Funding of collective redress

Financing options in the EU and beyond

September 2022

BEUC The European Consumer Organisation

noyb

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Feasibility study of public third-party funding of collective redress actions and recommendation on existing funding options

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Recommendations regarding the financing of collective redress under the RAD

To cover the costs related to collective actions, different financing models can be put in place. The Representative Action Directive ("RAD") acknowledges the need to provide adequate funding to organisations bringing collective redress: Article 20(1) of the RAD explicitly requires Member States to *"take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right*".

This study presents various mechanisms through which collective redress can be financed and concludes that none of the various mechanisms examined is sufficient on its own to ensure that collective redress actions are effectively financed. While a combination of these different options is recommended, the creation of a public fund, which is explicitly mentioned by the RAD, is the most appropriate way to ensure proper financing of collective actions in the EU. European legislators should therefore implement such public funds, taking example from other jurisdictions like Canada and Israel.

In this context, the study makes the following recommendations in order to address adequately the obligation of Member States to ensure that the costs of collective redress actions are not an obstacle for qualified entities to bring litigation.

Recommendation 1

The **financing of collective actions through individuals** affected as the sole avenue to finance a litigation does not appear to be a viable solution to fund collective actions.

However, such an option should remain possible, as it will contribute to the whole financing amount. In this respect, Member States should adopt legislation as suggested by Article 20(3) of the RAD and lay down rules explicitly allowing organisations to require a low entry fee to be represented in the litigation.

The national rules implementing the RAD should further define how the contribution may be made (membership, small donations) and the maximum amount that could be asked to the persons wanting to be represented (fixed amount or percentage of the claim).

Recommendation 2

Legal aid may be an interesting solution to cover all risks related to collective litigation if the specific case of collective redress is properly addressed by the rules governing the legal aid scheme in each Member State.

These rules should address the situation where not all claimants are eligible to receive legal aid, they should explicitly mention collective redress as a litigation eligible to legal aid, and make sure that organisations representing claimants to whom legal aid was granted can benefit from some financial support.

Recommendation 3

Contingency fees are not a suitable option for the financing of collective litigation: while making access to justice easier, potential existing adversary costs can still be deterrent since all costs other than lawyers' fees will still be borne by the litigating organisation. In addition, rules allowing, regulating or prohibiting contingency fees vary from one Member State to the other, which makes it difficult to have a suitable model throughout the EU.

Recommendation 4

Insurance schemes are not an effective solution for consumers, since existing insurance policies may not cover collective litigation or not be suited for the specific characteristics of collective litigation.

However, insurance schemes can be used by organisations as an alternative to third-party litigation funding, in particular in countries where such funding is not allowed. These insurances should cover all financial risks related to the litigation, and the premium should remain affordable to organisations.

Recommendation 5

Considering that **philanthropic funding** depends on the priorities of the funders, their budget, and their presence in some countries only, philanthropic funding should be complemented by additional funding options, such as structural public funding, private third party funding and public third-party funding.

Recommendation 6

The financing of collective redress based on **structural public funding** is an interesting option to address the shortcomings of private third-party funding. However, several reasons indicate that structural funding should be completed by other funding sources: the yearly allocation of resources, the limited subsidies, and the difficulties to ensure that the litigation will be financially sustainable can make it difficult for the organisation to start a collective action with the appropriate funding in the long term.

Recommendation 7

Private third-party funding already proves to be an effective way to finance collective actions. However, considering the shortcomings of such a model, and to ensure an access to judicial redress to a larger number of cases, it is recommended to assess how the existing private third-party funding options could be complemented with a public funding model where, among others, the return on investment would not be the main criteria, and the organisation funding the litigation would be able to bear the risk of low value claims and so-called test-cases.

Recommendation 8

The **financing of the public fund through the allocation of fines** perceived by independent regulatory authorities appears to be an interesting option, considering that the amount provided to the fund is not directly coming from the general budget but will be allocated to serve an objective of public interest.

Recommendation 9

The **public fund** could be financed (exclusively or not) by a **levy on the amounts received** in the course of the funded litigation. Ideally, the law should provide for the obligation to return a percentage of the amounts perceived to the fund. The levy should be determined having considered the percentage usually asked by the private funders, the need to maintain a sustainable fund and the reluctance to claimants to give part of the damages to a third party.

Funding through litigation does however mean that claimants can never receive the full amount of their legitimate claim, which may make collective redress unattractive for claimants. In this regard, and to allow for flexibility, it should be possible to decide not to ask for a levy or to lower its percentage (*e.g.* in case of low value claim). Such exception could be provided by law, ordered by the court, or decided by the fund.

Recommendation 10

Public funds financing collective actions could be **financed through unclaimed profits of successful litigation or settlements**. National and EU legislation should lay down the principles according to which such allocation of unclaimed amounts will take place.

Recommendation 11

In cases where the public fund is direct financed by the public authorities, such **financing should be regular, based on a fixed and regular amount** (ideally yearly), so that the fund remains sustainable and independent.

The financial resources of the fund should be high enough to allow the fund to accept a high number of applications and a diversity of cases, including cases with a lower chance of success.

Recommendation 12

The financing of collective actions by a public fund should be **open to all qualified entities under the RAD** when such qualified entity:

- is based in the country where the fund is operating (domestic cases)
- is bringing an action in the country where the fund is located but is qualified in another country (relevant for cross-border cases)
- is bringing an action involving individuals located in the country where the fund is located but is qualified in another country (relevant for cross-border cases).

Recommendation 13

It is therefore recommended that the financing of collective actions is open to the violation:

- of at least the legislation listed in Annex I of the RAD
- of additional (EU or national) relevant legislation as chosen by the legislator in the relevant Member State.

Recommendation 14

Several criteria should be established to select the applications for public funding of a collective action. These criteria should

- be clear and objective
- be laid down in a law to avoid any discretionary selection of applicants
- be transparent and objective enough to avoid any discretionary decision
-

- allow some flexibility for the selection organ to allow the financing of cases that might not meet all the criteria but which would present a particular interest for the public.

Recommendation 15

The public fund should cover all **direct and indirect costs of the collective litigation**, including at least:

- research and preparation fees
- lawyer fees
- expert fees
- adversary costs
- other expenses
- court and administrative fees.

The funding should not be limited to a certain amount or percentage of the total costs, considering that the objective of a public funding is precisely to allow an effective access to justice.

The funding should also cover adversary costs to ensure an effective access to the court to the applicant which should not bear the financial burden of supporting these costs.

Recommendation 16

The **funding agreement** with the public fund should include **minimum contractual requirements**. These requirements should be laid down by the applicable national rules.

However, the fund should have some flexibility to negotiate certain contractual aspects of the funding agreement with the applicant to ensure that these conditions are the most suitable to the case funded.

The relevant national rules should provide for the possibility or the obligation to ask for a percentage of the amounts perceived in the course of the litigation. Such percentage should be high enough to provide financial resources to the fund, but also reasonable and below market standards.

Recommendation 17

The members of the **selection body** deciding to fund a collective action should be **independent** and appointed by the legislative or executive branch.

The members should have the relevant experience to assess the legal merit of the case but also be representative of the consumer and public interests. The members could, for example, be representatives of the courts, of the law society, of consumer organisations and regulatory bodies in charge of enforcing the legislation listed in Annex I of the RAD.

Recommendation 18

The selection procedure to apply for public funding of a collective action should specify at least the following elements:

- the time when the applications should be submitted (several times a year or any time)
- the necessary documents and information to provide to assess the case
- the time within which the selection procedure will last
- the possibility for the selection panel to ask further information to the applicant and/or to organise a hearing
- the obligation to publish the decisions of the selection panel
- the possibility for review or appeal the decisions of the selection panel.

I. Introduction

The financing of collective redress actions is one of the most important preconditions for the effectiveness of collective actions.[1]

In addition to the typical costs of any litigation, organisations bringing a collective action must additionally manage the costs associated with the identification and management of claimants (campaigning, verification of claims, coordination of claimants) and the administrative costs of the organization itself (e.g. incorporation of a legal entity, overhead, human resources).

Ordinary legal costs are likely to be multiplied in collective actions, considering the number of complainants: the number of claimants can make the task of assessing the damage more complex or make the burden of proof more difficult to bear. The cost of litigation in the EU varies from one Member State to another, and the novelty of collective redress mechanisms and the potential need to solve new legal issues will probably make the risk – and therefore the costs – of collective litigation much higher than individual litigation.

At the same time, grouping several claimants together can also lead to **economy of scale** in many aspects (one lawyer coordinating one single action, one single procedure and court fee, less risk of contradictory judgements).

Considering the high costs of collective action and the fact that only non-profit organizations may bring a case, a system where the organisations conducting collective actions do not bear the full risk of the litigation is crucial for the RAD to provide the representative organisations with an effective way to bring litigation under the RAD.

To cover the costs related to collective actions, organisations (mainly consumer organisations in the EU) may employ different funding models. Recognizing the need to provide funding options Article 20(1) of the RAD explicitly requires Member States to *"take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right*". Article 20(2) of the RAD refers to some of these potential measures, such as public funding (including structural support for qualified entities), limitation of applicable court or administrative fees, or access to legal aid. It is however left to each Member State to choose effective options.

While the present report will focus on the **public funding** (Section III) of collective redress actions under the RAD, Section II below briefly presents different options available to finance collective litigation. This will allow comparison of the different models, identification of potential issues with the existing options for financing collective actions, and incorporation of the most effective elements of each model into any proposed public funding scheme.

[1] L. VISCHER – M. FAURE, "A law And Economic Perspective on the EU Directive on Representative actions", p.472, available at https://link.springer.com/article/10.1007/s10603-021-09491-3.

II. Existing financing options

A. Funding by individuals

Funding of collective redress can of course be supplied by the individuals represented by the organisation starting a collective action.[2]

However, Article 12(2) of the RAD provides that individual consumers concerned by a representative action shall not pay for the costs of the proceedings unless Member State law provides for such a possibility under specific circumstances, like in case of intentional or negligent conduct of the consumer.

The objective of this provision is general immunity for class members from liability for costs. Since individual class members have little practical opportunity to influence the conduct of the action, it would be unfair for those class members to bear the costs associated with litigation.[3] Furthermore, a class member should not be liable for costs simply because the representative claimant is not in a position to fund the collective action.

On the other hand, Article 20(3) of the RAD explicitly states that Member States may allow qualified entities to exact a modest entry fee or similar charge from consumers who have expressed their wish to be represented by that qualified entity in a specific representative action. By limiting fees to consumers who have opted in, this option allows qualified entities to recoup some costs while preventing consumers who have not agreed to participate in a collective action from facing compulsory legal fees.[4]

In our opinion, it remains possible under the RAD for individuals to contribute to the costs of the litigation by contributing financially to the organisation starting the collective action. These contributions may be donations, membership fees, or contribution to the costs of the organisation.

At least two downsides to this option can be developed:

- First, individuals may be wanting to be represented but they may be **reluctant to pay** to be a member of the class and, as a consequence, decide not to join the class.
- Second, a **financial contribution before litigation begins may be insufficient**. The total cost of litigation is usually difficult to predict (in particular the lawyers fee). Adversary costs (including the obligation for the losing party to pay the legal fees to the other party that wins the case) will have to be borne by the organisation, making the total amount of funding necessary for the litigation even more difficult to predict. The qualified entity managing a collective action may also be ill equipped to shoulder the financial and logistical burden that the administration costs for a large number of individuals can present. Both elements can have a big impact on the financial capacity of the organisation to conduct the litigation until

[2] **Litigation crowdfunding** could also be put under this category. Crowdfunding in this case refers to small investments made by large groups of individuals to provide the financial support to fund a dispute. See British Colombia Law institute, *Study Paper of Financing Litigation*, October 2017, pp. 232-233, https://www.bcli.org/wp-content/uploads/2017/10/2017-10-04-BCLI-Study-Paper-on-Financing-Litigation-PUBLICATION-COPY-rev.pdf.
[3] R. MULHERON, "*Costs and funding of collective actions, realities and possibilities*", February 2011, https://www.qmul.ac.uk/law/media/law/docs/staff/department/71112.pdf.
[4] L. VISCHER – M. FAURE, "A law and Economic Perspective on the EU Directive on Representative actions", p.472, p. 473.

the end, not to mention that this situation could even jeopardize the long-term financial sustainability of the organisation.

Recommendation 1

The financing of collective actions through individuals affected as the sole avenue to finance a litigation does not appear to be a viable solution to fund collective actions.

In respect, Member States should adopt legislation as suggested by Article 20(3) of the RAD and lay down rules explicitly allowing organisations to require a low entry fee to be represented in the litigation.

The national rules implementing the RAD should further define how the contribution may be made (membership, small donations) and the maximum amount that could be asked to the persons wanting to be represented (fixed amount or percentage of the claim).

B. Legal aid

Legal aid is explicitly mentioned by Article 20 of the RAD as a possible measure for Member States to fund collective actions. Article 47 of the Charter of Fundamental Rights of the EU also provides that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[5] Under legal aid schemes, funds covering legal fees are provided by the State, sometimes with specific measures to limit or avoid the cost of proceedings. These funds are paid to the associations of lawyers (bar associations), which then distribute them to the specific lawyers representing the claimants. Legal aid is usually available only for a **small number of beneficiaries**, based on the financial situation of the applicant and on the merits and subject matter of the case.[6]

In addition, legal aid may only covers the costs of **individual litigation**, and not the additional costs of collective actions.[7] It is unlikely that all or even most class members' financial situations will meet the criteria required to receive assistance. Under the circumstances described above, legal aid therefore does not seem to be the most suitable solution to fund collective actions if the national rules do not address specifically the case of collective litigation.

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[5] For an overview of legal aid and the case-law of the ECHR, see "Legal aid in Europe: minimum requirements under international law", Open Society Justice Initiative, https://www.justiceinitiative.org/uploads/d69e329c-6cb7-47ca-bdf0-07f8992a728b/ee-legal-aid-standards-20150427.pdf.

[6] K. HAMULAKOVA, "Funding of collective actions », in International and Comparative Law Review", 2016, vol. 16, n°2, p. 136.

[7] L. VISCHER – M. FAURE, "A law And Economic Perspective on the EU Directive on Representative actions", p. 473, https://www.researchgate.net/journal/Journal-of-Consumer-Policy-1573-0700/publication/352356767_A_Law_and_Economics_Perspective_on_the_EU_Directive_on_Representative_Actions/links/60c59279299bf1949f5411ae/A-Law-and-Economics-Perspective-on-the-EU-Directive-on-Representative-Actions.pdf. In Ireland, Civil legal aid is not available for representative actions, as funding for such actions is expressly precluded by legislation (see Section 28(9)(a)(ix), Civil Legal Aid Act 1995). See also Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, which does not address the scope of legal aid regarding collective redress actions.

Considering the above, legal aid does not appear to be an effective option to finance collective actions: not all claimants might be eligible to receive legal aid, the financing does not typically cover collective actions, and the representative organisations will still bear all costs other than lawyer fees.

Recommendation 2

Legal aid may be an interesting solution to cover all risks related to collective litigation if the specific case of collective redress is properly addressed by the rules governing the legal aid scheme in each Member State.

These rules should address the situation where not all claimants are eligible to receive legal aid, they should explicitly mention collective redress as a litigation eligible to legal aid, and make sure that organisations representing claimants to whom legal aid was granted can benefit from some financial support.

C. Contingency fees

Collective actions may also be funded by a lawyer, on the basis of **contingency fees** ("no win no fees" basis), where the payment of the lawyer fees is contingent on the success of the case. Usually, the lawyer receives a share of the outcome of the proceedings if the claimants are successful but would not be paid if the client loses the case.

However, **contingency fees are restricted or prohibited in some jurisdictions**. It also appears that in some Member States, where some forms of contingency fees are regulated, there are specific provisions on the operation of such remuneration in collective redress actions.[8] In any case, the divergence of national rules on the limitations on contingency fees make it difficult to be considered as an effective funding mechanism for collective actions in all jurisdictions.[9]

In addition, **only the lawyer fees would be covered by this option**, and any proceeding costs and adversary costs would not be covered by the agreement with the lawyer. Article 12 of the RAD makes indeed clear that the Member States must ensure that the unsuccessful party in a representative action for redress is required to pay the costs of the proceedings borne by the successful party under the national rules. Under Recital 38 of the RAD, these costs should include, for example, "any costs resulting from the fact that either party was represented by a lawyer or another legal professional, or any costs resulting from the service or translation of documents".

[8] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), Section 2.3.3, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2018:040:FIN.
[9] K. HAMULAKOVA, "Funding of collective actions", in International and Comparative Law Review", 2016, vol. 16, n°2, p. 135.

Therefore, it is likely that claimants would not turn to such a solution to finance their case: they would still have to bear the risks of losing the case and bearing the costs of the proceeding should they lose the case.

Recommendation 3

Contingency fees are not a suitable option for the financing of collective litigation: while making access to justice easier, potential existing adversary costs can still be deterrent since all costs other than lawyers' fees will still be borne by the litigating organisation. In addition, rules allowing, regulating or prohibiting contingency fees vary from one Member State to the other, which makes it difficult to have a suitable model throughout the EU.

D. Insurance schemes

Insurances schemes may be used to finance litigation costs, by insuring the financial risk of the costs linked to litigation.

Such insurances schemes can take different forms: "**before the event insurance**" ensures that once the insured natural or legal person brings a claim before a court, the insurance company covers the litigation fees.

"After the event" schemes cover all litigation fees or only the risk of having to pay the adversarial costs in case the claimant loses the case.[10]

Insurance schemes may be a relevant solution in jurisdictions where procedural financing is not allowed (*e.g.* Ireland or UK). Insurance sector remains however a regulated sector and insurers need to comply with the relevant requirements.

However, these schemes are usually employed by professionals and not consumers (except in some case, like household policies). Even in cases when consumers have contracted an individual insurance, it is not certain that the insurance could use it in collective actions.

Although these insurances could potentially be used by consumer organizations to finance collective actions, the additional cost of these premiums can be quite high and pose an obstacle to consumer organisations which cannot afford it.[11]

[10] K. HAMULAKOVA, "Funding of collective actions", in International and Comparative Law Review", 2016, vol. 16, n°2, pp. 132-133.
[11] BEUC, "Litigation funding in relation to the establishment of a European mechanism of collective redress", Section II, https://www.beuc.eu/publications/2012-00074-01-e.pdf.

Recommendation 4

Insurance schemes are not an effective solution for consumers, since existing insurance policies may not cover collective litigation or not be suited for the specific characteristics of collective litigation.

However, insurance schemes can be used by organisations as an alternative to third-party litigation funding, in particular in countries where such funding is not allowed. These insurances should cover all financial risks related to the litigation, and the premium should remain affordable to organisations.

E. Philanthropic funding

Consumer organisations may benefit from structural and/or project based funding coming from a **private funder** (usually a philanthropic organisation).

Existing foundations are already focusing on funding strategic litigations, including collective actions. The Digital Freedom Fundation (DFF), or Luminate offer specific financial support for strategic litigation. Open Society Foundation also gives structural funding to civil society and NGOs active in strategic litigation and consumer rights.[12] While funding can be allocated to finance a specific litigation, funding can also be granted to an organisation conducting strategic litigation without being linked to a specific case.

Conditions may be attached to the funding (be it specific to a litigation or a structural funding)[13], and the availability of private funding always depends on the strategy, the objectives, the budget and the main missions of the private funder. In addition, reporting obligations imposed by certain funders can impose prohibitively large overhead for some organisations that will have to dedicate resources to reporting and not to the litigation itself.

Recommendation 5

Considering that philanthropic funding depends on the priorities of the funders, their budget, and their presence in some countries only, philanthropic funding should be complemented by additional funding options, such as structural public funding (see F), private third party funding (see G) and public third-party funding (see section III).

[12] See for example 2021 *noyb* annual report, p. 20.
[13] Classically, the representative organisation may be asked to find funding from an additional source, or from its own funds, and will be subject to reporting obligations, will have to share some strategic information with the funder.

F. Structural public funding

Organisations can also count on **structural funding from the public sector**. However, these options are not well established in the EU: only a few public subsidies are intended for the direct financing of claims.[14]

Some Member States' consumer organisations receive public subsidies that can be structural or dedicated to specific activities or projects, but these do not usually cover costs for collective redress.

In some Member States, public **subsidies are specifically allocated to the financing of claims.** This is the case in Austria, where the main consumer organisation (VKI), receives governmental subsidies to finance claims. In the same vein, the umbrella organisation for German consumer organisations (VZBV), receives annual subsidies from the Federal Ministry for Consumer Protection, including a specific amount dedicated to legal proceedings.[15]

Since public funding usually depends on the Ministry in charge, independence of the organisations should be preserved. No conditions should be attached, for example, to the way that money dedicated to litigation should be spent. the independence of the organisation

Lastly, recurrent subsidies are usually allocated on a yearly basis. This makes it **difficult to predict the amounts needed** for the actions and to plan potential litigation. Litigation usually takes years, and the organisation might not be sure to have the financial resources to conduct the litigation until the end.

Recommendation 6

The financing of collective redress based on structural public funding is an interesting option to address the shortcomings of private third-party funding. However, several reasons indicate that structural funding should be completed by other funding sources: the yearly allocation of resources, the limited subsidies, and the difficulties to ensure that the litigation will be financially sustainable can make it difficult for the organisation to start a collective action with the appropriate funding in the long term.

G. Private third-party funding

Private third-party funding is an option for litigation funding that continues to develop globally. Third-party funding refers to an agreement whereby a third party (the funder) finances the costs related to the litigation in return of a share of any amounts received by the representative organisation.

Usually the funder covers not only lawyer fees, but also bears other costs, which may include:

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[14] BEUC, "*Litigation funding in relation to the establishment of a European mechanism of collective redress*", 02/02/2012, Section I; see also Overview of existing collective redress schemes in EU Member States, https://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf.
[15] BEUC, "Litigation funding in relation to the establishment of a European mechanism of collective redress", Section I.

- adversary costs as a consequence of the "loser pays principle"[16]
- research costs[17]
- courts or administrative fees[18]
- any other costs (*e.g.* travel or translation costs).

Despite the criticisms regarding private third-party funding (see here under), this model has the advantage of covering the costs of the proceedings that have to be paid by the losing party.[19] Private third-party funding is therefore in many cases the only way to ensure the right to access to courts.

Some of the criticisms about private funding of litigation are the following:

- The question of **independence** of the representative organisation from the funder is also another concern in cases where the funder tries to influence decisions on the strategy and the litigation.[20]
    - funders can try to pursue the litigation instead of reaching a settlement where no damages are allocated or when more damages could be obtained by a decision of the court. [21]
    - the funder may try to influence the representative organisation's choice of lawyer, although the latter is the only one granting the power of attorney to the lawyer.[22]
- A **conflict of interest** may arise where the defendant is the funder's competitor.

It therefore welcome that the RAD address these potential issues through the obligation for Member States to lay down **stable rules avoiding conflict of interests and guaranteeing the independence** of the representative entities: Article 10 of the RAD provides that Member State shall ensure that conflicts of interest are prevented, by enacting legislation that should make sure that the funder may not divert the representative action away from the protection of the collective interests of consumers. According to the same Article, Member States should also make sure that the action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.[23] Such rules enable to ensure that the interests of the funder are aligned with the ones of the consumers.

The RAD even provides for a **control by the court of the funding conditions** and the power for the judge to order to modify the funding agreement, if necessary, to ensure compliance with the principles laid down here above. Under these circumstances, the criticisms about private Third-Party Litigation funding should be considered as appropriately addressed by the RAD, subject to national implementation ensuring clear and transparent conditions for the funding of collective action by private actors.

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[16] In some jurisdictions, the losing party has to pay the costs of the other party. These costs can be regulated by the law (these costs can be a fixed amount, a maximum amount, or the actual amount incurred by the other side) or fixed by the court.
[17] That can include legal and technical research to prepare a case, collection of evidence, commissioning of studies, contact with the defendant before the litigation.
[18] Article 20(1) RAD encourages Member State to make sure that the costs of the proceedings are not too high. Article 20(2) mentions that Member State may by example, limit the court or administrative fees.
[19] K. HAMULAKOVA, "Funding of collective actions", in *International and Comparative Law Review"*, 2016, vol. 16, n°2, p. 137.
[20] J. SAULNIER, K. MULLER and I. KORONTHALYOVA, "Responsible private funding of litigation", Study for the EPRS, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf.
[21] BEUC, "Litigation funding in relation to the establishment of a European mechanism of collective redress", 02/02/2012.
[22] K. HAMULAKOVA, "Funding of collective actions", in International and Comparative Law Review", 2016, vol. 16, n°2, p. 138.
[23] See Article 10(2)(b) of the RAD.

Although private third-party funding under these circumstances appears to be a suitable model in many cases, it might not be best suited for certain **low-value claims**.[24] The private funder will indeed usually take the decision on the following factors: the cost/benefit analysis to evaluate the potential profit against the expenses related to the litigation, the complexity of the case, the difficulty of gathering evidence and the possibility of a high damage claim (to make sure that the damages obtained in court or the settlement will provide a sufficient return on investment). For issues aiming at clarifying a fundamental legal issue ("test cases" [25]), potential financial returns may be too low to attract third-party investment.

Recommendation 7

Private third-party funding already proves to be an effective way to finance collective actions. However, considering the shortcomings of such a model, and to ensure an access to judicial redress to a larger number of cases, it is recommended to assess how the existing private third-party funding options could be complemented with a public funding model where, among others, the return on investment would not be the main criteria, and the organisation funding the litigation would be able to bear the risk of low value claims and so-called test-cases.

The advantages and modalities of a public third-party funding is commented under the sections below.

III. Public funding of collective redress actions

Financing collective redress though a public funding scheme is an option that already exists in some non-EU countries (*e.g.* Canada, Hong-Kong, or Israel) but is not implemented in the Member States.

As seen above[26], consumer organisations receive public subsidies in some Member States. However, these funds are usually designated to specific projects and research, and not to legal proceedings. Only a few Member States finance legal claims initiated by the consumer organisations.[27]

The establishment of a public fund dedicated to finance collective actions is a funding option at the **crossroad between a public structural funding and private third-party funding** where collective representative organisations can apply for third-party funding organisations being set-up and financed by public authorities with the mission to allocate the financial resources that

[24] For example, cases where little damages not claimed or where no damages are at stake, but only an injunctive relief.
[25] For example, cases where case-law could confirm the existence of a right for individuals.
[26] Section II.F.
[27] BEUC, "Litigation funding in relation to the establishment of a European mechanism of collective redress", Section I.

they manage to the selected applicants, in the public interest and with the view of aneffective access to collective redress as required under Article 20 RAD.

Under these circumstances, a **dedicated public fund for collective redress** would be a model created at the initiative of the Member States, providing for financial assistance to claimants apart from needs-based legal aid or a structural funding of consumer organisations.

It should be noted that the question of **public third-party funding is a political question**. Article 20 of the RAD makes explicit that Member States must provide for measures aiming at ensuring that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their rights to seek a measure under the RAD.

However, the concrete implementation of such measures will likely be subject to pressure from business interests as well as other Member States with an interesting in avoiding collective actions being brought against local business. At the same time, public funding would be an **acknowledgment of the importance of the public interest in ensuring effective access to remedies for all**,[28] which lies as the heart of the RAD.

Creating a model providing public funding for collective actions will ensure that all claimants (not only impecunious plaintiffs, as with legal aid) would be entitled to bring actions for any kind of remedy (including cease and desist orders, and not only claims that generate a financial benefit for the claimant which are the usually the only actions financed by private procedure financing companies).

That explains why the creation of a fund for class actions is often seen as "*the most attractive method of supporting class proceedings*".[29]

There is no self-evidently suitable form for the legal entity providing the fund, and the characteristics of such a fund can be adjusted to suit the particular policy priorities of implementing Member States.

The following sections cover different elements which should be taken into account when addressing the setting-up of a public scheme for funding collective actions:

- different potential sources of revenue for the public fund, with the view that the fund should be sustainable in the long run,
- clear and objective criteria for allocation of the fund (*i.e.* types of cases covered, cases excluded, scope of the fund),
- clear and objective criteria for the selection of the applicants,
- clear and objective selection procedure,
- scope of the funded activities (*e.g.* legal costs, adversary costs, research costs, management costs).

A. Options to finance a public fund dedicated to finance collective actions

Although the budget constraints might make it difficult for Member States to provide sufficient resource to a public fund, its financing could be done following several models, which are not mutually exclusive. Different funding solutions can be combined.[30]

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[28] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court,* Report No 46 (1998) para 308.
[29] Scottish Law Commission, *Multi-Party Actions Court Proceedings and Funding,* Discussion Paper NO 98, para 8.43, https://www.scotlawcom.gov.uk/files/3112/7989/6877/rep154.pdf.
[30] EU Commission Green Paper, November 2008 (COM (2008)794 final), §51.

One example of combination of different means of funding is the Recommendation from the Victorian Law Reform Commission, that proposed an establishment of a Justice Fund[31], which would be funded through:

(a) entering into funding agreements with assisted parties whereby the Justice Fund would be entitled to a share of the amount recovered by the successful assisted party;

(b) having statutory authority in class action proceedings under Part 4A of the Supreme Court Act 1986 (Vic) to either (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or (ii) make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment;

(c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs;

(d) receiving funds by order of the Court in cases where cy–près type remedies (ie distribution of proceeds obtained from the legal proceedings that indirectly benefit the public as a whole in some way relating to the purpose of the class action litigation) are available; and

(e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies.

The following options could be explored by the Member States:

a. Public funding through allocation of fines

Allocating fines imposed by authorities competent to enforce the legislation related to consumer protection is a first potential source of revenue for a public fund for collective redress.

These regulators should ideally intervene in case of violation of the legal provisions listed in Annex I of the RAD to maintain a nexus between the fine and the financing of the public fund. The fund could therefore be financed through the fines imposed by various regulators, such as competition, telecoms and bank regulators, as well as data protection authorities under the GDPR and the future ePrivacy Regulation. Likewise, part of the fines imposed by the EU Commission under the new Digital Market Act[32] could be allocated to a dedicated fund with the aim to fund collective redress actions under the RAD. The same could apply to fines imposed by

[31] The law Reform Commission of Honk Kong, Report on Class actions, May 2012, para 8.66, https://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf.
[32] European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)), article 30.

the EU Commission under the future Digital Service Act.[33] The different regulatory systems, authorities and political situations in each Member State may allow allocating other such resources to collective redress.

Such a model is already used in some countries as illustrated by the following examples:

In **Italy**, fines imposed by the competition authorities supported projects linked to specific consumer issues.

This model is used in **Quebec** and **Brazil**, where funds finance consumer education and consumer law projects and organisations.[34]

The so-called **Modernisation Directive**[35] modified, inter alia, the enforcement provisions in several consumer law directives. Its Recital 15 provides that "When allocating revenues from fines, Member States should consider enhancing the protection of the general interest of consumers as well as other protected public interests."

In Victoria, the **Consumer Law Fund** derives finance from a number of sources, including penalties ordered under the Australian Consumer Law.[36]

From a budgetary point of view, fines would in this case would not be allocated to the general budget of a Member State but go directly allocated to a specific purpose (funding of collective actions). While this may make funding more independent form political decisions and austerity measures, the income coming from fines can vary from year to year and may be dependent on the enforcement policy and practices of regulators and courts. For example, the relevant regulator could limit cash flow to collective redress funds by simply imposing lower fines. It would therefore be advisable to choose independent regulators as a funding source.

[33] See Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN. Final text subject to the agreement of the European Parliament and the Council still to be approved and published.
[34] BEUC, "Litigation funding in relation to the establishment of a European mechanism of collective redress", Section I.
[35] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, https://eur-lex.europa.eu/eli/dir/2019/2161/oj.
[36] See https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/victorian-consumer-law-fund. The VCLF receives its funds through penalties for breaching the Act and can be used for:
- the purposes of improving consumer wellbeing, consumer protection or fair trading; or
- any other purpose consistent with the objectives of the Australian Consumer Law (Victoria).

Recommendation 8

The financing of the public fund through the allocation of fines perceived by independent regulatory authorities appears to be an interesting option, considering that the amount provided to the fund is not directly coming from the general budget but will be allocated to serve an objective of public interest.

b. Return of a share of successful claims to the fund

This option refers to the allocation of a share of the amounts collected through the collective action will return to the public fund so that it can finance further collective actions. The obligation to return part of the amounts obtained after a successful claims to the funder is common practice in private third-party funding and could be used in a model where public funding would be granted, bearing in mind that the share is not subject to the profitability required in the private sector.

Such a return can be determined by a funding arrangement between the representative organisation and the fund, or laid down by law.

The obligation to return a levy on the amounts perceived in the course of the litigation can also be ordered by the judge to avoid any discussion between the fund and the representative entity. A court could be given the possibility to reduce the share of the damages to be returned to the fund, if the share appears to be unfair towards the claimants. The law or the fund could also decide that in some cases, the share of the damages would be reduced or not even required, considering all the circumstances of the case and in the light of the principle of fairness and equity.

The obligation to return a share of the funds to the representative organisation will allow self-financing of the fund and more independence from external sources of funding (like a direct funding from a government).

In the case of a public funding, the levy can be lower than the percentage usually applied by third-party funders, since the public fund may have less incentive regarding the return on investment. Considering the average share that private TPF are usually applying, and taking into account the purpose of a public fund (funding collective action under better conditions), it would be reasonable to assume that the share on all damages ordered by a court or as a result of a settlement should not be higher than 10 percent of the amount received. A 10% levy is applied in Ontario[37], where the representative plaintiff must reimburse the Fund for the amount it paid out, plus a levy of 10% of the court-ordered award or settlement amount[38], as a top-up mechanism for the benefit of future litigants who may require recourse to the fund.[39]

However, this would also mean that claimants would (by law) be dispossessed of a certain percentage of their claims, whenever they choose to be represented in a collective redress

[37] This model has been praised in Quebec, where an author considered that, contrary to the Ontario fund, "the fact that the Fund takes a portion of all class settlements or judgements, whether or not it provides funding, creates an energizing cycle" (The law Reform Commission of Hong Kong, Report on Class actions, May 2012, para 8.62, https://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf)
[38] See also Executive summary of the Study commissioned by *noyb* on the Public Models Funding Models for Third-Party Litigation in annex.
[39] The law Reform Commission of Hong Kong, Report on Class actions, May 2012, para 8.62, https://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf.

lawsuit. This would *de facto* amount to a government "tax" on any successful claim via collective redress instruments. While this can be seen as a fair arrangement, given that the general public is financing a private claim and private financial risks, it may make collective redress less attractive for claimants and could lead to unfair results especially when claims are high and claimants cannot afford to lose the relevant percentage. In any case there would have to be a cap and/or exceptions for low-income claimants.

In Member States where the applicable law foresees extraordinary returns for a claimant (such as high damages amounts, a reimbursement of legal costs that is higher than actual costs or forms of "punitive damages") such successful claims could be more easily returned to the funds, without cutting into the legitimate compensation of a claimant.

Recommendation 9

The public fund could be financed (exclusively or not) by a levy on the amounts received in the course of the funded litigation. Ideally, the law should provide for the obligation to return a percentage of the amounts perceived to the fund. The levy should be determined having considered the percentage usually asked by the private funders, the need to maintain a sustainable fund and the reluctance to claimants to give part of the damages to a third party.

Funding through litigation does however mean that claimants can never receive the full amount of their legitimate claim, which may make collective redress unattractive for claimants. In this regard, and to allow for flexibility, it should be possible to decide not to ask for a levy or to lower its percentage (*e.g.* in case of low value claim). Such exception could be provided by law, ordered by the court, or decided by the fund.

c. Allocation of unclaimed amounts to the fund

Another option to finance public funds is the possibility for the court to allocate the unclaimed amounts obtained in the course of a proceeding to a specific fund to a public fund (so-called 'cy-près' distribution), which are a common phenomenon in larger and longer lasting litigation.

In collective litigation, there are two cases where 'cy-près' distribution can take place:

- an unclaimed amount needs to be distributed, to prevent it from reverting to the defendant;
- it is impossible or impracticable to distribute direct compensation to individuals who have suffered damage, but it is possible to calculate aggregate damages for the group.[40]

Non-profit organisations bringing litigation must usually donate unclaimed funds to avoid any "profit" from the litigation. The RAD already opens the door for potential of 'cy pres distribution' in Article 9(7): Member States can use proceeds that remain unclaimed to feed into a Legal Aid or Public/Private collective redress fund.[41]

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[40] P. CASHMAN and A. SIMPSON, "*Class Action Remedies: Cy-près; An Imperfect Solution to an Impossible Problem*", 2020, p. 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765085.
[41] I. TZANKOVA and X. KRAMER, "*From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands*", https://deliverypdf.ssrn.com/delivery.php?ID=228120074126095085012121121071000123113033089067083026007068072066002068004084087077016096063033044063062007019115007000088121042014014018044024073117081119011003047044053096126025103002096084111093020090074031073075069005126103081093030127027098006&EXT=pdf&INDEX=TRUE

In **Québec**, the mount collected by the Class Action Fund depends on the method of recovery of the class and applies to unclaimed amount in every class action (not just those in which funding has been granted).[42]

This solution of redistributing the unclaimed amount cannot only ensure that the defendant is deprived of ill-gotten gains[43] when claims cannot be paid out, but also allow that the allocation of the entire damages suffered by the group to a fund protecting the collective interest.

Recommendation 10

Public funds financing collective actions could be financed through unclaimed profits of successful litigation or settlements. National and EU legislation should lay down the principles according to which such allocation of unclaimed amounts will take place.

B. Direct funding

The public fund established can be directly financed by the public authorities. The law can provide that the public fund can be financed on a regular basis (*e.g.* every year) or at specific occasions. The fund can be provided with an amount fixed by the law, paid from the general budget or from a budget depending on a ministerial department. This source of funding can of course be mixed with another option to finance the fund, as mentioned under Section III.A.

Examples of direct funding can be found in the report commissioned by *noyb* on Canadian and Israeli Public Funding Models for Third-Party Litigation.[44]

[42] See Regulation respecting the percentage withheld by the Fonds d'aide aux recours collectifs, R.R.Q. c. R-21, r. 3.1., https://www.legisquebec.gouv.qc.ca/en/document/cr/F-3.2.0.1.1,%20r.%202; W.A. Bogart, J. KALAJDIC and I. MATHEWS, "Class Actions in Canada: a National Procedure in a Multi-Jurisdictional Society?", December 2007, p. 29, https://inspectapedia.com/Design/Class-action-lawsuits-in-Canada-2007.pdf.
[43] R. AMARO, M.-J. AZAR-BAUD, S. CORNELOUP, and others, "*Collective redress in the Member States of the European Union*", Study requested by the JURI Committee of the European Parliament, p. 74, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf.
[44] Fobler Rubinof Report in Annex, p. 22.

The federal Court Challenge Program (CCP) in **Canada** received primarily its funding from the Government of Canada. Annual report is not yet available but the available amount to distribute under the CCP is approximately € 4.909.000. According to a report from 2016, the sustainability and independence of the program could be better achieved[45] by a foundation or endowment model that would be enshrined in an act of the Parliament.[46] Such a model would make it difficult for future governments to remove funding. [47]

In **Ontario**, the initial funding received by the Class Proceedings Fund (CPF) was a $500,000 CAD grant from the Law Society Foundation of Ontario. Since then, the CPF receives a levy of 10% of any award or settlement in favor of the financed claimant. In 2020, the closing balance of the fund was approximately € 7,904,000. The amount received from the 10% levy was approximately € 2,788,000.

In **Québec**, the Class Action Fund is directly funded by the Government on a yearly basis. Alternatively, the Government can guarantee the payment and/or loans made by the Fund.

In **British Columbia**, the Participation Fund received $ 100,000 CAD annually from the Law Foundation of British Columbia.

In **Israel**, the Class Action Fund annual budget is relatively low (around 1.5 million NIS – approximately less than half a million euros) and cannot be carried over into the next fiscal year.[48]

Of course, the initial financial means provided to the fund should be substantial enough to allow the fund to finance several litigations without depending on further resources. The example of the Class Action Fund in Israel shows that a low budget is an obstacle to finance large cases, which are common in collective actions.[49] Also, the fund should have enough resources to be in a position to finance cases with a lower chance of success.

In order to ensure a long-term sustainability of the fund, the law should establish the amount to be funded (with potential increase and adjustments to take inflation into account for example), the periodicity of the funding and the potential additional sources of financing of the fund.

Furthermore, clear legal provisions would ensure that the fund would not have to renegotiate every year the amount of funding to be received. This would also make the fund less dependent on political influence by a new government or parliament.

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[45] As of February 2017, the Court Challenges Program has been reinstated with an annual budget of $5 million.
[46] Summary report on the Court Challenges Program consultations, p. 8, Section 2.2; https://www.canada.ca/content/dam/pch/documents/corporate/publications/general-publications/summary-court-challenges-program-consultations/rapportConsultationsPCJ-ReportConsultationsCCP-eng.pdf.
[47] https://www.viewer.vn/wiki/en/Court_Challenges_Program_of_Canada?action=history.
[48] E. BUKSPAN, "The Israeli Public Class Action Fund New Approach for Integrating Business and Social Responsibility", in *The Cambridge International Handbook of Class Actions, Cambridge University Press*, January 2021, p.532, Section 26.3.
[49] Fobler Rubinof Report in Annex, p. 23.

Recommendation 11

In cases where the public fund is direct financed by the public authorities, such financing should be regular, based on a fixed and regular amount (ideally yearly), so that the fund remains sustainable and independent.

The financial resources of the fund should be high enough to allow the fund to accept a high number of applications and a diversity of cases, including cases with a lower chance of success.

C. Selection criteria

The question of which collective redress actions will be financed is of course essential once a public fund for collective redress has been established. Selection criteria should be determined in advance by the law to guarantee transparency and an objective assessment of each application.

The question can be split into the following sub questions:

- who can apply,
- which types of collective actions can be funded, and
- which criteria are applied to select which actions will receive funding.

a. Admissible applicants

Considering that the RAD provides for the possibility for all **qualified entities under Article 4(2)** to bring domestic or cross-border cases under the RAD, the same qualified entities should be included in the list of entities admissible to apply for the financing of a collective redress action.

Two lists of qualified entities can co-exist in each country (*i.e.* one for domestic cases and another one for cross-border cases). Both types of qualified entities in a country should have access to the fund available in this country, to avoid funding gaps when one the core objective of the RAD (cross-border collective redress cases) is pursued.

In other cases, different (national or European) funds could also finance the action. The exact territorial scope of Article 20 RAD is not clear, but the text seems to envision a duty of the Member State where litigation is brought to ensure proper funding. After all, this Member State is the one establishing the national procedure and the costs and funding options, such as third-party funding.

A fund will probably only finance an action when a link between the country of the fund and the action can be found. Therefore, the relevant national rules could provide that the funding will be also be available for qualified entities based in another country but bringing an action in the country where the fund is located.

There seems to be an issue that Member States would hardly have any political interest in funding litigation initiated by an organisation from another Member State against a local business. Equally, Member States may be reluctant to fund litigation in another legal system where legal fees may be more expensive. Adequate funding for claims in another jurisdiction is therefore necessary to ensure that litigations can be initiated against defendants in Member States that do not provide for similar funding.

Furthermore, the RAD does not mention the possibility for a consumer organisation or another qualified entity to intervene in a pending case, for example to support the position of a party to the pending litigation, or to bring relevant elements to the litigation.[50] Such a possibility could also be included in the list of potential applicants to the fund, to allow qualified entities to intervene in a pending case where allowed by the national rule.

Recommendation 12

The financing of collective actions by a public fund should be open to all qualified entities under the RAD when such qualified entity:

- is based in the country where the fund is operating (domestic cases)
- is bringing an action in the country where the fund is located but is qualified in another country (relevant for cross-border cases)
- is bringing an action involving individuals located in the country where the fund is located but is qualified in another country (relevant for cross-border cases).

b. Litigations covered by the fund

Article 2(1) of the RAD states that representative actions shall be brought against any infringement of the provisions of Union law referred to in Annex I of the RAD. The long list of Annex I includes consumer–related legislation about, among others, product safety, electronic commerce, data protection, protection of air passengers, and credit agreements.

Collective actions regarding the violation of the legislation listed in Annex I of the RAD should therefore all be financed by a public fund. Additional national laws aiming at protecting consumers can also exist in some Member States where the RAD will be implemented and providing for public funding. In these countries, the financing of collective actions regarding the violation of these national laws should also be possible. These should be added in a list decided by law and published by the fund.

Moreover, it is also up to the Member States to decide to open collective action to other laws which are not directly linked to consumer protection. For example, human rights legislation, regarding the protection of minorities, immigration law, or freedom of speech, are likely to be better enforced under a collective action, since they usually involve a large amount of complainants.

Recommendation 13

It is therefore recommended that the financing of collective actions is open to the violation:

- of at least the legislation listed in Annex I of the RAD
- of additional (EU or national) relevant legislation as chosen by the legislator in the relevant Member State.

[50] For example, the Canadian Court Challenge Program provides for such a possibility.

c. Material selection criteria

In order to ensure an **objective selection** of the actions financed by the fund, but also considering the limited amount of funding available, it is essential to lay down criteria on the basis of which financing of the collective actions will be selected by the fund.

Deciding on these **factors should ideally be laid down by the legislator**, or the Ministerial department in charge, to set-up a framework within which the fund will decide to finance the case. Ideally, the persons in charge of establishing selection criteria should be separate from those assessing the criteria for each individual case.

Examples of relevant of selection criteria can be found in the report of Fogler Rubinoff annexed to this study.

In **Ontario**, regarding Legal Aid, the **Legal Aid Ontario** ("LAO") will assess the case on specific criteria.

When reviewing application, the LAO considers many several factors, including:

- whether the test case aligns with LAO's mandate and strategic priorities;
- whether the case is of high quality (clear facts, developed legal argument, and reasonable budget); whether the case is likely to succeed, including the characteristics of the client and of the lawyer; and
- whether the case is the most effective and efficient use of resources and public funding.

In deciding whether the case is cost-effective, LAO will consider:

- the estimated cost of the case;
- whether the case will resolve or reduce other duplicative or unnecessary matters;
- whether LAO previously funded similar litigation;
- whether the case is likely to otherwise come before the courts; and
- whether there have been other pro bono contributions or other sources of funding.

LAO also considers the significance of a case, including:

- whether it raises a novel issue not previously litigated;
- whether the case will have a broad impact;
- whether the outcome can affect a large number of low-income people;
- whether the advancement of the law is of serious importance; and
- whether the case has the capacity to improve access to justice in LAO's core areas of service.

In **Canada**, the **Canadian Court Challenges Program** ("CCP") will assess whether an applicant who seek funding as **interveners** satisfy the following criteria:

- the application involves (1) a legal remedy for which the CCP has already approved funding, or (2) a legal remedy for which the former Court Challenges Program has approved funding (or for language rights, the former Language Rights Support Program), or (3) a legal remedy that involves one of the human rights covered by the CCP;
- the intervention raises important arguments that have legal merit and that contribute to the resolution of the legal issues raised in the test case;

- the arguments have not been covered in substance by other parties or interveners;
- the intervention could assert and clarify one of the language rights or human rights
- covered by the CCP; and
- the case is of national importance.

In **Ontario**, **Class Proceedings Committee** will consider each application to the **Class Proceedings Fund** on a case-by-case basis and assess the following factors:

- the merits of the case;
- fund raising efforts by the class representative;
- the proposed use of the funds;
- financial controls regarding the use of the funds;
- the extent to which the issues in the litigation affect the public interest;
- the likelihood of certification;
- the amount of the class proceedings fund required for other proceedings; and any other matter considered relevant.

The examples above show that the criteria are usually based on

- the priorities of the fund established,
- the likelihood of success of the action,
- the amount required to bring the litigation,
- the number of cases funded,
- other cases funded in the same field,
- other relevant factors (*e.g.* impact the protection of individuals, amount of claimants involved, efficient and effective use of public funding).

It appears from the list above that the **criteria should be flexible enough** to allow the organ in charge of the selection to decide to finance an action that does not meet all the criteria. The **criteria should also objective enough** to ensure transparency and to avoid arbitrary decisions.

Recommendation 14

Several criteria should be established to select the applications for public funding of a collective action. These criteria should

- be clear and objective
- be laid down in a law to avoid any discretionary selection of applicants
- be transparent and objective enough to avoid any discretionary decision
- allow some flexibility for the selection organ to allow the financing of cases that might not meet all the criteria but which would present a particular interest for the public.

D. Expenses funded

Considering that Article 20 of the RAD requires that Member State take the measures to ensure that the costs of the proceedings do not prevent qualified entities to exercise their right under the Directive, public funding should cover as many costs as possible. Recital 38 of the RAD mention, as costs of proceedings, for example, lawyer fees, or translation costs. This list is however not exhaustive, as explained here below.

The potential costs can be the following:

- **Research and preparation fees**: the development of a case usually needs some research. This can include collection of evidence, legal research on the merit, collaboration with experts, or preparation of legal analysis.[51]
- **Lawyer fees**: hiring a lawyer will usually be necessary to bring a collective action in many jurisdictions, where the expertise of a lawyer will be needed. Oftentimes, the national law provides that judicial proceedings can only be brought with the assistance of a lawyer.[52]
- **Expert fees:** experts might be hired during the litigation, and their costs is to be borne by one of the parties (usually the party who lost the case). Since the costs for such experts might be quite high, not covering expert costs might jeopardise access to remedies under the collective actions scheme.
- **Adversary costs:** in countries where the "loser pays principle" applies, losing party has to pay the other party's costs. These costs add to the other costs already incurred by the representative entity bringing a collective action, and can include lawyer fees from the other party but also other expenses ordered by the court.[53]
- **Other expenses:** these relate, for example, to travel costs, travel costs, administrative costs (copying, printing) costs linked to the management of the claimants and the advertising campaign.[54]
- **Court and administrative fees:** these costs are usually borne by the entity bringing the litigation and recovered if it wins the case, under the "loser pays principle".[55]

Considering that the objective of public financing of collective action is to ensure a better access to justice for consumers, the funding should cover all the costs incurred by the entity bringing a collective action.

The fund should cover the other party's costs: the risk of paying the other party's costs if the applicant loses the case will be an obstacle to any entity bringing proceedings if it does not have the fund to cover these costs.

The Court Challenge Program in Canada, not covering the lawyer fees of the applicants, was criticised for putting a heavy financial burden on the applicant, failing to address the barrier to litigation that exorbitant legal fees pose.[56]

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[51] These costs can be covered by the Canadian Court Challenge Program (see p. 4 of Fobler Rubinof Report in Annex). The Participation Fund in British Columbia also cover these amounts (see p. 19 of Fobler Rubinof Report in Annex).
[52] These costs are generally covered by the Fund financing the action (see for example the Canadian Court Challenge Program, Fobler Rubinof Report in Annex, p. 5). As an exception, the Ontario Class Proceeding Fund does not include these costs, which may be an obstacle for the applicant that will have a large amount to finance by itself.
[53] These costs are covered in Québec, under the Class Action Fund,
[54] See Ontario Class Proceeding Fund which is funding these costs, Fobler Rubinof Report in Annex, p. 11. The Class Action Fund of Quebec will also cover these costs, see http://www.faac.justice.gouv.qc.ca/.
[55] As an example, the Canadian Court Challenge Program cover these fees.
[56] D. COLLINS, "*Public Funding of Class Actions and the Experience with English Group Proceedings",* 2005 CanLII, Docs., p. 235, see Appendix C to the Fobler Rubinof Report in Annex.

Limiting the financing of the collective action up to a certain amount or percentage of the costs of the proceedings[57] may be an obstacle for organisations that might not have the necessary fund to finance the total amount of the litigation.

Recommendation 15

The public fund should cover all direct and indirect costs of the collective litigation, including at least:

- research and preparation fees
- lawyer fees
- expert fees
- adversary costs
- other expenses
- court and administrative fees

The funding should not be limited to a certain amount or percentage of the total costs, considering that the objective of a public funding is precisely to allow an effective access to justice.

The funding should also cover adversary costs to ensure an effective access to the court to the applicant which should not bear the financial burden of supporting these costs.

E. Funding agreement and financial conditions

Litigation funding agreements determine the conditions under which the parties (the third-party funder and the organisation initiating the litigation) will perform their obligations.[58] The funding agreement is drafted pursuant to the principle of **freedom of contract**. It might have some limitations, such as the ones already provided in Article 10 of the RAD stating provisions ensuring the independence of the funded entity and the absence of conflict of interests.

It is not excluded that the law establishing the public fund may lay down some principles that the funding agreement should include. This should, however, not deprive the fund the power to negotiate certain provisions to make sure that the funding conditions are the most suitable for the case funded.

Regarding the **financial aspects** of such an agreement, it is common practice that the funder recover the funded costs if these are repaid by the losing party. In addition, as a return on investment, private third-party litigation funders typically take a share of the amount awarded in the case (or a multiple of the funding provided). Excessive fees to be paid by the claimant may deprive them of a substantial part of the litigation's outcome. In this context, a balance should be found between contractual autonomy and the public interest of ensuring the effectiveness of access to justice.[59]

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[57] See for example the Class Action Fund in Israel, Fobler Rubinof Report in Annex, p. 23.
[58] See J. SAULNIER, K. MULLER and I. KORONTHALYOVA, *Responsible private funding of litigation*, Study for the EPRS, p. 64 Section 3.
[59] J. SAULNIER, K. MULLER and I. KORONTHALYOVA, *Responsible private funding of litigation*, Study for the EPRS, p. 22, Section 3.2.8.

Well-funded and well implemented litigation fund can help to finance cases that would otherwise be unlikely to meet the profitability threshold for private third-party litigation funding, such as cases that are mainly aimed at non-monetary reliefs like injunctions or declarations. Therefore, profitability is not a crucial factor for cases financed by public funding.

However, as already mentioned above[60], it is not unusual for part of revenues perceived by public funds to come from a levy on the amounts perceived in the course of the collective action after a settlement or a decision from the court.

National law should provide for the possibility or the obligation to ask for a percentage of the amounts perceived by virtue of a settlement or damages following a court order. Such a percentage should be high enough to provide financial resources to the fund, especially if the levy on the amount is its main source of financing. Considering the absence of a profit motive, the percentage should also be reasonable and below market standards to prevent the levy from serving as a barrier to potential applicants. As an example, the Ontario Class Proceedings Fund collects 10% of any judgement or settlement obtained in the class action, as a "top-up" mechanism for the benefit of future litigants who may require recourse to the Fund.[61] The Ontario Fund has been criticized for its statutory 10% levy, which lacks flexibility to account for the range of cases and makes it not competitive with third-party funders who can offer lower rates to low-risks cases (since they usually cover lawyer fees, which are not covered by the Ontario Fund).[62]

Recommendation 16

The funding agreement with the public fund should include minimum contractual requirements. These requirements should be laid down by the applicable national rules.

However, the fund should have some flexibility to negotiate certain contractual aspects of the funding agreement with the applicant to ensure that these conditions are the most suitable to the case funded.

The relevant national rules should provide for the possibility or the obligation to ask for a percentage of the amounts perceived in the course of the litigation. Such percentage should be high enough to provide financial resources to the fund, but also reasonable and below market standards.

F. Selection body and selection procedure

a. Selection body

The governance of the public fund and the body in charge of assessing the application may be different organs. In any case, the law maker should guarantee the existence of **objective and impartial decisions** to finance collective actions.

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[60] Section III.A. b) and c).
[61] See Fogler Rubinoff Report in Annex, p. 10. The levy is calculated pursuant to Regulation 771/92, s. 10: O. Reg. 771/92.
[62] British Colombia Law institute, *Study Paper of Financing Litigation*, October 2017, pp. 232-233, https://www.bcli.org/wp-content/uploads/2017/10/2017-10-04-BCLI-Study-Paper-on-Financing-Litigation-PUBLICATION-COPY-rev.pdf.

The **independence** of the persons in charge of assessing the applications is therefore crucial to avoid any conflict of interest.[63] The members of the body should be independent from the representative entities applying for public funding, but also from any other organisations that might have an interest in the decision to finance or not to finance a specific collective action or collective actions in general.

The **competence of the selection body** assessing the case is also of the essence, since the evaluation of an application will usually require legal[64], but also financial and administrative skills.

In this respect, the composition of the Class Action Fund in Israel is interesting. The Fund is composed of nine members selected by the Minister of Justice. While a judge chairs the board, the other members are representatives of regulatory agencies such as the Consumer Protection and Fair Trade Authority, the Competition Authority, or The Commission for Equal Rights and persons with Disabilities.[65]

Recommendation 17

The members of the selection body deciding to fund a collective action should be independent and appointed by the legislative or executive branch.

The members should have the relevant experience to assess the legal merit of the case but also be representative of the consumer and public interests. The members could, for example, be representatives of the courts, of the law society, of consumer organisations and regulatory bodies in charge of enforcing the legislation listed in Annex I of the RAD.

b. Selection procedure

The national rules should lay down the **time when applications should be sent** to the organ in charge of the selection. The selection could either take place periodically (*e.g.* every 6 months) or upon receipt of the application.[66] Whereas a fixed deadline to submit applications may appear easier for the fund to manage, it might not leave the necessary flexibility for applicants, who might not be able to file an application before a specific deadline, for example if there is a need for urgent action to preserve evidence or gain injunctive relief.

The selection procedure should also mention which **documents and information** should be provided to the selection panel. These documents should include a description of the case with all necessary information to allow the panel to assess the case.[67] In Member States with extensive Freedom of Information laws, there may be the need to limit access to such documents by the opposing parties, as these applications may include many strategic elements that would allow an opponent to gain an advantage in litigation.

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[63] In the Canadian Court Challenges Program, the panel is composed of 7 independent experts: see Fogler Rubinoff Report in Annex, p. 7.
[64] On a material but also procedural level.
[65] See Fogler Rubinoff Report in Annex, pp. 21-22.
[66] The Class Actions Fund in Quebec needs to issue a decision in one month after receiving the application; See Fogler Rubinoff Report in Annex, p. 17. In British Colombia, the applications are considered approximately three times a year: see Fogler Rubinoff Report in Annex, p. 19.
[67] See for example in Ontario, where the Class Proceedings Fund will receive a legal opinion describing and assessing the merits of the applicant's case, a legal opinion on the likelihood of certification, and itemized statement of financial support being requested, see Fogler Rubinoff Report in Annex, pp. 11-12.

The panel can of course organise a **hearing** with the applicant or invite the applicant to submit observations regarding the application.[68]

For transparency reasons, the decisions to finance or not the collective action should be made transparent to the applicant. The fund should in any case publish an annual report with details, such as the number of approvals and refusals and a brief description of the cases.[69]

National rules should also precise whether the decisions are subject to **appeal or review**.

Recommendation 18

The selection procedure to apply for public funding of a collective action should specify at least the following elements:

- the time when the applications should be submitted (several times a year or any time)
- the necessary documents and information to provide to assess the case
- the time within which the selection procedure will last
- the possibility for the selection panel to ask further information to the applicant and/or to organize a hearing
- the obligation to publish the decisions of the selection panel
- the possibility for review or appeal the decisions of the selection panel.

[68] For example, the Class Actions Fund in Quebec can meet the applicant and allow for observations: see Fogler Rubinoff Report in Annex, p. 17.
[69] See 2020 Activity Report of the Class Actions Fund in Israel showing statistics about the number of cases and the field of the cases approved: Fogler Rubinoff Report in Annex, p. 24.

BEUC The European Consumer Organisation

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