



The European Federation of Insurance Intermediaries

La Fédération européenne des intermédiaires d'assurance

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MEMO

From: BIPAR Secretariat
To: BIPAR Member-Associations
Subject: Collective Redress – Directive on “representative actions for the protection of the collective interests of consumers” – BIPAR Brief Analysis

In June 2020, the European Parliament and Council of the EU reached a **political agreement on the final text for the Directive on “representative actions for the protection of the collective interests of consumers”, the so-called Collective Redress Directive**. Please find attached the agreed final text of the Directive.

Once formally approved by the EP in plenary session and by the Council of Ministers of the EU, the Directive will be published to the Official Journal of the EU. Twenty days after its publication, the Directive will enter into force. EU Member states will then have **24 months** to transpose the Directive into national law and **additional 6 months** to start applying its provisions.

The aim of these rules is to put in place an EU-wide enforcement system of Union law establishing obligations for the protection of consumers. Consumers harmed by a trader¹ (such as insurers and insurance intermediaries) who allegedly infringed specific EU legal acts listed in the Directive (e.g. IDD, MiFID II), can bring actions against the infringing trader collectively, represented by a qualified entity, e.g. consumer association. Such actions will seek to prohibit an illegal practice and/or compensation - injunction order & redress order respectively.

These new EU rules on collective redress introduce the possibility to bring a cross-border representative action, where the trader/service provider is established in one Member State and the group of consumers harmed reside in another Member State. In this case, the qualified entity can represent consumers and seek for an injunction or redress order collectively before the Court of a Member-State other than the one in which the consumers harmed habitually reside and other than the one in which it is designated. In addition, when the consumers harmed reside in different Member States, several qualified entities from different Member States can bring representative actions for the protection of the collective interest of consumers from different Member States.

The Collective Redress Directive does not replace the existing national procedural mechanisms aiming at the protection of collective or individual consumer interests. It is left to the discretion of the Member States whether to design the representative action set out by this Directive as a part of an existing collective injunction or redress mechanism or as a separate mechanism.

¹ “trader” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in that person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession.

However, at least one national procedural mechanism should be established in the form of representative action that complies with the modalities set by this Directive.

“**Collective interests of consumers**” means the general interest of consumers and, in particular for the purpose of redress measures, the interests of a group of consumers. The national court seized at each time will decide whether or not the case at issue qualifies as one for which a representative action can be brought.

In what follows, you can find a summary of the provisions of the Collective Redress Directive and an overview of the possible consequences of these new rules on insurance and financial intermediaries.

What does the Directive provide for?

1. Scope: Insurance and financial rules included

- Annex I of the Directive lists the legal acts which are the **legal basis for representative actions** seeking to enforce consumer law. The list includes the EU legislation on financial and insurance services:
 - **for Solvency II, Articles 183-186,**
 - **for IDD, Articles 17-24 and 28-30,**
 - **for MiFID II, Articles 24-29,**
 - **for PRIIPs. Articles 1-23.**
 - **GDPR, all Articles. The Directive is without the prejudice to the mechanisms and definitions provide for in the GDPR.**
 - **PEPP is not included in the list.**
- The Directive should cover infringements of provisions of Union law listed in Annex I to the extent that these provisions protect the interests of consumers. Infringements harming natural persons qualifying as traders should not be covered (Recital 6a).

IDD: Articles 17-24 and 28-30

- ✓ Article 17: **General principle**; “when carrying out insurance distribution, insurance distributors always act honestly, fairly and professionally in accordance with the best interests of their customers”.
- ✓ Article 18: **General information provided by the insurance intermediary or insurance undertaking** before the conclusion of an insurance contract.
- ✓ Article 19: **Conflicts of interest and transparency.**
- ✓ Article 20: **Advice, and standards for sales where no advice is given.**
- ✓ Article 21: **Information provided by ancillary insurance intermediaries**
- ✓ Article 22: **Large risks and stricter national provisions.**
- ✓ Article 23: **Information conditions.**
- ✓ Article 24: Information on **Cross-selling.**
- ✓ Article 28: Requirements in relation to IBIPs; **Conflicts-of-interest.**
- ✓ Article 29: Requirements in relation to IBIPs; **Information to customers.**
- ✓ Article 30: Requirements in relation to IBIPs; **Suitability assessment.**

MiFID: Articles 24-29

- ✓ Article 24: **General principles and information to clients.**
- ✓ Article 25: **Suitability assessment.**
- ✓ Article 26: **Provision of services through the medium of another investment firm.**
- ✓ Article 27: **Obligation to execute orders on terms most favourable to the client.**
- ✓ Article 28: **Client order handling rules.**
- ✓ Article 29: **Obligations of investment firms when appointing tied agents.**

Consequently, when an insurance or financial intermediary is in breach of the above listed obligations affecting this way the interests of a group of identifiable consumers, independently of whether this occurs intentionally or by negligence, a qualified entity representing collectively the consumers affected may bring against him/her an action before the court seeking to order him/her to stop this practice and proceed with the necessary actions to comply with these legal obligations (injunction order). If the court holds that the intermediary is actually in breach of these legal obligations, the intermediary will be ordered to conform with specific injunction measures, e.g. provide information.

Injunction measures could include not only an order to stop an ongoing practice, but also an order prohibiting a practice in case the practice has not been carried out but there is a risk that it would cause serious or irreversible harm to consumers. Injunction measures could also include measures establishing that a given practice constitutes an infringement of law, in cases where that practice ceased before the representative actions has been brought, when there is still a need for establishing that such a practice constituted an infringement of law, for instance to facilitate follow-up actions for redress measures.

In addition, the qualified entity representing collectively the consumers may also bring against the intermediary (separately or combined with the action seeking for injunction order) an action before the court seeking to order him/her to provide remedies to the consumers harmed by the infringement (redress order). Such remedies will be based on the Union or the national law which provides for substantive rights of consumers to contractual and non-contractual remedies (contract law, tort law), such as compensation for damages or losses, contract termination, etc. In such proceedings the loss or damage incurred needs to be proved.

2. Qualified Entities (QEs): Only QEs can bring representative actions

- Qualified entity means any organisation or public body representing consumers' interests which has been designated by a Member State as qualified in accordance with the Directive to bring representative actions.
- **Eligibility criteria for Qualified Entities.** The Directive distinguishes between QEs entitled to bring actions in the Member State where they have been designated (**domestic representative actions**) and QEs entitled to bring actions in another Member State than the one of their designation (**cross-border representative actions**). The action is still considered as a domestic representative action (when brought in the Member State of designation) even if it is brought against a trader domiciled in another Member State or consumers from several Member States are represented within the action (Recital 9a).
- **For cross-border actions**, QEs will have to fulfil the harmonised criteria set out in the Directive (Article 4 & Recital 10). A QE must:
 - ✓ be able to demonstrate 12 months of actual public activity in the protection of consumer interests prior to its designation request;
 - ✓ have a statutory purpose which demonstrates that it has a legitimate interest in protecting consumer interests;
 - ✓ have a non-profit making character;
 - ✓ not be subject to insolvency procedure or declared insolvent;
 - ✓ be independent and not influenced by persons, other than consumers, who have an economic interest in the bringing of any representative action and, to that end, have established procedures preventing such influence as well as conflict of interest between itself, its funders and consumer interest (see also Article 7 on funding of representative actions for redress);
 - ✓ disclose information demonstrating compliance with the above listed criteria and

information about the sources of its funding in general, its organizational, management and membership structure, objectives and activities.

- Member States shall communicate to the Commission **a list of the QEs designated in advance for the purpose of bringing cross-border representative actions**. The courts or administrative authorities shall accept the list as proof of the legal standing of the QE to bring a cross-border representative action, without prejudice to their right to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case.
- **For domestic actions**, QEs will have to fulfil the criteria set out in the national law of its Member State of designation. Member States should be able to apply the criteria set out by this Directive for QEs designated for the purpose of cross-border actions also in respect of QEs acting only for the purpose of domestic actions (Article 4, para 5).
- QEs may also be designated on an ad hoc basis, for the purpose of a particular domestic representative action, if they comply with the qualified criteria set out in the national law. However, no such possibility is provided for the purpose of a cross-border representative action (Article 4, para 6).

3. Injunction and Redress Measures

- QEs are entitled to seek, as appropriate, at least the following measures (Articles 5a and 5b):
 - a. **Injunction measures**; a provisional or definitive measure to cease or, where appropriate, to prohibit a practice deemed to constitute an infringement. These measures are independently of any actual loss or damage suffered by individual consumers or whether the infringing practice was committed intentionally or by negligence. Such a measure could be requiring the trader to provide consumers with the information previously omitted in violation of legal obligations.
 - b. **redress measures**; a measure that shall oblige the trader to provide consumers concerned 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.
- **Opt-out system for injunction measures**. Individual consumers concerned are not required to express their will to be represented by the QE, before the QE brings an action to seek an injunction measure (Article 5a, para 2).
- **Mandatory prior consultation**. Member States are given the possibility to introduce a mandatory consultation stage prior to the launch of the action seeking for injunction, during which the defendant-trader should bring the contested infringement to an end within two weeks (Article 5a, para 3).
- **Choice of opt-out or opt-in system for redress measures**. It is left at the discretion of each Member State to establish rules on whether and how the individual consumers concerned by an action may explicitly or tacitly express their will, after that action has been brought, to be or not to be represented by the QE within the representative action for redress measures and to be bound by the outcome of the action (Article 5b, para 2).
- **The opt-in system is mandatory** where the consumers represented have not their habitual residence in the Member State where the action is brought. In the case where the consumers habitually reside in another Member State, they have to explicitly express their will to be represented in the redress action in order to be bound by its outcome (Article 5b, para 3).

- **Ne bis in idem principle (=not twice against the same thing).** Consumers who have explicitly or tacitly expressed their will to be represented in a representative action can neither be represented in other such actions with the same cause of action and against the same trader, nor be able to bring an individual action with the same cause of action and against the same trader (Article 5b, para 3a). This is without prejudice to any additional remedies available to consumers under Union or national law, which were not subject to the representative action at issue (Article 5b, para 10).
- The Directive further requires that the redress order specifies the individual consumers entitled to benefit from the remedies provided. If this is not possible, it shall at least describe the group of consumers entitled to benefit from those remedies (Article 5b para 4).

4. Settlement Agreements on redress

- Member States shall ensure that within a representative action for redress measures:
 - a. the QE and the trader may jointly propose to the court or administrative authority a settlement regarding redress for consumers; or
 - b. the court or administrative authority may invite the QE and the trader to reach a settlement regarding redress (Article 8, para 2).

These settlements are subject to the scrutiny of the court or administrative authority.

- **Effect of settlements.** Approved settlements are **binding** upon the QE, the trader and the individual consumers concerned. Individual consumers concerned by the redress obtained by a settlement agreement concluded between the trader and the QE may be given the possibility to accept or to refuse to be bound by the settlement (Article 8, para 6).

5. Effect of final decisions

- A final judicial or administrative decision establishing an infringement harming collective interests of consumers can be used as evidence of the existence of that infringement for the purposes of any other redress action against the same trader for the same infringement (Article 10).

6. Disclosures of evidence by the trader

- At the request of a QE that has presented reasonably available evidence sufficient to support the representative action, and has indicated further evidence which lies in the control of the defendant or a third party, the court or administrative authority may order that such evidence be presented by the defendant or the third party, subject to rules on confidentiality and proportionality (Article 13).
- Upon request of the defendant, the court may equally order the QE or a third party to disclose relevant evidence.

7. Electronic Databases

- Member States may set up national electronic databases in the form of websites providing for information on QEs designated in advance for the purpose of bringing domestic and cross-border actions and general information on ongoing and concluded representative actions.

- The Commission shall establish an electronic database accessible, as relevant, to the national contact points, QEs designated by the Member States for cross-border and domestic actions and the Commission.

8. Penalties for infringing traders

- Infringing traders should face effective, dissuasive and proportionate penalties for failure or refusal to comply with an injunction measure or with an order to provide evidence or information about the final decision to consumers concerned. Those penalties may take the form of fines (Article 14).

9. Transitional provisions

- The Directive will apply to representative actions brought after the date of application.
- The Directive 2009/22 on “injunctions for the protection of consumers' interests” will be repealed as of date of application of this Directive. The Directive 2009/22 will apply to representative actions brought before the date of application.