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# IBA Annual Litigation Forum

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## Current trends in class actions

**WORKSHOP 3: The Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers**



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# Overview of key topics and the (non-)harmonising Directive's approach

1	General approach of Directive and subject-matter of actions for redress	<ul style="list-style-type: none"> <li>General approach: minimum harmonisation regarding key aspects of collective redress mechanism, in particular actions for redress and their scope</li> </ul>
2	Legal standing of qualified entities for domestic and cross-border actions	<ul style="list-style-type: none"> <li>No harmonisation of requirements for designation regarding domestic actions</li> <li>Full harmonisation of requirements for designation regarding cross-border actions (Art. 4(3) RAD)</li> </ul>
3	Opt in / opt out in case of domestic and cross-border actions	<ul style="list-style-type: none"> <li>Mandatory opt in requirement for consumers resident outside of the forum state</li> <li>No harmonisation for domestic actions</li> </ul>
4	Further admissibility requirements for actions for redress / certification requirements	<ul style="list-style-type: none"> <li>No general harmonisation of admissibility requirements (recital 12 RAD)</li> <li>No requirement of separate certification stage</li> </ul>
5	Funding and costs of actions for redress	<ul style="list-style-type: none"> <li>No harmonisation regarding availability of funding: Member States can choose</li> <li>Minimum harmonisation in case of availability of funding (Art. 10 RAD)</li> </ul>
6	Determination and distribution of damages	<ul style="list-style-type: none"> <li>No harmonisation, Member States are free to choose their own model</li> </ul>
7	Other topics: settlements, interaction with other instruments of collective redress	./.

# Key facts on the Directive's transposition in the Netherlands

1	General approach of Directive and subject-matter of actions for redress	<ul style="list-style-type: none"> <li>Horizontal approach is followed with the exception of funding provisions (conflict of interest: applicable only in consumer matters; see also under 3.)</li> </ul>
2	Legal standing of qualified entities for domestic and cross-border actions	<ul style="list-style-type: none"> <li>Domestic actions: qualified and ad hoc established entities</li> <li>Cross-border actions: only qualified entities</li> </ul>
3	Admissibility requirements for actions for redress / certification requirements	<ul style="list-style-type: none"> <li>Rather extensive certification requirements for domestic and cross-border actions (entities): governance, funding, representativity, superiority, nexus NL etc.</li> </ul>
4	Opt in / opt out in case of domestic and cross-border actions	<ul style="list-style-type: none"> <li>Domestic non-consumer actions: opt out for NL domiciled, opt in for non NL domiciled unless court orders opt out</li> <li>Domestic consumer actions: always opt out for NL domiciled and opt in for non NL domiciled</li> </ul>
5	Funding and costs of actions for redress	<ul style="list-style-type: none"> <li>TPF Full cost orders allowed (including success fee funder?)</li> <li>5x fixed costs adverse costs order in case of frivolous litigation</li> </ul>
6	Determination and distribution of damages	<ul style="list-style-type: none"> <li>Aggregate calculation of damages in settlement funds</li> <li>No explicit cy pres in legislation and no explicit provisions for remaining funds</li> </ul>

# Key facts on the Directive's transposition in Portugal (Decree-Law no. 114-A/2023, of 5 Dec)

1	General approach of Directive and subject-matter of actions for redress	<ul style="list-style-type: none"> <li>Domestic and cross-border representative actions for the protection of <u>consumers'</u> rights and interests grounded on infringements of <u>national and EU provisions mentioned in RAD Annex I</u>, by <u>traders</u> (even if ended before the action is filed or concluded), which harm or may harm consumers' collective interests</li> </ul>
2	Legal standing of qualified entities for domestic and cross-border actions	<ul style="list-style-type: none"> <li>Domestic actions: associations, foundations (subject to independence requirements), local authorities</li> <li>Cross-border actions: qualified entities [subject to Art. 4(3) RAD]</li> </ul>
3	Admissibility requirements for actions for redress / certification requirements	<ul style="list-style-type: none"> <li>No certification process or preliminary decision</li> <li>Nonetheless, at an early stage of the proceedings, the court may dismiss the proceedings if claims are deemed manifestly unlikely to proceed</li> </ul>
4	Opt in / opt out in case of domestic and cross-border actions	<ul style="list-style-type: none"> <li>Opt out as a general rule for domestic and cross-border actions</li> <li>Opt in for consumers that are not habitually resident in Portugal</li> </ul>
5	Funding and costs of actions for redress	<ul style="list-style-type: none"> <li>Funding requirements: certified copy of the agreement provided to the court, (i) including a financial summary of funding sources used and costs and expenses to be borne by the funder, (ii) establishing a fair and proportionate remuneration for the funder and (iii) ensuring the claimants' independence and the absence of conflicts of interests</li> <li>No judicial costs are, in principle, borne by the claimant (exceptions: total dismissal or manifestly unfounded decisions)</li> </ul>
6	Determination and distribution of damages	<ul style="list-style-type: none"> <li>Determination by the court: global amount if consumers are not individually identified</li> <li>Distribution manager determined by the court: notably, the claimant or one or more identified represented consumers</li> </ul>

# Key facts on the Directive's transposition in Germany

1	General approach of Directive and subject-matter of actions for redress	<ul style="list-style-type: none"> <li>• All civil law disputes concerning consumer claims against traders</li> <li>• Applicability is extended to claims of small enterprises (fewer than 10 employees and an annual turnover or balance sheet of not more than 2 million euros)</li> </ul>
2	Legal standing of qualified entities for domestic and cross-border actions	<ul style="list-style-type: none"> <li>• Domestic and cross-border actions: only qualified entities</li> </ul>
3	Admissibility requirements for actions for redress / certification requirements	<ul style="list-style-type: none"> <li>• No separate certification state; minimum of 50 consumers affected; rather strict requirements regarding similarity of claims</li> </ul>
4	Opt in / opt out in case of domestic and cross-border actions	<ul style="list-style-type: none"> <li>• Late pre-judgment opt in (possible until 3 weeks after the closing of the oral hearing at first instance)</li> </ul>
5	Funding and costs of actions for redress	<ul style="list-style-type: none"> <li>• TPF generally admissible but maximum success fee of 10% and most likely no deduction of success fee from compensation allowed</li> <li>• Statutory court and lawyers' fees are capped to limit cost risks for claimants</li> </ul>
6	Determination and distribution of damages	<ul style="list-style-type: none"> <li>• Determination of compensation is (generally) done indirectly in a preliminary redress judgment (PRJ) in which a common method for calculating the compensation is determined. Based on the PRJ the court can freely estimate the amount ('collective total') that has to be paid in an implementation fund. The defendant can be ordered to replenish the fund if the amount is not sufficient. Excess amounts are refunded.</li> <li>• The distribution of fund is established by an independent trustee who is appointed by the courts. The trustee determines the eligibility of the consumer in accordance with the PRJ. Costs must be borne by the defendant.</li> </ul>

# Key facts on the proposal of the Directive's transposition in Spain

1	General approach of Directive and subject-matter of actions for redress	<ul style="list-style-type: none"> <li>• Actions for protection of consumers</li> <li>• Not limited to Annex I</li> </ul>
2	Legal standing of qualified entities for domestic and cross-border actions	<ul style="list-style-type: none"> <li>• Domestic: Public Prosecutor's Office and qualified entities (including competent administrative authorities)</li> <li>• Cross border: Qualified entities</li> </ul>
3	Admissibility requirements for actions for redress / certification requirements	<ul style="list-style-type: none"> <li>• Certification process: analysis of procedural issues –incl. legal standing-, homogeneity of claims, obvious lack of grounds, funding</li> </ul>
4	Opt-in / opt-out in case of domestic and cross-border actions	<ul style="list-style-type: none"> <li>• Opt-out system for domestic and cross-border actions. Possibility of opt-in when the amount exceeds 3000 €/consumer and the court deems it necessary (cumulative requirements)</li> <li>• Opt-in for non-resident consumers</li> </ul>
5	Funding and costs of actions for redress	<ul style="list-style-type: none"> <li>• TPF will be rejected in case of conflict of interest or when third party's interest might deviate the legal action from pursuing consumers interests</li> <li>• Costs: General rule applies (defeated party pays costs)</li> </ul>
6	Determination and distribution of damages	<ul style="list-style-type: none"> <li>• Determination by court: global amount if consumers are not individually identified</li> <li>• Distribution is made by a third party</li> <li>• No cy-pres. Remaining amounts are given back to the defendant</li> </ul>

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