Representative Actions Directive – the European and Polish perspectives

Aleksander Woźniak
Senior Associate, Poland
T +48 22 520 8455
E aleksander.wozniak@cms-cmno.com

Anna Cudna-Wagner
Partner, Poland
T +48 22 520 5529
E anna.cudna-wagner@cms-cmno.com

The Representative Actions Directive enacted by the EU in late 2020 is set to reshape the consumer protection landscape across all EU member states. By introducing brand-new legal mechanisms, this will soon open the path to cross-border litigation of mass claims – which will potentially involve thousands or more consumers. European businesses who regularly face this type of legal issue on their home ground should now keep an eye open for the fresh assortment of challenges and the widespread consequences that the new regulations may bring.

The Representative Actions Directive (Directive 2020/1828, the RA Directive) requires EU member states to introduce (by June 2023 at the latest) legislation that will facilitate bringing before their courts and administrative bodies representative actions (i.e. mass U.S. class-action style claims for protection of the rights of consumers). Consumer rights that will be covered using the recently designed instruments span a multitude of business sectors. The new mechanism will apply to both domestic and cross-border disputes and will enable consumers to seek a variety of different measures.

In what sectors will representative actions apply?

According to the RA Directive, the new mechanisms will apply to infringements of the collective interests of consumers that are protected under EU provisions listed in an annex to the RA Directive. These encompass over sixty EU acts that regulate and harmonise member states' laws in a variety of sectors, such as energy, health, travel, financial services, and telecommunications. The RA Directive is a supplementation, rather than a replacement of the existing tools of consumer protection.

Who can bring representative actions?

The RA Directive requires that representative actions on behalf of consumers will be brought by "qualified entities" designated by EU member states. Concerning cross-border representative actions, the RA Directive sets out several criteria that a qualified entity must meet: among others, a non-profit character and a statutory purpose demonstrating its legitimate interest in protecting consumer interests. Member states are also allowed to use the same criteria for the appointment of qualified entities to bring domestic representative

actions, as well as designating public bodies as qualified entities. Members states will be required to inform the public about qualified entities for the purpose of domestic representative actions, and to provide information to the EU Commission about qualified entities and cross-border representative actions. The Commission will maintain and oversee a public list of such entities.

What types of claims can be pursued a representative actions?

Generally, two types of means of protection are envisaged in the RA Directive: injunctive and redress measures. However, EU member states might introduce further solutions within the framework of representative actions.

Injunctive measures are aimed at ceasing or prohibiting a practice, which constitutes an infringement of the consumer rights protected under the RA Directive. These can also be pursued as provisional measures and may establish that a practice in question constitutes infringement or obligates the publication of the decision on the measure or the issuance of a corrective statement. Moreover, failure or refusal to comply with an injunctive measure will be subject to penalties. Qualified entities pursuing injunctive measures will not need to obtain an expression of intent from individual consumers and will not be required to demonstrate a defendant's liability through intent, negligence, loss or damage to individual consumers.

Redress measures require entities who committed an infringement to provide remedies to consumers, encompassing reimbursement or reduction of price, compensation, contract termination, replacement, or repair. To be included in and bound by the outcome of representative action, consumers will need to express their wishes, explicitly or tacitly. In the latter case, as the consumers are not individually specified, the redress measure should at least describe the group of consumers entitled to benefit from the remedies granted. Regarding, cross-border representative actions, only an explicit expression of intent will be sufficient. Parties to the representative action will also be able to propose a settlement redress for the consumers concerned, which will be subject to approval by the court or the administrative body conducting the proceedings.

In their transposition of the RA Directive, member states may also make it possible to seek both injunctive and redress measures in a single representative action.

In addition, the court or administrative body conducting the proceedings will be able to obligate the unsuccessful party to inform the consumers about the result of a particular representative action.

How will the procedure look?

The RA Directive does not include any particular procedure applicable to representative actions. However, it provides for several specific rules that will have to be taken into consideration by member states. Notably, member states are required to implement rules of disclosure of evidence. Also, it will be possible for member states to rely on final decisions issued in representative actions as evidence in other proceedings against the same trader for the same practice. Furthermore, pending representative actions, proceedings will suspend or interrupt limitation periods of claims that the involved consumers might have.

On the other hand, the RA Directive does not set precise standards of certification, which is usually one of the fundamental aspects of any class-action type proceedings in many jurisdictions. In this respect, the RA Directive provides that a qualified entity bringing a representative action will be required to provide the court or administrative body with sufficient information about the consumers concerned and that the court or administrative body conducting the proceedings should have the possibility to dismiss manifestly unfounded cases at the earliest possible stage.

How will representative actions be financed?

The matter of the costs of the proceedings is largely left out of the scope of harmonization. Consequently, the RA Directive provides that the unsuccessful party should bear the costs as per applicable domestic rules and that individual consumers should not pay the costs, except under exceptional circumstances where costs were incurred as a result of the individual consumer's intentional or negligent conduct.

Interestingly, the RA Directive sets out specific rules for third-party funding of representative actions for redress measures. Namely, third-party funding will be subject to scrutiny to avoid a possible conflict of interest or adverse effects of third-party funding on the collective interest of consumers. The inclusion of the abovementioned rules makes the RA Directive the first piece of legislation on the EU level addressing third-party funding, indicating its growing importance for dispute resolution, particularly as a tool enabling access to justice.

How representative actions might work in Poland?

In Poland, the RA Directive will have to fit into the existing system of protection of the collective rights of consumers, which can be divided into three main categories. Firstly, the protection of consumers in

general falls under the competence of the President of the Office of Competition and Consumer Protection, an administrative body that conducts ex officio investigations that may result in issuing declaratory decisions, as well as imposing significant financial penalties that can later be appealed to a specialized court. Secondly, the Financial Ombudsman has the power to initiate proceedings against financial institutions on behalf of their clients, concerning unfair commercial practices (as defined in Polish provisions implementing the Directive 2005/29/EC). Finally, mass claims concerning consumer protection can be pursued within the Polish group-action litigation system, which is based on an opt-in structure, must involve at least ten individual claimants, and provides for an elaborate process of certification.

Poland should adopt and publish the provisions implementing the RA Directive by 25 December 2022 and apply them on 25 June 2023. However, to date, no draft bills or other official documents concerning the transposition of the RA Directive have been published.

If you are interested in the subject, please have a look at our new CMS European Class Actions Report 2022.