

# Collective Redress

## Appendix

January 2023

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## Contents

I. Background .....	4
II. Representative actions .....	4
III. Scope of the Directive and relevance for SMEs .....	4
V. Damage and available remedies .....	5
VI. Entities eligible to bring representative actions .....	6
VII. Opt-in & opt-out .....	6
VIII. Financing .....	7

## I. Background

Collective redress is a generic term that refers 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 1990s-2000s, several EU Member States have adopted collective redress mechanisms in their national legal systems. These mechanisms tend to differ significantly in their procedural design and scope. An evaluation [report](#) published by the European Commission in 2018 highlighted a persisting diversity in collective redress mechanisms across Europe and stressed that collective redress mechanisms were still unavailable in several countries.

In the wake of the Dieselgate scandal, the European Commission launched its “[New Deal for Consumers](#)” initiative. 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 built on the existing EU Injunctions Directive ([Directive 2009/22/EC](#)). The EU adopted the [Directive 2020/1828 on representative actions for the protection of the collective interests of consumers](#) (hereafter “Representative Actions Directive” or “RAD”) on 25 November 2020. Member States had until December 2022 to transpose the new rules into their national systems. The Directive enters into application in June 2023. However, representative actions will be permissible to seek redress for damage taking place before June 2023 subject to limitation periods for seeking relevant remedies, as foreseen by Member States’ national laws. Importantly, the RAD did not intend to regulate all procedural details of representative actions.

On the contrary, it left a large leeway to the Member States and different options that Member States are free to choose, such as for example the possibility to follow an opt-in, opt-out system, or a combination between the two. The Directive only imposes the use of the opt-in system for consumers who are residents in a Member State other than the one where the action has been brought.



## II. Representative actions

The Directive provides for the mechanism of representative action, which 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 a group of consumers, for the protection of the collective interests of consumers, to seek an injunctive measure, a redress measure, or both.

## III. Scope of the Directive and relevance for SMEs

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



It is noteworthy that some Member States have, prior to the adoption of the RAD, already decided to make their mechanism of collective redress available also to small and medium businesses. This is for example the case of Belgium (see below).

Furthermore, 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 interests of consumers as protected by EU laws enumerated in Annex I to the Directive are at stake. Member States may also make the collective redress mechanism applicable to areas of law other than the ones covered by Annex I of the RAD.



**Example:** Initially, Belgium reserved the use of collective redress actions to consumers. However, as a consequence of the Fipronil crisis in 2017, Belgium expanded the scope of its legislation and also allowed SMEs to start collective redress actions under certain circumstances (see below). As a consequence, since 2018, SMEs and thus also self-employed persons may also go to court collectively to claim compensation for their harm. The definition of SMEs follows the definition laid down in the Commission's Recommendation 2003/361/EC of 6 May 2003 on the definition of micro, small and medium-sized companies. The Belgian legislation transposing the RAD has not been published yet. It is therefore too early to say whether this possibility for SMEs to file collective redress actions will be maintained under the new rules.

## V. Damage and available remedies

Under the RAD, 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 from consumer contracts, 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** may 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.



## VI. Entities eligible to bring representative actions

The RAD provides that ‘qualified entities’ may bring representative actions. “Qualified entities” refers to any organisation or public body representing consumers’ interests, which has been designated as such by a Member State.

The RAD 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 actions (Art. 3 (6) and (7) RAD).

- **Domestic 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 France and brings an action in France.

- **Cross-border representative action:**

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 the Czech Republic and brings an action in Poland.

The RAD only sets out requirements for qualified entities designated for the purpose of bringing *cross-border* representative actions (Article 4(3) RAD). The requirements concern the structure, activities, independence, and transparency of the qualified entity. In parallel, the list of requirements to be designated as a qualified entity for the purpose of bringing *domestic* actions are to be established at national level. The RAD 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).

Noteworthy: some national legislations have adopted specific rules for actions brought by SMEs.



**Example:** According to the current Belgian legislation on collective redress (preceding the transposition of the RAD), collective redress actions involving SMEs may be initiated by:

- An inter-professional association having legal personality and represented in the Council for Self-Employed and SMEs (Hoge Raad voor de Zelfstandigen en de KMOs - Conseil supérieur des Indépendants et des PME) or authorised by the Minister in charge of consumer affairs.
- A non-profit association having legal personality whose statutory aim corresponds to the collective harm and is authorised by the Minister in charge of consumer affairs.
- An entity authorised by an EU Member State to act as a representative and complying with the criteria set out in Art. 4 of the 2013 Recommendation on collective redress (i.e., having a not-for-profit character, a direct relationship between the objectives/statutes of the entities and the infringed rights protected at union level, and sufficient capacity to bring collective redress actions).

## VII. Opt-in & opt-out

Constituting the group of consumers that may benefit from the collective redress action is a pivotal issue. To do so, there are two main procedural mechanisms within actions seeking redress measures:

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

## VIII. Financing

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. Here, the RAD 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 national legislation, to reduce some of the direct court costs and to make collective actions cheaper for claimant organisations. The RAD also allows that qualified entities ask consumers to pay modest entry fees in order to participate in the representative action.

However, even with these adaptations, the costs of the collective actions may still be prohibitive, 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. National laws may foresee the use of third-party funding to finance representative actions. In this event, the Directive provides for transparency obligations to ensure there is no conflict of interest and that the decisions of the qualified entities are not unduly influenced by the third-party funder.



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