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Thunder Road: The Implementation of the Representative Actions Directive in Europe

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THUNDER ROAD: THE IMPLEMENTATION OF THE REPRESENTATIVE ACTIONS DIRECTIVE IN EUROPE

*Alexandre Biard-Denieul**

ABSTRACT

In December 2020, the European Union adopted breakthrough legislation setting out new rules for collective redress—better known as “representative actions”—in Europe. EU Directive 2020/1828 gives representative entities the possibility to seek injunctive and/or compensatory measures on behalf of groups of consumers affected by mass harm situations. The EU Member States had until December 25, 2022 to transpose the European rules into their national legal systems. The transposition phase was expected to be key as the Directive gives significant leeway to the Member States to decide on several important procedural aspects likely to influence the overall functioning and effectiveness of representative actions. However, the transposition process in the Member States has been complex and led to very different outcomes across Europe. Meanwhile, stakeholders have been preparing to use the new instrument actively.

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INTRODUCTION

“Hey, I know it’s late, we can make it if we run
 Oh, Thunder Road, sit tight, take hold
 Thunder Road”¹

In December 2020, the European Union adopted breakthrough legislation setting out new rules for collective redress, better known as “representative actions” in the European jargon.² At that time, this seemed to be the last step on the long and windy road towards collective redress in Europe, which had started

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¹ BRUCE SPRINGSTEEN, *Thunder Road*, on BORN TO RUN (Columbia Records 1975).

² In the 2010s, the European Union adopted the term “collective redress” instead of “class action” to stress the difference between the E.U. approach and the U.S. class action regime. In 2018, the Representative Actions Directive finally retained the terminology “representative actions.” *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*, COM (2018) 184 final (Apr. 11, 2018).

several decades earlier.³ In 2016, the topic benefitted from a new impetus when the so-called “Dieselgate scandal” broke. Millions of consumers worldwide bought Volkswagen cars equipped with “defeat devices” to cheat emissions testing, with eleven million in Europe alone.⁴ The scandal revealed that consumers were insufficiently protected when mass harm situations occurred in Europe,⁵ and triggered a legislative reaction at the EU level known as the “New Deal for Consumers” legislative package.⁶ The objective of the EU policymakers was first and foremost to strengthen the enforcement of consumer protection rules in Europe.⁷ Specifically, one of the proposed laws sought to introduce binding rules for representative actions across Europe allowing consumers to obtain redress collectively.⁸

After years of discussion where the European Parliament and the Council (the two European co-legislators) intensively re-worked the Commission’s initial legislative proposal, a political deal was finally reached in June 2020.⁹ A few months later, EU Directive 2020/1828¹⁰ (hereafter, the “Representative Actions Directive” or “Directive”) was finally adopted on November 25, 2020.¹¹ As is the case for all European Directives, the EU text still had to be transposed in the twenty-seven Member States and the deadline for doing so was set for

³ For a historical overview, see Alexandre Biard, *Collective Redress in the EU: A Rainbow Behind the Clouds?*, 19 ERA FORUM 189, 189–204 (2018); Iris Benöhr, *Collective Redress in the Field of European Consumer Law*, 41 LEGAL ISSUES ECON. INTEGRATION, 246–56 (2014); Christopher Hodges, *Collective Redress: A Breakthrough or a Damp Squibb?*, 37 J. CONSUMER POL’Y 67, 67–71, 73–74, 77 (2013); Csongor I. Nagy, *The European Collective Redress Debate After the European Commission’s Recommendation—One Step Forward, Two Steps Back?*, 22 MAASTRICHT J. EUR. COMPAR. L., 530–52 (2015).

⁴ See *Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customer on 2.0 Liter Diesel Vehicles*, U.S. DEP’T JUSTICE (June 28, 2016), <https://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving>.

⁵ Recommendation Following the Inquiry into Emission Measurements in the Automotive Sector, EUR. PARL. DOC. P8 TA para. 59 (2017).

⁶ See *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers*, COM (2018) 183/3 final (Apr. 11, 2018).

⁷ *Id.* at 1.

⁸ *Proposal for a Directive of the European Parliament and the Council on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing Directive 2009/22/EC*, COM (2018) 184/3 final (Apr. 11, 2018).

⁹ Marta Requejo Isidro, *Agreement on EU-Wide Rules on Collective Redress*, EUR. ASSOC. PRIVATE INT’L L. (June 23, 2020), <https://eapil.org/2020/06/23/agreement-on-eu-wide-rules-on-collective-redress/>.

¹⁰ Council Directive 2020/1828, 2020 O.J. (L 409) 1, 1–27 (outlining representative actions for the protection of the collective interests of consumers).

¹¹ Alexandre Biard & Stefaan Voet, *Collective Redress in the EU: Will It Finally Come True?*, in CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL? 1, 1 (Alan Uzelac & Stefaan Voet eds., 2021).

December 25, 2022.¹² The transposition process was expected to be key for the future of representative actions. Indeed, the Directive leaves important leeway to the Member States to decide on several strategic procedural aspects.¹³ The transposition of the Directive in the Member States has not been a smooth process. As of January 2024, eighteen of the twenty-seven EU member states have transposed the Directive, and have done so in different manners.¹⁴ Meanwhile, consumer organizations and other stakeholders have been preparing actively to use the new instrument.¹⁵

I. COLLECTIVE REDRESS ROLLERCOASTER AND EU KALEIDOSCOPE

A. *Complex Transposition Process in the EU Member States*

When the transposition period came to an end in December 2022, only three EU Member States had transposed the Directive.¹⁶ In January 2023, the European Commission started a set of infringement proceedings against no less than twenty-four Member States for failure to transpose the Directive in due time.¹⁷ During the first half of 2023, the transposition process accelerated at national level, but still followed very different paths across Europe. Some Member States published draft laws and/or organized public consultations, while others did not start their transposition work at all.¹⁸ By July 2023, eleven Member States had transposed the Directive. By January 2024, the transposition of the Directive continued to be very uneven in Europe.¹⁹

¹² See Council Directive 2020/1828, *supra* note 10, art. 24.

¹³ Xandra Kramer & Alexandre Biard, *The EU Directive on Representative Actions for Consumers: A Milestone or Another Missed Opportunity?*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 249, 249–51 (2019).

¹⁴ See discussion *infra* Section I.

¹⁵ See discussion *infra* Section II.

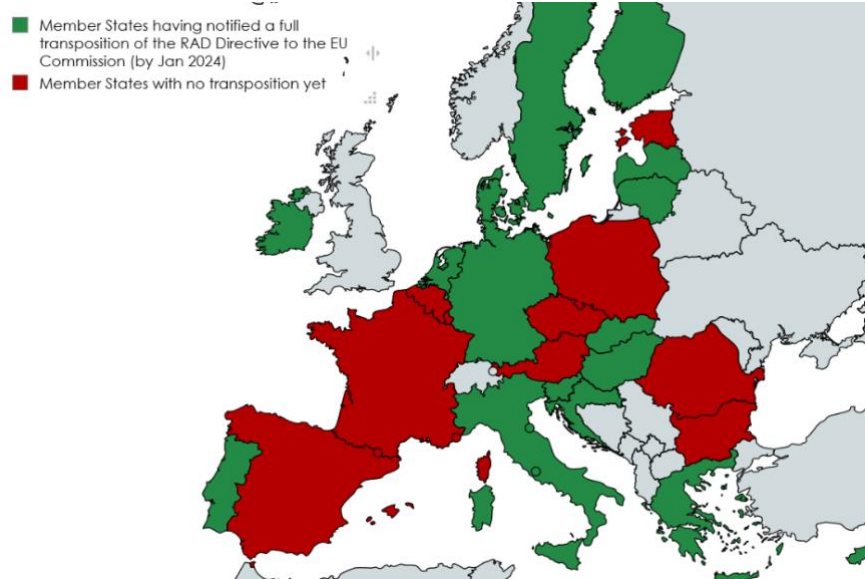
¹⁶ See *Non-Transposition of EU Legislation: Commission Takes Action to Ensure Complete and Timely Transposition of EU Directives*, EUR. COMM'N (Jan. 27, 2023), https://ec.europa.eu/commission/presscorner/detail/en/inf_23_262. Hungary, Lithuania, and the Netherlands were the member states who had notified a full transposition of the Directive to the European Commission. *Id.*

¹⁷ See *id.* States who failed to transpose the Directive included Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Luxembourg, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden. *Id.*

¹⁸ *Document 32020L1828*, EUR-LEX ACCESS TO EUROPEAN UNION LAW (last visited Mar. 6, 2024), <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32020L1828>.

¹⁹ Denmark, Germany, Cyprus, Greece, Ireland, Italy, Croatia, Finland, Hungary, the Netherlands, Malta, Lithuania, Latvia, Slovakia, Slovenia, Portugal and Sweden had notified a full transposition of the Directive to the European Commission. *Id.* Conversely, Austria, Belgium, Bulgaria, Czech Republic, Estonia, Spain, France, Luxembourg, Poland and Romania member states still had not notified a full transposition of the Directive. *Id.* Note that there were also important differences between countries: some (e.g., Belgium, France) seemed close

Transposition of the E.U. Representative Actions Directive in the European Union: State-of-Play in January 2024²⁰



Many different reasons can explain these delays. First, national transpositions took place in very different domestic contexts. Some countries already had collective redress mechanisms in place long before the Directive was adopted (*e.g.*, the Netherlands, Italy, Belgium, Portugal).²¹ Sometimes, the pre-existing instruments were already aligned (or almost aligned) with the requirements of the Representative Actions Directive.²² For those countries, the changes needed were therefore limited. This was particularly the case of the Netherlands as the rules on the Dutch collective redress action (*Wet afwikkeling massaschade in collectieve actie* [WAMCA])—in force since January 2020—

to finalize their national transposition processes, while others were still lagging behind. *Id.* Austria for instance received additional warnings from the Commission in October 2023. *Id.*

²⁰ Map is created by the author (last updated January 2024).

²¹ See Dan Cooper, et al., *National Transposition of the EU Representative Actions Directive: What Is the Current Status?*, COVINGTON & BURLING (Feb. 27, 2023), <https://www.insideprivacy.com/eu-data-protection/national-transposition-of-the-eu-representative-actions-directive-what-is-the-current-status/>.

²² See *id.*

were already in line with the Directive.²³ The Netherlands was among the first European countries to notify a full transposition of the Directive to the European Commission.²⁴

In parallel, other countries viewed the EU Directive as an opportunity to modernize and upgrade their existing collective redress instruments, which so far had failed to deliver for consumers. This was, for instance, the case in France, which has a long history with collective redress actions. The first legislation establishing a so-called “group action” mechanism (*action de groupe*) was adopted as early as 2014.²⁵ Initially, group actions in France were limited to consumer and competition law aspects, and then rapidly expanded to cover additional sectors, such as discriminatory practices, environmental matters, data protection, or health-related issues.²⁶ Yet the French experience with group actions has been disappointing, as several reports and studies have highlighted over the years.²⁷ French group actions are commonly lengthy, complex and a very few have come to an end to date.²⁸ The Representative Actions Directive was thus perceived as an opportunity to upgrade the existing group action framework and to make it more effective.²⁹ Similarly, Belgium also had pre-existing rules on collective redress (*action collective*)³⁰ and also sought to use this opportunity to improve the existing mechanism.³¹ Finally, for a remaining group of countries (such as Czech Republic, Slovakia, etc.), collective redress was an entirely new procedural instrument and therefore required several procedural adaptations.³²

²³ Ianika Tzankova & Xandra Kramer, *From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands*, in *CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL?* 1, 20 (Alan Uzelac & Stefaan Voet eds., 2021).

²⁴ *Document 32020L1828*, *supra* note 18.

²⁵ Alexandre Biard, *Transposition de la directive UE 2020/1828 sur les actions représentatives : corriger le tir*, 3 *CONTRATS, CONCURRENCE, CONSOMMATION* (2023); Maria Jose Azar-Baud & Alexandre Biard, *The Dawn of Collective Redress 3.0 in France?*, in *CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL?* 73 (Alan Uzelac & Stefaan Voet eds., 2021).

²⁶ *See generally* Azar-Baud & Biard, *supra* note 25.

²⁷ *See* Pierre Januel, *Action de groupe : bilan décevant... mais changements à venir?*, *DALLOZ* (June 18, 2020), www.dalloz-actualite.fr/flash/action-de-groupe-bilan-decevant-mais-changements-venir; Alexandre Biard, *Sale temps pour L'action de groupe... la nécessaire recherche d'outils alternatifs pour résoudre les litiges de masse*, *REVUE LAMY DROIT CIVIL* 21, 21–26 (2018).

²⁸ *See generally* Januel, *supra* note 27.

²⁹ At the time of concluding this paper, France had not yet published its final transposition.

³⁰ Stefaan Voet, *Class Actions in Belgium: Evaluation and the Way Forward*, in *CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL?* 131, 132, 138, 140 (Alan Uzelac & Stefaan Voet eds., 2021).

³¹ For Belgium too, the final transposition had not been adopted yet in December 2023.

³² Bryony Hurst et al., *Collective Redress in Europe – The Current State of Play*, *BIRD & BIRD* (Jan. 20, 2022), <https://www.twobirds.com/en/insights/2022/uk/collective-redress-in-europe-the-current-state-of-play>.

At the same time, the transposition of the Directive in many Member States still encountered fierce opposition from businesses representatives. After the final adoption of the Representative Actions Directive in November 2020, many of the business representatives turned their attention to the issue of third-party litigation funding as the topic is vital for the overall viability of collective redress.³³ Such procedures indeed tend to be highly costly for claimant organizations, while the funding possibilities remain scarce.³⁴ Challenging third-party litigation funding (for example, calling for stringent conditions limiting its use) was thus sometimes used as an indirect way to attack the nascent representative actions.

Finally, additional domestic and international reasons also contributed to slowing down the transposition at the national level. For instance, countries like Czech Republic, Poland, Sweden and France organized elections or experienced some political instability during that period, which arguably stalled the parliamentary discussions for several months. In parallel, difficult international contexts (COVID-19 pandemic, the cost-of-living crisis and other international tensions) also required a lot of the national legislature's attention and postponed the discussions.

B. Towards an EU Collective Redress Kaleidoscope

The national transpositions of the Representative Actions Directive have led to multifaceted national instruments across Europe.³⁵ Let us consider several examples to illustrate the rise of what we may refer to as an EU collective redress kaleidoscope.

1. Adhesion to the Group (opt-in/opt-out)

Article 9 of the Directive sets up rules on how and at which stage of the representative action the individual consumers will explicitly or tacitly have to express their intent to join the action.³⁶ Member States had the possibility to use

³³ See *Joint Business Statement on Responsible Private Funding of Litigation*, EUR. JUST. F. (June 22, 2022), https://europeanjusticeforum.org/files/Contents/Documents/Downloads/Joint%20Business%20Statement%20on%20Responsible%20Private%20Funding%20of%20Litigation_June%202022.pdf.

³⁴ *Id.*

³⁵ For all national legislation transposing E.U. Directive 2020/1828, see *Directive – 2020/1828*, EUR-LEX (last visited Feb. 1, 2024), <https://eur-lex.europa.eu/legal-content/EN/NIM/?qid=1706777580481&uri=CELEX%3A32020L1828>.

³⁶ See Council Directive 2020/1828, *supra* note 10, art. 9.

an opt-in or an opt-out model, or a mix between these two.³⁷ As a result, EU Member States have adopted very different models. Countries like Italy, Lithuania and Latvia have decided to rely on opt-in mechanisms.³⁸ Others, like the Netherlands or Portugal, have chosen the opt-out system.³⁹ A third category has adopted a mix between the two systems where the use of either the opt-in or the opt-out models depend on the circumstances of the case at stake.⁴⁰ However, complexity does not stop here since countries using the opt-in mechanism also adopted very different procedural configurations. For example, some countries rely on a so-called “early opt-in model” (e.g., Latvia, Lithuania) where individual consumers are required to join the group at the early stages of the proceedings (for instance, when the action is officially lodged before the court or before the first court hearings take place).⁴¹ Conversely, others rely on “late opt-in” mechanisms (e.g., Italy, France) where individual consumers may only join the group once the court has handed down its decision establishing the liability of the defendant.⁴² Once issued, the court’s decision is no longer subject to appeal.⁴³

2. *Criteria for Qualified Entities*

Pursuant to article 4 of the Directive, claimant organizations must be designated by the Member States to be authorized to bring representative

³⁷ Under the opt-in system, consumers must expressly step in to be included into the claimant group. Under the opt-out mechanism, by default, individual consumers are presumed to be part of the group and must expressly step out to be excluded from it.

³⁸ See *Class Actions in Italy*, CMS LEGAL (Feb. 3, 2022), <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/portugal>; Andris Tauriņš, et al., *Collective Redress Directive: What Will It Bring for Businesses and Consumers?*, SORAINEN (Apr. 3, 2023), <https://www.sorainen.com/publications/collective-redress-directive-what-will-it-bring-for-businesses-and-consumers/>.

³⁹ See *The E.U. Representative Actions Directive in Germany and The Netherlands: One Small Step or One Giant Leap for Access to Justice?*, HAUSFELD (Feb. 27, 2024), <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-eu-representative-actions-directive-in-germany-and-the-netherlands-one-small-step-or-one-giant-leap-for-access-to-justice/>; see also *Class Actions in Portugal*, CMS LEGAL (Feb. 3, 2022), <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-eu-representative-actions-directive-in-germany-and-the-netherlands-one-small-step-or-one-giant-leap-for-access-to-justice/>.

⁴⁰ Sarah Jane Dobson, et al., *Collective Redress & Class Actions 2023*, CHAMBERS & PARTNERS (Nov. 7, 2023), <https://practiceguides.chambers.com/practice-guides/collective-redress-class-actions-2023/eu/trends-and-developments/O15016>.

⁴¹ See BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS [BEUC], *SEVEN YEARS OF DIESELGATE*, 5 (2023) [hereinafter *SEVEN YEARS OF DIESELGATE*], https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-130_Dieselgate_7th_report.pdf.

⁴² See *id.*

⁴³ See *id.*

actions.⁴⁴ The so-called “Qualified Entities” may notably be consumer organizations and must comply with several requirements ensuring (among others) their transparency, capacity, or expertise. Importantly, the Directive only sets out requirements for Qualified Entities eligible to bring cross-border representative actions.⁴⁵ The member states were free to adopt the same requirements for Qualified Entities bringing domestic actions but could also decide to adopt less or more stringent ones. Many Member States have adopted the same eligibility criteria for the designation of Qualified Entities but some (e.g., France, Portugal) also introduced differences between Qualified Entities eligible to bring domestic and cross-border actions. Furthermore, some member states have allowed *ad hoc* Qualified Entities for the purpose of bringing domestic representative actions whereas others have excluded this possibility.

3. *Financing Representative Actions*

Article 20 of the Directive provides that Member States must ensure assistance to Qualified Entities.⁴⁶ This could take many different forms, such as public funding, including structural support for Qualified Entities, limitation of applicable court or administrative fees, or access to legal aid. In addition, article 10 of the Directive sets up rules on funding representative actions, which mostly apply to third-party litigation funders.⁴⁷ Here as well, Member States have adopted very different approaches to support representative actions, including a limitation of court fees or a possibility to re-allocate unclaimed damages to cover plaintiffs’ expenses (e.g., Portugal).⁴⁸ When it comes to third-party funding, the

⁴⁴ Council Directive 2020/1828, *supra* note 10, art. 4.

⁴⁵ Pursuant to the Representative Actions Directive, a “domestic representative action” means a representative action brought by a qualified entity in the member state in which the qualified entity was designated (e.g., a Qualified Entity designated in France brings an action in France). *Id.* A “cross-border representative action” means a representative action brought by a qualified entity in a member state other than that in which the qualified entity was designated (e.g., a Qualified Entity designated in France brings a representative action in Italy). *Id.*

⁴⁶ See *Funding of Collective Redress – Financing Options in the EU and Beyond*, BEUC (2022), www.beuc.eu/sites/default/files/publications/BEUC-X-2022-116_Funding_of_collective_redress.pdf; *Money Makes the World Go Round – Costs and Financing of Collective Redress Actions*, BEUC (2022), www.beuc.eu/sites/default/files/publications/BEUC-X2022087_Costs_and_financing_of_collective_redress.pdf.

⁴⁷ Council Directive 2020/1828, *supra* note 10, art. 10.

⁴⁸ See, e.g., Carla Góis Coelho & Rita Samoreno Gomes, *Portugal: Representative Actions for Consumer Protection*, MONDAQ (Dec. 13, 2023), <https://www.mondaq.com/arbitration—dispute-resolution/1400740/representative-actions-for-consumer-protection> (detailing elements of Portuguese legislation incorporating Council Directive 2020/1828, including a provision that shifts unclaimed damages to the plaintiff).

situation is also very uneven across Europe. In some member states, third-party litigation funding has been prohibited traditionally (e.g., Ireland) or is restricted (e.g., Greece).⁴⁹ Others have used the transposition of the Directive to impose stricter requirements on third-party litigation funding.⁵⁰ For instance, the German law transposing the Representative Actions Directive provides that third-party litigation funders are not authorized to receive more than ten percent of the final award.⁵¹ Finally, in other countries, there are no rules limiting the use of third-party funding.⁵²

4. *Other Procedural Specificities*

Some member states have established mandatory mediation procedures before the filing of representative actions (e.g., Portugal), others have foreseen a role for the national public consumer protection authority as the latter must be informed before the action starts before a court (e.g., as discussed for instance in Poland in its draft law transposing the Directive).⁵³ Finally, and beyond the examples presented above, additional procedural variations may actually be found in almost all the provisions of the Directive where the member states have been given some margin of maneuver, all of this strengthening the impression of an EU collective redress kaleidoscope.

B. *Some Preliminary Conclusions: “Collective Redress Hub” versus “Collective Redress Dead-End,” Paradise for Researchers and Uncertainties for Consumers*

As shown above, the situation in Europe is uneven and disparities are likely to widen in the coming years. Some countries—in particular those relying on opt-out mechanisms, where court fees remain limited and where financing

⁴⁹ See Julie Murphy-O’Connor & Emma Trainor, *Third-Party Litigation Funding: Overview (Ireland)*, MATHESON LLP 1, 2 (June 1, 2023), [https://www.matheson.com/docs/default-source/practice-area-attachments/commercial-litigation-and-dispute-resolution/third-party-litigation-funding-overview-\(ireland\).pdf?sfvrsn=12a0f5ba_2](https://www.matheson.com/docs/default-source/practice-area-attachments/commercial-litigation-and-dispute-resolution/third-party-litigation-funding-overview-(ireland).pdf?sfvrsn=12a0f5ba_2); *Responsible Private Funding of Litigation*, at 1 (Mar. 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf).

⁵⁰ See *The E.U. Representative Actions Directive in Germany and The Netherlands*, *supra* note 39.

⁵¹ Verbandsklagenrichtlinienumsetzungsgesetz – VRUG [Representative Actions Directive Implementation Act], Oct. 12, 2023, Bundesgesetzblatt, Teil I [BGBL I] at 272 2023 (Ger.).

⁵² See, e.g., Góis & Gomes, *supra* note 48 (noting that in Portugal, third-party funding is not yet regulated).

⁵³ Agnieszka Trzaska-Śmieszek & Magdalena Osmęda, *Draft of the Act Implementing Directive 2020/1828 on Representative Actions*, CLASSACTION (Mar. 22, 2023), [https://classaction.pl/en/naszym_okiem/draft-of-the-act-implementing-directive-2020-1828-on-representative-actions/#:~:text=The%20draft%20of%206%20December,%20FEC%20\(hereinafter%3A%20E%20%80%9CDirective.](https://classaction.pl/en/naszym_okiem/draft-of-the-act-implementing-directive-2020-1828-on-representative-actions/#:~:text=The%20draft%20of%206%20December,%20FEC%20(hereinafter%3A%20E%20%80%9CDirective.)

opportunities exist for Qualified Entities—might progressively become what we could call a “collective redress hub” attracting representative actions and allowing consumers in those countries to effectively obtain redress in mass harm situations. Conversely, others—specifically those member states where proceedings are costly, complex, or lengthy, and where there are insufficient measures supporting the work of Qualified Entities—may become a “collective redress dead-end.” In those countries, consumers will still experience many difficulties to obtain redress in mass harm situations. Between these two extremes of the spectrum, there will be various national procedural mechanisms with widely different effectiveness.

The European context will also become an interesting large-scale field experiment for researchers working in the area of collective redress. In the coming years, they will have the opportunity to compare various national procedural tools, to identify best practices, and to find out what works in practice and what does not. As such, the Representative Actions Directive does not close the collective redress book in Europe but rather means the start of a new chapter. Since 2023, the European Commission has been evaluating the various national transposition laws (known as “transposition checks”) to assess whether the national rules indeed comply with the objectives of the Directive (which was to ensure consumers’ access to justice in mass harm situations). Where relevant, the Commission may take additional steps in a near future to ensure that the Representative Actions Directive meets its objectives.

II. ON YOUR MARK, GET SET, GO: GETTING PREPARED FOR REPRESENTATIVE ACTIONS IN EUROPE

A. *Embracing New Opportunities – The Case of Qualified Entities*

Although the national laws transposing the Directive will obviously play an essential role, the future of representative actions in Europe will importantly depend on the willingness and readiness of the different stakeholders to use the new tool. In this context, one of the key drivers behind representative actions will be Qualified Entities. As explained above, Qualified Entities are designated by the member states and are eligible to bring domestic and/or cross-border representative actions.⁵⁴ Since the adoption of the Directive in 2020, consumer

⁵⁴ For a preliminary list of Qualified Entities eligible to bring cross-border representative actions, see *List of Qualified Entities Designated to Bring “Cross-Border Representative Actions,”* EC-REACT (last visited Mar. 27, 2024), <https://representative-actions-collaboration.ec.europa.eu/cross-border-qualified-entities>.

organizations across Europe have been preparing themselves as many consider representative actions to be a new enforcement pathway and an opportunity for vindicating consumer rights. Yet representative actions—in particular due to the high costs they entail and the resources they demand—also represent important challenges. Not all consumer organizations will have the capacity to start and manage such actions which may last several years. Currently in Europe, a small number of consumer organizations (for instance in Italy, Portugal, Belgium, France and others) already have the sufficient resources and/or the experience to start collective redress actions. Where allowed by national rules, some of them have already filed collective redress actions.⁵⁵ In November 2023, the German consumer organization (*Verbraucherzentrale Bundesverband – vzbv*) launched the very first representative action in Germany based on the new E.U. rules against the telecom company Vodafone.⁵⁶

On a more general level, for Qualified Entities, setting the stage for representative actions means:

- *Being officially designated as a Qualified Entity.* This may be automatic and straightforward in some countries (in particular in countries where collective redress already existed before the Directive), but in others, the designation process will need to be designed from scratch and therefore some time will be needed before it is fully operational.
- *Getting the necessary digital infrastructure.* Digital tools are essential for Qualified Entities to deal with the various aspects of representative actions, including: *informing* individual consumers (either that a representative action is about to start and inviting them to join once the action is launched, or informing them about their eligibility to join the action), *communicating* with individual consumers (e.g., informing them about the progresses of the action), *processing and collecting* consumers' information and data (e.g., collecting information about the product bought, the date of purchase, collecting the proof of purchase etc.), and *aggregating* consumer information and keeping the information updated.

⁵⁵ Altroconsumo in Italy, Deco in Portugal, UFC Que Choisir and CLCV in France are among the consumer organizations which have filed collective redress actions in past years. See SEVEN YEARS OF DIESELGATE, *supra* note 41, at 8–9.

⁵⁶ *Consumer Centre Federal Association (vzbv) sues Vodafone for Unilateral Price Increases*, VERBRAUCHERZENTRALE (Nov. 14, 2023), www.sammelklagen.de/vodafone.

- *Getting familiar with the emerging collective redress ecosystem.* There may be differences between consumer organizations who are already familiar with collective redress and those for which this instrument will be a novelty. Furthermore, some consumer organizations have already been working with third-party litigation funders for several years whereas others have no (or little) experience.⁵⁷ One of the indirect effects of the Representative Actions Directive has been to attract new players to Europe, such as U.S. third-party litigation funders and some U.S. law firms contemplating EU representative actions as an emerging market.⁵⁸ It is therefore important to engage with those actors to further exchange on the specificities of the European context and to explain the functioning of EU representative actions and the way the consumer movement is operating across Europe.
- *Defining a strategy.* Representative actions are another tool which can be added to the traditional consumer enforcement toolbox available to claimant organizations across Europe.⁵⁹ In particular, from now on, representative actions before courts (seeking injunctive and/or compensatory relief) exist in parallel to other enforcement pathways, such as complaints to public authorities (public enforcement). All enforcement pathways have their respective pros and cons, which are each time carefully assessed and compared, considering in particular the situation at stake, the objective sought for consumers and the capacity of the organization. In some situations, bringing a representative action may be the best option but in others filing first a complaint with a public authority and then at a later stage launching a representative action may also be a sound strategy. Put differently, increased consideration is now given to the respective role of private and public enforcement and how best they can complement each other to efficiently deal with mass harm situations.⁶⁰
- *Picking up the right battles.* Considering the resources needed to bring representative actions and the possible reputation costs for the concerned Qualified Entities, it is not possible to start

⁵⁷ See *Responsible Private Funding of Litigation*, *supra* note 49, at 51.

⁵⁸ See Nina Dahm-Loraing & Alexander Eistert, *Class Actions in the Netherlands – (Not) A Role Model for Europe?*, GEN RE (Nov. 10, 2022), <https://www.genre.com/us/knowledge/publications/2022/november/iipc22-1-en>.

⁵⁹ Stefaan Voet & Stein Dether, *Bridging the EU Consumer Enforcement Pathways in Mass Harm Situations*, BEUC (Jan. 2024), www.beuc.eu/sites/default/files/publications/BEUC-X-2024-005_Bridging_the_EU_consumer_enforcement_pathways_in_mass_harm_situations.pdf.

⁶⁰ *Id.*

representative actions on every subject and Qualified Entities will be cautious when picking up their battles. Importantly, most of them will be on a learning curve in the years to come. They will learn based on their experience and through the sharing of experiences with other stakeholders.

B. Supporting the Development of Representative Actions - The Role of the European Commission

Since the Representative Actions Directive was adopted in November 2020, the European Commission has been instrumental in supervising the implementation of the new rules in the member states and has also been raising awareness about the new instrument with various stakeholders. Among others, the European Commission organized (or co-organized) several events, workshops, and training sessions to inform stakeholders about representative actions.⁶¹ Several trainings and activities to raise awareness took place in 2022 and 2023.⁶²

To facilitate synergies and cooperation in the area of representative actions, the European Commission has set up a new digital platform known as the “Representative Actions Collaboration Tool” or “EC-REACT.”⁶³ This online platform was foreseen under article 14 of the Representative Actions Directive and proposes three autonomous and clearly separated workspaces for three groups of stakeholders, namely courts and administrative authorities dealing with representative actions, Qualified Entities, and national contact points.⁶⁴ More specifically:

- *For judges and administrative authorities dealing with representative actions.* The registration on EC-REACT is voluntary. The tool intends to facilitate the sharing of information on cases brought at national levels.⁶⁵ It also intends to trigger discussions and exchanges between national judges on the various

⁶¹ See, e.g., *Representative Actions Directive*, EUR. COMM’N (last visited Feb. 1, 2024), https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en#multi-stakeholder-workshop-on-the-implementation-of-the-representative-actions-directive (a multistakeholder workshop organized by the European Commission in November 2021).

⁶² Among others, the European Commission has been focusing specifically on judges and members of the judiciary as they will have key roles to play for the management of representative actions in Europe. See *id.*

⁶³ *Welcome to the EC-REACT – The Representative Actions Collaboration Tool*, EUR. COMM’N (2024), <https://representative-actions-collaboration.ec.europa.eu/>.

⁶⁴ Council Directive 2020/1828, *supra* note 10, art. 14.

⁶⁵ See *Welcome to the EC-REACT*, *supra* note 63.

procedural questions related to representative actions that may arise when they deal with mass claims.⁶⁶

- *For Qualified Entities.* The registration on EC-REACT for Qualified Entities is also on a voluntary basis. The tool intends to facilitate communication and exchanges between Qualified Entities designated across Europe. For example, a Qualified Entity in Spain may use the platform to request information from other another Qualified Entities based in (say) Slovenia about the domestic procedural rules applying to representative actions.
- *For contact points.* The registration is mandatory. The objective of the tool is to facilitate communication in situations where (for instance) a contact point in Sweden would need to check whether a Qualified Entity has been correctly designated in (say) Spain.

On a more general level, stakeholders may also find on the platform a wealth of useful information, including detailed information about the Representative Actions Directive and other information.⁶⁷ The EC-REACT platform became operational only recently (i.e. during the first semester of 2024). It may take some time before it is fully used and before stakeholders become fully acquainted with its functionalities. Ultimately, the future will tell whether the EC-REACT platform has achieved its objective, which is to become an instrumental tool in shaping an EU collective redress community.

CONCLUSION

The collective redress landscape is changing rapidly in Europe. The very same EU Directive has triggered a myriad of diverse procedural instruments whose effectiveness is likely to be uneven for consumers. At the same time, stakeholders, in particular consumer organizations, have been preparing to use the new tool. As Bruce Springsteen wrote in one of his famous songs: “*sit tight, take hold, Thunder Road.*”⁶⁸

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ BRUCE SPRINGSTEEN, *Thunder Road*, on BORN TO RUN (Columbia Records 1975).