James Williamson, Vannin Capital: Funding competition claims – How do funders work?

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Référendaire, Court of Justice of the European Union (General Court), Luxembourg
James WILLIAMSON, Vannin Capital: Funding competition claims – How do funders work?

It is a pleasure to meet with you, James. In addition to your role as an associate director of Vannin Capital, a leading litigation funder, you have particular expertise in funding disputes involving breaches of competition law. I thought it would be extremely enriching for both practitioners and academics to get a clearer understanding of what litigation funders can offer in the realm of competition private enforcement in Europe. The questions I have decided to ask you address three themes, the terms of competition litigation funding, the consequences of litigation funding on competition claims and finally the next developments in the field.

The terms of funding antitrust claims

There are a number of factors that litigation funders take into consideration when assessing claims such as the type and strength of the case, the potential damages, the jurisdiction where the case is brought, the settlement prospects, the likely length of time to resolution, the amount of capital required to prosecute the case, and the defendant’s ability to satisfy a judgment. What are the most important factors you pay attention to when considering funding a competition claim?

Broadly speaking, we have three areas of priority when looking at any case. The first is the legal strength of the claim. As well as being confident in relation to key issues such as jurisdiction and governing law, we require any claim that we fund to have prospects of success at final judgment or award of 60% or more. Second, we need to have a clear understanding of the anticipated budget and realistic quantum of the claim, including whether the case meets our 1:10 costs/quantum ratio (which I explain more fully below). Finally, at an early stage, we will assess recoverability and enforcement issues, such as the identity, location and financial standing of the defendant.

Competition claims do raise their own specific issues. Most competition claims we fund are follow-on damages actions, which “follow-on” from a regulatory finding of infringement. In such circumstances, the legal strength of the claim is normally clear. However, a particularly important question for competition claims is the strength of the economic analysis underpinning the claim. This is a difficult question to assess at the outset of a claim. However, given the centrality of economic evidence to competition litigation, it is important that the working...
hypothesis is credible and robust. Another important issue in the collective action context is proper identification of the claimant group. Recent case law in England has reinforced the importance of carefully identifying the relevant claimant class, as failing to do so risks criticism from the court and the early termination of the claim.

It seems to me that most litigation funders now offer a wide range of services that companies and their lawyers might not be fully aware of. Let’s suppose that a company considers it has suffered significant antitrust damages further to a long-lasting cartel condemned by the Commission and a national authority. What services would a litigation funder be able to offer to that victim or its lawyer?

There are now a range of solutions to help litigants meet the cost of funding legal proceedings.

Commonly, funding takes the form of a non-recourse loan made to the claimant. The claimant will use this financing to pay lawyers’ fees and other expenses associated with bringing the claim, meaning that the litigation comes at no upfront cost to the claimant with no downside cost risk or exposure. At the end of the proceedings, if there is a successful outcome for the claimant a portion of the damages received from the defendant is used to repay the funder and to provide the funder with a return on its investment. If the claim is unsuccessful there is—given the non-recourse nature of the financing—no obligation for the claimant to repay the funding it has provided.

In the competition space, we have applied this model to help claimants in a range of contexts, including follow-on claims arising from breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Looking forward, we expect portfolio funding to become increasingly common. This model, which provides financing (again, on a non-recourse basis) to cover a portfolio of disputes rather than a single case, can be made available directly to claimants or law firms, and is a popular means of providing a more comprehensive, but still flexible, solution to managing litigation risk.

Among the companies that have heard of litigation funding, many of them have questions about the process they will have to go through to obtain funding. How does the funding process work in essence? How long does it normally take for you to decide on a case? Are you normally approached by the companies themselves or by their lawyers? What are the main steps before the funder approves to fund a competition case and how long does it typically take to decide?

We receive requests for funding from a broad range of sources. Often, law firms approach us on behalf of their clients. Increasingly, corporates and financial institutions are approaching us directly to discuss the ways in which we can help them with the costs of their litigation, thereby allowing much needed internal capital to be released into other parts of their business.

Once a confidentiality agreement has been signed, our funding process consists of a period of internal and external due diligence, followed by a review of the case by our funding committee. The internal due diligence will be undertaken by our associate and managing directors. If the outcome of their review is positive a term sheet, setting out the commercial terms for the financing, will be agreed with the client. The term sheet also provides us with a period of exclusivity during which we obtain, at our own cost, independent expert opinions on the relevant legal and, if appropriate, quantum issues in the claim. If the diligence process is completed satisfactorily, our funding committee, which consists of our most senior management and retired judges, will review the funding proposal. If the proposal is approved, the parties will then agree and enter into a funding agreement.

We can complete these stages very swiftly, and generally are happy to move as quickly as the relevant information can be provided to us. As a very general guide, our experience is that the process tends to take approximately two months.

Once funded, we require monthly updates on all funded cases, and we welcome a regular ongoing dialogue. However, we recognise and respect the importance of lawyer-client relationships and the obligations that law firms owe to their clients. We do not run or seek to control the claim that we fund: as a matter of both practise and principle, control of the claim is maintained by the law firm as instructed by the client.

There is a cloak of secrecy surrounding the actual cost of calling upon litigation funders. It is natural that these costs will vary from one case to another but can you tell us what factors will be taken into consideration and what these costs would be on average depending on these factors in a competition claim?

The terms of a litigation funding agreement, as in any commercial deal, are a matter for negotiation.

That said, the return the funder requires is likely to be based on either: a multiple of the costs they have invested in the case, a percentage of the damages recovered by the claimant, or a combination of both. The terms may also be calibrated to take account of the likely length of the potential action (for example, if the proceedings are anticipated to last for a very long time, the funder may expect to receive a higher return to reflect the “time value” of money).

Whilst we do not have a minimum claim size, we do adhere closely to a 1:10 costs to quantum ratio. This means that we will fund up to a maximum of 10% of the realistic value of a claim. For example, if we provide EUR 3,000,000 of funding for a claim the estimated quantum should be at least EUR 30,000,000. We stick to this formula to protect the claimant’s returns because, in our experience, if the ratio slips the return the claimant may receive (especially in a settlement scenario) may be unattractive.
Do you expect from the lawyers that submit a request for funding to provide you with a preliminary economic assessment of the potential damages, or do you rely for that on your own economic experts?

Usually a claimant will have a relatively clear idea of the losses they have suffered, and that information allows us to determine at an early stage whether a claim meets our 1:10 costs to quantum ratio. Additionally, the more information we have on quantum (and other key issues) the more quickly we can move through our funding process. As I’ve mentioned, as appropriate we will also obtain our own independent assessment on quantum. This is helpful diligence for us and can also help to reassure or manage the expectations of our clients as to the recoveries that are likely to be achieved.

The consequences of litigation funding on competition claims

Litigation funding has been criticised for allegedly leading to frivolous claims. It is also said that it leads lawyers to settle as quickly as possible for the lowest amount of damages and takes away the power of companies to take the legal strategic decisions. Is that the case for competition claims?

We invest significantly in due diligence to avoid funding frivolous claims. Every case that we fund is an investment, and we need to have confidence that we are likely to see a return on those investments. Put simply, for us funding frivolous claims is bad for business. In the competition space, follow-on actions are often sensible claims for us to finance given that the liability of the defendant(s) has already been established. In those cases, external capital can be essential for helping the victims of anti-competitive behaviour (often large and disparate groups of claimants) to bring their claims. More broadly, and as I’ve already mentioned, we do not run or seek to control the claims we fund.

What’s next?

We are only a few months away from Brexit now. What consequences do you believe Brexit will have on the number of private competition claims brought before the English courts and on funding competition claims?

Although the precise legal position post-Brexit remains to be determined, the national regulator in the UK, the Competition and Markets Authority (“CMA”) has been proceeding on the basis that it will need to investigate and enforce cases impacting on the UK market that would, pre-Brexit, have fallen within the jurisdiction of the EU. That effort has been supported by increased funding from central government; an additional £20.3 million total budget for 2018–2019 (a 29% increase). At the same time, we expect the experience and expertise of the English courts—including the Competition Appeals Tribunal (“CAT”)—and broader legal community in handling competition matters to continue to be an attractive proposition to claimants.

So far, most competition claims that are funded seem to be follow-on cartel claims. Do you expect the number of standalone claims to increase thanks to litigation funding in the next coming years and for what reasons?

The Consumer Rights Act 2015 was an important step forward for the private enforcement of competition law in England & Wales. In particular, the expansion of the CAT’s jurisdiction to hear both opt-out collective actions and “standalone” claims is important, and in the coming years we expect to see a growth in both follow-on and standalone cases brought before the CAT on an opt-out basis.

It looks like litigation funding is not only here to stay but will continue to grow fast over the next years. Do you feel it is an industry that is mature enough to be regulated and if so, at the national or European levels, or both?

In England & Wales, the Association of Litigation Funders (“ALF”), the independent body charged by the Ministry of Justice, (through the Civil Justice Council) with delivering self-regulation of third-party funding, has played an important role in enshrining best practice principles across the industry. In the future, regulation in the rest of Europe and beyond will clearly need to be responsive to local market and jurisdictional demands but the lessons learnt by ALF should provide a helpful benchmark for the purposes of informing the debate.
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