



WORKSHOP ON THE IMPLEMENTATION OF THE REPRESENTATIVE ACTIONS DIRECTIVE (EU) 2020/1828

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THEMATIC DEBATE ON FUNDING OF ACTIONS AND PUBLIC ASSISTANCE TO QUALIFIED ENTITIES

Brussels 26 November 2021

This report should be read together with the discussion paper
<https://prod5.assets-cdn.io/event/7409/assets/8362336566-62284890c7.pdf>
prepared by the European Commission, DG Justice and Consumers, Directorate Consumers

The debate consisted on the presentation of the video explaining in plain language the topic of the debate, 10 minutes introduction by the rapporteur, 5 min presentation by each of the panellists, 25 minutes panel discussion as well as one-hour Q&A session with the audience.

Rapporteur:

Prof. Dr Ianika Tzankova, Tilburg University, Netherlands.

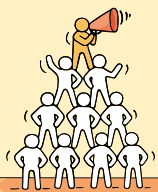
Panellists:

Paulien van der Grinten, Senior Legislative Lawyer, Ministry of Justice and Security, Netherlands;

Augusta Maciuleviciute, Senior Legal Officer, Team Leader, BEUC, the European Consumer Organisation, Belgium;

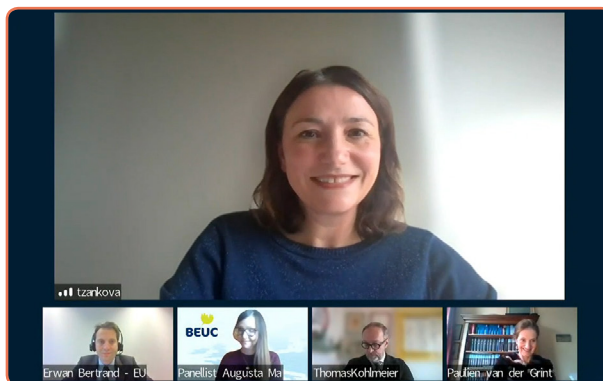
Erwan Bertrand, Head of Single Market Policy, Eurochambres, Belgium;

Thomas Kohlmeier, Co-CEO and Partner, Nivalion, Switzerland.



Detailed report:

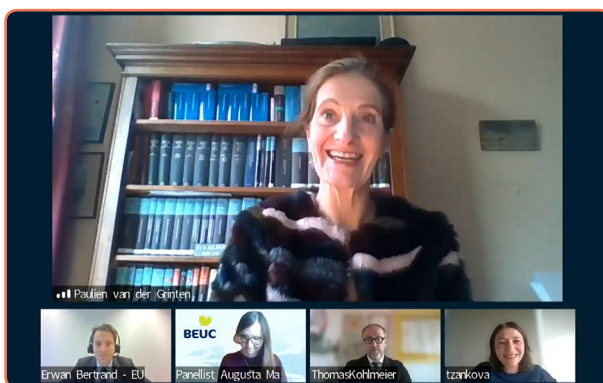
- ▶ The rapporteur, *Prof. Dr Ianika Tzankova (Tilburg University, Netherlands)* welcomed the panellists and participants and opened the event, noting that there were many participants and among them, representatives of EU Member States, consumer associations, academia, and practitioners. She went on to introduce a poll about the background of the participants and an informative video about the topic of funding. The results of the poll confirmed a high participation rate of representatives from the EU Member States, consumer organisations, business, academia, and practitioners. She expressed her regret about the lower participation of funders.



Prof. Dr Ianika Tzankova, introduced the topic of the thematic debate, reminding about the discussion paper prepared for the debate by the European services that is available on the workshop website. Starting with the academic viewpoint, she recalled capital importance of litigation financing within civil procedure. Statutory norms protecting the rights of individuals are worthless without enforcement, while enforcement depends on its financing, in particular to ensure equality between the parties. The practitioner's view is that if one party wants to prevail over their opponent within legal proceedings, they need to make sure they understand the opponent's financial incentives and capabilities in order to try to limit them. The Directive recognizes the importance of the topic and gives it explicit attention. She explained the objectives of the debate, namely to draw a clear picture of measures that could help to effectively meet the obligations under the Directive for the Member States and other actors implementing the Directive, and to support the efficient implementation of the options offered by the Directive.

- ▶ *Paulien van der Grinten (Senior Legislative Lawyer, Ministry of Justice and Security, Netherlands)*

→ The panellist stated that in the ideal world of collective redress, qualified entities would be self-funding. In the ideal world, the collective action would be cheap not only for individual consumers, but also for qualified entities. But this is not an ideal world. So what to do if we know that without proper funding, there are no collective actions. The panellist was not in favour of state funding, even if a few entities receive some small subsidies from the state in the Netherlands. The main reason is that the Dutch system is horizontal, being much wider than only consumer protection. Around 40% of the actions are against the state, so there could be a certain conflict of interests in that regard.





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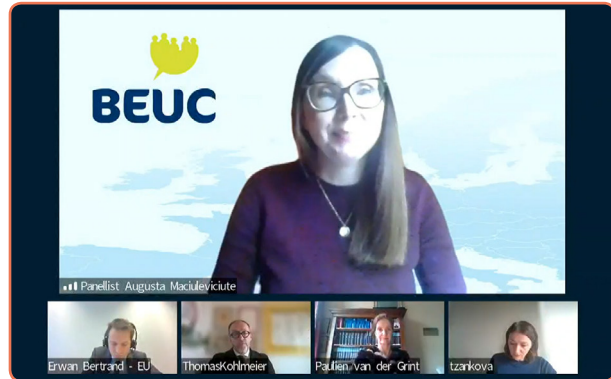
- Another option would be legal insurance. This is fairly widespread in the Netherlands, but so far, it is not clear how the individual insurance policies should or could be used for the collective funding of a qualified entity, even if a lot of consumers want to use this specific entity for their collective claim. It would be interesting to see if a wider use is possible or if the insurers are willing to play a bigger role.
- In the Netherlands, the rules for lawyers and fees are rather strict. ‘No cure, no pay’ is not allowed, except in very specific personal injury cases by way of experiment. So direct funding of collective actions by lawyers is not really an option.
- The organisations bringing collective damages actions in the Netherlands may require a contribution, which may be a combination of membership fees from the consumers and a separate fee to be paid upfront for a specific collective action, and/or a fee based on the percentage based on the outcome of the case in the case of success. The Dutch authorities regard this contribution of consumers as an important source of funding, albeit insufficient in most cases. In that regard, they hope that the Directive and its Art. 12 will not be interpreted in a too restrictive way that would limit this important tool.
- Most Dutch consumer organisations will not have a ‘war chest’ to pay for the action. So they will look for external funding, for example, by way of third party litigation funding (TPLF). In the Netherlands, TPLF is allowed and is not yet specifically regulated in the law. However, the general rules for the admissibility of a collective action require that the qualified entity has sufficient means to fund the action and has a sufficient say about the action, in order to prevent conflict of interest. Also, the qualified entity must be open on its website about contributions asked of consumers, which could include the amounts asked to fund the action or to pay back the funder. In the view of the Dutch authorities, this allows for a sufficient control of the TPLF arrangements under Art. 10 of the Directive, in combination with the Dutch general rules of civil procedure empowering courts to ask for more information if they require it.
- Then, there are more specific rules included in the Dutch Claim Code of 2019. It is a private initiative with principles for qualified entities aiming at self-regulation. In the previous version, some rules on governance were included. But in the newest version, the most important addition were some principles concerning external funding by a commercial funder. These principles require that a funding agreement contains a choice of law for Dutch law and a choice of forum for Dutch courts. This is next to the requirement of a solid financial position of the funder and the transparency on the website about the funder’s identity and the percentage asked, in case there is one. Many ongoing collective actions in the Netherlands seem to use TPLF.
- In case of a collective redress awarded by the court, the defendant will have to pay the reasonable costs incurred by the qualified entity for the action. This is more than the usual fixed fee arrangements in the loser pays system. This could also include the cost of the TPLF arrangements and it is, therefore, also helpful as an implementation of Art. 20 of the Directive on support. The panellist informed that, in order to have a broader spectrum of funding in the Netherlands, it has also been decided to research the advantages and disadvantages of a public fund for the collective actions, which could be filled with unclaimed amounts as a *cy-près* solution under Art. 9(7) of the Directive. Thus, this could be used as a further means to support qualified entities in the future, to broaden their options.



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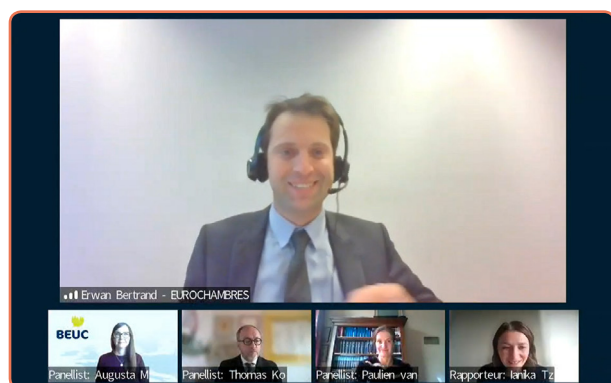
► *Augusta Maciuleviciute (Senior Legal Officer, Team Leader, BEUC, the European Consumer Organisation, Belgium)*

- Without proper funding, little to no actions could be brought in most countries. Consumer organisations look at the issue with a broad perspective and do not view one way of funding as a ‘magic bullet’. They think there are several options, which should be combined and used according to the legal traditions and circumstances in each country.
- One of the solutions could be defining a maximum amount of the claim on the basis of which the costs are calculated. This means that even if the aggregate amount of the claim would be several million euros (which happens quite often in consumer collective actions), the court fees would be capped at a certain percentage of this set maximum amount. For example, in Portugal, the maximum amount is capped at EUR 66.000 and in Germany at EUR 250.000.
- Another option is to limit the financial risks if the case is lost. For instance, in Portugal, even if the consumer organisation would lose a case (which has not happened until now), they would only need to pay between 1/10 and 1/2 of the costs of the opposing party based on the decision of the judge, except if the action was brought in bad faith.
- Member States could also provide for specific rules, e.g. which costs would be reimbursable to the consumer organisation if it wins the case, including the remuneration of the third party funder, the contingency fees (where they are allowed), or the costs of informing consumers (which are often quite high).
- Aside from the financial measures, the general setup of representative actions is also important. Some forms of representative actions are more expensive than others. For example, when you have a strict opt-in, the management of the case is much more expensive than opt-out. The Member States should look at the many options and see which combinations might work in their legal system to ensure access to justice.



► *Erwan Bertrand (Head of Single Market Policy, Eurochambres, Belgium)*

- The panellist stated that when it comes to collective redress in Europe, we are at a crossroads. It is finally here but much remains to be done, especially considering that the Directive leaves many legislative choices to the Member States, and this is certainly true for third party funding and public assistance to qualified entities. Despite the progress in the recent years, some of the topics discussed in Brussels and in the national capitals revolve around the same issues that have already been discussed before, namely how to compensate consumers when they have been harmed, and how to create a balanced system in the European way that is acceptable to all.



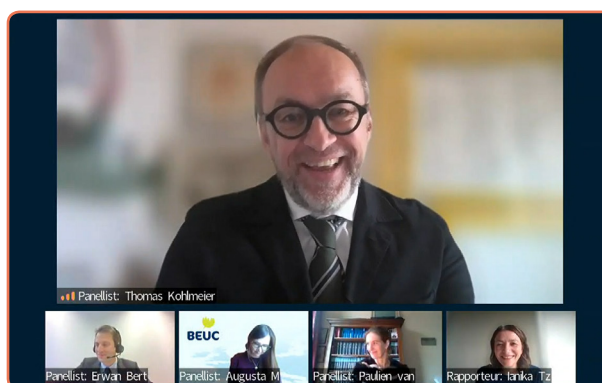


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- These discussions in the capitals led to the 2013 Commission recommendation on common principles for collective redress and now to the Directive itself. In connection with funding and public assistance, it is indispensable to keep in mind why the collective redress instrument should be one of the tools available to remediate harmful business practices. The cornerstone should be providing access to justice for consumers. They are the ones who the legislators have in mind and aim at protecting. However, businesses should be protected as well in some way, mainly against unfounded cases that might damage their reputation. But it is the compensation of the harmed consumers that should take the centre stage of the discussions.
- We are going into uncharted waters with the Directive and the Member States will have to make hard decisions. However, there are a few trends that we can observe and expect to be exacerbated in the coming years. The litigation funding sector will grow bigger, and more new funders will settle in a jurisdiction which seems most advantageous. A study of the European Parliament Research Service from this year estimates the value of the litigation service sector at EUR 39 billion. It is almost a given that this sector will grow and there is almost no one who thinks it will not be a big sector. New investors will come as it will become clear what the opportunities are. And in times of low interest rates, investors are looking for higher returns.
- The Competitiveness Council has agreed on a general approach on the Digital Service Act (which is not the topic of this debate), which will regulate e-commerce. The new regulation is coming because the e-commerce has started to boom and it has become clear that some players have become systemically important and they need to be better regulated to the benefit of all. Much like in the tech sector, it will be up to the legislator to regularly take stock of what is happening and see whether the community is still well served with the existing rules. Much like in the tech sector, where the legislator asks, in legally binding acts, the tech platforms to take responsibility, it will be up to the legislator also in this area to assess whether the functioning of private funding of litigation should be regulated. Therefore, we are at a crossroads, but also at new beginnings.

► *Thomas Kohlmeier (Co-CEO and Partner, Nivalion, Switzerland)*

- The panellist thinks we need to talk about numbers. Why is funding expensive and is funding a good idea with regard to consumer actions? He thinks it might be, but there are much better tools such as state aid or others mentioned by Ms Maciuleviciute. It is sometimes said that funders want 30% of the proceeds or a so called multiple on invested capital of four times. If a funder invests 10 million in a case, it wants 30 or 40 million back. That certainly does not sound like a bargain, but we should keep in mind the numbers Mr Bertrand mentioned, which predicted the litigation service market to reach EUR 40 billion. Also, it is rumoured that Volkswagen has already spent more than 20 billion on the Dieselgate case on defending themselves and denying consumers their damages. Compared to these numbers, it is a drop in the bucket.
- Why is funding expensive? We have to remember that it is a risk-transfer instrument and these consumer cases are never clear-cut.





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- For example, the Dieseltgate case has been an uphill battle for at least 4 years now. 'High risk needs to yield high returns'. Funders are also looking into the risks and fund – in their own interest – only cases that are meritorious. They might weed out 9 cases out of 10. Pricing expectations for third party funding are therefore in line with other investment classes like private equity. Third party funding and venture capital (series A) funding are pretty much aligned in terms of risk involved and reward. So if we want to bring in private money to help consumer cases along, we should be aware that high risk needs to yield high returns.
 - There are a few interesting developments. If legal protection insurance and third party funding could be combined, that would probably result in a better assessment of the cases.
 - As to the pricing of risk, if a case has 60% prospect of success, the pure price of risk should be $(1+60\%) = 167\%$ (including capital). However, funders cannot offer funding at the pure price of the risk. Funders need to be able to build portfolios, in which they have to account for some losses and bare overheads.
 - The main takeaway is that funding is expensive, but the price is not dictated by greed. Instead, it is dictated by a function that is tied to the duration of the risk. The longer the money is exposed to the risk, the more expensive it gets.
- ▶ *Prof. Dr Ianika Tzankova*, found interesting the observations of Ms van der Grinten about the limitations of state aid. She typically hears the argument that state aid is not going to work because it is in crisis in civil justice systems, that it is not sustainable, it can change with governments and is never enough. She pointed out to the remark of Ms van der Grinten that many of the actions can be against the state and the resulting conflict of interest. She would be interested in whether that could apply also to other jurisdictions, which have collective redress only in consumer matters and thus not very likely to have such conflict if interests, since the Netherlands is specific with its trans-substantive regime. We know that earlier versions of the Directive included the obligation of a state to provide state legal aid for collective redress, but that did not pass the test.
- *Paulien van der Grinten* agreed that this argument might be a bit specific for the horizontal collective redress system in the Netherlands. In certain cases, the actions against the state might be initiated by consumers, but in a majority of cases, it will be based on wrongdoing of the state that was very often very long in the past. Also, she thinks that state funding and legal aid can be two separate things. She thinks in some Member States, they use direct state funding for their one and only or one of the few organisations. But that would not work in the Netherlands because they felt that having only one designated qualified entity would not lead to the collective actions being brought to the extent that they wanted to. That is also the reason why they allowed ad-hoc organisations, and these were specifically created and active in many cases like the Volkswagen case. They make sure that the legal expertise in that organisation and the governance is appropriate for the specific action. She believes in the added value of allowing ad-hoc entities, but it would be strange to have a state direct funding for those.
 - She added that state legal aid might be a slightly different situation. In the Netherlands, they have state legal aid in administrative proceedings, which are always against some part of the government. Therefore, some people do say that there might be a conflict of interest. She still thinks it would be interesting to see if the individual legal aid that the consumers might receive for their claims could be channelled to a qualified entity by way of collective legal aid. Another option to obtain some funding (although a very preliminary idea that should come out of research that is yet to start) might be a *cy-près* fund. The legal aid council might be the right governing body to execute this fund since they already have experience in granting legal aid.



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- ▶ *Prof. Dr Ianika Tzankova* referred to the observation of Ms van der Grinten that some organisations might not have a 'war chest'. She thinks Ms van der Grinten might have been referring to particularly the Dutch investor association, which always over the years negotiated a special fee for themselves that would allow them to fund future actions. What would be the pros and cons of having a more explicit right of qualified entities to negotiate and obtain such incentive awards going forward as opposed to having such a fund, where a body needs to direct the unclaimed funds and would finance the collective actions?
- *Thomas Kohlmeier* said that he is not sure, he would like to pick up on an argument of Mr Bertrand and have the discussion in the best interest of consumers. He thinks it is an idea worth pursuing to let qualified entities have *cy-près* funds. They have to be aware though that they would face reputational issues because the defendants would try to paint them as solely trying to fill their own coffers. He thinks that can be dealt with and he would have trust in the qualified entities that they would do a good job. He has never seen an example of a qualified entity in Europe going rogue or trying to push unmeritorious cases.
- If the qualified entities have their own funds, they could still always team up with the funders. It would reduce the risk the funders are taking and result in a better pricing.
- He added that if we are trying to come up with ideas on how to make this work for the consumers, why not try a network approach? The qualified entities and legal protection insurance companies could all chip in. In the Dieseltgate scandal, in Germany alone, the legal protection insurers have paid out over a billion Euro in fees and they had 380 000 consumer cases. That means they have a wealth of data and know how the cases are developing. From a funder's perspective, this is interesting because if a case is mature enough, it can be seen as lowering the risk and the funders might offer better pricing. The risk is also lower if the court fees are reduced or if qualified entities can chip in, so he would say that funders might play a role of topping up the 'war chest' as needed and that would probably be a way for the consumers to end with a bigger portion of the damages going forward.
- *Erwan Bertrand* said that with regard of public and private enforcement and funding, this calls for further analysis and discussion in the national capitals. He noticed a tension between private enforcement and public enforcement. He considers the Directive as related to private enforcement, but if we start to talk about public funding, we start to blur the lines a little bit. It is a debate to be had, but he asked if we can still talk about private enforcement if the qualified entities would become quasi-governmental agencies. It is a political question, and there are no clear-cut answers.
- Mr Bertrand remarked that he heard several speakers talking about a 'war chest' and he is not sure if the term is appropriate. Ms Tzankova clarified that it is a phrase used by the Dutch investor association itself. Mr Bertrand warned about creating a litigation culture as in some other jurisdictions. With regard to *cy-près*, he said that we need to look to the spirit of the Directive. If we look at Art. 3(10), it defines the redress as really the redress that the consumer gets, so we need to be careful about creating new tools like that. In addition, it is something coming from the US.
- *Augusta Maciuleviciute* said that *cy-près*, so redress awarded to consumers that remains uncollected, would not be contradictory to the Directive. She thinks it is not straightforward to allocate these funds directly to qualified entities, and it will need to be looked at in each country separately. In some countries, it might not be possible for the associations because their non-profit character prevents them from collecting any money or profit. For others, they might not want to have it because it can indeed impact their reputation of being independent and of only serving the consumers' interests.



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She warned about Member States choosing to adopt it as their only measure because, especially in some smaller Member States, it might not even suffice to fund the next action. Instead, Member States should draw inspiration from the Netherlands, look at this option attentively and see whether it could be used in their countries. But it is not contradictory with consumers getting redress because it is for the next cohort of consumers who were harmed and who suffered damage to get redress.

- Mr *Bertrand* replied that we have to ask why certain consumers do not come forward and collect their damages.
 - Ms *Maciuleviciute* referred to behavioural studies on consumer inertia, but she does not believe that the lack of activity would suggest they were not entitled.
 - Mr *Bertrand* said that, of course, if there is a judgment, they were entitled, but it probably means that they were not interested in the case.
 - Ms *van der Grinten* said the discussion is interesting and she considers the bottom line to be whether it is fairer to give it back to the defendant and she is not sure. She thinks that the idea of non-collected funds going back to the organisation is an interesting one. For the qualified entities to build a 'war chest' (or a fund for future actions, to be more precise), she fails to see how it would work for a true ad-hoc entity because it is created for one specific action. There, a fund (maybe executed, for example in the Netherlands, by the Council for legal aid) would be more suitable because why reward the organisation which does not plan to pursue other actions in the future with the uncollected funds.
- ▶ *Paulien van der Grinten* referred to Mr *Kohlmeier's* remark about legal expenses insurance working in combination with state legal aid. She thinks that the best interest of consumers is getting solution at the lowest possible cost, but not free of cost. The fact that consumers do not need to start an individual action is a very clear benefit for them, but this does not mean that there should be no payment at all. The Dutch authorities have been looking in the past into how the individual legal expense policies could fund collective actions but, so far, they have not been able to come up with a good solution with the insurers. It could be either that it is done through those individual policies or, since there are also after the event insurances, it remains to be seen if the qualified entities could make use of those (not useful for ad hoc entities).
- Mr *Kohlmeier* said that with regard to the non-collected proceeds, they should go into the budget of the Member States because law is the glue that holds our society together. It is unthinkable that these proceeds should go back to the defendants because there have been negative judicial decisions against them. Alternatively, the money should be used for the existing qualified entities because they will have to stock up on knowledge to deal with the funders and insurers to come up with the best solutions for consumers.
 - He added that there is a development in the third party funding that the lines are getting blurry between it and the legal expense insurance. That is because the after the event insurance is a different side of the same coin. If you combine this after the event insurance with the third party funding, the prices will drop a bit (in his opinion) because the insurers have broader balance sheets and have other key metrics that they apply. Therefore, he thinks that the combination of insurance and third party funding is probably a very smart way to protect the interest of consumers. He would be more cautious about using the existing individual policies to fund the collective actions. It would be for another debate also with the insurers, it could be addressed and his personal view is that the legal protection insurance industry wants to play a more active role and they are perfectly suited to do so.



The Q&A:

- ▶ A participant asked if the matter of legal insurance could be further explained.
 - *Prof. Dr Ianika Tzankova* noted that with regard to the Dutch legal market, it is an in-kind market and the insurers can do a lot of the work in-house. She compared it with the German system, where, according to her understanding, you really need to retain a lawyer, which also makes it a bit more expensive. But she has seen legal insurers playing a role in the context of collective redress by collecting and forming a group because the funders want to see that there is already a sizeable group out there before they provide funding. That is costly and difficult to organise and sign up, so the legal insurers could facilitate that. Once it is clear that there is a sizeable group that is affected, it is easier to obtain financing and perhaps the terms could also be more favourable.
 - *Paulien van der Grinten* thinks there is another role to play for the insurers and she wanted to comment on Mr *Kohlmeier's* point that the individual policies should not play a part. She thinks that there was already at least one case where the individual insurance played a part in one of the Groningen cases. There, the court dealt with earthquakes and damage caused by them. The discussion was that the legal insurers save a great deal of money by not having to fund the individual cases of their clients, so how could some of that money be used for a collective action in which these consumers take part. She thinks it needs to be figured out and has not been easy so far, but it is not unthinkable.
 - Mr *Kohlmeier* said he could not agree more, but there are some tricky legal questions as regards insurance law and the obligation of legal insurers to step in in legal cases which merits a separate discussion.

- ▶ A participant asked if it is really reasonable to expect the consumers to take out a legal expense insurance for every product and service?
 - *Thomas Kohlmeier* responded that, of course, requiring that would be totally unreasonable. That is, in fact, one of the pitfalls of legal expense insurance. It is expensive, the consumers have to pay up front for many years until the first case arrives, and the socio-demographics of insured consumers show that it might only be available for the wealthier consumers. This would leave a high number of consumers unprotected, as they cannot afford legal insurance or do not want it. So the funders will probably always have a role of bridging a gap between the insured and uninsured. That is also why he believes that the funders and insurers should work together to find solutions in the best interests of consumers.

- ▶ A participant asked the following question 'One of the options under the Directive is a possible cap on the remuneration of funders. What are the pros and cons of this option?'
 - *Thomas Kohlmeier* said that this is a concept we need to talk about. In a hypothetical example, if a well-known internet giant massively infringes the rights of consumers and the damage could be EUR 5 billion, while the cost of the risk of the funder would be EUR 20 million, he agreed that it would be outrageous for the funder to walk away with 30% of 20 billion. There might be some cases where it makes sense. In his opinion, a reasonable funder would talk with the qualified entity about the reasonable expectations for the pricing of the funding. If we talk about caps, we should also talk about floors. Is there a minimum reward for the risk? He thinks that these discussions would go well together. He started as a lawyer assessing the risk of appeals proceedings and has now worked in funding for more than 20 years and he has never seen two cases that were exactly alike. So every case needs a tailor-made solution,



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and he doubts that we can come up with a one-size-fits-all. While caps might be a fair solution in some cases, in others they will result in no funder willing to fund the case.

- Prof. Dr *Tzankova* replied that it is her takeaway that having an overview of the fees of funders is a good idea but on a case-by-case basis. We have to leave the review to the courts.
- Mr *Kohlmeier* replied that funders will need to be more transparent and explain more about their pricing, so the qualified entities can assess whether it is reasonable or not.
- Prof. Dr *Tzankova* referred to a workshop where a funder explained that he always shows scenarios of best case, worst case, and the cases in between. Mr *Kohlmeier* agreed.
- *Erwan Bertrand* said that he does not have a clear opinion on whether there should be a cap or not. But there are already quite a few litigation funders in Europe (in the UK, Germany, and the Netherlands) and they operate cross-border as well. As an economist, he presumes that if the market gets bigger, there will be more competition and maybe, it might have an effect on the percentage. He thinks it is too soon to have this discussion and the legislators should look closely at what is happening with the market dynamics.
- He agreed with Mr *Kohlmeier* on the need for transparency. For instance, the funding agreements need to be transparent. All interested parties should have a clear overview of what is happening. He mentioned that some regulation might be called for, such as venture capital is also regulated, for example.
- *Paulien van der Grinten* says that transparency is important if there are some contributions asked from the consumers, and relevant information should be on the website of the qualified entity, even though the contributions might ultimately go to the funder. As for the transparency of the funding agreement and sharing that with the defendant, she is absolutely against that. The defendants will also not provide an insight into how much money they have available for their defence. It would be rather disastrous because it links to the point Prof. Dr *Tzankova* made in the beginning that knowing to what lengths could your opponent go to might be used to win the case. That is different from the courts controlling to ensure that the agreements are reasonable and fair, which can be done without sharing the information with the defendant.
- She also wanted to respond to a point made in the chat about consumers being entitled to 100% compensation under the Directive. She considers that is an illusion in most cases. But it was also mentioned in the chat that everyone should have a rule as in the Netherlands that the loser pays principle also covers always the costs of the TPLF. While this is not expressly provided for under Dutch law, there is a rule that the judge could also order the costs of the case to be repaid to the qualified entity, which in her view could also cover the fees that the qualified entity will have to pay to the funder. But it would depend on the structure of the arrangement and on the individual case.
- Mr *Kohlmeier* agreed with Ms *van der Grinten* that there absolutely should not be any disclosure to the defendant of the funding arrangements. This would derail the proceedings. For example, in the Dieselgate case or in most of the cartel cases, the defendants know that they are facing an opponent which is specialised and also has 'big guns', so they are trying to find some loophole in the third party funding agreement. He participated in a discussion held by University of Milan and there were some judges present. All of them agreed that that is a bad idea. He thinks that the qualified entity should certainly look at the arrangements and they need the means to do so, but there are many lawyers working there, and the funders need to be transparent about what they are doing and why.
- Mr *Bertrand* said that we should weigh the question of caps using interest of the consumers and their getting the redress for the damages incurred.



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- ▶ *Prof. Dr Ianika Tzankova* asked if we think that the judges are trained to review the funding arrangements since we are putting a lot of faith in them by relying on them to review these. Should we develop a training programme for the judges in the Member States about litigation funding in the process of implementation? She added that she heard from a colleague that in Canada, a judge needs to decide in the beginning whether the fee is fair. She wanted to ask if this is something that the funders would want or if it is fine to wait on for the outcome of the case for the evaluation, i.e. which is the best time to perform the assessment.
 - *Paulien van der Grinten* considers useful the training of judges, but in the Netherlands, the judges were so far able to keep up with the developments of the new ways of financing, at least in the collective settlement cases.
 - *Prof. Dr Tzankova* disagreed and recalled the *Fortis* case where the court asked for the participation and the input of public, so she got the opposite impression.

- ▶ A participant noted that it would be good to examine the experience in the US and see if the third party funding costs are excessive or not and think about what we should learn from that experience.

- ▶ A participant said that the Luxembourgish law requires that public funding of mediators is ensured in order to induce the qualified entity and the defendant companies to go for an out-of-court settlement once the action is declared admissible.
 - *Paulien van der Grinten* noted on the topic that under the Dutch law, after the admissibility test was successfully passed, there is an obligation for the parties to start negotiations on a settlement. There is a possibility to include a mediator (who is not funded by the state), but in practice, both parties are represented by a lawyer and they are quite capable of reaching a settlement on their own.
 - *Thomas Kohlmeier* considers mediation as an excellent tool. However, it is perhaps unrealistic to expect too much in the context of big consumer cases since the board of the defendant has to decide if they will follow a settlement proposal of that mediation but it faces a lot of legal questions as well. In his opinion, they need to have at least a second judicial decision to be able to say that they litigated the issue and tried to defend the company.

- ▶ A participant asked with regard to the requirement in the Netherlands that consumers pay contributions if there are any limits and if it is regulated somehow.
 - *Paulien van der Grinten* said that there is no legal requirement for the consumer contributions. There is a possibility for the qualified entity to ask for the contribution and the amount should be mentioned on its website. The judge will look at all the elements on the website and determine whether it constitutes a reasonable and good governance of the qualified entity to take over the case. If the amount is unreasonable, the court will not allow it.
 - *Erwan Bertrand* said that asking for contributions from the consumers is a quite interesting *piste*. He wonders how it would work in practice. Maybe it would require an opt-in system, which would also solve the *cy-près* question.
 - *Prof. Dr Ianika Tzankova* added that it is how the collective actions in the Netherlands were financed in the early days. It initially seemed like it could work together with the legal expense insurance, but over time, it proved to be quite difficult because it requires administration and organisation, it is not sufficient and in one case, it was unaccounted for by an ad-hoc entity (so there is a potential to misuse membership fees). In recent years, we hardly see any collective redress actions funded through membership fees.



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- She added that in the Netherlands, there is also a ‘freerider problem’, when the initial group pulls their resources together, start the proceedings and are successful, but everybody else can also profit without contributing to the action. It has proven difficult to correct or compensate that. In recent years, we see professionalization of the financing of this type of cases. It will be interesting to see if the crowdfunding platforms and cryptocurrencies can change the scene. But right now, membership contributions seem to her more like a step backwards than forward.
- ▶ A participant commented that if there were a conflict of interest in the legal aid, then there would be no legal aid in administrative proceedings and there would be a breach of Art. 47 of the Charter, so it is the lawyers’ independence that grants the absence of the conflict of interest.
 - *Paulien van der Grinten* noted that in England, there were reports that the legal aid has been cut back so much that it is very hard to get it for some cases, and thereby, you do not get to the point where a lawyer independent from the state is taking up the case for the citizen. However, she agrees that in the Netherlands, the legal aid is paid to the lawyer, but it is the citizens who choose a lawyer that they go to.
- ▶ A participant asked if there is a state funding of the qualified entity’s costs and if the entity is successful, so the defendant must repay the costs based on the loser pays principle, is it justified then that the qualified entity keeps it or should it be obliged to return these costs to the state budget.
- ▶ A participant asked about the respective experiences of the speakers and if they can estimate an average cost of bringing and concluding a collective redress action in Europe.
 - *Thomas Kohlmeier* said that, according to his knowledge, there is no overall study on this issue. From his experience seeing cases in the UK, Spain, Portugal, Germany, and the Netherlands, the usual amount of funding needed was between 5 to 10 million Euros. There were some bigger cases and some smaller ones. But as a rule of thumb, he would be surprised if a meaningful consumer action could be done for less than 3 to 5 million Euro. For example, in the emissions scandal case, Volkswagen has employed Freshfields and it is rumoured that they have been paid 2 billion Euros in legal fees to date. This shows the amount of money that is needed to see some of these cases through.
 - *Prof. Dr Ianika Tzankova* added from her practitioner’s perspective that she thinks that the numbers mentioned by Mr *Kohlmeier* like 3 to 5 million Euros for litigation, are not unrealistic for a complex case. They have seen a case in the Netherlands, where in the collective settlement procedure (not litigation) the defendant compensated the organisation that followed up the settlement negotiations with an amount around 3 million Euros, maybe even more.
 - Mr *Kohlmeier* mentioned the concept of multiple on capital invested. That is a key metric for some funders. The qualified entities have to be aware that the bigger the amount, the more expensive the funding gets. This is what they call budget stuffing. He warned about using unnecessarily large amounts of funding capital.
 - Prof. Dr *Tzankova* noted that this is a matter of balance. For qualified entities, it is important to have sufficient funds, no equivalent to the defendant but sufficient to level their positions, so the higher costs should be compensated.



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- *Erwan Bertrand* said that he thinks the 2013 recommendation provides some interesting wording on this issue. The claimant party needs to have sufficient funds to meet any adverse costs. He does not think that the judges necessarily need training sessions, but they primarily need criteria to use. Maybe the trainings could be additional.
 - Prof. Dr *Tzankova* replied that maybe not trainings, but some guidelines would be useful.
 - Mr *Bertrand* remarked that they would also need to know how and when to stay the proceedings. He then referred to other issues that could come up, for example Art. 10 and undue influence, that could be also discussed.
- ▶ With regard to management costs incurred by consumer organisations (e.g. managing the consumers that sign up to the action, managing the documents, answering e-mails, setting up the IT solutions), are these to be regarded as costs of the proceedings or costs of informing the consumers and should be reimbursed by the defendant in case the action is successful?
- ▶ Prof. Dr *Ianika Tzankova* referred to the issue of conflict of interest. In the Dutch Claim Code (which is not a legislative document), there are some relevant provisions. She sees explicit arrangements in the agreements that can be disclosed to the court, if needed. There are also requirements for three board members, and three supervisory board members with experience. She thinks it is easier for a funder to influence one person than six people and their independent lawyer.
 - *Paulien van der Grinten* noted that Ms *Tzankova* painted a good picture of the Dutch landscape but she thinks that the main things to guarantee the independence of the qualified entity vis-à-vis the funder that they have included in the law are the sufficient means and the sufficient say about the claim and the means. The judge will have to control whether it is the case and consequently can ask for the funding agreement and review it.
 - *Thomas Kohlmeier* thinks that every funder worth his salt absolutely will refrain from interfering with the litigation because that opens up a whole Pandora's box of intricate legal problems, namely party behind the party, active legitimacy and others. That is something you want to avoid at all cost as a funder. You do not want to be a party to the proceedings. When he first started, it took him a few months to realise that. The way the industry addresses this is that they are looking at the law firms and the qualified entities. Does the qualified entity have enough knowledge to be a good partner to the law firm that is litigating? What is the track record of the law firm? How good and trustworthy are they? Most funders have a lot of legal talent for their in-house due diligence and underwriting, but they do not have either the team sizes or the time to stay with the litigation. If they believe in the qualified entity and the law firm, they step in the background afterwards.
 - A participant suggested that the most reasonable way to finance the qualified entities would be to use the penalties imposed on unfair traders for unfair market practices.
 - A participant asked Prof. Dr *Tzankova* why, according to her, the cryptocurrencies could influence the litigation funding.
 - She replied that she has been told that a cryptocurrency could be a way to deal with the practicalities connected with collecting individual members' contributions that she explained before.



- *Thomas Kohlmeier* respectfully disagreed and considers using a cryptocurrency a bad idea because it adds another layer of risk and it ties in with the regulatory issues. He is torn about those. Regulation is a market entry barrier. For the existing players, it is no problem, they will comply and hire additional legal team. But it could prevent the new players from entering the market as Mr *Bertrand* expects and the resulting better pricing. There is also the elephant in the room of what to do with rogue funders or runaway funders. This situation occurs when there is a consumer action that has been funded and then it turns out that the funder is not good for his money. That has never happened to the best of his knowledge neither in the US nor in the EU, but it is a legitimate concern and we should provide answers for that.
- *Erwan Bertrand* considers cryptocurrency and decentralized finance as possible solutions. He mentioned the possibility of crowdfunding through Bitcoin.
 - Mr *Kohlmeier* replied that it would raise data protection issues.
 - Mr *Bertrand* responded that he likes the innovative part of the idea. He also mentioned preparations of regulation of cryptocurrencies in the US and the EU and the China ban on mining of cryptocurrencies.
- ▶ A participant asked if self-regulation of funders (for example a code of conduct) could give a sufficient protection to consumers.
 - *Thomas Kohlmeier* (also in connection with his point above regarding rogue funders) that as far as he is aware, self-regulation has been working out in the United Kingdom. He is not aware of any cases that called for regulation. All funders have internal auditing procedures, and auditors looking at their books. But if he could think about one topic that we should talk about, it is the capital adequacy of the funders. Funders need to be good for the money if push comes to shove. He would not actively advocate it, but he would not be afraid of it.
 - *Erwan Bertrand* agrees with the reputational issues and the danger of rogue funders. But he said that same as the funders want to act in good faith to protect their reputation, the businesses need to avoid frivolous cases to protect their reputation.
- ▶ A participant asked if good funding of qualified entities avoid the risk of market monopolization by the richest entities.

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