O presidente da ATM e da CITIZENS' VOICE - Consumer Advocacy Association, Octávio Viana, apresentou o tema ações populares, financiamento do litigio por terceiros e aplicação privada (*private enforcement*) perante o *Legal Committee* da BETTER FINANCE.

BETTER FINANCE é uma organização não governamental de interesse público que defende os interesses dos cidadãos da União Europeia enquanto utilizadores de serviços financeiros, junto dos legisladores e do público. A ATM é membro-fundador da BETTER FINANCE.

O tema é de extrema relevância, não só para Portugal, mas no contexto da União Europeia e das reformas legislativas em curso e das mais recentes decisões do Tribunal da Justiça da União Europeia.

Acesso à apresentação em *powerpoint*: Class Actions, Thrid-Party Litigation Funding, Private Enforcement – Octávio Viana (2022) – 17.06.2022 – Greece

Meeting of the Legal Committee of Better Finance
Athens, Greece, 17 June 2022

*** SLIDE 1 ***

Good morning, Ladies and Gentlemen, Dear Colleagues,

As many of you know, my name is Octávio Viana and I am the president of the board of directors of the Portuguese Investor's association, member of BetterFinance.

I am also the president of CITIZENS' VOICE – Consumer Advocacy Association, who applied for membership of Better Finance.

The story of CITIZENS' VOICE has just begun to be written.

On December of 2021, the CITIZENS' VOICE was formally established, and soon after, on February of 2022, the CITIZENS' VOICE won a historic consumer protection case in the Portuguese Supreme Court of Justice.

The Portuguese Supreme Court of Justice ordered Vodafone Portugal to refund all the consumers for the additional payments that had been charged to them, due to the automatic activation of additional services that the consumers didn't want.

This lawsuit was CITIZENS' VOICE's first class action.

This was a very relevant court decision, which has been widely cited and which marks the Portuguese jurisprudence in terms of class actions and consumer law.

Currently, CITIZENS' VOICE is involved in 10 different class actions.

It's about this important legal instrument the reason I come to talk to you today.

But, first and foremost, thank you very much for having me here.

The Legal Committee of Better Finance is constitute by the most prominent people in the industry from both the consumers and investors side. Only the best in the field will take the time and make the effort to come for a conference like this, in Greece, Athens.

Once again, thank you for your time, it's an honor to be here with you today.

Thank you my friend, Pepe, José Estevez, dear chairman of this Legal Committee, for this journey over several years together in protecting consumers and investors.

Thank you, Christiane, my dear colleague and friend, dear vice-chair of this Committee, for being always available to help us achieve these incredible victories.

*** SLIDE 2 ***

As you all know, today I am going to talk about:

1. Class Actions;
2. Litigation Funding; and
3. Private (law) Enforcement.

The context and construction of class actions has a small grown in all European Union countries, even after the entry into force of Collective Redress Directive, although it has existed for many years, in the various domestic legal systems of several Member States, as is the case of Portugal.

The Collective Redress Directive still hasn't yet had any impact, it hasn't been transposed anywhere, no laws or approaches have been changed since its entry into force, as far as we know.

Even so, such initiative is useless if it doesn't have legal and procedural mechanisms capable of putting this important law and rights into practice.

Therefore, I will also talk about these important mechanisms: third-party ligation funding and private enforcement.

Finally, I will present some brief conclusions and suggestions, which can help to improve our action, in BetterFinance and all members actions, in the defense of the interests of consumers throughout the European Union.

*** SLIDE 3 ***

The class actions are an efficient mechanism for the pursuit of consumers' interests, when these are violated on a large scale and in cases where the injured parties are unlikely to defend themselves judicially and individually.

Many consumers, victims of illegal practices, do not have the means of accessing the courts to defend themselves against such practices and/or individual actions entail an unacceptable cost/benefit.

Thus, the class actions aim to allow the victims of these practices to obtain a fair compensation for the damages caused to them through a single lawsuit, which tends to be free of charge, promoting efficiency in litigation, and in addition up to a certain degree of (initial) anonymity that prevents them from facing other types of pressure.

In many cases, the class action lawsuit is the only realistic option for victim protection and reparation.

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Class actions are not a new invention, they have been around for centuries. That's why it's important to revisit the history of this mechanism and give you a brief historical point of view: the actio popularis.

The actio popularis, with origins in Roman law when the institution of direct participatory democracy, aimed to defend a popular interest with a public character, generally for the protection of things, such as, for example actions to:

• prevent people from taking dangerous animals to the populations (de aedilitio edicto et redhibitione et quanti minoris); or
• throwing objects and waste from the house into the street (effusis et deiectis); or
• violating the material integrity of religious ressentiment such as the violation of graves (actio sepulchro violato); or
• demand who consciously altered the praetor's edictum exposed to the public (a actio de albo corrupto).

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This type of lawsuits currently exists in several countries, namely in the Member States of the European Union.

The Directive (EU) 2020/1828 on collective actions to protect the collective interests of consumers, known as Collective Redress Directive, is a small step to harmonize the enormous number of collective litigation lawsuits in the European Union and to achieve a better protection against domestic and cross-border 'mass harm.'

But the Diretive has many problems:

1. First, the Directive only applies to a limited set of infringements of European Union law.
2. Second, the Member States discretion to decide for an opt-out or opt-in approach for domestic claims. Worse, the European Union's steer is towards opt-in.
3. .The Directive actually assumes that there will be third-party litigation funding, which is great. But impose limits and rules on third-party litigation funding. We can argue those rules and limits are reasonable, but we believe that discourages the use of third-party litigation funding, only allowed in accordance with national law. In any case, we should welcome the Directive's defense of duly regulated third-party funding.

But the the main problem is that the Directive doesn't really impose any positive harmonization. It allows Member States to continue to have whatever national system they want. It imposes negative harmonization – certain limits, and it requires the right of an entity based in one Member States of using the collective redress mechanisms of other Member States.

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In Portugal, one of the European Union countries whose right of class action is a constitutional right and has been provided for in its domestic legal system since 1995 (Law 83/95 on the right to class action), therefore one of the oldest in the modern legal system, the model adopted is the option-out, which means that all holders of the interests at stake in the lawsuit, whether directly involved or not, are represented in the lawsuit and all the positive effects of the decisions handed down will apply to them, unless they expressly exclude themselves from the lawsuit [cf. article 15 (2) of Law 83/95].

It's important clarify those represented in the class action are only bound by positive outcomes. They are not bound, for example, if the claimant fails to prove the infringement. They could still afterwards file their own action and try to prove it.

As the Romans had already conceived, this type of lawsuit can be launched on the initiative of any member of the community of holders of the interests in question, with a view to both the public interest and the interest of the community. From an ideological point of view, the objective is to protect collective values and the universal hegemony of peoples.

*** SLIDE 7 ***

[Image]

*** SLIDE 8 ***

It's important to evaluate whether the opt-out or opt-in is the best solution.
We should weigh both the pros and cons in order to choose one or the other.

There are many factors to consider, from the practical to legal issues, including a financial decision.

The practical issues begin with the management of the entire lawsuit, starting with collecting hundreds or thousands of powers of attorney.

The legal and financial issues may be, in particular, but not exclusively, the ability to share in any settlement or judgment.

Portugal has adopted the opt-out model and it has worked well, notwithstanding that there have been some problems related to bad judicial decisions of the administrative courts that prevented the opt-out of some represented plaintiffs. But this issue was due to the court's unpreparedness to deal with the reality of class actions. This issue is currently being disputed.

In our experience, so far, we consider the opt-out model to be the one that best defends the interests of consumers in class actions where their rights have been violated on a large scale. From the practical point of view, the opt-out model seems to us to be the best choice.

In any case, we argue that it should be up to the plaintiffs to decide the model they want to adopt when proposing the class action; if opt-in or opt-out.

*** SLIDE 9 ***

[Image]

*** SLIDE 10 ***

Third-party litigation funding consists of financing the costs of litigation in favour of one of the parties to the lawsuit by a third party, in return for a portion of the gains from the lawsuit.

Third-party litigation funding is important as a way of accessing justice and combating financial and economic asymmetry between large companies and consumers.

The third-party litigation funding allows to eliminate the economic barriers, that many times are responsible for the plaintiffs not to exercise their rights in court. This is a mechanism allowing access to justice and to private enforcement.

These third-party funding agreements allow the victims, the plaintiffs, to be provided with more economic means and, at the same time, with more resources to litigate, contributing to a better playing field in the access to justice and to the success of the lawsuit.

The financiers of this kind of lawsuits are specialists that try to measure the merit of the lawsuit and it is on the basis of it that they finance these lawsuits or not. Thus, these types of lawsuits, from the outset, are actions with high merits. With this kind of funding, the lawsuits can then be decided on the basis of their merits rather than the financial strength and resources of one of the parties.

Third-party litigation funding is a way, in many cases perhaps the only way, to claim damages suffered by the injured parties. The mere existence of this kind of financial support, in conjunction with class actions, has a deterrent effect allowing the prevention of illicit behaviour or a behaviour that causes damage to the majority of consumers.

In other words, we are also preventing the social cost that results from illicit or harmful conduct by companies.

There is therefore a public interest in accessing justice and preventing harmful behaviour with a high social cost.

The public interest behind the third-party litigation funding is explicit in the article 47 of The Charter of Fundamental Rights of the European Union.

Finally, it's important to emphasize, that third-party litigation funding is a litigious financing activity only and cannot be considered like banking, insurance or stock market investment. We say this because some defendants, in desperation, in class actions that we have filled, tried to use this suicidal argument to defend themselves and blocked third-party funding initiative.

Third-party funding is clearly different from banking, insurance or stock market investments. It's not subject to those rules and in most Member States it is not yet regulated. It should and surely will be regulated in the future. But in the meantime reputed funders already comply with voluntary Codes of Conduct that tackle the concerns that are sometimes raised

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[Image]

*** SLIDE 12 ***

The famous law cases Vincenzo Lloyd v Adriatico Assicurazioni SpA, C-295/04, and Bernard Crehan and Bernard Crehan v Courage Ltd and Others, C-453/99, before the Court of Justice of the European Union, concerning the right to compensation for damages caused, had opened space to leap from public enforcement to private enforcement, due to anti-competitive conduct.

Class actions can be considered a form of private enforcement and an effective way to replace lethargic and inefficient public enforcement.

Our experience, when we compare the results of our class actions with the actions, we had pledged to the European Commission, namely to DG-Competition, we realize that the public enforcement doesn't work so well, when compared to the private enforcement that results from our class actions; even when there is an obvious violation of Article 102 of the Treaty on the Functioning of the European Union.

An example of this is, again, the Vodafone case, whose harmful practice is extended to several Member States, namely Spain, France, Italy, among others. DG-Competition, despite being required to act [according with the article 102 of Treaty on the Functioning of the European Union and article 18 of Council Regulation (EC) 1/2003] and already having knowledge of the decision of the Portuguese Supreme Court of Justice, remains inactive. Public enforcement is not working in this case.

However, private enforcement always has a major challenge, which is the calculation and proof of the damages. This difficult challenge removes any deterrent or preventive effect of private enforcement against companies that adopt illicit or harmful practices.

Therefore, we defend private law enforcement, precisely to have a deterrent effect on this harmful conduct, increasing the risk for the offender and, in particular, making them costly.

If the offender, in the end, continues to have a financial advantage even if convicted, the offender will obviously continue with the harmful conduct. Thus, it's extremely important to guarantee a way for private enforcement to overcome the challenge of calculating and proving damages and this can only be achieved through the law.

In that context of the private (law) enforcement we have the Directive 2020/1828 that, for example, provides the right to access to documents and other evidentiary elements as an instrument for the preparation and proof of allegations.

We also have Directive 2014/104/EU on the rules governing damages actions for breach of competition law provisions and the lack of harmonization and implementation of legal rules applicable to private performance under European Union law.

The directive is clear when it says that the application of substantive rules and procedural steps relating to claims for damages resulting from infringements to competition law cannot render the exercise of the right to compensation practically impossible or excessively difficult.

These difficulties are already recognized in lawsuits related to certain harmful conduct. In these cases, some mechanisms already exist that allow overcoming these challenges, now it is necessary to extend these mechanisms to all other situations and not only to competition law issues.

The solution is the access to documents and evidences must be provided by law to all kind of class actions, taking into account the principle of maximum effectiveness and private enforcement and the quantification of the total damage suffered by the injured parties, when this is practically impossible or excessively difficult to calculate it accurately, the compensation must be decided by the court of law taking into account the evidences and using an estimated damage calculation, in order to ensure that a fair compensation for damages is obtained; finally,

*** SLIDE 10 ***

In conclusion, it's important;

a) to adopt in all Member States the possibility for the plaintiffs to decide the class action model (opt-out or opt-in) to be adopted when filling the class action in court.

b) the possibility of third-part funding and the payment to funders must be institutionalized and provided for by law with adequate regulation to prevent abuses

c) the access to documents and evidence must be provided by law to all kind of class actions, taking into account the principle of maximum effectiveness and private enforcement;

d) the quantification of the total damage suffered by the injured parties, when this is practically impossible or excessively difficult to calculate accurately, the compensation must be decided by the court of law taking into account the evidences and using an estimated damage calculation, in order to ensure that a fair compensation for damages is obtained; finally,

e) as in the UK, where the “claims administration” activity is, since 04.01.2019, regulated by the FCA, this must also happen in all Member States, namely giving this competence to consumer and sector associations or specialized firms on that job, providing a fair compensation for such work.

Last but least, the success of a class action always depends on the merits of the case, but also, and a lot, on the ability of the judges to correctly interpret this reality and have the courage to balance the scales in a fair, legal way and guided by the principle of isonomy.

We found the judges of the courts of first instance, in general, are very ill prepared to deal with class actions. There are courts where no judge has ever seen, dealt with, or ruled on a class action. That is why it’s not surprising that decisions in the courts of first instance are unfavourable to consumers / plaintiffs and that decisions are almost always reversed by higher courts.

Fortunately, in the Supreme Court of Justice, in the Lisbon Court of Appeal and in the Competition, Regulation and Supervision Court, which is a specialized and well-prepared court, there are capable, sagacious, fair,m and courageous judges in the application of the law and in the making of justice.

For example, the decision of the Supreme Court of Justice in the Vodafone’s class action was described, in an very important publication in Brazil, on the other side of the Atlantic, under a very happy title “a piece of filigree in Portuguese jurisprudence”, in a clear and more than deserved praise for the work of the Portuguese Justice, in the guise of the very noble rapporteur, the Judge of the Supreme Court, Maria Clara Sottomayor, and the Deputy Judges, Pedro de Lima Gonçalves and Fernando Samões, who unreservedly subscribed the same understanding. This recognition is very important for the credibility of justice and the deterrence of offenders. We could add other names such as the judges Eurico dos Reis, Oliveira Abreu, Luís Espírito Santo and Alexandre Reis to this effort to apply justice well.

Thank you for your time.

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