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## Isabelle BERGER-STEINER: Funding competition claims – What is the impact of the Covid-19 crisis?

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Director

Nivalion AG, Zug

Interview conducted by Marc Barennes,  
Executive Director, CDC Cartel Damage Claims,  
Luxembourg, and Lecturer, Sciences Po, Paris

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# Isabelle BERGER- STEINER: Funding competition claims – What is the impact of the Covid-19 crisis?

## Since Feb. 2018

Director, Head of Switzerland,  
France & Benelux, Nivalion AG, Zug

## Since Sept. 2011

Counsel, Schellenberg Wittmer AG,  
Zürich

## Since Jan. 2008

Associate, Homburger AG, Zürich

**As a follow-up to the first interview with a litigation funder I carried out last year, it is my pleasure this year to interview Dr Isabelle Berger-Steiner, a Director and Head of Switzerland, France & Benelux with the litigation funding firm Nivalion AG, based in Zug (Switzerland).**

**Thank you very much Isabelle for kindly accepting to answer my questions! We all live in special times from both a personal and professional perspective. On the professional side, it still seems quite unclear how the Covid-19 crisis will impact the antitrust private enforcement market in particular. I think our readers will be most interested in hearing your personal views on the subject.**

**If you allow me, I would like to start with a general question. A number of litigation funders have publicly declared that the Covid-19 crisis has led to a very significant surge of litigation funding requests from law firms and potential claimants. Have you experienced such a surge in the antitrust private enforcement field and if so, what are the reasons explaining such an increased interest in your opinion?**

We indeed encountered a significant increase in several areas where the demand was (and still is) obviously driven by the Covid-19 crisis and its economic consequences. However, this uptick in requests relates not specifically to the field of antitrust private enforcement since these cases typically require considerable preparation and build-up time before a funder can assess them. The antitrust private enforcement cases we are assessing now have been “in the making” way before the pandemic broke out. But the crisis will no doubt positively impact the number of antitrust private enforcement cases in the near future, i.e., we expect an increase in funding inquiries in this field.

Looking at the funding industry more generally, the current uncertainty and its challenges for many businesses and law firms have already led and will increasingly lead to a greater demand in litigation finance. Also, it seems to fuel the interest in the newer and more sophisticated, but lesser-known funding products on offer. In fact, we are now being approached by large corporations who may not have thought about funding previously.

Those clients are particularly interested in portfolio funding solutions. Portfolio funding means that selected claims of a corporate client are pooled for funding in a case portfolio. There are basically no limits to the composition of such a

portfolio. It can include only a few or many cases, contain plaintiff in addition to defence matters, and extend to cases against single or multiple parties in related or unrelated matters. Importantly, the funder's investment and return are spread across the entire portfolio of claims. Due to this risk diversification, the financial terms of portfolio funding are generally better for the client than several individual funding arrangements. In addition, depending on the individual circumstances, cases which would fail if considered individually on the selection criteria and would not be eligible for funding can potentially also be included in the portfolio.

In addition to these companies' wishes not to support the costs and risks for their disputes, they ask for an advance on the future prospects of their cases (so-called "monetisation," which I further discuss below).

**“The crisis will no doubt positively impact the number of antitrust private enforcement cases in the near future.**

It is also noteworthy that we are seeing an increased desire from businesses to reduce their exposure to claims they are defending. Indeed, defensive litigation is fundable if there is a strong counterclaim, or if the defensive litigation can be included in a portfolio of affirmative matters (i.e., where the client is the claimant and seeks to obtain a monetary or other benefit). Alternatively, provided that the company has enough funds available to pay the funder's return in the event of success (it being understood that in this context, "success" does not necessarily require that the claim be dismissed in its entirety; rather, the parties will define "success" by setting specific thresholds), a defence case can, of course, also be funded individually. This is in particular conceivable in the antitrust private enforcement field, when an infringing company—often large corporations with deep pockets—is seeking to reduce its potential financial exposure by aggressively defending against a follow-on damages action, without, however, be willing to come up for the related litigation costs.

Last but not least, we are seeing law firms starting to think about how they may benefit from funding. This has been extremely rare in Continental Europe until now.

**Litigation funders take into consideration numerous factors when assessing a potential investment. Can you tell us if and how you factor in the Covid-19 crisis in your current assessment of whether a case should be funded?**

The pandemic itself is not an event that we are factoring into our assessment. However, we factor in effects such as (i) potentially increased duration of cases due to Covid-19-related delays in proceedings, (ii) key individuals in businesses we support getting ill, and – most importantly – (iii) sustainable solvency of the involved parties and enforceability of successful claims. This last aspect is in my view the most important, because the crisis has affected and will further affect the solvency and viability of corporations and sovereigns. Funders have to think

ahead and assess if the defendants will be good for the damages in five years' plus time. This is, of course, not new, and funders have done so already before the crisis. However, when you look at how certain industries, for instance aviation, are struggling, this adds a new layer of risk to claims. Also, funders need to carefully reassess their ongoing funding cases with a view to the collectability risk of each defendant in their portfolio. In practice, in the event of a drastic change in the solvency of a defendant, this could mean that a funder might consider terminating the funding agreement because the funded claim is no longer commercially viable.

**There has been an increasing amount of money invested into litigation funding partially resulting in the decrease of litigation funding costs over the past few years. Do you expect a change in that regard because of the Covid-19 crisis?**

This is difficult to predict. There is an inherent factor when it comes to the pricing of litigation funding, and that is a risk-adjusted return expectation. Since there is – even in antitrust private enforcement cases – a risk of total loss, pricing will always have to reflect that. If the current trend of a significant increase in the number of funding requests continues over a longer period, I would even expect this additional demand for funding in the market to lead to increasing costs. A parallel issue is that it remains to be seen whether funders will be able to raise funds as easily as in pre-Covid-19 times. If investors are more hesitant to engage in this asset class, there will be less funds for funding, which in turn might increase the cost for funding in the long run. And funders might become pickier going forward.

**“It remains to be seen whether funders will be able to raise funds as easily as in pre-Covid-19 times.”**

**More generally, what impact do you think the crisis may have on the antitrust private enforcement actions brought in Europe? Do you expect that the companies which are harmed by antitrust infringements and are undergoing financial difficulties will bring more antitrust private actions? Do you think the Covid-19 crisis will have an impact on the willingness of companies to settle?**

The demand to capture additional sources of income will become even more important to companies than before. In this context, an increased interest in bringing more antitrust private actions seems to be an obvious consequence. Also, we at Nivalion expect the number of infringements to rise, since it sadly seems an easy way for some companies to grapple with the situation. Whether infringers will be willing to settle earlier (to get liabilities off their balance sheets in order to be able to get more favourable funding terms from their banks) might be a question to be answered in each and every individual case. I do not expect a general increase in the willingness to settle claims.

**Some hedge funds have recently started purchasing from cartel victims their antitrust claims upfront with a cash payment. This model contrasts with the one pursuant to which cartel victims obtain a majority share in the proceeds if and when their case is successful. What is your opinion about these upfront compensation schemes? Do you think they will further develop in the future, especially if companies harmed by an antitrust infringement are in need of immediate cash because of the aftermath of the Covid-19 crisis?**

This is indeed a very interesting development. We already noticed pre-Covid-19 a rising awareness that selling claims against an upfront payment might be a beneficial option for companies. This trend will certainly grow as companies will be facing liquidity constraints following the outbreak of the pandemic.

For those readers who might not yet be familiar with the monetisation of claims: Monetisation refers to the provision of working capital collateralised by legal claims. While litigation funding is most commonly used to pay for legal fees, monetisation functions as a non-recourse advance on amounts that a business will ultimately recover in litigation. Unlike debt, the advance does not need to be repaid unless the litigation is successful. In principle, any affirmative litigation claim has the potential for monetisation. However, the more developed a claim, the more easily a funder can assess its merits and commercial value. This being said, there is in my view definitely an untapped potential for monetisation of large antitrust claims.

**“There is in my view definitely an untapped potential for monetisation of large antitrust claims.”**

**There is a consensus that the health crisis will be followed by a financial crisis. One question that lawyers seem to ask themselves is whether litigation funders that committed to provide funds in an ongoing**

**private antitrust action will still be able to honour their commitments if the financial markets collapse.**

The old rule that a claimant and its lawyers should only engage with funders that can safeguard the committed funds over the lifetime of the proceedings has become even more important. Claimants should ask for respective proof that the funder will be able to honour its commitment – or look for another funder. Remarkably enough, the majority of our clients and their lawyers still refrain from asking about our financial firepower and do not enquire how we ensure that sufficient funds will be available throughout the lifecycle of their case.

I believe there will be more critical questioning concerning this going forward. Speaking for Nivalion, we are in the lucky position to say that our partners can be assured of our financial stability. In every funded case the commitment is ring-fenced. Additionally, we can bring in our in-house, tailor-made insurance solution to cover adverse cost risk (ATE-insurance).

On another note, I think that there will be fewer new litigation finance companies launched in the near future, because investors will be hesitant to partner with a funder who does not have a convincing track record.

**To conclude, how do you see the litigation funding market with regard to private antitrust actions evolve in the next few years? Will private antitrust actions remain a very attractive field for litigation funders?**

In light of the above observations and expectations, I see a clear increase in demand for funding private antitrust proceedings that is partially fuelled by the pandemic. I predict most cases will go to highly specialised firms and funders. This is because it takes a rare combination of data collection and warehousing, legal and economical skills, and – last but not least – the necessary financial firepower to take an antitrust private action successfully to the finish line. ■

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