

**TERMS OF REFERENCE FOR A COMPARATIVE LEGAL STUDY
ON PROCEDURAL RULES AND THEIR IMPACT ON COLLECTIVE REDRESS
ACTIONS IN EUROPE**

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1. Context and definition of the problem

In today’s highly globalised and digitalised society, where an increasing amount of goods and services are sold to consumers in digital environments, violations of laws and unfair practices committed by traders are far more likely to impact a wide range of consumers across different countries.

Until recently, in cases of mass harm situations, many European consumers lacked the tools to seek redress collectively. Instead, they had to pursue legal actions individually. Given that court proceedings are typically complex, costly, and lengthy, many of them never considered vindicating their rights in court, especially when low-value claims are at stake. Consequently, traders’ unlawful practices went unchallenged and unchanged, and consumers were left uncompensated for the harm they suffered.

To address this gap in consumer rights enforcement, the EU adopted EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (hereinafter referred to as “RAD” or “the Directive”) allowing so-called “qualified entities” to start representative actions seeking compensatory and/or injunctive relieves for affected consumers. By May 2024, two-thirds of the EU Member States had transposed the Directive nationally.

While RAD represents a significant step to strengthen the enforcement of consumer rights in Europe, it only provides minimal procedural harmonisation. As the Explanatory Memorandum of the initial proposal highlighted, the Directive “*does not regulate all aspects of representative actions but only focuses on certain key aspects that are*

necessary for the establishment of a framework, which must be complemented by specific procedural rules on the national level”.

Consequently, many procedural aspects of collective redress actions continue to fall outside the scope of the Directive and remain regulated under national laws, which may vary significantly from one country to another.

2. Objectives

The purpose of this study is twofold:

1. To map national procedural rules — in approximately 4 to 5 selected EU Member States — that can impact the roll-out of collective redress actions as established by the Directive and potentially undermine their effectiveness.
2. To provide qualified entities with well-substantiated materials that can serve as a foundational resource for their advocacy efforts, aimed at enhancing both national and European legislation in this domain.

By achieving these specific objectives, this comparative study will contribute to the overarching goal of improving the level of consumer protection across Europe by strengthening the private enforcement of consumer rights.

3. Expected results

The study should compare how several key procedural provisions are regulated in the selected European countries. Based on this comparative analysis, the study should:

- (1) identify national legal provisions and EU/domestic case law that may pose obstacles for collective redress actions** in Europe. The study should outline less effective practices, demonstrating why the chosen methods to regulate these issues may hinder the private enforcement of consumers’ rights. Additionally, it should highlight better approaches potentially adopted by some national legislators as examples of best practices that could contribute to ensuring a higher level of consumer rights protection.
- (2) make policy recommendations** for legislative changes for both the EU and the Member States covered by the study. These recommendations should encompass procedural and substantive law adjustments aimed at regulating these matters more effectively. The study should articulate why these changes are necessary to achieve a higher degree of consumer rights enforcement across the EU.

4. Activities

The study should focus on the main issues that have a significant effect on the launch and roll-out of representative actions and that are not harmonised under the Directive. Prior to commissioning this study, BEUC consulted its members who have knowledge and experience about representative actions. Through these exchanges, it became clear that **the study should focus on the following three issues:**

1. **Burden of proof, access to evidence and disclosure of information,**
2. **Financing of collective redress actions, with a focus on third-party funding and court fees,** and

3. **Quantification of (immaterial) damage**, especially in cases where infringements take place in digital environments.

More specifically:

- **Rules on burden of proof, access to evidence and disclosure of information** vary considerably across legal systems in Europe. In some countries, the burden of proof lies with the plaintiff qualified entity, while in others it can be shifted to the defendant trader. This difference impacts the ability of qualified entities to launch collective redress actions successfully. Some European countries have procedural tools to force defendants to disclose evidence, but others do not have such mechanisms or the mechanism in place may only be used under very strict conditions. The study should analyse:
 - o How the issues of burden of proof are regulated in the selected countries,
 - o What the procedural tools to access/disclose evidence are in the selected Member States, and
 - o How these rules can be used by qualified entities in the context of collective redress actions.

- **Financing collective redress: focus on rules on third-party funding and court fees.** Accessibility to funding is key for the viability of collective redress actions. Consumer organisations often lack the financial resources to undertake complex and lengthy legal proceedings. Hence, stringent regulation or outright prohibition of private funding, coupled with the absence of a framework for structural public funding may trigger significant challenges for qualified entities. With regard to third-party funding¹ and court fees², national regulatory landscapes vary widely across Europe. High court fees may dissuade qualified entities from initiating high-profile collective redress actions, even where fees can be recoverable upon success. This study should examine the existing rules in the selected European countries, identifying those that are more favourable for collective redress and those that are less so.

- **Quantification of (immaterial) damage, especially in digital environments.** Quantifying damage in digital environments poses unique challenges due to the intangible nature of many digital goods and services. Unlike physical products, which often have clear monetary values, assessing the harm caused by digital infringements, such as data breaches, can be exceedingly complex. In some countries, national provisions lack clarity or specificity regarding the quantification of damage in digital contexts, thereby hindering the pursuit of collective redress claims. Conversely, other countries may boast more robust and adaptive provisions better suited to quantifying damage in digital

¹ For instance, German law transposing RAD dissuades third-party funders by capping their share of proceeds from a successful claim at 10%, with the claim deemed inadmissible if a higher share is agreed, along with obliging funders to individually collect their share from each respective consumer individually. Conversely, in some countries, the potential success fee is considerably higher, rendering collective action funding more attractive and thereby facilitating qualified entities in pursuing claims. For example, in the Netherlands, while the law imposes no specific limit on success fees, case law has established a much more reasonable framework, such as a cap of five times the investment of a litigation funder or 25% of it, depending on the specifics of the action.

² Some exempt representative actions from court fees entirely, while others impose caps, and some lack any specific rules regarding court fees for collective actions, failing to distinguish them from individual claims.

environments. For instance, in some European countries, judges are granted discretion to estimate immaterial harm and award a flat-rate amount to each harmed individual, whereas in others, judges must scrutinise the evidence of harm for each participating consumer. Taking this further, in a recent judgment³, a Dutch court ruled that the claim for immaterial damages (here arising from GDPR violations) is inadmissible as the damage would need to be assessed individually for each data subject, which is deemed impossible in a collective action. Such a national approach evidently makes collective redress actions seeking compensatory measures in digital contexts very difficult. This study should further clarify how courts in the selected jurisdictions approach the issue of damages to compensate immaterial damages and, where relevant, indicate the methods used to calculate the damages awarded to plaintiffs.

5. Scope

The study should cover 4 to 5 European countries. The selected countries should be suggested by the researcher and subsequently confirmed by BEUC. The selection of the countries covered by the study should consider various factors, including (but not limited to) their geographical distribution and legal tradition. The jurisdictions covered by the study should also be selected in a way that would allow the resulting comparison and analysis of the respective national provisions and case law to draw up best practices ensuring an adequate level of consumer rights enforcement.

6. Methodology

The methodology of this study will primarily be desk research, and should include:

- **A comparative legal analysis:** the researcher is expected to draft a detailed comparative legal analysis examining the national procedural rules (legislation and case law) related to the 3 topics highlighted above. This analysis should highlight the differences and similarities in the approaches taken in the selected jurisdictions, with a focus on identifying best practices and areas for improvement.
- **Case studies:** the researcher should use case studies to substantiate the analysis. The case studies should highlight how the relevant legal provisions and practices apply in practice and how they impact the enforcement of consumer rights and the roll-out of collective redress actions.
- **Expert consultations:** the researcher should conduct expert consultations with national practitioners or other relevant stakeholders having practical knowledge on the issues at hand. The objective will be to gain additional practical insights into the implications of the procedural rules examined in this study. The list of persons consulted and a declaration of conflict of interests should be indicated in the draft report.

³ Judgement of the Amsterdam District Court issued on 10 January 2024 for the cases C/13/702849 / HA ZA 21-526, C/13/706680 / HA ZA 21-789 and C/13/706842 / HA ZA 21-794 (collective claims against claim against several TikTok entities).

- **Policy recommendations:** based on the national examples set forth in the study, the researcher should make policy recommendations to improve the EU framework for collective redress. These recommendations will aim to address the identified challenges and to improve the effectiveness of collective redress mechanisms across the EU.

7. Deliverables

The expected deliverables of this study should be drafted in English and include the following:

- (1) A **detailed report** with the study's findings, including:
 - A **comparative analysis** detailing the national procedural rules and practices in the selected European countries for the three topics identified above.
 - **Case studies** illustrating the practical implications of the analysed legal provisions and practices (with at least one case study for each issue in each selected jurisdiction).
 - A summary of the insights collected through the **expert consultations**, along with the list of consulted experts and declarations of conflicts of interest.
 - A list of **policy recommendations** that could be made at the EU level to strengthen the EU framework for collective redress.
- (2) An **executive summary** with the key findings and recommendations of the study.
- (3) A **presentation of the findings** by the researcher(s) during a dedicated (online or physical) meeting with BEUC and its member organisations in 2025. The exact date and format of the meeting will be defined at a later stage.

8. Profile of the researcher

The researcher should have previous experience in conducting comparative legal research, with a proven record of academic papers published in legal journals and policy reports. The researcher undertaking this study should possess the relevant background and expertise in European consumer law, collective redress, and civil procedural law, along with a solid understanding of the legal frameworks governing consumer disputes. Previous experience as a practitioner will be an asset.

9. Budget

The total budget allocated for this study is 30,000 EUR incl. VAT (i.e. 24,793 EUR excl. VAT).

No additional costs will be borne by BEUC.

10. Timeline

The study should start **no later than 1 September 2024**. The final version, including its executive summary, must be submitted to BEUC by **14 February 2025 (COB)**.

The deadline for the researcher(s) to submit the preliminary version of the study to BEUC is **10 January 2025** (COB).

BEUC Secretariat may provide comments on the preliminary draft by **24 January 2025** (COB). Upon request from either party, an (online) meeting between the researcher(s) and BEUC should be arranged to discuss BEUC's comments on the preliminary version.

The final version of the study report will be approved by BEUC.

The researcher(s) are expected to present the key findings of the study in a dedicated online or physical meeting with BEUC and its member organisations during Q1-Q2 2025, following the availability of the final version of the study. The exact date and format of the meeting will be determined later.

11. Submission of proposals

Interested researchers are invited to express their interest in this call by submitting the following documents:

- (4) An overview of the proposed research methodology, including information on how the objectives and scope outlined in the present Terms of Reference will be addressed, and explaining which European countries the researcher would propose to cover and the rationale behind.
- (5) A detailed CV, including relevant experience in consumer law, civil procedural law, comparative legal analysis, and previous work related to collective redress mechanisms and a list of relevant publications.
- (6) A sample of previous research work relevant to the subject matter of this study.
- (7) Contact information of the researcher.

Proposals should be submitted electronically to Elizabeth.Bragina@beuc.eu no later than **28 June 2024, 6 pm CET**. Late submissions may not be considered.

The selected researcher will be announced by mid-July.

12. Further information

For clarification of any of the above, please send an e-mail to: Elizabeth.Bragina@beuc.eu.

May 2024