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Comparative Law

# The Representative Actions Directive - a class action for Europe? 3 February 2021



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#hashtag

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## Standing for the representative actions (Augusta) Qualified entities

Directive is prescriptive of which bodies can be given legal standing to bring representative actions – it is either public bodies or non-for-profit organisations. Such bodies will be designated as “qualified entities” if they comply with certain criteria (Art 4):

- have a certain degree of permanence and level of public activity (12 months),
- have a non-profit-making character and have a legitimate interest, given their statutory purpose, in protecting the interests of consumers as provided for by Union law.
- Are not the subject of insolvency proceedings or declared to be insolvent.
- Are independent and not influenced by persons other than consumers who have an economic interest in the bringing of a representative action, in particular by traders or hedge funds, including in the event of funding by third parties. Qualified entities should have established procedures to prevent such influence as well as to prevent conflicts of interest between themselves, their funding providers and the interests of consumers.
- Make publicly available information demonstrating that they comply with the criteria for designation as a qualified entity and general information about the sources of their funding in general, their organisational, management and membership structure, statutory purpose and activities.



## Standing for the representative actions (Augusta) Qualified entities – questions

- The EU Directive only sets those criteria for cross-border actions – when the case is being brought in another EU country than where the qualified entity is established. For domestic cases, EU countries can freely set the criteria. What will those criteria be?
- Will some countries only tend to designate public bodies?
- The scope of the Representative actions procedure is defined by a wide list of the EU legislation (66 acts). Will there be enough qualified entities to cover all the scope? This will also of course depend on the options for the funding of representative actions.
- Will qualified entities in practice be able to join and bring actions on behalf of the consumers from several countries?



## Standing for the representative actions (Valerie) Reactions

1. Keep in mind the goals of the Directive eg
  - a. Access
  - a. No undue influence
  - b. Allow certain level of autonomy at domestic level
2. Being a Qualified Entity brings with it a variety of obligations, including:-
  - a. Discussions with traders
  - b. Transparency obligations
  - c. Disclosure of sufficient information
  - d. Publication obligations
3. How does standing under the Directive “fit” with existing rules in member states?
  - a. The Netherlands
  - b. The UK
  - c. Germany

## Domestic/Cross Border (Rhonson) Art 6, 15 and recitals 21-23,31,32

*Art 6 (1): obligation on MS to ensure that QE designated in another MS can bring actions in that MS.*

*Art 6(2): obligation on MS to ensure that representative action can be brought before the court or administrative authority of a Member State by several qualified entities from different Member States in order to protect the collective interests of consumers in different Member States.*

*Art 6(3): Reiterates the usage of a list to determine standing to bring cross border claim*

- Link between designation and forum of claim determines cross border/domestic designation.
- Combined with Art 15, rules seem to encourage quick procedures and promotes forum shopping.
- List approach reinforces mutual recognition of designation. 6(3) seems to create a 'Suitability Test'
- Existing Priv. IL concerns not resolved.

## Remedies (Rhonson)

Art. 7(4) – 7(5), Arts.8, 9 and 11.

Recitals 10,11, 33, 35-37,40-49, 50, 53-56, 67and 69.

"Qualified entities" can bring representative actions to seek injunction measures and/or redress measures:

**Redress measures:** covers remedies such as compensation, repair, replacement, price reduction, contract termination and reimbursement of the price paid. Lis alibi pendens rule. Punitive damages not permitted

**Injunction measures:** covers provisional or definitive measures to cease or prohibit an infringing practice. May include publication obligation & declaratory relief. QE does not have to demonstrate any actual loss or damage of the individual consumers, nor any intention or negligence of the trader

**Settlements** subjected to court or relevant administrative authority approval.

- Purposive test towards remedies sought by QE.
- Effect is to make injunctive remedies much more achievable (e.g. Art.8(3)).
- Burden of quantification shifted to representative action
- Directive seems to evidence a desire to promote the use of ADR to resolve claims.



## Opt-in/Opt-Out (Rhonson)

### Recitals 43 - 46

In redress remedies, choice is left to to each Member State. But opt in required for redress claims made on behalf of a consumer not habitually resident in the Member State of the court /administrative authority.

- Prohibition of opt-out schemes for consumers resident in other Member States makes cross-border actions less efficient.
- Creates a distinction in opt-in between claims concerning a consumer habitually resident in the Member State of the court or administrative authority seized and those relating to foreign consumers.
- Opt-in approach to foreign redress claims benefit defendant parties.

## Procedure: disclosure and evidence (Valerie)

### Article 15

Member States shall ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence.

### Article 18

Member States shall ensure that, where a qualified entity has provided reasonably available evidence sufficient to support a representative action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court or administrative authority is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law, subject to the applicable Union and national rules on confidentiality and proportionality. Member States shall ensure that, if requested by the defendant, the court or administrative authority is also able to equally order the qualified entity or a third party to disclose relevant evidence, in accordance with national procedural law





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## Procedure: disclosure and evidence (Valerie)

- A great degree of flexibility left to Member States;
- Success... rests with communicating successfully
- Do Articles 15 and 18 take us very far?



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## Looking ahead... (Matthew)

### Reception and thoughts for the future

1. High level overview of how the Directive has been received in certain Member States
  1. France
  2. Italy
  3. The Netherlands
  4. Germany
2. Future thoughts: the panellists' views on likely impact of the Directive and the way ahead