Revista Ítalo-Española de Derecho Procesal
Vol. 2 | 2020 Procesos colectivos pp. 129-141
Madrid, 2020
Marcial Pons Ediciones Jurídicas y Sociales

ISSN: 2605-5244

THE LONG-AWAITED DIRECTIVE ON REPRESENTATIVE ACTIONS: STILL WAITING FOR GODOT…

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Abstract: On 25 November 2020, the EU adopted the Directive on Representative Actions. This long-awaited legal instrument is the first to create a binding European-wide collective action mechanism for monetary relief. Notwithstanding that it was supposed to crown three decades of intellectual efforts, the Directive failed to establish a workable system going beyond traditionalist fundamentalism. The Directive takes a markedly minimalist approach and its only added value is that some collective mechanism, however ineffective and low-key, should be available in every Member State.

This paper provides an analytical overview of the Directive in light of the pertinent European debate. Section 2 provides a general presentation and assessment of the Directive's scope and nature and the issues it fails to address. The rest of the sections deals with the Directive's different regulatory chapters. Section 3 deals with the rules on standing and qualified entities. Section 4 addresses the Directive's provisions on opt-in and opt-out. Section 5 presents the safeguards the Directive sets up against abusive litigation. Section 6 contains the paper's conclusions and defines the incremental value generated by the Directive (it takes stock of those elements that may represent an added value in comparison to the pre-Directive regulatory situation).

Keywords: Access to Justice; Class Actions; Collective Actions; Collective Redress; Directive 2020/1828; Effectiveness of Law; EU Law;, Representative Actions

Sumary: 1. Introduction.—2. Scope, nature and novelty.— 3. Standing.— 4. Opt-in versus opt-out.— 5. Safeguards against abusive litigation.— 6. Conclusions: what is the incremental value?

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1. INTRODUCTION

On 25 November 2020, the EU adopted one of its most awaited legal instruments, the first legislation that is supposed to create a European-wide collective action mechanism for monetary relief. According to Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (hereafter: "Directive on Representative Actions" or "Directive"), Member States have to adopt the transposing measures by 25 December 2022[1] and give effect to them on and apply them "to representative actions that are brought on or after 25 June 2023."[2]

The European movement for collective litigation started approximately three decades ago. It earned official European recognition in competition law in the 2005, owing to the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules,[3] followed by the White Paper of the same title in 2008.[4] In 2013, the Commission issued a very withheld recommendation (hereafter: "Recommendation on Collective Redress")[5] with a similar purpose. This, naturally, contained no mandatory rules and had, in fact, very little impact on the situation in the Member States.[6] Some could consider the Recommendation to be ushering a new era in the field: the Recommendation was very conservative and contained no (could not contain any) mandatory rules, but still implied the expectation that if the conservative opt-in system advocated by the Recommendation proves to be ineffective (as it did prove to be highly ineffective), the European legislator will revisit the issue. These hopes were reinforced by the enactment of the Directive on competition law's private enforcement,[7] which deliberately left collective re-

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[1] Article 24 of the Directive on Representative Actions.

[2] Article 22(1) of the Directive on Representative Actions.

[3] COM(2005) 672 final (Dec. 19, 2005).

[4] COM(2008) 165 final (Apr. 2, 2008).

[5] 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. For an overview on the Recommendation *see* Laura Carballo Piñeiro, Recomendación de la Comisión Europea sobre los Principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión Europea (Estrasburgo, 11 de junio de 2013). 65(2) Revista española de derecho internacional 395 (2013); Astrid Stadler, Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz, 1(1) Zeitschrift für die gesamte Privatrechtswissenschaft 61 (2015); Csongor István Nagy, The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?, 22(4) Maastricht Journal of European and Comparative Law 530 (2015).

[6] Commission Report 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, p. 2.

[7] Directive 2014/104/EU 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, [2014] OJ L 349/1. For a comprehensive overview of the Directive's national implementation, see B.J

dress out,[8] apparently because a legal instrument of general application was supposed to address it. In light of these historical antecedents, it is no exaggeration to say that the Directive on Representative Actions was expected with tense excitement.

Unfortunately, the eventual hope that the Directive on Representative Actions would establish a workable system for collective litigation proved to be vain. The Directive has a disappointingly limited scope and is more conservative than the Recommendation, which showcased that in collective litigation traditionalist fundamentalism is doomed. The Directive is replete with non-mandatory rules (references to measures that Member State "may" take) and where it contains mandatory rules, which the Member State "shall" implement, it does not go beyond the already existing lowest common denominator. The Directive's only added value is that some collective mechanism, however ineffective and low-key, should be available in every Member States. Nonetheless, given the current European landscape, this appears to make little difference. Taking this into account, the Directive amounts to an instrument that recognizes the existing European practices and, instead of the common core of best practices, ossifies the European "regulatory minimum." The only positive aspect in this regard is that the Directive makes clear that it sets out minimum harmonization and Member States are free to go beyond what is provided by it. Hence, even though it does not stimulate more innovative national solutions, it should not block them either.

This paper provides a critical overview of the Directive on Representative Actions in light of the pertinent European debate. Section 2 provides a general presentation and assessment of the Directive's scope and nature and the issues it fails to address. The rest of the sections deals with the different regulatory chapters of the Directive. Section 3 deals with the rules on standing and qualified entities. Section 4 addresses the Directive's provisions on opt-in and opt-out. Section 5 presents the safeguards the Directive sets up against abusive litigation. Section 6 contains the paper's conclusions and defines the incremental value generated by the Directive (it takes stock of those elements of the Directive that may represent an added value in comparison to the pre-Directive regulatory situation).

2. SCOPE, NATURE AND NOVELTY

The Directive does not apply to consumer matters in general, its scope is limited to the application of 66 consumer protection directives listed in Annex I. It is unfortunate that the EU legislator did not seize the opportunity to create a collective mechanism for Union law at large, as the Recommenda-

Rodger, M. Sousa Ferro and F. Marcos (eds.), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018).

[8] Recital 13 of the Directive on Representative Actions.

tion on Collective Redress did. After all, the EU does have an essential interest in enhancing the effectiveness of EU law in the Member States and collection actions could be excellent auxiliaries.

The most painful and perverse omission is, however, that competition law was left out and by this not subject to any collective mechanism. As noted above, the movement for collective actions came into existence in competition law as part of the endeavors to make competition law's private enforcement a reality. It was competition law's private enforcement that vocally introduced the need for collective actions in the public discourse. In the end, however, the EU legislator worked out an elaborate scheme for competition law's private enforcement that left out a single element: collective actions. The reason was that collective litigation is a horizontal issue and, hence, needs to be addressed in a piece of legislation of more general application. The Directive on Representative Actions will not be the one that delivers on this promise. Furthermore, there are also very important policy reasons that make this omission unreasonable. Competition law's system of private enforcement is made up of various victim-friendly rules, which facilitate actions for damages. These could make sure that collective actions could effectively gain ground here, if they were available.

In terms of added value, the Directive brings little enhancement.

First, the Directive does not require more than what is essentially already available in Europe. It is a legislative instrument that adjusts morals to customs and not customs to morals. It requires Member States to do what they have already been doing. The Directive's expectations against Member States are, put it mildly, minimalist. Collective actions are available in roughly 60% of the Member States anyway,[9] and the majority of those which have collective actions legislation have regimes going way beyond the requirements of the Directive.[10] While the Directive purports to set minimum standards and allows states to go beyond these minimum requirements, this is because it sticks to the lowest possible standards. It would be an exaggeration to say that it identifies and codifies the common core of European collective actions. In reality, it embeds Europe's lowest common denominator.

Second, a good number of the already watered rules is not mandatory but merely suggestions. The Direction looks more like "Recommendation 2.0"[11] than a full-fledged legal regime. As a numerical demonstration, the main body of the directive, which consists of 16 articles (Articles 4-20) uses "may" 15 times in relation to Member State action. Furthermore, while the

[9] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 73-74 (Springer, 2019).

[10] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 73-74 (Springer, 2019).

[11] María José Azar-Baud and Miguel Sousa Ferro: Op-Ed: "Directive on consumer representative actions: a sheep in wolf's clothing?", EU Law Live (December 4, 2020), available at https://eulawlive.com/op-ed-directive-on-consumer-representative-actions-a-sheep-in-wolfs-clothing-by-maria-jose-azar-baud-and-miguel-sousa-ferro/

Directive does not go significantly beyond the Recommendation in terms of mandatory rules, it has a limited scope. While the Recommendation introduced no mandatory rules, it was at least of general application covering all violations of EU law.

Third, more perversely, while a good number of the Directive's positive rules, which further collective actions, are not mandatory, the negative rules, which limit the facilitation of collective actions by the Member States, are binding. This suggests that the EU legislator feared collective actions much more than it wanted to create it. A similar contradiction may be perceived between the Directive's named aims and detailed rules. Although the Directive claims to introduce representative actions to "boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition and create a level playing field for traders operating in the internal market,"[12] the detailed rules reflect a mindset that was equally concerned by the growingly progressing collective actions movement and could not resist the temptation to keep it in check.

3. STANDING

The Directive provides that at least qualified entities (non-profit civil organizations and, if the Member State wishes, also public bodies[13]) shall have standing to launch representative actions.[14] According to Article 4(1), "Member States shall ensure that representative actions as provided for by this Directive can be brought by qualified entities designated by the Member States for this purpose."

While the Directive does not rule out the possibility that Member States confer standing on individuals and entities that are not pronounced as qualified by the Directive, it may have such an indirect straight-jacketing effect. The Directive's message is clear and this is expected to have an impact on Member State legislation. Furthermore, and more importantly, the Directive's hard-fisted rules on standing and the different safeguards against abuse indirectly limit Member States' possibilities to extend standing.

The Directive distinguishes between domestic and cross-border representative actions. The distinction is not based on the characteristics of the dispute or the defendant but on the characteristics of the group representative. Actions launched by out-of-state entities will qualify as cross-border representative actions, while domestic entities will launch domestic representative

[12] Recital 7 of the Directive on Representative Actions.

[13] Article 4(7) of the Directive on Representative Actions.

[14] Article 4(1) of the Directive on Representative Actions. According to Article 3(4) of the Directive, "'qualified entity' means 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."

actions.[15] As to domestic representative actions, the Directive leaves the regulation of standing to the Member States. On the other hand, Article 4(3) sets out relatively detailed requirements against entities that envisage launching cross-border representative actions. These requirements leave no doubt that only non-profit-making legal persons may be designated as qualified entities and suggest that, as to cross-border representative actions, group members and for-profit entities cannot serve as group representatives. This is at odds with the "rule of no-regression" embedded in Article 1(2) of the Directive: Member States need to have at least a Directive-based collective mechanism, they are otherwise free to adopt and retain in force "procedural means for the protection of the collective interests of consumers at national level."

Furthermore, while Member States may (but are not obliged to) apply the above rules to domestic representative actions,[16] in reality it is very difficult for them to depart from the very restrictive rules established concerning cross-border actions. Article 4(4) suggests that standing as to domestic representative actions should not depart radically from the rules governing cross-border actions ("Member States shall ensure that the criteria they use to designate an entity as a qualified entity for the purpose of bringing domestic representative actions are consistent with the objectives of this Directive in order to make the functioning of such representative actions effective and efficient."). In addition, Member States "may designate an entity as a qualified entity on an ad hoc basis for the purpose of bringing a particular domestic representative action" but only "if it complies with the criteria for designation as a qualified entity as provided for in national law."[17] The designation of group members is ad hoc by definition. However, if Member States have requirements as to the permanent designations as qualified entities, they also have to apply these to ad hoc designations, including the designation of group members as representative plaintiffs.

The above approach goes against the achievements Member States have already reached. Although it is beyond doubt that the authors of European collective litigation are non-governmental not-for-profit organizations, standing is not reserved solely for them. In fact, in several Member States the standing of non-profit organizations and public bodies operates in parallel to that of group members and only a few systems exclude the latter from standing. This is true even if there is a clear tendency to reserve "hard cases", which are difficult to manage and present a higher risk of abuse, to public entities and recognized civil organizations.[18]

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[15] Article 3(6)-(7) of the Directive on Representative Actions.

[16] Article 4(5) of the Directive on Representative Actions.

[17] Article 4(6) of the Directive on Representative Actions.

[18] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 95 (Springer, 2019).

4. OPT-IN VERSUS OPT-OUT

The question whether representation without authorization should be allowed in Europe is probably the most fundamental and fiercely debated issue of collective litigation. The Directive maintains the earlier stance of EU law: the opt-out principle is acceptable (in fact, mandatory) in cases where collective limitations is provenly incapable of operating effectively and achieving results, while in cases of importance, Member States should make the choice.

The Directive obliges Member States to make opt-out collective actions possible in civil matters, but only as to injunctions. Article 8(3) makes this crystal-clear: "[i]n order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity." When it gets, however, to monetary claims ("remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid"),[19] the choice between opt-out and opt-in is left to the Member States.[20] With this, the Directive preserves a salient regulatory contradiction that has been in place since the introduction of representative actions for an injunction by Directive 98/27/EC.[21]

The preservation of this regulatory situation is the more unfortunate, as opt-out collective actions are not rare in the Member States: notwithstanding the silence of EU law in terms of mandatory regulation, approximately 60% of the Member States have introduced collective actions for monetary claims and from those who did, more than half chose, in one way or another, the opt-out system and only less than half stuck fully to the more conservative opt-in principle.[22] Accordingly, the opt-in principle can no more be considered the mainstream or predominant pattern in Europe. The Directive's approach as to the opt-out principle is even more disappointing if taking into account that more than a decade ago the European Commission already came out with a proposal for an opt-out system[23], which it finally revoked.

When it is about injunctions and declaratory judgments, qualified entities may launch actions on behalf of a class of unidentified consumers, without a need for any individual authorization or assent. What is more, this procedure is, literally speaking, not an opt-out scheme (in fact, it is "worse"), since it does not make it possible for group members to leave the group. Group members cannot opt out even if they want to – they are stuck in the group. However, this attitude evaporates right away once it touches pecuniary claims,

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[19] Article 3(10) of the Directive on Representative Actions.

[20] Article 9(1)-(2) of the Directive on Representative Actions.

[21] Directive 98/27/EC was consolidated by Directive 2009/22/EC, which preserved this plight.

[22] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 73-85 (Springer, 2019).

[23] *See* Maria Ioannidou, Enhancing the Consumers' Role in EU Private Competition Law Enforcement: A Normative and Practical Approach, 8(1) Competition Law Review 59, 78–80 (2011).

which calls for an explanation. Conceptually, and also from the perspective of legal tradition, there should be no difference between pecuniary and non-pecuniary claims. After all, legally speaking, they are both civil claims. It seems that there is no legitimate reason to accept the opt-out system for injunctions and declaratory judgments and to treat this as something that is irreconcilable with pecuniary claims.

Of course, the disparate treatment has its reasons, even though they are covert. It is the apprehension about the privatization of a parcel of public policy. Collective actions are perceived to be a tool of privatizing public policy and this seems to be clearly alien to European civil-law. Although absent the very special US regulatory environment (punitive damages, American rule on attorney's fees, contingency fees, pre-trial discovery etc.) class actions in Europe are simply not susceptible of playing a policy role similar or even comparable to that played on the other side of the Atlantic, it seems that the European reception has been impregnated by this fear.[24]

Although the Directive purportedly aims to cast in stone the European lowest common denominator without limiting Member States' freedom to go beyond that, it contains a very significant restriction on opt-out representative actions. Article 9(3) provides that out-of-staters can be covered by the representative action solely on an opt-in basis.

> *Notwithstanding paragrap. 2, Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought have to explicitly express their wish to be represented in that representative action in order for those consumers to be bound by the outcome of that representative action.*

In other words, in respect to redress measures, Member States are free to choose between the opt-in and the opt-out system, but when it gets to out-of-state group members, they must follow the opt-in principle. This is a major setback for collective actions in Europe. While this limitation of the purview of opt-out is not unknown in Europe, since some opt-out systems do contain such a limitation (that is, out-of-staters need to join on an opt-in basis),[25] quite a few of them do not. In these Member States opt-out collective actions have been available for both in-state and out-of-state group members. As a consequences of Article 9(3), these national laws, at least in matters coming under the scope of the Directive, may need to limit the availability of their opt-out schemes. According to Recital 11, the Directive "should not replace existing national procedural mechanisms for the protection of collective or individual consumer interests" and Member States are free to decide if they create a separate Directive-based mechanism or make the Directive-based mechanism part of their existing mechanisms. Whichever approach

[24] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 39 (Springer, 2019).

[25] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 81-82 (Springer, 2019).

they take, they have to make sure that the Directive-based mechanism complies with the Directive's mandatory rules, including the rule that out-of-state group member cannot join the representative action on an opt-out basis.

It is very difficult to justify the above discrimination. There are certainly technical and jurisdictional issues that are more easily resolved in relation to domestic group members. Nonetheless, it is highly questionable if these are really so compelling to justify the disparate treatment of out-of-state group members. Furthermore, the above rule effectively entails that whichever model (opt-in or opt-out) the Member States choose on the basis of the freedom provided by Article 9(1)-(2), matters reaching beyond the borders of an individual Member State (these are the ones which involve out-of-staters) cannot be fully litigated under the opt-out principle (unless the Member State chooses to have a collective mechanism in addition to the Directive-based scheme).

5. SAFEGUARDS AGAINST ABUSIVE LITIGATION

As noted above, while a good part of the Directive's enabling rules tends to be non-mandatory, which "may" be implemented by the Member States, the limiting rules are mandatory.

First, as noted above, out-of-staters are excluded from the opt-out principle.

Second, the Directive authorizes courts to screen out and "dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law."[26] The message and use of this provision is dubious. On the one hand, it makes it clear that collective actions are second-class citizens to individual actions, even though high-value individual claims are equally susceptible or unsusceptible to abuse as collective actions of the same value. More importantly, however, in view of the Directive's markedly minimalist approach and overblown safeguards, the court's above right to dismiss appears to be needless.

Third, in Article 10, the Directive sets out rules on (third-party) funding. Nonetheless, a closer look at these provisions reveals that these do not ascertain how collections actions can be funded but how they cannot. The rules on funding are not meant to create a workable funding mechanism, which could make collection actions viable. Quite the contrary, they actually establish limits and prohibitions. This is the more unfortunate, as funding is a crucial, if not the crucial question of collective litigation.[27] The Directive, similarly to the Recommendation on Collective Redress, does not make any attempt to ensure the financial viability of representative actions, but focuses instead on determining how these actions cannot be funded. It effectively rules out

[26] Article 7(7) of the Directive on Representative Actions.

[27] Csongor István Nagy, Comparative Collective Redress from a Law and Economics Perspective: Without Risk There Is No Reward! 19(3) Columbia Journal of European Law 469, 482-483 (2013).

market-based private funding schemes without offering any surrogate. The Directive suggests that the best way to fund representative actions are public moneys and philanthropic donations. Although these are ideal sources, indeed, none of them is capable of making collective actions widespread and sustainable. Furthermore, if it is the public budget that finances collective litigation, the question emerges: is not the state simply using private contracts to fulfill its own duty?

Fourth, the Directive, as part of its endeavor to safeguard against abuse, strongly warns against punitive damages and discards the two-way cost shifting of legal costs in favor of collective plaintiffs. The exclusion of punitive damages does not appear in the Directive's main text, but its preamble rejects it clearly. According to recital (10), "[t]o prevent the misuse of representative actions, the awarding of punitive damages should be avoided and rules on certain procedural aspects, such as the designation and funding of qualified entities, should be laid down." Recital (42) adds that the Directive "should not make it possible to impose punitive damages on the infringing trader, in accordance with national law." According to Article 12(1), "Member States shall ensure that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party, in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general." It has to be noted that this applies to the group representative who acts as the collective plaintiff, Article 12(2) expressly shields individual group members from "paying the costs of the proceedings." Exceptions to this rule include the case where "the costs of proceedings that were incurred as a result of the individual consumer's intentional or negligent conduct"[28] and Member States' possibility to prescribe that joining group members "pay a modest entry fee or similar charge in order to participate in that representative action."[29]

Punitive damages (or more generally, to include treble damages, supercompensatory awards) and one-way cost-shifting are peculiar to US law and are considered to be liable in part to the alleged dysfunctions of US class actions.[30] Their exclusion appeared already in the Recommendation on Collective Redress, which makes the use of the "loser pays" principle mandatory,[31] excludes, at least in principle, contingency fees[32] and prohibits punitive damages.[33] The justification for these safeguards is highly questionable: they

[28] Article 12(3) of the Directive on Representative Actions.

[29] Article 20(3) of the Directive on Representative Actions.

[30] Csongor István Nagy, Comparative Collective Redress from a Law and Economics Perspective: Without Risk There Is No Reward! 19(3) Columbia Journal of European Law 469, 483-485 (2013).

[31] Recommendation on Collective Redress, para 13.

[32] Recommendation on Collective Redress, paras 29-30. According to the Recommendation, contingency fees can be permitted only exceptionally. ("The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.").

[33] Recommendation on Collective Redress, para. 31.

appear to be an example of regulatory shadow-boxing. The Directive creates no viable mechanism for collective actions and nothing going beyond the European minimum. The scheme that emerges from the Directive needs no safeguards against abuse, because it can be hardly used in the first place. Furthermore, punitive damages and one-way cost shifting are essentially unknown in Europe anyway and there is no sign of any eventual sudden change in this regard.

6. CONCLUSIONS: WHAT IS THE INCREMENTAL VALUE?

All in all, the Directive's provisions are at odds with its purpose of creating a workable system. The regime introduced falls short of what has already existed in Member States: the Directive takes a admittedly minimalist approach that results in a rudimentary system, which does not go beyond what is already available in almost two-thirds of the Member States.[34] Furthermore, a good part of the Directive's enabling rules tends to be non-mandatory, which "may" be implemented by the Member States; this stands in stark contrast to the mandatory character of the limiting rules, called safeguards against abuse. Fortunately, Member States are free to maintain collective mechanisms that are not based on the Directive, they simply have to ensure that they have at least one mechanism that is in conformity with it. Furthermore, the Directive contains a "rule of no-regression," which makes it clear that the Directive does not aim to impair the already existing *"aquis"* of the collective actions movement. Article 1 provides that the "Directive does not prevent Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level. (…) The implementation of this Directive shall not constitute grounds for the reduction of consumer protection in fields covered by the scope of the legal acts listed in Annex I [of the Directive]."

Nevertheless, the Directive is frank when not promising more than European window-dressing. According to Article 1(2), the Directive's purpose is to make sure that when it gets to collective litigation there is "something" available in every Member State.

> Member States shall ensure that *at least one procedural mechanism* that allows qualified entities to bring representative actions for the purpose of both injunctive measures and redress measures complies with this Directive".[35]

In line with the above minimalist approach, the Directive identifies the provision of "appropriate safeguards to avoid abusive litigation"[36] as equally important to the very availability of collective mechanisms. In this context,

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[34] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 71-112 (Springer, 2019).

[35] Emphasis added.

[36] Article 1(1) of the Directive on Representative Actions.

"consumers' access to justice"[37] is pronounced to be of merely secondary relevance.

Notwithstanding the above, the Directive does have some incremental value in terms of promoting collective actions in Europe, even if this falls painfully short of the expectations.

A major part of this incremental value is made up of the fact that, in view of the Directive, at least a collective mechanism shall be available in consumer matters (at least the ones listed in Annex I of the Directive). One third of the Member States has no collective mechanism in place.[38] The Directive is bringing some change in these. In addition, the Directive may be considered a "regulatory nudge," as it will serve as an occasion to revise national regimes and to engage in a renewed cross-border exchange of views and experiences.

Furthermore, the Directive contains a set of minor rules that may facilitate collective litigation.

First, Article 13(5) provides that group representatives' communication costs shall be part of the shiftable litigation costs and, hence, recoverable ("Member States shall ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action"). Group organization costs may be significant, especially in case of opt-in proceedings. It has been questionable, if these expenses can be included in the notion of shiftable legal costs. Article 13(5) suggests that they can.

Second, Article 16 creates clear creditor-friendly rules concerning the limitation period. Representative actions shall suspend or interrupt the limitation period.

> *In accordance with national law, Member States shall ensure that a pending representative action for an injunctive measure (…) has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action, so that those consumers are not prevented from subsequently bringing an action for redress measures concerning the alleged infringement (…) because the applicable limitation periods expired during the representative action for those injunctive measures. Member States shall also ensure that a pending representative action for a redress measure (…) has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action.*

These rules may not be novel and might be deductible from the general civil-law principles governing limitation. Nonetheless, Article 16 makes the legal plight clear.

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[37] Article 1(1) of the Directive on Representative Actions.

[38] Csongor István Nagy, Collective Actions in Europe – A Comparative, Economic and Transsystemic Analysis 76 (Springer, 2019).

Third, Article 18 provides for a faint equivalent of in-procedure discovery, which is otherwise not generally available in European civil procedure. The effectiveness of the duty to disclose is backed by penalties.[39]

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

Fourth, Article 19 reinforces the weight of injunctive measures, which, in civil-law countries, may be otherwise subject merely to the general rules of court enforcement, with the introduction of "effective, proportionate and dissuasive" penalties.

[39] Article 19(1)(b) of the Directive on Representative Actions.