

Our position

FINAL

Collective Redress in the EU

Domestic vs Cross-border cases

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2018, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Cross-border vs. Domestic cases

The 'General Approach' that the Council of the European Union adopted regarding the proposal for a Directive on Representative Actions for the protection of the collective interest of consumers ('DRA') on November 28, 2019, relies on the distinction between 'domestic' and 'cross-border' cases. Those are defined as follows:

'Domestic Representative Action' means 'a representative action brought by a qualified entity in the Member State in which the qualified entity is designated';

'Cross-border Representative Action' means 'a representative action brought by a qualified entity in a Member State other than that in which the qualified entity is designated.'

As a consequence, under the Council's 'General Approach', harmonised safeguards (used in order to prevent abusive litigation, forum shopping and a 'race to the lowest standards'), governing Qualified Entities (QE) and their actions would only apply to QEs for the purpose of Cross-border Representative Actions, while leaving the potential introduction of safeguards for Domestic Representative Actions solely at the discretion of each Member State.

While it is understandable that Member States wish to retain their autonomy to regulate Domestic Representative Actions, the above definitions mean that domestic cases may have strong cross-border implications. Such implications can undermine Member State regulatory autonomy with regard to setting the parameters for cases in which solely the local consumers are affected.

As a result, the above definition of a Domestic Representative Action only relies on two criteria: **the court and the QE being in one Member State**. Two other key elements of a representative claim – **location of beneficiaries and defendants** – are neutral in the definition of Domestic Representative Action. As a result, a case will be qualified as a Domestic Representative Action as long as a QE established in a given Member State (**A**) brings a case in front of the court in the same Member State (**A**), even though the defendants and/or beneficiaries are from another Member State (**B**). In this scenario, even if Member State (**B**) has set strong safeguards and criteria for the Domestic Representative Actions, it will have no influence on nor ability to prevent beneficiaries and defendants from Member State (**B**) being involved in notionally 'domestic cases in Member State (**A**), even though the standards of Member State (**A**) are far lower than the ones of Member State **B**.

It should be clearly emphasised that the result of the definition of Domestic Representative Actions in the Council's General Approach is that the autonomy of Member States to regulate their domestic representative actions will be de facto diminished.

The above issue can be addressed via three possible solutions:

- 1) Merge the domestic and cross-border cases (as is the case in the European Commission and European Parliament texts);
- 2) Introduce the same safeguards for domestic cases and for cross-border cases; and
- 3) Amend the definitions of the Domestic Representative Actions or Cross-border Representative Actions. This can be done in one of the two ways:
 - a. Add to the definition of Domestic Representative Actions that the defendants shall be located in the same Member State as the court ruling the case and the QE;
 - b. Clarify within the definition of Cross-border Representative Actions that scenarios where consumers reside in more than one Member State are represented in a given case by a QE. The case in this instance shall be defined as being a Cross-border Representative Action.

Both of these solutions would help preserve the autonomy of Member States to tailor the systems for cases involving local consumers.