Directive (EU) 2020/1828 on representative actions and its transposition: where do we stand?

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2. Where do we stand?
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4. Representative actions in the digital society: the value of data
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Background

Background

- The Representative Actions Directive (EU) 2020/1828 aims **to ensure that consumers are able to protect their collective interests in the EU** via representative actions, the legal actions brought by representative entities (so called qualified entities).
- **Representative actions are actions brought by qualified entities** before national courts or administrative authorities on behalf of groups of consumers **to seek injunctive measures** (i.e. to stop trader's unlawful practices, similarly to what has been foreseen by the Injunctions Directive 2009/22/EC), **redress measures** (such as refund, replacement, repair) or both injunctive and redress measures.
- The Directive aims to protect the collective interests of consumers in many areas of law and economic sectors, such as **data protection, financial services, travel and tourism, energy and telecommunications**.
- Member States had to adopt and publish, by **25 December 2022**, the laws, regulations and administrative provisions necessary to comply with this Directive. They had to apply those measures from **25 June 2023**.

Background… with some preliminary comments

- Is the Directive a game changer? I don't believe so.
- The directive is a huge step ahead for those member states which didn't have at all a legislation on collective redress, or they had a legislation that made hard to start a class action.
- There are still unresolved issues, such as the impact of international private law on cross-border actions.
- However, we might witness some competition among consumer organizations (a qualified entity in one country benefits from a system of mutual recognition in other Union countries)

Where do we stand?

Where do we stand?

- **Only 10 countries implemented it so far**: Irleand, Netherlands, Finland, Italy, Greece, Denmark, Hungary, Lithuania, Croatia, Malta
- Amongst the Member States which have not yet transposed the directive, the **European Commission sent in July reasoned opinions to Estonia, Cyprus, Latvia, Luxembourg and Poland** because they have failed to provide satisfactory information on the measures transposing the Directive.
- **These Member States now have (more or less) one month left to address** the shortcomings identified by the Commission. In the absence of a satisfactory response, the Commission may decide to refer them to the Court of Justice of the European Union

Opt in
vs.
Opt out

Opt in vs. Opt out

- In a nutshell, **Opt-in** means that a **decision is binding only for those who voluntarily joined the action**, **Opt-out means that a decision is binding automatically for the whole class** unless a consumer asks to step out
- there's a **huge discretion** for member states on what kind of system (opt-in or opt-out) they can implement
- **Opt in is mandatory for consumers resident in another member state** than the one where the action is brought

Opt in vs. Opt out

- In some countries, for a certain time, opt-out was considered contrary to art. 6 of the European Convention of Human Rights

Article 6 § 1 of the Convention – Right to a fair trial

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ..."

Opt in vs. Opt out

- Historically, main arguments against opt-out collective actions were: they restrict the right to a hearing and the right of disposition («the party is the master of his own case»)
- In the context of French law, it has been referred to the principle of «no one pleads by proxy»: for having standing, the plaintiff must have a legitimate interest in the case and, to be legitimate, the interest must be direct and personal; as a corollary, all the persons involved in the lawsuit must be identified and represented in the procedure.

Opt in vs. Opt out

- The European Court of Human Rights addressed the issue of representation without authorization in Lithgow vs. United Kingdom (1986).
- “The right of access to the courts secured by art. 6, par. 1, is not absolute but may be subject to limitations”
- These limitations may not impair the very essence of the right and need to “pursue a legitimate aim” and there needs to be a “reasonable relation of proportionality between the means employed and the aim sought to be achievied”

Opt in vs. Opt out

- **Opt-out is not contrary to the ECHR**
- **Opt-out seems to be the best choice for small claims**: it must be noted that while the right of disposition is constitutionally protected, access to justice is equally a constitutional fundamental right. The purpose of collective litigation is to make practically unenforceable rights a reality.
- Furthermore, while mandatory representation may go counter the right to private autonomy **there is no forced membership in the case of an opt-our system. People can leave the group**.

Opt in v. Opt out: a concrete example

- Dieselgate in Italy (pure opt-in):
  - **600.000** consumers involved in the scandal
  - **75.000 opted-in**
  - **10-11%** of the class members (potentially) compensated (appeal pending)
- Dieselgate in San Francisco, U.S.A. (opt-out):
  - **490.000** class members
  - **3300** opted-out
  - **99,3%** of the class member has been compensated

Representative actions in the digital society: the value of data

Representative actions in the digital society: the value of data

We're all familiar with the metaphor of data as the new oil, but there are crucial differences between the economic characteristics of oil and data. These differences have implications for the valuation of data as compared to oil:

1. **Data is normally considered to be non-rivalrous**, meaning that when one person uses a piece of data, it does not prevent another from also using it
2. **Data is often non depletable**, in that using it does not reduce the amount of data or reduce its value to others. This is the case when users are in different markets.
3. **Data typically depreciates over time**. A person browser's history or location data is most valuable at the moment is recorded
4. **Data is typically more valuable** when is **combined with other data**.
5. **Data** eventually exhibits **decreasing returns to volume**.

Representative actions in the digital society: the value of data

- These special characteristics of data as an asset class mean that valuation can differ over time and context as well as between cohorts of users or owners.
- Valuing data related claims in the context of collective redress can be a complex task.
- There's not always a uniform value or "market value" for data, unlike for example in commodity markets.
- Moreover, the losses suffered by the data subjects are often non-pecuniary. This non-monetary damage arising from a violation of data protection law may vary in nature.

Representative actions in the digital society: the value of data

- In a litigation context **extra complexity** is added because the value of data used in a claim will depend on the legal standard applied, that is **whether the standard is compensatory, restitutive or punitive**
- **If the standard is compensatory** (as most of the times in the different European jurisdictions) this means that there's a need to show in court the monetary and non-monetary loss that the individual has suffered.
- As stated recently by the EU court of justice in Österreichische Post AG case (C 300-21), *"Article 82(1) GDPR must be interpreted as meaning that* ***the mere infringement of the provisions of that regulation is not sufficient to confer a right to compensation****"*

Representative actions in the digital society: the value of data

- In the **restitutive standard**, the concept of **unjust enrichment is used**, where damages are commensurate to the gains made by the offending party. But In many jurisdictions, **this is a residual criterion** that can only be applied to the person who enriches themselves without a justifiable cause at the expense of another party. They are obligated, to the extent of the enrichment, to indemnify for the corresponding decrease in assets.

Representative actions in the digital society: the value of data

- In **the punitive standard, damages serve as punishment** to the defendant.
- This last **standard is explicitly excluded by the directive** according recital 10 says that *"In order to prevent the abuse of the use of representative actions, the recognition of punitive damages should be avoided"*
- At the same time **In a society increasingly characterized by an intangible economy, a purely compensatory redress system may end up not discouraging** conducts that produce enormous profits for those who implement them but whose damage is difficult to prove.

Representative actions in the digital society: the value of data

- Let me give you just an example taken from some recent decisions issued by German courts on a data scraping case.
- These were individual cases (not collective ones): On 10 decisions, just 2 recognized a redress for the claimant (500 euros).
- In most cases what the court ruled was *"The plaintiff has not sufficiently demonstrated the occurrence of specific, immaterial damage, which also may include fears, concerns, stress as well as loss of comfort and time*.
- So either we can accept that there's no concrete space for private enforcement in the field of data protection (with limited exceptions) or, *de iure condendo*, we could get inspired by **statutory damages** in US copyright law

Cross border actions: lessons learned at Euroconsumers

Cross border actions: lessons learned at Euroconsumers

- **Euroconsumers is a kind of pioneer** in the field of cross border actions.
- **We started long before** the directive spoke of cross borders representative actions and we did so by leveraging our presence in four important European jurisdictions.
- **The class action against Volkswagen is probably one of the best known**, but more recently we filed a coordinated class action against Apple for planned obsolescence of certain iPhone models, or the HP out of court early settlement.

The story so far… lessons learned

1. Stronger together
2. Multiple jurisdictions
3. Different entities/one single PoC
4. A solid legal network

How to empower class action in 3 moves

- **Coordinated Action Agreement**: a formal governance for coordinated class actions in our countries (and to foster local actions).
- **A unique platform to manage class actions**: using a centralized platform (leveraging on CaaS platform) to gather all the data coming from different countries and organizations so we can act local but think global
- **EC-Law**: establishing a unique network of lawyers to have a presence in each country and, at the same time, to be fully coordinated centrally for the decision-making.


A GLIMPSE OF
THE FUTURE

Epic - Fortnite

- On December 2022, Epic reached a settlement with the Federal Trade Commission (FTC) in the USA
- Epic has agreed to pay $245 million for allegedly misleading consumers regarding in-app purchases in its popular online video game Fortnite
- The FTC plans to use the settlement money to provide refunds to Fortnite gamers who were affected by the company's billing and refund practices
- On April 2023, We asked Epic to make refunds available in Europe and Brazil, too

Epic – Fortnite (the class)

- Parents whose children made an unauthorized credit card purchase in the Epic Games Store between January 2017 and November 2018
- Fortnite players who were charged in-game currency (V-Bucks) for unwanted in-game items (such as cosmetics, llamas, or battle passes) between January 2017 and September 2022
- Fortnite players whose accounts were locked between January 2017 and September 2022 after disputing unauthorized charges with their credit card companies

Epic - Fortnite

- On June 2023, we were informed by Epic that the terms of the settlement agreement do not restrict the FTC from using these funds to redress consumers outside the United States and we were encouraged to contact the FTC directly for questions about the ability of non-US consumers to obtain redress.
- On August 2023, we wrote to FTC requesting to provide us with information on how non-US consumers, particularly those in Belgium, Italy, Portugal, Spain, and Brazil, can obtain redress from the settlement funds.

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The Citroën AdBlue® case: the next dieselgate?

Background

- On July-September 2022, a growing number of consumers* in Italy and Spain, owners of Citroën-branded cars registered after 2015, complained, years after purchase, about anomalies attributable to the Selective Catalytic Reduction anti-pollution system (so-called SCR system)

- Indeed, cars with diesel engine alerted the driver respectively:

  a) the merely apparent arrival to the reserve level of the AdBlue® additive, with the AdBlue®/urea warning lights coming on, and indication of the remaining range of kilometers that can be traveled before immobilization of the vehicle due to additive exhaustion; that is to say

  b) detection of a malfunction of the SCR system, with (i) The AdBlue®/urea/service warning lights coming on as well as engine self-diagnosis, (ii) Audible signal emitted, (iii) Display of the "anti-pollution anomaly" message, and indication of the remaining number of kilometers that can be traveled before the engine immobilizer is activated

**Source: complaints received through CICLE project*

*** Presentation based on the legal opinion provided by LTF Consulting (Maurizio Gualdieri and Giorgia Vommaro, attorneys at law)*

Background

- According to what was reported by the consumers and that was also highlighted by an investigation run by Altroconsumo, the malfunctions were caused by a design and / or manufacturing defect of the system tank (or even part of the injection pump of the AdBlue® additive, or of the control units)
- The maintenance solution proposed by the authorized Citroën centers provides for the replacement of the tank with a new component supplied by the parent company at high costs varying from **800 to 1,200.00 euros**
- From the seriality, contextuality and similarity of the failure reports, it can be assumed that the component (the tank) is defective from its origin
- Precisely the fact that each user indiscriminately has detected the same type of malfunctioning excludes, for probabilistic reasons, its traceability to random events or to normal deterioration deriving from use and wear, and instead connects the malfunctioning to a congenital anomaly of the product

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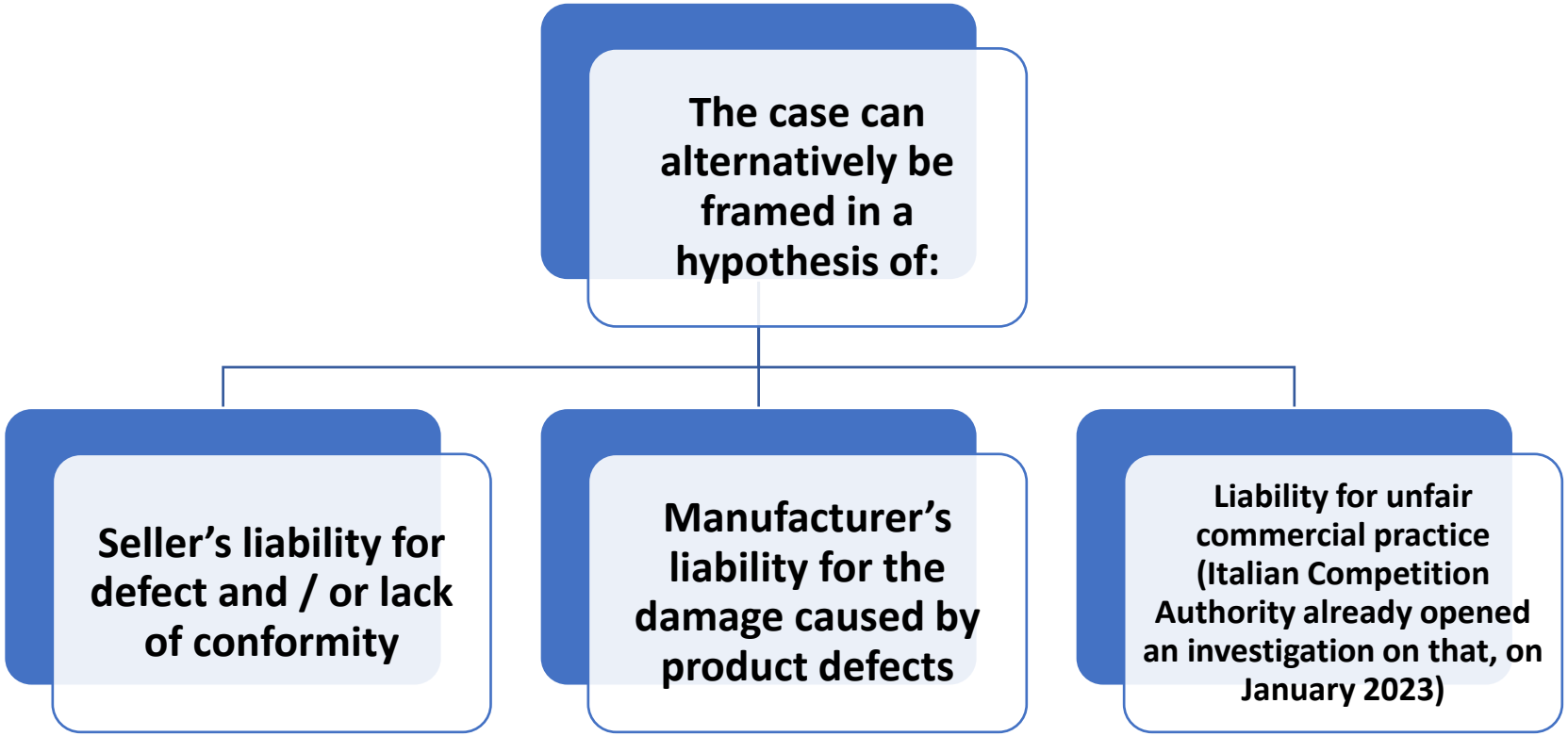
Regulatory framework




The way to get started is to quit talking and begin doing.
Walt Disney

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