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# Directive 2020/1828 on representative actions for the protection of the collective interests of consumers: an overview

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*ABSTRACT: This paper provides an overview of the most relevant elements that the recently enacted Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers introduces into European Union law and that the Member States must take into account when transposing the aforementioned Regulation. Specifically, this paper deals with the aspects related to legal standing in national and "cross-border" representative actions, the subjective scope of protection, the opt-in and opt-out mechanisms, the nature of the claim, the relationship between the representative action and other subsequent actions, the supervision of the financing of representative actions by third parties, the possibility of settlement agreements and the information and publicity of representative actions.*

*KEYWORDS: Collective redress – representative action – consumers – Directive 2020/1828 – class actions.*

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## 1. Introduction

Consumer protection is a pillar of the regulatory strategy of the European Union legislator. In this context, one of the issues that has been debated for many years is the possibility of introducing representative actions for consumer protection, a European version of American class actions, in the different Member States.[1] The goal of this legal transplant is, on the one hand, to favor access to justice for consumers in scenarios of mass damages and, on the other hand, to deter future wrongdoings harmful to consumers by companies operating in the European Union.[2]

Since the publication of the White Paper on damages in 2008, actions for breach of the EC antitrust rules have increased and many legislative instruments of different types have been published within the European Union in the field of consumer collective protection. Also in 2008, the Green Paper on consumer collective redress and, a year later, Directive 2009/22/EC were introduced.The latter marked a turning point in the European regulatory framework for collective redress. Directive 2009/22/EC urges Member States to ensure the implementation

[1] Consumer rights must not only be enacted, but also effectively enforced, otherwise, as Howells and Wilhelmsson, as well as González Beilfuss and Añoveros Terradas argue, they will be worthless. Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (London: Routledge, 1997), 259. Cristina González Beilfuss and Beatriz Añoveros Terradas, "Compensatory Collective Redress and The Brussels I Regulation (Recast)", in *Cross-Border Class Actions. The European Way*, ed. Arnaud Nuyts and Nikitas E. Hatzimihail (Munich: Sellier, 2014), 241. The 2010 Flash Eurobarometer on cross-border trade and consumer protection, produced by the European Commission, shows that 79% of respondents would be more willing to seek redress in case of a violation of any of their consumer rights if they could join with other consumers to sue on the same issue. "Analytical Report on the Flash Eurobarometer on cross-border trade and consumer protection", 55.

[2] Willem H. Van Boom and Marco Loos, "Effective Enforcement of Consumer Law in Europe. Synchronizing Private, Public, and Collective Mechanisms", *Social Science Research Network*, (2008): 5, accessed May 2, 2022, DOI: http://dx.doi.org/10.2139/ssrn.1082913. Carlos Balluguera Gómez places representative actions within the new (or recently coined) "Social Private Law". In this regard, this author points out that in order to counteract the concentration of economic power in the market, a new corporatism or joint action in defense of common interests is promoted by strengthening the representative power of the associations of contracting parties, recognizing their legitimacy for the exercise of representative actions. Carlos Belluguera Gómez, *El contrato no-contrato* (Madrid: Fundación Registral, 2006), 435. Jones states that "*(...) collective remedies in Europe should be comprehensive and effective because what are fundamentally involved are issues ofc the rule of law and access by the citizen to justice*". Graham Jones, "Collective Redress in the European Union: Reflections from a National Judge*", Legal Issues of Economic Integration*, vol. 41, no. 3 (2014): 289. Alfonso-Luis Calvo Caravaca and Javier Carrascosa González indicate that "class actions" favor access to justice and reestablish a certain balance between the parties. Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, "La regla lex fori regit processum y la legitimación procesal en los litigios internacionales", in *El Tribunal Supremo y el Derecho internacional privado* (vol. I), ed. Alfonso-Luis Calvo Caravaca and Javier Carrascosa González (Murcia: Rapid Centro Color, 2019), 21. Stadler argues that representative actions can function as a mechanism with a regulatory function insofar as the mere existence of an effective instrument for the collective protection of injured consumers would encourage companies to change their marketing strategies and to comply strictly with consumer protection standards. Astrid Stadler, "Group actions as a remedy to enforce consumers interests" in *New frontiers of consumer protection. The interplay between private and public enforcement*, ed. Fabrizio Cafaggi and Hans-Wolfgang Micklitz, (Mortsel: Intersetia, 2009), 316. Stadler further notes that "although it is highly commendable that the fears of the European business sector were taken seriously, it seems rather doubtful whether the Commission will be successful in accomplishing two conflicting policy goals: access to justice for consumers and protection of potential defendants. Some examples will show that some safeguards are unrealistic and that too many safeguards against frivolous claims are counterproductive". Astrid Stadler, "European Developments in Collective Redress", *Journal of European Consumer and Market Law*, vol. 2, issue 2 (2014): 83.

in their respective legal systems of actions for injunctions for acts of non-compliance with EU law that harm consumers. Mention should also be made of the Commission's important Recommendation on Common Principles applicable to collective injunctions or redress mechanisms in the Member States in the event of infringement of rights recognised by EU law.[3]

The latest legislative impetus for representative actions at EU level is "Directive (EU) 2020/1828 of the Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC" (henceforth "Directive 2020/1828" or the "Directive"). It entered into force on 24 December 2020, and introduces, for the first time, representative actions for injunctions and redress in all Member States of the European Union.[4]

Until the enactment of Directive 2020/1828, some Member States did not contemplate the possibility of representative actions, either for injunctions or for redress, while others did regulate some type of collective remedy, but the diversity of regulations in this regard is still notable.[5]

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[3] García Rubio and Otero Crespo indicate that "*the Recommendation declares that all Member States should have collective redress mechanisms at a national level not only for injunctive purposes, but also for compensatory relief. Furthermore, the respect of the basic principles that are set out in the Recommendation is defined as mandatory, which should also be common across the EU. Member States should then ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive*". María Paz García Rubio and Marta Otero Crespo, "Rebuilding the pillars of collective litigation in the light of the Commission Recommendation: the Spanish approach to collective redress", in *Collective redress in Europe: why and how,* ed. Eva Lein, Duncan Fairgrieve, Marta Otero Crespo and Vincent Smith (London: BIICL, 2015), 142. Vanikiotis explains that the European Commission published the 2013 Recommendation to establish a series of principles that should be adopted by the Member States to improve access to justice through collective redress mechanisms, but always with respect to the procedural systems of each Member State and their procedural mechanisms that allow avoiding abusive litigation. Teresa Vanikiotis, "Private antitrust enforcement and tentative stepts toward collective redress in Europe and the United Kingdom", *Fordham International Law Journal*, vol. 37 (2015): 1670.

[4] Gascón Inchausti, when addressing if Directive 2020/1828 truly establishes a European model of collective redress, the author argues that for there to be a model, the essential elements of the system must be defined, without prejudice to the fact that there may be local variations, i.e., in each Member State. The problem is that, after analyzing the basic elements of the system established in the directive, it is difficult to speak of a moderately complete model when on the one hand, it is not intended to be the only formula for collective protection, but national procedural systems may have other tools that are very different from the one outlined in the directive and on the other hand, the definition of many relevant aspects is delegated to the procedural autonomy of the Member States. With the room for maneuver offered to the Member States, there are many elements of the system that can be very different from one country to another. It is not just that there is no minimum procedural harmonization, which would make it possible to identify some "common elements" in all national implementations, such as the existence of an initial *ad hoc* phase for carrying out checks on the legitimized entity and its financing. In some extremes, the directive offers so much freedom to the Member States that, for example, in some Member States, collective claims for compensation may be brought before administrative authorities, which is unthinkable in many others. Something as basic as the choice between a model of inclusion or exclusion of consumers in the subjective scope of the process remains undefined, despite the radical change of approach underlying one or the other. Fernando Gascón Inchausti, "¿Hacia un modelo europeo de tutela colectiva?", *Cuadernos de Derecho Transnacional*, vol. 12, no. 2 (2020): 1322. On the implications of the enactment of Directive 2020/1828, see *in extenso* Astrid Stadler, "Are class actions finally (re)conquering Europe? Some remarks on Directive 2020/1828," *Juridica International,* vol. 30 (2021): 14-22. Alvaro Perez Ragone, "Injunctions and Collective Redress: European Mission and Vision," *Derecho PUCP*, vol. 87 (2021): 231-272.

[5] On the different models of collective judicial protection that exist in the European Union, Alexia Pato, *Jurisdiction and Cross-Border collective redress. A European Private International Law Perspective*

The entry into force of Directive 2020/1828 obliges all Member States to introduce some form of representative action for injunctions and damages into their national legislation, without regard to the fact that they may already have other means of consumer protection.[6] The Directive is committed to introducing consumer collective protection of a representative nature. This representation must be exercised by qualified entities for which financial transparency and adequate controls by the public administration are required (Article 5).[7]

The European Union legislator avoids the American class action model in which it is a leading lawyer or leading injured party who brings the action and is in charge of forming a class of affected individuals. The Directive also rejects punitive damages and even rejects the use of the American nomenclature, i.e., class action, and instead, using the term "representative action" at all times. The explanation behind this approach is to avoid the creation of a litigation industry that increasingly seeks the financial benefit of the litigator rather than that of the consumer.[8]

(Oxford: Hart Publishing, 2019). Regarding the legislative diversity or heterogeneity of models of representative actions in the different Member States, see Burkhard Hess, "Collective Redress and the Jurisdictional Model of the Brussels I Regulation", in *Cross-Border Class Actions. The European Way*, ed. Arnaud Nuyts and Nikitas E. Hatzimihail (Munich: Sellier, 2014), 59. Recital 6 of Directive 2020/1828 indicates: "*Procedural mechanisms for representative actions, both for injunctive measures and for redress measures, vary across the Union and offer different levels of protection for consumers. In addition, some Member States do not at present have any procedural mechanisms for collective actions for redress measures in place. That situation diminishes consumers' and businesses' confidence in the internal market and their ability to operate in the internal market. It distorts competition and hampers the effective enforcement of Union law in the field of consumer protection*".

[6] *Inter alia*, Directive 2020/1828, Article 9.9.

[7] Recital 52 of Directive 2020/1828 states: "*Qualified entities should be fully transparent vis-a-vis courts or administrative authorities with regard to the source of funding of their activities in general and with regard to the source of funds that support a specific representative action for redress measures. This is necessary to enable courts or administrative authorities to assess whether third-party funding, insofar as allowed in accordance with national law, complies with the conditions provided for in this Directive, whether there is a conflict of interest between the third party funding provider and the qualified entity that poses a risk of abusive litigation, and whether the funding by a third party that has an economic interest in the bringing of the representative action for redress measures or its outcome would divert the representative action away from the protection of the collective interests of consumers. The information provided by the qualified entity to the court or administrative authority should enable the court or administrative authority to assess whether the third party could unduly influence the procedural decisions of the qualified entity in the context of the representative action, including decisions on settlement, in a manner that would be detrimental to the collective interests of the consumers concerned, and to assess whether the third party is providing funding for a representative action for redress measures against a defendant who is a competitor of that third-party funding provider or against a defendant on whom the third party funding provider is dependant. The direct funding of a specific representative action by a trader operating in the same market as the defendant should be considered to imply a conflict of interest, since the competitor could have an economic interest in the outcome of the representative action which would not be the same as the consumers' interest. The indirect funding of a representative action by organisations that are funded through equal contributions by their members or through donations, including traders' donations in the framework of corporate social responsibility initiatives or crowdfunding, should be considered eligible for third-party funding, provided that the third-party funding complies with the requirements of transparency, independence and the absence of conflicts of interest. If any conflicts of interest are confirmed, the court or administrative authority should be empowered to take appropriate measures, such as requiring the qualified entity to refuse or change the relevant funding and, if necessary, rejecting the legal standing of the qualified entity or declaring a specific representative action for redress measures inadmissible. Such a rejection or declaration should not affect the rights of the consumers concerned by the representative action*".

[8] Jaap Spier, "Balancing acts: how to cope with major catastrophes, particularly the financial crisis", *Journal of European Tort Law*, vol. 4, issue 2 (2013): 224. Smithka explains that the implementation of a system that recognizes the possibility of claiming large amounts of punitive damages is being denied in Europe and that some lawyers make this procedural mechanism their business thanks to high fees and the incurring of high legal costs. Christopher Smithka, "From Budapest to Berlín:

In this paper, we will briefly look at the relevant elements of Directive 2020/1828 such as the aspects of legal standing in national and "cross-border" representative actions, the subjective scope of protection, the opt-in and opt-out mechanisms, the nature of the claim, the relationship between the representative action and other subsequent actions, the supervision of the financing of representative actions by third parties, the possibility of settlement agreements and the information and publicity of representative actions.

## 2. Standing in national and "cross-border" representative actions

Directive 2020/1828 grants legal standing to "qualified entities", which it defines as "any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions". Articles 4 and 5 of the Directive are devoted to the design and operation of the qualified entities, focusing on the need that the latter seek consumer protection and be nonprofit, as well as mentioning other important criteria of supervision and transparency.[9]

how implementing class action lawsuits in the European Union would increase competition and strengthen consumer confidence", *Wisconsin International Law Journal*, vol. 27, no. 1 (2009): 187. In this regard, see Roger Van den Bergh and Louis Visscher, "The preventive function of collective actions for damages in consumer law", *Erasmus Law Review*, vol. 1 (2008): 22-23. See Javier López Sánchez, *El sistema de las class actions en los Estados Unidos de América* (Granada: Marcial Pons, 2011), 5. In the United States, the Class Action Fairness Act of 2005 was enacted to combat this type of abuse. On this situation and on the aforementioned regulation, Andreeva argues that "*one can hardly deny that the class action device has significant potential for abusive practices by the class counsel. Congress has been struggling to come up with a solution to these problems since 1998, but the severe criticisms by the opposition precluded the measure from making it to the President's desk until this year. The Class Action Fairness Act of 2005 will likely lead to unwanted consequences because it is very broad in scope, drastically changes the procedural law on class actions, and fails to resolve the issues that worry its supporters. Finally, there already exist numerous procedural mechanisms that the courts can use to minimize class action abuse. Although there has been misuse of the class action device, the abusive practices cannot be eliminated entirely without eliminating the class actions themselves*". Anna Andreeva, "Class Action Fairness Act of 2005: The eight-year saga is finally over", *University of Miami Law Review*, vol. 59, no. 4 (2005) 412. See also John Coffee, "Rescuing the private attorney general: why the model of the lawyer as a bounty hunter is not working", *Maryland Law Review*, vol. 42, no. 2 (1983): 215-288. However, authors such as Cassone and Ramello do not see so many negative aspects in the procedural entrepreneurship carried out by lawyers: "*(…) therefore, even though some commentators are uncomfortable with the idea of "selfish" individual interests being used as an instrument for promoting collective welfare, class action has the potential to recreate, in the judicial domain, the same effects that individual interests and motivations, governed by the perfect competition paradigm, bring to the market*". Alberto Cassone and Giovanni B. Ramello «Private, club and public goods: the economic boundaries of class action litigation», in *The Law and Economics of Class Actions in Europe. Lessons from America,* ed. Jürgen Backhaus, Alberto Cassone and Giovanni B. Ramello (Cheltenham: Edward Elgar Publishing, 2012), 124.

[9] The aforementioned regulatory diversity in the matter of collective protection in the different Member States (where some type of collective protection is regulated) is most evident in what has to do with the aspects of standing to sue. Josep Suquet Capdevila indicates that "*there is currently a high diversity of schemes across the EU which are devoted to protecting consumers. There are public and private schemes, and schemes based on the cooperation between the public sector with the industry and consumer organisations (...)*". Josep Suquet Capdevila, "The European legal framework on consumer online dispute resolution (ODR)", in *Boundaries of European Private International Law: Les frontières du droit international privé européen/Las ftonteras del derecho internacional privado europeo*, ed. Jean-Sylvestre Bergé, Stéphanie Francq and Miguel Gardenes Santiago (Brussels: Bruylant, 2015), 222. There is great legislative diversity in relation to legal standing to bring representative actions not only within the European Union but also at the international level. It can be stated — by way of summary — that, in any case, it will be public

Article 5 also requires each Member State to inform the European Commission on which entities have standing to bring what the Directive itself calls "*cross-border*" representative actions, i.e., representative actions brought by an entity in a Member State other than its Member State of origin. The Directive distinguishes them from purely national representative actions, in which the entity designated by a Member State acts in that Member State only. The inclusion in this list is relevant in the case of cross-border actions because, in accordance with Article 6 of the Directive, the instance of another Member State hearing the representative action can determine that the entity bringing the action has standing to sue.

It is important to emphasise that, although Directive 2020/1828 refers to national and cross-border representative actions, these are notions specific to the Directive that, in principle, do not affect existing private international law instruments. In particular, Recital 21 of Directive 1828/2020 states that "*this Directive should not affect the application of rules of private international law regarding jurisdiction, the recognition and enforcement of judgments or applicable law, nor should it establish such rules. Existing instruments of Union law should apply to the procedural mechanism for representative actions required by this Directive. In particular, Regulation (EC) No 864/2007, Regulation (EC) No 593/2008 and Regulation (EU) No 1215/2012 of the European Parliament and of the Council should apply to the procedural mechanism for representative actions required by this Directive*".

In terms of international jurisdiction, it should be noted that the CJEU has interpreted that a consumer association cannot make use of the forum of protection of Articles 17-18 of Regulation 1215/2012 (forum of the domicile of the consumer). Instead, the qualified entity can make use of the special non-contractual forum of Article 7(2) and the general forum of Article 4(1) of Regulation 1215/2012.

We bring up in this regard the Judgement, *Schrems*, January 2018, Case C-498/16. Mr. Schrems is an Austrian citizen, domiciled in Vienna, who has been a Facebook user since 2008 and, moreover, a well-known activist who has exercised before different bodies and in different jurisdictions a multitude of claims against Facebook and has also formed an association through which to channel all that activism. In the specific case at hand, Mr. Schrems managed to get other Facebook users, domiciled in different Member States of the European Union or even outside the European Union, to assign him their credit rights (or their claim rights) against the social network so that Mr. Schrems could exercise, together with his own legal action derived from his credit right, the actions of all the assignors.

In this regard, Mr. Schrems brought, before the Regional Civil Court of Vienna, Austria, the place of his domicile, a "collective action", arising from an assignment of claims, against Facebook on the basis of the forum of the consumer's

authorities (*e.g.* public ombudsman), authorized associations or individuals who have standing to sue. Deborah R. Hensler, "The future of mass litigation: global class actions and third party funding", *George Washington Law Review*, vol. 79, no. 2 (2011): 307. Directive 2020/1828 refers to qualified entities with standing to sue in order to bring representative actions. These entities may be public or private and are subject to an important state control, excluding that an individual or lawyer oversees the formation of the class and the exercise of the action, as it happens in the United States. In this regard, Gascón Inchausti refers to legislator´s will regarding a strong control of the standing to sue issues, which also serves as a filter to avoid misuse of the system. The directive opts for a legal standing concentrated in a closed list of entities, over which strict public control is foreseen. It thus excludes any manifestation of spontaneity and any room for action by individuals. Gascón Inchausti, *"¿Hacia un modelo europeo de tutela colectiva?"*, 1322.

domicile provided for in Section 4 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001). Proceedings brought by a consumer against another contracting party may be brought either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled. The Austrian court referred a question to the CJEU for a preliminary ruling, asking whether Mr. Schrems should be considered a consumer given that, although he initially used the social network for private purposes, he later used it to sell his books and promote his activism.

It also questioned whether Mr. Schrems could make use of the consumer protection forum (Section 4 Regulation 44/2001) to bring his action and that of the other assignors against Facebook. The CJEU concluded that Mr. Schrems must continue to be considered a consumer; but ruled that Section 4 of Regulation 44/2001 does not apply to the action of a consumer seeking to enforce before the court of the place where he is domiciled not only his own rights, but also rights assigned by other consumers domiciled in the same Member State, in other Member States or in third States.[10]

In relation to the second question, it should be noted that in the *Schrems* case, we are faced with a multiple assignment of claims that lacks the element of representativeness sought by Directive 2020/1828 or, at least, of representativeness exercised by an association or qualified entity and not by an individual. Advocate General Michal Bobek stated, in this case, that "*the perception of what qualifies as a class action may of course vary, depending on the precise definition that has been adopted. I must admit, however, that I have difficulty, when looking closely at the text and operation of the national provision concerning the present case, namely Paragraph 227 of the ZPO, to refer to that provision as an instrument of 'class action', certainly as far rules on territorial jurisdiction are concerned*".[11]

In other similar, but not identical, cases, the CJEU has also rejected the application of the consumer protection forum: in Judgement, *Henkel*, October 2002, Case C-167/00, it was a consumer association that brought the action in the interest of the consumers concerned; and in Judgement, *Shearman Lehman Hutton,* January 1993, Case C-89/91, similar to *Schrems*, a legal person was the assignee of rights of a group of consumers.[12]

Article 79 of Regulation 1215/2012 states that by 11 January 2022 the Commission shall present a report to the European Parliament, to the Council

[10] In relation to the first question, *i.e.*, the consideration of Mr. Schrems as a consumer for the purposes of Regulation 1215/2012, Alfonso-Luis Calvo Caravaca states that "*the concept of «consumer» is, in theory, a restrictive concept. However, the CJEU has now extended it to cases in which a private individual has gone on to practice as a professional in a manifest, public and conspicuous manner*". Alfonso-Luis Calvo Caravaca, "Consumer contracts in the European Court of Justice case law", *Cuadernos de Derecho Transnacional*, vol. 12, no. 1 (2020): 96.

[11] Opinion of the Advocate General Michal Bobek *Schrems*, 14 November 2017, Case C-498/16, recital 69.

[12] On representative actions and international jurisdiction under Brussels regime, see Zheng (Sophia) Tang, "Consumer collective redress in European Private International Law", *Journal of Private International Law*, vol. 7, no. 1 (2011): 101-147; Dimitros-Panagiotis Tzakas, "International litigation and competition law: the case of collective redress", in *International antitrust litigation. Conflict of Laws and Coordination*, ed. Jurgen Basedow, Stéphanie Francq and Laurence Idot (Oxford: Hart Publishing, 2011), 162-189; Cristina González Beilfuss and Beatriz Añoveros Terradas, "Compensatory collective redress and the Brussels I Regulation (Recast)", in *Cross-Border class actions. The European way,* ed. Arnaud Nuyts and Nikitas E. Hatzimihail (Otto Schmidt/De Gruyter european law publishers, 2013), 241-258.

and to the European Economic and Social Committee on the application of this Regulation and adds that where appropriate, the report shall be accompanied by a proposal for amendment of this Regulation". Perhaps, with the enactment of Directive 2020/1215, it would be a good time to consider the introduction within Regulation 1215/2012 of a new forum for representative actions, which could give international jurisdiction to the courts of the domicile of the qualified entity entitled to bring the action.[13]

## 3. Subjective scope of protection, opt-in and opt-out mechanisms and nature of the claim

The representative actions referred to in the Directive only protect consumers, defined as "*any natural person who is acting for purposes which are outside his own trade, business, craft or profession*" [Article 3(1)]. The problem with this subjective restriction is that it is sometimes complicated for the instance hearing the representative action to determine whether each of the affected individuals is a consumer or not, and this can complicate the exercise of some representative actions.

Some authors, when referring to Spanish law that includes the same requirement, state that they openly advocates for a flexible interpretation of such a legal requirement, since it is not possible to apply it otherwise, nor to attribute to the judge, the obligation to investigate, on a case by case basis the concurrence of the legal requirements, in relation to subjects that, sometimes by definition, are indeterminate or difficult to determine. Especially in cases of non-contractual liability.[14]

Directive 2020/1828 gives Member States the freedom to design an opt-in system, an opt-out system or a mixture of both.[15] For injunctive actions, Article 8 provides that "*in order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity*" and, for redress actions, Article 9 regulates that "*Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish within an appropriate time limit after that representative action has been brought, to be represented or not by the qualified entity in that representative action and to be bound or not by the outcome of the representative action*".

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[13] On the possible reform of Regulation 1215/2012, see Burkhard Hess, "La reforma del Reglamento Bruselas I bis. Posibilidades y perspectivas", *Cuadernos de Derecho Transnacional*, vol. 14, no. 1 (2022): 15-16. Against establishing a special forum for representative actions, Frederick Rielander, "Aligning the Brussels regime with the representative actions directive", *International and Comparative Law Quarterly*, vol. 71, no. 1 (2022): 137-138.

[14] Eugenio Llamas Pombo, "Requisitos de la acción colectiva de responsabilidad civil", *Diario La Ley*, no. 7141 (2009): 1.

[15] Recital 43 of the Directive 2020/1828 gives Member States the freedom to design their own system of representative action with regard to the opt-in or opt-out modality, taking into account the procedural culture of each Member State: "*Consumers concerned by a representative action for redress measures should have adequate opportunities after the representative action has been brought to express whether or not they wish to be represented by the qualified entity in that specific representative action and whether or not they wish to benefit from the relevant outcomes of that representative action. To best respond to their legal traditions, Member States should provide for an opt-in mechanism, or an opt-out mechanism, or a combination of the two. In an opt-in mechanism, consumers should be required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures. In an opt-out mechanism, consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures. Member States should be able to decide at which stage of the proceedings individual consumers are able to exercise their right to opt in to or out of a representative action*".

However, Article 9(3) provides that, for redress representative actions, where the injured parties are habitually resident in a Member State other than the one in which the representative action is to be brought, national legislators must provide for an opt-in system: "*Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought have to explicitly express their wish to be represented in that representative action in order for those consumers to be bound by the outcome of that representative action*". Article 9(6) also regulates that "*Member States shall ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action*".

In this case, an opt-in mechanism is introduced in which the injured parties who have been notified and who have expressed their willingness to be represented by the qualified entity will be bound by the outcome of the action. Those affected consumers who have not made their decision will keep their right to action intact.[16]

As said before, the European Union legislator avoids the American class action model in which it is a leading lawyer or leading injured party who brings the action and oversees the formation of a class of affected individuals. Directive 2020/1828 introduces a redress collective mechanism in all Member States but rejects punitive damages and even rejects the use of the American nomenclature, i.e., class action, referring at all times to "representative action". As mentioned, the explanation behind this approach is to avoid the creation of a litigation industry that seeks more the financial benefit of the litigator than that of the consumer but, at the same time, EU legislator wants to introduce a representative action system that also seeks deterrence.

In this regard, the functions of the civil liability system should not be confused with the functions of the dispute resolution system. It has been understood that continental civil liability systems do not have a preventive-punitive function but a compensatory function. In this regard, the regulation of punitive damages has traditionally been rejected by the EU legislator and by most of the national legislators of the different continental Member States[17]. However, punitive damages are not entirely alien to the legal systems of the Member States of the European Union, especially in the United Kingdom (a Member State until recently) and

[16] Recital 46 of the Directive 2020/1828 states: "*where consumers explicitly or tacitly express their wish to be represented by a qualified entity within a representative action for redress measures, regardless of whether that representative action is brought in the context of an opt-in or an opt-out mechanism, they should no longer be able to be represented in other representative actions with the same cause of action against the same trader or to bring individual actions with the same cause of action against the same trader. However, this should not apply if a consumer, having explicitly or tacitly expressed his or her wish to be represented within a representative action for redress measures, later opts out from that representative action in accordance with national law, for example, where a consumer later refuses to be bound by a settlement*".

[17] Recital 10 of the Directive 2020/1828 states: "*It is important to ensure the necessary balance between improving consumers' access to justice and providing appropriate safeguards for traders to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market. To prevent the misuse of representative actions, the awarding of punitive damages should be avoided and rules on certain procedural aspects, such as the designation and funding of qualified entities, should be laid down*". Recital 42 indicates: "*This Directive should provide for a procedural mechanism which does not affect the rules establishing substantive rights of consumers to contractual and non-contractual remedies in cases where their interests have been harmed by an infringement, such as the right to compensation for damage, contract termination, reimbursement, replacement, repair or price reduction as appropriate and as available under Union or national law. It should only be possible to bring a representative action for redress measures under this Directive where Union or national law provides for such substantive rights. This Directive should not make it possible to impose punitive damages on the infringing trader, in accordance with national law*".

Ireland, which recognise the existence of this type of damage, although not as strongly as the U.S. system does.[18] So, even if civil liability systems in conteinental Europe seek compensation and not deterrence/punition, dispute resolution methods as representative actions may seek deterrence without being contradictory to the essence of the civil liability systems.

## 4. Relationship between the representative action and other subsequent actions

One of the relevant aspects that we must consider is how the relationship between a representative action and other subsequent individual actions that may be brought by affected consumers are regulated. Specifically, we refer to the institutions of *lis pendens,* related actions and the effect of *res judicata*, all of them elements that, at different procedural moments, seek the same objective: the avoidance of parallel proceedings that give rise to contradictory or irreconcilable court decisions.

The CJEU has had the opportunity to rule on the suspension of individual proceedings due to pending a representative action proceeding under Article 43 of the Spanish Civil Procedure Act and how it fits in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. In Judgment, *Jorge Sales Sinués*, Joined Cases C-381/14 and C-385/14, Recital 36, the CJEU established that individual and representative actions are of a different nature and content and, therefore, independent. In *Jorge Salés Sinues*, Recital 30, the CJEU has also pointed out that the control exercised in one and the other is different (abstract in the collective and concrete in the individual).

The CJEU states that the procedural relationship that may exist between the two types of actions must only serve the proper administration of justice, as well as the need to avoid contradictory judicial decisions, but without this in any case entailing a reduction in the system of consumer protection generated by Directive 93/13.[19] In

[18] EU law also timidly recognizes some damages that could be identified as punitive, as regards consumer credit, anti-discrimination in the workplace and, in particular, discrimination between women and men. Helmut Koziol, "Punitive damages – a european perspective*", Louisiana Law Review*, vol. 68 (2008): 749. Regarding the nomenclature, it should be noted that the different names used and the different approaches taken to the collective protection of a group of individuals make it difficult to make a comparative study of this phenomenon. Christopher Hodges and Rebecca Money-Kyrle argue that *"«collective action» and «collective redress» are not legally defined terms (...) although it is useful to consider generally the range of models and their policy objectives. In different jurisdictions, collective procedures are called, amongst others, class actions (USA 5 and some Canadian provinces, for example), class proceedings (Canada), group litigation (England and Wales), group action (Finland), or collective action (Brazil and other Latin American jurisdictions)"*. Christopher Hodges and Rebecca Money-Kyrle, "European collective action: towards coherence?", *Maastricht Journal of European and Comparative Law*, vol. 19, issue 4 (2012): 479. Directive 2020/1828 refers to representative actions.

[19] In the Opinion of the Advocate General Spuznar, *Jorge Sales Sinues*, Joined Cases C381/14 and C385/14, recital 73, Advocate General stated: "*the option which is open to the consumer of participating in a collective action is not comparable to the bringing of an individual action. First of all, as is clear from the order for reference, individual participation in proceedings for the protection of collective interests brought pursuant Article 11(4) of the Code of Civil Procedure requires the consumer concerned to appear before the court seised of the case and to waive his right to bring proceedings in the courts of his own jurisdictional area (the commercial court for the place where he is resident). Next, the two-month period following the publication in the media contemplated by Article 15(1) and (3) of the Code of Civil Procedure may present certain practical difficulties for consumers who have been adversely affected and wish to participate in collective proceedings. Finally, the consumer will find himself constrained by the approach which the consumer protection association has taken to the case and will be unable to alter its substance or include other claims. He will also be affected by any delay which, as in the present case, poses an obstacle to his protection as a consumer"*.

this scenario, even if Member States introduce rules on *lis pendens* in national law, the problems related to international *lis pendens* remain unresolved.[20]

Each Member State will have to address these aspects by adapting its domestic procedural law.[21] However, Directive 2020/1828 states, in Article 15, that "*Member States shall ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence*". This is a novel issue as it obliges all Member States to recognise as evidence in subsequent proceedings judicial or administrative rulings, decisions on the existence of an infringement against consumer rights.[22]

## 5. Control of the financing of representative actions by third parties

Another aspect introduced by Directive 2020/1828 that is not only new in the area of representative actions, but also an innovation at a general level in European Union law, is the regulation of "third-party funding" (TPF).[23] TPF is a mechanism for financing by a third-party funder of the legal action. The third-party funder invests in the lawsuit and, if the funded party is successful, the funder will receive a portion of the compensation. If the funded party is unsuccessful, the third-party funder will lose their investment.[24]

The regulation of the TPF on representative actions is understood as part of a generalised concern of the European legislator that these types of actions should not be frustrated by a lack of financial resources. Thus, in addition to regulating the TPF, it is established that, without the Member States having to directly finance the exercise of representation actions, the national regulation should favor access to these resources by entities with legal standing.[25] Thus, it regulates the limitation

[20] In this regard, see Frederick Rielander, "Aligning the Brussels regime with the representative actions directive", 137-138.

[21] Recital 48 of Directive 2020/1828 indicates: "*Member States should lay down rules for the coordination of representative actions, individual actions brought by consumers and any other actions for the protection of the individual and collective interests of consumers as provided under Union and national law. Injunctive measures issued under this Directive should be without prejudice to individual actions for redress measures brought by consumers who have been harmed by the practice that is the subject of the injunctive measures*".

[22] Recital 64 states: "*Member States should ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming the collective interests of consumers can be used by all parties as evidence in the context of any other action seeking redress measures against the same trader for the same practice before their courts or administrative authorities. In line with the independence of the judiciary and the free evaluation of evidence, this should be without prejudice to national law on evaluation of evidence*".

[23] See more extensively my previous paper, Diego Agulló Agulló, "Los contratos de financiación de litigios por terceros (third-party funding) en España", *Revista de Derecho Civil*, col. IX (9), no. 1 (2022): 183-131.

[24] Enrique Fernández Masiá, "La financiación por terceros en el arbitraje internacional", *Cuadernos de Derecho Transnacional*, vol. 8, no. 2 (2016): 204.

[25] Articles 20(1) and 20(2) do allow for the possibility of the State financing, in some way, the exercise of representation actions: "*Member States shall take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures referred to in Article 7(2). The measures referred to in paragraph 1 may, for example, take the form of public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid*". However, this is not an obligation required by Directive 2020/1828. Recital 70 states: "*Having regard to the fact that representative actions further the public interest by protecting the collective*

of court or administrative fees or access to legal aid. States are also allowed to allow qualified entities to request a modest entry fee or similar charge to participate in the representation action (Article 20).

Returning to the TPF, it should be noted that, in February 2021, the European Parliament published the Report entitled "Responsible private funding of litigation" ("European Parliament TPF Report") which contains a series of recommendations for a possible future regulation of TPF in the European Union. In conjunction with the TPF Report of the European Parliament, the "Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))" ("Draft Report") was published, which includes, in its Annex ("Annex to the Draft Report"), a model proposal for a Directive on litigation funding for all types of claims or actions.[26]

Article 10.1 of Directive 2020/1828 establishes the general obligation of the Member States to introduce rules that adequately address conflicts of interest in such a way that the financing of a lawsuit by a funder who has an economic interest in the outcome of the action does not prevent the representative action from being brought for the protection of the interests of consumers, which is the purpose for which this collective protection mechanism is designed. In this regard, Article 10(2) of Directive 2020/1828 refers to the fact that national regulation must ensure that the decisions of the qualified entity bringing the actions and obtaining the funding act in the interests of consumers and not in pursuit of any other objective. Article 10(2) also refers to the fact that the financing may not be offered by a competitor of the defendant or where the defendant is dependent on the funder.

In order to comply with these requirements, Article 10(3) provides that the plaintiff must provide the judge with a financial overview of the sources of financing obtained. It is noteworthy that there is no requirement to disclose the financing arrangement in its entirety, as is required by the Draft Report [Article 15(3)]. If the judge identifies a lack of compliance with such requirements, he may request the plaintiff, in accordance with Article 10(4) of the Directive, to refuse or modify the financing and may ultimately deny the legal standing of the qualified entity.

Directive 2020/1828 regulates the duty of disclosure from the protective approach of safeguarding the weaker party in the contractual relationship, in this case the consumer, so that the judge intervenes directly to ensure that the financing does not harm those represented by the representative action.[27]

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*interests of consumers, Member States should retain or take measures aiming to ensure that qualified entities are not prevented from bringing representative actions under this Directive due to the costs associated with the procedures. Such measures could include limiting applicable court or administrative fees, granting the qualified entities access to legal aid, where necessary, or providing qualified entities with public funding to bring representative actions, including structural support or other means of support. However, Member States should not be required to finance representative actions*".

[26] Recital H of the Annex to the Draft Report indicates: "*whereas Directive (EU) 2020/1828 identifies certain safeguards relating to litigation funding, which are, however, limited to representative actions on behalf of consumers taken under that Directive, and therefore exclude many other types of action or categories of claimants; whereas, effective safeguards should apply to all types of claims*".

[27] Directive 2020/1828 regulates the duty of disclosure from the protective approach of safeguarding the weaker party in the contractual relationship, in this case the consumer, so that the judge intervenes directly to ensure that the financing does not harm those represented by the representative action. It could be argued that, while in arbitration matters, the duty of disclosure seeks equality of arms in the proceeding and the integrity of the arbitration process, in representative actions, the duty of disclosure aims to ensure that the action is aimed at protecting the interests of consumers and not those of a third party outside a representative action expressly intended and designed to protect

The Annex to the Draft Report includes not only a Regulation in the jurisdictional sphere, but also in the arbitration sphere (Article 3). Should the Draft Report be enacted, it may be necessary to amend all the arbitration laws of all the Member States of the European Union. Both in jurisdictional and arbitral matters, the Draft Report proposes a complete Regulation, although – in many ways – can be improved when ut comes to of the TPF. In our opinion, the European legislator should regulate the TPF at the jurisdictional level but, as we will see, not at the arbitration level.

A Regulation by country could give rise to dysfunctions between jurisdictions with a lax Regulation with respect to those that regulate the TPF in a stricter or more detailed manner, generating forum shopping situations that should be avoided within the European Union. That is, if Spain decides to regulate the TPF by establishing a series of limitations, some specialised funds could choose not to litigate in Spain and opt for more favorable jurisdictions. In our opinion, it would be more appropriate to legislate the TPF in jurisdictional matters through an instrument of EU law, which allows an efficient and homogeneous regulation throughout the territory of the Union.

Nevertheless, at the arbitration level, regulation would be better carried out through a soft law instrument accepted by the European or even the international market made up of legal operators engaged in arbitration, as is the case, at the international level, with the International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration (which already refers in its Article 6b to TPF), revised in 2014, or with the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The Annex to the Draft Report focuses on the Regulation of a system of authorisation for funds to operate in the Member States of the European Union (Articles 4 and 5); on aspects related to the capital necessary to operate (Article 6); and on the fiduciary duty of the funder, which means that the funder must act in the interest of the funded party or its beneficiaries (e.g. consumers) and that if this conflicts with the interest of the funder, the interest of the funded party or its beneficiaries must prevail (Article 7). The Annex to the Draft Report devotes an entire chapter to the supervisory authorities for the operation of financing funds and litigation funding (Chapter III).[28]

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consumers. The duty of disclosure of the existence of the TPF contract should be carried out in the context of an insolvency proceeding in order for the insolvency judge to approve the TPF contract, as this generally has a special patrimonial significance for the insolvent-funded party. In our view, the general rule should be that only the existence of a TPF contract and the identity of the funder should be disclosed. Disclosure of the content of the contract could also be relevant in the case of representative actions in the interest of consumers or in insolvency matters. Outside these cases, the duty of disclosure should be limited to the above, subject to exceptions (always interpreted restrictively). One of these exceptions concerns the need for the court to order a security for costs (where this possibility is regulated), which should also be interpreted restrictively in order to ensure access to justice.

[28] Nieuwveld and Sahani identify various litigation investor profiles in the US market, of which they highlight Insurance Companies, law firms themselves through contingent fees, or specialized investment funds. Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party finding in international arbitration* (Netherlands: Kluwer Law International, 2017), 3-7. Solas explains that given the combination of legal sophistication and financial strength, funders are emerging as an independent industry, with specific incentives and basic characteristics that make them capable of responding to the aforementioned demand. Gian Marco Solas, *Third party funding. Law, economics and*

The Annex to the Draft Report specifically proposes that clauses in a PFT contract allowing a funder not to bear losses in the event of an award of costs resulting from a lawsuit not satisfactory to the funder [Article 13(5)] should be considered invalid. The Draft Report specifies, however, that the funded party or its beneficiaries will have to be indemnified for all losses they may have suffered and which arise directly from the conclusion of a TPF contract that is ultimately declared invalid [Article 13(6)].[29]

The Annex to the Draft Report proposes to regulate the content of the TPF contracts. Among other aspects, it is established that they must be in writing and in one or more official languages of the Member State in which the claimant or his beneficiaries have their residence, and their clauses must be clear and comprehensible (Article 11).[30]

The Annex to the Draft Report is somewhat contradictory in dealing with relationship between the funded's lawyer and the funder: on the one hand, it requires that any limitation on the autonomy of the funded party to give instructions to his lawyers or to control the course of the proceedings to be recorded in writing in the contract (Article 11.b.i). But, on the other hand, it considers invalid any contractual clause that allows the funder to influence the course of the proceedings [Article 13(2)a].

In Singapore, the soft law legislator adopted another approach. Guidance Note 10.1. 1 (41) of the Law Society of Singapore establishes that the funder and the funded party are given the freedom to regulate in the TPF contract, and the level of intervention of the funder in the litigation. In particular, it is recommended to agree on the intervention that the funder will have in terms of assisting the funded party in the choice of lawyers, the choice of arbitrators and/or mediators (only applicable to ADR mechanisms), assistance in procedural tactics or strategy, the possibility for the funder to give instructions to the lawyers of the funded party or even the management of the litigation costs themselves or the possibility of entering into settlement agreements that put an end to the litigation.[31] It is also proposed to regulate the prohibition for the funder to intervene in the decision to reach a settlement agreement that puts an end to the lawsuit [Article 13(2)a].[32]

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*policy* (Cambridge: Cambridge University Press, 2019), 167. Cremades states that they are procedural finance companies (generally subsidiaries of insurance companies) that assume the cost and risk of the process, both judicial and arbitral (especially in investment arbitration). Bernardo Cremades, "La falta de recursos económicos para participar al arbitraje pactado", *Revista del Club Español del Arbitraje*, no. 8 (2010): 159.

[29] Article 13(5) states that "*Member States shall ensure that third-party funding agreements do not contain provisions that limit the liability of a litigation funder in the event of an order for adverse costs following unsuccessful proceedings. Provisions that purport to limit a litigation funder's liability for costs shall have no legal effect*". Article 13(6) regulates that "*Claimants and intended beneficiaries shall be indemnified in respect of any losses caused by a litigation funder that entered into a third-party funding agreement which is found to be invalid*".

[30] Article 11 regulates that "*Member States shall ensure that third party funding agreements are required to be written in one or more of the official languages of the Member State in which the claimant(s) and intended beneficiaries are resident, and presented in clear and easily understood terms*".

[31] Guidance Note 10.1. 1 (41) of the Law Society of Singapore regulates: "*you should advise your client that the funding agreement should specify the nature and scope of the funder's role. The funder's involvement could potentially include, inter alia: (a) assisting with choice of solicitor(s); (b) assisting with choice of arbitrator(s) and/or mediator(s); (c) assisting with strategic or tactical decisions; (d) considering advice from and providing instructions to the claimant's solicitor(s); (e) managing litigation expenses; and (f) providing input on decisions about whether to settle the claim and on what terms*".

[32] See section 6 of this paper.

Finally, the Annex to the Draft Report proposes to require that the TPF contract contain the amount that the funder will obtain if the litigation is successful for the financed party (Article 11.a). In particular, it is established that a clause granting the funder 40% or more of the amount obtained in the lawsuit will not be valid, except in exceptional circumstances [Article 13(4)][33]. The Annex to the Draft Report also proposes to regulate that, if the funded lawsuit is successful, any clause that allows the funder to obtain its percentage of the amount obtained before the funded party or its beneficiaries is considered invalid (Article 13.3).

## 6. Possibility of settlement agreements and publicity of representative actions

Directive 2020/1828 also provides for the possibility of terminating the representative action through a settlement agreement between the qualified entity and the defendant (Article 11). The Directive provides that the parties may propose the settlement to the judge or that the judge may urge the parties to reach such a settlement. The settlement shall be subject to the scrutiny of the judge, who will be able to approve it or refuse it if it is considered contrary to national law or if it contains conditions that cannot be enforced, taking into account the interest of the parties and, particularly, the interests of the protected consumers. If the settlement is refused, the judge shall continue to hear the representative action[34].

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[33] This quantitative limitation would only make sense in the case of representative actions, where it is in the interest of consumers' rights to be respected and their real redress sought, above any other business benefit of a funder, principles that inspire Directive 2020/1828; and in the case where the funded party is in bankruptcy proceedings, where too high a profit for the funder could result in serious prejudice to the bankrupt party who has received the funding to litigate. Nevertheless, in insolvency matters, as well as in matters of consumer representative actions, a maximum legal percentage of profit should not be set, but rather the parties should agree on a benefit for the funded and the judge would only have to verify its reasonableness, taking into account the circumstances of the particular case. Apart from these cases, when there is equality of arms in terms of the negotiating capacity of the parties to a TPF contract, no limitation should be regulated, but the principle of contractual freedom should govern.

[34] Article 11 states: "*for the purpose of approving settlements, Member States shall ensure that in a representative action for redress measures: (a) the qualified entity and the trader may jointly propose to the court or administrative authority a settlement regarding redress for the consumers concerned; or (b) the court or administrative authority, after having consulted the qualified entity and the trader, may invite the qualified entity and the trader to reach a settlement regarding redress within a reasonable time limit.*
*2. Settlements referred to in paragraph 1 shall be subject to the scrutiny of the court or administrative authority. The court or administrative authority shall assess whether it has to refuse to approve a settlement that is contrary to mandatory provisions of national law, or includes conditions which cannot be enforced, taking into consideration the rights and interests of all parties, and in particular those of the consumers concerned. Member States may lay down rules to allow the court or administrative authority to refuse to approve a settlement on the grounds that the settlement is unfair.*
*3. If the court or administrative authority does not approve the settlement, it shall continue to hear the representative action concerned". Recitals 53, 54, 55 and 56 of Directive 2020/1828 state: "Collective settlements aimed at providing redress to consumers that have suffered harm should be encouraged in representative actions for redress measures. The court or administrative authority should be able to invite the trader and the qualified entity that brought the representative action for redress measures to enter into negotiations aimed at reaching a settlement on the redress to be provided to the consumers concerned by the representative action. Any settlement reached within the context of a representative action for redress measures should be approved by the relevant court or administrative authority unless the conditions of the settlement cannot be enforced or the settlement would be contrary to mandatory provisions of national law, applicable to the cause of the action, which cannot be derogated from to the detriment of consumers by way of contract. For example, a settlement which would explicitly leave unchanged a contractual term that gives the trader*

Article 11(4) of Directive 2020/1828 states that «approved settlements shall be binding upon the qualified entity, the trader and the individual consumers concerned but specifies that "*Member States may lay down rules that give the individual consumers concerned by a representative action and by the subsequent settlement the possibility of accepting or refusing to be bound by settlements»*".[35] Again, the individual action of the consumer is still protected in any case.[36]

Directive 2020/1828 also refers to the need for adequate information on the representative actions being carried out in each Member State of the European Union. Therefore, some requirements are included for qualified entities regarding their duty to communicate and notify which representative actions they are going to exercise (Article 13).[37] Directive 2020/1828 procures the establishment by the European Commission of a database that collects relevant information regarding different aspects mentioned in Article 14 of the Directive.

## 7. Final considerations

Directive 2020/1828 is a great initiative of the European legislator to harmonise, to a certain extent, the processes of collective protection of consumers through representative actions exercised by qualified entities, which to a certain extent avoids the American class action model and introduces, for the first time in the whole European Union, representative actions for redress. Relevant aspects such as *lis pendens*, related actions, res judicata or questions of private international law, among others, remain unresolved. Nevertheless, this Directive is crucial both for those Member States lacking any system of representative action for consumer protection and for those Member States who wish to modernise their existing legislation.

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*an exclusive right to interpret any other term of that contract could be against mandatory provisions of national law. Member States should be able to lay down rules allowing a court or administrative authority also to refuse to approve a settlement where the court or administrative authority considers the settlement to be unfair*".

[35] Recital 57 states: "*approved settlements should be binding upon the qualified entity, the trader and the individual consumers concerned. However, Member States should be able to lay down rules under which the individual consumers concerned are given the possibility to accept a settlement or to refuse to be bound by it*".

[36] Article 11(5) adds that "*redress obtained through an approved settlement in accordance with paragraph 2 shall be without prejudice to any additional remedies available to consumers under Union or national law which were not the subject of that settlement*".

[37] Recital 58 of Directive 2020/1828 states "*ensuring that consumers are informed about a representative action is crucial to its success. Qualified entities should inform consumers on their websites about the representative actions they have decided to bring before a court or administrative authority, the status of the representative actions that they have brought and the outcomes of such representative actions, in order to enable consumers to take an informed decision as to whether they wish to participate in a representative action and to take the necessary steps in a timely manner. The information that the qualified entities are required to provide to consumers should include, as relevant and appropriate, an explanation, in intelligible language, of the subject matter and of the possible or actual legal consequences of the representative action, the qualified entity's intention to bring the action, a description of the group of consumers concerned by the representative action, and the necessary steps to be taken by the consumers concerned, including the safeguarding of necessary evidence, in order for the consumer to be able to benefit from the injunctive measures, redress measures or the approved settlements as provided for in this Directive. Such information should be adequate and proportionate to the circumstances of the case*".