



The Consumer Voice in Europe

Litigation funding in relation to the establishment of a European mechanism of collective redress

BEUC position

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Summary

- Resolving the problem of funding is crucial in ensuring that any collective redress system to be established is effective. BEUC strongly backs the **creation of a public fund** dedicated to the financing of collective redress brought by consumer organisations. This fund could be fed only partially by direct State deposits and complementary resources, for instance, a share of the fines imposed for antitrust offences, could be sourced.
- The possibilities to use after-the-event **legal insurance** have to be examined.
- **Third party funding** raises various fundamental concerns. If this system had to be endorsed at EU level, precautions and safeguards will have to be taken to ensure the risks inherent to this mechanism are eliminated.
- If the '**loser pays**' model is a fair instrument in relation to covering litigation costs, it may also become a disincentive for serious claims as claimants face the risk of having to pay both parties' costs. Therefore the judge should be given the power to **adjust the costs** to be reimbursed.

“Citizens need to be able to benefit from their rights stemming from European integration...establishing rights is not enough. Rights and obligations will become a reality only if they are readily accessible to those entitled to them. Individuals need to be empowered to invoke these rights wherever in the Union they happen to be.” Such was the assertion of the European Commission in 2010 in its Stockholm Programme Action Plan.

The question of funding of collective actions is central to the ongoing discussions on establishing a binding European instrument for collective judicial redress actions. Without sufficient measures to ensure the representative lodging the collective action will not bear unreasonable financial burden or risk, the system will not respond to consumer expectations. Resolving the problem of funding is crucial in ensuring the system to be established is effective and would enhance consumers’ access to justice.

In collective claims, several types of costs must be borne. Some are inherent to collective actions, such as the preparatory costs for identifying the victims and gathering the claims (spread of the information; collection and checking of claims; coordination), while others apply to all judicial redress mechanisms (collecting evidence; making copies; certification; legal, court and expert fees), but can be increased due to the specificities of collective actions (high number of victims; complexity of evaluating damages; proving the infringement). Still the possibility to group a large number of claims into one allows for the economy of costs compared with a big number of individual actions.

The total cost of this type of action varies greatly from one country to another, as Member States are free to set the amount of their litigation fees. It may reach several tens of thousands of euros, even hundreds of thousands, particularly in countries where litigation fees are generally very high (e.g. the United Kingdom).

Fifteen Member States currently have a mechanism for group action or similar means of redress¹. However, the funding mechanisms in these countries are not uniform and many have significant differences between them.

BEUC has carefully analysed existing litigation funding mechanisms in these Member States and also several other countries where instruments of collective litigation are available.

We believe that the coexistence of the following funding options would be the best way to achieve effective access to justice for victims and to guarantee proper collective redress.

¹ ‘BEUC Country Survey: Where does collective redress for individual damages exist?’ Available on www.beuc.eu

I. A dedicated public fund

In many Member States consumer organisations receive public subsidies, but these are more often designated to certain activities or projects and not for covering operational costs. In very few Member States are public subsidies intended for the direct financing of claims.

- This is the case in **Austria**, where VKI, the main consumer association receives governmental subsidies to finance claims. Also in **Germany**, VZBV the umbrella organisation of German consumer associations, is annually subsidised by the Federal Ministry for Consumer Protection with up to €9 million, including €230,000 for collective legal proceedings. This illustrates the public order nature of consumer welfare.

In order to achieve better access to justice and effective protection of consumers, **BEUC strongly backs increased support by Member States**. The creation of a public fund dedicated to the financing of collective redress brought by consumer organisations would be the best solution to reach these objectives.

We acknowledge that in the current economic climate additional burden for Member States might not be realistic, however such a fund could be fed only partially by direct State deposits and complementary resources could be sourced. For instance, a share of the fines imposed for antitrust offences could be used to finance collective consumer claims.

This concept of public funding through allocation of fines is used in Australia, Brazil and Québec, Canada where such a fund finances consumer education and consumer law projects and centres.

- In **Italy** a similar fund was temporarily created. Fines imposed by the competition authorities supported projects linked to consumer issues. For example, fines imposed on the members of a car insurance cartel were used to fund a study carried out by Altroconsumo on car insurance premiums.
- In the Rover case which dealt with a series of price fixings incidences, the **European Commission** opened up this option. Rover was required to pay £1million to compensate consumers. **UK consumer organisation Which?** received the majority of the money to spend on an information project on safety issues for people planning to buy cars.
- **Germany** debates whether a share of cartel fines should be used for financing consumer associations. German consumer organisations argue for an appropriation clause allowing the redirection of a share of cartel fines to the funding of consumer associations in general, and not be limited to the funding of collective redress actions. In its latest response to the Federal Ministry's proposal on a new cartel law, the German Federation of Consumer Organisations (VZBV) demands a competition-

related use of the fines e.g. by creating a Federal Special Fund which could finance actions dedicated to the restoration and preservation of competition.

An interesting funding option can also be found in **Québec** where the Law on Collective Redress provides for the creation of a special public fund to grant loans to finance collective actions. Loans from this fund are available on two conditions: the right of redress cannot be exercised unless it relies on solid legal arguments (i.e. it is likely to succeed or at least is not unreasonable). Secondly, the beneficiary has to prove that the money will be used for the needs of collective redress. The loans can cover specific expenditures, such as lawyer fees, court fees, expert and adviser fees, but also the defendant's litigation costs when the case is unsuccessful and any other useful costs related to the preparation or the handling of the case. The beneficiary will reimburse the loans only if the case is successful and only up to the received amount. Access to this fund is only available to a limited list of persons/organisations, namely physical persons, non-profit associations established under a certain provision of the Quebec company law, workers' associations and cooperatives.

Such funds could be instituted **within the Member States, but also at European level**. A share of the fines imposed by the European institutions could be deposited in a European fund and used to cover the costs of cross-border cases or cases with a European dimension (e.g. involving European scale damages, European cartels...). Consumer associations wishing to bring such a large scale case could then apply to receive funding.

This option would provide additional resources to counter fraudulent behaviour of companies, but it would also be a fair way to fund consumer collective redress as the fines would indirectly return to consumers i.e. the victims.

The fund could also be coupled with an extension of legal aid for the benefit of consumer representatives. Directive 2002/08 EC on the "Improvement of access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes" has established an obligation for Member States to grant legal aid to "*persons...who are partly or totally unable to meet the costs of proceedings...as a result of their economic situation, in order to ensure their effective access to justice*²". In order to ensure truly effective access to justice, the scope of this Directive should also be broadened to include consumer organisations and NGOs to facilitate the bringing of cross-border mass claims.

² Directive 2002/8/EC Art 5.1

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Litigation can be funded by the parties, but they can also use alternative funding solutions to transfer the financial burden to a third person. The three main actors in this area of litigation business are insurance companies, lawyers and litigation funding companies.

II. Legal expense insurance

In several Member States (**Austria, Germany, England and Wales, Netherlands, France**), insurance schemes are already available and are widely used to finance litigation costs in individual or collective claims. Such schemes can take different forms: Both physical and legal persons can subscribe to an insurance scheme before incurring legal liability (**'before the event' insurance**) to ensure that once they bring a claim before the court the insurance company will cover the litigation fees.

In some countries, once a conflict has arisen an insurance contract can also be agreed between the claimant and the insurance company (**'after the event' insurance**) to cover all litigation fees or only the risk of having to pay the defendant costs in case the latter wins.

Before-the-event insurance schemes do not seem to be an adequate tool for collective litigation brought by individuals. Contrary to the tendency of professionals to subscribe to such schemes, individuals rarely do so (except in Germany and Austria where it is widespread), unless it is included in other insurance policies such as for motor and household policies, as is common in Portugal, England, Wales and Denmark. In addition, even where an individual does have this insurance, it is not always certain that it could be used in collective proceedings. On the other hand, consumer associations are more likely to bring cases and could subscribe to such policies in order to finance potential future collective claims. However **BEUC expresses its concern** about the additional financial load it represents for consumer organisations, especially smaller ones for which it can be very burdensome.

After-the-event insurance is used only in few Member States e.g. Austria, The Netherlands, England and Wales. This mechanism is not widely used, even though it is increasingly recognised by some as a potential solution for the litigation funding issue. However as this mechanism is still in its infancy, the market remains restricted in terms of competition and as a result premiums are high.

III. Other funding options

Litigation funding companies and lawyers (via contingency fee agreements) can provide the necessary financial means to bring the case and then receive in exchange a share of the awarded proceeds if the case is successful.

In this situation the funder not only pays for the litigation fees, but also bears the litigation risk (that of having to cover the defendant costs when the 'loser pays' principle applies). The amount of the share withheld by the company or the lawyer in case the claim is upheld, is usually left to their discretion, but can often amount to up to 33%.

Having recourse to a third party funder allows the party to sue without having to bear the financial costs of a long and complex action, thereby enhancing access to justice. In fact, the plaintiff does not pay any fees upfront. It also allows for better management of litigation costs and can help avoid legally unmerited claims insofar as companies will carefully assess each claim before agreeing to finance it and will check the defendant's solvency in order to be sure they will recover their costs.

- In **Austria** FORIS AG, commercial litigation funding company, has collaborated with VKI the Austrian Consumer organisation to finance several cases. An example in 2000 is that of the case concerning Austrian tourists who suffered from food poisoning during their stay in a hotel in Turkey (during an all-inclusive trip), FORIS AG financed the action and accordingly made this action possible, in exchange for 30% of the proceeds obtained.

It must be said that litigation funding companies and contingency fees agreements are not often used in the European Union. Contingency fees are only allowed in a few countries and litigation funding companies are only used in **Austria, England, Wales, The Netherlands and Germany**. Indeed Member States fear that developing third party funding would lead to the abuse of collective litigation by creating new investment opportunities for certain types of companies and law firms.

BEUC raises some concerns about the risks which should be avoided at European level:

- As observed in Australia, private investors may fund litigation only to advance their interests in a speculative investment rather than to promote the interests of the claimants.
- Where defendants would be willing to reach a fair settlement with consumers, third party funders, be they lawyers or companies might want to pursue litigation in order to receive bigger proceeds (especially when the agreement does not include monetary compensation as seen in the Portugal telecoms case³),
- The funder might try to inflate the damages and influence the judgement,
- Lawyers could try to gather groups of victims in order to persuade them to bring claims which would not have been brought otherwise.

Moreover, BEUC is concerned that third party funding by companies is **inappropriate for low-value claims**. When deciding whether to fund an action third parties will make a financial cost/benefit analysis, examining the potential benefit against the expenses of recruiting and managing the represented claimants, the complexities of conducting the case and gathering evidence and the potential difficulty in assessing the merits of the case. This mechanism will therefore only suit high value (of several million euro) or large mass claims (for instance a million people claiming €10 of damage).

In addition, in instances where consumer organisations are aiming to **clarify a fundamental legal question**, the action might seem too risky for the funding company to take, whereas those actions are of major importance for consumers.

Taking the above into account, if this system had to be endorsed at EU level, **precautions and safeguards** will have to be taken to ensure the risks inherent to this mechanism are eliminated:

- The plaintiff must keep the control over the proceedings. The funder cannot have the capacity to improperly 'monopolise' the litigation, for instance, to impose a certain lawyer on the client or to attempt to influence the negotiated settlement or the actions of the lawyer in court. Neither can there be any conflict of interest between the funder and the plaintiff;
- A verification and court approval of fee arrangements entered into by consumer organisations to ensure that claimants have not been deceived;
- Funders' solvency also has to be verified to exclude 'rogue' funders who would be unable to pay a winning defendant's costs.

IV. 'Loser pays' principle and adjustments in court fees

The aforementioned litigation funding mechanisms allow the effective exercise of the right to sue when being a victim of a collective injustice. However, except from recourse to a public fund dedicated to the financing of group actions, each involves a cost for a plaintiff who will either not be fully compensated or will pay premiums to cover an insurance. In order to remedy this situation **any funding mechanism should be combined with a 'cost shifting' scheme**. Under this principle the losing party should pay the litigation costs incurred by the winning party.

Cost-shifting (the 'loser-pays' principle) is the predominant legal rule in European Union Member States. Under this rule, the losing party must pay the winning party's recoverable costs. In all of the EU Member States in which collective action mechanisms presently exist (Austria, Bulgaria, Denmark, England, Wales, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Poland, Spain and Sweden) cost-shifting is the general rule.

Although the risk of bearing the defendant's costs can help prevent unmerited and frivolous claims, it may also become a disincentive for serious claims as claimants face the risk of having to pay both parties' costs. To accommodate this situation, the judge might have the power **to decrease the amount to be paid** and most Member States provide for adjustments to the principle for specific cases.

- In **France and Italy**, the judge can decide not to apply the loser-pays rule when the claim brought was not unfounded and the defendant has sufficient financial means to cover the expenses.
- In **Poland**, the court may decide to not order all or some of the costs from the losing party where this party could not have predicted the outcome of the litigation.
- **Portugal** has a very effective and worthy system where the loser-pays principle is not applied to consumer organisations. Under the Consumers' Rights Law, consumers who launch a 'popular action' are exempted from the preliminary costs of bringing a case. When the case is successful they do not pay the court fees, when it is lost they only pay 10% - 50% at the discretion of the judge (the plaintiff association might pay more only when the claim is considered abusive). In contrast, the defendant will have to pay the court fees whatever the issue of the case. This system is excellent in guaranteeing full access to justice for collective claims.
- In **Spain**, the loser-pays principle usually applies, however a reduction of litigation fees can be awarded in favour of consumer associations. A consumer organisation which would not have sufficient resources can be exempted from paying the litigation fees.

Another option to adjust the legal expenses in favour of the claimants is **to allow the court to order the costs of a particular step in the collective action to be paid by either the defendant or by some other party**. Obvious candidates for shifted costs in this context are costs of notice and disbursements such as expert reports.

For instance, under the Dutch Class Action Financial Settlement Act, the court has the power to order one of the petitioners to pay costs related to the procedure. This power was used in the *Dexia* case, whereby Dexia was charged with the costs of notifying class members and those of the appointed expert.

Under the 'popular action' available in Spain, for those consumers who have insufficient financial resources to commence their own legal action, no legal costs are charged and a similar position may be available to consumer organisations. Effectively, this means that certain costs may be paid by legal aid, including: lawyers' and solicitors' fees; publication of announcements or edicts; copies; certificates etc. asked of public registers; notaries' fees; etc — but not the payment of media advertisements (which the consumer organisation must fund).

If the 'loser pays' model is a fair instrument in relation to covering litigation costs, BEUC would like to stress the fact that **adjustments could be expedient to achieve its objective of free justice** for the party which was within its right, without discouraging meritorious actions or overloading the party which had serious grounds to sue.

Therefore, a European instrument of collective actions should give powers to the judge to **adjust the costs** to be reimbursed by the losing representative organisation.

In cases won by the plaintiff, it should be possible to claim not only direct litigation costs, but also after-the-event insurance payment or other **reasonable expenses** which consumer organisation incurred in relation to the collective action.

Additionally, consumer organisations (from the outset) should be **exempted from the fee of lodging the collective action at court**, as such fees in some instances are calculated on the basis of the value of the claim and therefore can constitute considerable amounts.

Conclusion

Without appropriate funding, no collective redress mechanism will work in practice. The importance of funding is also acknowledged by the Commission in its 'Green Paper on Consumer Collective Redress'⁴ and the recent consultation 'Towards a Coherent European Approach to Collective Redress'. BEUC strongly believes that the issue of funding has to be addressed in establishing a binding European instrument for collective judicial actions. A dedicated public fund, aided by State deposits and additional sources of income such as fines for competition/consumer law offences, would appear to be the best solution, particularly in parallel with the evolvement of insurance schemes and adjustments to the 'loser pays' principle.

END

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Austria</p> <ul style="list-style-type: none"> - Representative test-case action - Collective redress actions of Austrian type (traditional representative action). 	<p>No litigation costs for claimants who use the test-case procedure.</p> <p>The loser-pays principle applies.</p>	<p>According to a contract with the responsible ministry, VKI receives funding for the preparation of cases in co-operation with this ministry. As a consequence of the possibility to use financing litigation companies, this budget is used only for claims of a value of less than €10,000 or risky cases. (However this dependence on government approval may create unfairness in selection of cases).</p>	<p>Legal expense insurance is available before and after the event.</p> <p>Mechanisms of third-party financing are used in cases with a value of over €100,000. The financing company bears the litigation risk, but receives approximately 30% if the case is successful.</p>	<p>A bonus can be awarded to the lawyer when the case is successful.</p>	<p>The financing mechanisms in Austria (financial support from the ministry, litigation risk borne by financing companies, no litigation costs for claimants who use the test-case procedure) have enabled the test-case procedure to be frequently used.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Bulgaria</p> <p>- Collective action for damages to the collective interests (representative collective action).</p> <p>- Collective action for damages suffered by consumers (group action).</p>	<p>The loser-pays principle applies.</p> <p>When a collective action is brought, the representative association receives the proceeds but has an obligation to use them only for consumer protection activities.</p> <p>In both possible actions, the case has to be brought by a consumer association, the costs will therefore be borne by this association</p>	<p>Public subsidies for consumer associations.</p> <p>A legal aid is available for poorer claimants in the group action procedure.</p>		<p>Success fees are allowed.</p>	<p>The low level of resources available for consumer organisations and the new law (1 March 2008) which requires sufficient financial means to admit a law-suit are barriers to the effectiveness of the Bulgarian group action.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Denmark</p> <ul style="list-style-type: none"> - Group action according to the Administration of Justice Act (group action) - Consumer Ombudsman's representative action 	<p>Those who opt-in share the common costs and incur some limited litigation risks. The representative has to provide security for the potential reimbursement of the winning defendant costs.</p> <p>The loser-pays principle applies in principle. In some exceptional cases the claimant may be asked to pay a certain amount to cover the representative's expenses even when the group action is successful.</p>	<p>When the case is brought by the public consumer ombudsman, the litigation costs are borne by the state budget (but the litigation risk remains on the consumers shoulders). Legal aid is available for poorer claimants (where individuals bring, join or are grouped in a group action).</p>	<p>Legal expense insurance is included in the family insurance</p>	<p>The fee structure is composed of several components including Success fees ..</p>	<p>The opt-in version is for "everybody", and the opt-out version is only for the consumer ombudsman and will be used for many smaller claims where it is considered prohibitive to use the opt-in.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Finland</p> <p>- Group action for compensation in consumers disputes (only possible for the public ombudsman) (representative action)</p> <p>- Group claim in the Consumer Disputes Board</p>	<p>The loser-pays principle applies except for the procedure before the Board.</p> <p>Access to the Board is free for the parties as long as they do not hire lawyers (no-cost rule). If they do so, they have to pay their fees.</p>	<p>When the case is brought by the public ombudsman, the litigation costs are borne by the state budget, but some limitations to the budget allocated to this activity can be imposed.</p>	<p>Legal expense insurance is available but rarely or never used in consumer matters.</p>	<p>Contingency fees are allowed but rarely used (not used for group actions since only the public Ombudsman can bring actions)</p>	<p>No case has so far been brought to court by the consumer ombudsman since the mere existence of this instrument has prompted companies to negotiate.</p>

Country	Origin of funding			Success / Contingency fees	Comments
	Claimants / Representative / Defendant	State	Third parties		
<p>France</p> <p>- Actions for the financial reparation of the consumer collective interest (representative collective action)</p> <p>- Joint representative action for consumers / investors (group actions)</p>	<p>The collective representative actions are funded by the association budget. This is financed by membership fees and through their activities.</p> <p>As this type of action does not aim to compensate consumers for damages, the proceeds of the action are used to finance the organisation's activities and thus future actions.</p> <p>The loser-pays principle usually applies, however the application of this principle might be moderated or denied when the suing representative has not acted unreasonably and when the defendant has 'deep pockets'.</p>		<p>Before the event insurance is available but not used in consumer matters (mainly used by professionals like doctors).</p>	<p>Success fees are allowed.</p>	<p>The collective representative action has been used frequently but its impact is limited since the awarded damages are usually far lower than the damages suffered by the consumers (the award can be €1!).</p> <p>The other mechanism of group action has hardly ever been used.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Germany</p> <p>- Einziehungsklage (claim by assigned rights on behalf of an undefined number of consumers)</p> <p>- Group actions in the capital market (group action)</p> <p>- Recovery of ill-gotten gains (skimming-off procedure)</p>	<p>The loser-pays principle applies.</p> <p>In the traditional representative action (Einziehungsklage), there are normally no costs for consumers since everything is borne by the representative consumer association.</p> <p>The procedure under the Capital Market Model Claims Act involves claimants sharing the common costs.</p>	<p>Public subsidies for consumer associations.</p> <p>A legal aid is available for the poorest claimants in general, therefore also in cases under the Capital Market Model Claims Act procedure. However, certain preconditions, such as not enough capital resources and sufficient chance of success have to be met.</p>	<p>Germany allows litigation financing companies, for the moment practically applied for skimming-off actions under the Law of Unfair Competition.</p> <p>Insurance mechanisms are available before the event (but not for investor's claims). Legal expense insurances cover 43% of the population.</p> <p>Assignment of damages claims: the damage claims can be sold to a special purpose company which will bring the case in its own name.</p>	<p>Contingency fees are in principle forbidden and only allowed if people otherwise would be restrained from access to law due to their weak economical situation. The granting of a bonus when the case is successful is allowed.</p>	<p>The representative action under the Act on Legal Services works relatively well for cases involving medium-value claims and a limited number of claimants, but not for low-value (where the amounts at stake do not justify such a heavy procedure) or mass claims which would require too much staff.</p> <p>The procedure under the Capital Market Model Claims Act involves claimants sharing the common costs, it has transpired as suitable only for mass claims and has so far rarely been used due to the complexity of the procedure (it was used for the 17,000 claimants Telekom case).</p> <p>The skimming-off action under the Law of Unfair Competition has hardly ever been used since the consumer associations must prove the trader's intention to infringe the law and the proceeds go to the State (punitive mechanism, not</p>

Country	Origin of funding			Success / Contingency fees	Comments
	Claimants / Representative / Defendant	State	Third parties		
<p>Greece</p> <ul style="list-style-type: none"> - Collective action for the protection of the general interest of consumers (representative collective action) - Declaratory action for damages (test-case) 	<p>These two procedures require consumer associations to bring the case. Neither the collective representative action under the Consumer Protection Act nor the declaratory action for damages entails litigation costs for consumers. However the latter might require follow-on litigation to be brought by consumers and thus they will have to pay the litigation costs.</p> <p>The loser-pays principle applies.</p>	<p>Limited public subsidies for consumer associations.</p>	<p>Legal expense insurance is available but very rarely used in consumer matters.</p>	<p>Success fees are allowed.</p>	<p>The collective representative action under the Consumer Protection Act (which does not compensate the damages suffered by consumers, but makes a fraudulent behaviour stop) is well used. However the incentive effect towards a better respect of the law is weak insofar as the damages allocated are lower than the profits resulting from the infringement.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Italy</p> <p>- Collective action (group action)</p>	<p>The loser-pays principle usually applies, however the application of this principle might be moderated or denied when the suing representative has not acted unreasonably and when the defendant has 'deep pockets'.</p>	<p>Public subsidies for consumer associations which have to bear preparatory costs (seeking and gathering the claims) and conduct the negotiations.</p>	<p>Before and after the event insurance is available but quite rare and mainly used by companies.</p>	<p>Contingency fees are allowed.</p>	
<p>The Netherlands</p> <p>- Act on Collective Settlement of Mass Damage (group action)</p>	<p>The loser-pays principle applies.</p> <p>Costs are not paid by consumers but by the representative association.</p>	<p>Public subsidies for consumer associations that otherwise would not be able to bear litigation costs.</p>	<p>Litigation financing companies are allowed and insurance mechanisms are available before and after the event.</p>	<p>Success fees are used.</p>	<p>Quite efficient mechanism which was frequently used, notably for very big cases. However, a serious limitation: the requirement for a prior settlement.</p>
<p>Poland</p> <p>Collective claim for damages (group action) since July, 2010</p>	<p>Claimants have to bear all the costs and the litigation risk. The group leader has to pay up-front when bringing the case.</p>	<p>Legal aid exists but is limited and is paid after the case has been brought. Thus the plaintiff has to pay up-front.</p>	<p>Legal expense insurance is available but very rarely used in consumer matters.</p>	<p>Contingency fees are allowed up to 20%, success fees can also be used.</p>	<p>As the instrument is new, it is therefore too early to assess it. However the fact that all the costs have to be paid by the consumer will be a serious obstacle to the use of this new instrument.</p>

Country	Origin of funding			Success / Contingency fees	Comments
	Claimants / Representative / Defendant	State	Third parties		
<p>Portugal</p> <p>- Popular Action (group action)</p>	<p>Claimants have to pay 10% - 50% of the litigation costs when the case is lost and nothing when it is won. This explains why consumers nearly always turn towards consumer associations.</p> <p>The loser-pays principle applies.</p>	<p>Legal aid is available for poorer claimants (where individuals bring, join or are grouped in a group action).</p>	<p>Legal expense insurance is available but rarely or never used in consumer matters.</p>	<p>Success fees are allowed.</p>	<p>The collective action has been successful despite the poor resources that consumer organisations have. Moreover the threat of such a procedure and the high media coverage have encouraged businesses to accept ADR.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Spain</p> <p>- Action in defence of rights and interests of consumers (group action)</p>	<p>Litigation fees are relatively low.</p> <p>The loser-pays principle applies.</p>	<p>Consumer associations with insufficient monetary resources do not have to pay the court fees but still bear the remaining part of the litigation costs.</p> <p>Legal aid is available for poorer claimants (where individuals bring, join or are grouped in a group action).</p>	<p>Legal expense insurance is available but very rarely used in consumer matters.</p>	<p>Contingency fees are tolerated to a certain extent.</p>	<p>The Spanish group action has been very efficient, fairly successful and is often used. This is notably due to the relatively low litigation costs.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p>Sweden</p> <p>- Group proceedings act (group action)</p>	<p>The representative plaintiff bears the litigation costs. Consumers who opt-in bear no or a very limited litigation risk, they can be liable for a limited amount when the case is successful but when the defendant cannot reimburse the plaintiff (e.g. in case of insolvency).</p> <p>The loser-pays principle applies.</p>	<p>When the case is brought by the public ombudsman, the litigation costs are borne by the state budget, however some limitations to the budget allocated to this activity can be imposed.</p> <p>A legal aid is available for poorer claimants (where individuals bring, join or are grouped in a group action).</p>	<p>Legal expense insurance is available but rarely or never used in consumer matters.</p>	<p>Possibility of 'risk agreement s' with the lawyer who will get increased or reduced fees depending on the case outcome.</p>	<p>The Swedish procedure is effective in achieving satisfactory redress for claimants. The threat of a collective procedure and the media coverage encouraged businesses to accept ADR. However public funds are insufficient to finance all the collective actions.</p>

Country	Origin of funding				Comments
	Claimants / Representative / Defendant	State	Third parties	Success / Contingency fees	
<p><u>United Kingdom</u></p> <p>- Group litigation Order (group action)</p> <p>- Competition action (traditional representative action)</p>	<p>When a Group Litigation Order (GLO) is brought the common high litigation costs are shared between the claimants but some state legal aid can be available for the poorest.</p> <p>In representative actions, the representative bears all the costs. Consumer associations are financed by membership fees and through their activities.</p> <p>The loser-pays principle applies.</p>	<p>A legal aid is available however this is not sufficient to ensure real access to justice as it is insufficient to finance group actions especially considering the high level of litigation costs in the country.</p>	<p>Litigation financing companies are allowed and insurance mechanisms are available before and after the event.</p>	<p>Conditional and success fees are used (and have been in the only case brought under the UK Competition Act 1998) but contingency fees are still forbidden.</p>	<p>The Group Litigation Order is unsuitable for low value claims insofar as the litigation costs are high and the decision of gathering the claims in a GLO is at the court discretion (thus claimants have to bring individual cases first).</p> <p>The representative action which can only be used by <i>Which?</i> has been used once but does not seem efficient (opt-in procedure which is not suitable for very low-value claims).</p>