

MONEY MAKES THE WORLD GO ROUND

Costs and financing of collective redress actions

WHY DOES IT MATTER

In the current world, with globalisation and digitalisation ever more present, consumer rights infringements can easily affect high numbers of consumers. However, various studies show that individual consumers do not go to court for low levels of compensation, as it would not be financially justified. Therefore, when situations occur where a large number of consumers are harmed, collective redress is a crucial tool for access to justice for consumers. Unfortunately, until recently in Europe only a handful of countries had functioning collective redress procedures.

This situation will now change with the new EU Directive on representative actions for consumers¹, which obliges all EU countries to set up collective redress procedures. It sets out some detailed procedural norms for these procedures, but mostly leaves open the question of how such actions should be financed. EU countries will now need to take very important decisions on the costs and financing of collective redress actions.

Collective redress cases are typically very expensive. Consumer associations need to manage large numbers of consumer registrations and significant amounts of evidence, procure expensive legal and potentially technical analyses and expert opinions for the courts, as well as cover court fees and legal representation costs. At the same time, they need to undertake fully-fledged communication campaigns, reaching out to consumers and media, and maintain constant information flows with regular updates to consumers they are representing. In addition, collective cases can take a very long time², which requires long term budgetary planning and the capacity to deal with these long-term costs. The experience of BEUC members shows that the costs of the collective redress actions can go into several hundreds of thousands of euros.

Given that the Representative Actions Directive (RAD) requires that the entities with the right to bring representative actions have to be not-for-profit, it is clear that the costs of collective redress actions may prevent such entities from launching them in practice.

In Italy, in the collective redress action against Volkswagen, the Italian consumer organisation Altroconsumo had to spend more than 150,000 euros just to inform consumers about the case and to invite them to register.

This was mainly because the judge in the case required Altroconsumo to publish notices about the action in several printed magazines. The notices in these magazines were much more expensive even than commercial advertising and had to be repeated several times.

¹ 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 and repealing Directive 2009/22/EC

² The length of a collective redress action, even in the countries where the justice system is not slow, can be at least 5-6 years. If there is an in-depth admissibility stage, another 1 or 2 years should be added. For example, most of the collective redress actions against Volkswagen emissions fraud in European countries are still pending, even if they had been introduced in 2016.

HOW TO LOWER THE COSTS OF COLLECTIVE ACTIONS.

The Representative Actions Directive gives EU countries considerable margin for discretion about how to introduce various procedural elements in their national legislation. However, Member States do have to ensure that these procedures are in line with the objective of the Directive – to improve consumers' access to justice, through effective and efficient representative actions for injunctive and redress measures. National rules cannot hamper the effective functioning of the procedural mechanism for representative actions required by the Directive.³

It is possible, through the national legislation implementing the RAD, to reduce the direct court costs and to make collective actions cheaper for claimant organisations. For example, there is a provision in the Portuguese civil

procedural code limiting court fees in collective redress actions to 66,000 euros, even in cases where the aggregate damage is much higher (for example, several million euros). In Germany, there is a similar provision, although the limit of 250,000 euros is higher.

Another helpful idea is to lower the financial risks of losing such a case. In Portugal, even if consumer associations lose the case, they only need to cover between 1/10 and half of the costs of the opposing party, unless the judge decides that the action was not brought in good faith. The “loser pays” principle is a fundamental feature in European civil law procedures, but it can deter civil society organisations from bringing important collective redress actions. So where possible, efforts should be made to limit financial risks.

FINANCING OPTIONS

However, even with the measures described above, the costs of collective redress actions may still be too high for civil society organisations. Some forms of external financing of collective actions are therefore necessary.

Among the most common options are state funding, special collective redress funds, legal insurance and commercial third-party funding. Each of these options may have shortcomings, so the best would be to have a combination of funding sources available.

SPECIALISED FUNDS

Some non-EU countries have set up public or semi-public funds to finance collective redress cases. These funds typically start with government funding, and then later may be able to be self-sufficient, depending on the constitution of the fund and the number of

sources of its income. It is important to note that both Canadian and Israeli class action regimes are not limited to consumer claims, so the funds in the examples below receive applications for funding for class actions in various sectors.

The Fund for Collective Actions in Québec

- Established by law in 1978
- Applicants entitled to receive funding are various representatives of potential class actions, but they need to comply with several criteria both regarding their financial assets and the viability of the case
- Financial costs, including attorney's fees
- In case of success, requires the refund of the support received + a percentage of the claim
- Funded from the percentage of all successful collective claims brought in Québec (not only from the cases financed by the fund)

Israeli Public Class Action Fund

- Established in 2006, by Israeli Class Actions Law
- Limited financing of costs, excluding attorneys' fees
- Money does not have to be refunded, even if the case is successful
- The cases funded pay a small fee (NIS 5,000 – 10,000)
- Fully funded by the government grant
- Funds around 45% of cases

COMMERCIAL THIRD – PARTY FUNDING

One of the most controversial funding sources is commercial third - party funding. As these funders take commission for their investment, it can mean that consumers do not receive the full amount of their compensation. However, it is still often necessary to have this option for big and expensive cases that could not otherwise be brought. In addition, third-party funders carefully evaluate cases and their chances of success, and their analysis can also bring added value.

There are concerns that third- party funding leads to under-compensation for the individuals concerned. However, such concerns need to be assessed from the perspective of harmed consumers. Even if the funder's commission is indeed taken directly from the consumer compensation fund and so reduces the individual's compensation to, say, 75% (if the commission of the funder was agreed at 25%), still it is better for an individual to receive three quarters of their compensation than none at all.

Several BEUC members are already using third-party funding for their cases and have not identified any negative issues related to its use. In any case, the safeguards foreseen in Article 10 of the Directive on representative actions are sufficient to prevent any eventual problems in consumer cases⁴.

An additional argument is that even if in Austria there have been attempts by defendants to dismiss cases because they were financed by third-party funders, the Austrian Supreme Court has rejected these arguments and allowed such third-party funding.⁵

How to establish a good system to ensure that the costs of collective redress actions do not prevent qualified entities from bringing collective claims?

First of all, given the public interest of collective consumer cases, court fees should be adapted to the benefit of the claimants and the financial risks of losing such cases should be lowered.

Moreover, several sources of financing for collective redress cases should be available. Third-party funding must not be prohibited. However, as the commercial funders will typically not finance strategic cases or cases where the amount of aggregate damage is low, other financing sources (such as, inter alia, state funding, public funds or project financing) should be available.

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⁴ When third-party funding is used by a qualified entity, Article 10 of the Directive foresees several safeguards to prevent conflicts of interest. First of all, the qualified entities need to remain in charge of the case and their decisions cannot be unduly influenced by the funder in a manner that would be detrimental to the consumers represented. Secondly, the representative action cannot be brought against a defendant which is a competitor of the funding provider or against a defendant on which the funding provider is dependent.

⁵ Judgements 6 Ob 224/12b of 27 February 2013 and 4 Ob 180/20d of 23 Feb 2021. In both cases the third-party funding was questioned as allegedly equal to the contingency fees and therefore prohibited. The second case also alleged a conflict of interest of the funder with the represented party. These arguments were dismissed by the Supreme Court.