FROM COLLECTIVE HARM TO REDRESS

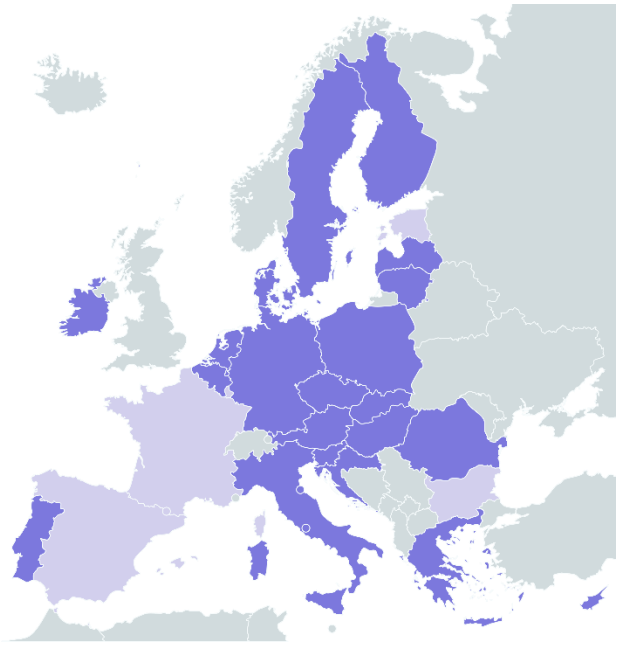
what's new

Newsletter second issue, November 2024

Contents

RAD roll-out

Implementation of the EU Directive on Representative Actions: what is the state of play?



Even though the transposition deadline of the Directive was 25 December 2022, by the end of November 2024, only 22 out of 27 EU countries had fully implemented it.

The most recent addition is Poland, where the Sejm of the Republic of Poland passed the law on 24 July. It was published on 14 August and came into force on 29 August. The scope of infringements covered by the Polish transposition aligns with the list in Annex I of the Directive. Poland has also adopted the same criteria for designating qualified entities who can bring domestic representative actions as those set for qualified entities who can bring cross-border actions as per Article 4(3). Notably, the Polish legislator chose the opt-in system and introduced a cap on third party litigation funders' compensation, limiting it to 30% of the total awards.

Five Member States still haven't transposed the RAD. Some of the key developments from the past three months include:

- **Bulgaria**: There has been significant movement. The draft law was approved by the Bulgarian Government on 4 September, and on 11 September, the Council of Ministers submitted the bill to the National Assembly. On 18 September, the Parliamentary committee leading on the file endorsed the text and proposed that the National Assembly adopts in first reading.

- **Estonia**: Unfortunately, there has been no progress. The draft act establishing a collective representative action procedure remains stalled in its second reading in the Parliament. Currently, amendments to the draft text are being developed by the Ministry of Justice, and

their completion is awaited. For the draft law to be adopted, it will need to pass both the second and third readings.

- **France**: The draft law on the Legal Regime for Group Actions is making progress. In May 2024, the Senate proposed new amendments to the draft law, as amended by the Senate, was transmitted to the National Assembly for a second reading but was blocked because of political instability. At the end October, a new legislative proposal was made by the French government (here).

- **Luxembourg:** Regrettably, there has been no movement. The substantially amended draft, published in April, is still awaiting the opinion of the Council of State, which is currently reviewing the text.

- **Spain**: In August, the Congress of Deputies (the lower house of the Parliament) published over 1,050 amendments to the draft law submitted by the Government in March. Given the sheer volume and the fact that the reform of collective actions is part of a broader judicial reform, it's fair to assume the process will still take some time.

You can find more information in our recent publication: "Collective Redress two years on".

Best practices of national transposition

The RAD leaves it up to Member States to decide how to regulate third-party litigation funding (TPLF) for collective redress. Member States are even free to prohibit TPLF entirely. Fortunately, only two Member States - Greece and Ireland - completely ban TPLF. However, Ireland may soon reconsider this stance. In July 2023, the Irish Law Reform Commission (LRC) released a consultation paper, presenting arguments for the legalisation of TPLF. Additionally, there is currently a bill before the Irish Senate that proposes allowing TPLF for certain proceedings, including those concerning consumer protection.

TPLF availability could be crucial for qualified entities bringing collective redress actions when no other suitable funding options are available. It's encouraging that 20 Member States have already allowed TPLF for collective redress in their national RAD transpositions. However, it is important to note that a few countries have introduced caps on the compensation funders can receive if the action succeeds. In Germany, for instance, funders' compensation is capped at 10% of the total award, while in Poland, it is capped at 30%.

Funders typically make substantial financial investments in collective actions and risk losing everything if the actions fail. If the potential compensation is capped too low, as with the 10% limit in Germany, it may become unprofitable and too risky for funders to support collective redress cases. Reducing available funding options could negatively impact qualified entities' ability to pursue collective redress actions on behalf of persons that suffered mass harm.

Find out more in BEUC recent position paper **Justice unchained: BEUC's view on third party litigation funding for collective redress,** as well as in our earlier publications (here and here).

Big Tech in the spotlight

First hearing in the Dutch class action against Google

On 22 October, the first hearing in the lawsuit by the Stichting Bescherming Privacybelangen against **Google** took place in the Amsterdam District Court. Supported by the Consumentenbond, the foundation sued the tech company to halt its illegal collection and processing of Dutch consumers' data for commercial purposes and to seek damages for these long-term, systematic privacy violations. This first hearing only covered the question of whether the foundation is permitted to represent the interests of millions of affected users in the Netherlands. The judgement of the court on this issue will follow on 15 January 2025. More info on Consumentenbond page.

Which? launches £3bn collective claim against Apple over competition law breach

Around 40 million UK iPhone and iPad users could be entitled to a share of a £3 billion claim against Apple. Which? believes **Apple** has breached UK competition law by failing to offer a choice of cloud storage providers. Instead, Apple steered customers towards its iCloud service, without clearly informing them about alternatives or how these could be used on iOS devices. The legal claim is being brought on an 'opt-out' basis for eligible consumers living in the UK and an 'opt-in' basis for those living abroad. Which? is seeking damages for all consumers who obtained iCloud services as of 1 October 2015. It estimates that affected UK consumers could be owed an average payout of £70.

Apple will face class actions in four countries over App Store surcharges on music streaming services

Testachats/Testaankoop, Altroconsumo, OCU, and DECO Proteste plan to initiate coordinated class actions against **Apple** in Belgium, Italy, Spain, and Portugal, respectively. They will be seeking redress for consumers impacted by Apple's exploitation of its market power to impose up to a 30% surcharge on non-Apple music streaming services, including Spotify, Deezer, YouTube Music, and others, via its App Store. This surcharge led to price increases for iOS users, with Spotify's monthly fee, for example, rising from €9.99 to €12.99. Additionally, Apple prevented these music streaming services from informing users about cheaper subscription options available directly through their own websites. These actions follow the European Commission's March 2024 decision to fine Apple €1.8 billion for these illegal practices where BEUC intervened as an interested third-party (appeal is currently pending). More than 500,000 consumers across the four countries could potentially benefit from these actions.

A UK collective damage claim against Apple over the app developers' fees approved for trial

The UK Competition Appeal Tribunal ruled on 18 October that claims against Apple regarding its allegedly unfair app developers' fees are suitable to be brought in collective proceedings. The proposed class representative, Dr. Sean Ennis, alleges that Apple infringed competition laws by abusing its dominant position and charging unfair commissions in the market for distribution of software applications for its iOS operating system. The claim is brought on behalf of over 13,000 UK-based app developers who have paid these allegedly unfair commissions.

Rotterdam court seeks CJEU ruling on whether national rules for collective actions comply with GDPR Article 80

On 13 November, in the dispute between the Dutch privacy foundation Stichting Data Bescherming Nederland (SDBN) and **Amazon**, the Rotterdam court decided to refer preliminary questions to the

CJEU regarding SDBN's admissibility. SDBN is seeking compensation from Amazon for both material and non-material damages on behalf of approximately 5 million Amazon account holders in the Netherlands, whose personal data was allegedly processes in violation of the GDPR. In its judgment of 13 November, the court outlined the background for these preliminary questions and granted the parties an opportunity to respond. A subsequent judgment will formally refer the questions to the CJEU. The proposed questions focus on whether national rules on the admissibility of collective actions - such as those under the Dutch WAMCA - comply with GDPR Article 80, regarding the organisations acting on behalf of data subjects, particularly in relation to the issue of explicit authorisation and the option for individuals to opt out. More details on the case and the questions can be found here.

Other major legal actions and judgements

First hearing in the class action against six water companies in England

Between 23 and 25 September, the first hearings took place in the UK's first environmental competition class action. Six water companies in England - Thames Water, Yorkshire Water, Anglian Water, Severn Trent, Northumbrian Water, and United Utilities - are accused of overcharging customers by £800 million to £1.5 billion by under-reporting the true extent of their sewage pollution. The action was filed by Carolyn Roberts, a former Oxford University professor and environmental consultant, on behalf of a group of affected consumers. If successful, the claim could result in refunds worth hundreds of millions of pounds.

First ever final judgement under the Dutch WAMCA regime is a setback for the claimant organisation

On 9 October, the Rechtbank Amsterdam ruled on a damage claim (financed by a commercial litigation funder) filed under the Dutch Collective Damages Act (WAMCA) against **Vattenfall**, addressing the issue of misleading practices regarding the kW fee charged to certain commercial clients (link). This ruling is the first final judgement under the WAMCA framework. The foundation behind the claim lost the case on substantive grounds, with the court determining that the misleading representations of which Vattenfall was accused did not fall under the assumed public disclosure requirements. The court noted that the alleged misrepresentations cited were not communicated publicly but were instead personal and specific to individual contracts. While this ruling does not compromise the functionality of the WAMCA, it is nonetheless disappointing. After navigating a lengthy procedural journey, the foundation faced a setback that underscores the challenges in litigating complex cases involving collective claims.

Latest updates from the Court of Justice of the EU

The Advocate General: national laws prohibiting claim assignment for damage claims contradict EU Law

On 19 September, Advocate General (AG) Maciej Szpunar delivered his opinion in case C-253/23, addressing a form of collective private enforcement of competition law in Germany called the claim assignment model ('*Abtretungsmodelle*'), or 'collection by group action' ('*Sammelklage-Inkasso*'). This model has been previously used to claim damages related to the 'Dieselgate' emissions scandal. The AG hold that a complete prohibition of the assignment of damage claims stemming from competition law infringements to legal service providers would be contrary to EU law, specifically the principles of effective judicial protection (Art. 101 TFEU and Art. 47 of the Charter). According to the AG, such a ban makes it excessively difficult to bring smaller damage claims. Consequently, national laws should not prohibit the assignment of claims to legal services providers unless equivalent legal or contractual options for consolidating damage claims are available. Should the Court adopt this opinion, it would enable a form of collective redress for competition law infringements (via claim assignments) across Europe, even in Member States that have not added competition law to the scope of their RAD Annex I transpositions. This would also be a green light for all claim vehicles collecting complaints from consumers in competition cases.

Advocate General issues opinion on consumer associations' standing to represent investors-consumers

On 5 September, AG Medina delivered her opinion in Case C-346/23 Banco Santander. The case concerns whether the MiFID I Directive prevents national case-law from limiting the standing of consumer associations to represent the interests of certain categories of investors-consumers, on the basis of the monetary value and nature of the financial products in which they have invested. The AG is of the opinion that, while Member States have discretion under Article 52(2) of the MiFID I Directive to decide whether consumer associations can represent the collective interests of investor-consumers, this standing is tied to the investors' status as consumers, and the nature or value of the financial products they have invested in is not a decisive factor. Therefore, the AG concludes that Article 52(2) of the MiFID I Directive must be interpreted as precluding national case-law that limits the standing of consumer associations to represent the individual interests of certain categories of investors-consumers, on the basis of the value and nature of the financial products in which they have invested.

Interesting reads

Publication of Comparative Procedural Law and Justice now online, including the Part on Collective Litigation!

The Comparative Procedural Law and Justice (CPLJ) project was envisaged as a comprehensive study of comparative civil procedural law and civil dispute resolution systems worldwide. Its goal was to produce a multi-volume open access online publication. The full publication was released in autumn 2024, including Part X: Collective Litigation, featuring contributions by Teresa Arruda Alvim, Alexandre Biard, Theo Broodryk, Deborah Hensler, Elisabetta Silvestri, Stefaan Voet and Francisco Verbic. You can access each chapter of the Collective Litigation part of through the following links: Introductory Notes on Collective Litigation, Introduction, Representative Actions, Overreaching Issues in Representative Actions, Aggregate Litigation, Mass Claims, ADR and Regulatory Redress and Conclusions.

The APPLIED project country reports are out

On 23 October the Expert Workshop of the APPLIED - Assessing Collective Private Parties' Litigation in the Economy of Data – project took place at Amsterdam Law School. The APPLIED project seeks to address the growing challenge of enforcing data protection rights across different European jurisdictions. Central to this project is the comparative legal analysis, which focuses on six selected jurisdictions: the Netherlands, Italy, Germany, Austria, Belgium, and France. The country reports for these countries have been published around two months prior to the workshop and can be found here.

Digital Freedom Fund launches Collective Redress Database

In November, the Digital Freedom Fund published several resources as part of their new Collective Redress Database. The initiatives aim to empower collective action in defense of digital rights under the EU Charter of Fundamental Rights. The Collective Redress Database features country reports authored by experts from Germany, Italy, Spain, the Netherlands, France, Greece, Croatia, Ireland, Portugal, and Belgium. Additionally, a comparative report has been developed, analysing the state of collective redress across these jurisdictions The Database also includes a comparative tool, enabling users to quickly identify convergences and differences between the listed jurisdictions.

Access the recordings of "Recent Legislative Responses to Litigation Finance"

On October 28, the Center on Civil Justice at NYU School of Law hosted a one-day conference, Recent Legislative Responses to Litigation Finance. The event brought together legal experts, legislators, practitioners, and academics from the US and Europe to discuss key legislative efforts regulating TPLF. The conference featured three panels: on disclosure of commercial litigation financing agreements, on consumer funding and on international legislation. You can access the recording here.

Events

- ➔ On 20 September, BEUC organised training on collective redress and private international law in cross-border representative actions, led by Professor Xandra Kramer.
- ➔ On 9 December, training on Artificial Intelligence Act as a basis for representative action will take place.

If you are interested and would like to participate in our future events, don't hesitate to contact us at enforcement[AT]beuc.eu!

Key outputs to watch

In spring 2025, BEUC will publish the results of a comparative legal study on procedural rules and their impact on collective redress. The study will focus on the following three topics:

1. Burden of proof, access to evidence and disclosure of information,
2. Financing of collective redress actions, with a focus on third-party funding and court fees, and
3. Quantification of (immaterial) damage, especially in cases of online infringements.

The study will offer a detailed analysis of the legislation and jurisprudence in Belgium, Germany, Italy, and Poland, while also considering experiences from Austrian, Dutch, French, and Spanish laws. The researchers will present the findings in an online workshop later in spring 2025. Stay tuned!

Stay connected and engaged

We are eager to make the activities of this new project as interesting and beneficial to your work as possible. Your feedback and ideas are invaluable to us. Please feel free to share your thoughts by e-mailing enforcement[AT]beuc.eu.

Additionally, if you know of other consumer or digital rights groups that could benefit from this project, please let us know.

You can access the first issue of this newsletter on the BEUC website here.

Supported by funding from Luminate Projects Limited.

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