circumstances of the case. Such information could be provided, for example, on the qualified entity's or the trader's website, in national electronic databases, on social media, online marketplaces, or in popular newspapers, including newspapers that are published only digitally. Where possible and appropriate, consumers should be informed individually by letter transmitted electronically or in paper form. Such information should be provided upon request in formats that are accessible to persons with disabilities.

Questions for discussion:

- *Would it be effective if the trader's obligation to inform consumers about the outcomes of the action was dependent on the request by qualified entity?*
- *Which other means of information could replace the information about the outcome of the action by a losing party? What would be the advantage of these other means?*
- *How may courts or administrative authorities efficiently supervise the information provided by the traders?*



1.4. Electronic databases

Options:

Consumers could be informed about representative actions through national websites as encouraged by Article 14(1) of the Directive. These websites could provide for the links to the websites of designated qualified entities. The electronic database to be created by the European Commission services under Article 14(3) of the Directive could also provide for links to national websites.

Questions for discussion:

- *How to ensure the consistency between the information provided by the qualified entities under Article 13(1) and the information provided under Article 13(2) and (3), and possibly the information provided within the national and EU databases?*
- *Could the national websites and the European Union website play a role in coordinating different types of information requirements? How could they be efficiently managed and advertised?*
- *What are the information measures, communication strategies and IT tools that proved to be effective within the existing national collective redress mechanisms?*

2. Consumer participation in the representative actions

Obligations:

Under Article 9(2) of the Directive, Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by the action should express their wish to be represented by the qualified entity and to be bound by the outcome of the representative action.

Under Article 8(3) of the Directive, in order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity.

Options:

As explained in Recital 43, to best respond to their legal traditions, Member States have the choice to provide for an opt-in mechanism, an opt-out mechanism, or a combination of the two. In an opt-in mechanism, consumers should be required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures. In an opt-out mechanism, consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures. Member States should be able to decide at which stage of the proceedings individual consumers are able to exercise their right to opt in to or opt out from a representative action. However, that possibility should be provided within an appropriate time limit after that representative action has been brought. The same obligation refers to the possibility given to the consumers as regards their wish to be bound by the outcome of the action. Member States may provide that consumers who expressed their wish to be represented in the action may at a later stage of proceedings opt-out from it, for instance by refusing to be bound by a collective settlement.

As explained in Recital 44, Member States that provide for an opt-in mechanism should be able to require that some consumers opt in to the representative action for redress measures before the representative action is brought, provided that other consumers also have an opportunity to opt in after the representative action has been brought. On the other hand as explained in Recital 47 for reasons of expediency and



efficiency, Member States, in accordance with national law, should be able to provide consumers with the possibility of directly benefitting from a redress measure after it is issued, without being subject to requirements regarding prior participation in the representative action. In other words, it may be considered that consumers should be offered the choice to decide whether they want to benefit from the action only after the liability of the trader is established in a final decision or even only after the relevant remedies have been awarded or settled.

Obligations:

Pursuant to Article 9(3) of the Directive, Member States shall provide for mandatory opt-in mechanism for individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought.

According to Article 9(4) Member States shall lay down rules to ensure that consumers who opted in to a representative action or did not opt out from it can neither be represented in other representative actions with the same cause of action and against the same trader, nor be able to bring an action individually with the same cause of action and against the same trader. However, as explained in Recital 46, this should not apply if a consumer, having explicitly or tacitly expressed his or her wish to be represented within a representative action for redress measures, later opts out from that representative action in accordance with national law, for example, where a consumer later refuses to be bound by a settlement.

Questions for discussion:

- *What are the pros and cons of 'opt-in' and 'opt-out' mechanisms? Could the mix of both mechanisms, 'opt-in' and 'opt-out', be an effective solution?*
- *Should the choice between these two mechanisms be made by the law or by the courts or administrative authorities on case-by-case basis?*
- *Should the choice between these two mechanisms depend of the type of individual damage or its value? What other circumstances should be taken into account?*
- *At which stage of the proceedings should 'opt-in'/'opt-out' operate? What should be the time-limits for consumers to 'opt-in'/'opt-out'?*

3. Distribution of redress awarded

Obligations:

Under Article 9(1) of the Directive, a redress measure shall require a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.

This list of possible remedies is not exhaustive. It will depend on EU and national law at stake in a specific case since the Directive does not affect rules under Union or national law establishing contractual and non-contractual remedies available to consumers for the infringements covered by its scope of application (Article 2(2)).

According to Article 9(4) of the Directive, Member States shall also lay down rules to ensure that consumers do not receive compensation more than once for the same cause of action against the same trader. As explained in Recital 48, Member States should lay down rules for the coordination of representative actions, individual actions brought by consumers and any other actions for the protection of the individual and collective interests of consumers as provided under Union and national law.



Under Article 9(6) of the Directive, Member States shall 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. Under Article 9(7), Member States shall lay down or retain rules on time limits for individual consumers to benefit from redress measures.

According to Article 9(5) of the Directive, where a redress measure does not specify individual consumers entitled to benefit from remedies provided by the redress measure, it shall at least describe the group of consumers entitled to benefit from those remedies.

As explained in Recital 50, redress measures should identify the individual consumers, or at least describe the group of consumers entitled to the remedies provided by those redress measures, and, if applicable, state the method of quantification of harm and the relevant steps to be taken by consumers and traders to implement the remedies. Consumers who are entitled to remedies should be able to benefit from those remedies without having to bring separate proceedings. For example, a requirement for separate proceedings implies the obligation on the part of the consumer to bring an individual action before a court or administrative authority for the quantification of harm. Conversely, in order for a consumer to obtain his or her remedies, it should be possible under the Directive to require consumers to take certain steps, such as making themselves known to an entity in charge of the enforcement of the redress measure.

Options:

Pursuant to Article 9(7), Member States may lay down rules on the destination of any outstanding redress funds that are not recovered, within the established time limits, by individual consumers entitled to remedies under a redress measure. The Directive is not explicit in this regard, but the same or similar measures could apply to redress funds agreed within the approved settlement and not recovered by individual consumers.

Questions for discussion:

- *Should courts or administrative authorities be entitled to:
 - i. quantify damage on an individual or aggregate basis,
 - ii. divide the sum of aggregated damage to individual consumers on an average or proportional basis,
 - iii. use the method of subgroups to facilitate the quantification of damage, the choice of the remedies and the redress distribution?*
- *Should the distribution of redress be managed by the court or administrative authority overseeing the representative action, or should it be delegated to another actor (the defendant trader, the qualified entity or a liquidator)? Should it be decided by the law or by the court or administrative authority on case-by-case basis?*
- *How should Member States decide on the destination of redress funds not recovered by individual consumers within the distribution process, within the established time limits? Should courts or administrative authorities be entitled to decide that the redress funds not recovered by individual consumers are designated to the next best use, such as a charitable purpose, consumer awareness campaign or public fund supporting the activities of qualified entities?*

