

# **ELI TPFL Principles' Potential in Promoting Delivery of Justice – Learnings from RAD Transposition**

Dr. Herbert Woopen, European Justice Forum

11th November 2024



# RAD\* Transposition: State-of-Play (November 2024)

\* Representative Actions Directive

22

## ***Adopted & Applicable:***

***Austria, Belgium, Cyprus, Czech Republic, Croatia, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden***

4

## ***Parliament Discussion:***

***Estonia, France\*\*, Luxembourg, Spain***

1

## ***Government Draft Law:***

***Bulgaria\*\*\****

Note: Official date for national  
TRANSPOSITION was end of  
December 2022





\*\* New Parliament Elections (2<sup>nd</sup> tour) took place on 7<sup>th</sup> July 2024. So far now new Government. RAD currently still in Senate. No clarity on next steps.

\*\*\* Preliminary government draft. Difficult political environment, e.g. with recurring new elections and difficult majority building in parliament is slowing down the process.



# RAD Transposition: opt-in – opt-out

as of November 2024

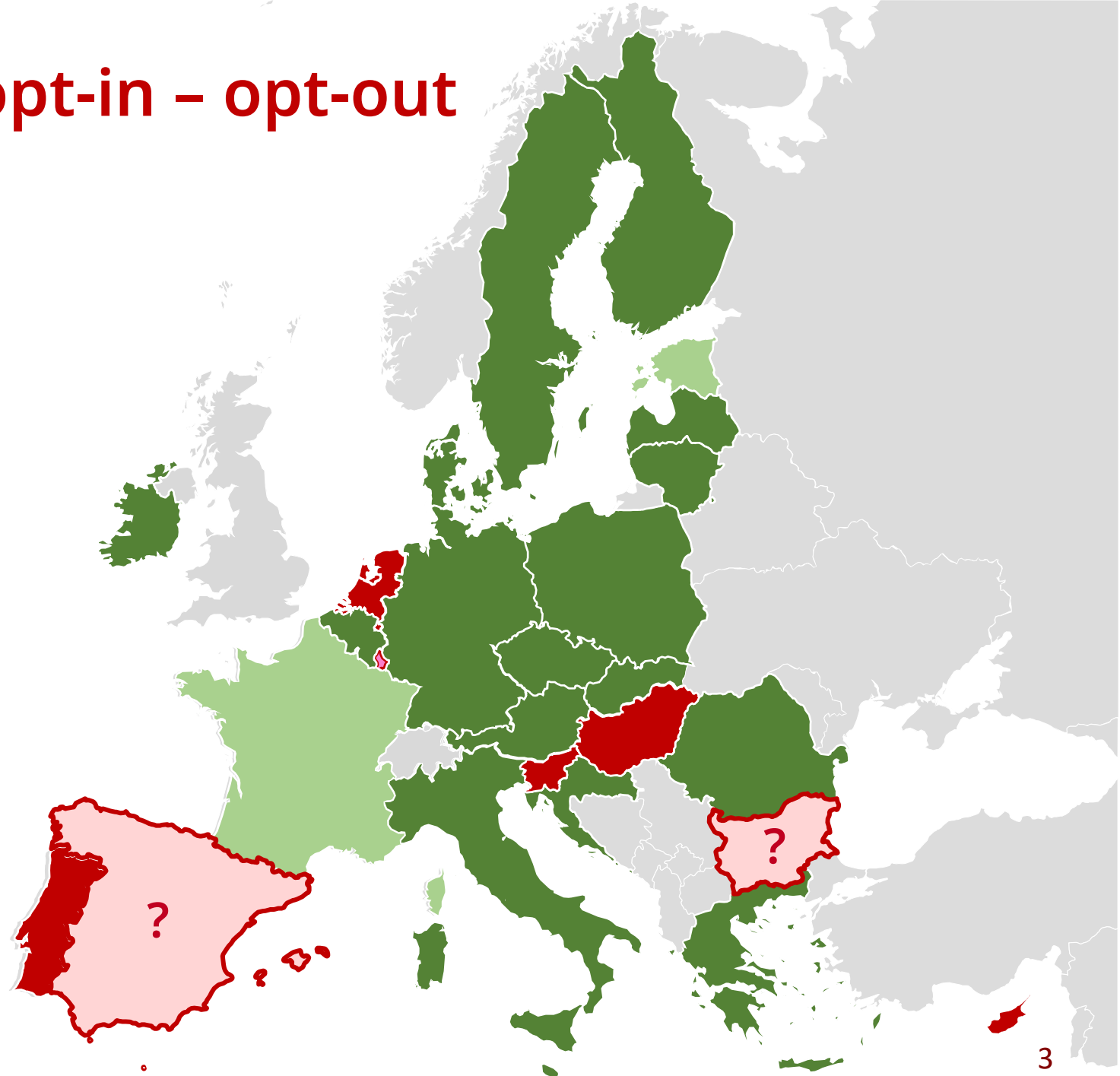
-  Opt-in adopted - 17
-  Opt-in drafted (or estimated) - 2
-  Opt-out adopted - 5
-  Opt-out drafted - 3

## TREND

- *Denmark: shifted to a pure **opt-in***
- *Belgium: judge has to take **opt-in** (formerly own choice), if up-front negotiation phase leads to no common agreement.*
- *Romania: Draft opt-out became an **opt-in** system*
- *Spain: Current draft has a **mandatory shift to opt-in** in case of more than 3k EUR redress per beneficiary*

## OPEN

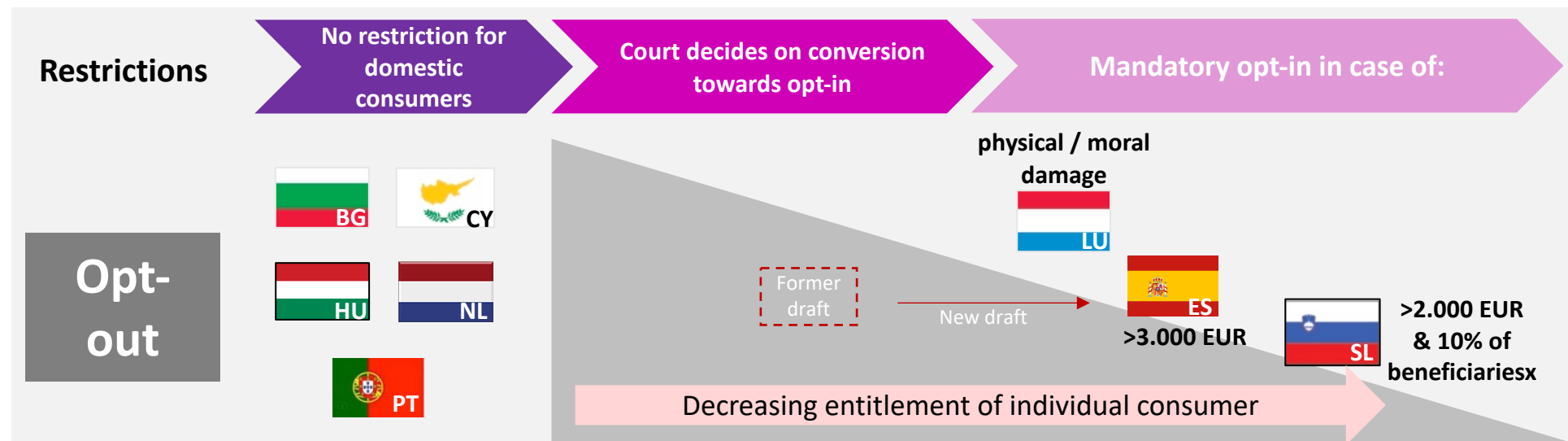
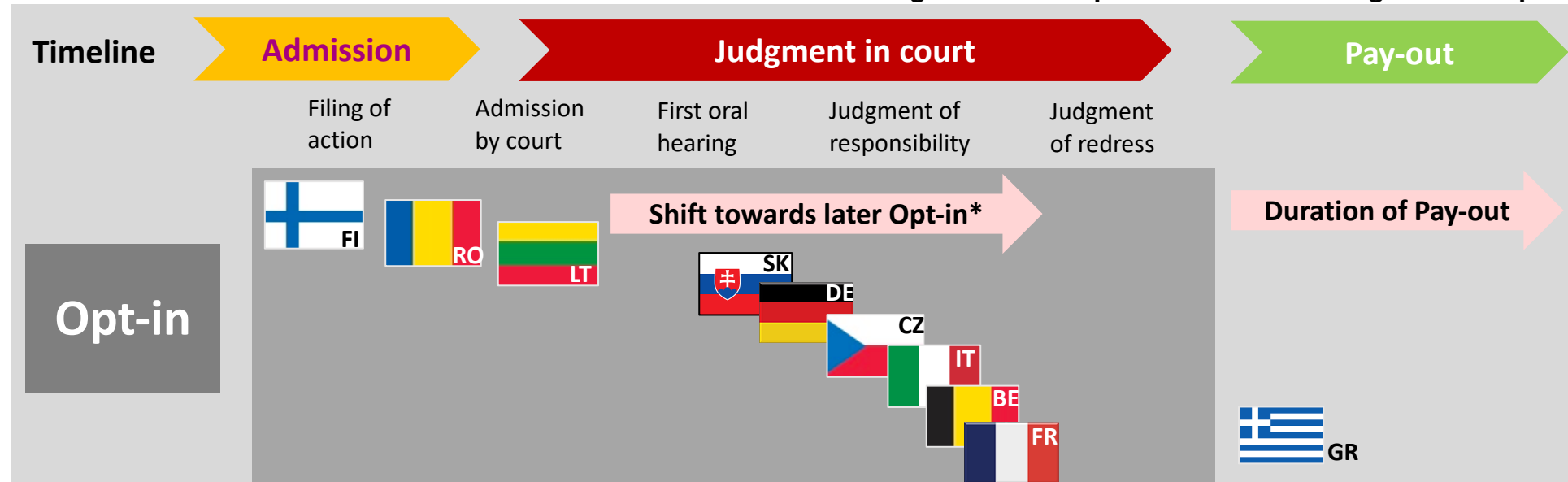
- *Bulgaria: So far opt-out but new draft proposal to be developed due to new elections*





# Fragmentation: Opt-in vs. Opt-out

\* Flag location of Opt-in: Estimated average time of opt-in





# Take aways: increased complexity in EU mass claims

## Qualified Entities (QEs):

- **Expanded role of QEs:** Risk of rising "Activist"-like QEs with focus on mass claims and less on other consumer support, **ad-hoc entities** potentially created by funders. Traditional QEs may face increased competition. **Some countries strengthened the traditional consumer organisations.**
- **Public Authorities:** Enhanced role in some EU states, potentially boosting public redress.

## Court Procedure

- **Signs of pre-trial disclosure:** To a certain extent available only in Croatia, Cyprus, Ireland, Malta & Poland.
- **Different parallel mass claims mechanisms make it harder to settle:** Different methods (class action laws, assignment models, representative actions) create a more complex claims landscape (national & EU-wide).
- **More settlement pressure via low court admission criteria:** Even more pressure when combined with potentially wider national scopes and activist-driven court claims (e.g. climate litigation, behavioural change and/or redress), **also positive examples asking for pre-efficiency checks or detailed admission criteria.**

## Private Litigation Funders and Service Providers

- **Selective Investment:** More choice of mechanisms for potentially early settlements or timely court wins through vague RAD regulation.
- **Wider implications:** Establishing law as an asset/investment class, competition, innovation, geopolitical ...
- **Some countries used RAD transposition to implement additional safeguards,** especially to limit profits or increase transparency for private TPLF. **But: possibilities to bypass via other mass claims mechanisms.**

## Regulatory Fragmentation

- **Challenges for EU-wide settlements:** Varying national regulations pose significant challenges. E.g. differences in opt-in phases, settlement conditions, and limitation periods complicate multi-national litigation.
- **Cross-border Actions:** Limited experience, high complexity, national settlements may exclude cross-border claims.

### Good Practice Samples

**Roles of traditional consumer organisations strengthened**  
→ ES: National Consumption Council, DE / AT: vzbv / VKI

**Minimum # of beneficiaries**  
→ DE / AT (50), SK (20), CZ (10)

**Broad # of Public QEs or Key Public QE** → CY, DK, FI, SE, EE, LV, PL ...

**Upfront check of other more efficient mechanisms** → CZ, DK, Malta, Slovenia

**Cap on claims value in %** → DE (10), CZ (16), SK (20), EE (30), ES (30), Slovenia on loan%

**Funding contract transparency** → DE, AT, CZ (incl. AML), PT



# Third Party Litigation Funding: Regulatory Initiatives

## Representative Actions Directive Safeguards (Only for Representative Actions under this Directive)

**Control of the third-party funding (6 points)** of redress actions by court or administrative authority, if at all allowed by the national legislation

Member States (Art 10):

- **Independence and transparency of the QEs**
- Funding shall **not divert** the action **from its objectives** (protection of the collective interests of consumers)
- **QE decisions, including decisions on settlement, are not *unduly* influenced** in a manner that would be detrimental to the collective interests of the consumers concerned;
- 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**.

QEs (Art 4):

- Make public **general information on funding**
- **Procedures in place** for independence and **preventing conflict of interests**

## INL adopted by European Parliament (25.07.2022) (Broader scope, covering all situations of private TPLF)

The **9 safeguards** in the EP's "Report on Responsible Private Funding of Litigation" are:

- Funders need to **have a license** (article 4).
- They need to **have adequate capital** (art. 6).
- Just like lawyers, funders should **have a fiduciary duty** towards claimants (art. 7).
- **Claimants should be paid first** and not the funders (art. 12[d]).
- There should be transparency over the funding, i.e. a **disclosure of the funding agreement** (art. 13 and art. 16[1]).
- There should **not be a conflict of interest** between funders and (claimant) lawyers (art. 13).
- There should be **no funder control** (art. 14.2[a]).
- **Claimants should get only a reasonable share** of the settlement or award (art. 14.4 and art. 17.d).
- The **loser-pays principle** should also **apply to funders** (art. 18).



# Qualified Entities: Models of Private Financing

Samples

\* Representative Actions Directive

## Private Enforcement

Private QE Financing  
via TPLF

Member states going beyond  
RAD\* regulation on private  
funding

## Regulatory Options

### RAD Criteria

Cap on redress awards

Transparency of contracts  
to court or supervisor\*\*

Transparency of beneficial owner  
behind TPLF to court\*\*\*

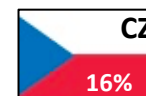
Maximum loan rate  
(central bank as reference)

Prohibition of private TPLF

## Countries/Samples



EU: Independence & transparency of QE, general information on  
funding to public, procedures in place preventing conflict of interest



\*\*\* CZ: Anti-Money Laundering (AML)  
Approach



\*\* AT: possible check by  
Federal Cartel Prosecutor  
(QE supervisor) during court  
procedure

Private QE Financing  
via CONTRIBUTIONS

Charging of a (modest) participation  
fee, incl. some voluntary  
contributions by traders (PL & EE)



Special use of  
„unused awards“

To other group members first, if any  
rest left to consumer QEs

For state & consumer protection in  
general (PT) or QE (CY)



Opt-in



Opt-out



# RAD Transposition: EU Member States variations

## Admission procedure

- Using to some extent **"Ontario Formula"** approach ... i.e. court must check before admission which are the most effective and efficient means for solving the mass claims. E.g. ombuds/ADR, RAD vs. assignment model. **(Czech Republic, Denmark, Malta, Slovenia)**
- **Minimum # of persons taking part**, e.g. 50 in **Germany (DE) & France**, 10 in **CZ**, min. 5 in **Latvia (LV)**

## Participation Mechanism

→ 20 MS with pure Opt-in (ca.75%)

- **Early opt-in** kept in **Finland** and foreseen in **Romania**.
- In view of digitisation, **incorporation of the beneficiary's account number** from the start of the opt-in process, an idea now incorporated in the transposition draft in **Estonia (EE)**.
- **Shifting towards opt-in**
  - **Exclusively opt-in** in **Denmark**, default opt-in in **Belgium**, formerly both with choice of opt-out
  - **Optional or forced change from opt-out to opt-in** (**Luxembourg, Slovenia, Spain**)\*

\* Other countries with opt-out systems are Netherlands, Portugal and most likely Bulgaria

## QE Criteria

- **Scope of public bodies enlarged to cover scope of Annex I** (**Cyprus, Finland, Romania**)
- Going beyond RAD cross-border **QE criteria: associations registered 2+ years (FR) or 3+ years (CZ)**

## Third Party Litigation Funding (TPLF)

→ Beyond RAD safeguards

- **Czech Republic revealing beneficial owners behind** the legal persons as funders (AML)
- **Limiting total awards for funders** in **Germany** (max. 10%), in **Czech Republic** (16% or if CZK 100 mio are exceeded as award lowering % up to half of it), **Slovakia** (max 20%) and **Slovenia** (cap on loan fees). Potentially **Spain & EE** (30%)
- **Mandatory disclosure** (transparency) **of funding contracts towards court** in **Germany**, foreseen in **Portugal** and **Bulgaria**
- **Prohibiting TPLF** in **Ireland, Greece**
- Right to charge **joining fee** (**EE, LT, IE**) or **state support** for consumer QEs in **Lithuania (LT), Latvia (LV)** vzbv in **DE**



# COMPETITION: A new core issue?

PRACTICE: Class Representative Network (CRN) Survey in UK from 20<sup>th</sup> September 2024

[Source: https://classrepresentativesnetwork.org/research-and-reports/](https://classrepresentativesnetwork.org/research-and-reports/)

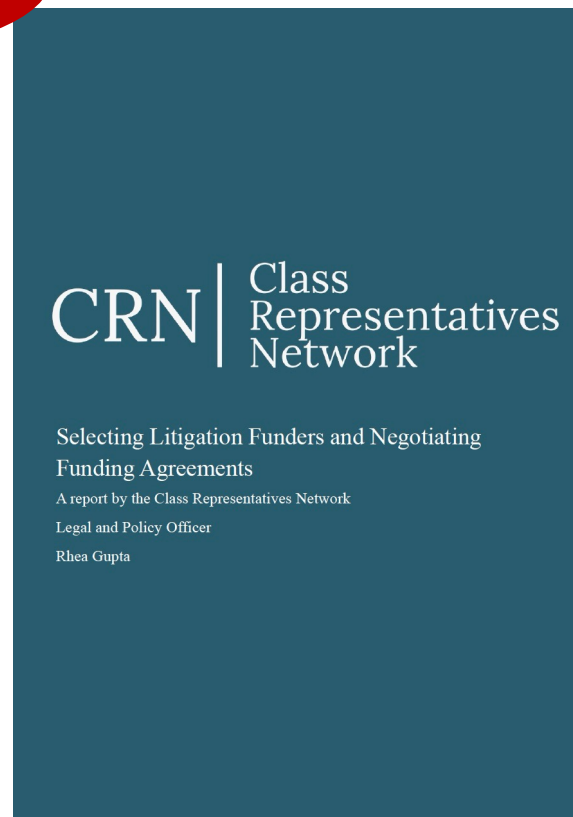
- In 97 % cases only 1 funding contract had been presented
- 90% undertook no enquiry for alternatives
- In 80% the solicitor advised that the offer - mostly only one presented – was suitable, so “no need for further enquiry”
- 75% had no funding expertise on consultative panel
- In 67% no independent advice when re-negotiating the terms

Raise issue  
of lack of  
competition!

## What are you looking for in first negotiation (quotes) ...

- Whether financials in best interest of the class (63%)
- Whether the terms are a „good deal“, relative to the funding market as a whole (45%)
- Overall quantum of funder’s success fee (18%)
- Urgency/Speed in reaching an agreement (18%)

How to prove  
what is best  
offer/choice?



**Competition  
between  
funders  
needed to  
bring costs  
down !**

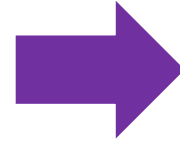


# Competition: 5 options to bring litigation costs down?

Ideas for  
discussion

1

COMPETITION  
between out-of-court and incourt measures

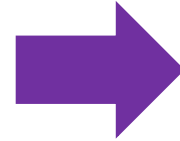


**ADR, OMBUDS ENTITIES, COMPANY SCHEMES,  
NEGOTIATION, COURT**

Here chance to strengthen out-of-court measures and traditional public enforcement.

2

COMPETITION  
between in-court measures

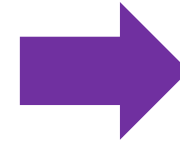


**Representative Actions Directive, Class Action Laws,  
Assignment Model, Popular Actions**

Here chance to strengthen Representative Actions as key lead.

3

COMPETITION between  
Qualified Entities (QEs) and/or claimants



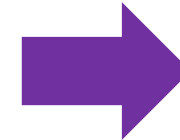
**PUBLIC & PRIVATE QEs, LAW FIRMS, CLAIM VEHICLES**

Here chance to strengthen in the EU

- traditional public enforcement,
- traditional consumer protection organisations,
- the Representative Actions.

4

COMPETITION  
between funding types

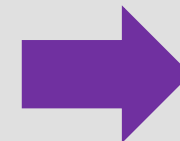


**PUBLIC, SELF-, PRIVATE FUNDING**

- Or any mixed forms.
- Here chance to strengthen the Representative Actions.

5

COMPETITION  
between private funders



**TRANSPARENT TENDERS & MARKET OVERSIGHT**

- Measure for acceptable profits for funders should be the economic adequacy of risk and reward as proven by multiple offers by different funders.
- More competition between private funders via market oversight.
- Forcing the conduct of transparent tenders via nudging through caps on returns.

Evidence: CRN Survey, September 2024



# Competition: Who should be in charge?

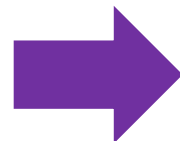
Ideas for discussion

Control: No overburdening of COURT

Check via  
COURT

1

COMPETITION  
between out-of-court and incourt measures

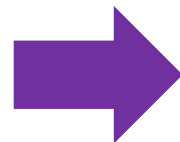


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Here chance to strengthen out-of-court measures and traditional public enforcement.

2

COMPETITION  
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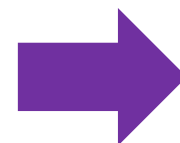


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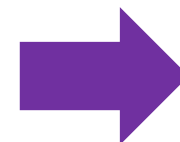
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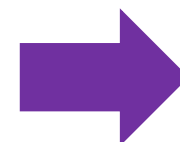


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Check via  
AUTHORITY



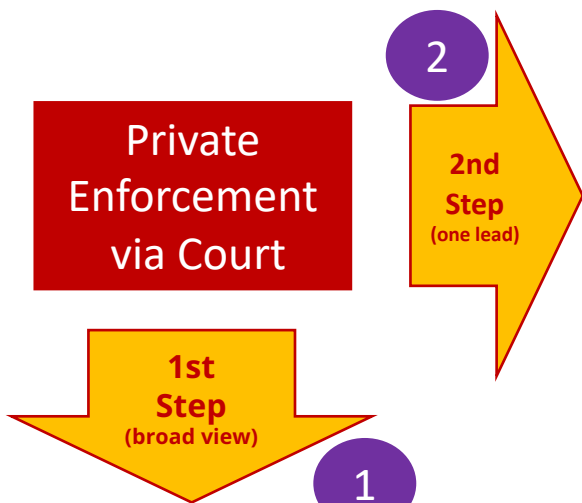
# Mass claims: Competition for cost reduction?

COMPETITION  
of Funding Types

4

- Only RAD\* can (a) strengthen public enforcement & (b) traditional consumer protection organisations.
- TPLF regulation strengthens RAD\* by increasing competition on ④ & ⑤

COMPETITION  
of in-court measures



**During Admission Phase:**  
COMPETITION of what is the most adequate, effective and effective measure of solving mass dispute & mass claim, incl. ADR, ombuds solutions or other compensation schemes [samples: CZ, DK, MT, SI]

RAD\*  
[in all EU member states]

\* Representative Actions Directive

Class Action Laws  
[samples: IT, HU, NL, PL]

Assignment Models  
[samples: AT, DE, NL]

Popular Action  
[sample: PT]

Mass Claims Measures  
in the EU

COMPETITION  
of QEs

3rd Step  
(feeds into  
2nd step)

Public QEs

Private QEs

Claimant / Law Firm

Platforms/LegalTech &  
Law Firms

Debt Collection  
Provider & Law Firms

Individual Claimant

Adhoc Entity (?)

Public Funding  
[samples: DE, FI, PL, RO]

Partial Public Funding,  
[samples: AT, LT, LV]

Partial/Complete Self-Funding  
[samples: EE, ES, IE, LT]

Private Funding by  
private litigation funder  
(**economic incentive  
driven**)

5

COMPETITION between  
Funders needed

Oversight of Private  
Funders Market needed  
(Single EU Authority)

Further option (seldom):  
crowd funding  
(e.g. via activists)



# Consumer friendly solutions for funding?



## Current situation weakening

- Public enforcement (as beneficiaries will be attracted by marketing of private enforcement),
- Representative Actions Directive (RAD) in countries with further regulations (like a CAP) will not/seldom be used by funders

## TPLF Regulation

establishing competition between private funders across all mass claims measures: e.g. transparent tender (3-5 offers) to increase cap up to best offer but not more than (**Amsterdam courts**):

- 25% for consumer matters,
- 40% for non-consumer matters.

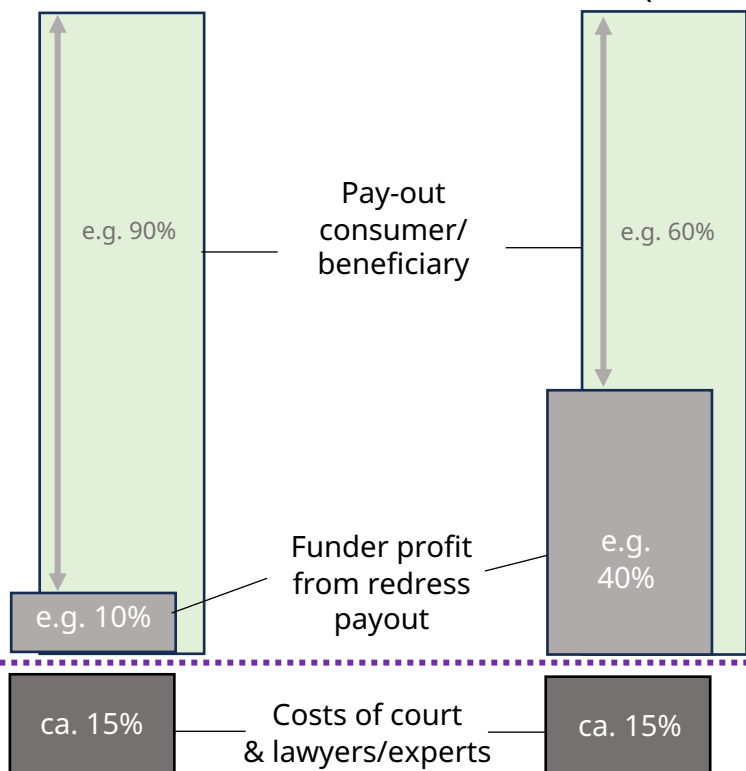
## Strengthening of Public Co-Funding

as further alternative, by using

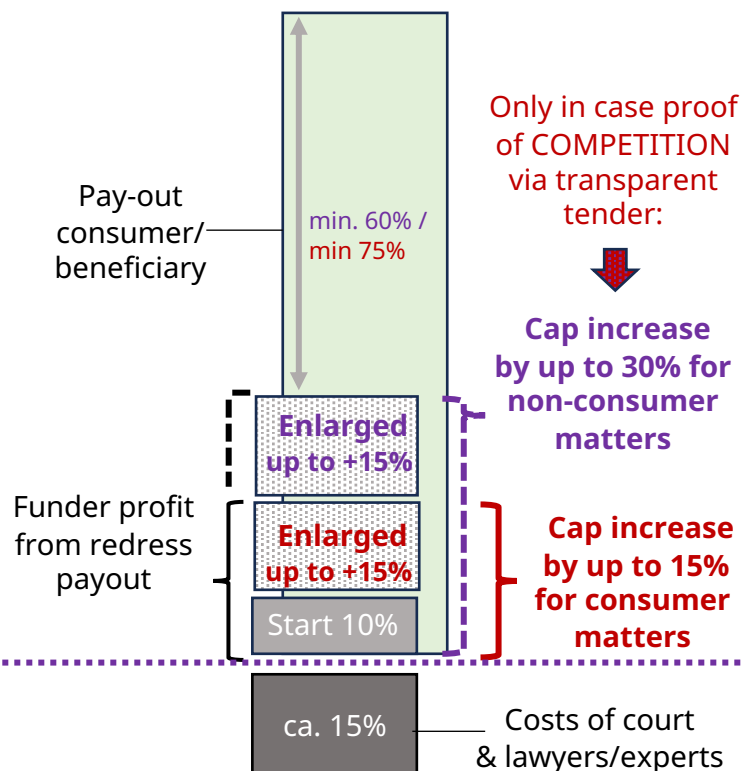
- Public QEs (e.g. VKI in AT, or public Ombuds entity in DK, Financial Ombudsman in PL)
- Co-funding (e.g. „Québec Model“)
- Public financing of private QEs (e.g. vzbv in DE)

RAD with conditions  
(e.g. profit cap)

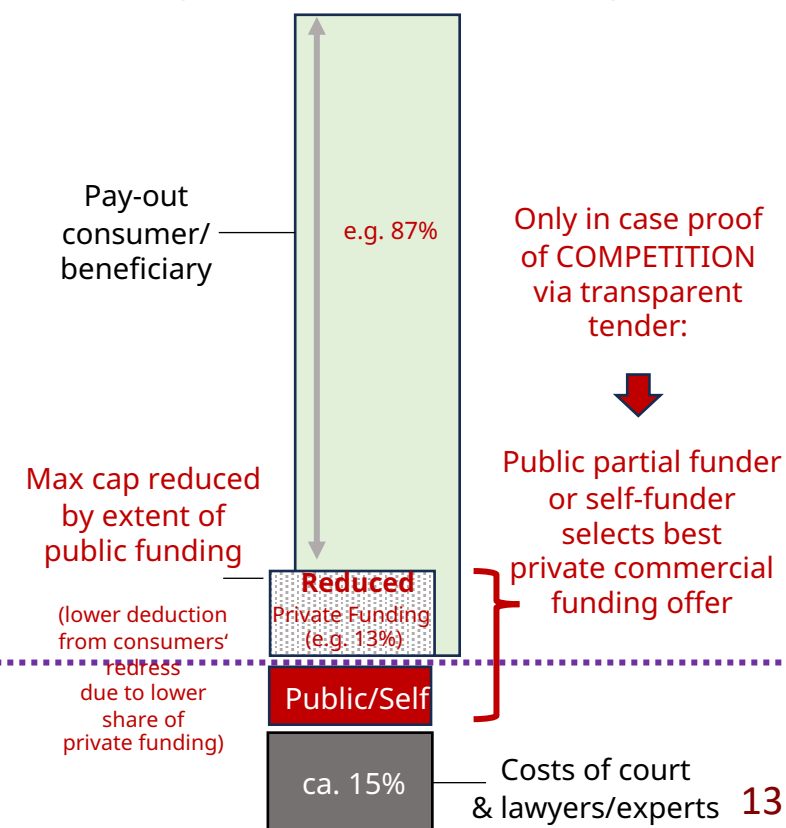
Assignment Model or  
other class action laws  
ca. 30-40 % (no limit)



For **all** mass claim measures



Public/Self co-funding  
(here for **consumer matters**)





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Ekkart Kaske, MBA

Executive Director of EJP

[e.kaske@europeanjusticeforum.org](mailto:e.kaske@europeanjusticeforum.org)

Dr. Herbert Woopen

Director of Legal Policy of EJP

[h.woopen@europeanjusticeforum.org](mailto:h.woopen@europeanjusticeforum.org)