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THE EFFECTS OF THE DIRECTIVE ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTEREST OF CONSUMERS ON THE FRENCH GROUP ACTION REGIME

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Abstract: By transposing the Directive on representative actions for the protection of the collective interests of consumers by the 25th December 2022, all the Member States will be endowed with at least one form of collective redress. This paper analyses the Directive's provisions that entail the need to introduce reforms in the French group action regime, as well as those outlined in the European text as recommendations that may constitute an opportunity to change the French state of affairs.

Keywords: collective redress; class actions; french group actions; collective actions; representative actions; representative proceedings; standing to sue; procedural rules; remedies; time limits; admissibility; third party funding; opt-in/opt-out; evidence; disclosure; cy-près; fluid recovery; collective settlements; cooperation

INTRODUCTION

Nine Member States do not yet provide for any collective redress mechanisms[1] and significant disparities exist through the Member States[2]. Therefore, to enhance the protection of the collective interest of consumers, the European intervention through the Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC[3], adopted on 25 November 2020, was needed and compliant with the subsidiarity principle.

The process of adopting this Directive was anything but a quiet river, and the text enacted is the result of 18 months of intensive negotiations. The starting point was 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 of 11 April 2018[4], which came along with the "New Deal for Consumers[5]". The latter was aiming to secure more effective consumer redress in mass harm situations. The European Parliament subsequently re-

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[1] The author addresses her grateful thanks to Eilish Buckley and to Laura Carballo Piñeiro for their review. *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, para. 2.1.1.*

[2] Proposal of 11 April 2018 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 (2018/0089 COD), Point 2., Besides, in the Member States where collective redress devices do not formally exist, there appears to be an increasing tendency of plaintiffs attempting to seek collective redress through the use of different legal vehicles like the joinder of cases or the assignment of claims.

[3] 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 ; OJ L 409, 4.12.2020, p. 1–27. For a comment in French, M. J. AZAR-BAUD, "La directive européenne sur les actions représentatives: un texte mi-figue, mi-raisin": JCP E n°51, 17 déc. 2020, 1542 ; in Spanish, "A propósito de la Directiva Europea sobre las Acciones Representativas para la Protección de los Intereses Colectivos de los Consumidores": La Ley, Argentina, Thompson Reuters, 22 Dec. 2020.

[4] See *Collective redress in the Member States of the European Union,* Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, PE 608.829 Octobre 2018, with R. Amaro, S. Corneloup, B. Fauvarque-Cosson, F. Jault-Seseke, disponible *in http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)608829* here in after *Collective redress in the Member States of the European Union.*

[5] It constituted an interesting step, with a twofold outcome. First, the Directive of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules). Second, 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 (Proposal of 11 April 2018 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 (2018/0089 COD).

ferred the Proposal to the Committee on Legal Affairs (JURI), which issued a report[6]. Since the Council was unable to reach a general approach, inter-institutional negotiations followed[7] and, on 26 March 2019, the Parliament adopted the JURI report as a legislative resolution at first reading[8]. After numerous meetings, the Council adopted a version that introduced the distinction between domestic and cross-border representative actions, amongst other measures and brought up new amendments in October[9] and in November[10] 2019. On 9 January 2020, the JURI committee voted to open negotiations on the basis of the European Parliament first-reading position, which took place until 22 June 2020. On that date, the co-legislators reached a provisional agreement, eventually adopted on 30 June[11] before its final adoption last 25 November and published on 4 December 2020. Member States must transpose the Directive by the 25th December 2022, which will be in force by the 25th June 2023 (art. 22).

Thus, time has come to analyze the effects the shiny new Directive will have on the existing measures already in place in France. Towards that end, we will first examine the impact of the obligation to adopt at least a (form of) representative action (A). Then, we will tackle the effects of the Directive on the representative proceedings (B).

A. THE TRANSPOSITION OF THE REPRESENTATIVE ACTION

For harmonization purposes, in terms of enhancing access to justice and enforcement of consumer rights, article 1 of the European Directive sets forth

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[6] Draft report of 12 October 2018 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)), G. Didier (EPP, France) reporter. The reporter submitted his draft report to the JURI Committee on 12 October 2018. The Committee adopted the report on 7 December) in the aftermaths of the Study of Trans Europe Experts (by R. AMARO, M. J. AZAR-BAUD, S. CORNELOUP, B. FAUVARQUE-COSSON, F. JAULT-SESEKE & *alii*). presented to the European Parliament on 10 October 2018 (Collective redress in the Member States of the European Union https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf

[7] This was confirmed in plenary on 12 December 2018.

[8] 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))

[9] Proposal of 14 October 2019 for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (CONSOM 265).

[10] Proposal of 28 November 2019 for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (CONSOM 325).

[11] Council of the European Union, 30 June 2020, Proposal of Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, Interinstitutional File: 2018/0089(COD), CONSOM 104, MI 206, ENT 71, JUSTCIV 59, DENLEG 39, CODEC 557.

the objective of ensuring all Member States shall make available *at least* [12] one representative action, aimed at the protection of the collective interest of consumers, while providing safeguard against abusive litigation [13].

Assuming the intended differentiation from the American class actions, the European collective redress device is original from the outset. For starters, its name, "representative action", is already revealing for the main feature that their "multinational parents", the European lawmakers, intended for it. Indeed, representative actions endorse only "qualified entities" to act as a claimant party on behalf of consumers, for the protection of the "collective interest".

The "collective interest" is defined as "the general interest of consumers and, in particular for redress purposes, the interests of a group of consumers. The said meaning should –hopefully– put an end to semantic controversies that have lasted for decades [14]. Thus, embracing both the general and particular interests, the collective interest should be understood as encompassing divisible (individual homogeneous interests) and indivisible (diffuse) interests in the Ibero-American terminology [15]. It can also be seen as a shy manifestation of the European system starting to lean towards the Anglo-American system [16] whereby, for instance, class actions for damages refer to the former (particular interests), and civil rights class actions may refer to the latter (general interest). Notwithstanding, the Directive only targets consumers and thus differs from the Recommendation of 2013, which encompassed legal persons as well.

Since the Directive does neither impose a special name nor a specific device, the Member States who are already endowed with a form of collective redress are not forced to introduce a new representative action. In this re-

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[12] Indeed, the Member States can adopt or maintain in force procedural measures at national level aiming at the same goal (art. 14.3). Besides, specific collective enforcement devices are not replaced, i.e. in the field of the General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. In these cases, the plaintiff will be able to choose amongst the different devices in order to act for the collective interest of consumers.

[13] The rules strike a balance between access to justice and protecting businesses from abusive lawsuits through the Parliament's introduction of the "loser pays principle", which ensures that the defeated party pays the other party the costs of the proceedings. To further avoid abusive lawsuits, Parliament negotiators also insisted that courts or administrative authorities may decide to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law. Negotiators agreed that the Commission should assess whether to establish a European Ombudsman for collective redress to deal with cross-border representative actions at Union level.

[14] In this line, M. J. AZAR-BAUD, *Les actions collectives en droit de la consommation. Etude de droit français et argentin à la lumière du droit comparé,* Dalloz, Nouvelle bibliothèque de thèses, 2013, n° 26.

[15] A translation into French of the Model Code of Proceedings for Ibero-American can be found in *Les actions collectives en droit de la consommation... op. cit.*

[16] Like in the class actions system (Rule 23 FRCP) and in the Model Code for Collective Proceedings, art. 1 (See, M. J. AZAR-BAUD, *Les actions collectives en droit de la consummation… op. cit.*, appendix).

spect, by just keeping its group and collective actions, France will seemingly be compliant with this particular provision.

It is noteworthy that France has a long tradition with collective proceedings understood in their broader sense[17], but a recent one when it comes to the "class actions *à la Française*[18]". Aside from substantial experience in the creation of ad hoc-compensation funds[19] regarding particular damages[20], the French Consumer Code provided for four kinds of collective actions addressing the cessation of unfair practices, the elimination of unfair terms in consumer contracts[21], joint representative actions (*action en représentation conjointe*)[22] and lastly the action for the compensation of damages caused to the "collective interest of consumers"[23]. The latter has been further extended to collective interest of the environment[24], users of the health system[25], investors[26], the collective rights and liberties of victims of psychological or physical threats[27], public patrimony,[28] and other interests covered by the Code of Criminal Procedure.[29] The joint representative action has also been expanded to plead on behalf of victims of damages pertaining to environmental concerns[30] and securities[31]. The said collective proceedings do not pursue the same objectives. Whilst some of them seek injunctive relief, only the *action en représentation conjointe* has a (theoretical) compensatory goal. However, the conditions subsequently set by lawmakers in 1992, namely the need for a mandate (to name the association

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[17] In extenso, M. J. AZAR-BAUD, *Les actions collectives en droit de la consommation. Etude du droit français et argentin à la lumière du droit comparé*. Nouvelle bibliothèque de thèses, Dalloz, Paris, 2013, n°224. *Adde* : M. J. AZAR-BAUD et A. BIARD, "The Dawn of Collective Redress 3.0 in France", in A. UZELAC and S. VOET, *Class actions in Europe : Holy Grail or a Wrong Trail ?*, Springer, forthcoming.

[18] M. J. AZAR-BAUD et V. MAGNIER, "Class action à la française", in B. FITZPATRICK and R. THOMAS, Cambridge University Press, forthcoming.

[19] These *ad hoc* structures are often public organisations created by a law and regulated by a decree, financed by the State and the social security system; they function as part of a scheme whereby compensation can be proposed to victims in an out-of-court context.

[20] Namely, those suffered by the victims of terrorism, such as the Compensation Fund for Blood Transfusion Patients and Haemophilia (Fonds d'indemnisation des transfuses et des hémophiles FITH), Asbestos victims Compensation Fund (Fonds d'indemnisation des victimes de l'amiante (FIVA) or, more generally, the National Office for the Compensation of Medical Accidents, Iatrogeneous and Nosocomial Infections (Office National d'Indemnisation des Accidents Médicaux, des Affections Iatrogènes et des Infections Nosocomiales, ONIAM)) or medically-related incidents (Namely the Public Health Code, art. L. 1142-1 s., R. 1142-42 s. and D. 1142-1 s.; Insurance Code, art. L. 422-1 et R. 422-1; French Code of Criminal Procedure, art. 706-3; Law n° 2000-1257 du 23 déc. 2000, art. 53).

[21] Art. L. 621-7 to L. 621-11 of the French Consumer Code.

[22] Art. L. 622-1 of the French Consumer Code.

[23] Art. L. 621-1 of the French Consumer Code.

[24] Art. L. 142- 1 of the French Environmental Code.

[25] Art. L.1114-2 of the French Code of Public Health, even if the article does not mention the expression "collectif interest".

[26] Art.L.452-1 of the French Monetary and Financial Code.

[27] Art. 2-17 of the French Code of Criminal Procedure.

[28] Art. 2-21 of the French Code of Criminal Procedure.

[29] Namely victims of discrimination, sexual offenses, children (art. 2-1 et seq. Code of Criminal Procedure). In this sense, A. BIARD & R. AMARO, "Resolving mass claims in France: toolbox & experience", RILE-BACT, n°2016/5, p. 13.

[30] Art. L. 142-3 of the French Environmental Code.

[31] Arts L. 452-2 et seq of the French Monetary and Financial Code.

who acts as a proxy) and the prohibition on advertising to obtain them, rendered joint representative actions completely useless[32] and made it clear that there was a need for a collective compensatory redress mechanism (and in particular, one without mandates), as was also advocated for at a national and European level. Therefore, the group action (*action de groupe*) was introduced in 2014 in France in the aftermath of the 2013 Recommendation[33].

Even though the Directive on Representative actions for the protection of the collective interests of consumers envisages collective actions in general, namely seeking injunctive and compensatory redress, the majority of the provisions that will have to be transposed concern the latter, known as group actions in the French regime. Thus, the question arises as to whether there will be a need to amend the current French group action regime to comply with the Directive provisions in terms of scope (1), standing to sue (2), remedies (3) and time limits (4).

A.1. Scope

The European Parliament in 2012[34] and the Commission in 2013[35] had already identified the need for a horizontal EU approach to collective redress in terms of the scope of the Directive. The Directive on Representative actions for the protection of the collective interest of consumers is far less ambitious since it only targets infringements of the provisions of the Union law listed in Annex I[36], which harm or may harm the collective interest of consumers (art. 2.1)[37].

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[32] See the contribution of the Head of the legal department of the Association by the time of the proceedings in the "mobile phone cartel" affair. G. PATETTA, "Une illustration flagrante des limites du système français", Revue Lamy Droit civil, 2010, No 70, p. 59. In that case, UFC-Que Choisir engaged an action for the reimbursement of the 1.2 million euros of overcharges paid by 20 subscribers of the million companies having taken part to the cartel (Orange, SFR and Bouygues). The association had brought an action "dans l'intérêt collectif" (see supra) and it was characterized as a joint representative action. Thus, the advertising made by the association through its website was considered as illegal under the joint representation rules (at that time art. L. 422-1 Consumer Code). It is noteworthy that out of the 200,000 consumers registered on the website, only 12,521 actually joined the proceedings. M. J. AZAR-BAUD, *Les actions collectives, op. cit*., n°231.

[33] 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, OJ L 201/60, 26.7.2013.

[34] In its 2012 Resolution 'Towards a Coherent European Approach to Collective Redress - 2011/2089(INI). EU competition policy European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)), OJ C 239E, 20.8.2013.

[35] Following the same horizontal line, the Commission presented its position in the Communication 'Towards a European Horizontal Framework for Collective Redress' and in the 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, OJ L 201/60, 26.7.2013. It also covered all situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and/or legal persons, being far larger than the current Directive.

[36] Art. 2.1.

[37] The Directive is also without prejudice of contractual and non-contractual remedies available to consumers for such infringements. It goes the same with the Union private international law rules (art. 9.9).

However, due to the "closed" referral technique used by Annex I, many areas are excluded from the Directive. Amongst other fields[38], it does not cover discrimination breaches or fundamental rights. That is logical if we consider the Directive only tackles consumer protection. Less commonsensically, the Directive leaves aside competition infringements, which may entail an important number of small homogeneous impairments as well as claims depending on prohibitively high cost and/or complex evidence. When those breaches cause damages to a class of consumers, redress measures highly depend on collective devices. However, the directive does not provide for a way out to overcome the barriers to access to justice[39] even if the considerations of the Directive refer to avoiding distortion of fair competition between infringing traders and compliant traders[40]. This loophole constitutes a missed occasion to provide for an interesting procedural instrument both in of terms effective access to justice and stimulating private enforcement.

As a matter of fact, the Directive does cover a wide range of areas[41], such as data protection, digital services, financial and investment services, travel and tourism, energy and telecommunications, environment and health, air and train passenger rights, in addition to general consumer law. Hence, more than half of the Member States that presently have a form of collective redress only dealing with consumer affairs *stricto sensu* will have to enlarge the scope of their systems to comply with the Directive (i.e. regarding data protection).

As for the state of affairs in France, despite the several matters whereby a group action has already been recognized, a group action (consumer, health, environment, discriminations and personal data), the lawmaker will still need to expand their scope to comply with the Directive. France will have namely to encompass the rights of passengers, in particular disabled persons and the liability of the carriers of passengers, food, energy and electricity, exchange contracts, time-sharing, markets in financial instruments and in particular securities and long-term investment funds, as well as insurance. To broaden the spectrum, France can either adopt a true horizontal approach for the protection of homogeneous individual rights or continue with the "step-by-step" approach. If the latter technique is followed, French lawmakers will have to

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[38] See *Collective redress in the Member States of the European Union, supra ;* M. J. AZAR-BAUD, "La nature juridique des actions collectives en droit de la consommation", Revue Européenne de Droit de la Consommation, Larcier, 2012/1, p. 1 & s.

[39] Just as in the conscious decision that was made not to include provisions on collective redress in the EU in the Antitrust Damages Actions Directive, competition was consciously not included in the Representative Actions Directive. It has therefore been confirmed that each Member State would still have to cope with the effectiveness of the right to full compensation in competition proceedings. M. J. AZAR-BAUD & F. JAULT-SESEKE, "Collective redress in Competition law: European and Private international law approach", in *Private enforcement of competition law in Europe,* Bruylant, Larcier, 2021, p. 75 & s.

[40] Recital n°1.

[41] Without prejudice to the enforcement mechanisms provided for or based on the legal acts listed in Annex I.

introduce reforms not only to the Consumer Code but also to the Code of Civil Procedure and autonomous laws that regulate group actions [42] (i.e. data protection legislation).

Therefore, the transposition constitutes an opportunity in France and many other Member States for the consecration of a group action based on a horizontal approach, taking into account any mass conflict; in other words, the protection of the homogeneous interests of consumers without limitation of matters. This technique would be wiser than the "step-by-step" one, both in terms of access to justice and in terms of harmonization of the proceedings. Furthermore, the overall architecture arising out of this reform would be positive in this regard, and explicitly introducing all the scopes of the Annex will put an end to the debates regarding specific areas, such as conflicts against insurers and banks that are today considered excluded from consumer protection in some Member States.

A.2. Standing to sue

Concerning standing to sue, the representative nature of the action is exclusively granted to a qualified entity. This feature is meant to be one of the European safeguards against the purported abuses of the "class action-type" [43].

First, according to the Directive, qualified entities can be public bodies or private organisations. Since France does not allow the former to bring group or collective actions, the chance should be seized to empower consumer agencies and other public entities to do so. Regarding private organizations, they can be designated in advance and a Member State can designate an *ad hoc* entity only for a specific domestic representative action. For the latter, Member States may set out the criteria an entity must meet to be "qualified", which can be the same as those set out for cross-border actions or not, but in any case they must be consistent with the objectives of the Directive. One can regret the *soft* feature of said rule, which will cause disparities amongst the different countries as some of them already recognize standing to sue for this type of entity whereas others like France do not. A mandatory rule setting the criteria to be met by the *ad hoc* entities would have been preferable in this regard to avoid forum shopping of the "best-qualified entities" to bring an action.

Second, for cross-border representative actions, entities must comply with a set of harmonized criteria in terms of public activity (12 months protecting consumers' interest prior to their request to be appointed as a qualified entity), statutory purpose to protect consumer interests, non-profit character, independent from third parties and having established procedures to avoid

[42] M. J. AZAR-BAUD, "French Group Action Lawsuits – Between tradition and modernity", European Journal of Consumer Law, 2/2020, p. 233.

[43] This feature has remained unchanged from the first versions of the representative action proposals.

conflict of interests, disclosing compliance with those criteria, being solvent, etc.[44] Moreover, in accordance with the principle of non-discrimination, the admissibility requirements applied to cross-border representative actions should not differ from those applied to domestic representative ones[45]. Nowadays, France requires that entities are registered in specific areas (*agréée*) or have existed as a legal person (association) for five years. Keeping up the said requirement after the transposition would render it harder for local associations to bring an action (5 years of existence requirement) than for foreign ones (12 months as per the Directive). Thus, the French lawmaker should synchronize that requirement and reduce it to one year of existence for local associations to bring group actions.

Third, Member States shall ensure mutual recognition of qualified entities' legal standing. In this vein, being listed as a qualified entity works as a proof of it, even if other EU courts or authorities can examine the statutory purpose requirement for one specific case (art. 4.2). It is provided for that a representative action can be brought by one entity or by many of them jointly, within a single representative action before a single forum, for the protection of collective interests involving different Member States. Even if France is already compliant, since its case law has a tradition recognizing standing to foreign entities that meet the conditions set up by their national regimes, it should take the opportunity to explicitly stipulate so, as it did for consumer injunctive measures[46] when transposing the Injunctions Directive.

Last, provisions shall be settled regarding the scrutiny qualified entities are subject to every five years. It shall state that the designation shall be revoked in case of non-compliance with the criteria set out above, which can be raised by the Commission or a Member State and that the defendant can also raise that type of concerns before the court or the administrative authority.

Thus, like many other Member States who only grant standing to sue to "authorized consumer associations", France might take this opportunity to improve their provisions in this respect with a threefold angle. Indeed, standing to sue should be recognized for: public entities dealing with the subject-matter of the action, namely Consumer Agencies; *ad hoc* organizations; and entities qualified in other Member States.

A.3. Remedies and measures

The Directive contains provisions about remedies, according to which a representative action pursues an injunctive[47] and/or collective redress[48].

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[44] Not being insolvent neither subject to insolvency.

[45] Art. 6.1.

[46] Art. L. 621-7 of the French Consumer Code.

[47] According to the degree of certainty of the infringement (art. 8.1.b).

[48] Art. 7.5. Injunctive and redress may be sought within a single representative action or within separate representative actions According to the national legislations;

The injunctive measures can lead to a provisional measure (for practices deemed to constitute an infringement) or a definitive one (for those that constitute an infringement). In order to simplify the proceedings[49], the Directive provides that the plaintiff will neither need to prove the actual loss or damage on individual consumers, nor the intention or negligence on the part of the trader. Likewise, procedural expediency is required in the case of injunction measures, and even a summary procedure shall be used for provisional measures requesting an injunction[50]. Moreover, the participation of the members shall not be required (i.e. no opt-in for injunctions). To guarantee their implementation, effective, proportionate and dissuasive penalties, namely in the form of fines in case of refusal, shall be applied[51]. To encourage alternative dispute resolution, Member States can set out the obligation for the plaintiff to engage in prior consultations before they can claim to publish a corrective statement.

Concerning redress measures, they are to be considered largely[52] as encompassing compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid[53], and are without prejudice to any additional remedies available to consumers under Union or national law.

By pursuing both redress and/or injunctive measures, one might see another rapprochement of the European system elaborated by the European Directive with the American *class action*. Hence, those Member States who do not yet provide for a compensatory collective redress will need to do so by either enlarging the scope of the object of their representative action to encompass compensatory measures or adopt a new representative action for that purpose.

As described above, the French system already provides for different injunctive and redress collective actions so that no amendments seem to be needed in this respect. Notwithstanding this, the French group actions as provided for in the Consumer Code can only seek the compensation of patrimonial damages arising out of "material harms[54]", thus excluding both immaterial or moral damages and compensation of body injuries, whilst the Directive does not have such limits. Transposition will have to tackle this issue.

A.4. Time limits

To protect the validity of consumers' claims, the Directive stipulates that rules on time limits shall be maintained or settled in a way that consum-

[49] Art. 8.
[50] Art. 17.
[51] Art. 19.
[52] Already in this sense, M. J. AZAR-BAUD & S. CARVAL, "L'action de groupe et la réparation des dommages de consommation: bilan d'étape et préconisations", Dalloz 2015, p. 2136 & s.
[53] Art. 9.
[54] Art. L623-1 of the French Consumer Code.

ers are entitled to benefit from the redress[55]. Insofar as injunctive relief and redress can be targeted regarding the same affair, limitation periods shall be interrupted or suspended, so that consumers concerned by an injunctive measure and who could engage in a subsequent redress action, are given the opportunity to do so.

France will not need to adapt its rules to this end, since the current French provisions already provide for the solution of the Directive and thus are already compliant. While suspension is the general rule, interruption applies to competition group actions.

Nevertheless, there is a loophole that might concern all Member States since the Directive does not address the case of continuous infringements, which began before and continued after the date of filing the action. This is likely to be interpreted very differently in the various Member States[56].

B. THE IMPACTS ON THE FRENCH PROCEEDINGS

On account of the principle of procedural autonomy, the Directive explicitly states it should not contain provisions on every aspect of proceedings in a representative action. Accordingly, it is for the Member States to lay down these types of rules. Notwithstanding this, some provisions do contain either guidelines or rules likely to impact the course of proceedings in Member States.

They concern the admissibility requirements (1), evidence and disclosure (2), the opt-in/out regime (3), the recovery of remaining funds (4), costs and funding (5), information and cooperation (6) and collective settlements (7).

B.1. The admissibility requirements

The Directive requires Member States to set out the admissibility requirements of a specific action. Consequently, the required degree of similarity between individual claims or the minimum number of consumers concerned by an action for redress -amongst other provisions, namely on evidence or means of appeal applicable to representative actions- remain national. Nevertheless, they cannot hamper the effective functioning of representative actions as laid down by the Directive.

The only particular rule established in the Directive in this regard is related to the need for qualified entities to provide "sufficient" information about the consumers concerned by the action[57], when bringing the action.

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[55] Only applying from the date of the entry in force on (art. 25).
[56] *Idem*.
[57] Art. 7.2.

France currently states that group actions are admissible for the compensation of individual damages suffered by consumers who are "in a similar or identical situation and whose common cause is the failure by one or the same trader(s)" to comply with legal or contractual obligations. Thus, no further provisions are needed. However, the way the informational duty of the plaintiff is stated gives us a half-hearted impression. Whilst it seems obvious that the plaintiff must delimit the subjective scope of their request (i.e. who will benefit from damages granted), the adjective "sufficient" could be thorny and give rise to different interpretations across Member States' jurisdictions. In any case, it is clear that the plaintiff must be aware of the importance of providing as much information about the group as reasonably possible not only to avoid the case being dismissed at an early stage but also to secure reasonable damages.

Furthermore, recalling the American motion to dismiss, the Directive contains a soft rule according to which Member States shall ensure that courts or administrative authorities are able to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law (art. 7.7).

Such a rule is unknown in French law. The closest provision one could think of in that respect is to be found in article 31 of the Code of civil proceedings which refers to the admissibility requirement of having an interest to bring the action. To some extent, this requirement also recalls the American "case doctrine". For the said reasons, introducing explicitly a possibility for the courts to dismiss collective and representative actions at an early stage when manifestly unfounded might, when transposing the Directive, might be a good procedural revolution.

B.2. Evidence and disclosure

The Directive makes it clear that redress measures are not necessarily follow-on actions. Thus, the prior establishment of an infringement cannot be required[58]. However, in what can be considered as a "non-rule[59]", the Directive states that a decision of a court or an administrative authority having established an infringement harming consumers should be admissible as evidence, regardless of the Member State of issuance[60]. But the provision adds no value to the current regimes. Instead, the solution of the Antitrust Damages Actions Directive[61] declaring an irrefutable presumption in the case of domestic representative actions would have been preferable, since National

[58] Art. 9.8.

[59] M. J. AZAR-BAUD & M. SOUSA FERRO, EU Law Live, Op-Ed: "Directive on consumer representative actions: a sheep in wolf's clothing? ", 04.12.2020

[60] Art. 15. Under the Commission's Proposal, the evidence was to be considered as irrefutable, in redress actions (former art. 10).

[61] See above.

Consumer Authorities also apply fines, amongst other penalties, in case of infringement of consumer policies.

Far from making a pre-trial discovery out of it, rules on disclosure of evidence have evolved from the provisions of the Commission's Proposal. It is now provided that the plaintiff, who has reasonably available evidence to support the representative action and indicated the existence of further evidence lying in the control of the defendant or a third party, is entitled to ask the judge or the authority to order them to disclose it under the Member State rules provided that the confidentiality and proportionality rules apply[62].

In France, existing provisions on the group action regarding anti-competitive practices, which can only be brought after a decision of national or European anti-competition authorities or jurisdictions[63], could be considered contrary to the Directive. Nevertheless, as explained before, since competition is unfortunately included from the scope of the Directive, no consequences should be expected in this regard.

B.3. Opt-in/Opt-out systems

In order for consumers to be represented by the plaintiff and bound by the final decision, the Directive leaves a wide discretion to Member States to establish the opt-in or the opt-out regime in their countries, with two exceptions.

The first one is the opt-in rule for non-residents. According to this rule, the consent of the consumers who are non-residents in the Member State of the court or administrative authority before which the representative action has been brought is required[64]. The said rule might pose problems in countries such as the Netherlands whereby collective settlements (WCAM, enacted in 2005) have been approved on the basis of an opt-out system, not only for Dutch residents, but also, if agreed upon by the contracting parties, for non-residents. Moreover, the WAMCA system (in force since January 2020), even if it sets forth a mixed system (opt-out for Dutch residents and opt-in for non-residents) seems to leave room for interpretation that could have led to the same solution (providing opt-out for non-residents in some cases). After the Directive, this interpretation no longer seems realistic[65].

The second mandatory provision stipulates that opt-in shall not be required in injunctive actions. This is another "non-rule" since, by nature, an order to cease does not allow for any act of will, either in the sense of opting-in or opting-out.

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[62] Art. 18.

[63] Art. L. 623-24 of the French consumer code.

[64] Art. 9. 3.

[65] M. J. AZAR-BAUD & M. SOUSA FERRO, EU Law Live, Op-Ed: "Directive on consumer representative actions: a sheep in wolf's clothing? ", 04.12.2020

France, having adopted the opt-in rule, does not need to modify its own system despite the fact that practice has demonstrated the failure of opt-in models. Indeed, since the plaintiffs do not know how many consumers would opt-in in the proper stage of the proceedings (which is after the decision on the liability merits and the notification period) they cannot be sure the action is worth the cost, risks and efforts of engaging the actions.

There is a rare pearl in the Directive that should not go unnoticed. After leaving Member States free to choose between opt-in and opt-out for national action, the Directive refers to the fact that consumers should explicitly or tacitly express their wish to be represented by a qualified entity within a representative action for redress measures (arts. 9 and 13). Such a possibility -of tacitly expressing their wish to opt-in- is currently unknown in French law and its transposition could be a tool as powerful and effective as the opt-out regime.

This provision, taken jointly with the possibility of determining the destination of any compensation funds not recovered by consumers at the end of the proceedings (art. 9.7), would constitute a significant qualitative change in French law of group actions. Under it, associations would be relieved when bringing actions, as they would no longer have reason to fear that the absence of explicit consent (as in the current system) could render their action meaningless.

B.4. Recovery of remaining funds

Once the judgment in representative actions grants compensation, the Directive tackles the case of funds remaining unrecovered after the expiration of the established time limits. Member States *may* lay down rules on the destination of the outstanding funds[66]. This very limited sort of fluid recovery, or cy-près, will constitute another commonality with the American *class actions*. Notwithstanding, the European lawmaker has –again– only adopted a recommendation here. It will be up to the Member States to choose to improve their systems by enacting the cy-près rule, a rule that is indispensable to avoid the proceedings being moot. Indeed, if after a decision imposing damages, the illegally gained profits are not skimmed-off because consumers do not claim them, there is no motivation to bring representative actions.

B.5. Procedural costs and funding representative actions

The Directive stipulates procedural costs and funding of the representative actions should not hinder qualified entities' right to seek for an injunction and/or redress. Thus, even if Member States are not required to finance

[66] Where an obligation should have been laid out.

representative actions, they must contribute to ensuring qualified entities' financial capacity to bring the actions through measures such as public funding, structural support or access to legal aid[67]. Likewise, modest entry fees or similar participation charges can be required of consumers.

Private third party funding is acknowledged by the Directive but only to the extent that national laws allow it. In case a collective redress measure benefits from it, the courts and administrative authorities shall be empowered not only to assess compliance in terms of avoiding any possible conflict of interests but also to take measures, such as rejecting the standing to sue of the entity or requiring the latter to take measures against the funding (refusing the funding, changing the funder)[68].

Since Member States are neither required to finance serious representative actions nor forced to accept and regulate third party funding, it is not risky to say that the Directive has not gone far enough in terms of granting access to justice; the economic viability of the representative actions is not guaranteed. Common law countries such as the United States and Australia show collective redress devices heavily rely on external funding. That is why the Directive ensured a regulated system rather than leaving discretion to Member States to deal with those important topics at a national level. For instance, France does not need to adapt any rule in this respect even if it could seize the occasion to regulate third party funding namely to consumer associations. Indeed, consumer associations are not used to private external funding and seem even to fear it, while they could improve their activities for consumer protection through it.

B.6. Information and cooperation

The possibility to opt-in and to opt-out depends upon giving consumers the information about the existence of the representative action. Thus, the Directive has laid down several rules in this respect. First, information has to be presented in a timely manner and by appropriate means. Thus, Member States shall set out rules imposing qualified entities to provide information on their websites about the actions brought and the remedies sought. Second, the court or administrative authority can require the defendant trader to inform consumers, at his or her expense, of decisions or settlements, even individually when appropriate, unless they are informed in another manner. The same applies to the plaintiff in case of dismissal[69]. Both the Commission and Member States share this responsibility. Whilst the former *shall,* the latter *may* set up publicly available national electronic databases (i.e. websites), that are directly accessible, providing for information on qualified entities,

[67] Art. 12.
[68] Art. 10.
[69] Art. 9.

domestic and cross-border actions and general information on ongoing and concluded representative actions[70]. Last, Member States and the Commission shall support and facilitate the cooperation of qualified entities and the exchange and dissemination of their best practices and experiences, as regards the resolution of cross-border and domestic infringements[71].

The rules concerning information and cooperation between the main stakeholders are key. The problem is, again, the non-binding phrasing of some provisions, which might lead to unequal level of information. Moreover, in order to overcome translation costs, it would have been preferable that the Directive provided for translation measures so that the information is available at least in the most common languages in the European Union.

B.7. Collective settlements

Collective settlements on redress measures are envisaged in two ways in the Directive. First, parties may submit a proposal of a settlement for approval, which will be scrutinized and refused if it is unfair, contrary to public order or includes conditions that cannot be enforced[72]. Should the settlement be approved, it will be binding upon the "formal" parties and the consumers having accepted it. This sort of second opt-in for certain cases echoes the second opt-out of the American settlement class actions. Furthermore, the court or the authority shall be able to invite the parties to reach a settlement regarding redress. France already stipulates that collective settlements need approval of the court. Thus, no reforms will be needed in this respect.

CONCLUSION

The long path that representative actions have had to go through is to be understood as the result of conflicting national legal traditions that struggled to make one out of these national practices. Admittedly, it is also the product of lobbying and of considerations of what is (sometimes wrongfully) considered to be the misuse of class actions[73].

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[70] M. J. AZAR-BAUD, "En attendant un registre d'actions de groupe et autres actions collectives. Revue de presse", JCP E, n°50, 13 Dec. 2018, 1637; *Collective redress in the Member States of the European Union, supra.*

[71] Art. 14.

[72] Art. 11.3. In which case, the proceedings will continue.

[73] For instance, revealing misconceptions on the link between class actions and punitive damages, as well as the fact that they are far less commonly used in than ordinary described, the Directive states it "should not enable punitive damages (…) on the infringing trader". On punitive damages, see R. MEURKENS, Punitive damages: the civil remedy in American law, lessons and caveats for continental Europe. Wolters Kluwer Business, 2014, n°3.1.4.

Despite the controversial points that have been addressed[74], the adoption of the Directive on Representative Actions for Consumers is a milestone in the pan-European landscape.

In France, transposition should entail some improvements. Firstly, the scope of group actions as provided for in the Consumer Code will have to be enlarged to include areas that are currently excluded or not certainly included (i.e. financial and investment services, travel and tourism, energy and telecommunications, transport). In addition, since the group actions regulated in the Code of Civil Procedure and autonomous laws are also of interest to consumers (i.e. data), their compliance will also have to be ensured. Therefore, the transposition is an opportunity for the consecration of a group action based on a horizontal approach, taking into account any area of mass conflicts. Secondly, standing to sue will have to be explicitly granted to qualified entities in other Member States and may be granted to public bodies and *ad hoc* entities. As for the requirement of at least a 5-years existence of the association plaintiff under the current general regime, this will become more restrictive than the 12 months required by the Directive with regard to an action brought by foreign entities. An amendment in that respect would be welcome. Thirdly, the rule restricting group actions to the compensation of patrimonial damages arising out of material harms will have to be adjusted. The most conspicuous provision is to be found in the possibility to be given to consumers of tacitly expressing their will. Combined with the cy-près rule, currently unknown in French law, France could further develop its system. However, the latter rule is a soft one, so that a positive development is not guaranteed.

Likewise, the Directive includes a rather high number of non-binding rules, which could have preferably been mandatory for harmonization purposes. France is thus not obliged to comply with them, but should do so to grant access to justice on behalf of consumers. This is the case for provisions on third party funding to avoid any conflict of interest or undue influence, and on the possibility of dismissing manifestly unfounded cases at the earliest possible stage of the procedure.

Finally, other procedural provisions of the Directive such as the principle of procedural diligence, assistance to plaintiffs (legal aid, public funding), cooperation and exchange of good practice, the application of effective, proportionate and dissuasive sanctions including fines in the event of non-compliance with orders to cease or with the production of evidence, transparency and information on the part of qualified entities, judges, competent authorities and Member States are relevant. One can hope they will be enacted in France and more generally in all the Member States.

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[74] M. J. AZAR-BAUD, "La directive européenne sur les actions représentatives : un texte mi-figue, mi-raisin": JCP E n°51, 17 déc. 2020, 1542 ; *Id.* with M. SOUSA FERRO, "Directive on consumer representative actions: a sheep in wolf's clothing? ", 04.12.2020.

The Directive also seems to constitute a "work in progress"[75]. Amendments to the Directive are to be expected after the Commission carries out an evaluation of the Directive[76] and cross-border representative actions that might follow its implementation, to determine whether a European Ombudsman for collective redress could enhance their enforcement[77]. Moreover, several reforms will still be needed at the European Union level before collective redress can achieve its goals. In particular, it will be necessary to abandon the opt-in regime and move towards an opt-out system or the *res judicata secundum eventum litis* of the Ibero-Americain system according to which the judgment is binding only if favorable to the representative party (one-way preclusion)[78]. Additionally, the Directive leaves much discretion to the Member States, raising the issue as to how harmonization can be achieved and forum shopping is to be avoided. Undoubtedly, because of the anchor-defendant rule, the choice of the defendant's country of registration will be biased.

The Directive's objectives of ensuring access to justice, the sound administration of justice, and reducing the cost and burden arising out of multiple individual actions, should have led to mechanisms able to deter companies from infringements and to encourage more serious governance and compliance by traders. In practice, whether these objectives can be delivered by the current Directive is yet to be seen. The reality is that several opportunities have been missed in order to truly enact a mechanism serving both deterrence and compensation.

For the time being, the main objective of the Directive seems to be that of preventing abusive litigation to the extent that it has introduced more provisions on this issue and that seek to protect defendants rather than delivering an effective consumer protection device.

On a positive note, the Directive can also be seen as a landmark text, slightly –and probably unconsciously– creating ties between common and civil law systems. In an ideal world, shouldn't considerations about the consequences of global infringements be about global justice?

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[75] An evaluation after 5 years after the date of application (2028) is to be carried out. Assessing whether the rules on air and rail passenger rights offer a level of protection comparable to that provided for under the representative actions directive is to be done and measures will be adopted accordingly (art. 23).

[76] Namely about the scope of the Directive, and the functioning and effectiveness of cross-border representative actions. Member States will annually provide with information related to the number and type of representative actions carried out in their Member States, as well as the type of infringements and parties to the representative actions and the outcomes (art. 23).

[77] Art. 23.

[78] *Les actions collectives … op. cit.,* n°498.