COSTS AND FUNDING OF COLLECTIVE ACTIONS: REALITIES AND POSSIBILITIES

A Research Paper

for submission to the

European Consumers' Organisation (BEUC)

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While the author is a member of the Civil Justice Council of England and Wales, the views expressed in this Paper are written in a personal academic capacity, and should not be taken to necessarily represent the views of the Civil Justice Council.

PART I

INTRODUCTION

1. BACKGROUND TO RESEARCH PAPER

Importance of the topic

The fundamental importance of costs and funding to the carriage, even viability, of collective actions, needs to be fully appreciated and understood, as many respected entities and individuals who have been charged with review of the area have concluded:

> *per* the European Commission, ***Towards a Coherent European Approach to Collective Redress*** (Commission Staff Working Document Public Consultation, SEC 173, 4 Feb 2011), para 22–23:
>
> > Any European approach to collective redress ... should not give any economic incentive to bring abusive claims. In addition, effective safeguards to avoid abusive collective actions should be defined. ... One commonly used safeguard is the 'loser pays' principle which means that the losing party pays the court and lawyers fees of both parties.
>
> *per* Lord Justice Jackson, ***Review of Civil Litigation Costs: Preliminary Report*** (Vol 1) (May 2009) ch 38, para 6.6:
>
> > The objective of the procedural rules [on costs and funding] must be (as always) to achieve a proper balance between the interests of claimants and defendants.
>
> *per* the Ontario Law Reform Commission, ***Report on Class Actions*** (1982), vol 3, 647:
>
> > the question of costs is the single most important issue that this Commission has considered in designing a expanded class action procedure .... the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilised at all.

Recent EC Collective Redress Consultation

On 4 February 2011, the EC released its consultation paper (referenced above) for public consultation. The EC states (at para 10) that,

> [g]iven the diversity of existing national systems and their different levels of effectiveness, a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and businesses and give rise to uneven enforcement of those rights. A coherent European framework drawing on the different national traditions could facilitate strengthening collective redress (injunctive and/or compensatory) in targeted areas.

As part of that public consultation, the EC has raised a number of questions to do with costs and funding of collective actions. Of most relevance to the present Research Paper are the following:

Q20 How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/ore compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

Q21 Should the 'loser pays' principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

Q25 How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

Q26 Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

Q27 Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

Q28 Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

This Research Paper has been drafted to assist BEUC to address these questions, from the point of view of Consumer Organisations which may be minded to institute a collective action, on behalf of aggrieved consumers, in a Member State in which such procedures are permitted.

This paper is intended as an Exposure Draft which, in particular, seeks to highlight the types of mechanisms by which the effects of costs-shifting may be ameliorated or softened, and the types of funding which may be available to a Consumer Organisation as representative claimant. It is not intended to be an exhaustive study of costs and funding of collective redress, nor does it purport to constitute an empirical study across the various European jurisdictions. That particular study, if desired as European collective redress reform measures go forth, is worthy of both specialist resources and personnel who are situated in the relevant EU Member States, and an appropriate time period for gathering the data and stakeholder insights together. It is apparent that the costs and funding landscape across European Member States is both disparate and lacking in coherence, and any new European collective redress measure will have to take account of that reality. Meanwhile, this Research Paper serves to emphasise, in a preliminary (and generic) manner, the various mechanisms by which costs may be handled, and by which funding may be sourced, to make collective actions operate 'at the coalface'.

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2. ASSUMPTIONS UNDERPINNING THE RESEARCH PAPER

1. It is assumed that a Consumer Organisation would wish to prosecute a collective action for the purposes of recovering damages for and on behalf of the group/class members which it purported to represent, and not merely for injunctive or declaratory relief.

2. It is assumed that a Consumer Organisation would be permitted to institute an action against the defendant without, itself, possessing a cause of action as a directly-affected class member. In other words, the Consumer Organisation may operate as an 'ideological claimant' under the relevant collective actions regime.

3. This Research Paper has necessarily required that reference be made to a variety of jurisdictions, all of which tend to use different terminology to describe their collective redress regimes. Typically, the terms, '***class action***', '***class proceeding***', or '***representative proceeding***', mean an opt-out collective action regime, whereby the class members have to take some proactive step to withdraw from the action (this terminology is favoured in the United States, Canada, and Australia, respectively). By contrast, a '***group action***' means an opt-in regime, whereby the group members must take some positive step to join or participate in the action. In this Paper, *all* of these terms will be included under the umbrella term of '***collective action***'. Hence, unless the context indicates otherwise, a 'collective action' means, where appearing in this Paper, a procedural scheme which is based upon either opt-out or opt-in principles; which is generic in the sense that it can handle a variety of substantive law disputes; and which entails the use of either a direct claimant or an ideological claimant. On the other hand, the term, 'group action', where appearing in this Paper, will generally denote a collective action which operates on opt-in principles. The terms, 'class members' and 'group members', are generally used interchangeably throughout.

3. METHODOLOGY

The information contained in this Research Paper is derived from a variety of sources:

Questionnaires — these were distributed to a number of parties who had involvement in the management of costs and funding of collective actions, and whose insights were considered to be valuable for this Research Paper. Written responses forthcoming from that exercise (anonymised for the sake of confidentiality and prudence) have been incorporated as and where appropriate. This written feedback was kindly provided by the following: Mr Peter Smith, Managing Director of Legal Expenses, Firstassist Legal Protection, London; Mr Mark Harvey, Partner and Head of Harmful Products and Overseas Accident Team, Hugh James Solicitors, Cardiff; and Mr Richard Sheehan, Operations Director, and Mr Brian Raincock, Chairman, Commercial Litigation Funding Ltd, London.

Materials pertinent to costs — a number of materials were helpful to the author, in forming ideas and in deriving the insights referred to in this Paper, including the following:

Alberta Law Reform Institute, *Class Actions* (Report 85, 2000), Sections N and O

Capisio M and H Cohen, *Awards of Attorneys Fees by Federal Courts, Federal Agencies and Selected Foreign Findings* (Nova Science Publishers, New York, 2002), ch 2, 'Litigation Expenses in Selected Foreign Nations' (ed, Sung Yoon Cho)

Cashman P, *Class Action Law and Practice* (Federation Press, Sydney, 2007), chh 3 and 7

Civil Justice Council, *Improved Access to Justice: Funding Options and Proportionate Costs* (June 2007)

Grave D and K Adams, *Class Actions in Australia* (Thomson LawBook Co, Sydney, 2005), ch 15, 'Costs and Funding'

Hong Kong Law Reform Commission Class Actions Sub-committee, *Class Actions* (Sep 2009), ch 8, 'Funding Models for the Class Action Regime'

Jackson (Lord Justice), *Review of Civil Litigation Costs: Preliminary Report* (May 2009), vol 1, ch 38, 'Collective Actions'

Jackson (Lord Justice), *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch 33, 'Collective Actions'

McCarthy Tetrault (eds), *Defending Class Actions in Canada* (2nd ed, Wolters Kluwer, 2007), ch 7

Morabito V, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash U L Rev* 231

Morabito V, *An Empirical Study of Australia's Class Action Regimes: Second Report* (Sep 2010)

Ontario Law Reform Commission, *Report on Class Actions* (1982), vol 3, ch 17

Country reports — a number the Country Reports produced for DG-SANCO (edited by Civic Consulting (Lead) and Oxford Economics, and available at: http://ec.europa.eu/consumers/redress/cons/, were also very helpful for the information which they contained about EU Member States. Where relevant Country Reports were the primary source of the author's information about a particular Member State, that is noted accordingly.

Author's materials — a number of the author's own materials have been drawn upon, summarised, cited or reproduced, in preparing this Research Paper:

Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004), especially ch 12, 'Costs and Funding of Class Actions'

Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 (4) *Modern L Review* 550

Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for Submission to the Civil Justice Council of England and Wales) (2008)

Mulheron, *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal* (A Research Paper for Submission to the Department for Business, Enterprise and Regulatory Reform (BERR)) (Oct 2008)

Mulheron and P Cashman, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312

Mulheron, 'Building Blocks and Design Points for an Opt-out Class Action' [2008] *J of Personal Injury Law* 308

Mulheron, 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia J of European Law* 419

Mulheron, 'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10

Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Law-makers' (2011) 50 *Canadian Business LJ* 335

4. THE DEBATE ABOUT THE OPT-IN AND OPT-OUT CHOICE

Before heading into a substantive discussion of the costs and funding options available to a Consumer Organisation in collective actions, it may be worth reiterating that there is a very close connection between the operation of costs rules (and any amelioration of those rules) and whether the collective redress regime is based upon opt-in or opt-out principles.

This is a policy question, and indeed, is not quite the clear-cut division between the two models that much literature in this field may suggest (for consideration of a variety of approaches to opt-out and opt-in that may underpin collective redress, see, e.g.: R Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Law-makers' (2011) 50 *Canadian Business LJ* 335). While a fulsome debate about that choice lies outside the scope of this paper, the following table may serve to emphasise the arguments which support the introduction of an opt-out collective action regime (although it must be acknowledged that there are a number of opposing viewpoints). Undoubtedly, any review by the European Commission of costs and funding associated with a newly-introduced European collective redress measure will require significant engagement with the policy issues outlined below:

Supporting arguments: the opt-out approach
• defendants are unlikely to have to deal with any claims other than those made in the collective action, and if they do, then they can know more precisely how many class members they may face in subsequent individual proceedings; • opt-out regimes enhance access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically, and who would be unable for one reason or another to take the positive step of including themselves in the proceedings; • efficiency and the avoidance of multiplicity of proceedings are increased for all concerned; • access to justice is the basic rationale for collective actions, and inclusiveness in the class should be promoted (i.e., the vulnerable should be swept in); • safeguards can prevent 'roping in', e.g., adequate notice explaining opt-out rights, permission to opt-out late in the action, and other procedural mechanisms; • for each class member, the goal of individual choice whether or not to pursue a remedy can be achieved if the decision for the class member is reformulated to another choice: whether to continue proceedings rather than commence them; • opting out more effectively ensures that defendants are assessed for the full measure of the damages they have caused rather than escaping that consequence simply because a number of class members do not take steps to opt in; • the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, so class members should not be denied whatever benefits are secured by the collective action by failing to act at an early stage of the action — it is fairer for the silent to be considered part of the class than not.

Source: R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004), Table 2.1, 37–38 (footnotes and references excluded). These arguments are also discussed and expanded upon by the author in, e.g.: 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 (4) *Modern Law Review* 550–80; and 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia Journal of European Law* 419–462.

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PART II

COSTS RULES/REGIMES AND COLLECTIVE ACTIONS

This Section of the Paper considers, in the context of collective actions, the main rule which applies in European (and in Commonwealth) jurisdictions — costs-shifting, with derogations therefrom — together with the possible alternatives: a no-costs rule and one-way costs-shifting.

5. COSTS-SHIFTING, AND DEROGATIONS THEREFROM, UNDER A GENERAL JUDICIAL DISCRETION

General rule: costs-shifting plus derogation

Costs-shifting (the 'loser-pays' principle) is the predominant legal rule in European 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 and Wales, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Poland, Spain, and Sweden), costs-shifting is the general rule in each of those jurisdictions.

However, typically, this rule is qualified. Derogations from costs-shifting will be permissible, in certain cases.

In EU Member States, derogations from costs-shifting will be made available typically by one of two ways. On the one hand, some jurisdictions imbue their courts with discretion as to the allocation of costs, albeit with an express indication that costs-shifting is the general rule. On the other hand, an EU Member State's law-makers may state that costs-shifting will apply but that the principle will be subject to certain exceptions/derogations stipulated by legislation. To take a sample of jurisdictions:

Jurisdiction	General costs rule	Can that be derogated from?
Poland	costs-shifting, per Code of Civil Procedure, art 98, section 1	Yes, because if the claim is accepted partially, then each party's litigation costs are divided proportionately: art 100. Also, where the losing party could not have predicted the outcome of the litigation, the court may decide not to shift all or some of the costs to the losing party: art 102.

Jurisdiction	General costs rule	Can that be derogated from?
England	costs-shifting applies as the general rule for 'contentious litigation': CPR 44.3: (1) The court has discretion as to – (a) whether costs are payable by one party to another; ... (2) If the court decides to make an order about costs– (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.	yes, the court retains a discretion not to award the winning party any costs at all: per CPR 44.3(2)(b).
Sweden	costs-shifting, per the Swedish Law of Procedure (1994), ch 18:1	If the only way that a case could be clarified is via a judicial decision, then a no-costs rule may apply: ch 18:2. If the winning party had no reason to litigate, so that the proceeding was considered to be unnecessary, the court can require the winning party to pay the losing party's costs, or can order that each party bears his own costs: ch 18:3.
Netherlands	costs-shifting, per art 237 of the Code of Civil Procedure	In the case of partial acceptance or partial rejection of a claim, the costs may be allocated accordingly. The court retains a general discretion to order that each party bears its own costs.
Greece	costs-shifting, per art 176 of the Code of Civil Procedure	In the case of partial acceptance or partial rejection of a claim, the costs may be allocated accordingly: art 178.

Source: M Capisio and H Cohen, *Awards of Attorneys Fees by Federal Courts, Federal Agencies and Selected Foreign Findings* (Nova Science Publishers, New York, 2002), ch 2, 'Litigation Expenses in Selected Foreign Nations' (ed, Sung Yoon Cho); plus the various Country Reports edited by Civic Consulting (Lead) and Oxford Economics, and available at: http://ec.europa.eu/consumers/redress/cons/.

Applications in consumer collective actions to seek exercise of general discretion to derogate from costs-shifting

It is always open to the drafters of a collective actions regime to specifically provide that costs-shifting can be derogated from, in certain stipulated scenarios, or to establish another costs-regime altogether.

In the absence of that type of provision, however (i.e., where the collective action regime is silent about derogation), experience from established costs-shifting jurisdictions, where consumer collective actions have been brought by a losing representative claimant, shows that applications to seek the discretion of the court to derogate from costs-shifting have been sought unsuccessfully. This may seem surprising, because the relevant representative claimants were 'doing a good turn', in the sense that they were acting as 'ideological claimants', bringing proceedings on behalf of directly-affected claimants, many of whom would undoubtedly not have commenced an action on their own account at all, but for the representative claimant's suit. Moreover, the representative claimants were liable for costs-shifting in the cases mentioned below, where the suits were not regarded as blackmail or vexatious suits. Even so, 'ideological claimants' have not particularly benefited from 'special treatment' under costs-shifting regimes elsewhere:

Jurisdiction	Consumer-interest case	Facts
British Columbia, Canada	*Consumers' Assn of Canada v Coca-Cola Bottling Co* [2007] BCCA 356, (2007), 72 BCLR (4th) 243	The claimant Consumer Organisation claimed that a non-refundable container recycling fee had been illegally levied upon consumers. The action was dismissed prior to certification. While BC statutorily implemented a no-way costs rule for class proceedings litigation, that costs protection for the representative claimant does not apply prior to the certification application — in this case, the Association's, the trial judge decided to apply the ordinary costs-shifting rule, and that was upheld on appeal. The British Columbia Court of Appeal rejected that Association's submission that there should be a policy that a public interest litigant, absent special circumstances, should be immune from an award of costs when class litigation was resolved against it.
Australia	*Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004	The representative claimant was a non-profit organisation which was committed to the anti-smoking cause. It was an incorporated association whose members comprised five people, all of whom were associated with organisations which were concerned about the extent of cigarette smoking in the Australian community and the effect of the practice on public health. The purposes for which TCCI was incorporated included the promotion of tobacco control, and securing funding for those purposes. The TCCI conceded that it had no substantial assets itself, and would be unable to meet any adverse costs order that might be made against it at the conclusion of the case, but contended that no costs-shifting should apply. That argument failed. Wilcox J was unable to find any reason to depart from the costs-shifting rule, holding that both 'hearts' and 'heads' need to be firmly fixed on the merits of the litigation, and that serious and genuine intentions, and dedication and enthusiasm, are not enough. His Honour also described the claim as 'prolix and confused'.

Jurisdiction	Consumer-interest case	Facts
Australia	*Qantas Airways Ltd v Cameron (No 3)* (1996) 148 ALR 378 (Full FCA) 380 (no public interest costs order), aff'd: *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 (Full FCA)	The Australian Federal Court, which also has vested in it a wide discretion in relation to costs, has similarly said that any public interest element to the representative proceeding could theoretically result in no order of costs against the representative claimant, if it were to lose. Attempts to rely upon that sort of 'public interests costs order' notably failed, however, in the cigarette-smoke-in-plane-cabins consumer case brought against Australian airline Qantas.

(Source: Discussed further in: R Mulheron, *'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere'* in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10, 214.)

These precedents do suggest that, if a Consumer Organisation were keen to ensure that a court could derogate from costs-shifting, should the Consumer Organisation bring a failed group action on behalf of consumers, then mere reliance upon a general power to derogate from costs-shifting is not enough. Efforts should be made to incorporate that measure into any collective actions regime under which the Consumer Organisation may proceed on behalf of consumers.

The views of the Canadian Consumers' Association were sought in relation to this point of view, via correspondence which reads in part:

> Dear Sir/Madam
>
> My name is Rachael Mulheron, and I am a professor at the Department of Law at Queen Mary University of London, England.
>
> I have been asked by the European Consumers' Organisation (BEUC) to undertake a study of costs and funding of collective actions, where the representative claimant may hypothetically be a Consumer Organisation.
>
> During the course of my research, I have read with interest the BCCA judgment in the action which the Canadian Consumers' Association brought against Coca-Cola Bottling Co a few years ago ([2007] BCCA 356, leave refused: SCC, 20 Dec 2007). In particular, it seemed surprising and unfair that Low JA refused to implement a no-costs rule, pre-certification, notwithstanding that: BC has employed a no-costs rule under its Class

Proceedings Act; that it was acknowledged that the Consumers' Association of Canada was a 'a non-profit society dedicated to consumer advocacy'; and that this was a novel action because there had been no similar action involving similar parties. Given that the court was not prepared to hold that the litigation was 'public interest' litigation that would warrant a no-costs order (especially at [11]-[17]), this decision is likely to be of much interest to European Consumer Organisations, given that costs-shifting is the usual costs rule in European jurisdictions.

In light of the Association's experiences in this case, I wonder if you would be willing to share any insights about this litigation, from a costs and funding point of view, or whether you have written any reports which critique this BCCA decision to which I could refer BEUC.

There has been no response to that correspondence to date.

Collective actions regimes may be notably silent on the issue

Some collective actions regimes have been established in European Member States, which plainly envisage that a *Consumer Organisation* will act as representative claimant under the collective action, and yet, the Parliamentary drafters did not insert into the regime any provision that derogated from costs-shifting, should the Consumer Organisation lose the group action.

By way of two examples, where Consumer Organisations are the relevant claimants:

Sweden	Under the Group Proceedings Act of 2002, an 'organisational action' is permitted. Costs-shifting applies, for any such organisational action. *(Source: Country Report – Sweden, 2, 7, available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf)*
England	Under s 47B of the Competition Act 1998, a follow-on action may be brought by a 'specified body'. To date, the English Consumers' Association, Which?, is the only such body specified by Regulation. Costs-shifting applies under s 47B.

Hence, despite their status as 'ideological claimants' under these regimes, the respective Consumer Organisations were not granted special costs status, and were expected to bear the usual difficulties which costs-shifting regimes bring to bear on a claimant that is not of particularly substantial means.

In that regard, costs-shifting undoubtedly acts as a real disincentive for instituting collective actions under these regimes — and the counterpoint argument, that costs-shifting deters unmeritorious or vexatious claims, has little impact in this scenario, given the type of responsible representative claimant which the drafters had in mind.

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6. STATUTORY DEROGATION FROM COSTS-SHIFTING, IN THE SPECIFIC CONTEXT OF COLLECTIVE ACTIONS

Statutory precedents

By contrast to the abovementioned category, a 'compromise position' may be achieved when costs-shifting remains the principal costs rule, but derogation from the costs-shifting rule is possible because the circumstances governing derogation have been legislatively specified. By way of example:

Ontario and Nova Scotia, Canada	In exercising their discretion with respect to costs, the courts in these jurisdictions may consider whether the class proceeding 'was a test case, raised a novel point of law or involved a matter of public interest', in which case no costs-shifting may be ordered (e.g., s 31(1) of Ontario's Class Proceedings Act 1992)

Lessons from the Ontario experience

For information, some important features of these legislative derogations from costs-shifting are worth noting:

- ❑ these three 'exceptional criteria' have not been legislatively defined, but various judicial attempts have been made to explain them. For example, a class proceeding acts as a 'test case' if it 'determine[s] the issues that will arise in other cases that are pending or, at least, contemplated'; 'novel' means 'addressing a legal point that is both important and without precedent'; and the two usual (but not essential) elements of 'public interest' are that the litigation involves issues of broad public importance and involve persons who are historically disadvantaged in a society;

- ❑ the provision has not necessarily proven plain-sailing for representative claimants or defendants. Case law in Ontario has shown that even proving two out of the three 'exceptional criteria' is not enough to necessarily show that costs-shifting should be abandoned (i.e., it is not a quantitative exercise);

- furthermore, even if none of these three criteria is made out, some Ontario courts have indicated that they retain a general residual discretion *not* to award costs against a losing representative claimant. The way in which the statutory exceptional criteria have (not) been applied rather bears out the author's previous comment that 'The Ontario experience serves to emphasise that, in reality, any statutorily-introduced directives to the courts by which to soften the potentially harsh effect of [costs-shifting] depends ultimately on judicial discretion, which will not be of much comfort to a representative plaintiff potentially or actually exposed to a formidable costs bill from a successful defendant': *The Class Action*, at p 451;

- furthermore, another notable feature of the Ontario experience is that courts have identified a number of specific scenarios in which costs-shifting can be avoided which seem to 'add flesh' to the exceptional criteria, and which may assist a representative claimant to more clearly identify whether costs-shifting would be likely to be departed from in any given case. The author has conducted a comprehensive study of Ontario class proceedings cases, for the purposes of determining in what precise circumstances a losing representative claimant has managed to avoid the burdens of the costs-shifting rule in class litigation — with the court making, instead, no order as to costs. The factors identified in that study are listed in the Table below. It must be emphasised that, where these circumstances apply, then a decision to derogate from costs-shifting has the inevitable consequence that a winning defendant has to bear its own costs, despite the fact that it prevailed in the litigation. When can that outcome be considered fair and reasonable? Several of the factors below were considered in combination to reach that conclusion, rather than conclusively in their own right (and the sample of cases from which these factors are drawn was relatively small):

Checklist of factors: When derogation from costs-shifting has applied in Ontario class proceedings

- the class proceeding constituted a true test case, the result of which would resolve other class proceedings on foot
- the class proceeding proceeded under the unusual circumstances of an appellate court overruling its own decision (unexpectedly, for the representative claimant);
- the class proceeding was of sufficient magnitude and importance so as to impact upon an extremely wide community
- the class proceeding had the potential to achieve a large degree of behaviour modification across an industry
- the class proceeding was very beneficial in clarifying the law
- the class proceeding had persuasive effect either in other jurisdictions or across other industries
- a costs award against the representative claimant in the class proceedings would have a 'chilling effect' upon future potential litigants
- Parliament has seen fit to enact legislation that dealt with the subject-matter of the class proceeding
- the defendant/s to the class proceeding have been the subject of complaints and subsequent investigation and sanction by the industry regulator
- the class proceeding was seeking to challenge/test/improve the governmental regulation of an industry
- the class proceeding would have involved matters of considerable historical interest and societal importance
- the class proceeding was brought on behalf of class members who are traditionally seen as a disadvantaged group in society

Source: R Mulheron, *'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere'* in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10.

- arguably, the Ontario experience shows that setting legislative criteria for any derogation from costs-shifting in collective actions regimes has three advantages. First, it sets some reference point for the courts, by which to determine whether costs-shifting should be departed from, and adverse costs not awarded against the representative claimant. Also, it may be argued that, by taking that step, the legislature has invited some litigant debate and argument as to whether costs should be shifted or not, thereby suggesting (perhaps) that a court would be more enthusiastic about departing from costs-shifting than if no criteria were mentioned at all. Thirdly, the presence of explicit power to derogate from costs-shifting in the context of a collective action may also prompt the court to more readily make a 'public interest' costs order — whereby the Consumer Organisation may be indemnified completely for adverse costs, should it lose the action — if such an order were possible in the relevant EU Member State, as part of the court's discretion as to the award of costs. For all of these reasons, the incorporation of explicit legislative criteria to permit derogation from costs-shifting in collective actions regimes would seem to be to the advantage of a Consumer Organisation, should it be a losing representative claimant in a collective action.

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7. STIPULATING ONE-WAY COSTS-SHIFTING FOR COLLECTIVE ACTIONS

How it works

Under such a rule — and as an alternative to a costs-shifting regime — only the losing defendant pays adverse costs. Hence, if the representative claimant (say, a Consumer Organisation) wins the group action, it recovers its costs from the losing defendant; but if the defendant wins the group action and defeats the claim, it cannot recover its costs from the losing Consumer Organisation.

Typically, there will be an ability to switch the costs rule to a full costs-shifting rule if vexatious or improper litigatious tactics or poor merits are apparent to the court (a most unlikely occurrence, of course, where the representative claimant is a Consumer Organisation).

One-way costs-shifting can operate on one of two conditions

From a legislative point of view, one-way costs-shifting can be drafted to operate as the general costs rule for collective actions, on two scenarios:

- ❑ because the claimant is a specific type of claimant, such as a Consumer Organisation, and is perceived to be the type of claimant likely to be bringing public interest-type litigation, involving novel cases affecting a wide range of consumers, in possibly precedent-setting litigation, and hence, should be protected from adverse costs; or

- ❑ because the type of litigation (and the type of litigants usually involved in such litigation) requires that one-way costs-shifting applies;

England	In his recent consideration of English costs reform, Lord Justice Jackson recommended one-way costs-shifting for collective actions which concerned personal injury litigation, but recommended full costs-shifting for all other types of litigation. However, if the representative claimant were to act unreasonably in the litigation, or 'where a claim is weak or lacking in merit, the court will no doubt insist that two way costs shifting should prevail.' *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch 33, paras 3.4–3.5

It is also possible for one-way costs-shifting rule to be set to switch to a full costs-shifting rule, where some characteristic of the claimant warrants that outcome (e.g., where the claimant is a person or entity of substantial financial means, or where the claimant is funded by someone who is). For example, in the abovementioned review, Lord Justice Jackson recommended, for English collective actions, that although one-way costs shifting should apply for personal injury actions, there should be a qualification that costs may be recovered by a losing representative claimant which is wealthy: *Review of Civil Litigation Costs: Final Report* (Jan 2010) ch 33, page 334, para 3.4.

Reaction to one-way costs-shifting

Given the possible attractiveness of the one-way costs rule to a Consumer Organisation which institutes a failed group action, the argument of unfairness which has been made against it are worth noting, should this option be seriously lobbied for by BEUC for any new European collective action.

The option of one-way costs-shifting was favoured, for example, by the Law Reform Committee of South Australia, but with the admission that it created a 'potential ... for injustice to a defendant who defeats the class claim but nevertheless cannot recover his costs. ... [but] the defendants to class actions will, almost without exception, be public authorities or large corporations which will not find the costs of litigation ruinous': *Report Relating to Class Actions* (Rep No 36, 1977) 8. Some law reform bodies have refused to endorse it, saying that it is intrinsically unfair, in that defendants, 'whether large corporations, public authorities or individuals, should not be deprived of their entitlement to claim costs while they remain liable to pay the applicant's costs if the action succeeds': ALRC, *Grouped Proceedings in the Federal Court* (Rep No 46,

1988) [264]; and also rejected by the Scottish Law Commission: *Multi-Party Actions* (1996) [8.16] for the same reason.

On the other hand, Lord Justice Jackson favoured one-way costs-shifting for personal injury litigation, because, inter alia, in the majority of personal injury claims, defendants did not recover their costs if they won, and therefore, they derived little benefit from costs-shifting. Moreover, it was considered that personal injuries litigation 'is the paradigm instance of litigation in which the parties are in an asymmetric relationship': *Review of Civil Litigation Costs: Final Report* (Dec 2009), para 184. In some views, these two characteristics may reflect the reality of collective actions litigation too (see, e.g., the discussion in R Mulheron, 'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10).

Hence, the arguments are balanced, but the reality is that one-way costs-shifting has not been a notable feature of collective actions costs jurisprudence to date.

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8. SPECIFYING A NO-COSTS RULE FOR COLLECTIVE ACTIONS

How it works

Under a no-costs rule, each side bears their own costs of the litigation, win or lose. Costs do not shift, depending upon the outcome. However, typically the rule is subject to an exception that costs-shifting applies where frivolous or improper litigation tactics are employed.

Precedents in collective actions regimes

There are examples, both in Europe and elsewhere, where a no-costs regime has been specifically stipulated by the overarching legislation, in the collective actions context.

Portugal	Under Portugal's 'popular action', both parties will pay their own lawyer costs, and costs do not shift in the event of success or failure. *(Source: Country Report – Portugal, 12, available at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf)*
British Columbia	Under British Columbia's Class Proceedings Act, RSBC 1996, s 37(1), the no-costs rule has been explicitly implemented for class proceedings in that jurisdiction. However, costs-shifting will apply wherever 'there has been vexatious, frivolous or abusive conduct on the part of any party', where 'an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose', or where 'there are exceptional circumstances that make it unjust to deprive the successful party of costs': s 37(2) of the Class Proceedings Act, RSBC 1996

Interestingly, both Portugal and British Columbia are, usually, costs-shifting jurisdictions, and hence, it by no means follows that, if the general rule applying in the jurisdiction is costs-shifting, that the collective actions regime must follow the same route. A legislature may deliberately choose a no-way costs rule for its collective actions regime, in preference to the costs-shifting rule.

Should a no-costs rule be implemented for collective actions?

A study such as this would not be complete without some consideration of whether a no-costs rule *should* be the governing costs rule for any new European collective actions instrument which may be introduced, rather than adhering to the more generally accepted position of costs-shifting. The no-costs rule certainly provides another possible approach to handling the costs of collective actions — albeit that the choice between a costs-shifting or no-way costs rule is, of course, policy-driven, and is a matter upon which reasonable opinion will differ.

Were a no-costs rule to underpin any newly-introduced European collective actions regime, it would provide certain advantages. A representative claimant, say, a Consumer Organisation, would not then require expensive funding for the potential exposure to adverse costs to which it may be exposed when bringing a collective action. In turn, the Consumer Organisation may potentially be more willing to assume the role of representative claimant if it knows that it does not risk an adverse costs order, should it lose the claim, and thereby access to justice is enhanced (a similar point was made, e.g., in: Alberta Law Reform Institute, *Class Actions* (2000) [384]). There have also been criticisms of the existing costs-shifting rules as a disincentive to collective redress, especially for consumers, and especially when precisely the same product can be the subject of successful compensation recovery for consumers in the United States — the differential treatment has been the source of immense frustration to English lawyers, as described in the following passage (G Langdon-Down, 'Product Liability: Safety First' (2007) *Law Society Gazette*, 18 Oct 2007, 22):

> Mark Harvey [partner and head of harmful products at south Wales firm Hugh James] finds it 'very frustrating' that the US system of contingency fees, class actions, punitive damages and no adverse costs orders mean cases there are investigated, prosecuted and 'the victims have their day in court', when cases involving the same product here have not even got off the starting block.
>
> Sapna Malik, partner with London firm Leigh Day & Co's complex claims department, agrees. The firm has been working on cases involving the anti-inflammatory drug Vioxx, withdrawn from the market after clinical trials suggested that it increased the risk of heart attacks. US claimants have been awarded millions of dollars in compensation (although the maker, Merck, has also successfully defended some product liability claims), but UK claimants cannot get public funding or insurance cover for their cases to be run here. 'Our "no win, no fee" system falls short of providing access to justice,' she says. ...

On the other hand, there are two distinct disadvantages of a no-costs rule, especially in the context of often expensive group litigation. First, the quid pro quo is that both sides of the litigation have the risk of paying the others' costs removed, but also cannot recover in the event of success — so that, if a Consumer Organisation had to spend a considerable sum in pursuing a case successfully but could not then recover any costs, then any monetary relief could arguably be eaten up by those costs. Secondly, there is the potential abuse by the representative claimants taking advantage of instituting actions without risking the adverse costs orders, or being more inclined to bring unworthy actions, knowing that they will not have to pay the defendant's costs if they lose — although presumably a Consumer Organisation would be trusted not to embark on such a course.

At face value, the prospects of a no-costs rule being implemented in any newly-introduced European instrument seems most unlikely, given the adherence to costs-shifting as a general rule in European Member States. However (and quite apart from the possible attractiveness of its member Organisations being relieved from having to seek cover for any adverse costs award), BEUC may be interested in lobbying for a no-costs rule in any newly-implemented European collective actions regime, for three reasons:

(1) first, it is possible to implement a no-costs rule which precludes vexatious or unmeritorious litigation by other means. Indeed, in the British Columbia jurisdiction itself, the point has been made that such litigation, if brought, can bring costs consequences upon the representative claimant under s 37(2), above: *Samos Investments Inc v Pattison* (2002), 216 DLR (4th) 646, [32];

(2) secondly, consideration of a no-costs rule in the context of any collective actions reform, has been put forward in favourable terms in a number of law reform studies (e.g., by Lord Justice Jackson, in his recent comprehensive review of costs law and reform in England, *Review of Civil Litigation Costs: Preliminary Report* (Vol 1) (May 2009) ch 38, paras 5.10, 5.12, although ultimately, a shift in viewpoint was demonstrated in his final report, in that his Lordship concluded that costs-shifting should apply to any collective actions in England, except in the case of personal injury litigation where one-way costs-shifting should apply: *Review of Civil Litigation Costs: Final Report* (Jan 2010) ch 33, para 3.4–3.5; and in law reform studies of collective actions undertaken in Alberta, Ontario, Manitoba, Victoria, and the Federal Court of Canada;

(3) finally, in 2010, the author undertook a study of costs-shifting in the context of litigation brought under Ontario's Class Proceedings Act 1992. This study of relevant judicial pronouncements concerning costs-shifting under an opt-out regime, exceptions to opt-out when no-costs rules apply instead, and the availability and awards of security for costs orders, is reported in: R Mulheron, *'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere'* in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10. In the study, the author proposed (at pp 226–27) a number of arguments which could substantiate the introduction of a no-costs rule for collective actions which were brought on a representative basis. Analogising this to the European scenario, the arguments (which were cited in *Preliminary Report*, ch 38, 5.13) may be stated as follows:

- a no-way costs rule promotes the very objective of seeking access to the courtroom or settlement table that is so obviously missing in European civil procedure for some case types—and it would be a pity to enact a procedural regime to facilitate access to justice, yet thwart it with costs rules;

- where costs-shifting has been departed from in Canada (say, in British Columbia), there is certainly no evidence that the no-way costs rule has 'opened the floodgates' to class proceedings in those jurisdictions;

- it is tempting to cast costs rules as a deterrent to unmeritorious claims, but the reality is that there are three other mechanisms to avoid this possibility: (a) the already-existing court powers to strike out for failing to show reasonable grounds for bringing the claim, etc; (b) insisting upon a cost–benefit test which any new collective proceedings will need to satisfy; and (c) insisting upon a requirement that the collective proceeding has real merit;

- there is no longstanding tradition of either ATE insurers or third party funders covering the adverse costs of defendants to group litigation in England to date, should the funded client lose the group litigation;

- no-costs-shifting avoids the necessity of creating a special collective actions fund from which to fund an adverse costs award, in tough economic times;

- where costs-shifting is the applicable costs rule, and successful defendants who win collective actions cannot recover their costs from either a representative claimant or from any other source, then the collective actions regime operates as a one-way costs regime, which is intrinsically unfair to a winning defendant;

- any no-way costs rule should contain a safety net, as in British Columbia, such that if the litigation is frivolous, etc, then costs should shift (to the representative claimant, or to the individual class members, or both, depending upon the circumstances);

- Ontario case law demonstrates that there is continuing judicial uncertainty as to when to depart from the usual costs-shifting rule, and what, precisely, the statutory 'exceptional criteria' mean (and how even the presence of two out of the three of the exceptional criteria may not be sufficient to justify departure from costs-shifting);

- notwithstanding both statutory exceptional criteria and a residual judicial discretion, courts in opt-out collective actions costs-shifting jurisdictions appear fairly reluctant to depart from the costs-shifting rule where a representative claimant loses all or part of the class litigation;

- the deliberate selection of an asset-poor representative claimant is oft-denied by claimant lawyers, and oft-asserted by defendant lawyers; examining the financial capacity of class members can be problematical — these problems would be obviated by a no-way costs rule;

- the potential for small classes of English litigants to form a collective proceeding, in order to specifically avoid the usual costs-shifting rule which applies to unitary litigation, appears remote, given that the court will only certify an opt-out collective proceeding on the basis that it is 'the most appropriate means' for the resolution of the dispute.

Hence, the idea of a no-costs rule in collective redress has sufficient precedent and support that it may not be one which BEUC wishes to dismiss 'out-of-hand'.

The no-costs rule — with the problem of partial costs–shifting

Costs-shifting may apply for *only part of* the collective action, and then, for another stage of the collective action, another costs rule applies. This may work variously to the advantage or the disadvantage of the representative claimant.

For example, the collective action regime may provide that there is costs-shifting up to a certain point (or after it), but that for the other stage of the collective action, a different costs rule will apply.

British Columbia	British Columbia implemented a no-costs regime for its class proceeding, but pre-certification, a class proceeding is governed by the ordinary costs-shifting rules. This means that costs-shifting applies to any interlocutory hearings prior to certification, to the disadvantage of the Consumer Organisation in *The Consumers' Assn of Canada v Coca-Cola Bottling Co* [2006] BCSC 1233 [18], aff'd: [2007] BCCA 356, (2007), 72 BCLR (4th) 243)). Also, it means that, if an action is dismissed prior to certification, then costs-shifting also applies: *Smith v Canada* [2006] BCJ No 2081 (BCCA) [6]; *Killough v Canadian Red Cross Society* [1998] BCJ No 3019 (BCSC [In Chambers]) [15]

An appreciation of the staged nature of collective actions proceedings may require the drafters of any new such regime, in Europe, to pay close attention to what costs allocation is intended to occur at those various stages. Otherwise, a representative claimant may find the collective actions regime difficult, or unpredictable, to use.

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PART III

POTENTIAL PROTECTIVE OR AMELIORATING COSTS TOOLS, WHERE COSTS-SHIFTING APPLIES IN COLLECTIVE ACTIONS

This Section of the Research Paper considers the possible tools and devices by which a court may reduce the level of any adverse costs award which a Consumer Organisation, as representative claimant, may bear (should it institute a collective action and lose the claim), or by which a Consumer Organisation could seek to protect itself in meeting the costs of its own side of the litigation.

9. USE OF LOWER COURT FEES/COSTS SCALE

What it means

There is the possibility that, for collective proceedings, costs should be allocated on a different (lower) scale than the ordinary scale of court fees/legal costs. If a Consumer Organisation, as representative claimant, were to lose, then this measure serves to ameliorate a costs-shifting rule. At least, where implemented, it means that a losing representative claimant may be protected against a high level of fees/costs on its own side, and may also avoid any significant adverse costs award so that the costs of a successful defence are very substantially worn by the defendant and not shifted to the representative claimant.

Precedent in collective action regimes

This option has been employed, for the benefit of a representative claimant, in both Europe and elsewhere:

Portugal	Under the 'popular action', pursuant to art 20(3) of the Lei 83/95, 31st of August, losing claimants only need to pay 10–50% of the court fees, whatever the court may determine in its discretion (taking into account the claimant's economic situation and the substantive reasons that the case was lost). If a representative claimant wins the case (or achieves a 'partial grant of the request'), then no court fees are payable at all, but if it loses, then it has to pay whatever reduced sum the court specifies (this is payable at the end of the litigation, given that the payment of any court fees depends upon the outcome of the litigation). The defendant is required to pay court fees, irrespective of whether it succeeds or loses. In that regard, the popular action has been said to ensure reduced costs for a Consumer Organisation which institutes collective actions. 'Court fees' means, in this context, court filing fees; it does not include lawyers' fees; *however*, under the court fees regime, the calculation of court fees may consider and incorporate a fee which aims to cover the defendant's legal expenses (this usually occurs only where the defendant is the recipient of legal aid). *(Sources: discussions with Mr Nuno Oliveira, and Country Report – Portugal, 6, 12, at: http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf)*

Quebec, Canada	In Quebec, the class proceedings regime has provided for costs to be limited to the small claims scale: CCP (Que), art 1050.1. The scale applicable is that established for claims between $1,000 and $3,000 (Class II-A). Apparently, this legislative tactic was prompted by one of the early Quebec cases involving Canadian Honda Motors Ltd, where the defence costs claimed against the losing representative plaintiff were $675,650, as cited in: *Edwards v Law Society of Upper Canada* (1994), 36 CPC (3d) 116 (Ont Class Proceedings Committee) [77]
Ontario, Canada	The Ontario legislature has also authorised regulations permitting the implementation of a lower scale. Under s 59.5 of the Law Society Act (Ont), the Governor in Council may make regulations establishing limits and tariffs for payments of disbursements to a representative claimant or the costs to a successful defendant; or may provide for the assessment of costs in respect of which a claim is made by a successful defendant. However, to the author's knowledge, such a power has not been exercised to date in Ontario, and there are no relevant regulations which implement a lower costs scale for class proceedings in that province.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – a lower costs scale

Respondent #1	This option seems like a good idea, but I'm not sure that it is practical!
Respondent #2	This option would be unworkable in England.
Respondent #3	This option may be an advantage, but given that individual issues associated with each group member (breach, quantum, e.g.) tend to be important at some stage in collective actions, a lower costs scale may not easily apply.

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10. USE OF INTERIM COSTS ORDERS

What it means

In the context of collective actions, interim costs orders entail that the court may award a 'chunk' of recoverable costs in the representative claimant's favour, if that representative claimant succeeds in an interlocutory stage of the collective action (e.g., at certification). It is an order that the recoverable costs incurred by the representative claimant be paid forthwith by the losing defendant, and not at the conclusion of the action (or negotiated as part of the settlement).

The advantage of an interim award of costs, of course, is that it eases the financial burden on the representative claimant, because it saves the prospect of that representative claimant having to carry those costs throughout the proceedings, in the hope that the action will ultimately succeed on the merits or settle on favourable terms.

Precedent in collective action regimes

Ontario, Canada	In *Robertson v Thompson Corp* (1999), 43 OR (3d) 389, the defendant was ordered to make an interim order for costs to the successful representative claimant, on the basis that such an order promotes the goal of enhanced access to justice: 'some account must be taken ... of the financial burden of carrying on litigation against wealthy and determined opponents': at [6]. The practice has been employed in other Ontario cases too, e.g.: *Nantais v Telectronics Pty (Canada) Ltd* (Gen Div, 18 Jun 1996); *Bunn v Ribcor Holdings Inc* (SCJ, 21 Aug 1998); *Nash v CIBC Trust Corp* (1996), 7 CPC (4th) 260 (Gen Div), aff'd: CA, 13 Mar 1997, leave to appeal refused: SCC, 2 Oct 1997

Interestingly, this power to order interim costs may not appear in the rules governing the collective actions regime. It was not specified either in Ontario's class proceedings legislation, or in the governing rules of civil procedure, but rather (it was said in *Robertson*), the court would always retain the right, in controlling its process, to make an award of costs on an interim basis, if the circumstances indicated that this was appropriate.

The debate in a nutshell

As with most costs-related issues in collective actions, there are two sides to this argument. The representative claimant may argue that its costs should be paid on an interim basis, if certification succeeds, because the certification motion is intended to screen claims that are not appropriate for collective actions treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation, so the *quid pro quo* of winning at certification is that the representative claimant has won the right to proceed further in the view of the court, and deserves a financial 'reward' for that.

On the other hand, the defendant will argue that, until the action has been tried, there has been no determination of the merits sufficient to warrant an immediate award of costs, and that interim payments involve a level of unfairness (in addition to any concerns that may arise as to whether those interim costs can be adequately assessed at that interim stage).

Interestingly, in his review of civil litigation costs, including those applicable to collective redress, Lord Justice Jackson did not approve of this protective costs mechanism, stating that 'I am bound to say that (subject to whatever arguments may be advanced in Phase 2) I have considerable reservations about this proposal, both on grounds of principle and on grounds of fairness as between the parties': *Review of Civil Litigation Costs: Preliminary Report* (May 2009), ch 38, para 4.3.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – Interim costs orders at certain stages of the proceedings (e.g., in favour of the Consumer Organisation if it succeeds in achieving certification).

Respondent #1	Clearly this would be helpful to a Consumer Organisation, if available. However, courts here in England favour equality of treatment between the parties to the litigation, and hence, this ameliorating step could be a double-edged sword, if the Consumer Organisation were to have to bear an adverse interim costs award.
Respondent #2	This option would give only modest benefit.
Respondent #3	This option would convey an advantage in several ways, not least as a reminder to the defendant of the mounting cost of the action.

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11. A 'COMMON FUND'-TYPE PROVISION

The problem of non-recoverable costs

In most EU jurisdictions operating under a costs-shifting regime, even if the representative claimant (say, a Consumer Organisation) succeeds in the collective action, the adverse costs payable by the losing defendant will not cover **all** of the representative claimant's costs. There will be a non-recoverable component of the costs, which the Consumer Organisation will have to bear itself, failing alternative protection available.

A 'common fund'-type doctrine: what it means

For that 'chunk' of non-recoverable costs, a 'common fund'-type provision provides a basis for recovery, along the following lines:

> If the court is satisfied that the costs or other fees reasonably incurred in relation to the Collective Action by the Consumer Organisation are likely to exceed the costs recoverable by the Consumer Organisation from the defendant, the court may order that an amount equal to that excess be paid to the Consumer Organisation out of any recovery obtained, whether by way of damages awarded or settlement agreed.

In other words, that 'chunk' of non-recoverable costs will constitute a first charge on the compensation recovered in the claim. Such a provision allows for a successful representative claimant to be fully reimbursed for the costs incurred in conducting the collective action, because the difference between what the losing defendant pays, and what the representative claimant actually incurred, are being paid out of the damages recovered on behalf of class members. (It should be clarified that this 'common fund' provision has nothing whatsoever to do with the availability of funding from some collective actions or generalist fund — that is an entirely different matter, and is covered in Sections 22 and 23, respectively, of this Research Paper).

A 'common fund' provision is a feature of American costs jurisprudence, but operates on the *full* amount of the costs incurred by a winning representative claimant there, given that there is, in general, no costs-shifting in United States' litigation. Under the American common fund doctrine, where there is a recovery of

a fund for the benefit of a class, the successful lawyers are entitled to be reimbursed their whole fees from that fund. That means that the burden which the representative claimant would have borne for lawyers' fees from his damages is effectively spread across the class. It is an equitable doctrine which means that 'when a class action successfully recovers a fund for the benefit of the class ... then the lawyers who created that class recovery are entitled to be reimbursed from the common fund for their reasonable litigation expenses, including reasonable attorney's fees': *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980).

Precedents in costs-shifting regimes

More relevantly for present purposes, a precedent for such a provision is to be found, for example, in some collective actions regimes to which costs-shifting applies. As a non-exhaustive sample:

Australia	A common-fund-type provision is contained in Australia's federal representative proceedings regime, in s 33ZJ of the Federal Court of Australia Act 1976: '(1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub group representative party, or a person who has been such a party, may apply to the Court for an order under this section. (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.'
Ontario, Canada	The Class Proceedings Act 1992, s 32(3), provides that: 'Amounts owing under an enforceable agreement [respecting fees and disbursement between a solicitor and a representative party] are a first charge on any settlement funds or monetary award.'

The debate in a nutshell

The principle to be applied is that contributions towards the Consumer Organisation's costs should be permitted to be extracted from group members with whom the solicitor/third party funder has no contractual

arrangement but who have benefited from that legal representation and successful outcome. The most manageable way of doing so is to allow the Consumer Organisation's lawyers (or third party funders — hence the reference to 'other fees' in the passage above, which covers something wider than mere legal costs) to recover an award of reasonable costs or fees out of a fund created by a monetary judgment or settlement achieved in the collective action.

The implementation of a common-fund-type doctrine is said to be fair to the Consumer Organisation, because it bore the burdens of the litigation and is the party which is contractually obliged to the class lawyer (or funder) in respect of fees and disbursements. It also overcomes the usual stricture that a lawyer retained by the Consumer Organisation cannot look to members of the class if they have not personally instructed it – and even if the class members have entered an agreement with the Consumer Organisation's lawyer, it should not be assumed, when drafting a collective actions regime (especially an opt-out one) that enforceable agreements would always be entered into by absent class members voluntarily, so as to relieve the Consumer Organisation from the costs burden which it owes to its lawyers. Australian judges have made the point that any provision that allows a representative claimant (or its lawyer) to take money out of the damages settlement/award for payment of legal fees is crucial, because that lawyer has no contractual arrangement with the class members to do so (usually, unless the legal representatives have created a 'tied class' upfront by entering into individual retainers with each class member — a feature of some Australian representative proceedings in relatively recent times). Also, a common-fund-type provision prevents free-riders, i.e., those 'who obtain the benefit of a lawsuit without contributing to its cost [and] are unjustly enriched at the successful litigant's expense': *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; *McMullin v ICI Aust Operations Pty Ltd* (FCA, 27 Nov 1997).

On the other hand, a common-fund-type provision does have some serious limitations, especially when drafted in a certain way. For example, such an order can only be made, under the Australian regime, in respect of an 'award of *damages*' by the court, not in respect of a settlement amount. Also, any provision compelling class members to contribute towards the costs of the litigation in successful collective actions for damages doesn't address the upfront funding problems that may beset a Consumer Organisation as representative claimant under a costs-shifting regime. Furthermore, in some contexts, the doctrine is entirely irrelevant. For example, if the Consumer Organisation were to successfully obtain injunctive relief, with no 'pot of money' recovered on behalf of the group members; or if the collective action fails, and adverse costs are awarded against a Consumer Organistion, then the provision never applies, to the benefit of the Consumer Organisation,

at all. Furthermore, if this path were to be pursued, it would seem to be a matter for primary legislation.

If there is no lawful authority for those non-recoverable costs to be recovered from the damages/compensation paid by the defendant, then the Consumer Organisation will either have to bear those costs itself, or look to have those costs borne by another source without recourse being sought from the Consumer Organisation. Most commonly in England, those non-recoverable costs will be borne by the claimant's lawyers who are acting on a conditional fee basis (and any multiplier that applies to the fees, by way of a 'success fee', assists to offset those non-recoverable costs). It depends upon the terms of the retainer between lawyers and client, however – sometimes, these non-recoverable costs may be for the winning client to pay to the lawyers who acted on their behalf. Alternatively, if a third party funder is funding the action, then under the funding agreement, the Consumer Organisation will typically undertake to repay the funding provided, as priority to the distribution of the net proceeds of the successful litigation to group members, and hence, for any non-recoverable portion of the costs incurred by the Consumer Organisation in conducting the collective action, the Consumer Organisation will need to 'top up' the costs.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – a 'common fund' doctrine, whereby a winning Consumer Organisation's non-recoverable costs were a first charge upon any damages recovered on behalf of the class.

Respondent #1	This would be a reasonable option, if the Consumer Organisation's lawyers were not able to rely upon a conditional fee agreement which obtained the maximum uplift permitted.
Respondent #2	This is a highly-attractive option.

Respondent #3	There should be parity between this 'chunk' of costs, and with other payments that would need to be made out of a damages or settlement fund (e.g., any payment to a third party funder involved in the case; any outstanding premium payable to an ATE insurer in the case; and any success (uplift) payment due to a solicitor who acted in the case on a conditional fee agreement (CFA) basis).

Again, to reiterate, references to a 'common fund' doctrine in this Section of the Research Paper refer to a 'first charge' upon the damages or other monetary sum recoverable by the representative claimant on behalf of the class (in respect of the non-recoverable costs incurred by the representative claimant in winning the collective action). The term 'fund', where used herein, does not refer to the recovery of costs from either a collective actions fund (discussed in Section 22) or from a generalist public fund (discussed in Section 23).

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12. USE OF COSTS-CAPPING ORDERS

What it means

A costs-cap means a court order which sets a ceiling, or limit, on the amount of costs which a winning party can recover from a losing party. In other words, where a costs-cap is imposed on a party who ends up winning the litigation, it pegs the losing side's liability for adverse costs to that amount.

Suppose that a court orders that a representative claimant (a Consumer Organisation) is subject to a costs-cap, for its future costs, of 500,000 Euros. That cap then operates as a ceiling, dictating the maximum amount which the Consumer Organisation can recover from a losing defendant, should the Consumer Organisation win the group action. On the other hand, suppose that the Consumer Organisation achieves an order from the court that the defendant's future costs should be capped at 400,000 Euros. If the Consumer Organisation loses, then the most which the Consumer Organisation is required to pay the winning defendant is the sum of 400,000 Euros.

Importantly, the costs-cap order does not prevent the Consumer Organisation or the defendant from exceeding those caps (500,000 and 400,000, respectively) in what they choose to spend on their legal representation. However, the cap sets what that party is entitled to recover, should it win. Hence, the defendant may have a costs cap imposed on it of 400,000 Euros, and choose to spend 1,000,000 Euros in defending the action brought against it by the Consumer Organisation. Nevertheless, should it win that case, the defendant is only entitled to recover 400,000 Euros from the Consumer Organisation.

Purposes of costs-capping

Costs-capping has been said to have numerous purposes. To summarise:

- ❑ it is perceived as being a judicial tool for achieving effective control over costs, so that costs can be more effectively budgeted and more realistically estimated by both sides;

- ❑ courts are encouraged to accept responsibility to take control of complex litigation at an early stage

as part of the management of the action, and to ensure that orders for costs are proportionate with the amount at stake and the complexity of the issues, especially where there was the risk that costs might become disproportionate and excessive;

- ❑ costs-capping is beneficial for the parties where there is a real risk that costs had been, and would be, incurred unnecessarily and unreasonably by one side or the other (per Gage J in *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB) [19]);

- ❑ costs-capping is said to be desirable because it is 'very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed': *Adam Musa King v Telegraph Group Ltd* [2004] EWCA Civ 613, [92] (Brooke LJ);

- ❑ the certainty which costs-capping affords to the litigants is considered to be very useful: 'individual litigants and NGOs need to know in advance what their costs liability is likely to be. ... It is the certainty of liability that is crucial. ... None of these developing principles is much use to an applicant unless he know in advance to what extent the court's discretion is likely to be applied in his favour': Lord Justice Carnwath, (2004) 16 *Journal of Environmental Law*, cited in: *Petursson v Hutchison 3G UK Ltd* [2004] EWHC 2609 (TCC) [35];

- ❑ because of the dangers of collective actions proceedings getting out of control, costs-wise, in England at least, the Civil Justice Council has recommended that there should be a rebuttable presumption for costs capping in group litigation: CJC, *Improved Access to Justice. Funding Options and Proportionate Costs* (2005), 26, recommendation 7.

Precedents in costs-shifting collective actions regimes

Of course, it is always open to a legislature/rule-makers to specifically provide for costs-capping – but precedent shows that courts dealing with collective actions may also be prepared to take that step without any such explicit authority. In England, for example, costs-capping has been applied where there was absolutely **no** specific power within either the general costs rules, or within the governing collective actions regime, to make a costs-capping order. The authority for the power to cap costs has been derived (said the relevant courts) from the courts' general power to award costs as they saw fit, and from their general 'case management

powers'.

Australia	The Australian Federal Court Rules, Ord 62A, provides that '(1) The Court may: (a) by order made at a directions hearing; and (b) of its own motion or on the application of a party; specify the maximum costs that may be recovered on a party and party basis.' Under this provision, a ceiling on the maximum costs that could be recovered by the defendant on a party and party basis against the representative claimant has been occasionally imposed, e.g., *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, order 1. In fact, in this case, Wilcox J, in making the application, criticised (at [18]) the lack of other costs protections available to the representative claimant under Australia's federal collective action regime, particularly where the legislature declined to implement a special fund like the Ontario Class Proceedings Fund (and especially when the Australian LRC had recommended such a step)

England	*AB v Leeds Teaching Hospitals NHS Trust (The Nationwide Organ Group Litigation)* [2003] EWHC 1034 (QB), concerned claims arising out of the harvesting of deceased children's hearts, lungs and brains, without parental consent, where those children had died of unexplained natural causes. The defendant sought an order to cap (1) past costs of the claimants (for the generic issues arising in the group action, these totalled about £1.45 million) and (2) the claimants' future costs (estimated in the region of £1 million). The claimants did not seek a costs cap to be imposed on the defendant. A costs-cap of the claimants' costs was awarded — 'there shall be a costs cap on the claimants costs from 10 February 2003 to the end of the trial in the sum of £506,500', calculated on the basis of an estimated 4-week trial. The costs-capping order in this case excluded specific orders made in interim proceedings. *Various Ledward Claimants v Kent & Motorway Health Authority & East Kent Hospitals NHS Trust* [2003] EWHC 2551 (QB) concerned a claim by a number of alleged victims of sexual assault who claimed that the acts had been perpetrated by a consultant gynecologist, since deceased, employed by the defendant. The application for costs-capping on each side was made by both lead/representative claimant and by defendants, by agreement. The claimants' solicitor came from the other end of the country from where they lived; court held that the costs hitherto incurred by the claimants were clearly disproportionate, and that, given the geographical problem with the solicitor, it was important to ensure that the paying party was not expected to pay more in costs than if local solicitors had been employed. The court imposed a cap on generic costs, and the costs arising from the eight lead cases, in relation to each party's legal fees.

Hence, even in the absence of a specific rule in any EU Member State, it may be potentially open to a representative claimant (say, a Consumer Organisation) to seek to rely upon that type of authority to seek a judicial order to cap the defendant's costs, and so limit its costs exposure. A lack of explicit powers granted by the legislature has not been a bar to the employment of costs-capping elsewhere.

The mechanics of costs-capping in collective actions

Where it has arisen in group actions to date, the procedures governing costs-capping can be quite flexible, as the following Table descriptors show:

Question/issue	How it has been applied in English group litigation to date
Who can apply for the order?	An application for costs-capping may be made by either the defendant to the litigation, or by the representative/lead claimant in the group action (say, a Consumer Organisation).
What costs of the group action may be capped?	Precedent shows that the judicial order may cap costs from start of action to the point of application (past costs); and/or the costs from point of application to the end of the trial (future costs). However, retrospectively capping costs is likely to be an exceptional order. After all, the money has been spent by the party, and if a court then imposes a costs-cap on that party, as the limit of what it can recover, should it win the action, it smacks of unfairness, as has recently been pointed out judicially in *Petursson v Hutchison 3G UK Ltd* [2004] EWHC 2609 (TCC), [41]–[43] ('Both sides have the right to a fair hearing. To impose a retrospective limit on costs in this case [at the claimant's application] would, in my judgment, amount to a breach of the defendant's right to a fair hearing. ... it would be a wholly exceptional case where it was appropriate to order a cap retrospectively. This is not such an exceptional case').
Can some costs be exempt from costs-capping?	Yes, a costs-capping order may specifically exclude, say, certain interim or interlocutory proceedings from being within the cap; or it may exclude the costs paid out for expert fees or for other disbursements required to prepare the case for trial.

Question/issue	How it has been applied in English group litigation to date
How is the costs-capping figure typically arrived at?	It has been said that any costs-cap must be 'proportionate with the amount at stake and the complexity of the issues', which requires a two-part test: is the costs-cap proportionate to the total amount at stake in the group action; and if is not (i.e., if the total amount was disproportionate), then 'the court should look at the component parts in order to determine if they are proportionate'. Also, the costs-cap only relates to the costs incurred in relation to generic issues, not the likely costs incurred for group members to prove their individual issues. When assessing an appropriate costs-cap, courts have been prepared to 'adopt a broad approach' rather than descend into 'the minutiae of each item'; and that sum is not necessarily referable to the sum which the defendant considers to be the costs of running the litigation, nor which a legal aid funding body (if involved) would consider it possible to run the litigation (these 'may provide a guide, and in some respects a good guide, to costs but it should not be the sole or dominant factor') (as set out in: *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB) [23]–[33].
Can the cap be amended?	Yes, the judicial order typically provides that each party shall have liberty to apply to vary the order in the event of some future unforeseen and exceptional factor which effects costs, either upwards or downwards (e.g., if the future costs are based upon a trial of x weeks' duration, and it turns out that the trial is estimated to last longer than that).

Potential problems with costs-capping in collective actions

It must be noted that costs-capping is perceived by some English commentators as having a real virtue in introducing realism into the group litigation scenario, but that the right 'cap' can be difficult to assess; it is important that the cap not be set so low that it fetters access to justice because the lawyers will recover so little from their representation of the party; and there may be room for 'litigious strategies' too. All of these issues are outlined in: D Locke, 'If the Caps Fits ...' (2007) *Law Society Gazette*, 30 Aug 2007, 30:

> Despite this, applications for cost caps seem to be relatively few, reserved primarily for cases where costs run into hundreds of thousands of pounds. It is unlikely that this is because costs on the whole are felt to be reasonable, but it may reflect the lack of cohesive guidance and an uncertainty as to the evidential requirements for these applications. Furthermore, at the root of it all, there are some concerns regarding the wider consequences for the administration of justice.
>
> The recent decision in *Dawson v First Choice Travel* (unreported) by the designated civil judge in Birmingham, His Honour Judge MacDuff, who capped the claimant's costs in a group action at 30% of their £726,000 estimated costs, demonstrates that this power has really got some teeth. It also highlights some of the fundamental issues likely to be of concern. ...
>
> A particular concern appears to have been the potential for a party, having succeeded in capping the costs of their opponent, to then adopt an approach to the litigation, designed solely to cause extra work, running their opponent aground upon the costs cap. Although the judge acknowledged this as a potential problem, it seems most unlikely that any but the most unscrupulous defendant would countenance spending money in such a way. Were it really considered a problem, there seem to be two clear solutions: cap the defendant's costs as well, or reapply for a variation of the costs cap. ...

Indeed, where costs-capping is concerned, a cap on the representative claimant's costs could be detrimental to the ability of that party to obtain access to justice, as the following submission to the Jackson Costs Enquiry pointed out: *Review of Civil Litigation Costs: Preliminary Report* (May 2009), vol 1, p 355, para 2.10:

> In their submissions to this review a firm of solicitors, a firm with much experience in group actions, make the same point; if cost capping becomes widespread, there is a danger that defendants will be tempted to under-estimate costs, in order to restrict the ability of claimants to fund adequate and equal representation. They add that because of the imbalance of power between claimants' groups and defendants in the areas they litigate, capping defendants' costs may be necessary to facilitate access to justice, whereas capping claimant's costs is likely to restrict it.

For further discussion of the possibilities of costs-capping, see, e.g.: M Mildred, 'The Development and Future of Cost Capping' (2009) 28 *Civil Justice Quarterly* 141; S Bate, 'Costs-capping Orders: Recent Developments' (2006) 17(6) *Construction Law* 29; and His Honour Judge Hurst, 'A Review of the Costs Rules and a Personal Perspective on What needs to Change', paper presented to the conference, *Costs, Collective Redress, Contingency Fees ... The Way Forward?* (Practical Law Co, London, 26 Feb 2009) [8]–[10].

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – Costs-capping orders imposed upon (a) the Consumer Organisation as representative claimant, (b) the defendant, or (c) both.

Respondent #1	Applications for costs-capping are frequently opposed by both sides' lawyers, where the other side applies for it. Indeed, experience shows that cost caps are often increased during a case, which leads to complications for those liable!
Respondent #2	A cost-capping order imposed upon the defendant, per (b), is desirable, if acting for a Consumer Organisation in a group action, given that it somewhat limits costs exposure, should the Consumer Organisation lose.
Respondent #3	A costs-cap imposed upon a Consumer Organisation may be an advantage, but if the budget is carefully checked and if a third party funder who is funding the Consumer Organisation's claim accepts this, it ought not to matter, as long as there are sufficient damages received. From the ATE viewpoint, a costs-cap imposed upon the defendant would be attractive; and this measure may also help from the funder's viewpoint, since typically the defendant is prepared to develop a high level of costs in the hope that the claimant will cease their action.

***

13. COMPENSATION AWARDS FOR THE CONSUMER ORGANISATION AS REPRESENTATIVE CLAIMANT

What it means

Although it is most unlikely that a Consumer Organisation, acting as representative claimant, would be permitted to be entitled to a solatium for the costs/angst/effort that was expended in representing the class, the possibility is mentioned for the sake of completeness. Where awarded, a solatium can be used to defray the costs incurred by the Consumer Organisation.

Competing arguments

On the one hand, class proceedings may involve a very considerable expenditure of time and effort by the Consumer Organisation on behalf of a wide group of consumers, who will benefit from the former's efforts if the action is successful. Moreover, the very purpose of a collective actions regime could be frustrated if a representative claimant is, in effect, left out of pocket at the end of the day.

If such compensation were permitted, however, consumer group members would have to accept less than full restitution in return for their 'free ride', as a defendant, if liable, cannot ordinarily be ordered to pay more than full damages (plus costs, under a costs-shifting regime). Where a representative claimant benefits from the collective action to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative claimant, then there may be an appearance of a conflict of interest between the representative claimant and the class members.

Precedent in collective action regimes

No collective actions regime of which the author is aware makes any express reference to compensation for the representative claimant (when it would have been easy enough to provide for it), perhaps indicating that the legislatures did not support additional compensation for the representative claimant.

However, by way of judicial order, in the case of an individual representative claimant, then modest

amounts have been granted as solatium in some limited cases in both Canada: *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div), and the United States: *Petrovic v Amoco Oil Co*, 200 F 3d 1140, 1152 (8th Cir 1999); *In re Catfish Antitrust Litigat*, 939 F Supp 493, 503–4 (ND Miss 1996); *Smith v Tower Loan of Mississippi Inc*, 216 FRD 338, 368 (SD Miss 2003); *In re SmithKline Beckham Corp Securities Litig*, 751 F Supp 525, 535 (Ed Pa 1990).

It is, of course, always possible for a collective actions regime to rule out the possibility of a solatium to the representative claimant, as the Private Securities Litigation Reform Act of 1995, 15 USCA § 87u-4(a)(2)(A)(vi) has done ('The class representative cannot accept any payment for serving as a representative party beyond his or her pro rata share of the settlement or final judgment').

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – the availability of compensation awards (solatium) to the Consumer Organisation, to compensate for the time and angst invested in the collective action.

Respondent #1	That option sounds helpful.
Respondent #2	I would not be in favour of this option.
Respondent #3	Except where their activity is pro bono, the Consumer Organisation needs to be paid for services rendered by it in developing the collective action on behalf of the group members. Normally this comes out of the damages.

***

14. HIVING OFF THE COSTS OF SPECIFIC TASKS IN THE COLLECTIVE ACTION TO THE OPPONENT, BY COURT ORDER

What it means

It may be possible for a representative claimant, say, a Consumer Organisation, to invoke the court's powers under the collective actions regime, or its discretion, to order that the costs of a particular step in the collective action be paid by either the defendant or by some other party. Obvious candidates for shifted costs, in this context, are the costs of notice and for disbursements such as expert reports.

Precedents in collective action regimes

Apart from instances of the opt-out notice costs being borne by the defendant in North American jurisdictions, on a case-by-case scenario, some specific statutory precedents exist in the EU collective actions regimes:

The Netherlands	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, per art. 1016(2). This power was used in the *Dexia* case, whereby Dexia was charged with the costs of notifying class members and of the appointed expert. *(Source: Country Report – The Netherlands, p 7, available at http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf)*

Spain	Under the 'popular action' available in Spain, per Law 1/1996, of 10th January, on Legal Aid (Ley 1/1996, de 10 de enero, de Asistencia Jurídica Gratuita), for those consumers who have insufficient financial resources to commence their own legal action, no legal costs will be charged; and a similar position may be available to consumer organisations (per s 2.2 of Law 26/1984, of 19th July, the General Law for the Defence of Consumers and Users (later s 9 RD Leg 1/2007). Effectively, that means that certain costs (per s 6 of Law 1/1996) may be paid by legal aid, including: lawyers' and solicitors' fees, publication of announcements or edicts, copies, certificates, etc. asked to public registers, notaries' fees, etc — but not the payment of the media advertisements (which the Consumer Organisation must fund). *(Source: Country Report – Spain, 8–9, available at: http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf)*

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Each of the following mechanisms to ameliorate against the effects of costs-shifting has been introduced into various collective actions regimes around the world (either legislatively or judicially). Which of these (if any) would you particularly favour, if you were acting for/funding a Consumer Organisation as representative claimant, given your experience in funding large-scale collective actions? – obtaining orders that specific tasks (e.g., notice, costs of experts) be borne by the defendant in the interim stages of the collective action.

Respondent #1	This option sounds helpful.
Respondent #2	This option risks being unworkable because of problems of privilege (to do with experts' reports?).
Respondent #3	This option should be an advantage to the claimant group, if such costs can be passed to the defendant.

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15. SEEKING A PROTECTIVE COSTS ORDER ON AN INDEMNITY BASIS

What it means

Where a representative claimant, such as a Consumer Organisation, claims costs protection on an indemnity basis, it means that it is claiming an entitlement to be paid all of its costs (fees, disbursements) incurred by it during the course of the litigation from the losing defendant, provided that those costs were not unreasonably incurred and were not an unreasonable sum.

Hence, an indemnity costs award in favour of the Consumer Organisation is a powerful mechanism for recovery of almost all of its costs, should it win the action. Obversely, the court may order costs on an indemnity basis against the Consumer Organisation if it loses and if the situation demands, rendering the tool a double-edged sword.

This type of costs protection is obviously of very limited in utility — it only applies to the Consumer Organisation's benefit if it wins; and it is retrospectively judged by the court, taking into account all the circumstances of the case, especially the parties' respective conduct during the litigation.

Precedent in collective action regimes

Interestingly, this scenario has occurred under the Australian federal representative proceedings regime, by virtue of the court's wide powers bestowed pursuant to s 33ZF(1) ('General power of Court to make orders'):

> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

This provision, together with the court's general discretion as to costs, allowed the Federal Court to exercise this power in favour of a representative claimant in one particular case:

Australia	In *Marks v GIO Australia Holdings Ltd* (1996) 66 FCR 128, a case concerning the interest rate on loan facilities and whether they were misleading and deceptive, the representative claimants succeeded in the action and recovered damages. They then sought an order for indemnity costs, which Einfeld J granted on a partial basis. All but one of the representative claimants had been prepared to walk away from the litigation at point X, but the defendants refused that proposal, and the case went ahead, which the claimants then won. Hence, his Honour held that the defendants should pay the representative claimant's costs up to point X on the usual party and party basis (usual adverse costs), but for all costs incurred after point X, the defendant should pay the representative claimants' costs on an indemnity basis. In the end, however, the judgment on liability in favour of the representative claimants was reversed.

Obviously, this power to award costs on an unusual basis is highly-dependent upon the powers available to the court of the relevant Member State, and in any event, would be expected to be sparingly applied (indeed, and consistently with this, in the Australian case, *Re Wilcox; ex parte Venture Industries Pty Ltd* [1996] FCA 1942, (1996) 72 FCR 151 (Full FCA), it was said that it would require 'some special or unusual feature' to warrant an order for indemnity costs: at para 5).

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PART IV

FUNDING COLLECTIVE ACTIONS

In EU Member States in which costs-shifting applies, a Consumer Organisation which institutes a group action will have to find both its own costs of that litigation ('own costs'), and any adverse costs award against it ('adverse costs'), should it lose the group action. This Section refers to the possibilities which exist by which a Consumer Organisation may theoretically seek to fund both sets of costs.

The possibility of public funding through a legal aid scheme (which may depend upon a mix of merits assessment, costs–benefit assessment, affordability review if political targets are set, etc) is very jurisdiction-dependent, and will not be considered in this Paper.

16. THIRD PARTY FUNDING

What it means

Litigation funding means, essentially, that funders are prepared to fund litigation in which they have no direct interest, for a return. It is a two-way street:

> Although their terms vary widely, under the typical funding agreement, the funded client (such as a Consumer Organisation):
>
> - ❏ receives financial and other assistance from the Funder, such as paying the fees of the Consumer Organisation's lawyers, expert fees, and other disbursements;
> - ❏ obtains an indemnity from the Funder against any adverse cost orders relating to any step in the action after the date of the funding agreement;
> - ❏ obtains an indemnity from the Funder against any security for costs required to be paid into court;
> - ❏ instructs the Consumer Organisation's lawyers throughout the litigation itself, retaining the conduct of the proceedings, but may need the consent of the Funder to any settlement or compromise of the action.
>
> In return, the Funder typically:
>
> - ❏ receives a success fee (this can take many forms, eg: a flat percentage fee; a sliding scale percentage fee up to a certain monetary threshold and a different percentage fee for any recovery above that threshold; a sliding scale fee that differs, depending upon when the litigation concludes; a multiplier of the outlay provided to the Consumer Organisation; or a multiplier of any security for costs paid into court by the Funder);
> - ❏ receives nothing if the claim fails;
> - ❏ is entitled to be kept informed by the Consumer Organisation;
> - ❏ may bear some or all of a winning defendant's costs (i.e., will bear some or all of the adverse costs, should the Consumer Organisation lose);
> - ❏ has the discretion to terminate the funding agreement (which might be exercised, for example, if the assessment of the merits reduces during the conduct of the case);
> - ❏ interacts with the Consumer Organisation and its lawyers throughout the litigation, but only to the extent that the litigation funding agreement (and judicial precedent) permit.
>
> R Mulheron and P Cashman, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312, 314.

Conditions for third party funding

The conditions upon which third party funding are typically made available vary between funders, but the following is a checklist which any Consumer Organisation may need to consider, together with a descriptor of how two funders who are operative in the English litigation market (Harbour Litigation Funding and Allianz) address these conditions in their publicly-available literature (see, respectively: http://www.harbourlitigationfunding.com/, and http://www.allianz-litigationfunding.co.uk/solicitors/why_litigation_funding/index.html).

The information contained in this Table (final column) has also been expanded upon by the author's own research, and by very useful information kindly supplied by Mr Peter Smith, Managing Director of Legal Expenses, Firstassist Legal Protection, London; by Mr Mark Harvey, Partner and Head of Harmful Products and Overseas Accident Team, Hugh James Solicitors, Cardiff; and by Mr Richard Sheehan, Operations Director, and Mr Brian Raincock, Chairman, Commercial Litigation Funding Ltd, London — all of whom are vastly experienced in handling group actions litigation in England.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
Minimum size of claim?	£3,000,000	£100,000	The minimum size can be as much as several million, depending upon the funder. The size of the claim required by the funder also takes into account that other parties must be considered too: e.g., the Consumer Organisation's solicitor who may be entitled to a CFA success (uplift) fee; and any unpaid ATE premium which requires payment.
Who appoints the lawyer?	The claimant	The claimant	The claimant, but the funder will ensure (via its due diligence checks) that the claimant's lawyer is experienced and proficient in the field.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
What else should form part of the funding package being offered to the Consumer Organisation, alongside TPF?	If CFA's are possible, then a funder may prefer/require that the lawyers provide their legal services to the Consumer Organisation on that basis: 'While we do not insist that your advisor works on a conditional fee basis, we will look at a case more favourably if the advisors are prepared to take some risk on their fees because it helps to demonstrate their confidence in the merits of your case.' The funder also states that the claimant's lawyers should ideally operate on an CFA under which their hourly rate is set at '50-70% of the usual hourly rate, with the applicable uplift on success').	ATE insurance is referred to as a possible adjunct to third party funding, via Allianz Legal Protection.	Typically, ATE insurance is also part of the package, because the third party funder may not be prepared to cover all of the adverse costs, should the Consumer Organisation lose, but may only be prepared to fund the ATE insurance premium payable to the ATE insurer, if the Consumer Organisation loses (adverse costs having been covered by ATE insurance). The claimant's lawyers are also likely to be required to act on a partial CFA.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
A merits assessment?	The funder requires 'good legal merits'. No percentage merits is stipulated. 'Merits means not only a strong case on liability but a clear comprehensible basis for the value of the claim. In addition we will want to know how long it is likely to take for the matter to come to trial or final hearing. The more developed a case is, the better.'	The legal advice provided by Consumer Organisation's lawyers to funder must show that 'there are (very) good prospects of success'.	Typically, merits assessment requires a probability of success of at least 60–70%. One respondent noted that, typically, a Queen's Counsel's evaluation of the chances of success at 60% or better is required, and that with anything below that, neither ATE insurers nor third party funders would be interested in taking on the collective action.
Characteristics of the defendant being sued?	As a criterion: 'Does the defendant have the ability to satisfy the claim - what is its asset position and where are those assets located?'	The 'financial strength' of the defendant is said to have to be 'sufficient'.	The funder will require proof that the defendant is financially capable of paying the damages sought plus adverse costs if the claimant wins.

Conditions for funding	**Harbour Litigation Funding**	**Allianz Litigation Funding**	**Other feedback/research**
Is the type of claim in an area of law which the funder will cover?	This firm 'will fund any case which has a damages (or money) outcome.' Of claims that may be of interest to a Consumer Organisation, this can include: breach of contract; professional negligence; misrepresentation claims'. This funder 'does not fund construction cases, nor do we fund pure "loss of opportunity" cases.'	The funder states that 'the area of law is of little importance. Whether your claim is a personal or a corporate one, we only look for good prospects in a claim and a reasonable share.'	Typically, funders are interested in a commercial case with a financial outcome, and won't fund cases which are seeking an equitable remedy such as injunctive relief only.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
What (if any) characteristics of the Consumer Organisation's lawyers are necessary?	This funder only funds cases where the claimant's legal representatives have 'demonstrable experience in the area of law to which the claim relates'.	None is stipulated.	An assessment of the proficiency of the claimant's lawyers is standard practice. Funders may require representation by QC and an experienced junior barrister who are both specialists in the area of law covered by the dispute. The solicitor should be an experienced litigator who is also a specialist in the area of law covered by the dispute.
What costs-to-return ratio is required, for the Consumer Organisation's action to be funded?	This is not stipulated. However, the funder will require to see that costs are proportionate to return. 'This includes all own side legal and experts' costs and estimated adverse costs through to trial or final hearing.'	If the multiplier method of success fee is applied, then a return of 1.5–3 times the amount outlayed in respect of the claim is said to be 'common', but with stepped multiples, depending upon when the action settles or is finalised at trial.	The damages to costs ratio is likely to be at least 3:1.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
What due diligence searches are likely?	This funder will require to meet with the claimant, and with its lawyers, and will 'enquire more extensively into the background to the claim, its merits, value, timeline and likely costs to trial' in addition to running 'a background check' on the claimant	None are stipulated on the funder's website.	These are likely to be rigorously conducted. The funder will typically require full details of the case, along the lines of the insurance requirement of utmost good faith which applies to ATE insurance; plus proof that the defendant is financially capable of paying damages sought plus costs; plus details of the budget proposed by the representative claimant for the action; plus a proficient legal team; plus insistence upon written evidence as opposed to oral testimony.
What costs incurred by the Consumer Organisation is the funder prepared to cover?	'own side solicitors' costs; own side barristers' costs; own side experts' costs'	The funder states that 'we provide all upfront funding required, e.g., disbursements, security for costs, own solicitor funding, ATE premium.'	

Conditions for funding	**Harbour Litigation Funding**	**Allianz Litigation Funding**	**Other feedback/research**
What adverse costs is the funder likely to cover, if the Consumer Organisation loses?	The funder states that 'if the litigation is not successful, Harbour bears the costs it has agreed to fund'. It is further said that adverse costs cover may include 'payment for an adverse costs insurance premium, or payment of monies into court to satisfy a security for costs application by the defendant'	The funder states that, if the action loses, 'we cover all the costs, including the opponent's costs.'	Some funders seem more willing to fund adverse costs than others; for those who are reluctant to do so, ATE insurance is required. Because of judicial authority in England (*Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655) which stated (dicta) that a funder is only obliged to pay an adverse cost award up to the level of funding provided, some funders are not prepared to fund all adverse costs. This is one reason why ATE insurance is arranged to cover the adverse costs.

Conditions for funding	Harbour Litigation Funding	Allianz Litigation Funding	Other feedback/research
How is the success fee calculated?	'Standard funding terms are the **greater** of a percentage of the proceeds of the action, or a multiple of the amount of funding provided at the time the matter concludes.'	There are two options, percentage and multiplier. Under the percentage method, a range of 10%–40% is mentioned. The percentages may be stepped, depending upon when the action settled and/or the amount recovered – the following example is given: 20% if the case settles before proceedings are issued; 30% of amounts up to £350,000 obtained by settlement/judgment after proceedings are filed; 20% of amounts exceeding £350,000.	The success fee is typically between 20%–50%. Funders are likely to use a sliding scale, where the portion retained by the funder is higher, the lower the damages or settlement – this encourages the claimant group to maximise the value of the collective action. The return to the funder, whether a percentage or multiple of investment, will also probably vary according to the duration of the case.
Will the funder fund security for costs that may be ordered against a Consumer Organisation?	Yes.	Yes.	Normally, funders are willing to fund security for costs sums ordered against a claimant.

Matters of law of which a Consumer Organisation would need to be cognisant, when sourcing third party funding

There are four legal matters of which a Consumer Organisation needs to be cognisant, when seeking to source third party funding:

1. Champerty and maintenance

At common law, maintenance is the giving of assistance or encouragement to one of the parties to the litigation by a person who has neither an interest in litigation nor any other motive recognized by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. Both potentially apply, where a third party funder is acquiring a share of the proceeds of the litigation without, itself, having a direct interest in the action. In light of these definitions, where a Funder does not seek to share in the proceeds of recovery, but merely to recover the costs outlaid during the litigation, this can only constitute maintenance, not champerty. An agreement to bestow upon the Funder a 30% share of the proceeds recovered meets the definition of champerty.

Hence, a Consumer Organisation would have to ensure that third party funding arrangements did not constitute the legal wrongs of champerty and maintenance.

England	third party funding agreements, by 'strangers to the litigation', have been judicially approved by senior appellate courts, e.g.: *Giles v Thompson* [1994] 1 AC 142 (HL), and *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655. Furthemore, s 13(1) of the *Criminal Law Act* 1967 abolished these as criminal offences, and s 14(1) provided that no-one could be liable in tort for any conduct amounting to maintenance or champerty.

2. Express bars in certain areas of law possible

Quite apart from any judicial statements on the lawfulness or otherwise of third party funding, it is worth noting that solicitors' codes of ethics may also provide some potential barriers to the use of such funding, in certain areas.

England	Rule 9.01(4) of the Solicitors' Code of Conduct 2007, 'Referrals of business', provides: 'You must not, in respect of any claim arising as a result of death or personal injury, either: (a) enter into an arrangement for the referral of clients with; or (b) act in association with, any person whose business, or any part of whose business, is to make, support or prosecute (whether by action or otherwise, and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury, and who, in the course of such business, solicits or receives contingency fees in respect of such claims.' As it presently stands, it is considered by the English Law Society that this provision bans lawyers from being involved in a personal injury claim where a party requires third party funding, including any group actions where compensation was being sought on behalf of those who had suffered personal injuries. The author understands that the rule remains under review, and may be subject to change in the future.

3. Judicial requirements for a lawful third party funding agreement

It is worth noting that, in any jurisdiction in which a defendant seeks to challenge the lawfulness of a third party funding agreement, courts will necessarily have to analyse the terms of the funding agreement carefully. Indeed, in 2008, the author co-authored a detailed analysis of the cluster of litigation funding case law emanating in Australia and Canada, which revealed what the courts in those jurisdictions typically had regard to, when determining whether a lawful third party litigation funding arrangement was on foot:

- The Client/Funded Claimant demonstrated an interest in suing on its own initiative;
- The Funder is subject to independent 'checks and balances' throughout the litigation;
- The Funder does not have the capacity to improperly 'monopolise' the litigation;
- There is no conflict of interest between the Funder and the Client;
- The type of Client is relevant to the overall assessment of the funding arrangements;
- The Funder has fully informed the Client about the effects of the funding arrangement;
- The Funder must have sufficient resources to meet its commitments to claimant;
- The Funder must be willing and able to meet any adverse costs order that may be rendered against the Funded Claimant or the Funder, should the action fail;
- The Funder must not have negotiated an 'inordinately high' fee; and
- The funding agreement does not otherwise have any tendency to corrupt the legal process.

(See: R Mulheron and P Cashman, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312, 339–40).

4. Control and supervision by extra-judicial means

Of course, it is always possible in any given jurisdiction that, in addition to judicial scrutiny of funding agreements on a case-by-case basis, a third party funder's arrangements will be subject to the supervision and control of, say:

- a Financial Services Authority (or equivalent) whose role it is to regulate financial services;
- the Solicitors' Regulation Authority (or equivalent);
- a regulatory regime applicable to claims management services;
- a voluntary code of practice or protocol which is industry-wide; or
- a regulator which is established specifically to take on the responsibility for regulating Funders.

Whether any of these applies will need to be examined by a relevant claimant Consumer Organisation on a jurisdiction-by-jurisdiction basis.

The funders' recovery of a share of the compensation: The Australian scenario of tied classes

Suppose that a Consumer Organisation were wishing to bring an action on behalf of a group of consumers, and the Consumer Organisation entered into a funding agreement with a Third Party Funder, assuming that a Third Party Funder were willing to fund the action.

Certain issues have arisen under the Australian opt-out representative proceedings regime, which are potentially relevant to a Consumer Organisation, in light of the fact that funders in Australia have required a 'tied class' of individual group members, given the funding model that has developed in Australia in third party funding. Under this funding model, the opt-out regime essentially converts to an opt-in model. The scenario which has emerged is described in the passage written by the author elsewhere (footnotes omitted):

> *Tying class members to claimant law firm or funder.* Class members may be under an obligation to take a positive act to join the class—by proactively entering into a client retainer with the law firm which has conduct of the matter, or by entering into a contract with the third party funder which is financing the litigation—because, from the outset, the class definition is worded so as to impose that 'tie'. As academic commentary has pointed out, the point has become a 'hotly contested issue' under Australia's Pt IVA regime. It has arisen, primarily, on the basis that 'an opt-in or limited group approach is favoured by litigation funders because they allow the funder to require each group member to accept the terms of their funding agreement, thereby eliminating the so called "free-riders" who, pursuant to an opt-out approach, are able to participate in a successful outcome without entering a funding agreement.
>
> A series of Australian decisions since 2005 have grappled with this issue of 'tied classes', with entirely differing judicial views being reached. In *Dorajay Pty Ltd v Aristocrat Leisure Ltd*, Stone J held that an Australian federal class action brought by clients of a particular law firm was an abuse of the court's process. As a class definition, it contravened the spirit of an opt-out regime, and subverted the policy of the legislation by imposing an opt-in requirement and by defining the class other than by reference to the cause of action itself. That view was endorsed in *Rod Investments (Vic) Pty Ltd v Clark*, and in *Jameson v Professional Investment Services Pty Ltd* In a telling passage, insofar as English law-makers are concerned, Stone J outlined the essential problem thus: 'The evidence of [the class members' solicitors] … describe clearly the difficulties involved in an 'opt out' procedure for representative proceedings. They have referred at length to the time and expense involved in, for example, the GIO litigation, because of the difficulty in identifying and contacting members of the representative group. Much of what they say might be persuasive if it was for the Court to choose between an opt-in and an opt-out process. However, Parliament has made a clear choice and it is not for the courts to hold otherwise. Therefore it is necessary to address whether the inclusion of the MBC criterion has the effect of implementing an opt-in procedure or otherwise subverting the process that the legislature has adopted.' Further, '[t]he

legislature made a clear choice [to adopt an opt-out regime] that was consistent with the recommendation of the Australian Law Reform Commission on this issue. Whatever advantages, real or apparent, may flow from the ability to identify each member of the class at the outset, a decision to apply an opt-in procedure can only be made by the legislature.'

Having regard to these comments, clearly, if an FSB-type regime is enacted in England, then the 'spirit' of that legislation (based, as it is, on judicial choice) would be entirely different to that which a 'default' opt-out regime supposedly imbues.

Not all Australian judges had the same concerns about tied classes, however. In *P Dawson Nominees Pty Ltd v Multiplex Ltd*, in which the class was defined by reference to those who entered into a litigation funding agreement, Finkelstein J doubted the correctness of Stone J's decision. His Honour endorsed the position of the litigation funders in seeking to exclude 'free riders' from the action (whereas the court in *Jameson* considered that Finkelstein J had 'overemphasised' the funder's concerns, and that '[t]he key focus must be on the overriding purpose of the statute'). Finkelstein J also opined that, as a matter of statutory interpretation, it was 'not forbidden' under Pt IVA to require class members to consent to bring an action; and that, even if tying class definition to a funder was 'opting in' to the action, 'all that Pt IVA requires … is that a group member *can opt out* of a group proceeding. That is what these group members can do. … if a group member decides that he does not want to be bound by any judgment in the action there is nothing preventing him from opting out at the appropriate time.' As a measure of its controversy, the matter divided academic commentary just as adamantly.

Less than two weeks after the decision of *Jameson*, the Full Federal Court unanimously upheld the first instance decision of Finkelstein J in *Multiplex*, and endorsed 'tied classes' formed by reference to those who had entered into a funding agreement. According to statutory interpretation, the wording of Pt IVA 'expressly permit[ted] the representative party to commence a proceeding on behalf of less than all of the potential members of the group'; and given that Parliament (when enacting Pt IVA) would not have considered the 'phenomenon' of litigation funding, or whether a class definition could be tied to a class of persons who had instructed a certain law firm or signed a litigation funding agreement, then little could be read into Parliament's consideration of the law reform report which preceded Pt IVA's enactment (held the court). However, the Full Federal Court drew an important distinction—it was permissible under Pt IVA to impose a criterion, *at the commencement of the action*, that in order to be a group member, a person must have entered into a funding agreement with a particular funder and/or retained a particular firm of solicitors; but given that 'Parliament made a deliberate policy choice to adopt the "opt out" procedure' for a Pt IVA action (which the statutory language reflected), then a class definition that allowed a person to take a positive step of "opting in" *after the commencement of the proceeding* would be inconsistent with that policy and language. The group definition in *Multiplex* was not a problem in this regard, because the definition restricted the class to persons who had entered into an agreement with the litigation funder, International Litigation Funding Partners Inc, at the commencement of the action.

Again, if and when a FSB-type regime is enacted in England, explicit attention to this troublesome issue may be warranted, especially given that third party funding is an integral part of the English litigation landscape, and is expected to constitute a useful source of

funding for collective actions in the future.

Source: R Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Law-makers' (2011) 50 *Canadian Business LJ* 335, 359–362.

In that regard, the reasons that Australian third party funders have insisted upon entering into individual funding agreements with group members, so as to ensure a percentage recovery from each group member's recovery, are multifarious:

- ❑ the Funder wishes to ensure that there is a *contractual* basis for recovery of those damages, by entering into a contract with each class member – without that contractual provision, the representative claimant (it would appear) has no entitlement at common law to enter into an agreement with a Funder which authorises the Funder to recover its success fee from the damages or compensation payable to group members other than that representative claimant; to achieve that result, the Funder must enter into contractual agreements to that effect with the class members, as well as with the representative claimant;

- ❑ the opt-out legislation in Australia, as drafted, does not give the funder an express right to claim a percentage of the amount recovered by the representative claimant (say, a Consumer Organisation) on behalf of the class members either. The most that the Australian legislation provides is this:

> 33ZJ(1) Where the court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
>
> (2) If, on an application under this section, the court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

This provision does not assist the right of a third party funder to recover anything from the representative claimant's monetary award at all, because (a) the success fee charged by the funder is probably not 'costs', (2) even if it did cover the success fee, it only covers the difference between what costs the winning representative claimant can recover from a losing defendant and what that winning

representative claimant must actually pay the Funder. Moreover, the provision only applies if the representative claimant recovers an award of *damages*, which precludes recovery of monies by way of settlement. This reduces the utility of the provision enormously;

- ❑ moreover, there is no 'common fund' doctrine applicable in Australian jurisprudence which would entitle a Funder to recover its success fee as a 'first charge' upon any damages recovered by the class members (the version of the common fund doctrine which Australian law *does* recognise is discussed in Section 11 herein). There is a wide power vested in the courts under the Australian legislation:

> s 33ZF In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

So far, so far as the author is aware, no attempt has been made to apply for a ruling as to whether such a provision would enable a Funder to apply for an order that its success fee constitutes a first charge upon the recovery of the damages or settlement sum awarded to a representative claimant on behalf of the group members. If that type of order were made, however, then presumably it would not require the collective action to convert to an opt-in prior to the commencement of the collective action;

- ❑ moreover, there is no guarantee that a representative claimant can indeed obtain an aggregate assessment of damages on behalf of the class of consumers – whilst aggregate damages are permissible under Australia's federal regime, the court may not order that in any given case, and in any event, a Funder's right to take its success fee from that aggregate assessment (in the absence of a common fund doctrine) is debatable; hence, individual retainers have been regarded as being necessary and prudent.

(The author is grateful to Prof Peter Cashman, Law School, University of Sydney, Australia, for useful discussions, and for clarifying her understanding about some of these points, during the course of the study).

Hence, BEUC may be keen to request that any new European collective action contain a 'common fund' provision which is worded more widely than the Australian regime, if third party funding were to be sought as a funding option. Section 33ZJ(2) seems to, at least, embrace the analogous concept of the American common fund doctrine, but is worded so narrowly that it is virtually useless. Any common fund provision proposed for

a European collective action (it is suggested) should ensure that both the representative claimant's legal costs and a Funder's success fee may comprise the first charge; that the first charge should apply to the entirety of the Consumer Organisation's liability for costs (over and above what can be recovered from the losing defendant); and that the first charge should be applicable to both judgment or settlement amounts recovered from the defendant. This provision, if drafted, would render the prospect of third party funding more attractive to both Funder and Consumer Organisation representative claimant.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — third party funding:

Respondent #1	Third party funding should certainly be considered, but clearly, funding from this source possibly involves a large deduction from damages
Respondent #2	Yes, third party funding is always worth investigating.
Respondent #3	Third party funding may be used to fund a range of costs: barristers' fees (where the Consumer Organisation's barristers are not acting on a CFA basis); experts' fees; court fees; and any ATE premium, if this is not deferred. If the Consumer Organisation's solicitors are working on a CFA basis which is, say, a 70% CFA (meaning that the Consumer Organisation is liable for 30% of the actual legal fees incurred by the its lawyers in conducting the action), then a third party funder may fund that 30% charge, instead of the Consumer Organisation funding that portion itself.

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17. AFTER THE EVENT (ATE) INSURANCE

What it means

In the context of collective actions, this type of insurance is purchased by the representative claimant/s, as insurance against the risk of having to pay the defendant's legal costs in the collective action, should the representative claimant lose the action. The insurance policy is taken out after the event giving rise to the instigation of legal costs (e.g., after the damage or injury was suffered by the claimants). The typical ATE insurance policy thus insures/protects the insured from adverse costs.

Conditions for its operation

The most difficult issues associated with ATE insurance revolve around how it operates in practice. A couple of respondents to the author's questionnaire provided several useful responses as to the features of ATE insurance, in relation to several specific questions put to them by the author about the operation of ATE insurance in practice.

The following table outlines the relevant issues and responses which may arise, should the Consumer Organisation be offered such insurance to cover some/all of the costs incurred in conducting group actions:

The issue	Respondent #1	Respondent #2	Respondent #3
Who is the 'insured party'? Do group members also have to sign up to the insurance policy upfront, in relation to any individual costs which their actions may entail, or is it just the Consumer Organisation who is the insured?	The insured can be either individuals, or the group, or the Consumer Organisation if it has an insurable interest.	The insured would be all of the individually named claimants, but this is likely to be subject to requiring a costs-sharing agreement between the claimants to ensure there is no partial recovery.	If the Consumer Organisation represents the claimants, they need to be named. It is vital to avoid any mismatch between the ATE policy and any third party funding agreement.

The issue	Respondent #1	Respondent #2	Respondent #3
If the Consumer Organisation were to lose its claim, would the ATE insurance policy cover both (a) any adverse costs awarded against it, and (b) the Consumer Organisation's own disbursements?	It is normal for the ATE insurer to cover both.	Yes, this is usual.	Assuming that the Consumer Organisation was a party to the litigation, yes. ATE insurance would only cover the Consumer Organisation's own disbursements and not its own legal costs.
If the Consumer Organisation took out an ATE insurance policy, would a security for costs order be nevertheless possible against the Consumer Organisation, or could that be successfully resisted, on the basis that the ATE policy was adequate security for the defendant's adverse costs, should the Consumer Organisation lose the collective action?	It is possible that a security for costs order against a representative claimant without substantial means could be resisted on the basis that ATE insurance was available. However, if the court is 'pro-defendant', then a security for costs order, notwithstanding ATE insurance, is possible too.	Nowadays security for costs orders are somewhat more unlikely than they were.	This would depend upon the court's views concerning the ATE policy. For example, has the ATE insurer an adequate rating by a security rating agency? Is the limit of the indemnity at least sufficient to pay the other side's costs?

The issue	Respondent #1	Respondent #2	Respondent #3
If the Consumer Organisation were to lose the collective action, what is the risk that the ATE policy could be avoided/repudiated by the ATE insurer, because of some non-disclosure of facts by the Consumer Organisation to the insurer? I understand that this has occurred in other cases, but would it be likely in the case of a Consumer Organisation bringing a collective action? If it did happen, what are the effects for the Consumer Organisation – would it just bow out and leave the ATE insurer and the defendant to 'fight it out'?	There would be very low prospect of voidance, as that outcome needs fraud, misrepresentation or non-disclosure, which is most unlikely in that scenario.	ATE is subject to non-disclosure risks found in all contracts of insurance. The winning defendant would seek recompense from the Consumer Organisation; it couldn't just bow out.	The usual obligation of utmost good faith applies to ATE insurance contracts, so this theoretical possibility exists. It is the claimant (Consumer Organisation) which remains liable to pay any adverse costs awarded against it, and hence, even though an ATE policy introduces a 'layer of comfort for the defendant', it does not remove the obligation of the claimant to pay adverse costs, should the defendant win. Practically, the defendant may apply to have the case struck out, if the claimant was impecunious, or if the ATE policy was inadequate (e.g. for an inadequate amount or provided by an unrated insurer).

The issue	Respondent #1	Respondent #2	Respondent #3
Would the Consumer Organisation be expected to pay the ATE premium upfront, or would that premium be deferred for the Consumer Organisation? I understand from the Jackson report that, if a claimant were to lose the collective action so that the insurance is needed, then the premium is actually not paid, but if the claimant wins the collective action, the premium is paid by the losing defendant, so that, either way, the claimant **never** pays that premium – but does that practice also apply to collective actions, and where the representative claimant may be a Consumer Organisation?	–	Most premiums nowadays are deferred and self-insured. If the Consumer Organisation's group claim fails, the ATE policy will pay off the risks insured (such as adverse costs payable to the winning defendant) and then pay itself off. If the Consumer Organisation's claim wins, then at the point of collection of damages or declaration, the ATE premium becomes payable by the Consumer Organisation, who in turn will seek recovery from the losing defendant.	This depends upon the terms of the ATE policy. Nowadays there is an element of the premium which ATE underwriters change at inception. Also there may be stage payments as the case progresses. Alternatively the premium may only be due when the case concludes or is settled. On conclusion of the case any outstanding premium is due. If the case is lost and the claimant cannot pay it, the ATE insurer will not be paid. If it is won the defendant will be assessed for costs which should include the ATE premium. The insurance contract for collective actions is no different from other forms of action as far as the premium payment is concerned.

The issue	Respondent #1	Respondent #2	Respondent #3
Are there any other issues that you think should be flagged up to a Consumer Organisation, as far as ATE policies for collective actions are concerned?	--	Issues which remain for Consumer Organisations in this context would include: costs sharing; and partial victories (i.e., what does the ATE insurer class as a win?).	

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — ATE insurance:

Respondent #1	ATE insurance should also be considered, not least because any ATE premiums payable by the Consumer Organisation are currently recoverable from the defendant should the Consumer Organisation win (and non-payable, should the Consumer Organisation lose). ATE insurance also provides greater security for the Consumer Organisation than third party funding does, because the latter is not regulated.

Respondent #2	ATE insurance is not strictly funding as such, but is used as a protection against the defendant's costs, should the Consumer Organisation lose the group action. ATE insurance is unlikely to cover both sides' costs — cover will probably be restricted to payment of adverse costs, if they are incurred because the Consumer Organisation loses, and also it will cover the Consumer Organisation's own disbursements.
Respondent #3	ATE insurance may be sought to cover the Consumer Organisation's own disbursements; and it is usual, where costs-shifting applies, for adverse costs to be covered by the ATE insurer as a minimum.

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18. BEFORE THE EVENT (BTE) INSURANCE

What it means

This form of funding involves the pooling together of individual insurance policies held by group/class members, who took out legal expenses insurance before the incurring of the legal liability. Frequently, these individual policies may be held as part of a home-and-contents insurance policy.

For example, the HSBC Home Insurance policy contains a Legal Expenses section, which provides, by way of explanatory notes, that the BTE insurer will only cover claims:

- which occur during the period of insurance;
- which have reasonable prospects of success;
- reported as soon as possible, and within 180 days, of the event giving rise to the claim;
- arising from a dispute regarding ... consumer disputes when you have continually held cover with either us or another insurer since the relevant agreement was made.

Source: HSBC Home Insurance Policy, available at:
http://www.hsbc.co.uk/1/PA_1_5_S5/content/uk/pdfs/en/policywording_household.pdf)

Issues that arise in BTE insurance

Although the author understands that grouped BTE insurance has been used in certain Austrian group actions, some features of BTE insurance make it somewhat uncertain for group actions in general:

- ❑ a BTE insurance policy will usually only cover the group members' own legal costs, and hence, it will be necessary for the Consumer Organisation to take out an ATE policy, to protect the insured (itself, or the class members) against the liability of their own disbursements and for the adverse costs, should the defendant win the collective action. For example, the HSBC Home Insurance policy, Legal Expenses insurance, provides that the costs covered will be 'all reasonable and necessary legal costs charged by the appointed representative and agreed by us', where that 'appointed representative'

means 'the lawyer or other suitably qualified person appointed by us to act on your behalf' – hence excluding any cover for adverse costs, should the insured lose;

- ❑ BTE insurers may seek to exclude or to limit insurance cover where the claimant seeks to invoke the policy in the context of grouped proceedings. This has been noted to be a difficulty in Swedish group litigation, for example (Source: *Country Report – Sweden*, available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf, at p 7)

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — BTE insurance (assuming that some of the consumers represented in the action carried BTE insurance as part of their household contents insurance – would grouping BTE insurance policies ever be feasible?)

Respondent #1	This option ought to be considered, though collective/group actions may not be covered by BTE, and there are numerous practical difficulties in using BTE in such cases.
Respondent #2	BTE insurance is unlikely to cover the group members' claims, but it is worth checking if the consumers were to pursue the claims personally.

Respondent #3	In the context of a collective action, BTE is likely to be difficult for three reasons. First, the limit of insurance cover may be too low, for BTE cover is not geared to the level of insured sums which collective actions usually involve. Secondly, the BTE insurer may not be willing to pay for litigation which would benefit parties (other members of the collective action) who were not their insured clients. Thirdly, even if the BTE insurer's involvement were merely to make a contribution on behalf of its policyholder, the level of cover, and how that is to be apportioned, may be difficult to ascertain, especially where the court has rejected the insured's claim or disputed quantum of damage.

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19. ENFORCED PERSONAL CONTRIBUTIONS FROM GROUP MEMBERS

A conflict with the general rule

Under many collective actions regimes, group/class members enjoy a general legal immunity from liability for costs.

A specific costs immunity for class members, in relation to the common costs of proving the generic common issues of law or of fact, is a feature of a classic opt-out collective actions regime. That immunity is statutorily provided in Australia, Ontario, and British Columbia (e.g. per the *Class Proceedings Act, RSBC 1996*, s 37(4), 'Class members, other than the person appointed as representative claimant for the class, are not liable for costs except with respect to the determination of their own individual claims'), and it is judicially stated that, in respect of class suits under the United States' federal regime in FRCP 23, absent class members are not liable for costs of litigation or attorneys' fees in the event of an adverse judgment against the class: *Lamb v United Security Life Co*, 59 FRD 44, 48 (SD Iowa 1973).

By contrast, each regime provides, however, that a group member should be liable for the *individual* costs of his claim, i.e., the costs (if any) of proving the issues (e.g., quantum) that are relevant only to his own claim, and which the Consumer Organisation could not have resolved on behalf of that group member in the group action. Leaving that burden to fall on the group members themselves is a frequent feature, legislatively-set, of collective regimes, whether opt-in (e.g., the English *Civil Procedure Rules*, r CPR 46.6A(4)(a), above), or opt-out (e.g., Ontario's *Class Proceedings Act, SO 1992*).

A variety of reasons have been put forward for the immunity from common costs. For example: if group members have little practical opportunity to influence the conduct of the action (or, perhaps, may not be aware that the action is on foot), then it would be unfair for those group members to bear costs. Secondly, the res judicata effects of group litigation could be severely compromised, if class members chose to opt out of a proceeding rather than face a potential costs liability. Thirdly, a class member should not be liable for costs, simply because the representative claimant is not in a position to fund, itself, the group action, for otherwise, the class member would either compulsorily take the position of representative claimant or be required to opt out.

This general immunity for common costs is also a feature of several EU collective action regimes, e.g., those operative in Sweden (under the Group Proceedings Act 2002), in Portugal (under the 'popular action' brought by a Consumer Organisation — unless the action is taken at the initiative of consumers themselves, rather than through that Organisation); in the Netherlands (under the Dutch Class Action Financial Settlement Act — given that individual consumers are involved neither at the settlement procedure nor at the procedure in which the settlement is declared binding); or in Greece (under its action for declaration as to damages).

However, that is not to say that group/class members can never be *required* to contribute towards the common costs incurred by a representative claimant (say, a Consumer Organisation), by way of enforced contributions, as a pre-requisite to the group members' participation in any 'fruits' of the litigation. In some scenarios, that is what occurs, and where applicable, may help to defray the costs of the representative claimant.

Requiring group members to contribute to the common costs of the group action, by virtue of the provisions of the collective actions regime itself

Some collective action regimes specifically require, under the terms of their legislation, that the group members are liable, severally, for an equal proportion of the 'common costs' of proving the generic (common) issues, should the representative/lead claimant (say, a Consumer Organisation) bring an action on their behalf. Where this applies, then obviously the financial exposure of the representative/lead claimant to bear ***all*** the burden of funding those common costs itself is negated.

England	Under this opt-in collective action regime, there is a special rule for common costs, once a GLO order is made, per Civil Procedure Rules, r 48.6A: (3) Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those costs. (4) The general rule is that where a group litigant is the paying party, he will, in addition to any costs he is liable to pay to the receiving party, be liable for – (a) the individual costs of his claim; and (b) an equal proportion, together with all the other group litigants, of the common costs.
Sweden	Under either the private group action or the organisational group action under the Group Proceedings Act of 2002, where a group action has succeeded, then group members can themselves be ordered to contribute towards the costs of the litigation, where either the defendant has been ordered to pay the representative claimant's costs and cannot do so, or where the group members, by their own improper conduct, have incurred additional litigation costs: ss 33–36. Therefore, relief from the burden of litigation costs is provided only where the losing defendant is not in a position to compensate the plaintiff for the litigation costs, or where litigation costs were incurred through the group members' own improper conduct. *(Source: Country Report – Sweden, 7, available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf)*

From a law reform perspective, this was also the recommendation of Lord Justice Jackson, in his recent report, *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch 33, p. 334, para. 3.4 ('Whatever costs regime operates ... the general rule in CPR rule 48.6A should apply: the individual litigant is only liable for his proportion of the common costs').

This sort of provision is, of course, protective of the representative/lead claimant's financial position on its face, and in that regard, would be of benefit to a Consumer Organisation operating under a similar collective actions regime. However, it has turned out to be highly-problematical in English litigation under the Group Litigation Order. In *Afrika v Cape plc X, Y, Z v Schering Health care Ltd Sayerss v Merck & Smithkline Beecham plc (MMR/MR Vaccine Litigation)* [2001] All ER (D) 365 (Dec), reference was made

to the difficulties of sorting out common-costs-per-class-member, when some group members may have discontinued, for example.

The issue of sharing 'common costs' has also been academically noted to be 'inordinately difficult' under the English Group Litigation Order, and that '[d]ifficult issues may arise where, for example, the group is only partially successful on the common issues, or where the group wins on the common issues but group members vary in their levels of success in establishing their individual entitlements': A Zuckerman, *Zuckerman on Civil Procedure* (2nd edn, Thomson Sweet & Maxwell, 2006) 525–526.

Requiring group members to contribute to the common costs of the group action, by virtue of some other mechanism

However easy or problematical it may be for a representative claimant such as a Consumer Organisation to achieve, it may be that the continuance of a group action is only possible, if each group member who wishes to participate in the fruits of the litigation is prepared to be liable for a relatively small (and limited) amount to cover either the Consumer Organisation's own costs of the collective action, or of the *estimated adverse costs*, should the Consumer Organisation lose the group action. Under such an arrangement, and as the *quid pro quo* of being represented by the Consumer Organisation, the consumer group members must be prepared to 'stump up' the money for the Consumer Organisation's liability for own and/or adverse costs.

The Netherlands	Under the Dutch Class Action Financial Settlement Act, it is provided that the individual consumers that are represented by a Consumer Organisation which is negotiating a settlement under the Act will not incur costs for the procedure. However, apparently in practice, the Consumer Organisation is sometimes created *ad hoc* to act in the interests of the consumers, and may be financed by the levying of a (modest) membership fee. It is conceivable that a consumer can be a free-rider, though, if that consumer does not join the Consumer Organisation, yet derives a benefit from a settlement being declared binding on all consumers. *Source: Country Report — The Netherlands, 6 and fn 4 (available at: http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf)*

England	This arrangement was evident in the *Equitable Life litigation* brought in England. Following an earlier (and different) arrangement which collapsed in 2004, the new funding arrangements which were used in the action are described in the following passage: The J Robins, 'Group Litigation: Strength in Numbers' (2008) *Law Society Gazette*, 11 Dec 2008, 14): The problem of organising big group actions was dealt with in a novel fashion in the legal action brought against Equitable Life by 407 with-profits annuitants, which settled a few weeks before going to trial earlier this year. The details of the settlement are confidential, but Robert Morfee, a partner at Bristol-based firm Clarke Willmott, says his clients were 'pleased with the result'. ... The firm ... created a special-purpose company with directors from the action group representing the clients. The court asked for each claimant to have sufficient money to cover their share of the estimated adverse costs of £5m – £12,500 each. ATE insurance was also provided through LawAssist. 'We had a company limited by guarantee and everybody was a member and had to hand over conduct of the case to the company,' explains Morfee. 'It worked extremely well and I'd certainly do it again.' This meant that the group action didn't suffer from 'fragmentation' — in other words, more clients walking away. Discipline, Morfee explains, was tough. 'All decisions were taken by the company directors,' he says. 'The clients had to like it or lump it.'

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be

awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — enforced contributions from consumers who are represented in the action (via notices, subscriptions, etc):

Respondent #1	Enforced contributions may become a necessity, if a combination of conditional fee agreements, ATE insurance, and third party funding, can't be put in place for the Consumer Organisation to bring the action.
Respondent #2	Enforced contributions really depends on the value of the claim and the keenness of claimants, but it is unlikely that a court would enforce such contributions.
Respondent #3	Collective actions could possibly be developed through enforced contributions from group members, but voluntary contributions are more likely to expand the number of group members.

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20. VOLUNTARY SOLICITATIONS FROM GROUP MEMBERS

How it works

As stated in the previous section, it is commonly provided, in collective action regimes, that class members are immunised from the 'common costs', and are only liable for their individual costs. However, there may be (albeit rare) other circumstances in which the class members are merely requested to contribute towards those common costs.

Precedent in collective action regimes

This issue has arisen in jurisprudence in Canada and in the United States (including the issue as to whether such solicitations can be made as part of the opt-out notice), where such orders have been made. In a rather curious provision, it may also be legislatively provided that solicitations can be made, as an expectation rather than as a liability:

British Columbia, Canada	The Class Proceedings Act, s 19(7) provides that 'With leave of the court, notice [of certification] may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements'. The Manitoba Law Commission has stated that solicitations for contributions to costs have been made in at least one proceeding in British Columbia to date (at p 80 of its report), although the case is not nominated by the Commission.
United States	In *Norris v Colonial Commercial Corp*, 77 FRD 672, 673 (SD Ohio 1977), it was said that 'the Court is aware of the dearth of authority on the question of post-certification contribution solicitation, but if a balance is to be struck, it would seem better policy to permit rather than deny fund solicitation from members of the class'.

This funding option is surely unlikely to be much-utilised, because of the disincentive to class member participation which up-front solicitations would entail — plus, with no sanction for non-compliance, it is difficult to see how it is practically useful to a representative claimant who is seeking funding sources for the collective action.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — voluntary solicitations from consumers who are represented in the action:

Respondent #1	This avenue is possible.
Respondent #2	This option very much depends on the value of the claim and the keenness of the group members.
Respondent #3	In collective actions, there will be some group members who are prepared to pay (and contribute to the overall cost of the collective action) while others are happy for a third party funder to pay on their behalf and, as a quid pro quo, give up an agreed share of their damages to that funder.

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21. TRANSFERRING THE BURDEN TO CLAIMANT LAW FIRMS, VIA CONTINGENCY FEE ARRANGEMENTS

What it means

Contingency fees are one means by which to shift the financial burden to the class lawyers engaged in the litigation. Under a contingency fee rule, a lawyer's fee paid by the client is calculated as a percentage of the monies recovered by the lawyer. If the action loses, no fee is payable by the client at all. By contrast, under a conditional fee rule, the lawyer and client enter into an agreement whereby, if the client's claim succeeds, the lawyer will be paid a fee, but if the client's claim loses, then no fee is payable by the client at all. The fee may be the *actual* legal costs incurred by the lawyer in conducting the action on behalf of the client, or may be calculated by some multiplier of that figure (e.g., a multipler or uplift of, say, 2–5, depending upon the difficulty of the case, etc).

Where a law firm is permitted to fund a collective action on either a contingency basis or a conditional basis, then it may be feasible for that law firm to also provide to its client an indemnity against any adverse costs award. This would effectively transfer the risk of losing the collective action and having to pay an adverse costs award from the client to the legal representatives.

The various types of contingency fees are shown in the Table below:

Type	Nutshell description
Speculative fee	the lawyer is paid a standard fee if the class wins, and is paid no fees if the class loses
Base/multiplier (or lodestar) fee	the lawyer is paid an uplift fee, (calculated by means of: the number of hours reasonably spent on the basis of time sheets recorded by the lawyers, multiplied by a reasonable hourly rate of compensation, multiplied by a factor that identifies the risk that the case involved, say, between 1 and 5) if the class wins, and is paid no fees if the class loses
Uplift fee	the lawyer is paid, in addition to his usual fee, an agreed flat amount or percentage uplift of the usual fee or of the party and party costs recovered, if successful, and is paid no fees if the class loses

Type	Nutshell description
Percentage of recovery fee	the lawyer is paid a set % of the quantum of damages recovered by the class if the class wins, and is paid no fees if the class loses
Sliding percentage of recovery fee	the lawyer is paid a % of the quantum of damages recovered by the class, but on a scale varying according to when the proceedings are resolved (eg, 20% of recovery if settlement reached within certain period, 25% if settled prior to trial, 30% if matter proceeds to hearing)

Source of table: *R Mulheron, The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) p 469.

On the other hand, some arrangements may involve uplifts in the event of success, but still require payment of the claimant lawyers if the class loses the group action, e.g., the 'risk agreement' possible under the Swedish *Group Proceedings Act of 2002*, under which the representative claimant and the lawyer can agree that the lawyer will receive a lower compensation if the claim loses, but will receive a higher level of compensation if the claim succeeds (ss 38–41) (per *Country Report – Sweden*, available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf, at p 7). That is **not** a contingency fee, in the sense used in this Research Paper.

Percentage contingency fees are not available in EU Member States except in very limited circumstances (e.g., they are not permitted in England for 'contentious business', although they are available for 'non-contentious' business, which can itself be litigious in nature, such as employment pay disputes).

Other cover will be needed

Even where a law firm is funding a collective action under a conditional fee agreement, that only covers the Consumer Organisation's **own** costs of bringing the action. The law firm itself will (probably) not be indemnifying the Consumer Organisation from an adverse costs order. This is for two reasons. First, an agreement to indemnify a losing representative claimant from adverse costs in a group action is probably too large a risk for a law firm to be likely to want to take, when offset against the relatively modest 'reward' offered by a CFA agreement for winning the case. Secondly, there is a question-mark as to whether it is unlawful for a law firm to indemnify its client from adverse costs because that constitutes insurance for which

the law firm would require an insurance licence — very recently, this question has been addressed by the English Court of Appeal on the basis that a law firm's indemnity agreement with a client to indemnify that client against adverse costs, should the client's case lose, is not a contract of insurance. The High Court had described it as 'a contract for the provision of legal services, with an indemnity clause whereby the solicitor undertook to pay the opponent's costs, in the event that that became necessary. To characterise it as a contract of insurance, albeit that the indemnity created some principles similar to an insurance contract, is to go too far': *Morris v Southwark LBC* [2010] EWHC B1 (QB, MacDuff J), para 46, from which an appeal was dismissed: *Sibthorpe (and Morris) v London Borough of Southwark* [2011] EWCA Civ 25 (25 Jan 2011).

Hence, some form of funding cover for those adverse costs will have to be arranged. This is where a funding package is very likely.

By way of example: in his *Review of Civil Litigation Costs: Preliminary Report* (May 2009), vol 1, ch 39, para 7.8, Lord Justice Jackson referred to the 'atomic test' litigation before the English High Court, a claim that was brought by almost 1,000 veterans, arising out of atomic and thermonuclear weapons tests undertaken in the 1950's and 1960's. The claim against the Ministry of Defence was for illnesses (cancers, skin defects and fertility problems) allegedly caused by exposure to radiation from the tests. There was a considerable statute of limitations problem in the litigation too. The funding of this claim was by means of a package, involving CFA's as the means of funding for the claimants' own side of costs in bringing the claim (with the prospect of a 100% uplift being applied, should the claim succeed), and ATE insurance to cover the adverse costs of the MOD, should the case fail. The following extract from F Gibb, *The Times*, 22 Jan 2009, demonstrates how conditional fee agreements (where available) are only one part of the 'funding equation':

> So how could they ever begin to fight their case? In 2002, when they first sought advice, there was legal aid. Proceedings were issued in December 2004. The Legal Aid Board then decided that the taxpayer could not afford such a claim. … Ian Rosenblatt, senior partner of the London firm Rosenblatt, heard of the action. His firm was prepared to dig heavily into its own resources to finance the case but needed backing should it fail.
>
> The possibility of a third-party funder was investigated but the funder would have wanted some control over the action and a slice of the damages.
>
> In the event, a litigation broker, The Judge, came to the rescue with what was then the largest such insurance package agreed: cover of £5 million (for the MoD costs, expert witness fees and so on) if the case fails. Rosenblatt itself has worked without charge for three years on the case with 25 solicitors at one point, now 17, racking up millions in costs, probably the largest

no win, no fee claim mounted by a British law firm. The firm acknowledges that the decision was a commercial one, as well as one of principle. They will stand to reap up to double their fees if the case succeeds. ...

The Judge [says] that the package is unprecedented. It benefits claimants additionally in that nothing will come out of the veterans' damages if they win. To lose would be a 'significant blow' to the market in this kind of case.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

Suppose that a Consumer Organisation sought advice about commencing a consumer collective action for, say, a follow-on or stand-alone competition law action, or a bank charges-type case. Just leaving aside, for present purposes, the different legal difficulties which may apply among these cases in proving liability and recovering damages: What funding package would you typically recommend, to fund both the Consumer Organisation's costs, and the possibility of adverse costs (including security for costs, if any) which may be awarded against the Consumer Organisation if it loses? Please indicate, from the following list, which may apply (and for which costs that funding source would be useful) — the Consumer Organisation's lawyers act on a CFA basis, for some or all of the costs:

Respondent #1	This option should be the obvious choice. It is important that a Consumer Organisation shop around to find a firm which has the expertise and which offers a full (as opposed to a partial) conditional fee agreement.
Respondent #2	Yes, a CFA is likely to be a good option – subject always to a satisfactory risk assessment performed by the lawyers undertaking the work on a CFA basis.
Respondent #3	This is likely to be a sine qua non for funding, depending on the circumstances. However, where ATE insurance is arranged (to cover adverse costs which may be incurred by the Consumer Organisation, for example), then a CFA arrangement is likely to be a requirement of obtaining such insurance.

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22. A SPECIALIST COLLECTIVE ACTIONS FUND

What it means

A specialist collective actions fund is self-generated by levies on damages achieved (either by judgment, settlement, or both) in successful collective actions. The fund finances either some or all of the legal expenses incurred by the representative claimant; while also indemnifying that funded litigant against adverse costs awards, should it lose the collective action. This type of specialist collective actions fund may feasibly be 'replenished' by a claim on damages which are:

(1) paid under settlements and/or judgments (whichever is specified);
(2) paid under settlements and/or judgments achieved in those cases which themselves received funding from the Fund; or
(3) paid to the fund because the fund acts as a destination of any unclaimed (residual) damages, rather than allowing such unclaimed amount to, say, revert to the defendant or be applied *cy-près*.

Precedents in collective action regimes

Such funds have been established in certain provinces in Canada and elsewhere.

Ontario	established per the Law Society Act, RSO 1990, c L-8, ss 59.1–59.5, and Law Society Act, O Reg 771/92, establishing the Class Proceedings Fund, and seeded as follows: 'The board shall, (a) establish an account of the Foundation to be known as the Class Proceedings Fund; (b) within sixty days after this Act comes into force, endow the Class Proceedings Fund with $300,000 from the funds of the Foundation; (c) within one year ... endow the Class Proceedings Fund with a further $200,000 from the funds of the Foundation
Quebec	Established by An Act Respecting the Class Action 1978, c 8, ss 5, 6, establishing the Class Actions Assistance Fund, or Fonds D'Aide aux Recours Collectifs (The Fonds)

Hong Kong	The Consumer Legal Action Fund was established in 1994 to give assistance to consumers to bring or defend a representative action. For any successful cases which the Fund supports, a 'benefit value' is payable to the fund, representing 10% of the amount of money received on behalf of the consumers. It was considered by the Class Actions Sub-Committee of the Hong Kong Law Reform Commission that the scope of this Fund could be expanded, should the proposed opt-out class action proposed by that Commission become law in Hong Kong.

A few notes about the Ontario Fund may be of interest, should a fund of this sort be considered/sought for an existing or future European collective actions regime.

The Fund is administered by the Class Proceedings Committee of the Law Foundation, and when assessing applications for funding, that committee is required by the Law Society Act and the related regulations to have regard to (a) the merits of a claimant's case; (b) whether the claimant has made reasonable efforts to raise funds from other sources; (c) whether the claimant has a clear and reasonable proposal for the use of any funds awarded; (d) whether the claimant has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; (e) any other matter that the Committee considers relevant; (f) the extent to which the issues in the proceeding affect the public interest; (g) the likelihood that the proceeding will be certified; and (h) the available money in the fund: ss 59(2)–(3).

Further:

- in any action in which the representative party has been granted such assistance, the Fund will indemnify him or her against any adverse costs award in the event that the class proceeding is unsuccessful – hence, a representative claimant may seek to avoid the burdens of an adverse costs order by sheltering behind the indemnity provided by the Ontario Class Proceedings Fund;

- the Fund is available for funding of disbursements only (but not for legal fees);

- if such financial support is provided to the representative claimant, and it then ends up losing, the winning defendant can only collect its legal costs from the Fund, and not from the representative claimant himself;

- In the event that the class proceeding is successful (judgment or settlement), the representative plaintiff is obliged to reimburse the Fund for the amount it paid out, plus a levy of 10% of the court-ordered award or settlement amount, as a 'top-up' mechanism for the benefit of future litigants who may require recourse to the Fund;

- the Fund is only entitled to a levy from those cases which it has funded, and unfortunately for the Fund's financial welfare, the cases which have settled for multi-million dollar amounts have not applied for funding;

- funding from the Ontario Fund has been quite sporadic since its implementation, such that, whilst a huge protection to the representative claimant if granted, it is clearly by no means forthcoming for everyone who seeks it;

- there is no prerequisite of certification having already occurred in applying for funding, although one of the matters which the Committee may take into account in making its decision on funding is the likelihood of certification

The reality is that, without such a fund, costs-shifting remains a real concern for an 'ideological claimant', such as a Consumer Organisation, which must find financial support (and cover for any potential adverse costs award) from some other source, whether it be insurer, funder, law firm, or some other source.

However, the establishment of any self-generating fund for collective proceedings — which, has as its purpose, the protection of both a losing representative claimant who cannot afford to pay the defendant's costs, and the defendant (or, more likely, its insurer) who is entitled by law to recover a substantial sum in being put to litigation which it won — raises broad policy (and political) issues, and for that reason, customarily requires close political scrutiny.

Interestingly, the idea of a specialist collective actions fund received support, in the collective actions context, by, e.g., the Civil Justice Council, *The Future Funding of Litigation: Funding Options and Proportionate Costs: Alternative Funding Structures* (June 2007), whereby the CJC recommended that a Supplementary Legal Aid Scheme (SLAS) should be established and operated by the Legal Services

Commission, for the conduct of group actions in England. It is fair to say that several problems with the SLAS idea were identified by lawyers who were experienced in group litigation in England, after the proposals were released. These problems were identified to include the following, in particular:

- ❏ any deduction from damages is problematical for that claimant (and the claimant lawyers);

- ❏ if funding was available from a SLAS-type fund, the hourly rate at which the claimant lawyers' fees would be calculated could be too low to warrant any reasonable level of fee recovery at the end of the litigation;

- ❏ if money was diverted from successful actions to a SLAS-type fund, it might encourage government to reduce its legal aid funding; and

- ❏ the merits test typically applied to any form of public funding can be difficult for group actions, and their complex issues, to meet.

Several of these problems are adverted to in the following article by J Robins, 'Multi-Party Actions: Under a Cloud' (2007) *Law Society Gazette*, 19 Apr 2007, 16:

> Mr Day reckons the SLAS is 'alright as an idea' but 'marginal in its relevance'. He adds: 'I just don't see it as providing any serious level of funding.' Leigh Day is advising former servicemen who took part in experiments at Porton Down (together with Kent firm Thomson Snell & Passmore), four of the men seriously injured during the TGN1412 drug trial at the premises of Northwick Park Hospital, individuals and businesses caught up in the Buncefield depot blast, as well as a toxic waste claim on the Ivory Coast. ...
>
> Patrick Allen, senior partner of north London firm Hodge Jones & Allen, is concerned that the CJC's [SLAS] proposal might be playing into the hands of a cost-cutting government. 'The bottom line is you can't trust the government not to take advantage of this sort of scheme,' he says, echoing a worry expressed by many at the CJC forum. 'If they saw another possible income stream coming in, then they might use that to reduce their own funding.'
>
> Insofar as the CJC has identified a problem, the solicitor 'wholeheartedly agrees' with its analysis. 'Yes, there's a crisis in the funding of multi-party actions,' he says. But chipping away at damages and solicitors' costs could have a counterproductive effect. 'If you took away 10% of the settlement in a catastrophic case, then you'll be taking away 10% of the injured patients' ability to fund future care and I have pretty profound problems with that,' he says.

> The solicitor also points out that claimant lawyers only get paid £70 an hour on the 'risk rate' for doing group action work under the legal aid scheme. And solicitors can only recover the market rate should they be successful. 'The problem with class actions is that they are incredibly difficult, especially the pharmaceutical ones, and you would be committing yourself to five or six years' of work. To do that at £70 an hour is a commitment not many firms would be prepared to make,' he adds.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Quite apart from opt-out availability (which clearly has a big impact upon the viability of these types of claims), do you think, for a collective regime to actually work under a costs-shifting regime, that any of the following should be lobbied for – a specialist CLAF-type fund for collective actions (modelled on the Ontario Class Proceedings Fund, say) to provide some or all of the funding required (and which, at least, covers adverse costs if awarded against the Consumer Organisation).

Respondent	Yes, it is important for a Consumer Organisation such as BEUC to lobby for the creation of such a fund – but don't hold the breath!

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23. A STATE GENERALIST FUND WHICH IS AVAILABLE, INTER ALIA, FOR COLLECTIVE ACTIONS

What it means

A generalist fund is funded by levies upon the costs or damages recovered in successful and participating litigation of whatever type, and along the lines of the specialist fund described in the previous section, and which indemnifies the funded litigant against adverse costs awards. Much like public legal-aid funding, cases are likely to be subject to a merits, and costs–benefit test.

A levy upon damages

Clearly, any generalist fund which operates upon the principle that it will be funded by draining from successful actions a levy, so that the net gain to the Fund from successful cases would hopefully cancel out the net loss of losing cases, has certain inherent political and economic difficulties.

This option has been canvassed by the CJC as 'unrealistic' for England in the present litigious climate, but that it might need to be reconsidered if the funding landscape were to absolutely deteriorate: CJC, *The Future Funding of Litigation: Funding Options and Proportionate Costs: Alternative Funding Structures* (Jun 2007), 22–24.

A levy upon costs

Wherever an 'access to justice' fund is established by legislation, then it is feasible that such money may be used to pay for collective actions litigation. This 'access to justice' fund may be seeded by a claim upon costs recovered in certain actions.

England	This possibility has arisen, by virtue of the Legal Services Act 2007, s 194, which aims to use a charitable body, the Access to Justice Foundation, to use money acquired under s 194 to promote access to justice. The arrangement (which has never been used to fund a group action in England to date) requires that any costs recovered by a winning claimant who was assisted by pro bono legal representation to be paid to the Access to Justice Foundation. Then, the Foundation will use that money to 'promote access to justice', in accordance with its charitable purpose (explained further by Lord Justice Jackson in Review of Civil Litigation Costs: Final Report (Dec 2009), ch 33, para 4.10).

Politically, this option may be perceived as being unrealistic in the present financial climate, but it remains an option which may have to be considered by Parliament, should funding become difficult to obtain for a claimant, especially a representative 'ideological' claimant.

Respondents' views

The author put this question to certain funders/law firms/insurers experienced in group actions:

> Quite apart from opt-out availability (which clearly has a big impact upon the viability of these types of claims), do you think, for a collective regime to actually work under a costs-shifting regime, that any of the following should be lobbied for – a state-funded general CLAF Fund to provide some or all of the funding required.

Respondent	Yes, it is important for a Consumer Organisation such as BEUC to lobby for the creation of such a fund – but don't hold the breath!

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24. STATE-SPONSORED 'CONSUMER ADVOCATE' FOR CONSUMER CLAIMS

What it means

Under this model, the State funds a public body (usually, a Consumer Ombudsman) to bring a public group action with the aim of seeking redress for consumer grievances.

Sweden	Under s 6 of the Group Proceedings Act of 2002, the Swedish Consumer Ombudsman is authorised to bring a so-called 'public group action' for consumer redress (that body is known as the Konsumentombudsmannen (KO)). *(Source: Country Report – Sweden, 2, 3, available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf)*

Particular motivations for this avenue

Of the Swedish choice to permit a public group action, it has been said that, 'Granting standing to sue [to] public agencies is a specific feature of the Swedish [Group Proceedings Act]. This is in line with the traditional strong engagement of the Swedish state in consumer protection and generally in protection of diffuse interests, and the well-established institution of the Consumer Ombudsman.' (Per the *Swedish Country Report*, at p 4).

Whether all EU Member States share the view that the involvement of the state in consumer protection is a political, rather than a legal, question (and, as the recent initiative of the Government of England and Wales to introduce a state-sponsored Consumer Advocate demonstrated, these views may very much depend upon the economic and political climate: see Department of Business, Innovation and Skills, *The Role and Powers of the UK Consumer Advocate: Consultation Paper* (Dec 2009). This proposal would have included the following (per R Clarkson, *The Solicitor*, 3 Dec 2009):

> This is the latest in a series of announcements by the Government to strengthen the rights of British consumers.
>
> Back in July, the Government announced plans to appoint a Consumer Advocate as part of

> the White Paper 'A Better Deal for Consumers: Delivering Real Help Now and Change for the Future' — which set out a package of measures designed to give consumers a better deal in the downturn and strengthen their consumer rights.
>
> Consumer Minister Kevin Brennan said: 'The Consumer Advocate's job will be to fight consumers' corner as a new national figurehead. The Advocate will support consumers, take legal action on their behalf, help them to get compensation and warn consumers about latest scams. This is especially important during the downturn when people's finances are hard pressed. We will advertise the role shortly and today we're seeking the public's views on the role and powers that the advocate will have, both in the short term and in the future.' The consultation seeks views on a number of key issues [including]:
>
> *Enabling the Consumer Advocate to take collective legal action on behalf of groups of individual consumers*
> This would create a new mechanism through which consumers could get redress and compensation. It is important as consumers are often reluctant to take court action themselves. The consultation seeks views on the scope of the power and circumstances in which it could be used. The Office of Fair Trading (OFT) estimates UK consumers suffered £6.6 billion in losses in 2007 as a result of defective goods or services.

So far as the author is aware, that particular proposal has not gone forth as yet.

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PART V

AVOIDING ABUSES IN COLLECTIVE ACTIONS: CHECKS AND BALANCES

This Section of the Research Paper considers the 'brakes' that could (and should) be considered for any collective actions regime, so as to prevent the scope for vexatious, frivolous or 'blackmail'-type litigation which could render businesses subject to adverse outcomes. It is not suggested herein that Consumer Organisations would bring such suits, given the statutory remits and political scrutiny under which they commonly operate. However, in the interests of fairness and justice, it is important for caveats upon the operation of a collective action to be debated and, where agreed, incorporated as a matter of legislation or as a matter of judicial practice. Possible caveats and brakes are discussed herein.

25. PRESERVATION OF SECURITY FOR COSTS AWARDS

What it means

A security for costs order specifies that either a specified sum of money, or a bank guarantee for a specified sum, be provided to the court by the claimant, as pre-litigation protection for the defendant's costs, should the claimant lose the claim and be required to pay an adverse costs award. A Consumer Organisation which lacks any visible substantive means of supporting a group action may be liable to such an order (depending upon the court rules of the respective Member States).

Moreover, in the context of any collective actions regime, even if the financial capacity of the representative claimant is judicially held not to form any, or any major, part of the 'adequate representative' certification criterion, a successful security for costs application may achieve much the same end.

The inherent tension about security for costs

In costs-shifting collective actions regimes, the capacity of the representative claimant (say, a Consumer Organisation) to satisfy any adverse costs award, should the class's claim fail, is crucial to the defendant, from a financial perspective. Should the defendant win, then it is entitled to recover its costs from the losing party. Additionally, costs-shifting is seen as a deterrent against speculative or 'blackmail' litigation, and security for costs is a further deterrent (or safety net, depending upon one's perspective) where the claimant is impecunious. Hence, the power to award security for costs against a representative claimant may be viewed as a necessary adjunct to costs-shifting. The third reason commonly put forward for a security for costs order – that there is a real prospect that where the representative claimant is meant to represent class members of all financial shapes and sizes, an impecunious representative plaintiff will be put forward, with the aim of avoiding an adverse cost award being levied against class members who may more readily be able to meet such an award – is inapplicable where the Consumer Organisation is acting on behalf of affected consumers.

However, and in conflict with security for costs orders, the ability of representative claimants to bring litigation to court which is important to a large body of people, possibly precedent-setting, and yet expensive, is one of the pillars upon which 'access to justice' is built. Experience elsewhere, in costs-shifting jurisdictions,

demonstrates that security for costs orders have had the potential or threat to stop a collective proceeding in its tracks. Moreover, some representative claimants against whom security for costs awards have been levied in collective actions in costs-shifting jurisdictions elsewhere would strongly contend that their suit was not 'a blackmail' suit, in the sense of being vexatious and lacking legal merit, but rather, one of good legal merits which was expensive to litigate for both representative claimant and defendant, and that security for costs was not intended for such a case.

The tension between these two positions is one with which courts in costs-shifting collective actions regimes have often struggled. It is perhaps striking to consider one particular Australian representative proceeding, the vitamins price-fixing case of *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153, which is notable for the fact that the four judges who heard the application as to whether security for costs should be awarded against the representative claimant perceived the issue differently.

> 'the Full Federal Court held that security for costs could indeed be ordered (at the request of one of the defendants, Aventis Animal Nutrition Pty Ltd). It was common ground in this case that Ms Bray 'has net assets of A$73,000. Her only current source of income is a Canadian invalid pension which amounts to A$931.40 per month. The applicant would not be able to meet an order for security for costs in the amount suggested by Aventis Australia ($300,00–$400,000). Ms Bray's solicitors stated that 'they do not hold instructions from any group member(s) that they or any of them would be able to provide security' (see para 134). The dilemma is clearly evident from the variant reasoning between the trial judge and the appellate court in this case.
>
> > The **trial judge** (Merkel J, reported as: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405) had originally held that it would be inappropriate to order that Ms Bray should be liable for security for costs, for four reasons:
> >
> > (1) Ms Bray had made out a prima facie case for relief under the TPA;
> > (2) the claims of the class members arose out of an unlawful price fixing cartel which had been admitted to;
> > (3) public policy considerations weighed strongly against an order for security of costs that might impede or hinder the class members' claims for injunctive relief and for damages resulting from the cartel arrangement; and
> > (4) the kind of circumstances that might warrant an order for security for costs against an impecunious individual bringing a class action were absent in this case.
>
> The **three appellate judges**, however, saw the matter quite differently, and held that security *could* be awarded in this type of case (the matter was remitted back to the first instance judge for further consideration). **Carr J** held that the discretion not to award security for costs was miscarried because Ms Bray clearly could not fund this very expensive litigation, 'someone else must be funding it' (para 138), and that it was for her to adduce evidence as to what the likely effect of any such order might be, which she had not done. **Finkelstein J** agreed (at para 250), and considered that whether an order

for security should be made depended upon the 'character of the proceeding', and that, in turn, would depend upon several factors: whether the members of the class were rich or poor; whether the class action was being funded by someone who would benefit from the action being brought (eg, the representative claimant's solicitors who were charging a contingency fee); whether it was the claimant who was 'bogging down' the class action in 'interminable and expensive interlocutory applications'; whether the preliminary evaluation of the merits of the claim were good or poor; and whether the class action appeared to be brought as an 'unmeritorious claim in the hope of compelling the defendant to agree to a settlement to avoid the enormous expense of fighting the case. Those types of actions can be discouraged by an appropriate order for security' (at [252]). **Branson J** agreed with both judgments on this point.'

Source: R Mulheron, *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal: A Research Paper for the Department for Business, Enterprise and Regulatory Reform (BERR)* (Oct 2008) pp 15–16, 19–20.

Precedents, and amounts of security where awarded

The author has not been able to locate any security for costs provisions in any of the European collective actions regimes studied.

However, security for costs awards against the representative claimant are clearly permissible under opt-out regimes operative in other jurisdictions. For example, the Australian federal regime expressly provides that nothing in Pt IVA affects the court's ordinary powers to order security for costs in representative proceedings: s 33ZG(c)(v). In the costs-shifting regimes of Ontario, Nova Scotia, New Brunswick and Alberta, the legislation is silent on the matter, but security for costs awards against the representative claimant are permissible in those provinces, as part of the court's legislatively-conferred power to 'make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination'. Interestingly, the Ontario legislature, by remaining silent on the security for costs issue, deliberately went against the recommendation of its law reform commission, which had earlier advised that security for costs should *not* be required in any class proceeding (except in respect of the class members' individual proceedings): See Ontario Law Reform Commission, *Report on Class Actions* (1982) 745, and Draft Bill, cl 41(2). On the other hand, ensuring that security for costs can be awarded against the representative claimant who is instituting a collective action has also been recommended by key recent law reform consideration of this topic in costs-shifting jurisdictions, e.g.: CJC, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report*

(Dec 2008) 226, which culminated in the incorporation of an appropriate provision in CPR 25.13(2)(h).

In those cases of group or collective actions brought in costs-shifting regimes in which security for costs have been awarded, the following examples may be cited:

Jurisdiction	**Case**	**Amount of security**
England	*Railtrack Private Shareholders Action Group; Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch) (misfeasance in public office)	£2.25m
Ontario	*2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation* (Ont SCJ, 28 Mar 2007) (price-fixing)	$10,000 payable, in favour of two defendants
Ontario	*Sutherland v Canadian Red Cross Society* (1994), 25 CPC (3d) 118 (Ont Gen Div) (HIV-contaminated blood)	$5,000
Ontario	*Bendall v McGhan Medical Corp* (1993), 14 OR (3d) 734 (Ont Gen Div) (breast implants)	$5,000
Australia	*Nendy Enterprises Pty Ltd v New Holland Australia Pty Ltd* [2002] FCA 550 (combined harvester design)	$50,000
Alberta	*Grabowski v Bodnar* [2007] ABQB 366, 428 AR 34 (QB), leave to appeal dismissed: [2007] ABCA 280 (charity concerts)	$78,500
Australia	*Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004 (anti-smoking)	$300,000
Australia	*Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, aff'd on appeal: [2006] HCA 41, (2006) 229 ALR 58 (restitutionary claim re invalid license fees)	$1,000,000

Several of these are referenced in: R Mulheron, *'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere'*, in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10, Appendix A.

There is no doubt that, depending upon the figure ordered, an award of security for costs may have a dramatic effect upon the continuance of a group action. For example, it was reported at the time that the order in Railtrack of payment into court to meet the government's costs 'almost prevented the action from going ahead': J Robins, 'Multi-Party Actions: Under a Cloud' (2007) *Law Society Gazette*, 19 Apr 2007, 16 (this group action involved 49,500 investors; the litigation against defendants for, inter alia, misfeasance in public office, was ultimately unsuccessful: *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch)).

In *2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation* (Ont SCJ, 28 Mar 2007), a competition law class proceeding in which security for costs in the amount of Can$10,000 was ordered, in favour of two defendants to the class proceedings, Gordon Food Service Inc and GFS Canada Co Inc, these particular defendants estimated that their costs, up to and including certification of the class proceeding, to be just over Can$200,000. However, Hoy J reiterated that the amount ordered by way of security should be 'modest' (at [51]), and cited a couple of earlier class proceedings, quite apart from the competition law context, where amounts as low as $5,000 had been ordered by way of security. Her Honour considered that the compromise of a low security figure was justifiable because (1) the objective of collective proceedings legislation in Ontario was to achieve 'enhanced access to justice', and that 'I am of the view that it is also a factor in determining what order for security for costs is just in the circumstances' and that (2) the amount of costs an unsuccessful plaintiff in a certification motion was typically ordered to pay in Ontario was 'modest' in any event, hence there was no need for a high security for costs amount to be set upfront.

By contrast, the large figure in the Australian case of *Fostif* was provided by a third party funder. It has been held by the Australian Federal Court that, although not a 'controlling consideration', the fact of third party funding 'ought to be taken into account in assessing the quantum of security': *Baygol Pty Ltd v Huntsman Chemical Co Aust Pty Ltd* [2004] FCA 1248 [28] (Tamberlin J). Undoubtedly, that figure is a world away from the earlier Canadian security for costs awards.

Factors prompting a security for costs award against a representative claimant

From a perusal of the case law across Australian and Canadian costs-shifting jurisdictions in which security has been either sought or awarded, the author has previously undertaken a study as to what factors have proven to be of relevance to such an award (R Mulheron, *'Costs-Shifting, Security for Costs, and Class Actions:*

Lessons from Elsewhere' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10).

Of the factors that were identified in that study, it may be relevant for a Consumer Organisation to take note of the following factors as a possible checklist, by which to assess whether and why security for costs may be awarded against it as a representative claimant in a collective action:

Checklist of factors: security for costs against a Consumer Organisation is more likely where ...
• the Consumer Organisation's claim has weak merits, lack of bona fides
• the Consumer Organisation is not genuinely exposed to the risk of adverse costs, and has no 'skin in the game'
• a security for costs application would not have the practical effect of removing the class members' immunity from costs liability
• the collective action is defensive in nature, where the defendant had issued debt collection proceedings against the class members, seeking recovery of amounts said to be owing under credit contracts, for example
• the class members (or one of them) is rich or of substantial financial means
• the litigious behaviour which the Consumer Organisation has demonstrated in the conduct of the collective action is poor, such as 'bogging down' the group action in interminable and costly interlocutory applications
• the collective action does not amount to 'public interest' litigation
• a security for costs order would not necessarily bring the collective proceedings to a halt
• the defendant's position regarding costs is not so adequately protected that no order for security is warranted (i.e., the defendant will be exposed financially if it cannot recover its costs from the Consumer Organisation, should it successfully defend the group action).

It is apparent that, should the topic arise in the context of a European collective action, courts who might be called upon to decide the issue of security for costs, in the uniquely difficult setting of collective proceedings, will have a range of factors from which to choose. However, the two important points to perhaps draw from the jurisprudence in Australia and Canada to date are that (a) circumstances have been held to exist where representative claimants have found it impossible to resist an order for security; and (b) in most cases, the

orders have been modest, but occasionally, they have been daunting to anyone other than a well-resourced financial backer.

Would a third party funder cover the security for costs payable by a Consumer Organisation?

As the discussion in Section 16 demonstrates, it is likely that, in practice, a third party funder would fund any security for costs order, if awarded against a Consumer Organisation.

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26. THE CONSUMER ORGANISATION'S FINANCIAL CAPACITY

How the financial capacity of a Consumer Organisation can matter in group actions

In a costs-shifting regime, the question immediately arises: should the financial capacity of a representative claimant (say, a Consumer Organisation) to satisfy an adverse costs award be relevant to the certification criterion of whether the Consumer Organisation was an 'adequate representative'? In other words, if a Consumer Organisation could not satisfy an adverse costs award, is it truly an entity which could 'vigorously and capably represent the interests of the class', as Nordheimer J put it in *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (Ont SCJ).

Certainly, the defendant may seek interlocutory orders that the Consumer Organisation provides security for costs — but what about the certification criterion of a 'suitable representative' itself?

Canadian precedent

This issue has arisen for express consideration under the Canadian provincial class proceedings regimes, for example (where to treat the financial capacity of a representative claimant as a certification criterion has been termed 'a sort of halfway house towards requiring security for costs': *Mortson v Ontario (Municipal Employees Retirement Board)* (2004), 4 CPC (6th) 115 (Ont SCJ), per Cullity J)). It is apparent in that jurisdiction that the financial standing of the representative claimant is, at least as the judgments presently stand, a *legally relevant* issue to the certification motion. In *Western Canadian Shopping Centres Inc v Dutton*, the Supreme Court of Canada expressly stated that '[i]n assessing whether the proposed representative is adequate, the court may look to ... the capacity of the representative to bear any costs that may be incurred by the representative in particular': [2001] 2 SCR 534 (SCC) [41] (McLachlin CJ). On that basis, if the representative claimant there can show that it is supported by the Ontario Class Proceedings Fund or by an insurer prepared to fund adverse costs should the representative claimant lose, then that has been relevant toward finding that the representative claimant was adequate.

However, and secondly, there is nothing in Ontario's class proceedings legislation that requires the representative claimant to show that he has a specific fund set aside and available to meet an adverse costs

order. Hence, the failure to point to some specific assets will not defeat the adequate representative' certification criterion. It follows that, notwithstanding the Supreme Court's statement in *Dutton* about the relevance of the representative's financial capacity, it seems that courts will be reluctant to find that a proposed representative fails to meet the adequacy criterion simply on the basis of the financial capacity to meet an adverse costs order.

For further discussion of this important point, as it is dealt with in Canadian class proceedings jurisprudence, see: R. Mulheron, 'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, Oxford, 2010), ch 10, 202–205.

A legislative drafting possibility

Of course, it is always open to the drafters of any new collective regime in Europe to insist that, at the commencement of the group action, the representative claimant (say, a Consumer Organisation) has the capacity to meet any adverse costs which may be awarded against it — not as part of a security for costs order, but as part of the 'certification matrix' that may be imposed at the commencement of the group action. That can be legislatively specified, and as a precedent, the recently-proposed collective action in England contained this feature:

England	Proposed (draft) CPR 19.21(20(b)(iv) of the Civil Procedure Rules provided: 'The court may approve the applicant to act as the class representative if the court is satisfied by the applicant that the applicant will be able to pay the defendant's recoverable costs if ordered to do so.'

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27. MANDATORY COURT APPROVAL OF FEE AGREEMENTS ENTERED INTO BY A CONSUMER ORGANISATION

Why court approval of the fee agreement has benefits

Judicial approval, upfront, of any agreement entered into by a Consumer Organisation with an external funder may have two distinct benefits to that Consumer Organisation:

(1) it serves as a 'check and balance' against the prospect of a third party funder seeking too large a 'chunk' of the damages that may be recovered, or the imposition of some other term (e.g., as a term of ATE insurance) that may be perceived to be unfair to the Consumer Organisation or the group members which it represents; and

(2) it protects the Consumer Organisation against any later allegation by the group members that it 'gave too much of their money away'.

Precedent in collective action regimes

Upfront judicial approval of a fees agreement is commonly mandated, for example, in the Canadian class proceedings statutes, and has been mooted as a wise step in collective actions regimes elsewhere too:

Ontario, Canada	s 32(2) of Ontario's Class Proceedings Act 1992 provides that: (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall, (a) state the terms under which fees and disbursements shall be paid; (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
England	Proposed 19.42(2) of the Civil Procedure Rules provides: 'An agreement in relation to the fees and disbursements payable by the class representative is not enforceable unless approved by the court.'
Sweden	the point was made in the *Swedish Country Report* (available at: http://ec.europa.eu/consumers/redress_cons/sv-country-report-final.pdf), when discussing the Group Proceedings Act of 2002, that '[t]here are several mechanisms by which the members of the group and the court can control the fairness of [fee] agreements (approval by the court; possibility for notice of dissatisfaction; and appeal of court decision to approve a risk agreement by members of the group)' (at p 7).

Some lessons from other jurisdictions

Canada: This provision is, of course, designed to ensure judicial supervision of contingency fees, so that lawyers were not taking too big a percentage (which is not a European concern – yet!).

Interestingly, this judicial involvement in the approval of fees stands in stark contrast to the Australian procedure, which, as enacted, does not deal with fee agreements that may be entered into between solicitors and representative parties or class members. Judicially, it has been noted in Australia that the issue of fee

agreements can not be said to be directly, or indirectly, regulated by Pt IVA: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167, [15]. This has proven unsatisfactory, for it may end up being the defendant (oddly enough) who queries whether the fee agreement is fair to class members; and if there is to be a common-fund-type provision available to lawyers/funders by which to render the non-recoverable portion of fees/costs a first charge on the damages or settlement monies recovered (as canvassed in Section 11 of this Paper), then it seems doubly important that the court should be aware, and approve, of how those costs/fees will be assessed.

Hence, the Australian position stands in marked contrast to the caution that was exhibited by the Canadian legislatures (and which is judicially invoked under United States FRCP 23 class actions). Judicial approval of the fee agreements between class lawyers and class representatives, with notification to the class members of the content of the proposed fee agreement, should be mandatory under any collective actions regime.

England: Interestingly, when drafting the rules of court for the newly-proposed English collective action, the drafters deliberately opted to go for a wider terminology than existed in Canadian regimes, because feasibly, a representative claimant's fee agreement could actually be made with:

(a) a third party funder,
(b) a legal expenses insurer,
(c) a legal-aid funding body,
(d) any special fund set up to fund collective actions (similar to the Class Proceedings Fund in Ontario),
(e) the class members themselves,

as well as with the lawyers – and it was thought that the court would wish to know what chunk of money the class representative would be liable to pay to *any of these parties*, if that was 'at the expense' of the class members' recovery of monetary compensation.

The role of the settlement agreement

As a matter of interest, the provision to do with fee agreements which was proposed for the new English collective action probably suffers from the same criticism that has been levelled at similar provisions in Canadian statutes:

> With the exception of the Alberta statute, the various statutes tend to be somewhat vague concerning the process whereby court approval is to be obtained and, in particular, the *timing* of the application for approval. Typically, plaintiffs' counsel will enter into the required written fee agreement with the representative plaintiff at the beginning of the lawsuit. There is no statutory direction as to when court approval of such an agreement must be sought. ... The Alberta statute specifically addresses the issue: ... [the agreement] cannot be enforced unless (1) court approval is obtained prior to or at the time of the application for certification; and (2) following settlement or judgment on the common issues, the presiding judge has reviewed the agreement to ensure that the fees and disbursements payable are reasonable in the circumstances.'

Source: *Defending Class Actions in Canada* (2nd edn, Wolters Kluwer, 2007) 302–3.

The authors of this book also make the point (at 303) that, in most class proceedings cases, the fee agreement approved by the court is actually overtaken and superseded by a settlement agreement which includes a provision for the fees/disbursements that a representative claimant has to pay, and that the court is required to approve that, again, as part of the requisite judicial approval of settlement agreements.

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28. CHECKS AND BALANCES DESIGNED TO PREVENT ABUSIVE OR VEXATIOUS COLLECTIVE ACTIONS: AT THE BEGINNING

If better funding strategies were available to Consumer Organisations, and/or if derogation from costs-shifting were to apply in those group actions in which the representative claimant were a Consumer Organisation, then in respect of any existing or newly-proposed group action regime, various checks and balances are feasible by which to ensure that abusive or vexatious litigation was not permitted.

This section deals with feasible brakes and caveats which could be introduced, as part of the 'design framework' of an opt-out collective actions regime. In so doing, the section canvasses for wider consideration by BEUC and its member Consumer Organisations the various design conundrums that arise in the procedural aspects of an opt-out collective action—throughout its beginning, its middle, and its end. The following section deals with costs-related checks and balances.

Procedural aspects 'at the beginning' dominate the framework, for this is the 'engine room' which fires up or extinguishes the collective action at the very outset. It is a moot point whether the 'beginning procedures' are overly stated/prescriptive, but this seems to reflect an attitude of the law reform commissioners and legislatures to ensure, and demonstrably so, that their collective frameworks are not merely transplants of the US opt-out class action regime.

It must be emphasised that not all of these 'design issues' would necessarily require legislative articulation. Some would probably be dealt with sufficiently by establishing judicial precedent, or by protocol or practice direction. Some may even be possible to deal with by consideration and negotiation between the parties during the course of the litigation, rather than by legislative prescription or judicial precedent being set down. All, however, have arisen as contentious points in collective actions jurisprudence elsewhere, and for most of them, *different* solutions are possible. For that reason, a fulsome debate by stakeholders about the different prospective solutions is crucial.

Framing the collective action itself

- ❑ the Consumer Organisation, as representative claimant, must be able to (a) specify the common issues of fact or law, or (b) define the class and sub-classes (if any), or (c) specify the causes of action and

the remedies sought for each class and sub-class;

- ❑ the class must be able to meet any legislatively-prescribed preliminary merits test/s specified, whether it be determined on the basis of prospects of success, costs-benefit, minimum financial threshold of individual and/or class claims—which (if any) applies will need to be articulated;

- ❑ a pre-certification stage may be desirable, requiring certain up-front disclosures (e.g., information about the size of class, or information about the likely common and individual issues, or facts that go to prove why a collective action would be superior to other means of resolving the dispute), prior to the certification hearing;

- ❑ a certification hearing should be mandated, as a 'gateway' through which all opt-out collective actions must pass before they have judicial permission to proceed in that form. At the certification hearing, a full panoply of requirements—pertaining to commonality, superiority, the representative, and suitability—must be satisfied by the class;

- ❑ the collective action must be the superior form of resolving the class members' disputes. If another procedural regime available to claimants is more efficient and less burdensome and costly, then that should be used, in preference to a collective action;

- ❑ the type/s of monetary remedy that may be sought and awarded in a collective action (eg, damages, disgorgement, restitution, exemplary damages, financial penalties) needs to be carefully considered, so that the regime is appropriately drafted to either cover or restrict the field of remedies;

- ❑ the collective action must be manageable, from the court's point of view (and the court must be satisfied of that at the outset);

- ❑ whether any type of legal issue should be excluded from the scope of the collective action regime (eg, some disputes 'carved out' from the generic regime, and better handled elsewhere) will need to be carefully considered;

- ❑ whether the ability to commence a collective action could be absolutely precluded by some other form

of dispute resolution needs to be carefully considered. For example, can the parties deliberately 'trump' a collective action by means of an arbitration clause in their contract?

- ❑ the circumstances in which a collective action can be certified for the purposes of creating a settlement class by consent (and which certification criteria can be 'overlooked' for that purpose, in the safe and certain knowledge that no trial court will ever have to hear and decide the merits of the action) will need to be carefully considered.

Class composition and formation

- ❑ a sufficient minimum number of class members must exist to form a class—and how this minimum threshold is defined will need to be articulated. Is 'a number of claims' too wide and non-specific, for example?

- ❑ the class members' claims must be sufficiently common to be heard in the one collective action. In this context, 'commonality' requires a careful consideration of (a) whether there has to be a common 'cause of action' in play, (b) whether a common issue of fact or law is sufficient, or (c) whether some sort of 'predominance' of common issues is necessary or not;

- ❑ the collective action must proceed without any conflict of interests between representative claimant and represented (but absent) class members;

- ❑ the class has to be defined (described) in a way that is fair to both claimants and defendants—not overly broad, so that the common issues do not bear any relationship to some of the class members, but not so narrow that the defendant is facing the prospect of repetitive litigation;

- ❑ whether the class definition can 'tie' class membership to an external party (rather than to the series of events out of which the dispute arose) must be carefully considered. For example, should it be acceptable to tie class membership to those members whom a law firm or a third party funder represents, or does that contravene the 'spirit' of the opt-out regime? See further discussion in Section 16;

- ❑ the status of the absent class members (e.g., their right to give evidence at certification or at trial, what disclosure should be permitted against them, and the scope of the legal duty of care owed to them by the law firm which represents the Consumer Organisation) needs to be carefully considered;

- ❑ how should foreign absent class members interact with any new European collective action regime? Worldwide classes provide a defendant with 'global peace', but can conflict with the principles of private international law or with treaties governing the mutual recognition and enforcement of judgments. In order to overcome potential due process difficulties, should it be a requirement that foreign class members must opt in to formally signify their submission to the jurisdiction of the court?

- ❑ whether any type of entity/person should be excluded from being a class member under the collective action (or only permitted to be a class member upon certain pre-requisites being satisfied) should be legislatively prescribed. For example, should members of Parliament or of the judiciary be excluded from being class members?

When considering the defendant's position in the collective action suit

- ❑ proper standing requirements should apply, where multiple defendants are being sued in the collective action. It must be clear whether it is required that every representative claimant has a pleadable cause of action against every defendant named in the action, or whether it is sufficient that, as against each defendant, there is *a* representative claimant who can plead a cause of action, needs to be carefully considered;

- ❑ a collective action must be fair to the defendant. For example, this will require consideration of appropriate certification requirements which must be met by the class, the rights of disclosure and appeal to which the defendant is entitled under the regime, and the *res judicata* principles that apply to collective actions;

- ❑ whether any particular types of defendants should be excluded from the scope of the collective action regime will need to be carefully considered.

When considering the Consumer Organisation's position as representative claimant

- ❑ the Consumer Organisation must be adequate to represent the absent class members (adequacy, in this context, meaning, inter alia, that the Consumer Organisation: must not have interests antagonistic to, or in conflict with, the class; will vigorously prosecute the claim on behalf of class member);

- ❑ the legal representation obtained by the Consumer Organisation must be adequate to represent the absent class members. Furthermore, during conduct, substitution must be permissible if judicially deemed necessary;

Preventing procedural abuses of process

- ❑ the extent (if any) to which a defendant may contact (communicate with) absent class members directly before the collective action is certified (with a view, for example, to individually settling with those absent class members) will need to be considered, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process;

- ❑ the extent to which *res judicata* and issue estoppel principles should apply in the collective action must be articulated. Is a Consumer Organisation permitted to frame the action around certain common issues, hiving off other common issues relevant to another line of argument for a 'rainy day' (i.e., for the day that the first collective action loses on the common issues)? The operation of *res judicata* and issue estoppel has a significant impact upon the degree of finality which a collective action may achieve for both class and defendant;

- ❑ how multiple litigation against the one defendant arising out of the same subject-matter should be handled, needs to be carefully considered. 'Multiple litigation', in this context, could mean either more than one collective action on foot against the defendant, or more than one class members' individual actions against the defendant (whether actions were instituted prior to certification of the collective action, or instituted by opt-out class members after certification).

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29. CHECKS AND BALANCES DESIGNED TO PREVENT ABUSIVE OR VEXATIOUS COLLECTIVE ACTIONS: DURING THE ACTION

The opting-out process

- ❑ the class members must be adequately informed about their opt-out rights under the collective action, giving them a realistic opportunity to opt-out. The manner of giving notice (e.g., when and how often the notice should be given, whether it is mandatory or discretionary to do so, whether group or individual notice should be permitted, what appropriate use can be made of the internet and websites for disseminating opt-out notice) needs to be prescribed (whether by legislation, rule or practice direction);

- ❑ who pays for the opt-out notice, both upfront and ultimately if a costs-shifting regime is preserved for the collective action, needs to be considered;

- ❑ the content of the opt-out notice, the appropriate length of the opt-out period (e.g., whether any minimum or maximum opt-out periods should be set), and how to opt out, need to be carefully considered — too long, and the notice is unfair to defendants;

Court control

- ❑ close judicial case-management of the collective action should be mandatory, for the protection of all parties to the collective action;

- ❑ the court should have freedom to exercise broad powers (to enable it to narrow/widen the common issues, amend the definition of the class, to direct amendments to the pleadings, etc), in order to permit the collective action to dispose of the dispute as expeditiously and proportionately as possible;

Conducting the collective action

- ❑ when, and how, is the class to be closed? At some point (and with very limited exception), the class must convert from opt-out to opt-in. In most scenarios, the class members, hitherto described, will have to 'put their feet on the sticky paper' at some point, thereby giving rise to the 'take-up rate' of the action. The parameters of this conversion from opt-out to opt-in must be carefully considered;

- ❑ the circumstances in which communications can be made by the Consumer Organisation (or by its legal representatives) to the absent class members (as either formal notice which requires court approval, or as general correspondence which does not) will need to be considered;

- ❑ the extent (if any) to which a defendant may contact absent class members directly, *after* the collective action is certified (with a view to individually settling with those absent class members), will need to be considered, in order to set the parameters of acceptable litigious conduct and to prevent claims of inappropriate or abusive process;

- ❑ the person/s (eg, the Consumer Organisation as representative claimant, absent class members) against whom disclosure can be sought with or without leave, will need to be considered, in light of the presently-existing rules on disclosure;

- ❑ the circumstances in which the collective action may, after certification, be de-certified, should be prescribed;

Dealing with limitation periods

- ❑ the limitation period will stop running for class members, either when the Consumer Organisation files the collective action, or when (or if) the action is certified. The precise circumstances at which the limitation period stops running must be legislatively prescribed — if that is 'left up in the air', then that is unfair to defendants;

- ❑ the limitation period will start running again upon certain events happening; these triggers must be legislatively prescribed — if that is 'left up in the air', then that is unfair to class members.

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30. CHECKS AND BALANCES DESIGNED TO PREVENT ABUSIVE OR VEXATIOUS COLLECTIVE ACTIONS: AT THE END

Settling the collective action

- ❑ settlement agreements should be subject to a fairness hearing. This is, essentially, to preserve fairness for absent class members and for the defendant, but also serves to protect the interests of the Consumer Organisation and the lawyers (for example, where judicial approval is sought for remuneration to the representative claimant and for legal fees, respectively);

- ❑ adequate notice of a forthcoming settlement hearing, and further adequate notice about the verdict reached at the settlement hearing, will need to be considered. In all instances, the timing and content of the notices will likely be required to be judicially approved;

- ❑ the 'fairness criteria' against which the court must subject a settlement agreement should be considered and articulated. Whether evidence from the Consumer Organisation, absent class members, defendant representatives, legal counsel from each side, and experts, would be helpful to the fairness hearing, needs to be considered;

- ❑ the potential impact of any 'bar orders' (whereby a settling defendant seeks to obtain an order that the defendant is not open to any claims for indemnity and contribution from a non-settling defendant, in the event that the non-settling defendant loses at trial), needs to be considered;

- ❑ the procedures by which absent class members can (a) object to a settlement negotiated by a Consumer Organisation, or (b) opt out of a settlement (if a second opt-out stage is to be permitted at all), need to be judicially or legislatively prescribed;

- ❑ the procedure (if any) by which absent class members can opt back into a class for the purposes of settlement need to be judicially or legislatively prescribed;

Assessing and distributing the compensation

- ❑ damages assessment may be individual, or based upon a class-wide aggregate assessment, depending upon the circumstances. The pre-requisites for aggregate assessment will need to be prescribed with the utmost clarity;

- ❑ how distribution of monetary compensation to the class members should be permitted—whether to class members directly, as well as via a *cy-près* order on either a price-rollback or distribution-to-organisation basis—needs to be prescribed;

- ❑ whether a direct distribution to class members may be permitted, not by an individual assessment of each class member's entitlement, but on the basis of an average or *pro rata* assessment for those class members identified at the point at which the assessment is being made, needs to be considered;

- ❑ *cy-près* distributions (if permitted) will need to be carefully considered (eg, the pre-requisites governing such distributions, what conditions are necessary before they are to be permitted, and the type of beneficiaries to whom such distribution may be made);

- ❑ whether or not coupon recovery should ever be permitted (compensation 'in like', rather than in monetary terms) needs to be carefully considered;

- ❑ whether or not any reversionary distribution to the defendant should be countenanced should be legislatively prescribed;

Treating the class members individually at the end

- ❑ the means of determining the individual issues (if any) which remain after the determination of the common issues (whether by judgment, or pursuant to a settlement agreement) must be clear and explicit, and will have to be imbued with the utmost flexibility;

- ❑ whether class members should have the right to insist upon individual assessment and direct

distribution, or whether, in the interests of proportionality, the managing judge may approve an average distribution or a *cy-près* distribution, regardless of individual class members' indications to the contrary, needs to be carefully considered;

Clarifying the rights of appeal in the collective action

- ❑ appeals from certification orders (e.g., who has the right to appeal, whether an appeal is as-of-right or only with leave) needs to be articulated;

- ❑ appeal rights regarding the judgment of the common issues (who, when, and with or without leave), and appeal rights regarding judgment on individual issues (who, when, thresholds, and with or without leave), as well as appeal rights from any judicially-approved settlement agreement, should be carefully considered.

(The source of Sections 28–30 of this Research Paper is: R Mulheron, 'Building Blocks and Design Points for an Opt-out Class Action' [2008] *J of Personal Injury Law* 308–325), with further discussion of these features contained in Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004).

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31. COSTS-RELATED CHECKS AND BALANCES IN COLLECTIVE ACTIONS: THE POSSIBILITIES

Given that costs-shifting is the dominant costs rule in EU Member States (and, in the context of collective actions, this rule retains considerable support, in that it is considered to be a deterrent against speculative or unmeritorious litigation), then any better funding mechanisms by which Consumer Organisations can bring collective actions require some careful balancing of the interests of both Consumer Organisations and defendants the subject of these suits, where costs are concerned.

Various possibilities have been put forth in this Research Paper, which are worthy of consideration, when considering the particular questions regarding costs and funding which were posed by the EC in its recent consultation on collective redress. To summarise the points made throughout the Paper:

- ***Derogation from costs-shifting:*** given the extent to which an application to derogate from the usual principle of costs-shifting has not been invoked in favour of a losing Consumer Organisation in other collective actions jurisdictions, it may be advisable for BEUC to seek an express rule permitting derogation from costs-shifting, rather than seek to rely on a general power to derogate in favour of the Consumer Organisation — experience shows that such 'favours' are not often granted by the adjudicating court;

- ***Explicit criteria for derogation from costs-shifting (including a defined meaning of 'public interest'):*** even where express criteria for derogation from the usual costs-shifting rule are included in the governing legislation, so as to enable the court to choose not to award costs against a losing representative claimant, experience in other collective actions jurisdictions demonstrates that these criteria tend to be narrowly construed, and that even the presence of such criteria does not mandate that costs-shifting is avoided where the representative claimant has brought a novel or test case, or an action which is in the public interest. Hence, although the incorporation of express criteria of this sort no doubt serves to cast *some* protection in favour of a Consumer Organisation, should it lose the collective action, BEUC may wish to seek the incorporation of express definitions of what amounts to, say, an action in the 'public interest', so as to have a better idea, upfront, as to whether derogation from costs-shifting can, or is likely to, be exercised in its favour (via a public interest costs order, etc);

- ***Incorporation of one-way costs-shifting:*** BEUC may wish to seek the incorporation of a one-way costs-shifting rule in any collective actions regime introduced to Europe (albeit that the notion has received critical feedback, and is not a notable feature of collective actions regimes, elsewhere). If introduced, then reversion to full costs-shifting should be possible, if the litigation lacks merit or is otherwise vexatious or abusive;

- ***Incorporation of a no-costs rule:*** alternatively, BEUC may wish to seek the incorporation of a no-costs rule in any collective actions regime introduced to Europe – there is precedent in other costs-shifting regimes (e.g., British Columbia), and the rule has some cogent legal and policy support. However, if introduced, then reversion to full costs-shifting should be possible, if the litigation lacks merit or is otherwise vexatious or abusive. Given the strong adherence of European legal culture to costs-shifting, and given the recent reiteration of the importance of 'loser pays' by the European Commission in its Consultation Paper, *Towards a Coherent European Approach to Collective Redress*, the adoption of a no-costs rule may be thought to be unlikely;

- ***Ameliorating (softening) the effects of costs-shifting:*** assuming that a costs-shifting regime is applicable for the collective action of which a Consumer Organisation is representative claimant, and assuming that no derogation from costs-shifting is ordered by the relevant court, then there are a variety of potential costs mechanisms of which a Consumer Organisation may seek to avail itself. These mechanisms may either reduce the burden of the Consumer Organisation's own costs of litigation, or reduce the potential burden of an adverse costs award, should the Consumer Organisation lose (albeit that each of these mechanisms depends upon the legislative and/or judicial willingness to incorporate them within the costs jurisprudence of the collective action):

    - the allocation of costs on a lower scale than the ordinary scale of costs/fees;
    - the use of interim costs orders, which enable a Consumer Organisation which wins an interlocutory stage in the collective action (e.g., certification) to have the costs of that stage awarded in the Consumer Organisation's favour forthwith;
    - the legislative incorporation of a common-fund-type doctrine, which enables the costs, expenses and fees (including any fees payable to a third party funder) to constitute a first charge upon any damages or settlement sum recovered by the Consumer Organisation on behalf of the group members;

- the incorporation of costs-capping orders, which sets a ceiling or limit on the amount of costs which a winning party can recover from a losing party (albeit that it does not prevent the party subject to the cap from spending more than the cap in seeking to prosecute/defend the collective action) – nevertheless, if a defendant is subject to costs-capping, then that represents the most which a Consumer Organisation would be liable to pay that defendant, should the Consumer Organisation lose the collective action;
- the incorporation of a power vested in the court to award a solatium amount to a Consumer Organisation for the costs/time/effort expended in representing the group of consumers (albeit that, in other jurisdictions, these awards have been limited and have only been awarded in favour of an individual representative claimant, to the author's knowledge);
- vesting in the court the power to order that the costs of a particular step in the collective action should be paid for by the defendant to the proceedings (or by some third party), pending the outcome of the collective action;
- use of protective costs orders on an indemnity basis, where the conduct of the defendant warrants such an order, and where the costs of the Consumer Organisation were not unreasonably incurred nor of unreasonable amount;

❑ ***Funding options:*** in order to increase the utility and viability of suits by Consumer Organisations under a collective actions regime, the full panolpy of funding measures should be investigated and pursued, if relevant to the action at hand and if permissible in the Member State in which the action is being brought. The range of funding measures may include the following:

- third party funding;
- after the event (ATE) insurance;
- before the event (BTE) insurance;
- enforced personal contributions from group members;
- voluntary solicitations from group members;
- use of contingency fees (a range of types are possible) by which to transfer the costs burden of conducting the litigation to the Consumer Organisation's legal representatives;

- the implementation of a specialist collective actions fund;
- the implementation/use of a state generalist fund which is available, inter alia, for collective actions;
- the introduction/use of a state-sponsored 'consumer advocate' for collective consumer claims.

However, all funding mechanisms referred to in the list above, where utilised in collective actions regimes elsewhere, have involved strictures and governance upon their use. In reality, this has the capacity to serve as an extra 'check and balance' upon the unwarranted commencement of collective actions.

❑ ***Other costs/funding measures to avoid potential abuses:*** finally, certain other measures are likely to be warranted, in the interests of fairness and justice to the defendant to a collective actions suit:

- a power vested in the court to award security for costs against a Consumer Organisation (or other representative claimant) which lacks any visible means of financial wherewithal to conduct the collective action should be incorporated/preserved;
- the financial capacity of the Consumer Organisation (or other representative claimant) to both fund its own litigation and meet any adverse costs award which may be ordered against it may be relevant to the 'adequacy' of the representative claimant, when assessing whether the collective action should be certified;
- any fee agreements entered into by a Consumer Organisation (or other representative claimant) with any third party should be subject to the scrutiny and approval of the court at an early stage of the collective action, in order for the collective action to proceed.

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