World Federation of Advertisers

7 January 2021

Collective redress

What impact on advertisers?

Background

The Directive on representative action for the protection of the collective interests of consumers (“**collective redress**”) was launched as part of the New Deal for Consumers package, presented in April 2018 in response to the Dieselgate scandal, when Volkswagen violated emissions rules on millions of diesel-fuelled vehicles and European owners did not have the same redress as that won by US counterparts. The Directive was published in the Official Journal on 4 December and will enter into force on 24 December. Member States will have a two-year transposition phase and the law must be applied within the following six months.

What is new?

The Collective Redress Directive requires all EU Member States to put in place at least one effective procedural mechanism allowing qualified entities to bring representative actions to court for the purpose of injunction or redress. The new law amends the Injunction Directive with the aim to **empower consumers by making collective redress available in all EU Member States – and also cross-border.**

Redress can take many forms: a trader may be obliged to provide remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law. However, the redress mechanism is limited to actual loss, rather than punitive damages. Only qualified entities, such as consumer organisations designated by EU Member States, will be able to launch an action.

To bring cross-border representative actions to court, qualified entities will have to comply with the same criteria across the EU, set out in the Directive. Domestic actions will be subject to criteria established under national laws.

Up until now, collective redress mechanisms have been completely voluntary under a 2013 Commission recommendation. Only a handful of Member States had functioning, efficient collective redress system (Belgium, France, Italy, Portugal, Spain, and Sweden).

The material scope of the Collective redress Directive is set out in Annex I, and includes key EU advertising related laws, such as:

- The Unfair Commercial Practices Directive (UCPD);
- The General Data Protection Regulation (GDPR);
- The Misleading and Comparative Advertising Directive (MCAD); and
- The Audiovisual Media Services Directive (articles 9-11, 19-26 and 28b) (AVMSD).

It is therefore worth noting that New Deal for Consumers package also introduced a Directive on better enforcement and modernisation of EU consumer protection rules, which amended the Unfair Commercial Practices Directive (UCPD). These updates include:

- The concept of “**dual quality**”, whereas national authorities will have to assess on a case-by-case basis whether “significant” differences in products qualify as a misleading action and are in breach of the law;

- Increased **transparency requirements** for online marketing practices by blacklisting undisclosed paid-for search rankings and false consumer reviews; and
- **Harmonised application of penalties** in the case of widespread infringements, giving national authorities the power to impose a fine of at least 4% of the trader's annual turnover. However, Member States are obliged to foresee fines only for cases that qualify as "widespread infringements" in Consumer Protection Cooperation Regulation (article 3:3-4). Member States can continue to opt for other enforcement routes for purely domestic cases.

In The New Consumer Agenda, which was published on 13 November 2020 and sets strategic priorities for EU consumer policy in the next five years, the European Commission commits to updating the UCPD guidance (2021) to better address hidden advertising, among other issues. The European Commission also argues that the coming into force of the collective redress directive will help step up enforcement of consumer law across the EU. The European Commission will "*seek to strengthen the capacities of potential future qualified entities under the forthcoming Directive on Representative Actions and of national consumer organisations as bodies designated to report alerts under the CPC Regulation.*"

Impact on advertisers

Conflicts of interest and abuse

Europeans have historically seen regulation rather than litigation, as the key mechanism for controlling corporate behaviour. The collective redress directive created some concern about the EU moving towards a US-style class-action lawsuits system. To address some of these concerns, the WFA joined in the wider business community in asking for robust **safeguards against conflicts of interest and abuse**. Many of them were kept in the final text, such as:

- Eligibility criteria for 'qualified entities' (article 4);
- Rules around third party funding (article 10);
- The loser pays principle (article 12.1); and
- The principle that damages should not be punitive (recital 10 and 42).

However, contrary to industry recommendations, the final text contains no prohibition of contingency fees at national level, and qualified entities may be established on an ad hoc basis. In addition, the safeguards relating to the designation of qualified entities only apply to cross-border cases; Member States remain free to establish criteria for qualified entities designated for the purpose of domestic cases (recital 26). Member States are free to choose between opt-in or opt-out mechanisms, according to their legal traditions (recital 43). For cross-border cases, however, opt-in is required (recital 45).

Advertising self-regulation

Many WFA and the advertising community cautioned against the unintended consequences that this new class-action system could have on **national advertising self-regulation**. Europe has a very strong tradition of advertising self-regulation which enables swift consumer complaint handling and removals of ads found to be non-compliant with national standards.

WFA and the European Advertising Standards Alliance (EASA) partnered to raise awareness of the role that self-regulatory organisations (SROs) play in enforcing EU law, such as the UCPD, at national level. A key concern was that SRO rulings may be instrumentalised by qualified entities for the purpose of collective action, and thereby undermine the self-regulatory systems. A company may become incentivised to challenge SRO rulings legally, and even go to court, rather than

voluntarily remove or correct an ongoing marketing campaign, if it believes the latter would increase the risk of a collective action and reputational damage to the brand.

While this risk exists, the final texts reflects an important ask by the WFA, namely that Member States may require that prior consultation be undertaken by the party that intends to bring an action for an injunction, in order to give the defendant an opportunity to bring the contested infringement to an end (recital 41). This enables Member States to rely on advertising self-regulatory solutions to resolve disputes in an out-of-court setting.

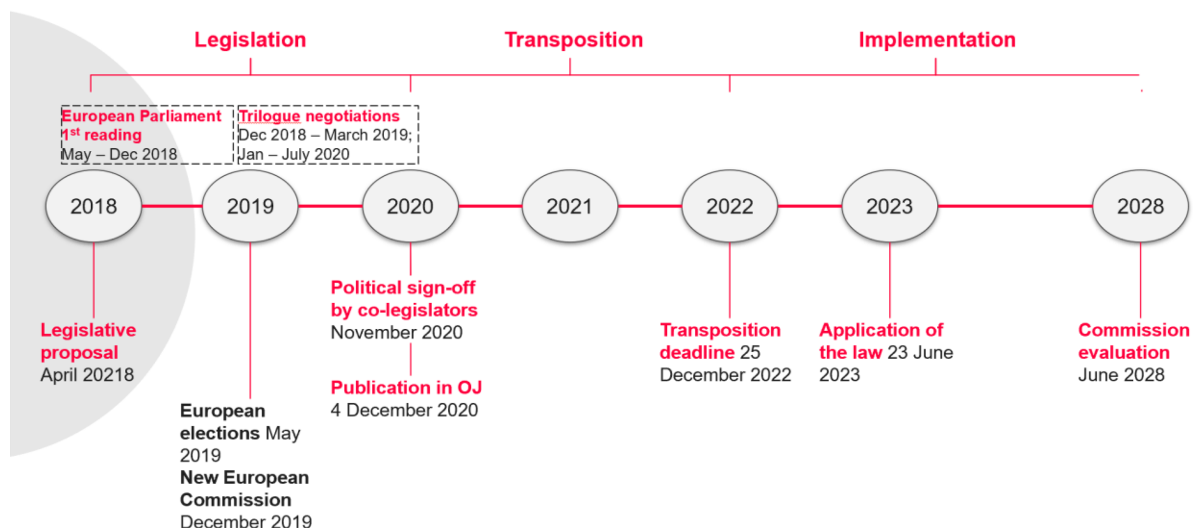
Financial implications

Key EU marketing related laws, such as GDPR, UCPD, AVMSD and MCAD, are included in the scope of the Directive. This means that infringements such as privacy breaches, hidden, misleading or aggressive marketing and even "dual quality" cases, could be subject of collective action, if these "harm or may harm the collective interests of consumers". An important outstanding question is: how will "consumer harm" be defined and qualified in these areas? This will in turn determine the appropriate remedy. Member States may not all take the same interpretation.

The implementation of the New Deal for Consumers package, over the next years, will mean greater financial risks linked to infringements of EU consumer and marketing laws. Not only has the level of financial penalties increased, but cross-border representative actions may also result in important economic losses for the company. In fact, a company may face both penalties and redress claims for one infringement.

Next steps

Within five years of implementation, i.e. latest by 26 June 2028, the Commission will carry out an evaluation of the effectiveness of the Directive for cross-border cases, and assess whether cross-border representative actions could be best addressed at Union level by establishing a European Ombudsman for collective redress.



For more information, please contact Rebecka Allén, r.allen@wfanet.org.