



Thematic debate on funding of actions and public assistance to qualified entities

This discussion paper outlines the issues related to the funding of representative actions and the public assistance for qualified entities, as regulated by the Directive on Representative Actions¹ (hereinafter ‘the Directive’).

Funding of representative actions is key for the effective functioning of the Directive. Representative actions entail fees and costs which can end up being very significant, e.g. court fees, lawyer fees, expert fees, administrative costs entailed by the need to properly inform consumers at all the stages of the procedure and possibly to manage the consumers’ participation in the action, etc. The qualified entities that bring representative actions to protect the interests of consumers have in general limited human and financial resources, in particular in light of the obligation to have a non-profit-making character (Article 4(3)(c) of the Directive). Without adequate resources to be able to cover all the costs of the proceedings, qualified entities may be deterred from bringing representative actions and access to justice may be hindered.

The Directive addresses this issue from different angles. Article 10 lays down rules aimed at preventing conflicts of interests in case of funding by third parties. Article 12 sets out principles related to the allocation of costs of a representative action for redress measures. Finally, Article 20 and Article 9(7) deal with the possible assistance which Member States should provide to qualified entities in order to ensure that the costs of the proceedings do not affect the effectiveness of the Directive.

This discussion paper identifies the main obligations for the Member States and the regulatory choices (options) provided by the Directive regarding these obligations.

The objective of the debate is to identify concrete measures that would serve an effective fulfilment of these obligations and support the efficient implementation of the options by the Member States.

To help the discussion, the present paper proposes questions to which the rapporteur and the panellists will aim to respond during the thematic debate.

All other participants to the debate will be able to express their views and ask further questions within the ‘Questions & Answers’ session.

1. Funding of representative actions under the Directive

The Directive lays down a number of rules related to the funding of representative actions for redress measures (Article 10). Qualified entities can turn to private funders including banks, legal insurers, other commercial litigation funders, but also traders through corporate social responsibility programmes or crowdfunding (Recital 52). In such cases, the Directive focuses on ensuring that the consumers’ interests are protected vis-à-vis the private funder. To this end, the Directive addresses the possible conflicts of interests (Article 10(1) and (2) and Recital 52), and the corresponding powers of courts or administrative authorities (Article 10(3) and Recital 52) including as regards the possible procedural consequences of a non-compliant funding (Article 10(4) and Recital 52). These rules do not apply to the representative actions seeking only injunctive measures.

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 (Text with EEA relevance) *OJ L 409*, 4.12. 2020, p. 1–27 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG



1.1. General rules regarding funding of representative actions for redress

Obligations:

Member States need to ensure that funding by a third party does not entail conflicts of interests. Member States also need to ensure that, if the third party that has an economic interest in the bringing or the outcome of the representative action for redress measures, that funding does not divert the representative action away from the protection of the collective interests of consumers (Article 10(1)).

For this purpose, Article 10(2) of the Directive provides more concretely that Member States must address two issues. First, the decisions of the qualified entity related to any steps of the representative action for redress measures, including as regards settlements, are not unduly influenced by the third party (Article 10(2)(a)). This means that the third-party funder is not allowed to steer the decisions of the qualified entity in a way that is detrimental to the consumers' interests. Second, a representative action for redress measures cannot be brought against a defendant who is a competitor of the funder or on which the funder is dependant (Article 10(a)(b)).

Recital 52 explains further the situations of conflict of interests within the meaning of the Directive, which pose a risk of abusive litigation. In particular, the existence of a conflict of interests can be implied by the direct funding of an action by a trader which operates in the same market as the defendant, thus being the competitor of the defendant and possibly having an economic interest in the outcome of the representative action which would not be the same as the consumers' interest. Conversely, the indirect funding of a representative action by organisations that are financed through equal contributions by their members or through donations, including traders' donations in the framework of corporate social responsibility initiatives or crowdfunding, should be considered eligible for third-party funding, provided that the third-party funding complies with the requirements of transparency, independence and the absence of conflicts of interest.

Options:

The Directive does not prescribe the types of funding to support representative actions for redress measures.

Member States are free to decide on whether they allow funding by third parties (Article 10(1)).

Member States are free to decide on additional regulation of third-party funding, going beyond the substantive requirements of the Directive (Article 10(2)). In particular, Member States are free to regulate from which source must be paid the investment return of the third-party funder, for example from the redress awarded to consumers in the final redress decision or within the settlement (with a possible cap), or as part of the adverse costs to be paid by the defeated trader.

Questions for discussion:

- Which models of private funding (e.g. legal protection insurance, contingency fees, third-party funding, etc.) work best in practice, in your experience, and why?
- What are the pros and cons of third-party funding?
- Which are the most effective solutions regarding the return on the investment of the third-party funder and why?



1.2. Powers of courts or administrative authorities

Obligations:

Member States must ensure that courts or administrative authorities in representative actions for redress measures are empowered to assess compliance with Article 10(1) and (2) of a funding by a third party (Article 10(3)). The assessment is not systematic but must be performed if justified doubts arise in this respect, in particular when the trader provides relevant evidence.

To that end, Member States must put in place measures ensuring that qualified entities are transparent about their funding (Article 10(3) and Recital 52). In particular, qualified entities must disclose only to the court or administrative authority, and not to the trader, a financial overview that lists sources of funds used to support the representative action. The information required from the qualified entity should enable the court or administrative authority to assess whether the third party could unduly influence the procedural decisions of the qualified entity to the detriment of the consumers concerned and whether there is a conflict of interests within the meaning of Article 10(2). These requirements must be read in conjunction with those laid down in Article 4(3) concerning transparency about the source of funding of their activities in general (Article 4(3)(f)) as well as the establishment of procedures to prevent undue influence and conflicts of interests (Article 4(3)e and Recital 25).

Member States must also empower courts or administrative authorities to take measures appropriate to the circumstances, in case they establish that a funding does not comply with the requirements (Article 10(4) and Recital (52)). Such measures include in particular requiring the qualified entity to refuse the problematic funding or make changes to the funding agreement. They can also include rejecting the legal standing of the qualified entity for the concrete representative action supported by the problematic funding or declare the action inadmissible, in which case the rights of the consumers concerned by that representative action are not affected.

Options:

Article 10(3) allows Member States to decide who is empowered to assess the compliance of a funding agreement with Article 10(1) and (2). It can be the court or administrative authority seised of the representative action, but it can also be a separate body, for example a specialised administrative authority which would become competent to make the necessary assessment.

Member States may provide for other procedural consequences of a failure to comply with Article 10(1) and (2) than the ones referred to in Article 10(4), insofar as they are appropriate to the circumstances of the case.

Questions for discussion:

- Which would be the optimal procedural arrangements to assess funding agreements while ensuring the effectiveness of the procedure?



2. Allocation of procedural costs of a representative action for redress measures

Obligations:

The Directive provides for the implementation of the so-called ‘loser pays’ principle in representative actions for redress measures (Article 12 and Recital 38). It provides that the party that loses the proceedings must pay the costs of the proceedings incurred by the successful party, in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general. In this connection, Member States should ensure that the unsuccessful party is not ordered to pay the costs which were incurred unnecessarily (Recital 38), which must be assessed on a case-by-case basis.

As regards the types of costs, Article 13(5) obliges Member States to ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action.

Finally, individual consumers concerned by such an action cannot be obliged to bear the costs of the proceedings (Article 12(2) and Recital 36). This limitation is in line with the rationale of representative actions and the overall objective of the Directive to secure that consumers do not bear the risks of the procedure in which they are represented by the qualified entity, but are able to benefit from it. This rule must be distinguished from the possibility opened under Article 20(3) to allow qualified entities to ask the consumers concerned to pay modest entry fees to support the action, as well as from the possible national rules according to which the return on investment in the case of funding by third parties can come from the total amount of redress awarded to consumers.

Options:

Article 12 gives Member States significant discretion to regulate the concrete conditions and exceptions framing the ‘loser pays’ principle.

In particular, Member States are free to define under national law which costs can be qualified as ‘costs of the proceedings’ within the meaning of Article 12, except for the obligation to ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action (Article 13(5)). Recital 38 provides guidance for the interpretation of this notion, stating that the costs of the proceedings should include, for example, any costs resulting from the fact that either party was represented by a lawyer or another legal professional, or any costs resulting from the service or translation of documents.

Member States are also allowed to provide that, in very exceptional circumstances, individual consumers may be ordered to pay for certain costs insofar that they were incurred as a result of those consumers’ intentional or negligent conduct, for example, prolonging the proceedings because of unlawful conduct (Article 12(3) and Recital 38).

Questions for discussion:

- *Which costs are of utmost relevance and should be included in the notion of ‘costs of the proceedings’? Are there any specificities related to the collective nature of representative actions that should be reflected under national law?*
- *In which exceptional cases could consumers be ordered to pay for certain costs incurred as a result of their intentional or negligent conduct?*



3. Assistance to the qualified entities

Obligations:

Member States must ensure that qualified entities are not prevented by the costs of the proceedings from seeking effectively injunctive and/or redress measures (Article 20(1) and Recital 70). The costs of the proceedings can constitute significant hurdles for qualified entities in practice and dissuade them from bringing representative actions. However, Member States are not obliged to finance representative actions as such.

Member States must support and facilitate cooperation between qualified entities and the exchange and dissemination of their best practices and experience as regards dealing with domestic infringements and cross-border infringements as referred to in Article 2(1) (Article 20(4) and Recital 71). This would clearly contribute to the capacity-building of qualified entities and assist them in order to mutualise resources and legal strategies. Indeed, such cooperation can lead to important cost savings, thanks to the common legal assessments of the cases, coordination of litigation strategies as well as the possible organisation of a common, single representative action brought by several qualified entities from different Member States, as it is allowed under the Directive.

Options:

The Directive provides a number of examples regarding the concrete measures that Member States could implement in order to address the challenge posed by the costs of the proceedings to the effectiveness of the procedural mechanism (Article 20(2) and Recital 70). Such measures could include limiting applicable court or administrative fees, granting the qualified entities access to legal aid, where necessary, or providing qualified entities with public funding to bring representative actions, including structural support or other means of support. Particular attention should be paid to the manner in which the general rules of civil procedure on costs interact with the collective dimension of representative actions. For example, given the probable significant value of aggregated damages to be claimed in representative actions, it appears necessary to assess whether the method of calculating fees as a percentage of the value of the claim, with possible caps, is adequate in the context of representative actions. A number of adaptations could also be considered as regards possible exemptions from legal fees at least in certain circumstances such as cases where a novel point of law appears or where a public interest of the case is significant. Member States are free to decide which concrete measures are most adequate in their legal orders, insofar as they comply with the principle of effectiveness.

Member States may allow qualified entities to require modest entry fees or similar participation charges of consumers who have expressed their wish to be represented by a qualified entity in a specific representative action for redress measures (Article 20(3)).

Finally, Member States are allowed to lay down rules so that any outstanding redress funds that were not recovered by the consumers within the established time limits would be used to support the activity of qualified entities - the so-called 'cy-près' rule (Article 9(7) and Recital 51)). This could translate for example into setting up a public fund to help financing representative actions and from which qualified entities could request financial aid to cover in particular the lawyers' fees, experts' costs, newspaper notices, and all other expenses necessary for the exercise of the claim.



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Questions for discussion:

- Which concrete measures would be the most effective to assist the qualified entities in their role of protecting the collective interests of consumers in the context of the representative actions (amicable solutions, legal actions, information obligations)? In particular, which measures appear effective without requiring direct public funding?
- Are the exemptions from procedural costs a good approach to alleviate the financial burden on qualified entities? If so, under which conditions or limitations?
- What are the pros and cons of implementing a rule on the reallocation of outstanding redress funds, not claimed by the consumers, to support the funding of representative actions ('cy-près' rule)?

