

How Will the EU Representative Action Directive Affect France's Class Action Regime?

As the Representative Action Directive enters into force, France will have to adopt a cross-border mechanism and expand the scope of entities qualified to bring consumer class actions.

The European Parliament has endorsed a new directive on representative actions for the protection of the collective interests of consumers (the [Representative Action Directive](#)). The Representative Action Directive, endorsed on November 24, 2020, will enter into force 20 days following its publication in the Official Journal of the EU and will repeal and replace [Directive 2009/22/EC on injunctions for the protection of consumers' interests](#). Member States must adopt and publish provisions necessary to comply with the Representative Action Directive within 24 months, and then begin enforcing the directive within 30 months.

What is the purpose?

[First presented in April 2018 by the European Commission](#), the Representative Action Directive was proposed as part of the "[new deal for consumers](#)" legislative package and in reaction to high-profile cases involving breach of consumer rights across the European Union.

The Representative Action Directive seeks to ensure harmonized and effective enforcement of consumer protection laws in order to safeguard consumer interests, while simultaneously providing sufficient checks against abusive lawsuits.

Although a number of EU Member States already have adopted representative actions mechanisms, the entry into force of the Representative Action Directive will ensure that all consumers across the EU will be able to benefit from representative actions.

What is the scope?

Both domestic and cross-border representative actions are available under the Representative Action Directive, meaning that qualified entities representing groups of consumers from several EU Member States will be able to bring a single suit before a Member State's national court.

The provisions of the Representative Action Directive will apply to representative actions based on violations of a limited list of EU laws and their respective national implementations committed by a "*trader*", which the directive defines as any natural person legal person, privately or publicly owned, that

acts, directly or indirectly, for purposes relating to that person's trade, business, craft or profession. The 66 European texts listed in Annex I of the Directive cover areas such as data protection, financial services, travel and tourism, energy, telecommunications, environment and health, as well as air and train passenger rights, and general consumer law.

The Representative Action Directive allows entities qualified to bring domestic or cross-border actions to seek both:

- Redress, such as compensation, repair, replacement, price reduction, contract termination, or reimbursement
- Injunctive relief, such as provisional or definite measures for the cessation and the prohibition of an infringing practice

As the new rules adopted under the Representative Action Directive and the national implementations will only apply to representative actions brought on or after the date of application of the directive, representative actions may not be available in certain Member States before mid-2023. Nonetheless, businesses operating within the EU should be mindful of the additional litigation risks the new European representative action may present.

Who are the qualified entities?

For the purpose of cross-border representative actions on behalf of groups of consumers, the Representative Action Directive requires qualified entities meet a number of criteria, including all of the following:

- Demonstrate **12 months of actual public activity** in consumer protection prior to its designation
- Demonstrate a **legitimate interest** in the protection of consumer interest in the statutory purposes
- Demonstrate the entity's **non-profit-making character**
- Establish procedures ensuring **independence** and **preventing undue influence** by persons other than consumers

The same criteria may also apply to the designation of qualified entities for the purpose of domestic representative actions. If such criteria do not apply in the domestic context, Member States must ensure that the criteria adopted for domestic qualified entities are consistent with the objectives of the Representative Action Directive in order to ensure efficiency and effectiveness of the domestic mechanism. Member States may also designate public bodies as qualified entities or make ad hoc designations.

Member States must publish information about the list of qualified entities that can bring domestic actions. As for those entities qualified to bring cross-border actions, a Member State must communicate a list to the European Commission and both the Member State and the Commission must publish that list.

What about procedural aspects?

- Member States should take measures such as **public funding, limitation of fees, and access to legal aid** to ensure that proceedings costs will not prevent the effective exercise of rights by qualified entities. Although third-party funding is possible under the European regime, it must be in accordance

with national laws and subject to measures ensuring that no conflict of interests or undue influence exists.

- While Member States will be free to choose whether actions can be brought on an **opt-in or opt-out basis**, cross-border representative actions will only be brought on an opt-in basis.
- The Representative Action Directive admits **settlements**, as long as they are subject to court or relevant administrative authority approval. Approved settlements will be binding on the concerned traders and individual consumers.
- National courts and authorities will be able to order the **disclosure of evidence** by the defendant as long as the qualified entity has provided reasonably available evidence sufficient to support a representative action, and final decisions handed down in the context of a representative suit may be used as evidence of infringement in other proceedings against the same trader.
- The Representative Action Directive puts in place safeguards to prevent abusive actions and provide greater security to business such as (i) the “**loser pay principle**” (meaning that the unsuccessful party pays the proceeding’s costs for the winning party) and (ii) the **prohibition of punitive damages**.
- The Representative Action Directive expressly provides for the **possibility of obtaining redress and injunctive relief for infringement that has already ceased**. This feature is intended to prevent the recurrence of any past infringing actions.

How will this impact France?

As the Representative Action Directive does not seek to replace or modify existing mechanisms already available at the national level, EU Member States such as France, where representative actions already exist, will not be required to adopt new mechanisms if the existing regime already meets the conditions set out in the European model. Still, the Representative Action Directive presents an opportunity to reshape or refine the French class action regime, especially as the current French class action regime does not fully correspond to the conditions set out in the Directive. Whether French legislators decide to reform and adapt the existing regimes or to adopt a new regime based on the European model, remains an open question.

The existing mechanism

In France, class actions were first introduced by Law No. 2014-344 of 17 March 2014, which provided for class actions related to consumer and competition law breaches. Through subsequent amendments and the adoption of new legislation, the scope of class actions was subsequently extended: Law No. 2016-41 of 26 January 2016 extended class actions to health product liability, and Law No. 2016-1547 of 18 November 2016 extended the scope to environmental liability, discrimination, and personal data protection.

Such developments led to the fragmentation of available mechanisms, as each sector-specific regime has different procedural requirements. Although common factors such as limitation of standing to qualified organizations, or the opt-in principle, exist across the different procedures, significant differences persist. For example, the judge’s capacity to order direct compensation of individual consumers is limited to actions based on general consumer law. The specific conditions to obtain standing, as well as rules regarding opt-in of concerned persons also vary across regimes. This fragmentation, and related judicial uncertainty, presents a potential obstacle to the further development of class action lawsuits in France.

The relatively low number of actions brought to this day, around 20 cases as of November 2020, with a high concentration in general consumer class actions, shows that the “French class action” regime has been slow to take off. In particular, class actions in sectors other than general consumer law are yet to be adopted as the procedure of choice by associations, as only three class action lawsuits have been engaged in relation to health products, and two each for discrimination and personal data protection. Although a couple of consumer rights organizations have been actively bringing suits, the high hurdle for qualifying as a qualified organization has been identified as another obstacle to their development.

What happens next?

As the existing French mechanism mostly coincides with the proposed European class action mechanism, impact on the French regime is expected to remain limited. In particular, the possibility of drastic changes such as the adoption of an opt-out mechanism under French law is rather low, as the directive leaves the choice between opt-in and opt-out mechanisms to the Member States.

However, the possibility of cross-border actions and the broader scope of the European representative action in comparison to the French class action procedures, both in terms of qualified entities and the legislation explicitly included as falling under the scope of the Directive, present additional litigation risk factors for businesses operating in France. Notably, the European representative action regime introduces several important procedural elements that coincide with [Legislative Bill No. 3329 introduced on September 15, 2020, which](#) seeks to reshape the French class action regime. For example, the alignment of the French regime with the European representative action mechanism could remedy several elements frequently identified as limiting the further development of class action in France, such as:

- The **fragmentation of procedures**, which could be directly remedied through the adoption of a single regime modeled after the European regime
- The **restrictive standing requirements**, such as the requirement under which an organization must be registered for at least five years in order to bring an action on behalf of groups of consumers, which would be significantly relaxed under the Directive’s criteria
- The **limits on damage allocation**, such as the exclusion of non-material prejudice
- The **limited funding available** to qualified organizations, which could be remedied by the possibility of third-party funding and the “loser pays” principle as introduced by the Representative Action Directive
- The difficulties consumer groups face when **obtaining evidence**, which could be mitigated through the adoption of evidentiary rules under the Representative Action Directive

Finally, the possibility of levying a fine against infringing traders as proposed by the legislation is compatible with the European scheme, which only prohibits punitive damages.

As such, some actors may consider the entry into force of the Representative Action Directive as an opportunity to reform the existing class action mechanisms under French law and to introduce a unified regime closely aligned to the European representative action.

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