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Herbert Woopen[2]

Third-Party Litigation Funding in Search of Competition (Part 1)

An unregulated business of systemic relevance requires productive rules that go beyond the European Law Institute's "Principles for Third-Party Funding of Litigation"[1]

Introduction

The transposition of the Representative Actions Directive, in short called RAD, has been completed now by 23 MSs, but 4 are still working on it. This has resulted in quite some variations: Only 5 MSs have adopted opt-out solutions, 1–2 more might still do so. While Spain is said to have just dropped that idea and Bulgaria appears to come up with a new draft proposal, this leaves us with 20 or 21 MSs with an adopted or expected opt-in solution. Not all opt-in solutions are equal, neither are opt-out solutions all the same. Different points in time and different properties appear within the various models.

These different approaches result in serious differences while the cross-border relevance of national court decisions and court-confirmed settlements in collective actions remains far from clearly defined and resolved.[3] This makes it impossible for defendants/potential defendants to assess what type of claim they may face and which breadth of the claimant's lawsuit.

Thus, such differences result in different attractiveness of national *fora* for claimants. This will result in intensive search of interested parties and intermediaries for the best *forum*, so-called "forum-shopping". It should go without saying that under the rule of law, circumstances affecting the *modus operandi* of law application and law enforcement are of systemic importance because they are the framework on which all economic activities in the jurisdictions concerned are based.

Against this backdrop, the role played by Third-Party Litigation Funding and Funders (TPLF) comes to the fore. Will funders be a driver of the choice of particular venues for litigation?

1. Differences of RAD Implementation Regarding TPLF

a) Caps

Leaving aside other differences in RAD-implementation, for the purposes of this paper, only the variations which regard to litigation funding are considered here. Within the **various national RAD transpositions** we see some caps on the share of the proceeds possible to be paid out to litigation funders within some MSs:

- **10 %** in **Germany**[4]
- **16 %** indirectly in **Czech Republic** for monetary claims[5]
- **20 %** indirectly in **Slovakia**[6]
- **30 %** in **Estonia**[7]
- **30 %** in **Poland**[8].
- A margin of discretion had first been envisaged in **Spain**[9], but according to more recent press reports a limitation was proposed by the Socialist Party of **30 %** and at the same time to **no more than double of the funder's outlay**,[10] before the topic of RAD transposition was on 04 Novem-

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1 European Law Institute, Principles Governing the Third Party Funding of Litigation – https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf.

3 Advocate General Bobek in ECLI:EU:C:2017:863 on C-498/16 no. 119–123 (the rules of Brussels Ia are not fit to cover all the questions raised by multi-party or multi-beneficiary actions for redress in a cross-border context).

4 Section 4 paragraph 2 number 3 VDuG (Verbraucherrechtedurchsetzungsgesetz of 8 Oktober 2023 (BGBl. 2023 I Nr. 272, S. 2), which has been changed by Art. 5 of the law dated 16 July 2024 (BGBl. 2024 I Nr. 240) – not yet available in English – https://www.gesetze-im-internet.de/vdug/BJNR1100B0023.html.

5 According to § 65 of the Czech transposition law (Act No. 179/2024 Coll. Mass Civil Procedure Act), the claimant can be paid a remuneration of up to 16 % of the amount awarded, i.e. in this case this share is taken out of the beneficiaries' compensation, be that paid to the claimant as a lump sum to be distributed by him to all beneficiaries, or be it out of each beneficiary's compensation if individual sums are awarded by the court to individual beneficiaries. Where it is not possible to deduce the "success fee" from the claims easily on a percentage basis, e.g. if the consumers want repair of the product or a new product instead of damages, the claimant can apply to the court – which will assess the proportionality of that proposal – that the defendant pay, on top of providing the requested compensation in kind to the beneficiaries, an amount of up to CZK 2,500,000 (close to 100,000 EUR) to the claimant. In that case, consumers obtain 100% of their compensation.

6 Section 13 paragraph 1 of Law 261/2023 Z. z. (Remuneration of the person entitled and reimbursement of costs), also potentially an indirect limitation on what the claimant can pay to a funder in order to assist the claimant in bringing the action; the amount is to be fixed by the court considering all the circumstances of the case. As it is not allowed, as a rule, the claimant can only in exceptional circumstances request legal fees in addition; it may well be that the claimant might also be a lawyer in these cases.

7 Section 4977 paragraph 3 of the Draft Act amending the Code of Civil Procedure and other Acts (creation of a collective representative action procedure) as of 14 July 2023.

8 Art. 46 f of the ACT of 16 February 2007 on competition and consumer protection – https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20070500331/U/D20070331Lj.pdf: QEs' tasks by entrepreneur(s), the QEs must conclude an agreement with the financing entrepreneur or group of entrepreneurs, in which their remuneration is determined. The remuneration is capped and cannot exceed 30 % of the amount of the adjudicated claim in favor of the consumers in representative collective action regarding the application of practices violating the general consumers interests; see also page 2 at https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-111_From%20collective%20harm%20to%20redress_Nov2024.pdf.

ber 2024 completely cut out of the huge general reform project of the law of civil procedure.[11] It was restarted on 14 March 2025 as before, discussions are ongoing.[12]

- And in **Slovenia** there is, besides a limitation for contingency fees charged by lawyers (max. 15 % share, 30 % if he or she assumes full liability for the cost of losing the case),[13] a limitation on the **maximum interest rate** for third-party funding by way of loans.[14]

b) Transparency

Furthermore, the requirements for **disclosure** within the RAD have been defined in very different ways:

- Mere disclosure of **any involvement of funders** (RAD – EU Directive Art. 10 paragraph 3 only asks for a list of "funding sources" which does not even specify that it is necessary to mention the name of a funder);
- An example of going a little further comes in certain MSs, where the **funder'(s') name(s)** are required to be disclosed: Romania (RO – Art. 10 para 5), Slovenia (SI – Art. 59) and again also the latest draft in Spain (ES – Art. 844 para 1 lit. f.);
- Going even further, in Czechia, the **names of beneficial owners behind the legal person(s) providing the funds** must be disclosed, thus getting closer to what an Anti-Money-Laundering-type requirement might ask for;
- A requirement **to disclose the money's real sources** i.e. the legal persons and natural persons behind these legal persons, **from which the money has actually been made available to the funder** to be invested by him or her. This is actually the only way of getting to know whether **economic business interests behind the funder compete with those of the defendant**. Without this transparency, it is impossible to verify whether there is, for example, a primary business interest of combatting a competitor. Furthermore, concerns around money laundering would be allayed by such a regulation. Lack of regulation of funders on the topic of money laundering is surely a major lacuna in the current regime. Strangely enough, when reading sentences 3 and 4 of Recital 52 para 1 RAD[15], one would expect national transpositions of RAD to require disclosure of the ultimate sources of the funds but as this abridged overview already shows, it simply has not happened. This deficit is all the more astonishing as it is quite obvious that the more information on the status of the litigation flows to the funder, the more opportunities arise for him or her to coordinate with "investors" behind the funder's money, and the more the temptation grows to intervene into the further conduct of the litigation. Instead of informing a funder in detail, who should be contained in a mere one-off investment decision, a consumer board should be and is often established which should happen under the supervision of ideally a single European knowledgeable authority supervising market activities (see Part 2 section 2.). This would ensure that the claimant truly follows consumer interests and not the interests of some possibly hidden party sitting disguised in the funder's clothes in the court room.
- Disclosure of the **funding contract's contents** is required in Germany (DE – section 4 para 3 VDuG), Portugal (PT – Art. 10 of DL 114-A of 05 December 2023), Austria (AT – section 6 para 4), and in the latest known draft from Bulgaria (BG – Art. 6.4 and 8.1), meanwhile withdrawn. Only knowledge of those contents can enable a court to understand the economic interest of the funder and the pressure he or she may be interested to exercise on the claimant as a consequence of that interest.
- Finally, there are differences between whether disclosure of the **funding contract is required in full or whether it is already sufficient in a redacted version** removing parts considered by funder and/or claimant to be a danger for the claimant's strategy if known by the defendant.[16]

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9 In this respect, Art. 850 (1), (2) and (5) and Art. 846 No. 2 grant the court itself a margin of discretion to assess the "appropriateness" of the financing conditions and their authorization, but do not define objective quantitative standards for this. Article 865. Judicial approval of the compensation agreement no. 2: "where appropriate, the amount of the sums to be paid to the third party who has financed the proceedings or …".

10 "El partido socialista propone limitar la remuneración que los fondos de financiación pueden obtener de estos procedimientos y pide que la cantidad a cobrar por el fondo no pueda superar el 30 % de la cuantía reconocida en sentencia o el 200 % de la financiación aportada por la entidad financiadora, según se desprende de la enmienda consultada por El Confidencial. Estos porcentajes se alejan de lo que suelen exigir los fondos para intervenir en demandas colectivas." (Article from El Confidencial, Una enmienda a la ley de acciones colectivas pone en jaque a los fondos de litigación, Por Álvaro Zarzalejos, https://www.elconfidencial.com/juridico/2024-08-14/enmienda-ley-acciones-colectivas-fondos-litigacion_3942420/).

11 https://observatoireactionsdegroupe.com/2024/12/the-spanish-path-to-a-new-collective-actions-regime-the-draft-law-proposed-amendments-and-the-late-suppression-of-collective-actions-legal-framework-from-the-draft-law / with link to the recording of the session of the Spanish Parliament on 04 November 2024.

12 https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-48-1.PDF.

13 For lawyers' contingency fees Art. 61 paragraph 1 states: "The lawyer may also agree with the claimant to receive as a fee a maximum of 15 % of the amount awarded by the court. If, at the same time, he or she undertakes to bear the entire costs of the proceedings in the event of his or her failure, the agreed fee may be increased up to a maximum of 30 % of the amount awarded by the court."

14 Art. 59 paragraph 3 prohibits to "charge interest on the funds provided at a rate above the statutory rate." These rates are defined as follows, according to https://www.kvestor.eu/item/215-statutory-interest-si: "Statutory interest rate in Slovenia: In the absence of different agreement, creditors are entitled to demand delay interest on top of the principal amount. Since July 2016, the statutory interest rate in Slovenia is 8 %. From 1 January 2007, the interest rate for late payment is equal to the **leading interest rate, increased by 8 percentage points** and is valid for a six-month period starting on 1 January and 1 July. The Minister of Finance shall publish the level in the Official Gazette of the Republic of Slovenia."

15 "The **information provided** by the qualified entity to the court or administrative authority **should enable the court or administrative authority to assess** whether the third party could unduly influence the procedural decisions of the qualified entity in the context of the representative action, including decisions on settlement, in a manner that would be detrimental to the collective interests of the consumers concerned, and to assess whether the third party is **providing funding** for a representative action for redress measures **against a defendant who is a competitor of that third-party funding provider or against a defendant on whom the third party funding provider is dependant**. The direct funding of a specific representative action by a trader operating in the **same market** as the defendant **should be considered to imply a conflict of interest**, since the competitor could have an economic interest in the outcome of the representative action which would not be the same as the consumers' interest."

16 See Herbert Woopen, Umsetzung der Verbandsklagenrichtlinie in Österreich, Zeitschrift für Versicherungsrecht (ZVers) 2023, 141 (145).

Member States also differ on the question of *who* should receive such disclosure of the contract:

- The best solution has been found in Austria where **disclosure** of the funding contract does **not** go **to the court, but only to the Federal Cartel Prosecutor**, an independent authority also admitting and supervising the qualifications of the Qualified Entities as claimants. The defendant thus does not have access to the information in the contract!
- In Germany, however, the defendant will have access as the contract goes "**to the court**", and as there is no special provision to bar the defendant from access to the court file, the defendant will also have access to that information under the general rules of German civil procedure.
- Also, in Portugal, the funding contract needs to be disclosed in full to the court but it is not clear whether the defendant has access to the contract's contents; some countries admit *"ex parte"* hearings and selected access to the contents of court files.

c) *Ad-hoc* claimants

It is notable that, in some Member States funders or other interested parties are allowed to create new, *ad hoc* claimant vehicles (Malta – MT, Romania – RO, Hungary – HU, the Netherlands – NL and Portugal – PT). In most Member States, this is rightly not allowed because this undermines the precautions against abuse which the RAD intended regarding serious checks on a continuous work of the claimant body in favour of consumer interests.

2. Regulation of TPLF within RAD Falls Short: the Case for Comprehensive Rules

The drawback of all kinds of regulation based on the RAD transposition, however, is from our perspective, that there are easy ways of circumventing the safeguards by which RAD had intended to ensure a balance of power between the parties to the conflict. It is clear that a collective procedure based on the RAD is not being used if and whenever there are other mechanisms available for collective actions in the same country which are economically more interesting for funders.

A plaintiff law firm in Germany clearly expressed this very early, following the entering in force of the RAD and before its transposition into German law, by openly writing that the German Declaratory Model Action of 2016 could not be a suitable tool for procedures in favour of SMEs based on the continuing legal situation (sec. 606 paragraph 1 ZPO). The government, however, discussed at that time already to include SMEs as beneficiaries of representative actions in the transposition law who indeed were included in the law as finally adopted if having fewer than 10 employees and a turnover or total assets of less than 2 m EUR. In addition, that lawyer argued that where the cost of the procedure can easily equal or exceed the actual amount of the claim, also SMEs would – given rational disinterest – pursue such cases (e.g. cartel damages) only with private funders; and as far as consumers are concerned, the resources of the "few consumer associations able to handle them" were too limited to cover all cases in need of being treated, so they were likely to also offer potential for the application of TPLF.[17]

In a very topical ruling, the Grand Chamber of the ECJ decided that national law must offer, in a cartel damage context, a stand-alone procedure in court (and not only follow-on after a decision of a cartel office) to obtain compensation collectively, irrespective of national regulation of debt collection services. That preliminary ruling was requested from the ECJ because some of the German lower courts interpreted the German Law on Legal Services (Rechtsdienstleistungsgesetz – RDG) to the effect that the group action for collection is not accepted in the field of compensation for harm caused by an alleged infringement of competition law, in particular where it concerns a 'stand-alone' action. The background were claims against the state for compensation rights assigned by 32 sawmills following an infringement of Article 101 TFEU allegedly committed by the Land of North-Rhine Westphalia and other owners of woodland.[18]

Accordingly, we are convinced that the approach taken by the VOSS report of 2022 with recommendations from the EP for a Directive on the "Responsible third-party funding of civil litigation"[19] goes into the right direction to tackle the issue of potential abuse of litigation funding as a cross-sectional issue as an umbrella regulation over all collective actions in court.

Before briefly looking through the 9 detailed proposals by the EP for regulating TPLF, above all the need must be stressed again to have consistent regulation for TPLF across all mass claims measures and not only for RAD claims in order to prevent circumvention.

Now, looking at these 9 identified points for regulation proposed by the EP it becomes quickly obvious where they go beyond the contents of the RAD's limited ambition to get to grips with the obvious challenges:

17 Alex Petrasincu and Christopher Unseld, Hausfeld Germany, Das Sammelklage-Inkasso im Lichte der BGH-Rechtsprechung und der RDG-Reform, Neue Juristische Wochenschrift (NJW) 2022, 1200 (1201) (published on 21 April 2022 – the German RAD transposition law Verbraucherrechtedurchsetzungsgesetz entered in force on 13 October 2023).

18 ECJ Grand Chamber of 28 January 2025 – C-253/23, ECLI:EU:C:2025:40 – https://curia.europa.eu/juris/document/document.jsf?docid=294715&doclang=EN.

19 Motion for a European Parliament Resolution with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) – https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html.

a) Different from RAD, the EP requests a **financial and legal services licence**.[20]
b) Different from RAD, the EP requests **adequate capital** for the funder.[21]
c) Different from RAD, the EP desires **funders to have fiduciary duties** like lawyers.[22]
d) Different from RAD, the EP considers that, as the purpose of collective action is to **pay consumers as beneficiaries, they should be paid first, and not the funder(s)**.[23]
e) More clearly than RAD, the EP expects **full disclosure of the unredacted funding agreement to the court**.[24]
f) Different from RAD, the EP wants to **exclude conflicts of interest** between funders and the claimant's lawyers or other players involved and therefore requests **disclosure** to the claimant and the intended beneficiaries **of relationships of funders with other players involved**;[25] the EP is **not** satisfied with

   aa) only asking – as RAD does – for procedures to be in place against conflicts of interest, and with
   bb) only requesting – as RAD does – the avoidance of conflicts resulting from a funder acting in the interest of a competitor of the defendant, and with
   cc) only excluding a funder acting in his own commercial interest while he or she depends on the defendant and therefore has an interest of his or her own to weaken the defendant beyond the funder's mere interest to make a profit on the investment in the lawsuit.
g) The EP wants to **exclude any form of funder control** on the court procedure or settlement[26] – while RAD only forbids that the funder take "*undue* influence" on decisions about settlement or other decisions of the claimant in the court procedure.
h) The EP proposes that the **claimant always receive at least 60 % of the total award** and thus that lawyers, experts, court and funders combined never receive more than 40 % of the sum on which the parties settle or which the court orders the defendant to pay. This is subject to a vague exception ("absent exceptional circumstances").[27]
i) And finally, the EP considers it appropriate that a funder who is instrumental in bringing an action should be **liable for any appropriate adverse cost** in case the claimant loses the case and has insufficient resources to meet adverse costs. As the claimant (likely) did not have enough money to start the procedure in the first place, it would be irresponsible towards the defendant and the court system to leave the claimant alone with the duty to reimburse a successful defendant. The EP rightly requests that it must be possible to declare the funder liable for such adverse cost orders **jointly and severally with the claimant and without any cap**.[28]

There would be obvious merit in ensuring a level playing field in the EU on such issues and these will certainly also be subject of the future review of RAD itself, possibly only starting *after* 26 June 2028,[29] even though this topic of funding, of course, goes far beyond the reach of RAD. Yet, the Commission had shown a keen interest in promoting the model of the representative action as opposed to the US class action model. So, while it had to refrain from imposing this model for all purposes in the EU due to a lack of such far-reaching legislative competence in matters of civil procedure,[30] a very effective contribution towards assimilating national collective procedures could be to ensure that RAD is the most attractive and meaningful option that such claimants would choose to take who truly represent the interest of consumers as beneficiaries. A well-considered and sophisticated regulation of TPLF across all mass claim measures certainly has high potential to achieve exactly this.

However, regulation of TPLF is being opposed not only by funders themselves, for obvious reasons of self-interest, but

20 Art. 4.2. Occasionally funders try to create the impression they are already regulated and supervised financial services providers but this is a misleading proposition. Correctly presented by Marcel Wegmüller, Isabelle Berger and Franziska Studer, Chapter Switzerland in: "Litigation Funding 2021", www.lexology.gtdt – p. 84 section 3 – a book issued by the Litigation Funder Woodsford: "… cannot be regarded as insurance offering" … "the core offering of a funder does not, in general, fall under the Swiss financial market laws (eg, Banking and Insurance Acts, the Anti-Money Laundering Act and the Collective Investment Scheme Act). However, depending on the funding structure, funders might qualify as asset managers of collective investment schemes and must be authorised by the Swiss Financial Market Supervisory Authority (FINMA)." This is the case for the Swiss funder Nivalion. The same applies for the UK: The CJC Consultation Paper explains at 3.18: "Some funders are also regulated by the Financial Conduct Authority (FCA) given the manner in which they manage their investors funds. Regulation by the FCA is not, however, necessary for a funder to provide TPF, and nor does it regulate TPF itself." Referring to R. Mulheron 2024 at 51, noting that Balance Legal Capital, Burford Capital, and Harbour Litigation Funding are regulated by the FCA in respect of other aspects of their businesses.

21 Artt. 6 and 5.1 d. The CJC consultation paper stresses at 3.14 the need to ensure financial solidity both of funder and insurer, but it is hard to see how a funded party's legal representative should be well positioned to take steps to ensure that the funder, and any relevant insurer, has sufficient capital to satisfy any claims or fund the costs of the funded claim! This can only effectively be done by a public supervisor, thus a strong point in favor of regulation.

22 Art. 7.

23 Artt. 12.d, 14.3 and more generally already 7.2 sentence 3.

24 Art. 16.1 (court to inform defendant only about the existence of a funding agreement and of the identity of the funder).

25 Art. 13.2.

26 Art. 14.2(a) and (b).

27 Art. 14.4 and 12(d). Total award defined as "including all damages amounts, costs, fees and other expenses".

28 Art. 18 and 14.5, i.e. in particular no application of the UK "Arkin cap".

29 Art. 23.1 RAD: "No sooner than … shall carry out an evaluation and present a report …"; it might seriously accelerate the effectiveness of collective redress in the Union that the Commission is obliged by Art. 23.3 to carry out by June 2028 an evaluation of whether cross-border representative actions could be best addressed at Union level by establishing a European ombudsman for representative actions for injunctive measures and redress measures, and shall present a report on its main findings to the European Parliament, the Council and the European Economic and Social Committee, accompanied, if appropriate, by a legislative proposal.

30 See Herbert Woopen, Kollektiver Rechtsschutz – Chancen der Umsetzung, Die europäische Verbandsklage auf dem Weg ins deutsche Recht, Juristenzeitung 2021, 601 (602 with fn.13): They did not dare to base it on Art. 81 TFEU but merely on an "annex competence" to the competence for assimilation of substantive consumer law of Art. 114 and 169 TFEU, see Opinion of the Legal Service of the Council 11326/19 of 17 July 2019 (Limite); a note from the Legal Service of the Parliament dated 7 November 2018, which is only one page long and available to the author, justifies Article 114 TFEU as the basis, because the Injunctions Directive 98/27/EC was also based on this and Parliament's resolution 2011/2098(INI) had called on the Commission to reinforce existing instruments like that directive and Regulation 2006/2004 on consumer protection cooperation and make them more effective.

also by the European Law Institute in its recent paper "Principles for the regulation of Third-Party Funding of Litigation"[31]. These principles provide an excellent review of the current state of play, when trying to shed light on a quite opaque business which does not like to share their contracts with a larger public nor even with the legal community. The ELI Principles will be extremely helpful for claimants when negotiating with funders on terms and conditions of funding contracts.

But why did they not go so far as to suggest regulation regarding the elements they deem necessary in each and every third-party funding contract[32]? The decisive reason for rejecting the possibility of drafting meaningful "prescriptive regulation" at all seems to be the perception that it appeared impossible to define a cap for an adequate funders' share in the award. ELI nevertheless did not fully exclude the possibility of meaningful regulation and showed openness to thinking further when it alluded several times to the UK regulations for Damages-Based Agreements and Conditional Fee Arrangements as sources to model TPLF regulation.[33]

So the key reason for ELI's reluctance remained the issue of finding scales for measuring the adequacy of funders' returns in view of different risk/reward profiles of different claims[34]. This is, at first sight, understandable but falls too short and does not consider simple solutions which are being applied in other areas. What brought us to identify a road towards a good solution to this intricate problem are some observations from a recent survey carried out in the UK:

3. Need for a Closer Look at the Proclaimed Third-Party Litigation Funding "Market"

The Class Representatives Network (CRN) Survey[35] of September 2024 highlighted that

- In 97 % of the cases only one funding contract had been presented
- In 90 % of the cases no enquiry for alternatives had taken place
- And that in 80 % the solicitor advised that this offer was suitable and no further enquiry needed
- That in 75 % of the cases there was no funding expertise on the claimant's side and in 67 % no external advice taken to re-negotiate.

The concern is, of course, that claimants, particularly inexperienced funded parties are presented a *fait accompli* when funding may be available on better terms.

The UK Competition Appeal Tribunal has very recently, in a judgment of 14 January 2025, expressed concern about the role of the "Proposed Class Representatives" (PCRs) particularly where funding had been lined up before a PCR was appointed, and so had no involvement in the choice and appointment of a funder:[36]

„115 … A class representative is not, and cannot be, ***merely a figurehead*** for a set of ***proceedings being conducted by their legal representatives***, but must act as the independent advocate for the class. Someone who chooses to act as a class representative therefore carries a heavy responsibility to ensure that the proceedings are conducted, in all respects, ***in the best interests of the class. The Tribunal will accordingly hold them to a high standard***.

116. As we have noted at paragraph 5 above, this is a case where the PCR became involved at a relatively late stage, *after the solicitors had identified a funder* ***for the proceedings that were contemplated***. The Tribunal understands that *this is a quite common feature of the way in which collective proceedings are conducted*. The Tribunal does not criticise this, but the case does underline ***the importance of the process by which those promoting the proceedings identify and recruit the PCR***."

These are observations diametrically contrary to ELI's perception that there is no market failure[37], but proof to the contrary, i.e. that there is a major structural issue. Furthermore, we *do* see – differently from ELI[38] – an identifiable problem which should certainly be recognizable when lawsuits turn into investments for a small group of oligopolistic structures at the expense of societal good[39]; or, an even clearer wording for the problem from the same US insurance industry perspective is that TPLF can "siphon value from the claims and risk management ecosystem – away from policyholders, claimants, and insurers – and transfers it to attorneys and investors".[40]

The usual solution to a lack of competition is a tender procedure, ideally under the supervision of a person with particular knowledge of the decisive properties of the market and about the offers' relevant features. But this is unlikely to happen all by itself in the current limited universe of close cooperation between various players which goes up to "portfolio investing" and lending to law firms for their general business purposes. While the UK Competition Appeal Tribunal has shied away from developing a way forward towards a general rule[41] (*"… and we are certainly not suggesting the straitjacket of a 'continual procurement exercise' (contrary to the suggestion of Mr de la Mare*

31 See fn. 1.
32 As the EP Draft Directive does in Art. 12.
33 See fn. 1, page 85.
34 Ibid., p. 12, 27/28 and 51.
35 Rhea Gupta, Legal and Policy Officer of the Class Representatives Network: Selecting Litigation Funders and Negotiating Funding Agreements, September 2024 – https://classrepresentativesnetwork.org/research-and-reports/.
36 Sections 115 and 116 in the judgment [2025] CAT 5 of the Competition Appeal Tribunal of 14 January 2025 in Case No. 1602/7/7/23 (Christine Riefa Class Representative Limited v. Apple and Amazon) – https://www.catribunal.org.uk/sites/cat/files/2025-01/20250114%201602%20%20Riefa%20v%20Apple%20and%20Amazon%20Judgment%20%28CPO%20application%29%20%282024%20CAT%205%29.pdf.
37 See above fn. 1, pp. 12, 27 and 65 twice.
38 See ibid., pp. 12 and 27.
39 See ibid. on p. 21 the quote of 2022 from Sean Kevelighan, CEO of Triple-I (Insurance Information Institute (Triple-I), 'What is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?' (July 2022), page 3 – https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf.
40 Ibid. page 2.
41 Section 117 of the judgement quoted above (fn. 32).

at the September hearing)"), obviously some incentive is required to kick-start true competition which alone can be used to define a suitable risk-reward-ratio from an *ex-ante* perspective.

The hope set out in the ELI report[42] and enshrined in its Principle 8(5) – that funders will verbalise *"the specific pricing factors relevant to each case, both for the Funded Party to understand, and to enable any court review to be an informed one"* is an unfounded, vain hope. No court can come to a clear conclusion with hindsight on adequate risk-pricing – such appraisal needs to be done beforehand by people putting their money on their decisions, and the only way of doing this is via competition – while the choice between various price offers which have been made from an *ex-ante* perspective will still require a good understanding of the market to the extent that not only a mere price indication but also other terms and conditions of an offer are decisive to find the best price-quality relationship as a solution to the problem.

4. Developing the way forward

The means of getting funders to truly compete for the funding of cases should be an "**adaptable limit**" for funding returns to be applied in any case – in those for which funders may scramble as well as in those where interest may be modest. In the latter cases further ideas will be proposed further down in this piece.

a) In the most straightforward solution already implemented in a few laws transposing RAD that we saw above, such cap could be and has been defined as a **percentage of the total proceeds** at the end of the procedure, i.e. the amount awarded by the court or agreed on by settlement. This could be, e.g., as a starting point a 10 % maximum rule as it exists in Germany for collective actions under the RAD, with several decisive modifications in order to soften it and make it instrumental for a procedure of fair pricing:

- The cap would need to apply across all procedures for collective redress;
- It should apply across all Member States of the Union;
- Its primary purpose would be to increase competition among funders across the Union with the objective of having a fair pricing defined by persons able and willing to truly take on the financial risk involved;
- This may require, as a rule to start from, obtaining 3 to 5 funding offers from different funders of which the economically most viable one would be used to define the new, binding cap limiting the compensation that the chosen funder can claim and not exceed at the end of the procedure.

This raises the question as to who should make that decision on which of the offers is the most viable, but we put this question on hold for now (see Part 2 section 3.) for the following reasoning about further aspects in need of consideration:

b) To the author's knowledge, funding practice has always included – on top of the reimbursement of the funder's outlay – not only a percentage of the proceeds of the action, but **alternatively a multiple of the funder's outlay** (e.g. 2 times), **whichever is the greater** ("the greater of X % of the proceeds or Y times funder's outlay"). This could raise the question whether a separate cap ought to be defined with respect to the formula about a multiple of the funder's outlay.

This definition of a separate cap is exactly what has happened in the Netherlands in the fairly recent TikTok judgment: the District Court of Amsterdam held that in determining a reasonable compensation when approving a settlement agreement (Art. 1018 h para 1 Dutch CCP) or a proposal for collective redress (Art. 1018 i CCP), it intends to apply five times what a litigation funder invested as a maximum[43]. This has already triggered the concern that the "5-times" upper limit will become the new standard provision for funding in the Netherlands.

In the UK, the standard for funding contracts has been influenced heavily by the relatively new *Paccar* decision making funders focus on contracts with pricing formulas based on multiples instead of percentages because calculating funder commission as a percentage of recovered damages was qualified by the Supreme UK Court as a Damages-Based Agreement (DBA) under s.58AA of the Courts and Legal Services Act 1990 and therefore subject to the Damages-Based Agreements Regulations 2013.[44] Many older funding contracts were revised therefore to calculate funder commissions based on multiples of monies advanced, rather than a percentage of damages, which were subsequently approved by the Competition Appeal Tribunal (CAT).[45]

c) The disadvantage of the two approaches mentioned before – percentage of total proceeds and multiple of funder's outlay – is that they are **oblivious of the time** passed since the "investment" or commitment has been made. Staff of the funder Nivalion AG in Switzerland emphasise this in the following words:[46]

"The [Swiss] Federal Supreme Court did not explicitly state a limit, but has indirectly approved the common practice in Switzerland with success fees ranging from 20 to 40 per cent of the net revenue of the proceeds. In its legal analysis, the court cited a source who described a success fee of 50 per cent as 'offending against good

42 See fn. 1, p. 50–51.

43 See e.g. https://www.fieldfisher.com/en/insights/a-maximum-fee-for-litigation-funders-in-class-actions.

44 See i.a. the CJC Interim Report and Consultation of 31 October 2024 from 1.1 to 1.12 – https://www.judiciary.uk/civil-justice-council-publishes-interim-report-and-consultation-on-litigation-funding/.

45 Vicki Waye, Nikki Chamberlain, Vince Morabito, How to Address the Regulation of Third-Party Litigation Funding of Class Actions?, Vol. 141 Law Quarterly Review (January 2025), p. 131–132 – Abstract at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5083425 – Full paper at https://papers.ssrn.com/sol3/Delivery.cfm/5083425.pdf?abstractid=5083425&mirid=1.

46 Marcel Wegmüller, Isabelle Berger and Franziska Studer, Chapter Switzerland in: "Litigation Funding 2021", www.lexology.gtdt – p. 84 section 2 – a book issued by the Litigation Funder Woodsford.

morals and thus illegal', however, without confirming or even commenting on this opinion (BGE 131 I 223 c. 4.6.6.).

In practice, the funder's share is usually dependent on the amount of proceeds recovered by the claimant and on the timeline within which the dispute can be resolved. Typically, the third-party funder's share is lower, the sooner a case can be settled. In recent times, the pricing of third-party litigation funders in Switzerland has become increasingly sophisticated so that the pricing structure may vary depending on the specific characteristics of the case. Frequently, a third-part funder's success fee is based on a time-dependent multiple of the amount invested or committed by the funder."

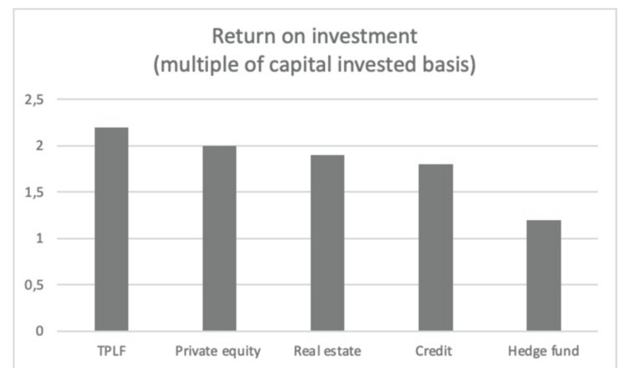
The factor time indeed induces different economic incentives for the parties involved: lawyers will not have a natural interest in coming quickly to a resolution if they are paid by the hour and therefore will wish to exhaust the budget available. They have, however, the opposite economic interest if they are paid a flat fee for handling the case (possibly within a pre-defined and certain time period or stage) – so they will in that case prefer to resolve the case in time or even earlier than foreseen, to pocket their fees and free up time for taking on the next new case.

Thus, **money per time** is the scale on which investments into funding compete with other investments. So far, litigation funding has appeared to be more lucrative an investment than private equity or hedge funds. Funders looking for profitable business, so acting as "investment managers", do however internally calculate their profit expectations rightly including the time dimension, i.e. for how long the money will be tied up and which percentage of return is achieved in the end. The scale applied is usually the **IRR – Internal Rate of Return**. The funding agreement in the most recent CAT case asked at one stage for an "IRR of 45 % on the drawn funds at the time of the successful outcome" which a defendant (rightly) considered as "manifestly excessive and disproportionate"[47] while the alternative formula applied later of up to 5.75 times of the drawn funds on top of their reimbursement was perceived as being even worse.[48]

In order to make this easily understandable: The rule of thumb for the IRR is that, for "double your money" scenarios, you take 100 %, divide by the number of years, and then estimate the IRR as about 75–80 % of that value. For example, if you double your money in 3 years, 100 % / 3 = 33 %. 75 % of 33 % is about 25 %, which is the approximate IRR in this case. And doubling the money is equivalent with a fee as a "multiple" of merely **1.0 *on top of the reimbursement*** of the outlay (= investment).

The multiples have been reported by Bloomberg to be the highest for the "asset class" of litigation funding with 2.2, thus outperforming other high risk asset classes and providing investors with very large multiples[49], higher than those observed in private equity (2.0), real estate (1.9), traditional credit (1.8) and hedge funds (1.2):

Global returns estimates in TPLF investment



These observations of multiples above do not, however, offer clear statements about the time horizon within which they are obtained (on average), so no clear IRRs can be identified which is the scale which the funders use internally to weigh their chances.

Nevertheless, for the sake of understanding the regulatory challenge better, one might consider prescribing a maximum IRR acceptable for funding offered. The German definition, e.g., of extortionate, immoral and therefore legally void contracting has been defined as a rule of thumb under a general clause of German private law (Section 138 (1) of the German Civil Code – Bürgerliches Gesetzbuch – BGB) – to pick a legal order familiar to the author – as "anything which is more than 100 % above the market price and uses the opportunity that the partner of the contract is in a difficult situation".[50] To go into more detail: The element of immorality, closely related to the legal principle of good faith, is an uncertain legal concept, the substantive content of which is difficult to determine in a pluralistic society. In its interpretation, case law, following a formula adopted by the German Federal Court of Justice in the 1950 s, is based on whether the transaction in question violates 'the sense of decency of all those who think fairly and justly' ("verletzt das Anstandsgefühl aller billig und gerecht Denkenden"). If and to the extent that the sense of decency of all those who think fairly and justly is actually used for interpretation, it depends on the average of the recognised standards within the affected group, which is why particularly strict as well as particularly liberal views of individuals are disregarded.

From the current case law, a typical proposition is as follows: 'According to § 138 para. 1 BGB, a legal transaction is void

47 CAT Case No. 1602/7/7/23 at 108 and 43 (Christine Riefa Class Representative Limited v. Apple and Amazon).
48 Ibid. at 50.
49 EPRS | European Parliamentary Research Service, STUDY Responsible Private Funding of Litigation – European Added Value Assessment, Authors: Jérôme Saulnier, Klaus Müller with Ivona Koronthalyova, European Added Value Unit – PE 662.612 – March 2021 – pages 6–7 –https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf.
50 See e.g. Neuberger, Verbraucherkreditzinsen und gesetzliche Wuchergrenze in der Niedrigzinsphase, Verbraucher und Recht (VuR) 2021, 403.

if, according to its overall character, which can be inferred from the summary of content, purpose and motivation, it is not compatible with the fundamental values of the legal and moral order (...). This is to be judged on the basis of a comprehensive overall assessment, taking into account **all the relevant circumstances at the time of the conclusion of the contract** (...). From a subjective point of view, it is sufficient if the person involved is aware of the facts from which the immorality arises or if he consciously ignores or withdraws from the knowledge. However, an awareness of the immorality and an intention to cause damage are not required (...)."[51]

Having achieved now a clearer picture of the points to which regulation could attach in order to define a cap of funder's remuneration, this shows that it is extremely difficult to define such cap in particular with respect to the effect of time on the profitability / IRR. Funders, (currently able to be) secretive in their communication and not very forthcoming when it comes to economically relevant data as they are,[52] will not easily share their expected IRRs in a funding proposal for comparison's sake when submitting offers to the claiming bodies. What is more, beyond the expectation at the start, cases do not always develop exactly as expected and the natural incentive created by IRR considerations and looking at multiples is to push claimants to settle early – because this increases the amount of money gained per time, thus increasing the IRR. On the other hand, a protracted action will lead to the IRR sinking into regions where a funder may consider the claim "no longer economically viable" as their usual clauses describe the situation where they would like to have a right to stop funding the case and quit. Summing up, there is no "average market IRR" recognizable based on which a 100 % surplus could be declared usurious and therefore void (applying the German usury provision).[53] So, what can a regulator do to get to grips with the problem nevertheless?

Summary

The business of Third-Party Litigation Funding has raised quite some attention over the past three years. Following a resolution by the European Parliament asking the Commission to create a regulatory framework for this financial business, the Commission confirmed to take the issue up and commissioned a "mapping study" on the status of Third-Party funding in the European Union.[54] The new Commissioner for Justice, Michael McGrath, even validated during his confirmation hearing the importance of this subject and his willingness to act upon it. The first part of this article explores to which extent the provisions comprised in the EU Representative Actions Directive and its national transpositions are, or are not, a sufficient basis for a balanced approach to the subject. It furthermore takes up the concerns pointed out by the European Law Institute with respect to suitable regulation. The potential definition of caps for funders' returns is considered from various angles.

The second part of this article in the next edition proposes a surprisingly uncomplicated practical solution as well as options to choose from for implementating it in the Union's legal order. Looking for further avenues to solving mass claims, it offers further perspectives on applying the idea of competition usefully. It finally suggests to reflect on solving the challenges in a genuinely "European way". A model for that can surprisingly be found across the Atlantic.

Herbert Woopen

51 German Federal Supreme Court for Labor Law BAG Judgement dated 21 April 2016 – 8 AZR 474/14 – ECLI:DE:BAG:2016:210416.U.8AZR474.14.0 – https://www.bundesarbeitsgericht.de/entscheidung/8-azr-474-14/ at 31.

52 See at 54 of CAT Case No. 1602/7/7/23 (Christine Riefa Class Representative Limited v. Apple and Amazon).

53 In the US State of Montana funder's return was capped at 15 % per annum (so at an IRR of 15 %) or 25 % of any damages awarded or settlement, whichever is lower, purportedly leading to funders ceasing to offer funding in that US state. Main reason might be that 15 % indeed is too low an IRR for an investment with a high risk of total loss with at the same time (rightly so) existing joint liability of funders for adverse litigation costs in Montana. Also Indiana and West Virginia are the rare jurisdictions to make reference to duration and interest. See for both US States the CJC Report at 5.30 and 5.31.

54 The "Mapping Study" was published when this article was already in print and could not be considered in this article – https://commission.europa.eu/document/65adb710-1a36-4550-a4c6-a606adbff061_en.

Herbert Woopen*

Third-Party Litigation Funding in Search of Competition (Part 2)

The first part of this article closed with the consideration of various potential approaches towards defining a cap for funders' shares in the litigation's proceeds. It turned out that the Internal Rate of Return (IRR) practically used by funders internally does not offer a suitable anchor for regulation

- because the duration of the procedure is not known at its outset,
- because there is no average market IRR which could be taken as a basis to determine excessive return expectations (e.g. more than double of the average market price as Germany's section 138 Civil Code is interpreted),
- and not least because funders will be unwilling to share their internal rate of return calculations for the offered funding contracts for review and comparison of various offers.

This raises the question on how this issue might nevertheless be solved.

I. Change of Paradigm: An "Adaptable Floor" for Pay-out

Given the difficulty of defining a cap for funders' share or returns, a reversal of the perspective on funders' benefit and beneficiaries' share provides a simple solution: If the good in need of protection is the beneficiaries' share in the outcome, and if the underlying consideration of such regulation is to avoid a violation of the 'sense of decency of all those who think fairly and justly' to prevent that content, purpose and motivation of the proposed funding contract are not compatible with the fundamental values of the legal and moral order (see Part 1, p. 118 f.), then the decisive issue is to ensure that the beneficiaries get an economically sufficient part of the money which the defendant is being forced to pay. The beneficiaries' share in the proceeds needs to be defended against exceeding demands. Profits for a funder which would have to be paid at the expense of the beneficiaries, and which would be higher than that ceiling allows for, would be considered unfair.

A good starting point could be the order of magnitude currently enshrined in German law[1] which is also proposed by the Spanish consumer protection association OCU for the expected implementation of RAD in Spain.[2] So when reversing the perspective, that starting point would be a 90 % minimum pay-out to the beneficiaries which would correspond to a maximum 10 % share of the funder in the award – under the assumption of a full loser-pays rule which covers the cost reimbursement to the successful party. The direction of the "waterfall" is important: the beneficiaries need to be paid *first*, and only after them the intermediaries – lawyers, experts, funder – share in the combined sum of the cost reimbursement and the rest of the damages/proceeds (this would have to include the reimbursement of the costs of the court that the claimant lawyers might, as a rule, have laid out in advance). The traditional notion in banking business for such definition of a minimum would be a "Floor", here to be defined for the pay-out to the beneficiaries. So the default pay-out floor to be enshrined in legislation as a starting point is here suggested to be set at 90 % for the beneficiaries.

In other words, the correct approach to regulation should be that the funder's share in the proceeds of a judgment or settlement should be capped as is required to ensure beneficiaries receive their minimum share in full. This means deducting *first* the share earmarked for the *beneficiaries* from the total award and *only afterwards* such part of the *costs of the litigation which have not been covered by the cost reimbursement* paid by the defendant *on top of the beneficiaries' compensation*. Therefore, **a minimum payout to the beneficiaries needs to be defined**, and fortunately enough, this is exactly the approach the European Parliament already had in mind in its proposal of a regulation with a minimum share of 60 % for the beneficiaries out of the total award (see above Part 1, p. 115 at 2 h).[3] In Australia, there was a proposal in 2021 that represented class members would receive no less than 70 % of the damages or settlement.[4] The courts in the Canadian province of Ontario

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1 See above part 1, p. 112 fn. 4.

2 Position paper of 24 March 2025, on file with the author (p. 16, Amendment 12 para 6: „Los términos del acuerdo de financiación se considerarán desproporcionados en perjuicio de los consumidores y usuarios afectados por la acción colectiva, en caso de que se prevea una remuneración para la entidad financiadora que exceda del diez por ciento de la cantidad total efectivamente satisfecha a los consumidores y usuarios afectados en ejecución de la sentencia").

3 Art. 14.4 and 12(d) of the EP's draft for a directive: Total award is defined as "including all damages amounts, costs, fees and other expenses". This is interpreted insufficiently at 5.10 (page 41) in the UK CJC Interim Report and Consultation as a "40% cap for funders' recovery", just as the ELI Report (above Part 1, p. 112 fn. 1) is imprecise in the same way at page 70.

4 CJC Interim Report at 5.4.

held that a return of greater than 50 % of damages awarded to the funder was unlawful.[5]

In short: The maximum payment to the funder could be defined by applying the fee agreement in the funding contract to the amount remaining after the following calculation:

- Total award (= full compensation plus costs payable by the defendant)
- Minus minimum share of 60 % of the full compensation awarded for the beneficiaries (i.e. not including costs separately payable by the defendant)
- Minus litigation costs to the extent they have not separately been reimbursed by the defendant.

Should the funder's remuneration not fully eat up that residual amount, the rest would go of course also to the beneficiaries, i.e. they would receive more than the minimum 60 % of total compensation.

If this leaves the funder with less revenue than he or she had calculated at the outset, that is part of the economic risk taken on when committing to the deal. It will still remain a nice chunk to cover costs of his or her business in general while the reimbursement of the costs of the claim as such will usually be assured anyway as an additional payment by the defendant beyond the actual compensation (assuming 100 % success of the claim brought). So the funder still comes out with a profit, albeit possibly lower than hoped for.

II. Risk-Adjusted Regulation of the "Absolute Floor" for Pay-out

When it comes to asking whether there is a need for regulation, the reasons for doing this raised in section 4.8 of the CJC Consultation are worth considering: "If the level of risk, in terms of the **severity and likelihood of occurrence of harm**, are high, then it is necessary to have a system of formal regulation, involving legal rules enforceable by state institutions and applicable to all who come within the stated ambit."

These reasonable considerations may merit different approaches for different situations of severity and likelihood of occurrence of harm. Taking a very plausible differentiation, there will be a big difference between the two following situations:

- If the persons driving an action have suffered damage themselves, are not a large crowd, are all from the business sector and have their own legal departments advising them how to organize among themselves a joint effort to claim compensation,[6] both the severity and the likelihood of occurrence of harm to them are relatively low – they would not enter a funding agreement with an external service provider which one would objectively view as unfair.
- The situation will be different where a vehicle, enabled to pursue litigation (possibly even created *ad-hoc* by a service provider who has not suffered any damage itself) is being offered to consumers to obtain compensation for which the consumers would never have sued themselves (due e.g. to rational apathy, i.e. costs and effort are larger than potential gain).

Remarkably, this **differentiation** has already arisen in Amsterdam court decisions: Dutch courts have consistently held that a maximum share of 25 % of the claim is acceptable for **consumer cases** under the WAMCA.[7] For **non-consumer cases**, higher percentages of 40 % were allowed[8] which ties approximately nicely in with the European Parliament's idea of a minimum compensation of 60 % for the beneficiaries.

Therefore, the regulatory objective should be to ensure a **minimum *pay-out* for all situations** of TPLF of **60 % of the total damages** while in **consumer cases** the objective should be a payout of **at least 75 % of the total damages**.

The need for tender offers, which is indirectly triggered with the proposed regulation, would therefore at the same time push for the development of certain standards, for the sake of comparability: Each and every funding proposal would need to primarily state the minimum percentage to be paid out to beneficiaries irrespective of the duration and cost of the whole court procedure drawn from the funder's commitment; expected IRR could be another subsidiary parameter in case funders would be inclined to share this figure during the tender procedure. In the same vein, comparability standards have been developed by regulators for other financial services products and their costs, upon request of consumer protection associations.

III. Options for Supervision

Now, after having postponed the answer to this question above (Part 1, at the end of section 4 a, p. 117), the broad picture is sufficiently developed to tackle the question as to who could be a suitable authority to review such offers for economic viability.

a) Most will immediately think that the **court** in question should decide itself, but as particularly the Judgment

5 CJC Interim Report at the end of 5.8 (obvious need to there replace in the CJC Interim Report "funded party" by "funder") with reference to R. Howie & G. Moysa, Financing Disputes: Third-Party Funding in Litigation and Arbitration (2019) 57:2, 465 at 486 with footnote 99 ("champertous") – https://www.canlii.org/en/commentary/doc/2019CanLIIDocs3782#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA .

6 Such an example being the most recent ECJ case quoted above in Section 2 (fn. 16): ECJ Grand Chamber of 28 January 2025 in case C-253/23 – ECLI:EU:C:2025:40.

7 Koen Rutten, Claimant Lawyer at Finch Dispute Resolution, in: Houthoff Class Action Survey – A 360-degree analysis of class action trends in 12 jurisdictions, 2024 (download at https://www.houthoff.com/insights/news/houthoff-class-action-survey-2024), p. 179, 186 referring to the most recent judgement by the Amsterdam District Court 10 April 2024, ECLI:NL:RBAMS:2024:2019, para 8.70.

8 Ibid., referring to Amsterdam Court of Appeal 13 December 2011, ECLI:NL:GHAMS:2011:BU8763, para 3.4.1-3.4.2.

[2025] CAT 5 shows[9], these "increasingly sophisticated"[10] contracts are particularly hard to understand and the calculations to be made for comparison's sake are far from obvious. Therefore, an institution different from the court of the individual litigation should be found and serve at the same time as center of competence for knowledge building allowing market oversight.

b) This means that particular economic understanding and business acumen should be involved, and a natural answer to that quest can be the know-how of **competition authorities**: they are best placed and experienced in dealing with markets to handle such questions. Ideally, one single competition authority might be the best office to deal with the ever growing, but still limited number of currently 300 or so funders which operate in the EU. Considering the fact that **Austria** has already defined its **Federal Cartel Prosecutor** as the institution placed best, the question springs to mind whether the institution best suited for such a task for the whole of the EU might be the DG Competition of the European Commission in Brussels (DG COMP). This would also have the charm of enabling DG COMP to get to know the "market" of litigation funding and to advise the various courts in the EU on which caps to admit based on the most viable offer.

c) Should one also introduce some form of **licensing and supervision** [as rightly proposed by the EP, see above Part 1, p. 115, at Sections 2 a) and b) – license and capital adequacy!], a very small new European Supervisory Authority (ESA) with a (very) small number of staff, so to speak **a "mini-ESA"** as an agency **supported jointly by DG FISMA and DG COMP**, would seem the ideal light-handed way to go. Having such a center of competence should be in the interest of all users, beneficiaries and dispute resolution structures in the Union. But would creating a new, even only very small institution, meet the current striving to reduce red tape in the EU? This certainly would be more acceptable than asking the **27 Member States** to implement one authority each and possibly even **on top a central one** for all – that latter approach would look like administrative overkill.

d) And **rather than** setting up another, **new network** of national supervisory offices with a central body in the form of the Directorate General Competition of the European Commission or a mini-ESA as central body, it would certainly be **more convincing to use an already existing network like the European Competition Network (ECN)**. It looks like an option fitting best the spirit of the current political mood to attach such new tasks to already existing networks – enhancing roles and responsibilities of such networks and having ECN team up with national authorities for the supervision of asset management.

e) Considering the fact that Australia once intended to make the **supervisors of asset management companies and securities markets** responsible for the admission of funders to the market and their supervision,[11] it might be the simpliest and most convincing approach to enhance the roles and responsibilities of ESMA in Paris, along with their network of national securities and asset management supervisors, to also include the new tasks in sight. A **close cooperation with the ECN** should go without saying and ensure adequate full EU market oversight from a competition angle, as well.

f) To be quite precise: would it not be comparatively easy to take roughly the contents of the text proposed as an EU *Directive* by the European Parliament, adapt it according to some of the ideas exposed above, and then put it into force as an **EU Regulation** with one small central office staffed by DG FISMA and DG COMP to coordinate the supervision for the "few" players in the market via these two networks?

Whichever institutional setup might convince decision makers most, an EU *Regulation* would save the cumbersome and lengthy procedure and divergences between Member States (MS) resulting from national implementation which an EU *Directive* would bring.

IV. Alternatives for Funding Models and Procedures

Beyond the solution of private funding for profit by Third Parties that are unrelated to the court case in question, there are **further sources of funding** for court cases:

- 10 of the 27 MSs allow the claimant to **charge the beneficiaries with modest participations fees** (Austria – AT, Belgium – BE, Cyprus – CY, Denmark – DK, Croatia – HR, Estonia – EE, Ireland – IE, Lithuania – LT, Latvia – LV and Poland – PL).
- 2 MSs – Greece and Ireland – currently completely **forbid third-party funding**, thus allowing nothing else but solutions different from private TPLF.
- Various MS budgets provide **public funding to Qualified Entities** for their law enforcement work including collective actions in court (for general Public Consumer Ombuds roles in Bulgaria – BG, Denmark – DK, Finland – FI, Germany – DE, Poland – PL and Sweden – SE; limited to the Annex I of RAD in Cyprus – CY; for sectorial responsibilities in Austria – AT [7 bodies], Croatia – HR, Estonia – EE [3 bodies], Hungary – HU, Romania – RO, and Latvia – LV).

9 See again (Part 1, section 3, p. 116, fn. 36) Judgment [2025] CAT 5 of the Competition Appeal Tribunal of 14 January 2025 in Case No. 1602/7/7/23 (Christine Riefa Class Representative Limited v. Apple and Amazon) at 106: "… the Proposed Class Representative [law professor Christine Riefa!] … must demonstrate … a clear view of the interests of the class and … must at the very least have a good understanding of (a) the effect of the terms being offered, and (b) the overall context in which it is being advised … including … the risks of any conflicts of interest … Prof. Riefa falls well short of demonstrating a good understanding of either of those things." – https://www.catribunal.org.uk/sites/cat/files/2025-01/20250114%201602%20%20Riefa%20v%20Apple%20and%20Amazon%20Judgment%20%28CPO%20application%29%20%282024%20CAT%205%29.pdf .

10 See above Part 1, p. 117-118, section 4 c) fn. 46 (Nivalion staff in the Woodsford book on Litigation Funding of 2021); practical example at 32 to 50 of the case mentioned in the previous fn., No. 1602/7/7/23 (Christine Riefa Class Representative Limited v. Apple and Amazon).

11 This Australian approach was unfortunately not enacted due to a change of government.

- The Canadian Province of **Québec** even has a **special fund** to provide seed funding for collective actions which it considers to be of particular public interest (details below section VII.).[12]
- Similar institutions exist also in the Canadian Province of **Ontario**, in **Israel, Chile and Australia**.[13]

But there are also *other court **procedures*** available for mass claim cases than under the RAD:

- Some MSs leave room for **different court procedures** other than RAD and let the court deal with choice of alternative procedures (i.e. ADR, Ombuds or Regulatory Redress) during the admission procedure in court, reminding us, to some extent, of the solution in the Canadian province of Ontario ("Ontario formula")[14].
- Some MSs have strong traditions of **public ombuds offices** who are publicly funded and are therefore able to sustain a collective action without private third-party funding or with a limited amount of additional private funding.
- Side-remark: Only one MS, Estonia, is sufficiently digitally developed to **immediately request the beneficiaries' bank details from the start** to ensure swift pay-out of a compensation to the individual consumers.

V. How the Regulatory Framework Can Guide Good Choices

Against this background, the question arises how to best approach the suite of problem solving solutions "on the market" to ensure a healthy future of collective redress in Europe, the objective being to "**heal the system with a lasting effect**" **at the least possible cost for society**:

1. There is and could be **fair competition between the various systems of resolving mass disputes** which courts could control to some extent by admitting collective actions in court of any kind only *as a last resort* – we call it the "**Ontario formula**" as mentioned above.[15]
2. Among the court procedures, **courts should have the power to assist in consolidating various collective and single actions into one single collective procedure**, and that single procedure should then be the model defined by the European Commission as the Representative Action under RAD.[16]
3. Among various competing claimants, **courts will have to decide** (under reasonable legislation) **which vehicle appears to be the most suitable** to take the case further and through to the end – as it has been regulated in a couple of countries already who have thought the issue through more thoroughly than others ("carriage motions", e.g. in Canada and the UK, but also in the Netherlands).[17]
4. And when there is not only private funding available for a case but **also sources of public funding or crowd funding or own funding by financially sound consumer associations**, another element of competition enters the stage.
5. Finally, **competition between various private funders** striving for profit needs to be bridled in the way described above in this article.

Especially points 3 – 4 show the strength of the RAD model, particularly regarding the competition aspects which should also bring costs down in the interest of consumers, defendants and public budgets. Only the RAD allows a competition between public and private QEs, as well as the clear option of public funding. This would also strengthen the existing European public enforcement culture and allow a competition with the private enforcement. A regulation of TPLF across all mass claims measures would therefore strengthen the RAD, as this would allow the same funding conditions for all measures. And the maximization of benefits would go where it belongs, to European consumers:

VI. Consumers' Delight

If TPLF were to be regulated along the lines shown above, the results would be highly beneficial for consumers as the following examples show:[18]

12 In French only: https://faac.justice.gouv.qc.ca – not without asking for a copy of the interested person's contract with his lawyers: https://faac.justice.gouv.qc.ca/aide-financiere/deposer-une-demande-daide#c32 – Annual reports at https://faac.justice.gouv.qc.ca/fileadmin/Site/Actualites_et_Publications/Publications/Rapports_annuels/RapportAnnuel2023-2024.pdf.

13 Elizabeth Bragina, Justice Unchained, BEUC-X-2024-091 – 20/11/2024 at https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-091_Third_Party_Litigation_Funding.pdf ; BEUC, Financing collective redress, June 2022, www.beuc.eu/sites/default/files/publications/BEUC-X-2022-087_Costs_and_financing_of_collective_redress.pdf . See also, Funding of Collective Redress: Financing Options in the EU and Beyond. Feasibility Study of Public Third-Party Funding of Collective Redress Actions and Recommendation on Existing Funding Options. September 2022 – www.beuc.eu/sites/default/files/publications/BEUC-X-2022- 116_Funding_of_collective_redress.pdf

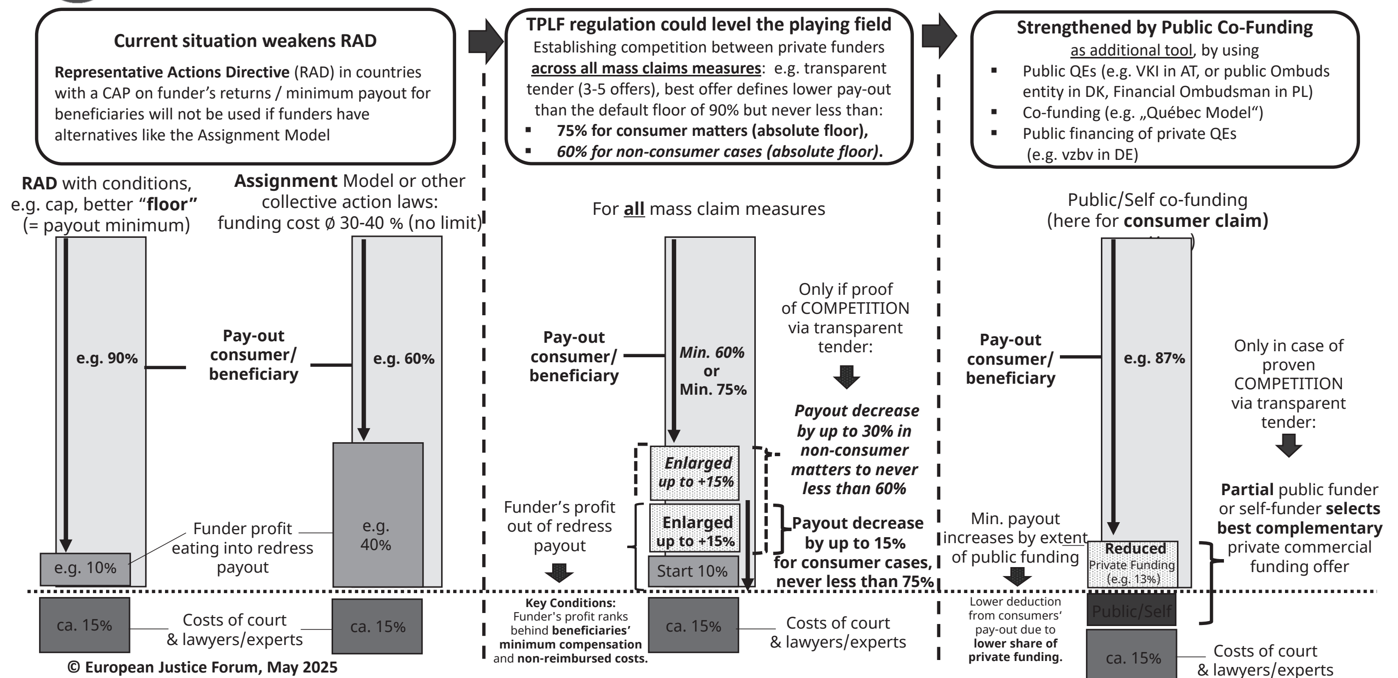
14 "… a class proceeding [on behalf of a group of persons] is the preferable procedure for the resolution of common issues only if at a minimum … it is **superior to all reasonably available means** of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, **or any remedial scheme or program outside of a proceeding** …" – see https://www.canlii.org/en/on/laws/stat/so-1992-c-6/latest/so-1992-c-6.html Sec. 5 para 1.1 lit. a.

15 See again its wording in the preceding footnote.

16 The author has proposed this for future legislation in Germany in his article "Kollektiver Rechtsschutz und Verbandsklagenrichtlinie: Recht ist keine Assetklasse, Rechtsbruch kein Geschäftsmodel" (translation: "Collective redress and the Representative actions directive: law is not an asset class, breaking the law is not a business model"), German Journal "Versicherungsrecht" (VersR) 2023, p. 886-887 and at the German Jurists Conference 2024 (Deutscher Juristentag) at Stuttgart where the proposal received recognition but not (yet!) approval, see resolutions Civil Law no. F.52 at https://djt.de/wp-content/uploads/2024/09/Beschluesse.pdf .

17 Germany unfortunately opted with respect to collective actions under RAD for the most unwise solution of all which is to only admit the first claimant (Section 8 VDuG – https://www.gesetze-im-internet.de/vdug/__8.html); this creates an incentive for speed over quality which in turn will produce a preference for less thoroughly working bodies and exclude the more reflected ones. But this issue must be put into the perspective of potentially competing other collective procedures, namely the assignment model, see also previous footnote.

Costs: Consumer friendlier solutions for funding?



In the current situation (left-hand picture) the RAD implementations with a cap like the 10 % in Germany will be avoided by funders in order to earn more money by funding – instead of RAD actions – the much more profitable assignment model actions or popular actions as allowed in Portugal.

Once an "adaptable floor" of an initial e.g. 90 % pay-out applies throughout for all ways of private enforcement of collective claims (middle picture), funders will submit different offers and not simply take as much as they can from consumers and defendants, but a truly risk-based pricing by persons accustomed to doing such appraisals will apply. As seen above (Section II, p. 174 fn. 7 and 8), the Amsterdam Courts' practice has developed ceilings for funders' remuneration which should apply even under the assumption of proven competition, and these are 25 % for consumer matters and 40 % for non-consumer cases. At first sight, these dimensions appear reasonable and lead to the results shown in the middle picture. But as shown above in Section I, p. 173-174, instead of a cap on funders' return, the rule should be phrased as a floor, i.e. as a minimum pay-out for beneficiaries which may reduce funders' profit against initial expectation in case not the full costs of the procedure are separately reimbursed by the defendant.

The benefit of public co-funding by a well-equipped consumer association or by a fund for justice of the judiciary yet to be developed in the EU, as we know it from the Canadian province of Québec, leads to the best results for consumers (the right-hand picture): consumers get 87 % in that example as opposed to only 60 % in the current practice of the assignment model or 75 % when applying under proven competition the absolute consumer floor without additional public funding being available.

Finally, when trying to sketch out a holistic picture of the ideas presented above, would it be asking too much to imagine that the staff of DG COMP and DG FISMA[19] mentioned above be combined with a team of judges coming from representative EU countries to manage a public fund for consumer law enforcement along the lines of the successful Québec model[20] which has operated in a convincing way for now already 45 years?

VII. Embracing Canada as the EU's 28th Member State?

Asking to forgive the slight exaggeration in this caption, it indeed is sign of closeness of mindsets between Europe and Canada, and particularly its French-Canadian province Québec that their thinking has created an almost unique institution which is proof of a continental European way of thinking about the appropriate methods of law enforcement:

The *"Fonds d'aide aux recours collectifs (FARC)"* founded 45 years ago under this name is the central piece of the Québec system

18 A great thanks to my colleague Ekkart Kaske at the European Justice Forum (EJF) for the vivid visualization and procedural structuring of such complex relationships and generally for providing numerous sources for this article as well as for his valuable collaboration throughout.

19 See above section III f), p. 175.

20 See already above section IV. at and incl. fn. 12, p. 176.

of collective judicial redress, renamed meanwhile to ***"Fonds d'aide aux actions collectives (FAAC)"***. Its Annual Reports can be found under www.faac.justice.gouv.qc.ca,[21] and they are very telling documents (to the extent you read French). The most relevant sections on class actions within the underlying legislation are §§ 571-604.[22] The Annual Report for the period from April 1st, 2023 until March 30th, 2024 shows that the current staff of the *Fonds* has not increased over the past five years or so. It consists of 3 Members of the Board of Directors (Conseil d'Administration) appointed by the government (Ministry of Justice), working part-time and usually meeting monthly for two days, and 7 full-time employees, among them two lawyers.[23] There are rules for governance of the *Fonds* and helpful statistics in the report as well as the balance sheet and profit and loss report of the *Fonds*. To give a short impression, just a few numbers:

- Total cost of the *Fonds* are CAD 107,000 = € 71,500 remuneration for the Board of three Directors which sits only 2 days a month, and merely 864,000 CAD = € 576,000 for the permanent staff of 7 (1 CAD at the time of writing = € 0.67);
- Total amount spent on litigation funding in the reporting year 2023-2024: CAD 5 million = € 3.3 million;
- Total assets (of which the larger amount of accumulated cash may be used in litigation): CAD 47 million = € 31.3 million.[24]

The *Fonds* has a key role in facilitating **collective actions which fulfill a public policy objective**: it can scrutinize all upcoming cases, as it intervenes without any upfront costs, nor indeed costs for the claimant in the event of an unsuccessful outcome – its funding contributions are given without charging interest (!).[25] It has accumulated capital over forty-five years by now from

- Modest yearly provincial subsidies and warranties from the provincial government which guarantee payment of capital and interest of any loan or other financial commitment made – these contributions were only instrumental in getting the fund going and given the small amounts in question for getting such an institution started are no serious obstacles to getting such a model to fly also in the EU due to the following much more important sources of income of the Québec Fonds which also seem possible in the EU:
- The Québec *Fonds* obtains a percentage of any recovery made in every class action in Québec, an entitlement that applies to all actions, not only those in which funding has been afforded by the *Fonds*, according to the „Percentage Regulation" which grants to the *Fonds*
  - 50–90 % of the balance remaining after claims by class members from an aggregate award (uncollected claims under an opt-out regime – which would not be an issue for most EU countries as they do not have opt-out procedures);
  - 30–70 % of the total award less costs and attorney's fees if the court decides not to allow individual claims;
  - 2–10 % of each individual award (if no aggregate award is made).[26]
- Furthermore, the *Fonds* subrogates into the rights of the recipient or his attorney up to the amounts paid to them; the recipient is obliged to reimburse to the *Fonds* the amounts paid by it up to the amounts it receives from a third party as fees, costs, or expenses (when the action is successful – otherwise the risk is assumed entirely by the *Fonds*);
- Finally, the *Fonds* of course increases its assets from interest and dividends on its financial investments in the capital markets.

The crucial difference between a commercial litigation funder and the *Fonds* is that a commercial funder acts for profit while the *Fonds d'aide aux actions collectives* acts in order to fulfill its public missions:

- Promotion of **access to justice** and
- Promotion of **real recovery by consumers**.

So, the proper administration of justice is boosted by the privileged funding that the *Fonds* can provide, and this ensures that it sees all requests for such collective actions first and can decide on whether such a request truly serves a public policy objective. The *Fonds* thus is actively involved in one third to a half of all collective actions taking place in Québec. Therefore, it has been recommended by a professor who became judge at that court[27] to "redefine the *Fonds* mandate to include a specific oversight mechanism of class action litigation", while it currently serves as „*de facto* screener of class actions, a powerful gatekeeper of the Québec system".[28] It also has a crucial role „to disseminate information respecting the exercise of class actions",[29] after the initial financing objective was enlarged in 1984 to include an educational information objective.[30] Currently, the *Fonds* seems to be – except for the examples mentioned above – pretty unique among all "class action systems", despite having supporters from academia around the world.[31]

Tying such an institution of the *judiciary* together with a litigation funding *supervisory* body suggested above for continuous cooperation on the public good of enforcement of mass claims within the EU could prove to be the very solution so dearly sought by many consumer associations. It might as well

21 E.g. the latest one under https://faac.justice.gouv.qc.ca/fileadmin/Site/Actualites_et_Publications/Publications/Rapports_annuels/RapportAnnuel2023-2024.pdf .
22 http://legisquebec.gouv.qc.ca/en/showDoc/cs/C-25.01?&digest=.
23 See report quoted above in fn. 21, p. 4–5.
24 See report quoted above in fn. 21, pp. 40 (cost of directors' meetings and of permanent personnel), 27 (total amounts of aid paid out), 41 (total assets).
25 See page 795 top line of the article by Catherine PICHÉ behind the link https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3520731_code1341764.pdf?abstractid=3520731&mirid=1.
26 Ibid., page 794.
27 Catherine PICHÉ, ibid. page 801.
28 Ibid., page 802.
29 Ibid., page 803.
30 Ibid., page 804.
31 Ibid., pages 808-809.

be the best bet for law-abiding companies longing for fair competition and consistent enforcement of the rules for fair play towards consumers to put an end to "legalized extortion" coming in the guise of consumer protection. This is all the more important as EU regulation has developed a tendency over the past few years to use increasingly a reversal of the burden of proof which may often come close to a denial of a fair court procedure.[32]

We do hope that the proposals made above spark useful discussions on how best to **heal our enforcement systems** where they are dysfunctional; may these proposals **trigger a market-friendly way forward** for this upcoming legislative period at EU level.

Summary

The business of Third-Party Litigation Funding has raised quite some attention over the past three years. The first part of this article (IWRZ 3/2025, 112) dealt with the provisions on this issue in the EU Representative Actions Directive and its national implementation laws. It furthermore covered the concerns pointed out by the European Law Institute with respect to the suitability of potential regulation.

This second part of the article proposes a surprisingly uncomplicated practical solution as well as options to choose from for implementing it in the Union's legal order. Looking for further avenues to solving mass claims, it offers further perspectives on applying the idea of competition usefully. It finally suggests to reflect on solving the challenges in a genuinely "European way". A model for that can surprisingly be found across the Atlantic.

Herbert Woopen

32 See e.g. for enacted rules: Racial Equality Directive (Adopted in Article 8); Goods and Services Directive (Adopted in Article 9); Employment Equality Directive (Adopted in Article 10); Recast Gender Directive (Adopted in Article 19); Antitrust Damages Actions Directive (Adopted in Article 17); General Data Protection Regulation (Adopted in Article 82); Product Liability Directive (Adopted Article 10). Examples of proposals not enacted: AI Liability directive proposal (Article 4), withdrawn by Commission; Ambient Air Quality Directive (proposed by Commission, article removed by Council); Industrial Emissions Directive (proposed by Commission, article removed by Council); Urban Wastewater Treatment Directive (proposed by Commission, article removed by Council).