COLLECTIVE REDRESS FOR CONSUMERS IN THE EUROPEAN UNION AND IN SPAIN

FERNANDO GASCÓN INCHAUSTI
FULL PROFESSOR OF PROCEDURAL LAW
COMPLUTENSE UNIVERSITY OF MADRID (SPAIN)

RITSUMEIKAN UNIVERSITY
KYOTO
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PART 1

A NEW EUROPEAN WAY TO COLLECTIVE REDRESS? REPRESENTATIVE ACTIONS UNDER DIRECTIVE 2020/1828 OF 25 NOVEMBER

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1. Consumers collective redress in the European Union legislative agenda: from the 2005 Green Paper to the 2020 Directive

A. First approaches of the European institutions to collective redress

1. At the European Union level, the issues raised by collective redress are linked primarily to the field of consumer law. This is obviously not the only legal sector for which collective redress techniques could be adequate or even necessary: the same can

be said of environment, non-discrimination, competition and personal data protection, to mention some matters where the European institutions have already taken regulatory action. Efforts so far, however, have focused preferentially in the field of consumer law and this is a factor that cannot be overlooked: even if unconsciously, consumers are usually thought of when addressing collective redress of rights, both in the European Union and in most national systems. For this reason, the European legislative agenda has dealt with collective redress in parallel to the singularities associated with an adequate protection of consumer rights.

Providing a high level of consumer protection has been, almost from its inception, a primary objective of the European institutions, for reasons that need no further explanation. In addition, the close link between consumer issues and the internal market has resulted in the approval of a very large number of directives and regulations. Initially, it was above all about recognizing the rights of consumers and users against traders, from a substantive point of view: [1] gradually the European legislator has built a reinforced legal position for consumers in the most varied contract sectors. Consumer law in the Member States is, therefore, primarily European law, without prejudice to national developments.

2. The progressive construction of the European Justice Area made it possible to focus additional attention on the instruments to achieve effective protection in the event of infringement of consumers' rights and interests. At the level of individual litigation – C2B or B2C - the 1968 Brussels Convention already contained special jurisdiction rules, which in practice recognized consumers the right to 'litigate at home', both if they were plaintiffs as if they were defendants; the Brussels I bis Regulation has not altered them. Moreover, this special line of procedural protection in cross-border litigation has been maintained in subsequent instruments (e.g., when issuing a European enforcement order or a European payment order against a consumer). Furthermore, individual consumer protection has been reinforced through a clear commitment by the European institutions to alternative dispute resolution systems: following the Directive on consumer ADR,[2] Member States are obliged to ensure the existence of out-of-court dispute resolution systems that meet high quality standards. [3]

3. The European legislator has taken somewhat longer to offer mechanisms to deal comprehensively and effectively with the collective dimension of infringements of consumer rights. In 1998, the Injunctions Directive[4] was approved, thanks to which the Member States were forced to introduce in their legal systems adequate actions to require cessation or prohibition of any consumers' rights infringement. It was a significant step, since this type of remedies provide collective redress in a broad sense, even though they

[1] Starting with liability for defective products (see Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 07.08.1985).

[2] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.06.2015, 65-79).

[3] On this, M.L. Villamarín López, 'On minimum standards in Consumer ADR', in R. Caponi, F. Gascón Inchausti and M. Stürner (eds.), *The Role of Consumer ADR in the Administration of Justice. New Trends in Access to Justice under EU Directive 2013/11* (Sellier, 2015) p. 131-148; P. Cortés, 'The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution', in P. Cortés (ed.) *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2016), p. 17-40, esp. p. 22-27.

[4] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.06.1998, p. 51–55).

do not always have a direct impact on the individual sphere of the affected persons. In 2009, the system was subject to certain adaptations and improvements through a new directive,[5] but the content of the available redress remained the same: cessations and prohibitions imposed on traders, but not positive and concrete measures in favour of consumers.

The 'pending subject' since then had been the definition by the European institutions of tools opening the doors to genuine compensatory collective redress.

4. The first clear sign that it could be within the intentions of the European legislator to address a regulation of this type of redress mechanisms, in fact, did not occur directly in the field of consumer law, but in a specific sector in which consumers can find themselves generally harmed, that of damages arising from infringements of competition rules. In December 2005, the Commission published the Green Paper 'Damages actions for breach of the EC antitrust rules'.[6] Among the issues raised by the Commission was the possibility of protecting through collective actions the rights of consumers and purchasers with small claims, which would allow 'consolidate a large number of smaller claims into one action, thereby saving time and money'.[7] The trinomial 'Antitrust damages - consumer protection - collective actions' is maintained later, when the Commission advances in the initiative by approving in April 2008 the White Paper 'Damages actions for breach of the EC antitrust rules'[8]. The Commission insists on warning of the risk that both individual consumers and small businesses will give up claiming scattered and relatively low-value damages, with the consequent weakening of the competition rules. In its opinion, the remedy involves combining 'two complementary mechanisms of collective redress', the so-called 'representative actions' - which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or identifiable victims - and the 'opt-in collective actions' - in which victims expressly decide to combine their individual claims for harm they suffered into one single action.[9] Possibly neither one nor the other are genuine collective actions in the sense in which this term is understood in certain scholarship and, of course, they do not fit in the notion of the US class actions. But in suggesting its suitability as an instrument for more effective private enforcement, the Commission notes that it is within the sphere of competence of the European institutions to adopt regulatory measures in relation to these mechanisms of collective redress and, above all, that it has intention to drive them. A significant announcement is made indeed: 'These suggestions on damages actions in the field of antitrust are part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU and may develop further within this context'.[10]

A few months later (still in 2008), the Commission complies with what was announced by presenting a new Green Paper 'on consumer collective redress'[11]: from that

[5] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests *(*OJ L 110, 1.5.2009, p. 30–36).

[6] Document COM(2005) 672 final (19.12.2005).

[7] Document COM(2005) 672 final, p. 9.

[8] Document COM(2008) 165 final (02.04.2008).

[9] Document COM(2008) 165 final, p. 4-5.

[10] Document COM(2008) 165 final, p. 5.

[11] Document COM(2008) 794 final (27.11.2008).

moment, the paths of antitrust damages and collective actions will follow separate developments.

The initiative on antitrust damages culminated, as is known, with the approval of Directive 2014/104/EU, [12] without any provision addressing the issue of collective redress: the 2013 Commission's proposal[13] omits any reference to it and recital 13 of the Directive establishes a kind of non-interference rule: 'This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.'[14] The reason offered is the convenience of addressing the problems raised by collective litigation in a horizontal and homogeneous way, instead of sectoral. And, in fact, on the same day the proposal for a directive on antitrust damages claims was presented - on June 11, 2013 - a fundamental text was also approved, the Commission Recommendation 'on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law'. [15] This Recommendation is one of the most relevant milestones, although it did not appear spontaneously either.

B. The Commission Recommendation of 11 June 2013

5. In 2008, despite the fact that it was presented as a horizontal response to the problem, the Green Paper on consumer collective redress takes consumer protection as the main axis for the debate and assesses, among other possibilities, the adoption of 'a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States' - in relation to which potential problems or difficulties are identified, such as financing, legal standing, preference due to an opt-in or opt-out model or the danger of unmeritorious claims.[16]

On February 4, 2011, the European Commission launched a Public Consultation entitled 'Towards a Coherent European Approach to Collective Redress"[17], with the aim of gathering additional perspectives and opinions. This was followed, one year later, by the Resolution of the European Parliament of 2 February 2012 - also entitled 'Towards a Coherent European Approach to Collective Redress'[18]- , which substantially endorsed the work carried out by the Commission up to then and urged approval of binding and horizontal rules that would allow a strengthening of the protection in sectors such as consumer law.

6. The approval of the Recommendation of June 11, 2013 demonstrated, on the one hand, that the European Union had not abandoned the issue of collective redress,

[12] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance *(*OJ L 349, 5.12.2014, p. 1–19).

[13] Directive Proposal of 11 June 2013 [COM(2013) 404 final].

[14] Even if, indeed, it would have been appropriate: see R. Van den Bergh, 'Private Enforcement of European Competition Law and Persisting Collective Action', 20 *Maastricht Journal of European and Comparative Law* (2013), p. 12-34; D.P. Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?', 48 *Common Market Law Review* (2011) p. 1125-1174.

[15] OJ L 201, 26.07.2013, p. 60-65.

[16] Document COM(2008) 794 final, p. 12-14.

[17] Document SEC/2011/0173 FIN.

[18] Document 2011/2089(INI).

despite not having been able to reach a point of legislative initiative similar to that of antitrust damages claims – launched the very same day. Moreover, to the same extent, it implied the assumption that, at least for the time being, it was preferable to opt for an instrument that is not binding on the Member States. The choice of a soft-law tool also allows the Commission to present a relatively clear model of collective redress,[19] which pivots on two axes: 'injunctive collective redress' and 'compensatory collective redress'.[20] Regarding the first, the Recommendation is rather conservative and reiterates the legislative policy options already underlying the 2009 Directive, while insisting on the need to arbitrate a system of provisional measures to quickly avoid irreparable damage, as well as the duty of Member States to establish adequate sanctions to ensure the effectiveness of injunctive orders.[21] The most innovative aspect of the Recommendation regards the system of compensatory collective redress. In this, the Commission's approach is quite direct: the 2013 Recommendation reflects some clear 'policies', grouped around an undisguised rejection of anything that might evoke an adoption on European soil of the American class-actions.[22] For this reason, the Commission recommends that Member States establish an opt-in system,[23] while urging them to approve rules regarding the setting of fees that do not encourage this type of

[19] For an overview on the evolution of the EU policies regarding collective redress, see R. Money-Kyrle and Christopher Hodges, 'European Collective Action: Towards Coherence?' 19 *Maastricht Journal of European and Comparative Law* (2012), p. 477-504; C. Hodges and S. Voet, 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles', in B. Hess and X. Kramer (eds.), *From common rules to best practices in European Civil Procedure* (Nomos-Hart, 2017), p. 353-377, esp. pp. 369-372.

[20] See, among others, *Statement of the European Law Institute on Collective Redress and Competition Damages Claims* (2014), esp. 11-60 (https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf); E. Silvestri, 'Towards a common framework of Collective Redress in Europe? An Update of the latest Initiatives of the European Commission', 1 *Russian Law Journal* (2013), p. 46-56; J. Sorabji, 'Reflections on the Commission Communication on Collective Redress' 17 *Irish Journal of European Law* (2014), p. 62-76; S. Voet, 'European Collective Redress: A Status Quaestionis', 4 *International Journal of Procedural Law* (2014), p. 97-128; C. Hodges, 'Collective Redress: A Breakthrough or a Damp Sqibb?', 37 *Journal of Consumer Policy* (2014), p. 67-89; A. Biard, 'Collective redress in the EU: a rainbow behind the clouds?', 19 *ERA Forum* (2018), p. 189-204; R. Mulheron, 'A channel apart: why the United Kingdom has departed from the European Commission's Recommendation on class actions', 14 *Cambridge Yearbook of European Legal Studies* (2015) p. 36–65; S. Law, 'Your Place? Mine? Or Theirs? A Legal and Policy-orientated Analysis of Jurisdiction in Cross-Border Collective Redress, in B. Hess and K. Lenaerts (eds.), *The 50th Anniversary of the European Law of Civil Procedure* (Nomos-Hart, 2020), p. 349-391, esp. p. 363-371.

[21] See sections 19 and 20 of the Recommendation.

[22] The Recommendation, however, also received criticism: see A. Stadler, 'Die Vorschläge der Europäischen Kommission zum kollektiven Rechtsschutz in Europa – der Abschied von einem kohärenten europäischen Lösungsansatz?', 10 *Zeitschrift für das Privatrecht der Europäischen Union* (2013), p. 281-292; C.I. Nagy, 'The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?', 22 *Maastricht Journal of European and Comparative Law* (2015), p. 530-552; C. Meller-Hannich, 'Kollektiver Rechtsschutz in Europa und Europäischer Kollektiver Rechtsschutz', 11 *Zeitschrift für das Privatrecht der Europäischen Union* (2014), p. 92-98; G. Barker and B.P. Freyens, 'The economics of the European Commission's recommendation on collective redress', in E. Lein, D. Fairgrieve, M. Otero Crespo and V. Smith (eds.), *Collective redress in Europe: why and how?* (British Institute of International and Comparative Law, 2015), p. 5-30.

[23] Sections 21-24 of the Recommendation.

litigation,[24] to prohibit punitive damages[25] and to provide for limits and controls on third party funding.[26]

Despite the margin of flexibility it offered to Member States, the 2013 Recommendation did not produce the desired effects. Both before and after its publication, Member States developed their own policies on collective redress without taking particular account of the European Union proposals. The panorama, therefore, was far from being homogeneous on basic issues, such as legal standing, the opt-in / opt-out dichotomy, judicial control over the exercise of actions and the effects of a potential decision or settlement; indeed, not all Member States even have a system of collective redress that would cover the minimums recommended by the Commission. [27]

C. The Directive Proposal of 11 April 2018 and the Directive of 25 November 2020

7. This situation prompted the Commission to take a step forward and enter the path of approximation of laws and 'forced' harmonization, promoting the elaboration of a Directive on collective actions. Specifically, on April 11, 2018, the European Commission launched the *New Deal for Consumers*,[28] a package of measures and initiatives aimed at reinforcing consumer protection from very different angles, which included a Proposal for a Directive on representative actions for the protection of the collective interests of consumers.[29] Once again, the purpose of approaching collective redress in a horizontal way ends up, in practice, focusing on the consumer sphere, although, the legislative path has led to cover also the field of data protection. There are indeed notable differences between the Commission's initial proposal and the text finally approved two and a half years later. On March 26, 2019, the European Parliament

[24] Sections 29-30 of the Recommendation.

[25] Section 31 of the Recommendation.

[26] Sections 14-16 and 32 of the Recommendation.

[27] This is clear from the Report on the application of the Recommendation published by the Commission on January 25, 2018 [Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final). For a comparative overview, see, among others, V. Harsági and C.H. van Rhee (eds.), *Multi-party redress mechanisms in Europe: squeaking mice?* (Intersentia, 2014); E.-M. Kowollik, *Europaische Kollektivklage: Referenzrahmen Fur Ein Leistungsfahiges Europaisches Justizsystem* (Nomos, 2018); previously, D. Fairgrieve and G. Howells, 'Collective Redress Procedures – European Debates', 58 *International and Comparative Law Quarterly* (2009) p. 379-409; C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart, 2008).

[28] Regarding the presentation to the public of the 'New Deal', see the Commission's press release: http://europa.eu/rapid/press-release_IP-18-3041_es.htm.

[29] 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 - 2018/0089 (COD)], available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523948214440&uri=CELEX:52018PC0184. For a first (critical) assessment, see A. Biard and X.E. Kramer, 'The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?', *Zeitschrift für Europäisches Privatrecht* (2019-2), p. 249-259; T. Domej, 'Die geplante EU-Verbandsklagenrichtlinie – Sisyphos vor dem Gipfelsieg?', *Zeitschrift für Europäisches Privatrecht* (2019-3), p. 446-471.

presented its report,[30] with a series of relevant modifications. The Council, on its side, approved on 28 November 2019 its common position[31] in which, unsurprisingly, it disagreed with the Parliament and the Commission in aspects of some importance. The Covid-19 pandemic delayed the legislative process, which could culminate on November 25, 2020 with the approval of the Directive on representative actions.[32]

8. As will be seen below, the Directive has a primarily procedural content, although it also delves into the field of substantive law (e.g., when defining the content of the actions or when dealing with the rules on limitation periods). Its legal basis, however, is not found in Article 81(2) TFEU,[33] but on Article 169 TFEU, obliging the Union to reinforce consumer protection and, consequently, on Article 114 TFEU, which allows the approximation of the laws of the Member States when its purpose is the establishment and functioning of the internal market. The breadth of Article 114 TFEU allows for a more extensive harmonization, not necessarily limited to litigation with a cross-border dimension - which is the limit imposed on provisions adopted for the construction of the European Area of Justice in civil matters.

9. It must be further noted that there is a clear divergence of approaches regarding the Directive's harmonizing scope between the Commission's initial Proposal - endorsed by the European Parliament - and the position taken by the Council, which has finally prevailed. The Commission and the Parliament were in favour of establishing a common regime - quite squalid, nevertheless - for representative actions, accompanied by some specialties in cross-border matters. The Council considered, however, that the closest approximation should be given above all to cross-border representative actions: when these have a purely national or domestic scope, the impact of the Directive on internal legislation should be significantly reduced. Two different visions lied under these approaches: the Parliament, more attentive to the protection of consumers, was ready to set limits to the procedural autonomy of Member States;[34] the Council, on the other hand, clearly opted for the latter and transferred to the political debate – and to the final text - the vision of several Member States, clearly reluctant to the generalization of compensatory collective redress systems and to spreading to European soil anything that may resemble US-style class actions.[35]

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[30] European Parliament legislative resolution of 26 March 2019 on the 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)0184 – C8-0149/2018 – 2018/0089(COD)].

[31] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14600_2019_INIT&from=EN

[32] 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).

[33] Article 81.2 TFEU opens the doors to a certain procedural harmonization in pursuit of effective judicial protection and the proper functioning of civil proceedings, as conditions to improve cross-border litigation.

[34] On the real meaning of the notion of procedural autonomy, see S. Law and J.T. Nowak, 'Procedural Harmonisation by the European Court of Justice: Procedural Autonomy and the Member States' Perspective', in F. Gascón Inchausti and B. Hess (eds.), *The Future of the European Law of Civil Procedure: Coordination or Harmonisation?* (Intersentia, 2020), p. 17-89; for a comparative view on how procedural autonomy is perceived among Member States, see B. Krans and A. Nylund (eds.), *Procedural Autonomy across Europe* (Intersentia, 2020).

[35] On the reasons for this reluctance, especially visible in the German scholarship, see A. Bruns, 'Einheitlicher kollektiver Rechtsschutz in Europa?', 125 *Zeitschrift für Zivilprozess* (2012), p. 399-419; T. Domej, 'Einheitlicher kollektiver Rechtsschutz in Europa?', 125 *Zeitschrift für Zivilprozess* (2012), p. 421

This prevention towards anything sounding like *class action* has been recurrent from the first approaches of the European institutions to this matter: the European lawmaker has shown a sort of obsession in avoiding any risk of abusive litigation and of instrumentalization of collective redress to distort the market.[36] The clearest example of this desire to define the European way to collective redress is that 'suspicious' expressions, such as 'collective actions' or 'class actions', are openly avoided, and the more 'aseptic' terms of 'representative actions' have been chosen, despite their equivocal nature - since the system does not necessarily rest on a technical notion of representation.

It was probably not the only way to deal with the US experience. The publication of the Directive almost coincides in time with the approval of a similar and partially coincident initiative. I am referring to the European Rules of Civil Procedure which, as is well known, are the result of a project of more than seven years between the European Law Institute (ELI) and UNIDROIT, which were approved in July and September 2020.[37] The European Rules of Civil Procedure are presented as a kind of model code to improve the regulation of civil procedure in European countries on the basis of a best-rule approach. They are made up of 245 rules, divided into 12 parts, one of which is dedicated to collective proceedings (rules 204 to 238). The path followed by the drafters of the European Rules is not completely coincident with that of the Directive: rather than a frontal refusal, some of the pieces that make up the American system have been adopted and adapted to the European sphere.

Anyway, an analysis of what the new Directive regulates and what it omits to regulate allows identifying the defining elements of the European system of representative actions that has just been approved.

2. The new system provides for a limited harmonization

-458; H. Willems, 'Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverbands der Deutschen Industrie (BDI)', in C. Brömmelmeyer (ed.), *Die EU-Sammelklage, - Status und Perspektiven* (Nomos, 2013), p. 17-20; A. Stadler, 'Class Actions in den USA als Vorbild für Europa?', in C. Brömmelmeyer (ed.), *Die EU-Sammelklage, - Status und Perspektiven* (Nomos, 2013), p. 91-108.

[36] On the notion of procedural abuse, see M. Taruffo (ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (Kluwer, 1999). On how US class actions may be perceived as leading sometimes to a blackmail effect, C. Silver, '"We're Scared to Death": Class Certification and Blackmail', 78 *New York University Law Review* (2003), p. 1357-1430.

[37] The text may be retrieved from https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules. More information on the Project on the ELI website (https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/) and on UNIDROIT website (https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules). See also R. Stürner, 'Principles of European civil procedure or a European model code? Some considerations on the joint ELI-UNIDROIT project', 19 *Uniform Law Review* (2014), p. 322; E. Silvestri, 'Towards A European Code of Civil Procedure? Recent Initiatives for the Drafting of European Rules of Civil Procedure', https://www.academia.edu/18086809/Towards_a_European_Code_of_Civil_Procedure (2015); B. Hess, 'Unionsrechtliche Synthese: Mindeststandards und Verfahrensgrundsätze im acquis communautaire / Schlussfolgerungen für European Principles of Civil Procedure', in M. Weller and C. Althammer (eds.), *Mindeststandards im europäischen Zivilprozessrecht* (Mohr Siebeck, 2015), p. 221-235; C.H. van Rhee, 'Approximation of Civil Procedural Law in the European Union', in B. Hess and X. Kramer (eds.), *From common rules to best practices in European Civil Procedure*, p. 63-75; E. Silvestri, 'The ELI-UNIDROIT Project: A General Introduction', in F. Gascón Inchausti and B. Hess (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, p. 199-204; B. Hess, *Europäisches Zivilprozessrecht* (2nd ed., De Gruyter, 2020), pp. 953-956.

10. In general terms, it should be noted that the approved text does not contain a more or less finished or complete collective procedure for the protection of consumers, that is, a kind of 'European collective procedure', equivalent to the European small claims procedure or the European order for payment procedure. The Directive seems limited to addressing various issues of consumer collective redress, such as the determination of the entities empowered to bring representative actions in other Member States and the types of collective redress that can be sought from the courts - or, in some countries, from the administrative authorities–: at this point, the new aspect is the inclusion of compensation measures, which had been left out of the previous regulatory actions of the European legislator (the Directives on injunctions of 1998 and 2009). It also includes, among others, provisions intended to identify and control the authorized entities' funding, the requirements for the acceptance of collective settlements, the trader's duty to inform consumers of the outcome of collective proceedings or the suspension of the limitation period of individual consumer claims while a representative action is pending. But there is no minimal outline of a common procedural structure or homogeneous 'procedural pieces' (such as, for example, an initial and formal judicial control for the bringing of the collective action, in the style of the class certification order under Rule 23(c)(1) of the Federal Rules of Civil Procedure): procedural autonomy of Member States will continue to prevail at this point. [38]

11. In fact, some of the more 'daring' provisions are presented as optional for the Member States, so that the Directive in some important aspects has ended up resembling a recommendation, as it does not necessarily determine implementations at the national level. In this vein, Article 1(2) clearly establishes that Member States may adopt or maintain other procedural instruments to protect the collective interests of consumers at a national level. This provision, in addition, clarifies the harmonizing impact of the Directive: if a Member State has several means to promote collective redress for consumers, at least one of them must comply with the requirements established in it. Consequently, in those legal systems in which there is only a collective redress system and in those in which none yet exists, the impact of the new Directive will be more relevant, and the European standards will also become national. In those Member States counting with several collective redress tools, on the other hand, a kind of competition will take place between them –i.e., including the 'Directive friendly' one–, which will end up being resolved in favour of the one that is perceived as more efficient by legal operators.

In the end, the level of harmonization that is sought turns to be somewhat disappointing: the European institutions seem to have assumed that the various systems - very heterogeneous among themselves - already adopted in most of the Member States must be able to subsist, even if with some minor adjustments. For this reason, the European lawmaker, more modestly, aspires (i) to compel the existence of a collective redress system in all of them, which allows compensation for damages - something undoubtedly valuable -, (ii) to enable a cross-border bringing of representative actions by other Member States' qualified entities and (iii) to establish certain controls on their funding, aimed at preventing abusive litigation.

3. Scope of the system

[38] Recital 12 is outright on this: *'In line with the principle of procedural autonomy, this Directive should not contain provisions on every aspect of proceedings in representative actions'.*

A. Material scope

12. The new Directive aims to establish a very broad material scope of application: representative actions must make it possible to react to any infringement committed by traders that harm or may harm the collective interests of consumers in any of the sectors covered by the regulatory activity of the European institutions (Article 2(1)). The European-style collective redress, therefore, focuses on the field of consumer law, understood in a very flexible sense, which also includes the protection of personal data[39]. More specifically, the specific provisions which may be enforced by means of representative actions are listed in Annex I of the Directive, which seems to order the 66 of them in a systematic way, from the most general levels – like defective products liability, unfair contract terms or sale of consumer goods and associated guarantees –, to most specific sectors.

It should also be recalled that the reason why collective redress instruments disappeared from the initiatives and subsequent EU rules on antitrust damages was the desire to offer a horizontal and general approach to these procedural tools. In view of the content of Annex I, it is paradoxical to see how, at the end of all the way, claims arising from antitrust harm and suffered by consumers have been left out of the European legislative action: national lawmakers may allow collective actions to seek redress for consumers in this field, but it will not be by requirement of the Union. [40] In addition, the environmental sector is also excluded, despite being a matter over which the Union exercises powers and in relation to which civil actions of a collective scope could be envisaged.[41]

B. Temporal scope

13. The time frames established by the Directive are not too strict. The transposition will have to adapt to two deadlines: by 25 December 2022 Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive. These measures, in turn, shall be applied from 25 June 2023 (Article 24(1)).

But, will they only apply to 'new' cases? The Commission's initial proposal, endorsed by the European Parliament report, sought to limit it to infringements committed after its entry into force. The final text, following the Council's position, proposes a more beneficial approach for consumers: the new rules must be applied to representative actions brought on or after 25 June 2023, regardless hence of the moment in which the infringement took place (Article 22(1)). This avoids the difficulties of interpretation and

[39] Addressing the issue of collective redress in the field of data protection, A. Pato, 'The Collective Private Enforcement of Data Protection Rights', in L. Cadiet, B. Hess and M. Requejo Isidro, *Privatizing Dispute Resolution. Trends and Limits* (Nomos, 2019), p. 131-154; M. Requejo Isidro, 'Procedural Harmonisation and Private Enforcement in the GDPR', in F. Gascón Inchausti and B. Hess (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, p. 173-195, 186; B. Hess, *Europäisches Zivilprozessrecht*, p. 835-841.

[40] See G. Bándi, P. Darák, P. Láncos and T, Tóth (eds.): *Private Enforcement and Collective Redress in European Competition Law (2016 FIDE Congress)* (Wolters Kluwer, 2016); F. Weber, '"A chain reaction" or the necessity of collective actions for consumers in cartel cases', 25 *Maastricht journal of European and comparative law* (2018), p. 208-230; D. Ashton, *Competition Damages Actions in the EU* (2nd ed., Edward Elgar, 2018), p. 281-351.

[41] On the basis of Article 9(2) and (3) of the Aarhus Convention -and Directive 2013\35-, as developed in M. Eliantonio, 'Collective Redress in Environmental Matters: A Role Model or a 'Problem Child'?',41 *Legal Issues of Economic Integration* (2014), p. 257-273.

application that would derive from the initial proposal, since it would not always be possible to identify the date of an infringement, especially if it is prolonged in time; and this, in turn, would raise doubts as to the type and content of the redress that could be sought. The chosen approach, in addition to being simpler and beneficial for consumers, is consistent with the procedural nature of the instrument.

C. Private international law issues

14. The European lawmaker has made the clear choice, not to deal with private international law issues, i.e., with jurisdiction, recognition and enforcement of (foreign decisions) and applicable law. Article 2(3) refers openly to the pre-existing Union rules on these issues, which according to Recital 21 are Brussels I bis Regulation -for jurisdiction, lis pendens and related actions, recognition and enforcement- and Rome I and Rome II Regulations -regarding the rules on the law applicable to contractual and non-contractual obligations. This referral is, to say the least, tricky: cross-border collective litigation gives rise to extremely complex issues, which are not easily solved applying the existing *acquis communautaire*.[42] Recital 22 acknowledges, in addition, that the Brussels I bis Regulation 'does not cover the competence of administrative authorities or the recognition or enforcement of decisions by such authorities. Such questions should be a matter for national law.'

At first glance, this option is shocking, especially when one realizes that cross-border representative actions seem to raise the most concerns. The explanation is possibly simply pragmatic: reaching clear and satisfactory solutions for all Member States would have made the approval of the Directive even more complicated. In fact, there is an express rule that, in a somewhat disguised way, affects the issue of cross-border recognition and enforcement: it is Article 9(3), which submits the extraterritorial effectiveness of representative actions to the requirements of the opt-in model and that, to that extent, drastically reduces the extraterritorial scope of judgments or settlements handed down in these proceedings.[43]

4. Legal standing to bring representative actions

A. Different requirements for domestic and cross-border representative actions

15. One of the defining elements of the European way to collective redress is the existence of a public control over the legal standing to bring actions on behalf of the collective interests of consumers. That was already the core of the 1998 and 2009

[42] See, among others, D. Fairgrieve and E. Lein (eds.), *Extraterritoriality and Collective Redress* (Oxford University Press, 2012); A. Nuyts and N. E. Hatzimihail (eds.), *Cross-Border Class Actions. The European Way* (Sellier, 2014); A. Pato, *Jurisdiction and cross-border collective redress. A European Private International Law perspective* (Hart Publishing, 2019); B. Hess, *Europäisches Zivilprozessrecht*, p. 826-831; C. Peraro, 'Cross-border Collective Redress and the Jurisdictional Regime: Horizontal vs Sectoral Approach', in B. Hess and K. Lenaerts (eds.), *The 50th Anniversary of the European Law of Civil Procedure*, p. 317-348, esp. p. 335-346; S. Law, 'Your Place? Mine? Or Theirs? A Legal and Policy-orientated Analysis of Jurisdiction in Cross-Border Collective Redress, in B. Hess and K. Lenaerts (eds.), *The 50th Anniversary of the European Law of Civil Procedure*, p. 371-391; J.T. Nowak, 'Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles?', in B. Hess and K. Lenaerts (eds.), *The 50th Anniversary of the European Law of Civil Procedure*, p. 394-450.

[43] See below, 38.

Directives on injunctive actions. And, without a doubt, this approach is maintained and reinforced in the new Directive, which opens the doors to redress claims.

According to the European legislator's design, representative actions must necessarily be brought by 'qualified entities', as per the definition of Article 3 (4): 'any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions in accordance with this Directive'. And this has, at least, two implications:

— Representative actions cannot be validly brought by natural persons individually and on behalf of a group of consumers who are in the same situation. In other words, any singular and 'private' initiative to promote collective redress is rooted out, unlike in the US system of class actions.[44]

— Not any entity claiming to be representing the rights and interests of consumers is entitled to bring a representative action, but only those that have passed a filter or control, established and managed by the public power: given their potential general impact, collective actions are considered instruments requiring a 'delicate' management, which can only be entrusted to 'reliable' entities – i.e., in the Directive's terminology, 'representative' -. The public power is in charge not only of (i) establishing the requirements on which that 'reliability' or 'representativeness' depends, but also of (ii) verifying that each entity fulfils them – by 'designating' them - and of (iii) controlling that compliance to the requirements is maintained in time.[45]

16. Regarding the requirements for an entity to qualify for bringing representative actions, the Directive sets a relevant distinction depending on the scope of the action – either domestic or cross-border. According to Article 3(6), a 'domestic representative action' means a representative action brought by a qualified entity in the Member State in which the qualified entity was designated, even if it involves reacting against a practice that may have had an impact on another Member State. And there will be a 'cross-border representative action' (Article 3(7)) if it is filed by a qualified entity in a Member State other than that in which the qualified entity was designated.

17. As far as domestic representative actions are concerned, Recital 26 of the Directive points out that 'Member States should be able to establish the criteria for designation of qualified entities [for the purpose of domestic representative actions] freely in accordance with national law'. The Union, thus, has not dared to harmonize in general terms the criteria on which the legal standing to bring collective actions should rest. Common criteria, on the contrary, are reserved for entities seeking the authorisation to bring cross-border collective actions (Article 4(3)): the goal, therefore, seems to prevent 'a *non-controlled and foreign* entity from bringing collective actions in *my* country'.

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[44] At this point there is a clear divergence between the Directive and the proposal made by the European Rules of Civil Procedure. Along with authorized organisations and ad hoc entities, rule 208(c) includes as a 'qualified claimant' –i.e., someone with legal standing to bring collective proceedings– 'a person who is a group member and who meets [certain specific] requirements': she shall have no conflict of interest with any group member, she shall have sufficient capability to conduct the collective proceedings (taking account of the financial, human and other resources available to the putative qualified claimant) and she shall be legally represented.

[45] On the implications of this policy, see R. Money-Kyrle, 'Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?', in B. Hess, M. Bergström and E. Storskrubb (eds.), *EU Civil Justice. Current issues and Future Outlook* (Hart Publishing, 2016), p. 223-254.

18. The Directive, nevertheless, does establish some provisions regarding the legal standing to bring domestic representative actions:

(i) consumer organisations, including consumer organisations that represent members from more than one Member State, shall be eligible to be designated as qualified entities (Article 4(2));

(ii) public bodies may also be designated as representative entities (i.e., they cannot be excluded just because of their public nature: Article 4(7));

(iii) an entity, at its request, may be designated as a qualified entity on an ad hoc basis for the purpose of bringing a particular domestic representative action, provided it satisfies the requested national criteria (Article 4(6));

(iv) information about the qualified entities designated by Member States for bringing domestic representative actions shall be made available to the public (Article 5.2).

These are not true requirements for an entity to be designated, but rather common pieces that should contribute to a better functioning of the system.

19. The fact that the Directive has limited its harmonizing efforts to cross-border actions is not surprising either. Indeed, one of the purposes of the European legislator since the first directive on injunctions has been precisely to allow some entities - entitled to bring collective actions in one Member State - to also file them in any other Member State, if it is found that the infringement of consumer protection rules has a cross-border scope. In the field of injunctions, in fact, a sort of 'mutual recognition of national designations' has been taking place so far: each Member State periodically supplies a list to the European Commission with the qualified entities, which the Commission uses, in turn, to publish a general list of qualified entities, so that inclusion in it obliges the judicial or administrative authorities of the other Member States to presume their legal capacity, without prejudice to the possibility of controlling whether the purpose of the qualified entity justifies its taking action in a specific case (Article 4(1) of Directive 2009/22).

The new Directive insists on this idea, since the relevant issue is not the scope of the infringement, but the nationality of the entity seeking to bring the representative action. When a national entity, designated in accordance with national law, exercises a representative action before a court of that country, nothing prevents the redress from having a cross-border scope –with the limits, of course, set forth in the Directive itself (e.g., in Article 9(3)) and arising, in general terms, from the Brussels I bis regime shortcomings. Concerns may emerge, however, if an entity from another Member State intends to bring an action of collective impact, without there being certainty about the minimum standards that have been required in its State of origin to qualify and act in this type of process. The difference with the previous injunctions directive regime consists in abandoning the automatic and blind recognition of entities designated under the various national laws - with the only filter of controlling the existence of a sufficient link between the entity and the particular case. This, which may be sufficient for injunctions, is not enough for actions seeking compensatory redress, whose practical impact may be much greater. Member States are only willing to allow foreign entities to bring collective actions before their courts or administrative authorities if they meet very high standards, which –among others- avoid distortions and abuses, while ensuring real representativeness of consumers' interests.

B. European standards for the attribution of standing to bring representative actions

20. According to Article 4(3), an entity may only be designated as a qualified entity for the purpose of bringing cross-border representative actions if a series of requirements and criteria are satisfied:

a) The entity must be a legal person constituted in accordance with national law of the Member State of its designation and it must be able to demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation. The aim is thus to prove seriousness and to avoid the creation of 'special purpose vehicles', preventing malpractice and/or abuses.

b) The entity's statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests. In fact, and in a manner equivalent to that indicated for qualified entities to bring domestic representative actions, the Directive considers it advisable to promote the designation of consumer organisations (Article 4(2)) and of public bodies (Article 4(7)) as qualified entities to bring cross-border representative actions.

c) The entity has a non-profit-making character. Compliance with this requirement can often be deduced from the legal form used for its incorporation and / or from its statutes.

d) The entity is not the subject of insolvency proceedings and has not been declared insolvent. The directive thus aims for the entity to enjoy a stable financial situation, to combat the risk of undue influence by third parties. The chosen threshold is minimal and to a certain extent formal: not to have become insolvent. Higher demands could have been difficult to implement in practice. Indeed, it is known that the economic position of consumer associations in many Member States is delicate, insofar as it relies mostly on the membership fees.

Being aware of this difficulty, the European legislator seems determined to oblige Member States to adopt measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to promote consumers' interests (Article 20(1) and (2)). The Directive, however, remains quite generic, since it does not create a public duty to contribute to the funding of these actions: structural public support is an option, but others are suggested, such as the reduction of court fees, the provision of legal assistance to the entities or even the contribution of the consumers themselves affected by the infringement, by means of paying a 'modest' entry fee or similar participation charge (Article 20(3)).

e) The entity has to be 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 –who might be competitors. This lack of bounds has to be assessed carefully in the event of funding by third parties. In addition, the entity is required to have established procedures to prevent such influence as well as to prevent conflicts of interest.

f) The entity discloses publicly –in plain and intelligible language– by any appropriate means, in particular on its website, information that demonstrates that the entity satisfies the criteria listed above, as well as information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities. Transparency becomes, therefore, a basic element of the new system, also from the point of view of its main actors, the qualified entities.

21. As is the case with entities qualified to bring domestic representative actions, each Member State will have to draw up and keep updated a list of those that have been

designated for the exercise of cross-border actions (Article 5(1)). It will be up to Member States to define the terms and the steps to be followed by entities in order to receive the qualification set in the Directive. On the basis of the information sent by each Member State, the European Commission will prepare and publish a complete list of entities, which will be updated annually and whenever changes are communicated.

22. In addition, three control mechanisms are envisaged:

— Member States shall assess at least every five years whether qualified entities continue to satisfy the criteria set in the Directive; entities which no longer satisfy one or more of those criteria shall be deprived of this status (Article 5(3)).

— Another Member State or the Commission may also raise concerns regarding the satisfaction by a qualified entity of the criteria laid down in the Directive –national contact points shall be designated for that purpose (Article 5(5))–. In such a case, the Member State that designated that qualified entity shall investigate the concerns and, if appropriate, it shall revoke the designation of that qualified entity (Article 5(4)).

— The above mentioned control is intended to be exercised in the abstract. But Article 5(4) also gives this 'power to raise concerns' to the defendant trader in a specific representative action (Article 5(4)). Although the directive does not give any hint of subsequent steps, it is reasonable to stay the proceedings while the matter is resolved. If the designation of the entity that filed the representative action is eventually revoked, the claim should be dismissed, without prejudice to the rights of the affected consumers.

C. Controls on the bringing of representative actions by qualified entities

23. The requirements are high and the controls - if carried out seriously - are strict. The aim is to concentrate the exercise of cross-border collective actions in a few hands, avoiding the risk that a hypothetical 'dispersed' legal standing could give rise to abusive or spurious lawsuits. The precautions, nevertheless, do not end here. Along with the general requirements set to bring cross-border collective actions, the Directive establishes additional filters and controls for each specific case, which also aim at preventing potential abuse of representative actions. Some of these requirements are of a general nature, while other safeguards apply only to compensatory actions - those apparently in greater need for a harmonizing intervention by the Union.

24. First, the Directive incorporates a provision allowing the courts or administrative authorities before whom the representative action is brought to dismiss it as soon as possible – 'at the earliest possible stage of the proceedings'- if they consider it manifestly unfounded (Article 7(7)). It is an apparently very powerful tool to face any potential abuse of representative actions, although several points must be taken into account:

(i) From the outset, it should be noted that the Directive does not oblige unfounded actions to be dismissed, but it does oblige national procedural laws to allow the courts - or, wherever the system is, the administrative authorities - to do so if they consider it appropriate. It may seem a sophism, but it has implications in two ways. On the one hand, it avoids automatisms, always delicate when access to justice is at stake. On the other hand, by including such a provision, the Directive has the potential to impose an important regulatory change, at least in those procedural systems where an initial inadmissibility of a claim or its early dismissal is only possible in limited cases and for procedural grounds - only very exceptionally for substantive reasons.

(ii) The only procedural guidance is that dismissal shall occur at the earliest possible procedural stage. An ex officio dismissal of a case should therefore be possible, which would be in turn consistent with the general spirit of the Directive to avoid any abuse of the rules on representative actions.

(iii) Regarding the core of the rule, it should be emphasized that the criteria to consider an action manifestly unfounded cannot be only formal (e.g., the entity does not comply with domestic or European requirements to bring representative actions: Article 5(4)): such a rule would have been unnecessary to reach that goal. The provision is rather envisaging that the case is unfounded as to the merits, since that is what the term 'unfounded' usually refers to. In practice, therefore, difficulties will arise defining the limits of that notion, bearing in mind that a high threshold has been imposed with the use of the adverb 'manifestly'. It should be noted, in addition, that early dismissal of the case is not necessarily linked, at least according to the literal wording of the provision, to its abusive nature: in other terms, a case could be manifestly unfounded without being abusive.

25. Secondly, and in line with the 1998 and 2009 Directives on injunctions, the inclusion of the plaintiff entity in the list of qualified entities only proves compliance with the requirements to bring a cross-border representative action. Therefore, in each specific case the court shall assess the link between the lawsuit and the statutory purpose of the qualified entity (Article 6(3)): only a sufficient connection between both empowers the entity with the necessary legal standing to promote the representative protection of the consumers affected by the infringement.

26. The strictest controls, however, affect the funding to bring compensatory representative actions. Third party funding can of course apply to sustain collective proceedings - as is the case notoriously in the United States or Australia. The aim of the Directive is to avoid that third party funding covers or hides a conflict of interest that results in an abusive or fraudulent process. Accordingly, Article 10(1) establishes the general duty of Member States to ensure that, in cases where a representative action for redress measures is funded by a third party - and this will be possible to the extent permitted by national legislation - conflicts of interest are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers. Article 10(2) describes two different potential conflicts of interest in the context of a representative action –obviously, in a non-exclusive manner: first, where the decisions of qualified entities, including decisions on settlement, are unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action; secondly, if the representative action is brought against a defendant that is a competitor of the funding provider or on which said funding provider is dependent (in this case, the Directive presumes the existence of an undue influence, incompatible with the representative action). Two complementary provisions aim to avoid these risks to become real, one addressing the means and the other the results.

(i) As to the first, the court hearing the action is empowered to assess whether there may indeed be a conflict of interest, in case justified doubts arise in this regard (Article 10(3)). To that end, the qualified entity will have to disclose to the court a financial overview, including the sources of funds used to sustain the action.[46] Although the wording is not

[46] The final provision is quite concise on this issue. The Commission and the European Parliament (Article 7.1 of the Proposal) proposed, in a more detailed manner, that the qualified entity should produce a financial

clear, it seems logical to understand that the production of this financial overview is always mandatory: only after being aware that there is third-party funding can justified doubts arise in the court that, in turn, empower it to assess the existence of a potential conflict of interest. In addition, it should also be understood that the court will be able to assess the existence of a conflict of interest at any point in the procedure, that is, as soon as it notices that any decision of the qualified entity could be detrimental to the interests of consumers.

(ii) Regarding the consequences in the event of a conflict of interest, courts shall be empowered to take 'appropriate measures' (Article 10(4)), such as requiring the qualified entity to refuse or make changes in the relevant funding. The court may even reject the legal standing of the qualified entity to bring the specific representative action - a denial that, in any case, cannot affect the rights of the consumers concerned.

The Directive, as noted from the outset in Article 10(1), does not seek to regulate in full the phenomenon of third party funding in the field of collective actions. However, it does impose a series of limits on national legislation and it provides appropriate tools to enforce compliance. It shall be borne in mind, moreover, that they apply to all representative actions for redress measures, and not only to cross-border ones: the impact will be general. The harmonizing drive is therefore more visible in this field, clearly connected with the Directive's overriding policy of avoiding the dangers associated with US-style class actions.

27. The requirements for an entity to have legal standing to bring cross-border representative actions (Article 4(3)) and the different control mechanisms established on how that legal standing is used serve the Directive to set the European standard to ensure an adequate attribution and a legitimate exercise of extraordinary legal standing for the collective protection of consumer rights. And it is not uncommon that European standards serve as an incentive to reshape national rules: the duty to adapt internal regulations, imposed by the Directive even in a specific area, may be seized as an opportunity to review whether the pre-existing domestic rules are adequate and/or if they can be improved following the European example.[47] At the end of the day, it is difficult to explain to litigants and legal operators that higher standards are observed only in certain specific sectors, although they are not required in other similar situations. The Directive is fully aware of this phenomenon and modulates it through two complementary formulas.

(i) On the one hand, there is the duty of Member States to abide by the requirements of the principle of effectiveness. In this vein, according to Article 4(4) the criteria established by national legislators to grant legal standing in order to bring domestic representative actions must be consistent with the objectives of the Directive itself to achieve an effective and efficient functioning of this type of actions.

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overview of the source of the funds used for its activity in general and the funds that it uses to support the action; it should demonstrate, in addition, that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.

[47] On this, F. Gascón Inchausti, 'Have the EU Regulations on Judicial Cooperation Fostered Harmonisation of National Procedures?', in F. Gascón Inchausti and B. Hess (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, p. 91-110; W. Hau, 'Europeanisation of Civil Procedure: Overcoming Follow-Up Fragmentation through Bottom-Up Harmonisation', in A. Nylund and M. Strandberg (eds.), *Civil Procedure and Harmonisation of Law* (Intersentia, 2019), p. 61-75.

(ii) On the other hand, Article 4(5) and Recital 26 'invite' Member States to use for domestic actions the same requirements set by the Directive itself to designate qualified entities to bring cross-border representative actions.

By proposing this transplant of the Directive's model to the domestic sphere, the European legislator sends a clear message: the legal standing to seek collective redress should not be in the hands of the consumers affected - neither individually nor grouped - ; it is preferable to concentrate it on qualified entities, showing an adequate level of representativeness. This decision does not prejudge a bet by the European legislator for an opt-in or an opt-out model when compensatory redress is envisaged. In this point, as will be seen later, the Directive aims to be as neutral as possible. The terms 'representative action' do not imply that qualified entities represent ex lege consumers (something similar to a mandatory opt-out model), nor that authorized entities must have a mandate or prior authorization from the affected consumers to bring an action that may end up to their benefit (an opt-in model). The heterogeneity of national procedural systems and the lack of will of the European institutions to alter the balances reached in each Member State have determined a high degree of regulatory neutrality on this issue, quite different from the clear commitment to the opt-in model formulated by the 2013 Commission Recommendation.

5. Available collective redress

28. The second major objective of the Directive is to open the door to compensatory collective redress at the European Union level, bearing in mind that injunctive relief to protect the interests of consumers has been a common phenomenon since 1998. Following the paths of the 2013 Recommendation, the European lawmaker delves into the field of collective remedies establishing a clear dividing line between injunctive and compensatory relief.

A. Injunctive relief

29. The content of injunctive measures - inherited from the 1998 and 2009 directives - is clear from Article 8(1): ordering a trader to cease or prohibiting him to undertake or resume a practice considered to constitute an infringement of consumers' rights or interests.[48] It is irrelevant, therefore, if the infringing practice has already ceased when the claim is filed, where there is a risk that it would resume.[49]

30. Article 8(1) - following the 1998 and 2009 regime - distinguishes between *provisional* measures and *definitive* measures. Definitive measures are indeed the content of a judgment issued at the end of proceedings on the merits, developed in accordance with the procedural rules of each Member State. Provisional ones usually depend on how provisional and protective measures are regulated in each national system. In some cases, there is a strict instrumentality requirement, and these measures will have to be adopted in the framework of an ongoing or imminent procedure. Other legal systems are more flexible, so that the effectiveness of a provisional injunction will not depend on the existence or imminent commencement of proceedings on the merits - unless, e.g., it is requested by the injunction's addressee.[50] This second, flexible approach is probably the

[48] B. Hess, *Europäisches Zivilprozessrecht*, p. 818-822.

[49] Article 2, in fact, clarifies it, when defining the scope of the Directive itself.

[50] This is the case, for instance, of the German *Leistungsverfügung*, the French *ordonnance de référé*, the Ducth *kort geding* or the Italian *provvedimenti d'urgenza*, among others.

most appropriate in this field - although the Directive does not require domestic changes, if national lawmakers prefer to maintain a strict instrumentality for provisional measures.

31. Injunctive relief – again here in line with the 2009 directive – may also entail the obligation to publish (i) the decision on the measure in full or in part, in the most appropriate manner, or (ii) a corrective statement (Article 8(2)(b)). In most cases, this additional content will become an obligation to meet the potential costs of such publication (if the trader does not pay them voluntarily and spontaneously).

32. Article 8(4) keeps the pre-existing provision on prior consultations: national lawmakers may allow qualified entities to seek definitive injunctive relief only if they have previously entered into consultations with the trader concerned, with the aim to end the infringement. In this case, if the trader does not cease the infringement within two weeks of receiving the request for consultation, the qualified entity may immediately bring a representative action for an injunctive measure. The rule, as such, should benefit both parties, as it can spare them the costs of proceedings; but, more than anything, it should benefit consumers, due to the expected shorter timing of consultations –compared with that of litigation.

33. From here on, the Directive establishes a series of additional provisions, which complete and improve the previous regime of injunctions, imposing duties and limits on national legislators:

(i) There is, in the first place, a new provision according to which a definitive measure may include 'a measure establishing that the practice constitutes an infringement' of the rights and interests of consumers (Article 8(2)(a)). In other words, the provision refers to the possibility for the courts –or administrative authorities- to render a declaratory judgment, establishing the 'illegality' or 'unlawfulness' of a practice. The label of 'cessation measures', therefore, includes also purely declaratory decisions, which could be the main aim of a claim and could later serve as ground to potential subsequent follow-on actions for compensation, either collective or individual.

(ii) It is established, secondly, that the granting of an injunction cannot depend on proof by the qualified entity of any actual harm (losses or damages) by the individual consumers affected by the infringement or of intent or negligence on the part of the trader (Article 8(3)). This highlights how injunctive relief, in its various forms, entails an abstract control on the legality or illegality of a practice, regardless of its actual repercussions. Seen from the reverse angle, it can also be said that an injunction is only legitimate after affirming that the practice qualifies as an infringement to EU consumer law.

(iii) Finally, Article 8(3) also forbids that national laws implementing the Directive require individual consumers to express their wish to be represented by the qualified entity seeking injunctive measures: in other words, consumers are not expected to participate in representative actions for injunctive relief. An opt-in model is thus excluded for this type of redress. This is logical, since the control carried out is general or abstract, focused on the impact of the infringement, not on consumers individually, but collectively in the most literal sense of the term: it seeks to 'clean' the market of illegal practices, regardless of the individual situation of consumers. Therefore, it does not make sense to demand neither their participation, nor some kind of authorization.

34. Injunctive measures ordinarily consist in orders for positive or negative performance,[51] so that non-compliance may lead to enforcement. In line with the previous

[51] Except for measures under Article 8(2)(a), which have a merely declaratory nature.

regime, Member States must arrange enforcement on the basis of penalties applicable to the failure or refusal to comply with injunctive measures (Article 19(1)(a)). These penalties shall be 'effective, proportionate and dissuasive' and, more importantly, Member States shall ensure that they are implemented, and that enforcement becomes real in practice, allocating sufficient resources to ensure compliance.

B. Compensatory relief (redress measures)

a) Content of compensatory relief

35. Redress for consumers harmed by an infringing practice can be achieved in different ways, depending on the circumstances of each case. Article 9(1) has chosen to establish a very generic formula, that of 'redress measures', followed by an exemplary list of possible remedies, such as compensation, repair, replacement, price reduction, contract termination or price reimbursement, as appropriate and as available Union or national legislation.

Under the label of 'redress measures', therefore, the European legislator wants to accommodate all those claims leading to impose on the trader the duty to perform one or more conducts in favour of the consumers concerned or, where appropriate, to accept legal changes (as happens with contract termination). The measures, thus, depend on the specific content of the infringed rights and of the remedies that European and / or national legislation associate to their infringement.

36. The European Parliament's report, [52] following the Commission's initial proposal and the 2013 Recommendation, sought to add a limit to the content of compensatory relief: the prohibition of punitive damages.[53] The approved text, however, does not expressly refer to this in its operative part, although Recital 42 is explicit: 'This Directive should not enable punitive damages being imposed on the infringing trader, in accordance with national law'. Consequently, the exclusion of punitive damages can be deduced, for each Member State, from the reference to national legislation: where punitive damages are prohibited - as is the case in most Member States belonging to the civil law tradition -, neither they may be granted in the framework of a representative action for redress. This legislative technique of 'reference by omission', however, carries a clear risk if cross-border representative actions are brought in a Member State that does admit punitive damages or an equivalent (such as Irish exemplary damages), thereby opening the door to forum shopping[54] and to potentially abusive representative actions.

b) ¿Opt-in or opt-out?

37. Beyond the content itself of redress measures, the Directive also addresses other issues, relating to the requirements to bring them and to their effectiveness. The first question that arises when designing a system of compensatory collective redress is whether the affected consumers shall necessarily adhere to the action if they want to

[52] Article 6(4 ter).

[53] See F. Parisi, M.S. Cenini, 'Punitive damages and class actions', in J.G. Backhaus, A. Cassone and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe. Lessons from America* (Edward Elgar, 2012), p. 131-146. In a more general way, H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009).

[54] See C. Poncibò, 'Forum shopping and consumer collective redress in action: the Costa Concordia case', in E. Lein D. Fairgrieve, M. Otero Crespo and V. Smith (eds.), *Collective redress in Europe: why and how?*, p. 251-272.

benefit from a potential positive judgment: in other words, it is the choice between an opt-in or an opt-out model. The 2013 Recommendation was clearly in favour of the former,[55] but the Directive has opted for greater neutrality. According to Article 9(2)

> Member States shall establish rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish within an appropriate time limit after that representative action has been brought, to be represented by the qualified entity in that representative action and to be bound by the outcome of the representative action.

If Member States decide to require an explicit adherence to the representative action, they will be facing an opt-in system. Determining what is to be regarded as a tacit expression of wish or consent may prove more confusing. For sure there is a tacit adherence, in the general framework of an opt-in system, if certain actions or behaviours of consumers are deemed as such. But there is also true tacit adherence if consumers are offered the option of expressing their refusal to be represented by the qualified entity and to be bound by the outcome of the action, and they do not use it within a specified deadline: passivity or lack of reaction - assuming adequate notification and information, as requested by Article 13(2)[56] - is comparable to an acceptance to be bound. For this reason, opt-out systems are also compatible with the Directive, as explicitly affirmed in Recital 43.[57] Member States will therefore keep a wide range of possibilities in order to implement changes or to keep pre-existing choices. The advantages and disadvantages of each mechanism have been analysed in depth by scholarship,[58] showing that in the end the choice between an opt-in or an opt-out system is a matter of legal policy: but, in principle, it will be a matter of national, not European, legal policy. Anyway, the Directive wants Member States to address explicitly this issue and to define how consumers are expected to express explicitly or tacitly their wish or consent. Consequently, a system based on a sort of mandatory representation, in which it would not be possible for an individual consumer to opt-out, will not be admissible: this is the rule for injunctions, but

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[55] Albeit quite unsuccessfully, see L. Ervo, '"Opt-In is Out and Opt-Out is In": Dimensions Based on Nordic Options and the Commission's Recommendation', in B. Hess, M. Bergström and E. Storskrubb (eds.), *EU Civil Justice. Current issues and Future Outlook*, p. 185-200

[56] According to Article 13(2),

> Member States shall set out rules that ensure that the consumers concerned by an ongoing representative action for a redress measure are provided with information about the representative action in a timely manner and by appropriate means, in order to enable those consumers to explicitly or tacitly express their consent to be represented in that representative action pursuant to Article 9(2).

[57] 'To best respond to their legal traditions, Member States should provide for an opt-in mechanism, or an opt-out mechanism, or a combination of the two. In an opt-in mechanism, consumers should be required to explicitly express their consent 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 that they do not consent 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 out of a representative action.'

[58] See T. Eisenberg and G. Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', 57 *Vanderbilt Law. Review* (2004), p. 1529: according to the study, less than 0.2% opt ut from class actions in the U.S.. See also R. Mulheron, 'The case for an opt-out class action for European Member States: A legal and empirical analysis', 15 *Columbia Journal of European Law* (2008-2009), p. 409; A-L. Sibony, 'A behavioural perspective on collective redress', in E. Lein, D. Fairgrieve, M. Otero Crespo and V. Smith (eds.), *Collective redress in Europe: why and how?*, p. 47-57.

it will not be acceptable when redress measures are at stake. Bearing in mind that joinder of injunctive and compensatory collective actions is permitted, it might turn necessary to coordinate potential differences in order to manage the issue of explicit or tacit consent of affected consumers.

38. Within this context of freedom to determine the personal scope of representative actions to obtain redress measures, the European legislator aspires nevertheless to make some impositions on national legislators.

(i) A common rule is wanted for cross-border situations, regarding the rights of individual consumers who are not habitually resident in the Member State in which the action is being brought. These abroad-resident consumers will have to explicitly express their wish to be 'included' in that representative action and to be bound by its outcome (Article 9(3)). An opt-in model is therefore imposed for abroad resident consumers, to avoid coordination problems between diverging models, which could cause difficulties for the recognition and, where appropriate, the enforcement of foreign decisions.[59]

(ii) Consumers who have explicitly or tacitly expressed their wish to be represented in a representative action can no longer be represented in another representative action, nor file individual claims, against the same trader and with the same cause of action (Article 9(4)). The broad scope of the rule makes it applicable for opt-in as for opt-out models.[60]

(iii) Member States shall ensure that consumers are not compensated more than once for the same cause of action against the same trader (Article 9(4)).

(iv) In many cases individual consumers entitled to benefit from the redress measures established by the court (or administrative authority) cannot be determined: in this situation, the measure shall at least describe the group of consumers who can benefit from the remedies (Article 9(5)). This description will be usually done by identifying the specific circumstances that determined the infringement and the entitlement to compensation.

In this regard, Article 7(2) states that the qualified entity, when bringing its representative claim, must provide the court (or administrative authority) with sufficient information about the consumers concerned by it. This requirement seems to seek several aims. On the one hand, it possibly serves to prove the link between the entity intending to bring the action and the specific infringement against which it acts - otherwise the claim may be inadmissible (Article 6(3)). But it also serves to lay the burden of determining with the greatest possible precision the personal circle or 'perimeter' of the action, i.e., who and how many - at least approximately - are the potential beneficiaries of the redress that is being sought.

c) Effects of collective compensatory relief

39. The European lawmaker has also sought to ensure minimum standards of effectiveness for representative compensatory actions, with consequences at different levels. From a more procedural point of view, Member States shall ensure that, once a redress measure has been granted, consumers are entitled to seek recovery of damages 'without the need to bring a separate action' (Article 9(6)). This provision, if strictly interpreted, entails a sort of mandate to 'dejudicialize' compliance with the judgment and,

[59] Recital 45 justifies this provision 'in order to ensure the sound administration of justice and to avoid irreconcilable judgments'.

[60] On this, see below, at 76.

where appropriate, its enforcement. In other terms, the European lawmaker seems to seek that consumers do not bear the burden to avail themselves of any judicial –or administrative- procedure in order to be considered as beneficiaries of the judgment and access the redress to be performed by the trader. A return to the court cannot be avoided in case of refusal or disagreement. But the system must provide mechanisms allowing compliance with the judgment without further ado and, more specifically, when the beneficiaries are not identified nominatim, they shall still be able to get the redress established in the judgment without having to obtain any sort of further judicial endorsement.

40. In this vein, the Directive assumes the possibility of establishing redress funds, i.e., something similar to the US *cy-près funds*:[61] if the redress consists in the payment of a compensation, a lump sum may be set in the judgment, the payment of which by the trader gives rise to a fund, which will be responsible for subsequently managing the payments to the beneficiaries. Article 9(7) sustains this conclusion, insofar as it establishes how 'Member States may lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits.' Each Member State would then have to determine who should organize and manage these funds - perhaps the qualified entity, or a third-party trustee – and how they would do it –namely, deciding on the destination of any outstanding sums.[62]

41. For this maximum effectiveness to be real, consumers benefiting of the collective action must be aware of its existence and, where appropriate, they must be informed of the redress measures granted by the court (or administrative authority). The Directive focuses part of its efforts precisely on ensuring adequate levels of information to consumers about the existence of the proceedings commenced by the qualified entity and about its outcome, so that they can properly exercise their rights in each context (Article 13(2)). Several information channels are envisaged:

— On the one hand, qualified entities must give information –preferably on their websites- about the representative actions they intend to bring, about the status of pending actions and about their outcomes (Article 13(1)). If their action has been successful, they will be entitled to recover the additional costs related to providing information to consumers (Article 13(5)).[63]

— On the other hand, traders will also be required, at their own expense and within specific time limits, to inform the consumers concerned by a representative action of any injunctive or redress measure granted by a court (or administrative authority) or of any approved settlement, unless they have been informed in another manner (Article 13(3)). If appropriate, the means to inform the consumers may include individual notification to all of them –and this, of course, may entail extraordinary additional costs-.[64]

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[61] On this, see R. Mulheron, *The Modern Cy-Près Doctrine: Applications and Implications* (Routledge Cavendish, 2006); A.-L. Sibony, 'Les actions collectives en droit européen: cent fois remettre sur le métier', 3-4 *European Journal of Consumer Law* (2010), p. 577-602, p. 598.

[62] The European Parliament's report proposed establishing two limits regarding the destination of this hypothetical outstanding funds: it cannot be returned to the trader, but neither can the qualified entity that had brought the action keep it. The final text is silent on this, although the proposal is more than reasonable.

[63] This is an important rule, since the costs of notification can be very high and, therefore, deterrent from the exercise of collective actions.

[64] Conversely, qualified entities may also be ordered to inform the concerned consumers about the final decisions on the rejection or dismissal of representative actions for redress measures (Article 13(4)).

42. The Directive also demands the existence of time limits for individual consumers to benefit from redress measures (Article 9(7)). In order to foster legal certainty, it would be advisable to set specific rules on this particular issue –reference to general provisions on limitation periods should not be sufficient.

C. Interaction between injunctive and compensatory relief

43. Injunctive and compensatory representative actions are different, inasmuch as they provide different types of relief; but they may also be complementary, which means they could also appear together in practice. A single infringement may give rise to collective actions serving different purposes, which, in turn, could be dealt with in a single procedure. It may be in the consumers' interest to join both types of action and the European lawmaker does not want that domestic legislation hinder or impede it. A very simple rule, set in Article 7(5), serves this purpose: where appropriate, Member States may enable qualified entities to seek injunctive and redress measures within a single representative action, so that those measures are also contained in a single decision.

More specifically, qualified entities shall be able to bring representative actions for a redress measure without it being necessary for a court (or administrative authority) to have previously established an infringement in separate proceedings (Article 9(8)). The Directive clarifies thus two sensible ideas. First, courts may only render a judgment including injunctive or redress measures if the existence of an infringement has been established: declaration of the existence of an infringement, however, does not have to be the main scope of proceedings, nor does it have to be established in previous proceedings. It shall be recalled, on the other hand, that measures establishing that a practice constitutes an infringement fall within the notion of injunctive claims, according to Article 8(2)(a); but this, of course, is not in itself an obstacle to bring such an action together with another one seeking redress measures.

6. Procedural tools to reinforce the effectiveness of representative actions

44. Beyond the most relevant pieces of the Directive's system – legal standing and available relief - a few additional procedural elements are added, in order to reinforce the effectiveness of representative actions.

A. Disclosure of evidence

45. In many consumer disputes, including collective ones, a significant part of the evidence is in the possession of the defendant trader or of third parties. Access to the relevant sources of evidence is a premise without which qualified entities will not be able to use their power to bring representative actions: they will not want to assume the risk of having to bear the costs of a process that will not be successful without enough evidence support.

46. The Directive, however, is not excessively proactive in this point, especially if compared with the system established in 2014 for competition damages claims.[65] Article 18 establishes the duty of Member States to open the door for qualified entities to obtain disclosure of evidence held by the defendant or a third party; but there is not much detail and a significant amount of requirements:

[65] On this, see D. Ashton, *Competition Damages Actions in the EU*, p. 86-136; in a very comprehensive manner, V.D. KERN, *Urkundenvorlage bei Kartellschadensklagen* (Mohr Siebeck, 2020).

— The qualified entity, in the first place, shall provide 'reasonably available evidence' showing that the representative action has sufficient support –one might think, for instance, of evidence submitted to the entity by individual consumers. The qualified entities shall show, in other words, a prima facie case, in order to prevent the risk of using this tool to carry on fishing expeditions.

— The qualified entity must also identify and indicate the evidence it intends to access and which lies in the control of the defendant or a third party. This requirement serves the same purpose of preventing abuse, although it should not be interpreted too restrictively, since this would render the provision useless. In this regard, the court should be satisfied if the qualified entity defines, in the most reasonably precise manner, the type of evidence it needs to have disclosed –a perfect and complete identification of specific pieces of evidence would be too high a standard.

— The court, in addition, is not obliged to grant the motion for disclosure of evidence. It must first assess and ensure respect for the rules on proportionality and on protection of confidential information.

— Disclosure of evidence –and this is of the essence– is to be ordered 'in accordance with national procedural law'. There is, therefore, a referral to domestic procedural rules and not a genuine common harmonized procedural tool. Courts shall have the power to order the disclosure of evidence –no doubt about it-, but there are no common specifications regarding the way, the time, the effects, and more especially the sanctions in case of non-compliance –and here might be the Achilles heel of the system. If compared with the equivalent rules in the field of competition damages claims, it looks as if the European lawmaker has not intended to provide a detailed system; on the contrary, the provisions are very general and remain conditioned by the procedural autonomy of Member States. In this author's view, however, a national regulation preventing or seriously hindering access to sources of evidence in practice could end up being considered by the Court of Justice as incompatible to the principle of effectiveness - no matter how much it would respect the principle of equivalence.

— Lastly, and in accordance to the principle of parties' equality, there is a reciprocal disclosure duty for qualified entities –or third parties- if requested by the defendant.

B. Effects of previous (judicial or administrative) final decisions

47. Consumer law can be subject to public enforcement –by administrative authorities acting as regulators and empowered to impose sanctions against infringements of consumers' rights and interests – and to private enforcement –through collective or 'representative' actions brought before courts or, in some Member States, before administrative authorities.[66] Both channels of enforcement have tended to develop in an uncoordinated manner. This determines that the administrative activity qualifying as

[66] Recital 19 reads as follows: 'Since both judicial proceedings and administrative proceedings could effectively and efficiently serve to protect the collective interests of consumers, it is left to the discretion of the Member States whether a representative action can be brought in judicial proceedings, administrative proceedings, or both, depending on the relevant area of law or the relevant economic sector. This should be without prejudice to the right to an effective remedy under Article 47 of the Charter, whereby Member States are to ensure that consumers and traders have the right to an effective remedy before a court or tribunal, against any administrative decision taken pursuant to national measures transposing this Directive. This should include the possibility for a party in an action to obtain a decision ordering the suspension of the enforcement of the disputed decision, in accordance with national law.'

public enforcement may not be beneficial to those affected by the infringement when they seek judicial redress in a disconnected way, in individual or collective proceedings. Lack of coordination, on the other hand, creates the risk that the same practice may be considered an infringement for public enforcement purposes, but deserves a different qualification in a process aimed at obtaining an injunction or redress measures.

48. The Directive offers its solution in Article 15, according to which the final decision of a court or administrative authority of any Member State concerning the existence –or non-existence– of an infringement 'can be used by all parties as evidence in the context of any other action before the national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on the evaluation of evidence'. Unlike the 2014 Directive on competition damages claims, the new Directive has waived to establish any sort of binding effect to judicial or administrative final decisions upon subsequent proceedings. Article 15 has preferred to remain in the playfield of evidence: a previous judicial or administrative final decision –national or rendered in another Member State- should help the qualified entity to lift the burden of proof on an issue usually hard to prove, the existence of an infringement, which is in turn in the basis of the trader's responsibility.

The rule, however, is quite strange, as it seeks to introduce a new type of evidence into the usual catalogue: the prior decision of another authority, may it be judicial or administrative, and national or foreign. One may dare consider it as strange, since judicial and administrative decisions are not a means of proof of the facts they declare as proven. The judgment, as a document, only proves its own existence, i.e., that it is the faithful expression of the court's decision - the same must apply mutatis mutandis to administrative decisions. Any judgment, of course, is based on the court affirming it is convinced about the positive or negative certainty of some facts; for this reason, the judgment includes the court's assessment of the evidence taken before it. But sustaining that the judgment proves what the court declares proven in it can be seen as a 'label fraud': it is as much as saying that the document proving that a court assesses some facts in a certain way is in itself proof of the certainty of the facts in question. What the new provision comes to indicate could be expressed, in somewhat colloquial terms, as follows: 'If another court or administrative authority has already affirmed that certain events have occurred –or not-, which amount to an infringement, then I can trust it and consider its conviction as a sufficient basis to support my own conviction'. If this reasoning is taken to its last consequence, we should assume that the previous judicial or administrative decision would not even be documentary evidence, but rather a sort of qualified written witness evidence.

49. Be that as it may, the flexible wording of the provision could be the origin of its own ineffectiveness, insofar as the Directive does not oblige to attribute a determined value to the decision; the court is merely allowed to uphold the existence or non-existence of the infringement, taking as evidential basis the previous decision, but only if this is compatible with national law on the evaluation of evidence. There is, in other words, a referral to national law, which the Directive does not oblige to modify, but rather will function as a limit to the effectiveness of the Directive at this point. In addition, free evaluation of evidence –also of this new type of evidence- does not ensure the purpose sought by the provision: many factors may be taken into consideration in order to assess if a foreign – or even national – final decision proves sufficiently the existence of an infringement (and, among these factors, one might expect the court's perception on the quality or fairness of the proceedings where the decision was issued).

From a different point of view, Article 15 may not be regarded as a limit to national law, if it wants to grant a stronger binding effect. This is clear, indeed, if the existence of an infringement has been declared in a judgment rendered as outcome of a representative action: the general rules on res judicata would probably apply if, in subsequent proceedings, a representative action for redress is brought into court. It is worth recalling, indeed, that such binding effect on individual claims –and, probably, proceedings- has already been endorsed by the Court of Justice of the European Union in *Invitel*,[67] in the field of unfair contract terms

> 'where the unfair nature of a term in the general business conditions has been acknowledged in an action for an injunction, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.'

C. Dealing with related procedures

50. One of the many problems raised by judicial protection of consumers is the difficult relationship between individual and collective actions or, if preferred, between the proceedings in which such actions are brought. Collective actions do not monopolize the judicial reaction against infringements of consumers' rights and interests. Individual actions are still possible, and in fact they are very frequent, for cultural reasons – strong individualism–, but also due to the pressure of a certain model of lawyering that emerged in the context of financial and banking litigation associated with the use of unfair contract terms.[68] Consequently, collective and individual actions can coexist.

In the field of unfair contract terms, it is worth recalling the ruling in *Sales Sinues*,[69] where the Court of Justice reacted against the *automatic* suspension of individual proceedings (aimed at declaring that a contractual term binding a consumer to a trader is unfair) on the basis that a collective action was ongoing (brought by a consumer association and seeking a final injunction to prevent the continued use, in contracts of the same type, of terms similar to those at issue in the individual action). By doing so, the Court was also indirectly denying any sort of automatic binding effect of the judgment rendered in the collective process on individual proceedings.[70] This, in turn, meant some sort of qualification to the previous decision made by the Court in *Invitel*[71] –where, as

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[67] Case C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, EU:C:2012:242.

[68] The situation in Spain, for instance, is very well described in M. Ortells Ramos, 'Tutela judicial civil colectiva y nuevos modelos de los servicios de defensa jurídica en España', 48 *Revista General de Derecho Procesal* (2019).

[69] Cases C-381/14 and C-385/14 Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.), ECLI:EU:C:2016:252. See S. Voet, 'Actions for collective redress', in B. Hess, S. Law (eds.) *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law II* (Beck-Hart-Nomos, 2019), p. 165-170.

[70] Section 41: 'In this context, it is also important to note that the need to ensure consistency between judicial decisions cannot justify such a lack of effectiveness since, as was stressed by the Advocate General at point 72 of his Opinion, the difference in nature between judicial control exercised in the context of a collective action and that exercised in the context of an individual action should, in principle, prevent the risk of incompatible judicial decisions.'

[71] Above, n 67.

mentioned above, the Court insisted in the convenience of providing the judgment granting an injunction with effects vis-à-vis all consumers who concluded with the trader a contract to which the same general business conditions apply, including those consumers who were not party to the injunction proceedings.

51. These decisions, however, have addressed the issue of connection between injunctive collective redress and individual actions seeking compensation. The Court of Justice has not made thus far any decision regarding the potential relationship between collective and individual compensatory actions –the former, indeed, will only belong to the landscape of EU law once the Directive has entered into force and has been implemented in Member States. Against this limited background, but being aware of the problem, the European legislator seems to have reached a minimum consensus, consisting in imposing a general obligation and a specific limit to Member States.

The general obligation is quite simple: 'Member States should lay down rules for the coordination of representative actions, individual actions brought by individual consumers and any other actions for the protection of the individual and collective interests of consumers as provided under Union and national law' (Recital 48). It will be up to each Member State to establish the appropriate means to ensure coordination, e.g., by means of lis pendens, related actions, joinder of proceedings or any other procedural tool designed for this specific purpose. Information is of the essence to ensure that these mechanisms are really operative and effective. In this vein, the European lawmaker proposes creating a useful tool: national electronic databases, publicly accessible through websites, providing information on qualified entities and on ongoing and concluded representative actions (Article 14(1)). If the data are specific –and not just statistics-, these databases could play a significant role in identifying whether there are simultaneous or subsequent proceedings having identical o related scopes, which would in turn allow a better application of the domestic rules on coordination.

52. As an exception to the general policy of referring this issue to the procedural autonomy of Member States the Directive has opted to impose a common rule for a specific situation: consumers who have explicitly or tacitly expressed their wish to be represented in a representative action 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 (Article 9(4)). The provision sets, indeed, three different prohibitions:

(i) The same individual consumer cannot be 'represented' in two different collective proceedings. The provision is clearly well-intentioned, but its practical operation can be very complicated, unless the information contained in the aforementioned databases is sufficiently specific (e.g., it includes a clear definition of the consumers or categories of consumers affected by two registered actions).

(ii) An individual action shall not overlap with a compensatory collective action, when the consumer has explicitly or tacitly adhered to it. In practice, this provision will become effective when the trader adduces in the individual proceedings the existence of the representative action and that the consumer belongs to the 'circle' of those whose rights are being - or have already been - represented in it. The rule is clear when it refers to the consumer's *explicit* wish or consent to be represented: this is the case of opt-in systems. As regards *tacit* wish, it may include consumers who, in an opt-out system, have not

exercised their power to opt-out,[72] provided that the system effectively ensures communication of this opt-out power. This means, in turn, that a consumer who brought an individual action may, in reaction to a potential motion for dismissal made by the trader on the basis of Article 9(4), adduce that she had no real knowledge of the existence of the collective process and that, therefore, she cannot be considered tacitly represented in it.

(iii) Finally, and as a substantive consequence of the previous prohibitions, it is established that consumers shall not receive compensation more than once for the same cause of action against the same trader.

53. This provisions on related actions, along with those on the evidentiary effects of final decisions, show a preference for collective/representative action over individual action. As a necessary complement, Article 16 offers a specific rule on interruption or suspension of limitation periods: the pending of representative actions for injunctive[73] and/or redress measures shall have the effect of suspending or interrupting limitation periods in respect of the consumers concerned by them.[74] These consumers, therefore, will not be prevented from subsequently bringing an individual action for redress measures regarding the same infringement on the sole ground that the applicable limitation periods expired during the development of the representative action. Dismissal or refusal of an individual subsequent action, however, may be possible on other grounds (for instance, due to the prohibition of double compensation).

D. Additional procedural requirements?

54. Harmonization is extremely reduced in the field of procedure itself. In line with the 2009 directive, Article 17(1) recalls that representative actions for injunctive measures shall be dealt with 'with due expediency' and, more specifically, when provisional injunctions are sought, 'by way of a summary procedure' if appropriate (Article 19(2)).

55. Apart from these two general recommendations -exclusively related to injunctions-, everything is referred to domestic legislation –with the limits, of course, of Article 47 CFREU[75]. This 'handwashing' is striking, particularly if one takes into account that collective actions require a higher level of case management and of judicial control

[72] Recital 46 endorses this view: 'Where consumers explicitly or tacitly express their wish to be represented by a qualified entity within a representative action for redress measures, regardless of whether that representative action is brought in the context of an opt-in or an opt-out mechanism, they should no longer be able to be represented in other representative actions or to bring individual actions with the same cause of action against the same trader. However, this should not apply if a consumer, after 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.'

[73] The judgment granting an injunction will serve as proof of the infringement in subsequent individual proceedings for compensation: for individual consumers, however, waiting will only be worth if they are certain that they will not lose their rights while the injunctive action is being processed.

[74] The group of concerned consumers will be more or less numerous, depending on the choice made in each Member State to implement the directive (opt-out or opt-in).

[75] It is worth recalling again Recital 12: 'In line with the principle of procedural autonomy, this Directive should not contain provisions on every aspect of proceedings in representative actions. Accordingly, it is for the Member States to lay down rules, for instance, on admissibility, evidence or the means of appeal applicable to representative actions.'

that would have justified a greater involvement of the European legislator.[76] In several places, in fact, the Directive grants powers and duties to the court directly linked to the best protection of consumer rights and the avoidance of an abusive use of representative actions (see, for example, what has already been pointed out regarding the manifestly unfounded nature of the claim, the existence of conflicts of interest in the qualified entity, checking whether other collective proceedings are pending with the same scope as the one pending before the court, or the approval of settlements). The Directive, however, has not established duties or limits regarding the use of these powers, which could have served, among other things, to reinforce mutual trust between Member States - which, in turn, would result in greater practical effectiveness of provisions such as that on the evidentiary effect of foreign decisions.

56. It has already been noted that the publication of the Directive was preceded by the approval, barely two months earlier, of the European Rules of Civil Procedure. On some points, the European Rules and the Directive are not fully compatible. This is namely the case regarding legal standing, which the Directive restricts to qualified entities, while the European Rules also grant it to individuals who are members of the group affected by the harmful event (rule 208 (c)). But for the rest, the European Rules do offer something about which the Directive is completely silent: a fairly detailed model of collective proceedings.[77] In this, therefore, the European Rules can serve as a basis to implement an effective system of collective proceedings for those legal systems that want or must make legal reforms on the occasion of the Directive's transposition or to extend collective redress beyond consumer law. Rule 210, for instance, provides for the contents of the statement of claim in collective proceedings, including all relevant information concerning the requirements for this type of litigation. The admission of collective proceedings is not automatic, but subject to a first judicial filter to verify that the established requirements are met and that leads to a 'collective proceeding order' (rules 212 and 213). Specific managerial powers of the court are set in rule 218, including the decision whether collective proceedings will operate on an opt-in or on an opt-out basis (rules 215 and 216). In relation to case management, two further tools are also envisaged: (i) the creation of a publicly accessible electronic register, in which collective proceedings must be entered, to avoid a plurality of collective proceedings against the same defendant(s) in respect of the same mass harm (rule 211); and (ii) each collective proceeding -including a potentially high flow of communications- must be managed on the basis of an ad hoc secure electronic platform.

7. Settlements

57. Collective settlements shall be admissible in the framework of representative actions, including those for redress measures. The extraordinary legal standing granted to

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[76] Cfr. I. TZANKOVA, 'Case Management: the stepchild of mass claim dispute resolution', 19 *Uniform Law Review* (2014), p. 329-351. With further much detail, the report by E. Falla, *Powers of the judge in collective redress proceedings* (Université Libre de Bruxelles, February 2012) (Research Paper submitted to BEUC, the European Consumer Organisation, available at https://www.beuc.eu/publications/2012-00227-01-e.pdf).

[77] The proposed rules on collective proceedings, in addition, benefit from the advantage of being included within the more general framework of the general rules, which provides full consistency to the system. For an in-depth analysis of the rules on collective procedings see A. Stadler, E. Jeuland and V. Smith (eds.), *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution* (Edward Elgar, 2020).

qualified entities to bring representative actions needs to be understood in a broad sense, i.e., empowering them to seek the most appropriate relief for consumers' interests, which includes reaching convenient settlements.[78] These settlements are subscribed by a qualified entity, but in the benefit of a group of subjects, which have not necessarily taken part in a judicial process –if it has started- or in any negotiations held prior to the agreement. Proper regulation of these settlements, therefore, lies in ensuring that the agreement reached is acceptable, both for the advantages it provides and for the damages that it does not unduly inflict on third parties.

58. The Directive only deals with settlements of claims for redress measures (Article 11); regarding injunctive measures, rather than real settlements, the Directive appears to expect traders to bring the infringement to an end as a result of the consultations envisaged in Article 8(4). Furthermore, the Directive only addresses settlements reached within the framework of a process, that is, once a representative action has been formally brought before a court -or administrative authority. Two potential scenarios are therefore assumed: (i) the parties have reached an agreement by their own means, which is submitted to the approval of the court or administrative authority; (ii) it is the court itself –or administrative authority– who invites the parties to try to reach an agreement regarding redress measures within a reasonable time limit.

59. A review or scrutiny of the settlement by the court - or by the administrative authority – is always required: without this approval it will not be effective. According to Article 11(2) some grounds should lead to a mandatory refusal of a proposed settlement, while others are left to the decision of national legislation. If the settlement is contrary to mandatory national law or includes unenforceable conditions, then the court –or administrative authority- will not approve it. Furthermore, if the national legislator establishes it when implementing the Directive, the settlement's approval may also be refused if it is considered unfair – unfair to the detriment of consumers, in this author's view; an assessment which in practice may prove really challenging.

If the proposed settlement is not approved, proceedings will continue (Article 11(3)). Approval, on the contrary, renders the settlement binding upon the qualified entity, the trader and the individual consumers concerned (Article 11(4)).[79] In this regard, Member States may set out mechanisms to give concerned consumers the possibility of accepting or refusing to be bound by this kind of settlements. The door is thus open to opt-in or opt-out systems for settlements, in addition to the prior domestic decision on how to establish from the outset the relationship between representative actions and the consumers potentially concerned by it.

This requirement –if established- ensures respect for basic procedural safeguards, but it may entail delays and additional costs, which should be analysed with caution. It might also be possible to obtain that consent for a potential settlement from the beginning of proceedings, so that: i) in opt-in models, those who join the action are warned that they must accept not only the judgment, but also a hypothetical settlement that is approved by the court; ii) in opt-out models, conversely, whoever does not exclude himself from the process may be affected not only by the judgment, but also by a settlement that may be

[78] On this, see C. Hodges and A. Stadler (eds.), *Resolving mass disputes: ADR and settlement of mass claims* (Edward Elgar, 2013).

[79] To avoid doubts, however, Article 11(5) clarifies that the redress measures obtained through an approved settlement shall be without prejudice to any additional remedies available under Union or national law, which were not the subject of that settlement.

approved. In this way, consent to be bound by the judgment and/or by the settlement could be gathered at once, reducing costs and time. The risk of this option is equally clear: consumers may be reluctant to issue such a broad 'blank check' to qualified entities, even though they may rely on judicial control to approve the settlement.

8. Funding and costs

60. The financial and economic dimension of representative actions has been one of the European legislator's main concerns.[80] Preparing, boosting and managing a collective process is rather complex and requires high human and financial efforts. Tasks such as identifying concerned consumers, communicating with them, obtaining evidence from them can consume high resources and become deterrents for the exercise of collective/representative actions, to the detriment of consumers' rights.

61. As seen before, the Directive requires qualified entities to bring cross-border actions not to be in a situation of insolvency; and it allows these entities to receive some supplementary support from Member States. These provisions, however, do not ensure a balanced regulation of the economic factors that can encourage or discourage the exercise of collective claims. The Directive tackles these issues with a series of rules seeking to 'square the circle'.

In the first place, third party funding of representative actions for redress measures is subject to strict control, through the provisions set out in Article 10, already mentioned, which oblige the qualified entity to disclose its sources of funding and to detect potential conflicts of interest, and which may lead to a waiver of the funding or to the rejection of the qualified entity's legal standing. These controls may be somewhat redundant or unnecessary, if one considers that these proceedings will probably offer very few incentives for third-party funders who are not altruistic - nor have an interest in harming the defendant. Indeed, the exclusion of punitive damages and a strict control over the destination of outstanding redress funds may mean that, in practice, third parties with the capacity to fund the process do not always see any benefit for them in doing so.[81]

In the second place, the allocation of costs of a representative active action for redress measures will follow the loser pays rule (Article 12(1)): the unsuccessful party will have to pay the costs of the proceedings borne by the successful party. This means that qualified entities bear the risk of having to face an order to reimburse costs to the successful trader. The provision is open to the conditions and exceptions provided for in national procedural law, a referral which seems essential, since it may offer the answer to relevant issues, especially in case of a partial success of the claim (e.g., if payment of a compensation is sought, it is probable that the judgment allocates a lower sum). On the

[80] In general terms, see R. Mulheron, 'Costs and Funding of Collective Actions: Realities and Possibilities', (Queen Mary University of London, Feb 2011) (A research paper for submission to the European Consumers' Organisation (BEUC) available online at https://www.qmul.ac.uk/law/media/law/docs/staff/department/71112.pdf); I. Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *Journal of Law, Economics & Policy* (2012), p. 549, p. 577; S. Voet, 'The Crux of the Matter: Funding and Financing Collective Redress Mechanisms', in B. Hess, M. Bergström and E. Storskrubb (eds.), *EU Civil Justice. Current issues and Future Outlook*, p. 201-222.

[81] See, among others, S. Menétrey, 'Le financement privé des actions collectives: perspective comparative et enjeux européens', *Revue internationale de droit économique* (2018-4), p. 499-515; A. Stadler, 'Third Party Funding of Mass Litigation in Germany. Entrepreneurial Parties – Curse or Blessing?', in L. Cadiet, B. Hess and M. Requejo Isidro, *Privatizing Dispute Resolution. Trends and Limits* (Nomos, 2019), p. 209-232.

other hand, this referral to national law may be detrimental to reaching a harmonized solution, [82] which should be suitable: in the field of the allocation of costs the general rule is as important as its nuances and exceptions.

Regarding exceptions, in fact, the Directive establishes an additional limit: individual consumers concerned by a representative action shall not pay the costs of the proceedings, so they may not be required to reimburse the trader nor the qualified entity (Article 12(2)). An exception to the exception, nevertheless, is considered acceptable for the costs of proceedings that were incurred as a result of individual consumers' deliberate or negligent conduct (Article 12(3)). It is doubtful whether such a provision will be really accepted by national lawmakers and, if so, whether it would be easily applicable in practice.

A final rule, already mentioned, needs to be recalled, which allows consumers to be required to contribute to the funding of the representative action by means of an entry fee or a similar participation charge, which should be 'modest' (Article 20(3)) –and the meaning of 'modest' may be different depending on the Member State or on what is at stake in the proceedings.

62. The Directive's policy in this field responds to a clear leitmotiv: prevent collective litigation from becoming a kind of niche for abusive litigation, with the potential to distort free competition, as this is how the phenomenon of US-style class-actions is perceived.[83] But if one reads the rules set by the Directive on this matter, the unavoidable question arises: how are then representative actions (i.e., European-style collective actions) going to be funded, more specifically, when they are predictably more expensive and complex, that is, when they concern a larger number of consumers? The answer, as has just been seen, results from the combination of multiple factors: i) the qualified entities' own resources, taking into account that they cannot be profit-making oriented; ii) Member States, to the extent and in the manner in which they so decide, e.g. through grants or subsidies, exemptions from judicial fees or by linking to this purpose the fines collected for non-compliance with injunctions; iii) the consumers themselves, if 'modest' contributions can be required from them to join the collective proceedings; iv) law firms, insofar as the limits imposed by national legislation on contingency fees agreements allow them to obtain a profit margin; v) third parties who, without being involved in a conflict of interest, find some legitimate incentive to fund the action.

In view of the panorama, it is difficult to predict the level of practical utility of the tool designed by the European legislator. There is a clear risk of 'death by starvation' if funding really becomes a problem. And this, in turn, forces to consider whether there is really no way to establish an effective system of compensatory collective redress other than US-style class actions or, at least, a system that uses some of the features of the US model.[84] If the operation of the system ends up depending on the public support received

[82] See on this A. Dori and V. Richard, 'Litigation Costs and Procedural Cultures. New Avenues for Research in Procedural Law', in B. Hess, X. Kramer (eds.), *From common rules to best practices*, p. 303-351.

[83] S. Issacharoff and G.P. Miller, 'Will Aggregate Litigation come to Europe?', 62 *Vanderbilt Law Review* (2009), p. 179, esp. pp. 197-202; R. Nagareda, 'Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism', 62 *Vanderbilt Law Review* (2009), p. 1-52.

[84] G. Calabresi and K. Schwartz, 'The costs of class actions: allocation and collective redress in the US experience', *European journal of law and economics* (2011-2), p. 169-183; A. Stadler, 'Abtretungsmodelle und gewerbliche Prozessfinanzierung bei Masseschäden', *Wirtschaft und Wettbewerb* (2018-4), p. 189-

by qualified entities, a time will come when the system itself will be considered redundant and where the most feasible option would be creating a public regulatory superstructure,[85] such as the European Ombudsman for collective redress whose potential establishment is envisaged by Article 23(3).[86]

9. Is there a European model of collective redress (beyond the rejection of the US model)?

63. These last considerations lead to determine whether the new Directive is really setting a European model for collective redress, i.e., if we are facing a real European way to collective redress. It all depends, of course, on the meaning of 'model'. In this author's view, there is only a model where the essential defining elements of the system are determined, even if there is space for local variations –in each Member State-. Unfortunately, an assessment of the basic elements established in the Directive does not allow the identification of a reasonably complete model.

On the one hand, representative actions as set out in the Directive will not be the single formula for collective redress. On the contrary, national systems may well have other different tools serving the same purpose, which may be different from the one outlined in the Directive. A so-called European system, therefore, would and will compete with a potentially wide set of national alternative systems.

On the other hand, very relevant aspects and elements of the European system are not established in the Directive but referred to the procedural autonomy of Member States. Many pieces of the system may –and certainly will- thus differ from one country to another. It is not just a matter of procedural structure or architecture: as far as the development of proceedings is concerned, there is almost no harmonization; it is therefore hard to detect any 'common pieces', such as a potential preliminary phase to assess compliance with the requirements regarding the qualified entity's legal standing or the representative action's funding, for instance. The Directive offers so much freedom to the Member States that, for example, in some of them representative actions for compensation may be brought before administrative authorities, something more than unthinkable in many others. Moreover, a key defining element, such as the choice between an opt-in and an opt-out model remains equally undefined, despite the radical change in approach underlying to each of them. The same happens, to give another example, with access to sources of evidence held by the opposing party or third parties, the effectiveness of which will depend on national implementation.

194; J.G. Backhaus, A. Cassone and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*.

[85] On the practical relevance of Ombudsman structures to provide better protection for consumers, see C. Hodges, 'Consumer Ombudsmen: Better Regulation and Dispute Resolution', 15 *ERA Forum* (2014), p. 593-608; N. Creutzfeldt, 'How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers', 37 *Journal of Consumer Policy* (2014), p. 527-546; N. Creutzfeldt, 'Ombudsman Schemes – Energy Sector in Germany, France, and the UK', in P. Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, p.101-122.

[86] According to Article 23(3), 'By 26 June 2028, the Commission shall carry out an evaluation of whether cross-border representative actions could be best addressed at Union level by establishing a European for injunctive measures and redress measures and shall present a report on its main findings to the European Parliament, the Council and the European Economic and Social Committee, accompanied, if appropriate, by a legislative proposal.'

64. There are, of course, several questions defined by the Directive with sufficient clarity. The main one, in this author's opinion, is the strong will to control legal standing to bring collective actions, which is intended to serve as a filter to prevent misuse of the system and to ensure adequate representativeness. The Directive opts for an extraordinary legal standing concentrated on a closed list of entities, over which strict public control is foreseen. Therefore, it excludes any margin of action for individuals[87] and for any manifestation of 'spontaneity'.

The interest of the European legislator in defining the remedies that can be claimed by means of representative actions is also striking. In this, there is a clear purpose to categorize potential types of redress, linking them, especially in the field of compensatory actions, to the content of the infringed rights -defined, for the most part, also by the European legislator.

Another defining element of the system is the intention to subject cross-border cases to greater controls. Two opposing drives collide here: on the one hand, the fear of the Member States that their economic systems will suffer distortions from abroad, through collective/representative actions; on the other, the basic idea of the European Union as a common market, whose dimension as an Area of Justice is based on the principle of mutual recognition and mutual trust.

It is necessary to recall, lastly, the lack of clarity of the Directive regarding the economic dimension of collective litigation. The aim is clear - to discourage abusive collective litigation - but the means set out entail the risk that there are no longer enough incentives for the tool to be used in practice.

65. These elements make up a sort of 'hard core' of the Directive, from which it can be deduced to a large extent that the European legislator is wanting to 'have it both ways'. Collective redress is essential for the proper enforcement of consumer law and, in a common economic and legal area such as Europe, it is imperative to achieve minimum common standards and promote a certain harmonization - there is no choice but to 'swimming' in the mainstream of collective redress. But, at the same time, the US model of class actions is avoided, as it is considered a source of abusive litigation, potentially distorting the European economic-productive model[88] - hence the desire to avoid the 'ugly face' of collective litigation.

But having it both ways is not simple. The European legislator, for example, does not have an easy time prohibiting punitive damages, since they may be acceptable in the legal systems of some Member States and, in fact, they have not been considered incompatible with public policy for the purposes of their recognition and enforcement in some Member States where they do not exist.[89] Avoiding *abusive* third party funding may be regarded as some sort of misleading advertising, since the system no longer offers the

[87] There is always the question of whether the action of these subjects should be encouraged or, on the contrary, they should be mistrusted: see T. Eisenberg and G. Miller, 'Incentive Awards to Class Action Plaintiffs: an Empirical Study', 53 *UCLA Law Review* (2005-2006), p. 1303.

[88] On the interaction between collective actions and economic system, see D. Hensler, C. Hodges, and I. Tzankova (eds.), *Class actions in context: How culture, economics and politics shape collective litigation* (Edward Elgar, 2016).

[89] This is indeed not a new question: see E.C. Stiefel, R. Stürner and A. Stadler, 'The enforceability of excessive U.S. punitive damage awards in Germany', 39 *American Journal of Comparative Law* (1991), p. 779-802. A recent discussion has taken place in Italy, as noted by E. D'Alessandro, 'Reconocimiento y exequátur en Italia de sentencias extranjeras que condenan al pago de daños punitivos', 34 *Revista de Derecho Privado* (2018), p. 313-326.

incentives that could justify a legitimate third party funding - or funding by the law firms themselves. In addition, establishing funds to receive and manage compensation, as a tool to prevent consumers from resorting to individual subsequent procedures to collect what they are entitled to receive - privatizing the enforcement of judgments - places the European system right on the other side of the Atlantic.

The Directive, therefore, may be regarded as the result of an exercise in realism, with the contradictions that this always entails. It is, in other words, a faithful reflection of the state of affairs within the Union and, to that extent, it is an example of the maximum consensus that could be obtained from the Member States in a matter considered by them as very sensitive and full of red lines.

PART 2

The Implementation of the Collective Redress Directive into the Spanish Procedural System: Key Elements of the Draft Act on Representative Actions

Fernando GASCÓN INCHAUSTI

Universidad Complutense de Madrid

1. At the beginning of this year (2023), the Spanish Ministry of Justice circulated the Draft Act on representative actions for the protection of the collective interests of consumers (*Anteproyecto de ley de acciones de representación de los intereses colectivos de los consumidores*). This is the first step towards transposing Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020[90] into Spanish legislation; in fact, it is a first step that was already late, as the regulations to transpose the provisions of the Directive should have been published by 25 December 2022 and, in any case, should have been applicable on 25 June. At the time of submitting this manuscript, in fact, the conversion of this Draft into a Project that can pass through Parliament is on hold, due to the general elections in July 2023 and the uncertainty as to when a new government will be formed. I understand, however, that the issue is still of interest to readers, because it is to be expected that the terms of the initiative will be maintained, albeit with even more delay than has already accumulated.

I. THE MODEL OF THE REPRESENTATIVE ACTIONS DIRECTIVE

2. The Directive on representative actions was adopted after a laborious effort, due to the reluctance of certain Member States and the difficulty of finding a balance between the

[90] OJ L 409, 4.12.2020, p. 1–27 (Representative Actions Directive, RAD hereinafter).

conflicting interests of those who are strongly committed to consumer protection - and, of course, to the full effectiveness of European consumer law - and those who are wary of the arrival on European soil of US class actions, with all the side effects that this would entail.[91]

3. This is, in fact, the driving idea behind the Directive's regulation: to deploy a comprehensive system of collective consumer redress that is immune from abuse.

a) As to the first point - to deploy a complete system of collective redress for consumers - it should be recalled that since 1998 the European legislator has obliged Member States to have a system of injunctions for the defence of consumers: in application of a 1998 Directive[92] (updated in 2009[93]) there are mechanisms in the national procedural systems that give standing to some entities to request that businesses or professionals cease or refrain from actions contrary to consumers' rights. The injunction or restraining order benefits all those who have been affected by the unlawful conduct and prevents other consumers from being harmed in the future: this is why such actions can and often are said to be "collective". What the injunction does not provide, however, is a remedy for the harm that the illegal conduct has caused to the individual consumers affected.

This has been the workhorse for more than fifteen years - the most relevant milestone along the way was the Recommendation addressed by the Commission to the Member States in 2013 on collective injunctions or compensation mechanisms[94] - as the economic

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[91] See, on this, among many others, F. Gascón Inchausti, "A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November", *GPR-Zeitschrift für das Privatrecht der Europäischen Union – European Union Private Law Review – Revue de droit privé de l'Union européenne*, 2-2021, pp. 61-80; C.A. Kern and C. Uhlmann, Kollektiver Rechtsschutz 2.0? Möglichkeiten und Chancen vor dem Hintergrund der Verbandsklagen-RL", *Zeitschrift für Europäisches Privatrecht*, 4-2022, pp. 849-883. Prior to the Directive's approval, see also A. Biard and X.E. Kramer, "The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?", *Zeitschrift für Europäisches Privatrecht*, 2-2019, pp. 249-259; T. Domej, "Die geplante EU-Verbandsklagenrichtlinie – Sisyphos vor dem Gipfelsieg?", *Zeitschrift für Europäisches Privatrecht*, 3-2019, pp. 446-471.

[92] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.6.1998, p. 51–55).

[93] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) (OJ L 110, 1.5.2009, p. 30–36).

[94] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201 26.7.2013, p. 60–65. On this, among others, see the *Statement of the European Law Institute on Collective Redress and Competition Damages Claims* (2014), esp. pp. 11-60 (available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf, last accessed 31.7.2023); E. Silvestri, "Towards a common framework of Collective Redress in Europe? An Update of the latest Initiatives of the European Commission", *Russian Law Journal*, 1, 2013, p. 46–56; S. Corominas Bach, "Hacia una futura regulación de las acciones colectivas en la Unión Europea (la Recomendación de 11 de junio de 2013)", *Revista General de Derecho Europeo*, 34 (October 2014), p. 1–30; J. Sorabji, "Reflections on the Commission Communication on Collective Redress", *Irish Journal of European Law*, Vol. 17, 2014, p. 62–76; S. Voet, "European Collective Redress: A Status Quaestionis", *International Journal of Procedural Law*, Vol. 4, 2014, p. 97–128; C. Hodges, "Collective Redress: A Breakthrough or a Damp Sqibb?", *Journal of Consumer Policy*, Vol. 37, 2014, p. 67–89; A. Biard, "Collective redress in the EU: a rainbow behind the clouds?", *ERA Forum*, Vol. 19, 2018, p. 189–204; R. Mulheron, "A channel apart: why the United Kingdom has departed from the European Commission's Recommendation on class actions", *Cambridge Yearbook of European Legal Studies*, Vol. 14, 2015, p. 36–65; A. Stadler, "Die Vorschläge der Europäischen Kommission zum kollektiven Rechtsschutz in Europa – der Abschied von einem kohärenten europäischen Lösungsansatz?", *Zeitschrift für das Privatrecht der Europäischen Union*, 2013-5, p. 281–292; C.I. Nagy, "The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?", *Maastricht journal of European and comparative*

consequences of an injunction are undoubtedly much less burdensome than those that may be associated with a judgment ordering that all or, if not all, a very large number of harmed consumers receive appropriate redress. Therefore, the most significant aspect of Directive 2020/1828 is precisely the fact that it obliges Member States to have effective instruments in their national legal systems to enable the exercise of collective actions for redress or compensation.[95]

b) And, precisely as a counterweight, the aim is to ensure by all means that the exercise of these collective actions for compensation will not be abusive, i.e. that they cannot be used in a tortious manner to distort the functioning of the market and/or the economic activity of producers and companies.[96] The terminology used is a clear indication of this desire to mark a distance from what is happening in the United States:[97] the term "representative actions" is used, not "collective" actions or "class" actions. But, apart from the symbolism of the words, the Directive uses several tools to achieve this end. Thus, standing is to be restricted to certain qualified entities, which must be approved by the Member States (Art. 4 RAD) and subject to their supervision (Art. 5 RAD): this excludes the possibility of a single consumer affected being able to set himself up as a class representative and, with the support of a law firm, bring a class action for damages - as is usually the case in the United States. It is also foreseen that unfounded claims can be dismissed "at the earliest possible stage of the proceedings" (Art. 7.7 RAD). The "allergy" to US-style class actions is also visible when the imposition of punitive damages is strongly discouraged (recitals 10 and 42 RAD). In the same vein, the prohibition that the representative action can be financed by a third party when there is a conflict of interest (Art. 10 RAD) is also relevant.

II. THE IMPACT OF THE DIRECTIVE ON THE SPANISH LEGAL SYSTEM AND THE OPTION FOR AN IN-DEPTH REFORM OF THE SPANISH COLLECTIVE CONSUMER PROTECTION SYSTEM

4. Once the Directive has been approved, each national legislator has had to analyse its real impact on its own legal system, as a prior step towards its transposition. In Spain, the

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law, 2015-4, p. 530–552; C. Meller-Hannich, "Kollektiver Rechtsschutz in Europa und Europäischer Kollektiver Rechtsschutz", *Zeitschrift für das Privatrecht der Europäischen Union*, 2014-2, p. 92–98; G. Barker and B.P. Freyens, "The economics of the European Commission's recommendation on collective redress", in E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), *Collective redress in Europe: why and how?*, British Institute of International and Comparative Law, 2015, p. 5–30.

[95] On this, A. Bruns, "Einheitlicher kollektiver Rechtsschutz in Europa?", *Zeitschrift für Zivilprozess*, Vol. 125, 2012, p. 399–419; T. Domej, "Einheitlicher kollektiver Rechtsschutz in Europa?", *Zeitschrift für Zivilprozess*, Vol. 125, 2012, p. 421–458; H. Willems, "Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverbands der Deutschen Industrie (BDI)", in C. Brömmelmeyer (ed.), *Die EU-Sammelklage, - Status und Perspektiven*, Nomos, Baden-Baden, 2013, p. 17–20; A. Stadler, "Class Actions in den USA als Vorbild für Europa?", in C. Brömmelmeyer (ed.), *Die EU-Sammelklage, - Status und Perspektiven*, p. 91–108.

[96] On the interplay between collective actions and economic system, see D. Hensler, C. Hodges and I. Tzankova (eds.), *Class actions in context: How culture, economics and politics shape collective litigation*, Edward Elgar, Cheltenham, 2016.

[97] See S. Issacharoff and G.P. Miller, "Will Aggregate Litigation come to Europe?", *Vanderbilt Law Review*, Vol. 62, 2009, p. 179 and ff., esp. 197–202; R. Nagareda, "Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism", 62 *Vanderbilt Law Review* (2009), p. 1–52; on the perception of US class actions as potential weapons to distort competition, C. Silver, "We're Scared to Death': Class Certification and Blackmail", 78 *New York University Law Review*, Vol. 78, 2003, p. 1357–1430.

entry into force of the Civil Procedure Act of 2000 (*Ley de Enjuiciamiento Civil*, LEC hereinafter) led to the appearance of procedural tools for the exercise of collective actions in consumer matters, with no limits as to their content, including also claims for compensation *lato sensu*. The transposition in 2002 of the 1998 Directive on injunctions, moreover, endowed this injunctive relief with a specific procedural regime. Viewed on a broad scale, it could be said that the existing Spanish legal system is indeed compatible with the Directive - it does "comply" with its main requirements. Consequently, it could be thought that the implementation of the Directive in the Spanish legal system would not entail excessive difficulty, beyond the necessary technical adjustments.

A closer comparison shows, however, that there are many "details" that the Directive regulates and that the existing system lacks; and not only details, but essential parts of the Directive's model, such as redress settlements, are currently conspicuous by their absence. Moreover, there are provisions in the Directive that may clash to a large extent with the will of the European legislator, especially regarding compliance with and enforcement of judgments and, where appropriate, redress settlements.[98]

On the other hand, it cannot be overlooked that the current regulation has not served to channel in practice the judicial protection of situations in which the collective rights and interests of consumers have been harmed. There are several reasons for the failure in practice of the class action model of the LEC;[99] but among them one should undoubtedly count a clearly incomplete and insufficient legal regulation, which does not provide the legal operators involved -primarily judges and lawyers- with an adequate environment of "procedural legal certainty".

5. The need to implement the Directive has thus served as an opportunity to propose a comprehensive restructuring of the Spanish collective action regime, both in its most external or visible aspects and in its very content.

a) In the external sphere, the Draft proposes to systematically regulate this issue in Book IV of the LEC, in a new Title IV, under the heading "Proceedings for the exercise of representative actions for the protection of the collective interests of consumers and users". With this, it is proposed to add 58 articles to the LEC (new Articles 828 to 885). This in turn entails abandoning the previous regulatory technique, which had consisted of establishing procedural specialities for collective proceedings dispersed in those parts of the LEC in which the procedural requirement, the procedure or the procedural effect that this speciality was to affect was regulated (e.g., when dealing with capacity to be a party, intervention, venue, consolidation of proceedings, res judicata or enforcement). It is therefore proposed to remove practically all references to collective redress from the general provisions of the LEC, except for a couple of mentions when dealing with the

[98] On this, F. Gascón Inchausti, "Acciones colectivas y Derecho Europeo: el impacto de la Directiva 2020/1828 en el sistema procesal español", in *Estándares europeos y proceso civil. Hacia un proceso civil convergente con Europa* (F. Gascón Inchausti and P. Peiteado Mariscal, eds.), Atelier, Barcelona, 2022, p. 699–748.

[99] See, in the Spanish litterature, M. Ortells Ramos, "Tutela judicial civil colectiva y nuevos modelos de los servicios de defensa jurídica en España", *Revista General de Derecho Procesal*, Nº. 48, 2019; M. Aguilera Morales, "Ante el reto de diseñar un modelo de tutela colectiva de manos de la Directiva (UE) 2020/1828", *Revista Española de Derecho Europeo*, núms. 78-79, 2021, p. 97–138 A. Armengot Vilaplana, *Hacia la reconstrucción de la acción colectiva*, Aranzadi, Cizur Menor, 2020; J. Martín Pastor, *Las técnicas de reparación judicial colectiva en el proceso civil. De las incipientes acciones colectivas a la tradicional acumulación de acciones*, Tirant lo Blanch, Valencia, 2019 G. Ormazabal Sánchez, "Los ejes fundamentales del sistema de acciones colectivas. Un intento de clarificación y propuestas de *lege ferenda*", *Justicia*, 2020-2, p. 47–11.

appeal in cassation (to ensure that it is always admissible) and provisional enforcement (to deny it).

Likewise, the Draft amends another relevant legal text, the General Law for the Defence of Consumers and Users (*Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios*), especially Chapter I of Title V, which no longer should regulate injunctions - their regime should be fully incorporated into the LEC - and should address the legal standing to bring representative actions, establishing which entities will be qualified for this purpose, the requirements to be met by consumer associations that aspire to this qualification, the procedure to be followed to obtain it and the mechanisms for supervision, evaluation and revocation.

The Draft, finally, proposes amending special Acts including specific provisions on collective redress and, namely, on collective injunctions to protect consumers' rights and interests, basically to adapt them to the proposed new provisions on legal standing and to the new proposed procedural rules.[100]

b) In terms of content, the 58 new articles to be included in the LEC offer a much more extensive and exhaustive legal treatment of the matter. First of all, because they cover issues that were hitherto not expressly envisaged in the legislation. And, in general, because they offer detailed provisions on the what, when and how of the different pieces and phases of the proceedings. Undoubtedly, the result is sometimes long and lengthy provisions, with frequent internal references, which require careful study of the whole. But this is in keeping with the regulatory culture of the Spanish procedural system, where both judges and lawyers are accustomed to working under the "umbrella" of detailed regulations and that, as pointed out earlier, offer them a context of procedural legal certainty that allows them to perform their respective functions better. And this element, even if it is more sociological, is important when it comes to promoting a better application of the law.

III. THE 2023 DRAFT ACT ON REPRESENTATIVE ACTIONS: COMMON FEATURES

6. Backing against the above considerations, the following paragraphs aim to provide an overall description of the system proposed in the Draft. I will first deal with those aspects that are common to the system, and then I will deal separately with the regime of injunctions and, above all, that of actions seeking redress measures. I will omit references to specific articles of the proposed text, as it is conceivable that there will be changes, if it is adopted. And, purely for reasons of style or economy of language, I will sometimes use the expression "collective action" as a synonym for representative action, and the expression "collective proceedings" to refer to proceedings in which a representative action is brought.

A. A system focused on consumer protection

7. In the abstract, collective redress systems can be envisaged in all areas of the legal system in which infringements may occur that generate homogeneous harm to a plurality of subjects. The 2020 Directive, however, only obliges Member States to implement

[100] Namely, the following legal texts should be modified: Acts on unfair competition, general contract terms, information society services, distance marketing of financial services, contracting of goods with an offer of restitution of the price, contracting of mortgage loans or credits, free access to service activities, consumer credit contracts, timeshare, guarantees and rational use of medicines.

collective redress mechanisms in line with its standards when it comes to the protection of consumer rights in those areas in which there has been prior regulatory action by the European legislator - which are listed in Annex I of the Directive. The aim, at least for the time being, is to strengthen the application of European consumer law as much as possible, leaving aside other possible sectors (e.g. the environment).

The Spanish legislator, like any other national legislator, is free to establish collective redress mechanisms with a broader scope, as long as the consumer sector is covered. However, the option of the Draft consists of restricting the proposed new regulation to the consumer sphere. However, unlike the Directive, an open and generic reference has been preferred: the system is proposed to be used to react against any conduct or practice by businesses or professionals which infringes the collective rights of consumers, without further specification. Therefore, all the sectoral areas of consumer law referred to in Annex I of the Directive are covered, including those that are not strictly speaking consumer protection rules but whose application may lead to infringements with harmful results for those who have had dealings with businesses or professionals in their capacity as consumers: this is the case, most notably, with the protection of personal data (the GDPR is listed in Annex I). Moreover, the generic scope of the regulation proposed by the Draft allows the bringing of collective actions in sectors not mentioned in Annex I of the Directive, provided that the aim is to protect consumers: this opens the door, for instance, to collective actions to claim compensation for damages caused to consumers - but only to them- as a result of the infringement of antitrust rules (despite the fact that this sector has been consciously left outside the scope of the Directive).[101]

B. Specialised and "empowered" courts

8. It is necessary to entrust the conduct and management of these proceedings to specially qualified courts. This qualification, in my view, is to be achieved in two distinct but complementary ways: specialised courts and "empowered" courts are needed.

a) The proper functioning of a collective action system can only be ensured if it is placed in the hands of specialised courts, i.e. expert in the matters being adjudicated, but also in the unique way of handling this type of proceedings. This specialisation can of course be encouraged through ad hoc training programmes; but it also needs to be backed up organically or, if preferred, organisationally.

On this point, the Draft proposes attributing these proceedings to the Courts of First Instance (*Juzgados de Primera Instancia*), rather to the Commercial Courts (*Juzgados de lo Mercantil*), irrespective of their subject matter. But they must be specialised courts, preferably with a provincial scope, handling only these type of proceedings or, at least, all the collective proceedings brought in their districts. These proceedings should be concentrated in a few courts which, if possible, are not overcrowded from the outset.

b) But, in addition to being specialised, the courts hearing collective proceedings must be "empowered" courts –something quite disruptive in the current landscape of the Spanish judiciary.[102] In my opinion, an "empowered" court is one in which three circumstances

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[101] See G. Bándi, P. Darák, P. Láncos and T. Tóth (eds.): *Private Enforcement and Collective Redress in European Competition Law (2016 FIDE Congress)*, Wolters Kluwer, Budapest, 2016; F. Weber, "'A chain reaction' or the necessity of collective actions for consumers in cartel cases", *Maastricht journal of European and comparative law*, 2018-2, p. 208–230; D. Ashton, *Competition Damages Actions in the EU* (2nd ed.), Edward Elgar, Cheltenham, 2018, p. 281–351.

[102] The prevailing view is that described and sustained in A. De la Oliva Santos, *El papel del juez en el proceso civil*, Civitas, Cizur Menor, 2012.

concur: i) it has been legally attributed with powers; ii) it is aware that it has them; iii) the legislator - in the abstract - and the litigants - in each specific case - expect it to exercise them and, in fact, can force it to use them. These powers of the court are not limited to the formal management of the proceedings, but also have an impact on their material management, as these two areas are particularly difficult to distinguish in collective proceedings.[103]

The Draft seeks to achieve this through rules that in some points of the regulation of the proceedings must be "open", in the sense that they do not predetermine the court's decision regarding a specific aspect of the proceedings, nor do they offer it closed guidelines or criteria that depend on "verifiable" elements, but force it to decide according to discretionary parameters, depending on the circumstances of the case and on what is considered best for the proper administration of justice, weighing the opposing interests in an appropriate manner.

C. Restricted and monitored legal standing

9. The regulation of standing to bring representative actions (whatever type of action they may be, i.e. without distinguishing between injunctive and compensatory actions) is envisaged to be delegated by the LEC to the General Law for the Defence of Consumers and Users. On this point, the Draft proposes changes of some relevance, as it proposes limiting the legal standing to (i) the Public Prosecutor's Office, (ii) the Directorate General for Consumer Affairs and other public bodies or entities with competence in matters of consumer protection and (iii) consumer associations that are qualified to bring representative actions.

In contrast to the current situation, the mere fact of being registered as such does not ensure that a consumer association has standing to bring collective actions. In order to be qualified to bring collective actions, a consumer association will have to comply with a series of requirements, which the Directive only sets for those that aspire to the exercise of cross-border collective actions - that is, representative actions in Member States other than the one in which they are established -, but which the Draft - following in this respect the recommendation of the Directive - has opted to extend also to purely domestic cases.[104] These requirements are aimed at ensuring a certain "seriousness" in the exercise of collective actions -consistent with the purpose of avoiding abusive collective litigation- and, to a large extent, coincide with those already required by Spanish legislation for registration as a consumer association. In particular, it should be noted that associations are required to have effectively and publicly carried out for a minimum period of one year the activity proper to their purpose of protecting the interests of consumers: this is intended to close the door to possible *ad hoc* associations and, of course, leaves out of the system the "consumer groups" which, according to the regime still in force, have capacity to be a party and standing to bring collective actions if they are made up of more than half of those affected by the harmful event.[105]

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[103] See I. Tzankova, "Case Management: the stepchild of mass claim dispute resolution", *Uniform Law Review*, 2014, Vol. 19-3, p. 329–351; also M. Strandberg and V. Smith, "Case management and the role of the judge", in A. Stadler, E. Jeuland and V. Smith (eds.), *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution*, Edward Elgar, Cheltenham, 2020, p. 164–181; C.A. Kern and C. Uhlmann, "Kollektiver Rechtsschutz 2.0?", 881–882.

[104] Art. 4.5 RAD establishes that "Member States may decide that the criteria listed in paragraph 3 [to be qualified in order to bring cross-border representative actions] also apply to the designation of qualified entities for the purpose of bringing domestic representative actions".

[105] See, on this, Article 6.7 LEC.

The fulfilment of the requirements on which the entitlement to bring collective actions depends, on the other hand, is subject to supervision. Apart from a more general and administrative control, pursuant to the Draft the defendant should be entitled to allege in the proceedings that the plaintiff entity lacks those requirements, as a formula for obtaining (after a report from the Ministry of Consumer Affairs) the dismissal of the proceedings or, at least, the exclusion of the affected entity from the proceedings –if there were other co-plaintiffs–: this is a piece of legislation that is part of the aim of avoiding abuses.

D. A Public Register of Representative Actions (and some other common elements of the system)

10. As a key element for the proper functioning of a system of collective actions, it is proposed that a Public Register of Representative Actions be created, of an electronic nature and based at the Ministry of Justice -similar to those that exist in other EU countries[106]-. This register should contain information on the collective claims admitted for processing, their scope, both objective and subjective, as well as the procedural milestones that are relevant for better coordination between collective proceedings and the proper exercise of the rights of the consumers affected as holders of the rights or interests at stake.

11. The legal position of potential plaintiffs is to be strengthened by extending to this area - with the necessary adjustments - the regime of access to sources of evidence of Arts. 282 bis et seq. LEC, which was initially designed in 2017 to implement the antitrust damages claims Directive and which also applies to proceedings in which actions are brought in defence of trade secrets.

12. It is also proposed that the exercise of any representative action, irrespective of its injunctive or compensatory content, should suspend the limitation periods of individual actions for damages brought by consumers. This rule, however, must be handled with some caution: as will be seen below, the exercise of a collective action for redress that is certified in an opt-out mode (the general rule) should end up determining, once the period for exercising the power of exclusion has expired, the preclusion of the exercise of individual actions falling within its scope; thus, even if the limitation period has been suspended, a potential independent exercise of such individual actions will be impossible at a certain point, even if not due to the statute of limitations.

IV. SPECIFIC RULES FOR INJUNCTIVE ACTIONS

13. As regards representative actions for injunctive relief, the Draft takes over the pre-existing regulation, although it adds a series of new features, taking on board the recommendations of the Directive on some points.

a) The possible content of the action is extended: in addition to the termination of the practice, the prohibition of repetition and the prohibition of the practice, a declaration that the practice infringes the rules for the protection of the rights and interests of consumers may also be sought.[107] The existence of legal interest in bringing purely declaratory claims is therefore presumed.

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[106] And also in line with the model proposed by the ELI/UNIDROIT European Rules of Civil Procedure (see, on this, rule 211). The Draft goes well beyond the provisions of Article 14 of the Directive on electronic databases.

[107] In line with what is suggested in Article 8(2)(a) of the Directive.

b) The upholding of the claim shall not require proof of intent or negligence on the part of the defendant, or of actual loss or damage on the part of the individual consumers affected by the infringement.[108]

c) The claim will only be admissible if a prior attempt to enter into consultations has been made to the business or professional, with at least fifteen days' notice: this provision was already envisaged in the 1998 and 2009 Directives, but the Spanish legislator had preferred not to adopt it. The Draft proposes to do so, in order to encourage a kind of voluntary compliance that would make it unnecessary to bring the action before the courts.

d) These claims will continue to be processed through the channels of the so called *juicio verbal*, which represents the fast-tack proceedings according to Spanish law[109], although with four special features:

> (i) the time limit for answering the claim will be twenty days, instead of the ten days usually provided for by law;
>
> (ii) a hearing must always be held; according to the law, a main oral hearing may not be held when there is no need for the oral taking of evidence; and this lack of need for evidence will not be unusual in proceedings in which actions for injunctions are brought, which often focus on purely legal, not factual, issues. The purpose of this proposal is to avoid proceedings in which high-impact claims are resolved without a formal hearing of the court with the parties (in a way that is more similar to an administrative case than to a judicial proceeding);
>
> (iii) it is handled as a preferential proceeding;
>
> (iv) an appeal in cassation shall in any case be available against the judgement handed down on appeal.

V. COLLECTIVE ACTIONS FOR REDRESS

A. Possible contents of the action and a preference for an opt-out model

14. The proposed regulation of representative actions for redress is the main novelty of the proposed system and, undoubtedly, the most controversial -especially, but not only, from the point of view of potential defendants.

The content of the collective action for damages or, if one prefers, the possible relief that can be sought from the court, depends on the substantive regulation, i.e. the type of rights or interests that have been infringed and the remedy envisaged. By way of example, and following the Directive[110], the following are listed: an order for the payment of compensation, the repair or replacement of goods or the reimbursement of the price paid; but there may also be room for "constitutive" collective claims, such as the mass termination of the contracts in which the infringing practice has materialised or the reduction of the price of the goods and services affected by the infringement. It is important to stress that the Draft, like the Directive, does not conceive these actions for

[108] As demanded by Article 8(3) of the Directive.

[109] When a case is to be processed as a *juicio verbal* there will be three relevant milestones: a written statement of claim; a written statement of defences, to be submitted within 10 days upon service of the claim; a main hearing, where evidence will be proposed and taken (see Articles 437, 438, 440 and 443 LEC).

[110] Article 9(1) of the Directive.

damages as follow-on or consecutive actions to a prior declaration of unlawfulness of the practice of the defendant business or professional: it is possible - in fact, it should be the rule - that within the framework of the same proceedings the declaration of unlawfulness of the practice or conduct is sought and that the collective condemnatory or constitutive claim is based upon it.

15. The key element when designing a model of collective redress is the determination of the way in which the subjective scope of the action is to be established. It is common to point out that there are two main possible models, the opt-in and the opt-out model. In an opt-in model, only the rights and interests of those consumers affected by the harmful conduct who have explicitly expressed their willingness to join and be bound by the outcome of the proceedings will be asserted in the process. In an opt-out model, by contrast, the proceedings and its outcome will reach all affected consumers, except those who have explicitly expressed their willingness to opt out.

In its 2013 Recommendation –precursor of the 2020 Directive– the European Commission already showed its clear preference for the opt-in model,[111] undoubtedly the favourite of potential defendants, since it limits the economic impact of collective proceedings. Nevertheless, at the time where the Directive was being drafted and approved, several national legal systems had already opted for an opt-out model, whereas in others the opt-in solution had been preferred[112]; the European lawmaker, thus, had no choice but to be flexible and allow Member States to keep their choices or to make new ones. For this reason, the Directive only requires Member States to regulate the manner and stage of the collective proceeding in which the consumers concerned must express their wish to be bound or not by proceeding and by its outcome.[113] This legal provision places the Spanish current system in a rather "uncomfortable" situation, since according to the LEC consumers are not expected to explicitly adhere, but they are not granted either a clear mechanism to opt-out.[114]

16. The Draft proposes to adopt, as a general rule, an opt-out model of collective redress: the collective proceeding and the decision or settlement that puts an end to it will affect all consumers harmed by the infringing practice, unless they have chosen to opt out. This is a proposal that is likely to arouse controversy - just as the opposite proposal would have done - because on this point the debate is fierce and the arguments for and against each of the alternatives are irreconcilable.[115] Apart from the economic consequences, the greatest challenge facing an opt-out model from a constitutional point of view is to establish a mechanism that ensures a real possibility for any affected consumer to exclude

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[111] Section 21 of the Recommendation reads as follows: "The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice."

[112] See the "Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)", of 25.1.2018, COM(2018) 40 final. Also S. Voet, "Actions for collective redress", in B. Hess and S. Law (eds.), *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law II*, Beck-Hart-Nomos, Munich, 2019, p. 165–170.

[113] Article 9(2) of the Directive.

[114] As a result of the interplay between Articles 15, 221 and 222(3) LEC.

[115] It must be recalled, however, that the (mandatory) advisory reports given by the Spanish Council of State (*Consejo de Estado*) and the Council of the Judiciary (*Consejo General del Poder Judicial*) on the Draft have considered that this choice is a valid one, i.e., not incompatible with the Spanish Constitution.

him/herself from the proceedings. For this reason, and above all, it is necessary to ensure effective knowledge of the existence of the process on the part of those potentially affected, something that requires publicity mechanisms with high standards in terms of their capacity to reach the addressees. To this end, the Draft opts for granting broad discretionary powers to the court, including individual notifications, when possible, and the use of the media or equivalent channels (including social networks) of wide dissemination in the geographical area in which the habitual residence of those affected can be presumed.

Along with this, it has to be ensured that opting out is easy, i.e., it should be made through simple, accessible and cost-free channels. For this purpose, the Draft resorts to one of the key elements in the procedural organisation of collective actions for redress, the electronic platform that must serve as a support for the management of each collective proceeding[116] and that will have to be established by the plaintiff entity if the court "certifies" the claim as a collective claim. The aim is allowing consumers who consider themselves affected by the practice that has triggered the bringing of the collective to register electronically, without any formalities, and express by this means their will to opt out, which will thus be reliably recorded (specific assistance should also be available for those affected by the digital divide).

17. As a flexibility formula, the Draft proposes giving the court the power to decide in a specific case that it is preferable to resort to the opt-in model, subject to two conditions: on the one hand, it must be justified, on the basis of the circumstances of the specific case, for the proper administration of justice (e.g., there are serious difficulties in ensuring that the existence of the process will be effectively communicated to its addressees); on the other hand, it must be reserved for situations in which the economic interest of the consumers concerned is relevant. As to the latter, the Draft proposes that the amount claimed or the value of the requested compensation for each beneficiary should be greater than 5,000 euros (this is, as can be guessed, a figure arrived at by a largely discretionary option, which can be reduced or increased depending on the economic situation).

Apart from the above, and because it is also required by the Directive[117], the consumers affected who reside outside Spanish territory may only be involved in collective proceedings in which claims for damages are being pursued if they have expressed their express wish to opt in.

B. The specific procedure for collective compensatory actions: certification hearing and certification order

18. The Draft also proposes important novelties from the most purely procedural point of view. The ordinary structure of civil proceedings provided for in the LEC is not adequate to structure a collective proceeding. For this reason, a new declaratory proceeding in the first instance is designed, the most important parts of which are the certification hearing and the certification order.

The procedure must begin with a statement of claim, filed by a qualified entity, which must clearly identify the infringing conduct that triggers the action, the consumers affected -either individually or by their characteristics-, the harm caused and the causal link between the conduct and the harm. The plaintiff entity must also justify the existence of commonality between the claims of the consumers affected and must specify the relief

[116] In line with the model suggested by the ELI/UNIDROIT European Rules of Civil Procedure (see rule 220).
[117] Article 9(3) of the Directive.

sought. Likewise, a financial summary of the sources of funding available to support the action must be included; if there is funding by a third party, it must be mentioned and identified.

Unless it finds that any procedural requirement is missing, the court will admit the claim for processing, serve it on the defendant and summon all parties to the certification hearing (no earlier than 20 days and no later than two months from the summons).

Once it has been served, the defendant may not yet answer the claim on the merits, nor as to the appropriateness of processing it as a collective action. It has a first reaction channel open, in writing, within the following ten days, to allege the lack of procedural requirements (including jurisdiction and venue) or the lack in the plaintiff entity of the requirements on which its entitlement to bring representative actions depends. The plaintiff, if any, may reply in writing within five days.

19. The certification hearing represents the first oral meeting of the parties with each other and with the court.

The first thing to be done at this hearing is to decide on the procedural issues raised by the defendant and on the standing of the plaintiff entity: it is possible, therefore, that the proceedings may be dismissed at this stage, without the court reaching a decision on the certification.

Once this has been overcome, if necessary, the hearing will focus on its essential purpose: to discuss and decide on the admissibility of the certification and, if so, on the objective and subjective scope of the proceeding. The term "certification" may be seen as an import from U.S. federal law,[118] but it still reflects what is to be done: to verify whether, in the form in which the claim is presented, the requirements for a representative action for damages are indeed met. And this depends on there being a sufficient degree of commonality or homogeneity between the claims, which justifies the possibility of a joint decision in a single proceeding. The Draft proposes to define the existence of commonality or homogeneity in the following terms: "when, in view of the applicable substantive rules, it is possible to determine the existence of the infringing conduct, the collective harm for which compensation is sought and the causal link between the two without the need to take into consideration factual or legal aspects that are particular to each of the consumers and users affected by the action".

The assessment of commonality will have to be made on a case-by-case basis and can be complex: after all, even if the circumstances are objectively equivalent (e.g., all those affected acquired a defective product), the impact of the harmful conduct will be potentially different for each consumer (depending, for example, on the use made by each of them of the defective product in question). Therefore, the proposed formula focuses on the collective dimension of the harm: the community must concur as regards the infringing conduct, the causal link and the "collective" harm; there is homogeneity because it can be assumed that the conduct has caused harm to all those affected, without the need to take into account singular data or circumstances in order to sustain this presumption.

Apart from the above, the certification hearing may also have the purpose of analysing whether the action for compensation is manifestly unfounded and, if there is third-party

[118] The ELI/UNIDROIT European Rules of Civil Procedure prefer to avoid US-looking terminology and talk about "collective proceeding orders" (see rule 213).

funding, to ascertain whether there is a conflict of interest[119] (in this case, the court will reject the funding, the plaintiff entity will have to waive or modify the funding and, if not, the proceeding will be dismissed or the plaintiff entity concerned will be excluded).

20. A denial of certification of the collective action should be a resounding victory for the defendant, since the finality of the decision has the effect of res judicata and prevents the admission in the future of another representative action for compensation having the same scope, regardless of who the plaintiff entity is. This is, once again, a provision aimed at preventing abuse.

21. The granting of the certification, on the contrary, should mark the genuine start of the collective proceeding. In the certification order, the court will first of all define the objective scope (the infringing conduct) and the subjective scope (the consumers concerned) and, in relation to the latter, it will establish, if appropriate, whether it is necessary to depart from the general rule and organize it through an opt-in mechanism. In any case, it will determine the period within which those consumers who intend to opt out from the process or, when this is the chosen modality, to join it (always for residents outside Spain) must express their will: this period may not be less than two months or more than four months and, in the meantime, the proceedings will be stayed.

The certification of the compensatory action determines the obligation of the plaintiff entity to set up the electronic platform to support the management of the proceedings and through which, as mentioned above, consumers will express their wish to opt out (or, where this is the case, to opt in). The expenses generated by the platform will be considered procedural costs, reimbursable in the event of the claim being upheld.

Equally essential, as has also been pointed out above, is to provide the certification order with the best possible publicity regime, so that the consumers concerned really get to know the existence of the proceeding as well as the possibility and the way of expressing their will to opt out (or to be bound).

The expression of the will to opt out is equated with the filing of an individual claim while the opt out period is still open, as well as the rejection of the offer of adhesion made to whoever has already filed an individual action whose scope is covered by the certification order. However, once the opt out period has expired, individual claims will no longer be admissible: this reinforces the legal certainty of defendants, since once this period has expired, they will no longer be exposed to new actions arising from the same (alleged) infringement, whether collective or individual.

22. Once the period offered to the affected consumers to express their will has expired, the plaintiff entity will draw up a list of those who have opted to exclude themselves (in ordinary cases) or to join (if the proceedings have been organized in this way). This list is essential to close the subjective scope of the procedure, and for this reason it must be expressly approved by the court, after hearing the defendant.

This is the moment when the defendant is in a position to gauge the potential reach of the proceeding in progress, since the infringing conduct, the type of collective damage that such conduct has caused and, above all, the group of affected parties and the type of redress sought for them will be determined. It is then, therefore, when a period of thirty days is opened to submit a written statement of defence to the claim, focusing on the merits of the case.

[119] It is the procedural moment at which the Spanish lawmaker proposes to implement the provisions set in Articles 7(7), 10(3) and 10(4) of the Directive.

It will be followed by the proposition of evidence and the holding of the trial, for the taking of evidence and the presentation of conclusions. The judgment will always be subject to appeal and cassation.

23. It is also proposed, as something completely new in the Spanish system, to establish a "procedure with successive judgments", which may be used only for compensatory actions in which monetary redress is claimed. If so decided by the court at the certification order, the answer to the claim and the trial will be limited to the determination of the defendant's liability, without any discussion of a hypothetical compensation quantum. Therefore, a first judgment will be issued declaring, if applicable, the liability of the defendant employer or professional and, after it has become final, a new contradictory quantification procedure will be opened. The purpose of this "staged procedure" is, above all, one of economy: it should avoid the costs and delays that in some cases quantification may entail, which would be unnecessary if the defendant is finally declared not to be liable; likewise, if the first judgment is affirmative, a settled solution to the question of quantification will be more conceivable - the incentive to reach an agreement will be much more intense -, which also avoids the costs of this possible second phase of the process.

C. The judgment upholding a collective action for redress: content and effects

24. As regards the content of the judgment itself, there is a relatively "predictable" part in the proposal of the Draft: the court will determine who the beneficiaries are, either on an individual basis -whenever possible- or by establishing the characteristics and requirements that must be met by an individual consumer in order to be able to benefit from it. From this point on, the Draft proposes to incorporate some additional provisions, intended to facilitate and stimulate compliance with the judgment, distinguishing according to the performance that the defendant has been ordered to make.

a) The judgment has ordered the payment of sums of money and it has been possible to identify the beneficiaries individually: the court will establish the time limit within which the defendant must make the payments, under threat of coercive fines; if necessary, the judgment will specify what the consumers concerned must do to benefit (e.g., provide the defendant with an account number to which to make a transfer).

(b) The judgment has order the payment of sums of money but it has not been possible to determine the number (and identities) of beneficiaries: the court shall fix in the judgment an amount representing, even if only on an estimated basis, the maximum amount due and shall specify the period within which this amount is to be paid into the court's account, again under threat of coercive fines. Thereafter, it will be for the claimant entity to proceed with the liquidation and payment to those who prove their status as beneficiaries (and the judgment will also specify in these cases what they must do to that end). It is important to emphasize that, if necessary, the claimant entity may request the court, after a hearing with the defendant, to increase the amount due, if it ends up being insufficient.

c) The judgment has ordered a non-monetary performance: the court will establish the time limit and the manner in which the judgment is to be complied with, also under threat of high coercive fines; it will also specify what the beneficiaries must do to obtain the performance due (e.g., take the defective device to a certain place to have it repaired).

25. Choosing an opt-out or opt-in model has direct consequences on the subjective scope of the res judicata of the final judgment that puts an end to the proceedings. The Draft proposes as a general rule the application of an opt-out mechanism, so that res judicata

must affect all consumers referred to in the certification order, whether or not they are identified (in the certification order or in the judgment itself). This rejects the confusing jurisprudence that had been established by the Spanish Supreme Court in its interpretation of the current article 222 LEC, an interpretation according to which only consumers identified in the judgment would be affected by res judicata[120] (despite the fact that these consumers, always according to the current regime, may not have had a real possibility of excluding themselves from the process). The option of the Draft is coherent, but it forces to emphasize the importance of achieving in practice an adequate publicity of the certification order -i.e., of the existence of the proceeding and of the power to opt out- that allows to presume the will of passive consumers to remain under the coverage of the collective action.

Conversely, if the court chose to certify the action for redress under an opt-in scheme, only consumers who have expressly opted in will be affected by the judgment - and, consequently, by its res judicata effect. In these cases, therefore, there should be no problems other than those arising from the frustration experienced by those consumers who, because they were unaware of the existence of the proceedings, were unable to join it and will have no choice but to file an individual claim.

In either scenario, the final judgment excludes the subsequent exercise of a compensation action having the same object as the one that was terminated by the final judgment, regardless of who is the plaintiff in the second proceeding. This solution is consistent with the extraordinary nature of legal standing to bring collective actions, in which it is not the rights of the plaintiff entity that are at stake in the proceedings. This provision must be read together with the rules, also proposed by the Draft, on the concurrence of collective actions with identical scopes and different plaintiffs, which allow for the consolidation of proceedings -and not necessarily the dismissal of the second one - if the certification of the action has not yet been resolved in the proceedings filed in the first place.

D. Redress settlements

26. A further essential part of the model of representative actions imposed by the Directive are the so-called redress agreements, i.e. collective settlements. Everything proposed in the Draft is new in this respect, since this possibility is not foreseen in the current regime and in order to make it operative at present there would be no choice but to resort to the general principles.[121]

The Directive is not very detailed in this respect: it limits itself (i) to requiring that this type of agreement be regulated, (ii) to making its effectiveness subject to the approval of the court and (iii) to establishing the minimum points to be checked by the court in order to decide whether or not to approve the agreement.[122] With regard to the latter, the Directive only requires verification that the agreement is not contrary to mandatory rules and that it does not include conditions that are impossible to comply with; if the legislator so decides, it may also provide for a refusal of approval in the event that the agreement is "unfair". This is an issue that must be handled with care, in order to avoid the court subjecting the settlement to an exhaustive substantive control, to a sort of filter of what it would have decided itself had it reached a judgment. The Draft has chosen to incorporate it, although with a partially different formulation, verifying that the agreement is not

[120] Judgment of the Civil Chamber of the Spanish Supreme Court 123/2017, of 24 February 2017 (ECLI:ES:TS:2017:477).

[121] See, on this, F. Gascón Inchausti, *Tutela judicial de los consumidores y transacción colectiva*, Civitas, Madrid, 2010.

[122] Article 11.

"unduly detrimental to the rights and interests of the consumers affected" and offering a series of parameters to carry out this control (e.g., the amount of the compensation, the evidence in the case or the sums to be delivered to the third party that has funded the process).

It should also be noted that the more control the court can exercise, the more justified will be the legal decision to impose the outcome of the agreement on the consumers. In such a scenario, a possible legal option would be to delegate to the consumers concerned the assessment of the reasonableness of the terms of the agreement and allow them, if necessary, to opt out, even if they had previously opted in or had not made use of their opt-out power.[123] But it is also possible that, once the subjective scope of the process has been defined, the legislator grants a strong irrevocability to the consumers' decisions not to opt out or to opt in, which would oblige them to accept not only the judgment, but also the agreement negotiated by the qualified entity with the defendant: this imposition is more strongly legitimized if judicial control over the content of the agreement can be more intense. And this has been, in relation to this aspect, the choice of the Spanish pre-legislator: therefore, in order to facilitate the verification by the court of an allegedly harmful nature of the agreement, the court is empowered to collect information and documents from the parties or third parties and a hearing is to be held to analyse a possible reformulation of the initially proposed agreement. In other words, it is the court that looks after the interests of consumers, without delegating to them.[124]

27. The regulation proposed in the Draft is very detailed and is based on a relevant distinction, depending on the moment at which the agreement is submitted to the court for approval.

a) The general rules set out above apply to the approval of an agreement reached once the certification order has already been issued (it is to be expected that the reciprocal incentives to reach an agreement are greater from that moment onwards). Since the subjective scope of the process has already been defined, it is foreseen that the agreement will bind all consumers who have not opted out from the collective action for damages within the time limit; and this results in the inadmissibility of both individual claims and new collective actions for damages having the same scope.

b) It is also possible that a settlement agreement reached prior to the certification of the action (even prior to the filing of the lawsuit[125]) may be submitted to the court for approval. In such a case, the proposed regulation is more complex, since in order to give binding effect to the agreement, it will be necessary to verify that the claim was indeed collective for these purposes, i.e., susceptible of certification. Moreover, there will be no choice but to establish how to allow consumers potentially affected by the agreement to exclude themselves from the agreement (general rule) or request to be included (depending on the terms in which the court would have considered it reasonable to certify

[123] This is the model suggested by the ELI/UNIDROIT European Rules of Civil Procedure (see rules 223, 225 and 226).

[124] Addressing the difficulties of this assessment, see C. Piché, *Le règlement à l'amiable de l'action collective*, Thomson Reuters Yvon Blais, Québec, 2014; A. Eggers, *Gerichtliche Kontrolle vom Vergleichen im kollektiven Rechtsschutz*, Mohr Siebeck, Tübingen, 2019; A. Stadler, "Collective settlements", in A. Stadler, E. Jeuland and V. Smith (eds.), *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution*, p. 252–261.

[125] Following on this the famous model offered by Dutch law, also addressed by the ELI/UNIDROIT European Rules of Civil Procedure (at rules 229-232).

the action, if it had reached this point in the proceedings). And this, in turn, will require the corresponding electronic platform to be put in place, with the costs involved.

Thus, automatism is avoided and a strong involvement of the court is expected, in line with the consequences arising from the approval of the collective settlement.

In either scenario, the parties are advised to include in their agreements the channels to be followed for cases in which, after approval, new damages arise, even if these are foreseeable: in the absence of foreseeability, the agreement will not be considered binding as regards new damages or aggravation of damages occurring after its conclusion.[126]

E. Compliance and enforcement of judgments and redress settlements

28. The Draft closes with a proposal to regulate compliance and enforcement of judgments and redress agreements. It has already been pointed out that one of the main novelties in this point consists of encouraging the compliance of judgments by the defendants, so that the need to resort to enforcement is residual - and it should be recalled that provisional enforcement is excluded in these proceedings.

If, despite the threat of coercive fines, the defendant does not comply with the terms of the judgment, beneficiaries who have not received what is due to them may request enforcement: but it will be sufficient for them to do so using a form, without the need for a lawyer, or even through the plaintiff entity. Thereafter, enforcement will be ordered and carried out ex officio.

In the case of monetary judgments whose beneficiaries are not identified, compliance will be more complex. The enforcement will be limited to obtaining, where appropriate, the amount fixed in the judgment - or the amount by which this is subsequently increased, if it is not sufficient to satisfy all the beneficiaries that have appeared-. From this point on, it is necessary to distribute it among those who can prove their status as beneficiaries. The Draft proposes entrusting this task to the same entity that has filed the claim: this option is not free of disadvantages, nor are the other alternatives (entrusting these functions to the court itself or to a third party, who would act as a professional liquidator). In any case, as it is a question of distributing money among those who are not identified in the judgment, the Draft sets out the way of proving the beneficiaries' status as such and the channel for resolving disputes in the event that the entity does not recognize their status as such. The Draft also establishes the need for the plaintiff to submit reports on payments made, in order to avoid abuses to the detriment of the defendant. In the event of any remainder, it must be returned to the defendant (fluid recovery or cy-près formulas, therefore, are not being proposed).

These rules should apply mutatis mutandis to compliance and enforcement of court approved settlements.

F. There is still an elephant in the room

29. As noted above, the Draft still has some way to go and it is to be assumed that its approval will be preceded by changes, perhaps significant ones. Be that as it may, it must be clear that a system of collective proceedings such as the one being offered cannot be the only tool for protecting consumers nor, in general, the only way of promoting the protection of their collective interests. In addition to well-structured and well-regulated collective proceedings, there is a need for effective mechanisms for the out-of-court

[126] Following the model of the Belgian Code of Economic Law, at Article XVII-45 §3 11º.

settlement of disputes and other specific judicial formulas, such as the model proceedings, which are applicable in contexts that are not propitious to collective actions.

30. On the other hand, a good legal regulation of collective actions and collective proceedings is not enough to ensure their practical effectiveness. To this end, it is essential to tackle the "elephant in the room", which is the funding of collective proceedings. Preparing, promoting and managing a collective procedure will be complex and will require high personal and financial efforts: tasks such as identifying the consumers concerned, communicating with them, obtaining evidence from them, setting up the electronic platform, managing the distribution of the amount to be awarded are activities that may consume high resources and become deterrents to the bringing of collective actions, to the detriment of consumers' rights. Nor can it be ignored that consumer associations, which are called to be the protagonists of the system, are not usually overburdened with resources.

The Directive does not prescribe the way in which the Member States will be able to implement the system, but merely lays down certain rules concerning several of the possible forms of funding that can be envisaged: the award of costs[127], the funding of the proceedings by third parties[128], public funding[129] or even the participation of the consumers concerned themselves, by means of "modest" contributions.[130]

A code of civil procedure is probably not the appropriate place to address many of these issues. The Draft establishes, because it is required by the Directive, mechanisms to verify that the third-party funding of the proceedings is not a source of conflicts of interest and abuses. But it does not regulate the third-party funding in itself, nor does it set any limits on the amount that the funders may claim for themselves as a return on their investment. The same applies to a possible public support of collective actions, either with funds earmarked for this purpose in the budgets of public bodies - or, why not, with the remainders of the amounts not distributed - or through subsidies to consumer associations.[131] If the aim is to prevent the planned system from dying or ceasing to be applied through starvation, it will be necessary to address these issues directly. But, given the silence of the Draft, it seems that this will have to be done outside the LEC and will require a different - not only procedural - and broader debate.

[127] Article 12(1) of the Directive.

[128] Article 10 of the Directive, where third party funding is assumed, but not regulated.

[129] Article 20(2) of the Directive that mentions structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid.

[130] Article 20(3) of the Directive.

[131] See S. Voet, "Costs and funding of collective redress proceedings", in Collective and Mass Litigation in Europe, p. 264–295; C.A. Kern and C. Uhlmann, "Kollektiver Rechtsschutz 2.0?", 861–868.