THEMIS COMPETITION 2021

SEMI-FINAL C: EU and European Civil Procedure

INSTITUTUL NATIONAL AL MAGISTRATURII

Representative action in Europe. The struggle to fit in.

Team

Alexandru BULIGAI-VRÂNCEANU

Andreea Veronica NITU

Răzvan Ovidiu CUBLESAN

Tutor

Amelia Raluca ONISOR

Introduction

In a Spanish village of whitewashed houses and steep winding cobbled streets situated on the edge of a hill in the Sierra Cabrera, Mrs. Fernandez was an online content creator. On 1st of June 2025, she bought a phone from the giant smartphone company "Cereza" on which she spent a month's income.

All the way in Romania, downtown Bucharest, Mr. Popescu was a cryptocurrency miner. On the 2nd of June 2025, he bought the same smartphone as Mrs. Fernandez.

They have both enjoyed their phones without encountering any malfunctioning for some time. But after being pushed to proceed with the update of the software system, little by little, they started to observe that the Facebook app wouldn't open up as quickly as before, their battery wasn't lasting as much as it used to and, overall, the phones were slowing down. Mrs. Fernandez started thinking that her phone was reaching its lifecycle and proceeded to buy a new one. Mr. Popescu blamed the deterioration of the phone's performance on its battery and replaced it with a new one.

Still unsatisfied about the solution, they found out that they were not the only ones experiencing difficulties with their phones. Mrs. Fernandez found an organisation called Consumer Aid and learned that it filed a class action lawsuit in Spain, asking Cereza to pay a compensation of at least 60 euros on average to all affected users for deliberately slowing down their phones, a practice known as planned obsolescence[1]. Consumer Aid advertised their class action on their website and Mrs. Fernandez from Spain was able to join the action in her country. Mr. Popescu made a quick mental calculation and came to the conclusion that he alone doesn't have the time and resources to bring an individual action to court against a giant tech company such as Cereza. Luckily for Mr. Popescu, the European institutions have made it possible for him to join the action in Spain or even in Romania by adopting in November 2019 the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers ("the **Directive**").[2]

Path through history

Over the last decades, European institutions have been preoccupied to create a mechanism that would better respond to the aim to build an efficient judicial system by providing more guarantees regarding access to justice and the effectiveness of it. What finally came to take the form of representative action was inspired by the US class action, after stirring a European debate that shook the resistance of the European legal tradition to its core. Also known as collective action, it was originally aimed at the cessation and prohibition of infringements of European law by harmful traders' practice.

[1] Planned obsolescence describes a strategy of deliberately ensuring that the current version of a product will become out of date within a certain period of time, determining consumers to seek replacement of the product.

[2] 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.

On the 11th of June 2013, the Commission issued a non-binding Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States[3], after previously issuing a Green Paper in 2008. The aim of the Recommendation was to put forward a set of common principles for all Member States, while leaving room for national judicial solutions and redress systems. The initiative also recommended that all Member States should have collective redress system at a national level.[4]

In the REFIT Fitness Check of EU consumer and marketing law, published on 23 May 2017[5], the European Commission concluded that the EU's legislative framework, which sets standards for consumer protection, had, for the most part, a strong enough mechanism to enforce consumer protection and provide redress. However, there were some aspects that could have used improvement.[6] Therefore, the "New Deal for Consumers" initiative[7] was created in order to modernize EU consumer protection rules in light of then-recent high-profile cases such as *Dieselgate*.[8] The new package was composed of two proposals for directives. The Directive on better enforcement and modernization of EU consumer protection, also known as Omnibus Directive[9], was adopted by the European Parliament in November 2019. The Directive on representative actions, which is the centre of this paper, was adopted in November 2020.

At that moment, in the area of consumer law, Directive on Injunction[10] was in place. Consumers rights were protected by qualified authorities and consumer organizations authorized to start proceedings in order to reach a ceasing of unlawful practices that are harmful to the collective interests of consumers. This type of collective redress takes the form of injunctive relief.

But there was no legal instrument that would allow consumers to obtain compensations for damages suffered. Therefore, the Commission proposed a new directive to modernize and replace the Injunctions Directive

[3] 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.

[4] Given the furious opposition against the assimilation of the North American class action into the European legal framework due to its shortcomings – abusive litigation, possible unconstitutionality of establishing power of attorney without authorization, different national legal systems, the most challenging aspect was to find a manner to allow consumers to obtain redress outside small value claims, while complying such a mechanism with Europe's traditionalism.

[5] The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. See for results SWD (2017) 208 final and SWD (2017) 209 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

[6] Further improving of the six Directives in force at the time required three strands of action: ensuring that judges and legal practitioners have better knowledge of all rights and duties of EU consumer and marketing law, ensuring stepped-up enforcement and easier redress when substantive law provisions are breached, considering targeted amendments to simplify the regulatory landscape where fully justified.

[7] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A New Deal for Consumers, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0183&from=EN

[8] In September 2015, the United States Environmental Protection Agency found out that the German automaker Volkswagen had deliberately modified its diesel engines in order to meet required standards during regulatory testing, while emitting up to 40 times more NOx in real-life driving, affecting millions of consumers, as well as having health and environmental consequences.

[9] 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, OJ L 328, 18.12.2019, p. 7–28.

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

by implementing a mechanism that would provide redress measures for consumers in case of infringements of Union law.

The Commission had reached the conclusion that the enforcement of small value claims was somehow unfeasible because of high ligation costs as opposed to low value claims, in some cases non-recoverable legal costs, lengthy procedure, risks emerging enforcement issues. Some Member States hadn't had any procedural mechanism for representative actions and the Union concluded that European consumers should benefit at least from such a mechanism.

The scope of the Directive is to assure a high level of consumer protection by ensuring effective access to justice while avoiding the vulnerability of the US class action system of abusive litigation. The more practical aim is to make representative actions available in all Member States in a homogenous manner. The directive brings forth a whole new mechanism made in Europe's own image that might just solve the challenges of an increasingly globalized and digitalized marketplace. It must be pointed out that the Directive allows Member States to have other types of collective actions at a national level, but obliges them to have at least one that meets with the requirements of the Directive.

Representative actions have certain advantages for individual consumers. The procedure is time-saving for individuals as they don't need to appear in court or make lengthy preparations for the case. Also, the costs to conduct such an action is low for each group member as opposed to what it would be, were they to bring separate actions to courts. The entities representing the group have experience in dealing with consumer cases, therefore they engage more resources and are better prepared to face a powerful multinational trader.

Regarding private international law aspects on collective redress, UNIDROIT, together with the European Law Institute (ELI) developed a Model rules of European civil procedure ("**Model Rules**")[11] as a mean to provide useful tool to help promote the increasing procedural coherence of European civil procedural law, dedicating Part IX to collective proceedings. The rules, along with commentaries, were published in January 2021.[12]

In general, model rules constitute a non-binding instrument which aims at devising a set of principles and rules to be later taken as a basis for innovative harmonizing legislation concerning legislatures from different states. The Model Rules represent an attempt to realise a feasible frame of reference for policy makers at a European and national level, promoting common standards that allow for an increase of mutual trust. The rules, which bear the status of soft-law, aim at transcending national jurisdictional rules and facilitate resolution of disputes arising from cross-border commercial disputes.

[11] The inspiration of this endeavour has been the Principles of Transnational Civil Procedure, published under the auspices of UNIDROIT and American Law Institute (available at: https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles). Unlike this, the model rules are concerned with developing more detailed rules, rather than principles, considering the acquis of binding EU law and common traditions in the European countries.

[12] https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules

In the future, the rules may be used as a basis for the development of an EU directive. Of course, the EU legislator has to find an appropriate level of detail in order to avoid over-regulation and to leave room for Member States to integrate the uniform measures into the existing national procedures, but also to valorise the need for inter-states mutual trust in judiciaries[13].

Due to globalization and digitalization, in the event of a mass harm incident, it is highly likely that consumers from different European countries would be affected. In a cross-border litigation, issues regarding differences between national procedures would arise, especially since the Directive only sets down minimum standards and in a three-years' time we will probably have different rules across Europe, making some member states more attractive for claimants than others. Harmonisation is desirable, although, in some fields highly impossible. We believe that a move towards harmonization and approximation is likely in the field of collective proceedings. Therefore, the now-in-place redress mechanism introduced by Directive 2020/1828, amended with some principles from Model Rules, would better serve the purpose of the Directive – ensuring a high level of consumer protection as well as eliminating unfair disadvantages for traders, depending on the forum.

What drove us to explore the subject is Romania's own mechanism. It is arguable if the Romanian legal system has a rudimentary mechanism of representative action or it is *sui-generis* action. The fact is the mechanism in place[14] resembles collective actions, but a procedural scheme for redress, beside the common one, is not available. The procedure is contained within two provisions and is applicable only to injunctive measures arising from abusive clauses in consumer contracts. The almost-lack of it has determined us to take an interest in the very new Directive on representative actions, hoping, as future magistrates, to have the chance to deliver judgements that will be properly enforced so that European consumers will benefit from.

In addition, we saw an opportunity to integrate the also-new Model rules. The Model Rules are the outcome of broad expert study of best practice and common trends in national and international civil procedures that lasted almost 5 years. The working groups studied the in-depths of different European traditions and the project benefited from the input of numerous institutional observers.[15] Therefore, it seems that the project engaged a lot of resources that give it a certain amount of credibility and higher chances to become a binding European framework alongside the Directive.

Our paper is structured in three parts, the first one touching upon the qualified entities designated to bring representative actions to court (A). The purpose is to observe that although the current regulation has imposed some limitations, they are well-thought and researched and still could use some improvements. The second part focuses on the procedure itself (B) and the last part on the effects of the judgments given in this proceeding (C).

[13] Dr. U. Bux, *The European Law Institute/UNIDROIT Civil procedure projects as soft law tool to resolve conflicts of law – In-depth analysis*, at 14, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/556972/IPOL_IDA(2017)556972_EN.pdf
[14] Article 12 and Article 13 of the Romanian Law no.193/2000 on unfair terms in consumer contracts.
[15] The Hague Conference on Private International Law, the European Commission, the European Parliament, the Court of Justice of the European Union, various professional associations.

We will focus our analysis on certain aspects that seems to be somehow problematic and could benefit from future improvement inspired by the Model Rules, by amending the Directive.

Directive (UE) 2020/1828

A. Entities allowed to be plaintiffs in representative actions

There are some aspects regarding Article 4 of the Directive (Qualified entities) that may benefit from some of the proposed provisions contained within the Model Rules, respectively Rule 208 and its commentaries.

From a procedural perspective, in a representative action, a certain number of plaintiffs with shared interest composing the class have been harmed by the same trader. The claimant of the action is the class itself, but the claim is brought to court by a single representative entity recognized by the legislator on behalf of the group. Group members are not and do not become parties in the proceeding, although the judgement can be binding upon them. The individuals have little control over the action, unlike the case of joinder of parties.

Any entity that wishes to bring a representative action on behalf of the consumers must apply for the status of "qualified entity" either in the Member State where it intends to bring the action, or, when it comes to cross-border actions, in Member States other than those where it intends to act.[16]

As opposed to the American system, where standing is reserved to a group member, in the European Union, *locus standi* to bring the action to court belongs to non-profit organizations designated by Member States for this purpose.

The Directive also states that a qualified entity can be designated on an *ad-hoc* basis, as long as it complies with the same criteria as entities designated in advance. One of these criteria is the fact that is should be a legal person.

Imagine that a number of consumers are harmed by their fishing knots provider, the very small trader "Knots Matter", so very different than our giant tech case-study Cereza. One of them is a lawyer with a hobby. He discovers that he hasn't caught a fish in months because of some production defects of its fishing instruments and he is thinking that others may have the same problem. He tries to reach an entity based in his country, but their case either presents no interest and he is ignored or postponed. Still, he doesn't want others to be robbed of the pleasure of a great leisure activity and he wants to do something about it.

Rule 208 (b) of the Model Rules provides for the possibility that an *ad-hoc* entity, established solely for the purpose of obtaining redress for group members can be authorized to act as a qualified claimant, as long as

[16] Christina Renner and Cecile Manong, *Collective actions in the EU: the past, the present, the future*, available at: https://www.morganlewis.com/pubs/2020/03/collective-actions-in-the-eu-the-past-the-present-the-future

some requirements are met.[17] The general term "entity" was chosen in order to make clear that legal personality is not necessary[18].

Therefore, we have a very well-prepared group member who is willing to establish an entity in order to introduce a representative action for the group he is part of. However, in practice, it may take plenty of resources to create a legal person and our lawyer does not have them.[19] He could however create and entity without legal personality. Entities without legal personality don't require registration and are usually created as a result of the common agreement of members. Since the other criteria regarding funding and non-profit character are still to be met, these ad-hoc entities are still checked by each state in the most important aspects. Permitting entities without legal personality to act on behalf of harmed consumers would only speed up the proceeding in situations where timing is a valuable aspect.

Regarding the conditions that needs to be met in order for an entity to be designated, the directive has established more complex criteria than those previously laid out by Directive 2009/22/EC. It must be pointed out that the criteria apply only to entities that are designated for the purpose of bringing cross-border actions. Member States have the freedom to apply the same criteria to those entities qualified for the purpose of domestic representative actions.

The European representative action is very strict in regard to the funding of the qualified entities.[20] As far as redress measures are concerned, although third-party funding is not prohibited, the qualified entities must ensure that there is no conflict of interests and that any funding from a party that may have an economic interest in the outcome of the action does not influence the entities to act in spite of the collective interest of the consumers. Traders' donations may count as eligible third-party funding as long as it is done in the framework of corporate social responsibility initiatives. Nevertheless, the court or administrative authority solving the conflict must be able to block such practices by requiring the entity to refuse or change the source of funding. This ensures that the forementioned bodies have the consumers' best interest at heart.

It is interesting that the court or administrative authorities are only to act in the manner described above when a representative action for redress measures is filled, Article 10 making no mention of injunctive measures. The explanation probably resides with the fact that the two actions have different outcomes. It is always necessary to put an end to a conduct that affects consumers' rights, no matter how the representative entity is financed.

---

[17] Rule 209 of ELI/UNIDROIT Model Rules: A person or entity shall not be qualified as a claimant unless: (a) they have no conflict of interest with any group member, (b) they have sufficient capability to conduct the collective proceeding. In assessing this issue, the court shall take account of the financial, human and other resources available to the putative qualified claimant If appropriate, the court may require security for costs (see Rule 243), (c) they are legally represented, (d) they are neither a lawyer or exercising an any legal profession.

[18] Comment no. 3 under Rule 208 of ELI/UNIDROIT Model Rules, p. 372.

[19] The members of an association must legalize a series of documents and submit the application of registration to a law court.

[20] Article 4 (3): (…) that entity complies with the following criteria: (e) it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflict of interest between itself, its providers and the interest of consumers.

Regarding the estimated success of the representative action, there are several aspects that may discourage the use of this procedural mechanism.

A first one would be the criterion imposed by the Directive in Article 4 (1) (c) – the entity must be a non-profit one. The European Union feared that if the entity authorized to represent a group of harmed consumers is a for-profit one, it may be subjected to external influences and therefore, would not act in the interest of the group.[21]

On top of this, under point (10) of the Directive it is clearly stated that *punitive damages should be avoided*. It is in the European tradition that the public policy role belongs to the state, it being the only subject that has legitimacy to enforce punitive sanctions on the unlawful trader, which are usually reserved for criminal law. Furthermore, to avoid the possible bias, no financial incentives are to be awarded.

The European institutions expressed their concern regarding the risk of abusive litigation that comes with a profit driven action. They concluded that financial incentives such as contingency fees of attorneys[22] or the possibility to seek punitive damages may make out of the representative action a powerful tool to force those on the defending side to settle a case, which may not necessarily be well-founded.[23]

However, all these limitations lead to the question whether a non-profit organization is stimulated to bring certain cases to court. Model rule 209 does not require a qualified claimant to be a non-profit body as, the researchers say, it cannot be reasonably expected that sufficient private actors will become active in the enforcement of the interests of a group if all kinds of financial incentive are excluded.

At the moment, it is uncertain how well this proposal will benefit the consumers. Only time will tell if this solution regarding the financing of qualified entities will work within the European Union.

B. Inside the procedure

To begin with, it is important to underline the main objective of the procedure established by the Directive. Collective redress was designed to be a procedural mechanism that allows, for reasons of procedural economy or efficiency of enforcement, many similar legal claims to be bundled into a single court action.

Furthermore, the connecting point between individual claimants may be the similarity of an alleged infringement of rights granted under EU law, cases in which the potential loss of each individual is small in comparison to the potential cost for each claimant, which leads to a more cost-efficient collective redress scheme that allows persons claiming damages to share costs. However, although the overall costs of the dispute are shared between the parties, the amount is not always the same, depending on the factual or legal issues regarding

---

[21] European Commission, *supra* note 7, p. 10.

[22] The European Bar Association forbids the *pactum of quota litis*. See Article. 3 (3) of Code of conduct for European lawyers, available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf. In spite of it, according to a study on litigation costs of 2010, Estonia, Finland, Hungary and Spain allow contingency fees under certain conditions (C. Hodges, *The cost and funding of civil litigation. A comparative perspective* (2010), at 132-133).

[23] European Commission, *supra* note 7, p. 8.

individual claims. But it is certain that the witnesses will be heard only once, the documents as pieces of evidence will be administrated on one occasion, so that a workload of a lawyer is, by reporting, for example at 10 hours/client/litigation, and not 10 hours*100 clients. Nonetheless, the balance is positive in collective litigation, provided that certain costs can be shared.[24] From the perspective of numbers, *on average, in Europe, the cost of an action for injunction amounts to approximately €12.000 for the organisation. This amount includes lawyers' and experts' fees and, where applicable, also court fees. However, these costs vary significantly among respondents and very much depend on the characteristics and length of the cases, and on whether the action is brought before a public enforcement authority or before a court (some participants indicated that injunction actions before their public enforcement bodies were free of charge). In some complex cases, the legal costs (including court fees) for consumer organisations went up to € 30.000- € 35.000 (in particular when the consumer organisation lost the case).*[25]

Returning to the aspect presented above, the essential condition regarding the representative action is the existence of a right belonging to a group of individuals. In other words, through the collective action no individual rights are defended, but a right that belongs to a community. Thus, each legal issue taken individually raises the same issue of law. Most often, the members of the group were harmed by a single prejudicial act or a series of illicit acts closely related to each other. Precisely this characteristic relation of sharing the common prejudice confers consistency and individuality to the group. This relationship is not specific to the institution of connection, but one focused exclusively on the homogeneity of the legal issue or of the factual situation.

Going further, concerning the procedure itself, article 7 from the Directive provides at least two measures for the qualified entities to seek: injunctive measures and redress measures.

The injunctive measure presumes a remedy in the form of a court order addressed to a particular person that either prohibits him from doing or continuing to do a certain act (prohibitory injunction) or orders him to carry out a certain act (mandatory injunction). The remedy is discretionary and will be granted only if the court considers it just and convenient to do so.[26] Regarding this definition, the European Parliament and the Council have opted to lay down rules only on prohibitive injunction measures, as it is clear from the wording of Article 8 (1) of the Directive.

The redress measure presumes any of the methods available at law for the enforcement, protection, recovery of rights or for obtaining relief for their infringement. A civil remedy may be granted by a court to a party to a civil action.[27]

[24] C.I. Nagy, *Collective Actions in Europe. A comparative, economic and transsystemic analysis* (2019), at 14-15.
[25] Report – Bureau Européen des Unions de Consommateurs, *Stepping up the enforcement of consumer protection rules* (2020), at 16, available at: https://www.beuc.eu/publications/beuc-x-2020-083_enforcement_mapping_report.pdf
[26] Oxford dictionary of law, Oxford University press (2006), at 174-175.
[27] *Ibid.*, at 454.

On the one hand, the first type of action, more exactly the injunctive measure, may be provisional or definitive. A definitive measure to cease a practice or to prohibit a practice may include, if provided in national law, a measure establishing that the practice constitutes an infringement, an obligation to publish the decision on the measure or to publish a corrective statement.

Article 8 (4) provides a prior procedure in the case of definitive injunction measure. Member States may introduce provisions in their national law or retain provisions in their national law under which a qualified entity is allowed to seek this above-mentioned type of measure after it has entered into consultation with the trader concerned with the aim of having that trade cease the infringement. If the trader does not comply, the qualified entity may immediately bring a representative action for an injunctive measure.

On the other hand, the second type of measure enshrined in the Directive, respectively the redress measure, requires the trader to provide consumers with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.

Regarding the two types of measures that may be sought, while the Directive is the one that establishes what types of measures are mandatory to be provided by the Member States, it also gives a certain amount of freedom to those Member States in organizing how the two measures come to practice. In that regard, Article 7 (5) of the Directive sets forth the ways in which the member states can organize procedural rules in regard to the two measures.

Firstly, it is stated that the Member States may enable qualified entities to seek the measures within a single representative action, where appropriate. Therefore, the first important note is that it is the Member States that may regulate such a thing, and in the absence of such regulation, the qualified entities will be able to seek just one type of measure per action. Allowing qualified entities to seek both measures with the same action appears to be a way to reduce the number of disputes before the courts. Additionally, organizing how the qualified entities may request the measure in such a way seems to be in line with the consumer interest.

A second thing to note is that the Member States may regulate that the qualified entities are allowed to seek both measures within a single action only where it is deemed appropriate. Thus, it seems like a general authorization, without giving the court the ability to check in each case if it is appropriate for both measures to be taken within the same action, is not allowed by the Directive. One such case is where the whole proceedings are delayed by the request for redress measures, most likely by the additional pieces of evidence that need to be presented before the court for such measures, and the injunctive measures are needed to come into effect as soon as possible, to reduce negative effects on the consumers.

Thirdly, it is stated that Member States may provide that those measures are to be contained in a single decision. In order to comprehend the meaning of this part of the article, one must read the first part of the same article 7, where it is stated that Member States may enable qualified entities to seek both measures within the

same action *where appropriate*. Consequently, the meaning of the last phrase of the article seems to imply that Member States are allowed to regulate in such a way that qualified entities need to ask for both measures within the same action, but the Member States would still have to take into account the criteria of whether it is appropriate or not. The difference in this situation is that it would not be in the court's hands to decide on this matter, but in the hands of the lawmakers, that would have to provide for regulation with certain situations where it is mandatory to seek both measures with the same action. We believe that in this situation the Member States still have to take into account whether it is appropriate to seek for both measures within the same action in order to be in conformance with the scope of the regulation, one of the goals of the Directive being to protect consumer interest.

Recapping, Member States have three options when it comes to regulating how the two measures may be requested in regard to the procedural mean, whether it needs to be filed under separate actions or not. Their first option is not to regulate the matter at all, in which case the national procedural rules may apply, establishing whether such measures can be filed under the same action. Their second option is to regulate just the ability of the qualified entities to file an action that contains both measures, without imposing such a request on them, but giving the court the ability to verify whether it is appropriate to that specific case for both measures to be sought in one action. The third option is to regulate further than the second option, intervening more in the liberty of the qualified entities in regard to how to seize a court seeking measures, and obliging them to request both measures with one single action.

Article 9 enshrines the opt-in and opt-out system that is available for the consumers regarding the redress measure.[28] More specific, it states that the Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish, within an appropriate time limit after the representative actions has been brought, to be represented or not by the qualified entity in that representative action and to be bound or not by the outcome of the representative action.

In other words, the opt-in approach involves groups that include only individuals or legal persons who actively opt-in to become part of the represented group[29], in contrast to the opt-out approach where the group is composed of all individuals who belong to the defined group and claim to have been harmed by the same or a similar infringement of rights, unless they actively opt-out of the group.

The doctrine raised the issue of compliance with the fundamental rights of the opt-out mechanism[30], *since representation without authorization may impair group members' private autonomy consisting in the right to decide whether or not to enforce a claim and how to enforce it.*

[28] C. Renner, C. Manong, *supra* note 16.
[29] A. Pato, *Cross-Border Collective Redress in the European Union and Private International Law Rules on Jurisdiction* (2017), at 71.
[30] *Ibid.*, at 71-72.

Nonetheless, the main counterargument is that *in absence of this collective redress mechanism, many small claims would not get to courts of justice; the collective redress mechanism confers solely benefits to group members; there is no forced membership in the case of opt-out system, meaning that group members can leave the group without any further, by expressing explicitly their option to do this; while the right of disposition is constitutionally protected, access to justice is a fundamental right, so that the purpose of the collective proceedings is to make practically unenforceable rights an efficient*[31] *and effective mean*[32].

Another criticism for the opt-out model refers to the right to be heard, given that absent members of a collective action would eventually be bound by a decision without having participated in the proceedings. Nevertheless, if absent victims are adequately notified and thus, are offered an opportunity either to intervene or to get out of the collective action, then we argue that their right to be heard is preserved.

Also, there were concerns over the compliance of mechanism with the right of access to a court guaranteed by article 47 (1) of the Charter[33] and article 6 (1) of the European Convention of Human Rights (ECHR)[34]. In its jurisprudence[35], European Court of Human Rights (ECtHR) established that the *right of access to the courts secured by article 6 (1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'.*

ECtHR addressed the problem of representation without authorisation in the *case of Lithgow and Others v. The United Kingdom*[36]. ECtHR has ruled, on the basis of *Ashingdane's case* considerations, that the restrictions on access to a court do not restrict or reduce the access left to the individual in such a manner or to such an extent that the very essence of the right is affected. At the same time, this limitation is compatible with article 6 (1) only if it pursues a legitimate aim and there is a relationship of proportionality between the means applied and the aim pursued. Applying the principles to the Lithgow case, the Court concluded that these conditions were met because individual rights were indirectly protected by the fact that the representative of the group was appointed to represent the interests of all and could be revoked in case of breach of duty. Furthermore, the Court held that the scheme *"pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalization measure, a multiplicity of claims and proceedings brought by individual shareholders" and there was "a reasonable relationship of proportionality between the means employed and this aim."* [37]

[31] T. Boosters, *Collective redress and private international law in the EU* (2017), at 15.
[32] C.I. Nagy, *supra* note 24, at 24-25.
[33] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.
[34] Available at: https://www.echr.coe.int/documents/convention_eng.pdf
[35] ECtHR, *Ashingdane v. United Kingdom,* Appl. no. 8225/78, Judgment of 28 May 1985, §57.
[36] ECtHR, *Lithgow and Others v. The United Kingdom,* Appl. no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, Judgment of 8 July 1986, §194, 196, 197.
[37] C.I. Nagy, *supra* note 24, at 26-27.

The above jurisprudence was confirmed in *case Wendenburg and Others v. Germany*[38]. Here, in the context of a procedure before the German Federal Constitutional Court (Bundesverfassungsgericht), the ECtHR, referring to the *Lithgow case*, held that while *"the applicants were barred from appearing individually before that court", "in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court."*[39]

Regarding the criteria for the admissibility of collective redress, the Directive sets out two guidelines, leaving it to the Member States to choose the proper content of the admissibility of such actions.

The references in the Directive concern, on the one hand, the assessment of the admissibility of the representative actions which falls to the courts of justice or administrative authorities, without regulating a precise scope. The only mention is that the assessment of admissibility will be made in accordance with the Directive and the domestic law of the Member States.

On the other hand, the Directive states that courts or administrative authorities may decide to dismiss manifestly unfounded cases from an early stage of the proceedings, also in accordance with the provisions of national law.

In comparison with the lacunar provisions of the Directive and by establishing as a decisional factor for the criteria of admissibility the national legislations of the Member States, Rule 212 of the Model Rules establishes 4 cumulative conditions of admissibility.

In the following paragraphs, we will try to outline the possible effects that the ratification of similar rules would entail either at the level of recommendation in the EU or at the final level of transposition by Member States of this Directive.

Thus, according with the aforementioned rule, the court may admit a collective proceeding if:

a) It will resolve the dispute more efficiently than joinder of the group members' individual claims;

First of all, this criterion would be in full accordance with the very purpose of the Directive, that of simplifying and giving a note of the effectiveness to the collective proceedings, as opposed to an individual action.

Of course, this criterion would not be safe from criticism. This is because the holder of the collective action, respectively the qualified entity, is the one who, *ab initio*, assesses whether the initiation of a collective procedure is an advantageous one, from the perspective of the costs involved in terms of potential benefits, sufficient number of consumers, etc.

This condition would shift the responsibility from the collective entity to the court or the administrative authority. However, this is not necessarily a negative aspect, as long as a court presents all the conditions of independence, impartiality and full observance of the law, in accordance with article 47 (2) of the Charter. Similarly, when talking about the administrative authority, this entity is one constituted according to the law, with

[38] ECtHR, *Wendenburg and Others v. Germany,* Appl. no. 71630/01, Judgment of 6 February 2003.
[39] C.I. Nagy, *supra* note 24, at 26-27.

specific attributions, subject to the control of the national forum, so that it presents greater credibility of correct evaluation of the criteria from letter a) than the qualified entity.

Secondly, this requirement is linked to the proper administration of justice. The only one entitled to assess this character is the court or the administrative authority. These entities will take into account the complexity of the case, the likely cost to group members of pursuing their claims individually and the value of each group member's claim for compensation, etc.

For these arguments, we consider it opportune to insert the condition from letter a) regarding the admissibility criteria.

b) <u>All the claims for relief made in the proceeding arise from the same event or series of related events causing mass harm to the group members;</u>

From a superficial analysis of this condition, it can be concluded that the same event could be a so-called "single event mass harm", e.g., a mass accident such as a plane crash, a chemical plant explosion etc., or it could arise from a series of related events, e.g., a so-called "single cause mass harm" such as the use of unfair contract terms, product liability cases, or liability for misleading information in capital market brochures.

Although the Directive does not expressly lay down this condition, preferring to leave it to the Member States to establish such a condition of admissibility, the uniqueness of the event giving rise to the mass damage or the connection of events giving rise to damage is the starting point in completing the puzzle of collective redress.

The starting point must be the cause that produced the consumer harm and that determines him to fully recover his prejudice. From this perspective, it can be said that this condition of admissibility is an implicit one. Even if Rule 212 requires the establishment of this issue to the court or administrative authority, in the end if we start from the idea that the qualified entity engages the case based on its own criteria, the court would also qualify, from the perspective of its own competence, this proceeding as a collective one.

We appreciate that this implicit condition would be an improvement of the content of the directive, as long as the condition represents the core of the collective proceeding. For these arguments, we consider it opportune to insert explicitly the condition from letter b) regarding the admissibility criteria.

c) <u>The claims are similar in law and fact;</u>

This condition is no longer an implicit one, as it was the previous one. The requirement that the requests should have a sufficiently strong connection from the perspective of the factual situation and the legal framework is a softer condition. After all, this condition does not belong to the core of collective redress, being rather one of predictability, *e.g.* from the perspective of probation. One is the situation in which for the court to rule on the merits of the law to take into consideration the same pieces of evidence and another is the situation in which the applications arise from the same situation or related events, but different in fact or in law so that hearing of evidence implies multiple pieces of evidence. In the latter situation, the very purpose of qualifying the promoted

action as collective could be affected, which would generate high costs and would no longer justify the union of individual consumer requests.[40]

However, this condition would not complicate the issue of admissibility because its wording is a generic one, meaning that the factual and/or legal situation must be a similar one, without mentioning the degree of similarity. Thus, the courts or administrative authorities could decide, on a case-by-case basis, whether the collective redress passes the filter of admissibility, depending on the particularities of each case. This does not mean that the courts are held only by criteria such as estimated amount of individual damages, the size of the group and the chance of notifying all or almost all group members, whether members of the group have a realistic chance of bringing individual actions to justice. The courts or administrative authorities have full freedom to establish criteria related to the particularities of each case, as long as this similarity between the consumer's requests exists.

For these arguments, we consider it opportune to insert the condition from letter c) regarding the admissibility criteria.

d) Except in case of urgency, the qualified claimant has allowed the defendant or defendants at least three months to respond to a settlement proposal.

The requirement in letter d) practically introduces a mandatory preliminary procedure in the case of representative actions, an aspect that fundamentally changes the requirements for exercising the action.

We appreciate that this condition would not improve the procedure, but would make it more difficult and inaccessible to consumers. On the one hand, this condition would require the individual consumer to direct his efforts to contact, negotiate and try to reach an agreement with the perpetrator. On the other hand, it would inhibit consumers from resorting to collective proceedings as long as if they formulated an individual action, there would be no need for an attempt to reach an agreement with the professional, nor for the passage of a forfeiture period in which to seek a favourable settlement of the dispute. The purpose for which the collective redress mechanism was created was to facilitate the procedure and make it much easier for all consumers injured by the same professional. Imposing such a condition would prevent the very purpose of the Directive from being fulfilled, which would be unacceptable.

For these arguments, we consider that this condition should not be considered as a supplement to the admissibility conditions.

As mentioned in this paper, consumers who have expressly or tacitly consented to join the opt-in procedure, cannot individually bring an action with the same object and against the same trader.

Rule 217, from our perspective, secures the legal circuit by establishing a presumption of waiving the collective proceeding if a member of the group promotes an individual action against a defendant during the opt-

[40] I.I. Neamț, *Considerații generale cu privire la acțiunea reglementată de art. 12-13 din Legea nr. 193/2000. Analiză de drept comparat,* Revista Română de Drept Privat nr. 6/2013, at 98.

out period. In other words, if initiating individual proceedings without waiving the collective proceeding, a defendant will become aware that the claimant in the individual proceeding is part of the group as described in the collective action and may inform the court of this fact. Consequently, the claimant in the individual action will be deemed to have renounced to the collective redress.

For the argument of improving the security of the legal circuit, we appreciate that it would be opportune to complete the provisions of the directive with this recommendation of the Model Rules.

C. A look towards the effects of the judgement

In relation to the effects of the decision on a representative action, we would like to begin our analysis by questioning if such a decision has *res judicata*. This question can be tackled on two fronts. Firstly, referring the injunction measures, the Directive does not expressly deal with the issue.

In contrast, in regard to redress measures, the Directive does offer a solution. In analysing the mentioned solution, one initially needs to determine whether the decision has *res judicata* for a new representative action. Regarding this matter, the Directive tackles a direct solution in article 9 (4), where it states that a new representative action with the same cause of action and against the same trader could not be taken.

Secondly, in determining if the decision has *res judicata* for individual actions, filed by the consumers that were legally represented, meaning having given explicitly or tacitly their wish to be represented in a representative action, the Directive states that an individual action with the same cause of action and against the same trader cannot be permitted. Additionally, it is the Member States that have the duty to adopt such procedural regulation that would ensure the requirement of the Directive is met in this regard.

The first thing to note is that the Directive does not make a distinction based on the solution given to the initial representative action. For that reason, a new action with the same cause of action and against the same trader cannot be filed in both of the two possible situations, those being if the initial representative action was granted or denied.

Another important aspect is that the Directive does not lay out whether the judgement on a collective action seeking injunctive measures prohibits a new collective action seeking the same measures.

With the current wording, the national systems of the member states will be the ones establishing whether the effect of *res judicata* should apply in case of injunctive measures. In tackling this issue, member states should take into consideration that the legal solutions laid out at a national level, based on the principle of procedural autonomy, will be compatible with the principles of equivalence and effectiveness, as they were laid out by the Court of Justice of the European Union[41].

In certain cases of *rejection* for the representative action, individual consumers do not lose the ability to file another action, even if it is with the same cause of action and against the same trader. This solution is set forth

[41] See, *e.g.*, CJEU, Case C-676/17, *Călin* (EU:C:2019:700), at para. 34-43, and the judgements cited.

in article 10 (4), which states that if the court finds that the qualified entity is not allowed to file the action because another person is entitled, the rights of the individual consumers do not get affected. The most notable right that the article refers to is the one to file an individual action against the same trader and having the same cause of action.

In regard to the effects of admitting representative actions seeking injunctive measures, art. 8 (1) regulates these effects indirectly, by referencing the court can order the trader to cease a practice or, where appropriate, to prohibit a practice by the trader, either as a provisional measure or a definitive one. These measures would come into effect only in relation to the consumers which did not opt-out. Regarding the consumers that did opt-out, they can be represented by a qualified entity in a new representative action even if it is with the same cause of action and against the same trader, or they have the ability to introduce an individual action against the trader.

Regarding the effects of admitting representative actions seeking redress measures, art. 9 (1) provides insight into these effects, stating that they will include remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. Regarding the remedy of damages, the Directive does not state any provision regarding to how the sum the trader will have to pay should be expressed, as a global sum or as an amount per consumer.

To cover this gap, we would advise for rule 228 of the Model Rules to be used, meaning that the final judgment that sets the amount of compensation shall include: (a) the total amount of compensation payable in respect of the group or any sub-group, if an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount; (b) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

Such a solution takes into account the fact that sometimes the particularities of the case make it difficult to have an exact calculation of individual group member's damages. Therefore, the court could estimate the damages to the group members as a whole, and thereafter distribute those damages according to the criteria specified in the same judgement.

Another aspect the Directive does not touch on is the one regarding the enforcement of the judgement where the representative action was admitted. As such, we would bring into attention rule 227 (3) of the Model Rules, which sets forth that a final judgment may be enforced by the qualified claimant, and if the qualified claimant does not enforce the final judgment within a reasonable time, any group member, with the court's permission, may enforce the final judgment. We believe applying such a rule might contribute to the effectiveness and efficiency of the representative action mechanism, as it is detailed in the recital (7), because having a clearly regulated way of enforcement ensures the consumers are receiving the benefits of the actions as soon as possible.

When referring to the effects of a decision in a representative action where the court denied the request for the redress measures, the Directive touches on the matter of **supporting the other party`s legal costs**, stating

in article 12 (1) 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.

One important observation is that the Directive refers to the conditions and exceptions provided for in national law applicable to court proceedings, that still remain applicable. An additional rule expressly stated by the Directive is that the individual consumers concerned by a representative action for redress measures will not be the ones to pay the costs of the proceedings, that meaning the qualified entity is the one the Directive refers to as the unsuccessful party in case the representative action is denied, even if the qualified entity acts in behalf of the individual consumers, and only the qualified entity will be the one subject to supporting the other party`s costs of the proceedings.[42]

In this regard, the matter is directly regulated only in relation to redress measures, so regarding injunctive measures, it is the national system of the Member State that shall apply.

As to the effects of the decision as **evidence**, the Directive wants to establish in article 15 the rule that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence. This applies to the hypothesis where the two actions are filed separately, and the qualified entity does not seek both injunctive and redress measures within the same action.

The rule takes into account the fact that in the representative action where injunctive measures are sought, the plaintiff still has to prove that the trader had a practice that has been found to constitute an infringement of the provisions of Union law referred to in Annex I, and that is the premise for the redress measure too. Therefore, once this burden of proof has been met in front of a court, in the second proceedings, where the qualified entity would try to seek redress measure also, it would be more efficient not to have to prove again the same infringement, and rather use the decision as evidence. Consequently, in this situation, if the court concludes in a representative action that there wasn't any infringement of EU law, in a new representative action seeking different measures, a new court cannot state that there was in fact an infringement with the same cause of action and against the same trader without taking into account any new evidence, because that would amount to irreconcilable judgements. Also, to be noted is that the judgement has to be final in order to be used as evidence in a subsequent trial.

[42] In some legal systems of member states, the legislative solution takes the opposite approach, allowing consumers to be liable for costs under a representative action. In such scenarios, it is stated that when individual consumers expressly join the action by opting-in, it would be feasible to assume, even constitutionally, that they take on the risks attached to a possible failure.
However, the solution laid out in the Directive takes into account the fact that "the information asymmetry between the members [individual consumers] and the group representative [qualified entity] may warrant that this risk be placed on the latter"; C.I. Nagy, *supra* note 24, at 98.

In relation to this aspect, a few scenarios are required to be analysed. The first scenario is where in the representative action seeking injunctive measures, the qualified entity did manage to prove the practice of the trader. In such a case, in the representative action for redress measures or in the individual action filed by the consumers for obtaining redress measures, both the qualified entities and the consumers will be able to use the final decision in which the injunctive measures were granted as evidence in the new action. Therefore, by referring to *all parties*, in article 15, the Directive not only refers to the qualified entities, but also to the individual consumers too.

The second scenario is where the qualified entity did not manage to prove the practice of the trader in the action seeking injunctive measures. Thus, in the action seeking redress measures, the trader will have the interest to use the first decision as evidence of him not having committed the practice for which the redress measures are asked, in accordance with the national procedural law.

One aspect to be taken into consideration is that the Directive addresses the effects on evidence of a judgement ruling on a representative action only in the relation between the injunctive measures and redress measures. It does not deal with the effects on evidence in relation to people that were not *parties* to the proceedings, those *parties* being the qualified entity, the consumers that opted-in or did not opt-out, depending on the case, and the trader. Therefore, the Directive does not cover how the consumers that did opt-out in an opt-out proceeding and the ones that did not opt-in in an opt-in proceeding, can benefit from the judgement in terms of evidence. It seems that those consumers cannot rely upon the Directive to use as evidence a judgement on a representative action that was admitted with the same cause of action and against the same trader but with the qualified entity representing other consumers in a new representative action, where the qualified entity represents them now. However, the CJEU stated before in a specific area of consumer law, unfair terms, that where the unfair nature of a term included in the general business conditions (GBC) of consumer contracts has been recognized in an action for an injunction, the national courts are required, of their own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those conditions apply will not be bound by that term[43]. The Court referred precisely to the effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings.

[43] CJEU, Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (ECLI:EU:C:2012:242).

Of course, consumers can rely on national rules regarding the evidence, based on the principle of procedural autonomy, when EU law does not prescribe in these matters. CJEU might be tempted though to interpret largely article 15, but until that, one can only speculate about it.

Concluding remarks

The Directive proves to be a highly anticipated addition to the European *acquis*, ensuring that consumers among Member States benefit from a mechanism designed to ease their access to justice, while maintaining a firm balance between the consumers' and the traders' interests.

Coming as a direct response to situations that occur with expanding frequency in today's modernized society, such as *Dieselgate*, it fulfils its role in the "New Deal for Consumers" initiative, providing more guarantees for the consumers, guarantees that only add to those already provided in the standards for consumer protection existing in EU's legislative framework.

It does so by prioritizing efficiency and effectiveness of the whole proceedings, by building upon the prior framework in relation to the topic of representative actions, in the form of the Injunctions Directive, by modernizing the latter and expanding the range of measures the consumers have access to in a representative action, with the addition of the redress measure. Essentially, it fills the legislative gap existing prior to the adoption of the Directive, allowing groups of consumers to obtain compensations for damages suffered with the use of a mechanism provided for by the EU legislation.

Providing consumers with the ability to benefit from a representative action offers them a viable alternative to situations where an individual action would not be as feasible, either due to the small value of the claims compared to the potential litigation costs or the length of the procedure or even the risk of enforcement problems. The qualified entities would have the knowledge to tackle consumers cases in a more efficient manner, juggling more resources and being more suited to take on a multinational trader. The Directive also offers consumers access to a mechanism that might not currently exist in the legislation of the Member States where they reside.

Therefore, in its attempt to regulate the matter of representative actions in a homogenous manner, the Directive's intent is to provide for a mechanism inspired from the US class action system, but adapted to EU's own legislative background, hoping to contribute to solving the problems that come nowadays with an increasingly globalized and digitalized marketplace, where the possibility of mass harm incident is ever present.

While the Directive is a major step forward, certain aspects were left unregulated, and in an attempt to deal with this legislative gap, we have included a series of suggestions for rules that would complement the Directive in certain regards in case of a future amendment, taking inspiration from the Model rules of European civil procedure.

Firstly, we would argue that permitting entities without legal personality to act on behalf of harmed consumers would speed up the proceeding in situations where timing is a valuable aspect, a solution rule 208 of the Model Rules supports.

Another aspect we would advise to be taken into account would be to allow a profit organization to bring a representative action to court, a solution already adopted in rule 209 of the Model Rules, as questions arise to whether a non-profit organization is stimulated to bring certain cases to court.

In terms of admissibility of a representative action, we believe the conditions set forth in rule 212 of the Model Rules would provide national courts with a filter to allow only the situations the drafters of the Directive had in mind to be judged under the specific procedure of representative actions. These conditions refer to verifying if: (a) the representative action will resolve the dispute more efficiently than joinder of the group members' individual claims; (b) the claims for relief made in the proceeding arise from the same event or series of related events causing mass harm to the group members; (c) the claims are similar in law and fact.

Rule 217 of the Model rules provides with another beneficial addition to the mechanism regulated by the Directive, securing the legal circuit by establishing a presumption of waiving the collective proceeding if a member of the group promotes an individual action against a defendant during the opt-out period.

In relation to the effects of judgements, we would advise for rule 228 of the Model Rules to be used, meaning that the final judgment that sets the amount of compensation shall include: (a) the total amount of compensation payable in respect of the group or any sub-group, if an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount; (b) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

Finally, another aspect the Directive does not touch on is the one regarding the enforcement of the judgement where the representative action was admitted. As such, we would bring into attention rule 227 (3) of the Model Rules, which sets forth that a final judgment may be enforced by the qualified claimant, and if the qualified claimant does not enforce the final judgment within a reasonable time any group member, with the court’s permission, may enforce the final judgment.

As of 25 June 2023, the day the Member states must apply the legislation that transposes the Directive, consumers like Mr. Popescu and Mrs. Fernandez can find comfort in knowing they are more protected by the European Union in their interaction with traders, because while they may not have a guardian angel watching over them, they do have a qualified entity working for them.