European Commission DG Justice and Consumers

Mapping Third Party Litigation Funding in the European Union

CIVIC CONSULTING

British Institute of International and Comparative Law

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Authors

Prof Eva Lein, BIICL/UNIL (study lead, legal analysis)

Constance Bonzé, BIICL (legal analysis and coordination of national experts)

Rhonson Salim, BIICL/Aston University (legal analysis)

Dr Frank Alleweldt, Civic Consulting (co-lead, EU consultation component)

Dr Senda Kara, Civic Consulting (EU consultation component)

In collaboration with

Asser Institute: Dr Vesna Lazic and Dr Jos Hoevenaars

Risk & Policy Analysts Limited (RPA): Eliza Kritikos, Daniel Vencovský, Dr Liljana Cvetanoska, Matija Curic

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Prof Eva Lein and Giuseppe Agrelli	*UNIL/BIICL*	Switzerland (CH)
Rhonson Salim	*BIICL/Aston University*	United Kingdom (UK)
Prof Maya Steinitz	*Boston University*	United States (US)
Prof Camille Cameron KC	*Schulich School of Law*	Canada (CA)

Table of Contents

ABSTRACT

In reply to the EU Commission's Request for service number JUST/2023/PR/JCOO/CIVI/0016, the Justice and Consumers Evaluation Consortium (JCEC) led by the British Institute of International and Comparative Law (BIICL) and Civic Consulting, and supported by experts from the Asser Institute and from Risk & Policy Analysts (RPA), carried out a study on Mapping Third Party Litigation Funding in the European Union.

The aim of the study is to collect and analyse information on legal frameworks and practices of third-party llitigation funding (TPLF) in the Member States of the European Union and selected third countries (CA, CH, UK, US). The study is structured around: national reports; national interviews; a broad stakeholder consultation; and an expert panel.

The results of the study will be used by the Commission's services to prepare future policy decisions concerning third party litigation funding, in particular on the follow-up to the Resolution of the European Parliament of 13 September 2022 on responsible funding of litigation.[1]

[1] European Parliament, Responsible private funding of litigation, European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)).

EXECUTIVE SUMMARY (EN)

In reply to the EU Commission's Request for service number JUST/2023/PR/JCOO/CIVI/0016, the Justice and Consumers Evaluation Consortium (JCEC) led by the British Institute of International and Comparative Law (BIICL) and Civic Consulting, and supported by experts from the Asser Institute and from Risk & Policy Analysts (RPA), carried out a study on Mapping Third Party Litigation Funding in the European Union.

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The study is structured around:

A legal analysis based on desk research and national reports (including national interviews) presenting the situation in all 27 EU Member States and in selected non-EU jurisdictions (CA, CH, UK, US). The legal analysis also included an expert panel conducted to discuss initial findings, potential undesired features of/consequences of the use of TPLF in the Member States, the solutions proposed in the EP resolution and options for the way forward. An outline of the components of the legal analysis is as follows :

- **National reports**: the national experts conducted intensive desk research on the relevant existing and planned legislation applicable to TPLF in their jurisdiction, covering a broad range of aspects connected with TPLF.
- **National interviews**: national experts also collected information on the practical operation of TPLF in their jurisdiction, including 3 to 5 national interviews of relevant stakeholders, carried out by the national experts under the supervision of the BIICL team.
- **Synthesis**: the results of the national legal research, along with the results of the broad desk research and the expert panel, have been analysed and synthesised to present the salient features, similarities and differences of TPLF regulation across the selected jurisdictions, as well as the main issues identified. Particular focus was also placed on two areas of interest: assignment of claims, and financial regulation / investment funds.
- **Comparative table**: a table presenting the degree of compatibility of the national TPLF regulations (if existing) with the solutions proposed by the EP resolution, including an assessment of the need for and the value added of the proposed solutions.

A broad consultation of stakeholders which presents and analyses opinions of key stakeholders on the regulation and practical operation of TPLF in their jurisdictions and on the needs regarding regulation of TPLF both at the national and at the Union level. The consultation consisted of a general stakeholder survey that was targeted at: litigation funders; lawyers/ law firms, businesses (other than law firm and litigation funder), consumer organisations and other representatives of consumer/citizen interests, public authorities, judiciary, arbitrators/mediators, academics/researchers (in all cases also including the representative organisations of these

[2] European Parliament, Responsible private funding of litigation, European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)).

stakeholders). The survey was accompanied by targeted interviews with business and consumer stakeholders, litigation funders, as well as clients and defendants of cases in which TPLF was used. This complemented the national level interview process (see above).

Main findings from the legal analysis

Existing or planned legislation

- In most of the **EU Member States**, there is no specific regulation of TPLF, except for the provisions implementing Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers (Representative Actions Directive, "RAD"),[3] specifically the implementation of Article 10 of the RAD.
- In the selected **non-EU jurisdictions**, the approach to TPLF legislation varies. In Canada and the United Kingdom there is no existing legislation that directly addresses TPLF. Most of the guidance has come from the development of the common law on a case-by-case basis. In the United States, TPLF is subject to the overlapping jurisdiction of state and federal courts, state and federal legislatures, regulatory agencies, and bar associations. Legislation, regulation, and oversight of TPLF is being undertaken at each of those levels. In Switzerland no specific regulation exists, either.
- Where there is no TPLF-specific legislation, the practice of TPLF operates within the general framework of **national contract law and civil procedure**. **Consumer law**, including legislation on unfair contract terms, applies if a consumer is a party to the agreement.
- Additionally, **rules of ethics and professional conduct apply to lawyers**: these include avoidance of conflicts of interest, obligations of confidentiality, loyalty, and duties to remain independent.
- **Assignment of claims**: Assignment of claims is generally possible and permissible in all EU Member States and non-EU jurisdictions selected in this study. However, the practical interaction of assignments of claims with TPLF has been observed and/or discussed only in some jurisdictions. In jurisdictions where champerty still exists (Ireland, Canada, UK) the assignment of claims as means of funding is limited or prohibited.
- **Financial regulations / investment funds**: all jurisdictions have existing banking and financial regulatory frameworks that impose specific conditions for authorisation, including capital adequacy, that could potentially apply to litigation funders, depending on their nature or structure. National experts did not, however, report any issues arising from those regulations and TPLF specifically.

Main issues identified by the legal research

The rise of TPLF has spurred vigorous debates among legal scholars, practitioners, and policymakers, offering both new opportunities and challenges to the legal system. In doctrine,

[3] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27.

concerns have been raised regarding potential conflicts of interest, ethical dilemmas, and the risk of frivolous lawsuits driven solely by profit-seeking funders.[4] In the selected jurisdictions, the main issues discussed at doctrinal level are:

- **Permissibility and qualification of TPLF**: whether TPLF-specific regulation exists or not, most jurisdictions do not prohibit TPLF, apart from Ireland on the grounds that it constitutes maintenance and champerty.
- **Undue control of funders over the proceedings**: such as the risk of the funder unilaterally terminating the funding agreement, funders retaining the right to consent on settlements, funders interjecting into strategic decisions of the litigation, or the risk of funders charging excessive fees, consequently depriving the claimant of a substantial part of the award.
- **Conflicts of interest**: in particular concerning the relationship between a funded party's lawyers and funders.[5]
- **Transparency and disclosure**: are being discussed as tools to alleviate the risks of conflicts of interests.
- **Need for regulation**: in some jurisdictions, the doctrine is of the opinion that the absence of regulation creates a certain degree of confusion and uncertainty, potentially creating risks for claimants, such as funders operating without sufficient financial means. However, the extent to which TPLF should be regulated at the EU level is the subject of debate.
- Some **specific considerations** appeared at national level as well, for instance in Germany TPLF in the context of the skimming-off action.

Degree of compatibility of TPLF regulation with the EP Resolution

National experts have reported on whether their legal systems contain provisions similar / equivalent to the measures in the draft directive annexed to the EP resolution.

- **Authorisation system (Art. 4)** and **conditions for authorization (Art. 5)**: EU Member States and the selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 4 and Art. 5. Partial compatibility is reported as courts exert a level of control. Partial compatibility is also reported where financial and banking regulations impose conditions for authorisation. These conditions are, however, not homogenous, vary between jurisdictions, and may not apply to funders depending on the nature/structure of the fund.
- **Capital adequacy (Art.6)**: Members States have not reported TPLF- specific provisions compatible or equivalent to Art. 6. In some jurisdictions, funders may, depending on the structure of the fund, be subject to general financial regulation, including minimum initial capital requirement. Outside of the EU, funders who are part

[4] Veljanovski, 'Third-Party Litigation Funding in Europe', at 408, Jérôme Saulnier, Ivona Koronthalyova, and Klaus MüLler, 'Responsible Private Funding of Litigation: European Added Value Assessment', in European Parliamentary Research Service (ed.), (European Parliament,, 2021), at 20.

[5] See the National Report for the United States: the author, Prof Maya Steinitz, served as expert witness in the Burford/Sysco case. See also, M. Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy And Funders' Intermeddling*, Cornell Law Review (forthcoming 2025).

of the Association of Litigation Funders in the UK are required to maintain a minimum capital amount and to maintain the capacity to cover aggregate financial liabilities under all of its LFAs for a deinfed period.

- **Fiduciary duty (Art.7)**: Poland and Italy report partial/limited compatibility with general investment fund regulation, under which some funders might fall. Outside of the EU, one US State (Arizona) imposes fiduciary duties on funders. In Canada, funders have an obligation to negotiate an agreement that is not unconscionable, and control of the litigation shall rest with the beneficiaries.
- **Powers of supervisory authorities (Art.8)**: EU Member States and the selected non-EU jurisdictions have not reported TPLF- specific provisions compatible or equivalent to Art. 8, except in some Member States in the context of financial regulation, or consumer collective redress.
- **Investigations and complaints (Art.9)** and **Coordination between supervisory authorities (Art.10)**: EU Member States and the selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 9 and Art. 10, except in some Member States in the context of the regulation of financial entities (Denmark, Sweden). Poland reports partial compatibility with Art. 9 in the context of consumer collective redress and qualified entities.
- **Content of third-party funding agreements (Art.12)**: No TPLF-specific provisions reported, except in Germany where a 10% cap on the funder's share applies in redress actions in the terms of the RAD. In all jurisdictions, general contractual principles under civil law apply.
- **Transparency requirements and avoidance of conflicts of interest (Art.13)**: Partial compatibility is reported in the context of the implementation of Article 10 RAD. Outside of the EU, compatibility is reported via LFA content and court scrutiny (Canada, United States), codes of conduct/deontological rules (United Kingdom, Switzerland), and market discipline (United States)..
- **Invalid agreements and clauses (Art.14)**: No specific TPLF regulation. General contractual principles apply. Partial compatibility reported in Slovenia.
- **Termination of third-party funding agreements (Art.15)**: No TPLF-specific provisions reported. The issue is governed by the principle of contractual freedom. Outside of the EU, funders who are part of the Association of Litigation Funders in the UK are required to follow its Code of Conduct stipulates the grounds in which ALF funders can terminate funding agreements.
- **Disclosure of the third-party funding agreement (Art.16)**: Partial compatibility is reported in the Member States that have implemented the RAD (more specifically Article 10(3) RAD). In general, apart from collective claims, there is no duty to disclose TPLF.
- **Review of third-party funding agreements by courts or administrative authorities (Art.17)**: Partial compatibility is reported in the Member States that have implemented the RAD (more specifically Article 10(3) RAD). Outside of the EU, partial compatibility is reported in Canada, UK and the United States, in the context of consumer protection, competition claims, and/or collective redress.

- **Responsibility for adverse costs (Art.18)**: No TPLF- specific provisions reported. General civil procedural rules apply.
- **Sanctions (Art.19)**: Members States and the selected non-EU jurisdictions have not reported TPLF- specific provisions compatible or equivalent to Art. 19, except in some Member States in the context of the regulation of financial entities (Sweden), and consumer collective redress (Malta, Poland).

Main findings from the stakeholder consultation

Practices of litigation funders as reported by stakeholders

The first part of the consultation explored current practices of litigation funders, as reported by stakeholders other than funders and litigation funders themselves.[6] The results illustrate that TPLF is used in various **areas of law**. Commercial law, civil law, competition/antitrust and consumer protection law were most frequently mentioned as being areas in which respondents (or their members) have been involved in TPLF funded case(s). Close to 60% of respondents were aware of **litigation funders operating in their jurisdiction**. A large number of stakeholders (often business stakeholders having a critical view of TPLF) provided comprehensive lists of litigation funders, indicating the names of close to 300 entities that are active in the EU and are involved in litigation funding.[7] Many of these litigation funders operate simultaneously in several Member States. In interviews, funders pointed to the fact that litigation funding has a long tradition in some EU Member States, most notably Germany and the Netherlands. Also Belgium, France, Austria, Spain, Portugal, Denmark, Sweden and Italy were mentioned as countries in which litigation funders are active (see country reports for more details).

Data on the **number of cases funded** by litigation funders in EU Member States is scarce. This was confirmed by the results of the survey, in which many stakeholders indicated that often the fact that a case is funded by a litigation funder is not known. Still, a considerable number of respondents provided estimates regarding cases in their jurisdiction. The largest number of estimates were provided for the Netherlands, Germany and Belgium. In the Netherlands, respondents frequently estimated the average number of TPL funded cases per year to be around 80. Higher estimates were reported from Germany and Austria, with some respondents reporting estimates in the thousands. A second important source concerning the number of funded cases are litigation funders themselves. A total of 23 litigation funders provided details regarding their EU operations. Typical figures provided are in the range of less than 10 to more than 100 cases per year, in total close to 700 cases for the 23 funders (including enforcement cases), of which less than 100 arbitration cases. Some funders pointed out that the figures provided concern ongoing cases in a given year, which typically have a duration of more than one year, other focused their estimate on new cases per year.

6 While a large number of stakeholders participated, covering all MS and stakeholder categories (in total 231 contributions, including national interviews that were based on a similar questionnaire), the results of this consultation do not necessarily a complete picture of litigation funding in the EU, but rather provide a summary of those practices that were observed by the participating litigation funders and other stakeholders.

7 See consultation section for detailed list. The listed entities are mostly litigation funders, but also include some insurers, law firms, claim aggregators and other organisations involved in litigation funding. The scope of activities and the geographical coverage of the listed entities have not been independently verified.

As the understanding of respondents that provided estimates may have been different in this respect, the total figure has to be interpreted with care.

The **minimum value of a claim** funded by TPLF is between less than 1 million Euro and 14 million Euro, according to more than 70% of respondents who provided an assessment. A similar share of respondents who provided an assessment said the **typical value** of a claim funded by TPLF was between 5 million Euro and close to 300 million Euro. But there were also several litigation funders that reported considerably lower typical values of funded claims, reflecting the diversity of litigation funding practices for different types of claims and areas of law.

In contrast, there was a great degree of consistency concerning the **typical ratio between investment by the funder and claim value**. This ratio is most frequently considered to be 1:10, with more than 70% of respondents who provided an assessment indicating that the ratio was between 1:5 and 1:15. When asked about **typical size of the investment by the litigation funder**, most respondents provided estimates between less than 1 million Euro and 5-9 million Euro.

The **share of compensation** awarded typically demanded by litigation funders is most frequently reported to be in the range of 20% to 30%. However, stakeholders noted that the remuneration structure of litigation funders is often far more sophisticated, and that the share of compensation may vary and could change during the duration of the funding. Litigation funding agreements might also provide for multiples of the committed or incurred costs as compensation of the funder, or a mixture of both - share of compensation and multiples of costs.[8]

In the questionnaire, we also asked respondents to elaborate on their information regarding the **origin of funding** provided by the litigation funder. There was general agreement across most stakeholder groups that related information was scarce, that funding practices were 'opaque', that various sources of funding were used, and that the origin of funding was likely to vary between litigation funders.

Concerning the question of whether litigation funders exercise any form of **control over the legal proceedings,** stakeholders other than funders that had an opinion overwhelmingly answered with 'Yes', whereas a majority of litigation funders found a 'No' as an appropriate answer. But even so, a significant number of litigation funders agreed they exercised some form of control over the legal proceedings. Stakeholders were then asked to indicate what type of control litigation funders had, with top ranked forms of control being 'consent for settlement', 'choice of lawyer' and 'agreement on strategy'. There was a broad agreement among different stakeholder groups, including litigation funders, that is it possible for the litigation funder to **withdraw funding during the litigation process**.

Of those respondents that had an opinion, a majority of both stakeholders other than funders and litigation funders considered that litigation funders have **safeguards in place to avoid conflicts of interest**. Regarding the question whether the funding agreement typically covers the issue of **liability as to costs in the event of an unsuccessful outcome** ("adverse costs"), most stakeholders other than funders and litigation funders considered the answer to be 'Yes', and specified that this was a "limited" or "conditional" liability.

We finally explored the degree to which **funding agreements are disclosed to the court**. Respondents were split in their answers, with roughly two thirds of stakeholders other than funders and close to half of litigation funders that had an opinion indicating 'No', and the remaining one

[8] It was reported that in some cases, a 'higher of' a multiple of the funded costs or a percentage of compensation awarded is agreed with the client.

third of stakeholders other than funders and a slight majority of litigation funders that had an opinion indicating 'Yes'. In the comments to the answers, several respondents emphasised that funding agreements are typically not disclosed to the court, with a limited number of national exceptions in specific circumstances, typically related to collective actions, often in the context of the transposition of the Representative Actions Directive (2020/1828).

Stakeholder views on effects of TPLF

The next part of the consultation concerned stakeholder opinions regarding the **effects of the current practices of TPLF in the EU**. Stakeholders mostly saw the current practice of TPLF in the EU as either only having positive effects (34%), or as having both positive and negative effects (24%). 17% of respondents saw only negative effects, 4% neither positive nor negative effects. The rest had no opinion or provided no answer. Responses varied considerably by stakeholder group. Only businesses (other than law firms/litigation funders) and their organisations had an overwhelmingly negative view of the effects of TPLF (8 in 10 respondents that had an opinion). However, a small minority of the responding businesses saw positive, or a mix of positive and negative effects of TPLF. In the other stakeholder groups of litigation funders, consumer organisations, law firms/lawyers and academics/researchers, majorities of respondents expressing an opinion found current practices of TPLF in the EU to have positive effects, or both positive and negative effects. The small number of public authorities that responded to the survey had divergent views, with the largest number having no opinion or seeing no effects. Members of the judiciary and arbitrators/mediators (with again each group having less than 10 respondents), as well as 'other' respondents most frequently saw both positive and negative effects of the current practice of TPLF in the EU.

In a follow-up question, respondents were asked to indicate the **positive effects** of the current practice of TPLF in the EU they had observed. The three most often observed positive effects were:

- 'Better access to court procedures for parties that could not fund litigation otherwise' (observed by 56% of respondents)
- 'Professionalisation and expertise for complex cases provided by the funder' (34%) and
- 'Filtering effect, as cases with a low chance of success will not be funded' (28%).

Those respondents that observed **negative effects** of the current practice of TPLF in the EU specified them in a separate question. Four negative effects were most frequently indicated by the respondents (by 25% to 26% of respondents). These were

- 'Reduction of compensation for the claimant'
- 'Conflicts of interest involving litigation funding'
- 'Undue influence on the substantive and procedural decisions of the funded beneficiaries, including on settlements and appeals' and
- 'Funding of frivolous claims with the aim of reaching an extorted settlement, or other forms of abuse'. The potential of frivolous claims was a frequently mentioned concern of business stakeholders in the interviews we conducted, and often (but not only) focused on specific areas of litigation (such as patent litigation, shareholder litigation, product liability litigation), where business interviewees described ongoing and past cases against them that were reportedly organised by litigation funders and/or hedge funds to elicit high settlements, in some cases using the most suitable features of national justice systems to exert the largest possible pressure on defendants.

Stakeholder views on the need for regulation

The last part of the consultation concerned stakeholder opinions regarding the **need for regulation** of TPLF at national or EU level. 29% of respondents answered 'yes, at EU level', 25% answered 'yes, both' (EU and national level), 4% answered 'yes, at national level', bringing the total share of respondents who see a need for regulation to 58%. In contrast, 29% of respondents saw no need for regulation and the rest did not know or did not answer.

Again, views differed strongly between stakeholder groups. In the stakeholder groups judiciary, business, academics/researcher, other, and arbitrator/mediators more than two thirds of respondents saw a need for regulation either at EU or national level or both, and more than half of the responding lawyers/law firms. In contrast, in the stakeholder groups consumer organisations and litigation funders there was only a minority for any form of regulation. A majority of public authorities said 'Don't know'. Those who argued that there was a **need for regulation** often referred to the negative effects they believed to be associated with TPLF (see above). While stakeholders (especially from the business side) were partly in favour of a **comprehensive regulation of TPLF in line with the draft directive annexed to the EP resolution**, others, including minorities of consumer organisations and litigation funders, were in favour of a **'balanced' or 'light touch' regulation of TPLF,** which would provide basic, not too specific rules, but be careful to keep TPLF a viable option. Stakeholders who saw **no need for regulation of TPLF** at EU or national level mostly argued that in their view there was no evidence of negative effects of TPLF and that over-strict regulation could deprive meritorious litigants of financial resources to access justice and enforce their rights.

The final set of questions related to the **effectiveness of the measures** in the draft directive annexed to the EP resolution to address potential undesirable features of current TPLF practices (if any). A list of measures contained in the draft directive annexed to the EP resolution was provided and respondents were asked to indicate for each measure on a four-point Likert scale whether they considered the measure to be 'not at all effective', 'rather not effective', 'rather effective' or 'very effective'. An effectiveness score was assigned to each item, ranging from 0 for 'not at all effective' to 3 for 'very effective', and on this basis a ranking of the measures was calculated in terms of effectiveness. 'Transparency requirements and avoidance of conflicts of interest (Art. 13)' were the most highly ranked measure, followed by 'Capital adequacy (Art. 6)' and 'Responsibility for adverse costs (Art. 18)'. However, only transparency requirements were considered on average to be 'rather effective', while all other measures were considered on average to be less effective. Overall moderate average scores for effectiveness and relatively small differences in effectiveness scores between measures were to some extent the result of the different views on effectiveness between stakeholder groups, with the result that conflicting scores cancelled each other out. The average effectiveness score was therefore calculated across all 14 measures by stakeholder group. Differences in average effectiveness scores between stakeholder groups were much larger than the differences in scores between measures when looking at the full sample. Only businesses and their organisations and the small number of responding arbitrators/mediators considered the measures in the draft directive annexed to the EP resolution on average to be 'rather effective'. All other stakeholder groups gave a lower average effectiveness rating to the measures, with litigation funders being the most negative, rating the measures on average as worse than 'rather not effective'. This assessment was to some extent consistent with attitudes towards the need for regulation (elaborated before).

In light of the results and data gathered in the legal research and the consultation, three different approaches are considered thereafter, along with their rationale.

No regulation

National experts and stakeholders in favour of 'no regulation' argue that there is no evidence of negative effects of TPLF and that over-strict regulation could effectively prevent any TPLF activity, and consequently deprive meritorious litigants of financial resources to access justice and enforce their rights. Existing principles of contract law, civil procedural rules, consumer protection, financial and banking rules, and collective redress legislation, along with the supervision of the courts and in some Member States, supervisory authorities, are deemed sufficient to regulate TPLF activity. Specific sectoral problems (e.g. related to patent litigation, or more generally the costs of civil proceedings) should according to this view be addressed in legislative amendments to the relevant sectoral legislation.

Light-touch regulation

A considerable number of national experts and stakeholders are in favour of a 'balanced' or 'light touch' regulation of TPLF, which would provide basic, not too specific rules, but be careful to keep TPLF a viable option.

They argue that the current system of rules is a patchwork that can lead to unpredictable outcomes and higher risks for all parties involved. Claimants, funders, and defendants are dependent upon unpredictable developments in the case law. Considering the growing development of TPLF activities in the EU, along with the current lack transparency, reverting exclusively to the courts to exert control and supervision of funders could place an excessive burden on the judiciary.

Specific issues are identified as needing regulation: transparency and disclosure, financial regulation (rules on capital adequacy), and consumer protection. A balance must be struck when regulating, taking into account the practical issues that arose, as well as the financial reality of the TPLF market. A balanced EU-level approach would facilitate access to justice, help monitor TPLF activities, while preventing abuse, and maintain fairness in legal proceedings.

Strong regulation

Stakeholders in favour of comprehensive regulation (such as the proposal for a directive annexed to the EP resolution) often refer to the negative effects they believe to be associated with TPLF, in particular: conflicts of interest and undue influence on the substantive and procedural decisions, funding of frivolous claims, reduction of compensation for the claimant, increase in claims and risk of over litigious society, increase of legal costs and price of insurance premiums, commercialisation of legal proceedings, distortion of the legal market, breaches of confidentiality. Regulation is perceived as a way to build confidence in litigation funders through transparency and legal certainty. On the other hand, a comprehensive regulation could effectively prevent any TPLF activity, consequently depriving meritorious litigants of financial resources to access justice.

SOMMAIRE DE GESTION (FR)

En réponse à la demande de service de la Commission européenne numéro JUST/2023/PR/JCOO/CIVI/0016, le Justice and Consumers Evaluation Consortium (JCEC), dirigé par le British Institute of International and Comparative Law (BIICL) et Civic Consulting, et soutenu par des experts de l'Asser Institute et de Risk & Policy Analysts (RPA), a réalisé une étude sur le financement des litiges par des tiers ('TPLF') dans l'Union européenne.

L'objectif de l'étude est de collecter et d'analyser des informations sur les cadres juridiques et les pratiques de financement des litiges par des tiers dans les États membres de l'Union européenne et dans certains pays tiers (CA, CH, UK, US). Les résultats de l'étude seront utilisés par les services de la Commission pour préparer de futures décisions concernant le financement des litiges par des tiers, en particulier sur le suivi de la résolution du Parlement européen du 13 septembre 2022 contenant des recommandations à la Commission sur le financement privé responsable du règlement de contentieux.[9]

L'étude est structurée autour de :

Une **analyse juridique** basée sur des recherches documentaires et des rapports nationaux (y compris des entretiens nationaux) présentant la situation dans les 27 États membres de l'UE et dans les juridictions non européennes sélectionnées (CA, CH, UK, US). L'analyse juridique comprend également un panel d'experts chargé d'examiner les premières conclusions, les caractéristiques indésirables potentielles/conséquences de l'utilisation du TPLF dans les États membres, ainsi que les solutions proposées dans la résolution du PE et les options pour la voie à suivre. Les éléments de l'analyse juridique sont les suivants :

- **Rapports nationaux** : les experts nationaux ont mené des recherches documentaires approfondies sur la législation existante et prévue applicable au TPLF dans leur juridiction, couvrant également un large éventail d'aspects liés au TPLF.
- **Entretiens nationaux** : les experts nationaux ont également recueilli des informations sur le fonctionnement pratique du TPLF dans leur juridiction, y compris 3 à 5 entretiens nationaux avec les parties prenantes concernées, menés par les experts nationaux sous la supervision de l'équipe du BIICL.
- **Synthèse** : les résultats de la recherche juridique nationale, ainsi que les résultats de la recherche documentaire générale et du panel d'experts, ont été analysés et synthétisés afin de présenter les caractéristiques principales, les similitudes et les différences de la réglementation du TPLF dans les juridictions sélectionnées, ainsi que les principales problématiques identifiées. Une attention particulière a également été accordée à deux domaines d'intérêt : la cession de créances et la réglementation financière / les fonds d'investissement.
- **Tableau comparatif** présentant le degré de compatibilité des réglementations nationales en matière de TPLF (si elles existent) avec les solutions proposées par la résolution du Parlement européen, y compris une évaluation de la nécessité et de la valeur ajoutée des solutions proposées.

[9] Résolution du Parlement européen du 13 septembre 2022 contenant des recommandations à la Commission sur le financement privé responsable du règlement de contentieux (2020/2130(INL)), disponible en français à : https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_FR.html

Une **large consultation** présentant et analysant les opinions de parties prenantes sur la réglementation et le fonctionnement pratique du TPLF dans leurs juridictions et sur les besoins en matière de réglementation tant au niveau national qu'au niveau de l'Union. La consultation a consisté en une enquête générale auprès des parties prenantes : les tiers financeurs de litiges, les avocats/cabinets juridiques, les entreprises (autres que les cabinets juridiques et les tiers financeurs), les organisations de consommateurs et autres représentants des intérêts des consommateurs/citoyens, les autorités publiques, le pouvoir judiciaire, les arbitres/médiateurs, les universitaires/chercheurs (y compris, dans tous les cas, les organisations représentatives de ces parties prenantes). L'enquête s'est accompagnée d'entretiens ciblés avec des entreprises et des consommateurs, des tiers financeurs, ainsi que des clients et des défendeurs dans des affaires où le TPLF a été utilisé, ce qui a complété le processus d'entretien au niveau national (voir ci-dessus).

Principales observations de l'analyse juridique

Législation existante ou prévue

- Dans la plupart des **États membres de l'UE**, il n'existe pas de réglementation spécifique concernant le TPLF, à l'exception des dispositions mettant en œuvre la Directive (UE) 2020/1828 du Parlement européen et du Conseil du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs (Directive sur les actions représentatives, « RAD »), et plus précisément la mise en œuvre de l'article 10 de la RAD.
- Dans les **pays tiers** sélectionnés, les législations relatives au TPLF varient. Au Canada et au Royaume-Uni, il n'y a pas de législation existante qui en traite directement. La plupart des lignes directrices proviennent du développement de la *common law* au cas par cas. Aux États-Unis, le TPLF est soumis à la compétence croisée des tribunaux fédéraux et étatiques, des assemblées législatives fédérales et étatiques, des organismes de réglementation et des associations d'avocats. Le TPLF fait l'objet d'une législation, d'une réglementation et d'une surveillance à chacun de ces niveaux. En Suisse, il n'existe pas non plus de réglementation spécifique.
- En l'absence de législation spécifique concernant le TPLF, la pratique du TPLF s'inscrit dans le cadre général du **droit national des contrats et de la procédure civile**. Le droit de la consommation, y compris la législation sur les clauses contractuelles abusives, s'applique si un consommateur est partie à l'accord.
- En outre, **des règles d'éthique et de déontologie s'appliquent aux avocats** : Il s'agit notamment de règles visant à éviter les conflits d'intérêts, d'obligations de confidentialité et de loyauté, et devoirs d'indépendance.
- **Cession de créances** La cession de créances est généralement possible et autorisée dans tous les États membres de l'UE et les pays tiers sélectionnés dans le cadre de cette étude. Toutefois, l'interaction pratique entre les cessions de créances et la TPLF n'a été observée et/ou discutée que dans certaines juridictions. Dans les juridictions où la doctrine de champartie existe encore (Irlande, Canada, UK), la cession de créances comme moyen de financement est limitée ou interdite.
- **Réglementation financière / fonds d'investissement** : toutes les juridictions disposent d'un cadre réglementaire bancaire et financier qui impose des conditions d'autorisation spécifiques, notamment en matière d'adéquation des fonds propres, qui pourraient éventuellement s'appliquer aux financeurs en fonction de leur nature ou de leur structure. Les experts nationaux n'ont toutefois signalé aucun problème lié à ces réglementations et au TPLF en particulier.

Principales problématiques identifiées par la recherche juridique

La montée en puissance du TPLF a suscité de vifs débats parmi les juristes, les praticiens et les responsables politiques, offrant à la fois de nouvelles opportunités et de nouveaux défis au système juridique. Dans la doctrine, des préoccupations ont été exprimées concernant le risque de conflits d'intérêts, les dilemmes éthiques, et le risque de poursuites abusives motivées uniquement par la recherche de profits. Dans les juridictions sélectionnées, les principales problématiques discutées au niveau doctrinal sont les suivantes :

- **Admissibilité et qualification du TPLF** : qu'il existe ou non une réglementation spécifique au TPLF, la plupart des juridictions n'interdisent pas le TPLF, à l'exception de l'Irlande au motif qu'il s'agit de champarti (« *champerty* »).
- **Contrôle excessif des financeurs sur la procédure** : risque de résiliation unilatérale de l'accord de financement par le financeur, risque les financeurs conservent le droit de consentir à des règlements, que les financeurs s'immiscent dans les décisions stratégiques du litige, ou risque pour les financeurs de facturer des honoraires excessifs, privant ainsi le demandeur d'une partie substantielle des dommages et intérêts.
- **Conflits d'intérêts** : notamment en ce qui concerne la relation entre les avocats d'une partie financée et les financeurs.
- **Obligations de transparence et d'information** : elles sont considérées comme des outils permettant d'atténuer les risques de conflits d'intérêts.
- **Nécessité d'une réglementation** : dans certaines juridictions, la doctrine est d'avis que l'absence de réglementation crée un certain degré de confusion et d'incertitude, ce qui peut entraîner des risques pour les demandeurs, par exemple lorsque les financeurs n'ont pas les moyens financiers suffisants. Toutefois, la question de savoir dans quelle mesure le TPLF devrait être réglementé au niveau de l'UE fait l'objet d'un débat.
- Certaines **considérations spécifiques** sont également apparues au niveau national, par exemple en Allemagne dans le contexte des actions intentées par les organisations de consommateurs à l'encontre des commerçants.

Degré de compatibilité de la réglementation du TPLF avec la résolution du Parlement européen

Les experts nationaux ont indiqué si leur système juridique contenait des dispositions similaires/équivalentes aux mesures contenues dans le projet de directive annexé à la résolution du PE.

- **Système d'agrément (article 4)** et **conditions d'agrément (article 5)** : Les États membres de l'UE et les juridictions tiers sélectionnées n'ont pas signalé de dispositions spécifiques au TPLF compatibles ou équivalentes à l'article 4 et à l'article 5. Une compatibilité partielle est signalée dans la mesure où les tribunaux exercent un contrôle. Une compatibilité partielle est également signalée lorsque les réglementations financières et bancaires imposent des conditions d'autorisation. Ces

conditions ne sont toutefois pas homogènes, varient d'une juridiction à l'autre et peuvent ne pas s'appliquer aux financeurs en fonction de la nature/structure du fonds.

- **Adéquation des fonds propres (article 6)** : Les États membres n'ont pas signalé de dispositions spécifiques au TPLF compatibles ou équivalentes à l'article 6. Dans certaines juridictions, les financeurs peuvent, en fonction de la structure du fonds, être soumis à une réglementation financière générale, y compris à des exigences en matière de capital minimal initial. En dehors de l'UE, les financeurs qui font partie de *l'Association of Litigation Funders* au Royaume-Uni sont tenus de maintenir un montant de capital minimum et de conserver la capacité de couvrir l'ensemble des engagements financiers au titre de tous leurs accords de financement à long terme pendant une période déterminée.

- **Devoir de loyauté (article 7)** : La Pologne et l'Italie font état d'une compatibilité partielle/limitée avec la réglementation générale sur les fonds d'investissement, dont certains financeurs pourraient relever. En dehors de l'UE, un État américain (Arizona) impose des obligations fiduciaires aux financeurs. Au Canada, les financeurs ont l'obligation de négocier un accord qui ne soit pas déraisonnable, et le contrôle du litige doit rester entre les mains des bénéficiaires.

- **Pouvoirs des autorités de contrôle (article 8)** : Les États membres de l'UE et les juridictions non-UE sélectionnées n'ont pas fait état de dispositions spécifiques au TPLF compatibles ou équivalentes à l'article 8, sauf dans certains États membres dans le cadre de la réglementation financière ou des recours collectifs des consommateurs.

- **Enquêtes et plaintes (article 9)** et **Coordination entre les autorités de contrôle (article 10)** : Les États membres de l'UE et les juridictions non-UE sélectionnées n'ont pas fait état de dispositions spécifiques au TPLF compatibles ou équivalentes à l'art. 9 et à l'art. 10, sauf dans certains États membres dans le contexte de la réglementation des entités financières (Danemark, Suède). La Pologne fait état d'une compatibilité partielle avec l'Art. 9 dans le contexte des recours collectifs des consommateurs et des entités qualifiées.

- **Contenu des accords de financement par un tiers (article 12)** : Aucune disposition compatible ou équivalente spécifique au TPLF n'a été signalée, sauf en Allemagne où, dans le cadre de la transposition de la RAD, un plafond de 10 % s'applique au gain touché par le financeur. Dans toutes les juridictions, les principes contractuels généraux du droit civil s'appliquent.

- **Exigences de transparence et évitement des conflits d'intérêts (article 13)** : Une compatibilité partielle est signalée dans le cadre de la transposition de l'article 10 RAD. En dehors de l'UE, la compatibilité est signalée par le biais du contenu de l'accord de financement et de l'examen par les tribunaux (Canada, États-Unis), des codes de conduite/règles déontologiques (Royaume-Uni, Suisse) et de la discipline de marché (États-Unis).

- **Accords et clauses non valables (article 14)** : Pas de réglementation spécifique du TPLF. Les principes contractuels généraux s'appliquent. Compatibilité partielle signalée en Slovénie.

- **Résiliation des accords de financement par un tiers (article 15)** : Aucune disposition spécifique au TPLF n'a été signalée. La question est régie par le principe de la liberté contractuelle. En dehors de l'UE, les bailleurs de fonds qui font partie de *l'Association of Litigation Funders* au Royaume-Uni sont tenus de respecter son code de conduite, qui stipule les motifs pour lesquels les financeurs peuvent mettre fin aux accords de financement.

- **Divulgation de l'accord de financement par un tiers (article 16)** : Une compatibilité partielle est signalée dans les États membres qui ont mis en œuvre la RAD (plus précisément l'article 10, paragraphe 3). En général, à l'exception des actions collectives, il n'y a pas d'obligation de divulguer un accord de financement par un tiers.

- **Examen des accords de financement par un tiers par les tribunaux ou les autorités administratives (article 17)** : Une compatibilité partielle est signalée dans les États membres qui ont mis en œuvre la RAD (plus précisément l'article 10, paragraphe 3). En dehors de l'UE, une compatibilité partielle est signalée au Canada, au Royaume-Uni et aux États-Unis, dans le contexte de la protection des consommateurs, des plaintes en matière de concurrence et/ou des recours collectifs.

- **Responsabilité des dépens de la partie adverse (article 18)** : Aucune disposition spécifique au TPLF n'a été signalée. Les règles générales de procédure civile s'appliquent.

- **Sanctions (article 19)** : Les États membres et les juridictions non-UE sélectionnées n'ont pas signalé de dispositions spécifiques au TPLF compatibles ou équivalentes à l'article 19, sauf dans certains États membres dans le cadre de la réglementation des entités financières (Suède) et des recours collectifs des consommateurs (Malte, Pologne).

Principales observations issues de la consultation des parties prenantes

Pratiques des financeurs de litiges telles que rapportées par les parties prenantes

La première partie de la consultation a exploré les pratiques actuelles des financeurs de litiges, telles qu'elles sont rapportées par des parties prenantes autres que les financeurs et par les financeurs de litiges eux-mêmes.[10] Les résultats montrent que le TPLF est utilisée dans divers **domaines du droit**. Le droit commercial, le droit civil, le droit de la concurrence et le droit de la protection des

[10] Bien qu'un grand nombre de parties prenantes aient participé, couvrant tous les États membres et toutes les catégories de parties prenantes (231 contributions au total, y compris les entretiens nationaux basés sur un questionnaire similaire), les résultats de cette consultation ne donnent pas nécessairement une image complète du financement des litiges dans l'UE, mais fournissent plutôt un résumé des pratiques observées par les financeurs de litiges participants et d'autres parties prenantes.

consommateurs sont les domaines les plus fréquemment cités comme étant ceux dans lesquels les participants à la consultation (ou leurs membres) ont été impliqués dans des affaires financées par le TPLF. Près de 60 % des personnes interrogées connaissaient l'existence **d'organismes de financement des litiges opérant dans leur juridiction**. Un grand nombre de parties prenantes (souvent des entreprises ayant une vision critique du TPLF) ont fourni des listes complètes de financeurs de litiges, indiquant les noms de près de 300 entités de financement actives dans l'UE.[11] Un grand nombre de ces financeurs de litiges opèrent simultanément dans plusieurs États membres. Lors des entretiens, les financeurs ont souligné le fait que le financement des litiges a une longue tradition dans certains États membres de l'UE, notamment en Allemagne et aux Pays-Bas. La Belgique, la France, l'Autriche, l'Espagne, le Portugal, le Danemark, la Suède et l'Italie ont également été mentionnés comme des pays dans lesquels les financeurs de litiges sont actifs (voir les rapports par pays pour plus de détails).

Les données sur le **nombre d'affaires financées** par les financeurs de litiges dans les États membres de l'UE sont rares. Cela a été confirmé par les résultats de l'enquête, dans laquelle de nombreuses parties prenantes ont indiqué que le fait qu'une affaire soit financée par un tiers n'est souvent pas connu. Néanmoins, un nombre considérable de participants a fourni des estimations concernant les affaires dans leur juridiction. Le plus grand nombre d'estimations a été fourni par les Pays-Bas, l'Allemagne et la Belgique. Aux Pays-Bas, les participants ont estimé le nombre moyen d'affaires financées par un tiers à environ 80 par an. Des estimations plus élevées ont été communiquées par l'Allemagne et l'Autriche, certaines personnes interrogées ayant fait état d'estimations de l'ordre de plusieurs milliers. Une deuxième source importante concernant le nombre d'affaires financées est fournie par les financeurs de litiges eux-mêmes. Au total, 23 d'entre eux ont fourni des détails sur leurs activités dans l'UE. Les chiffres fournis vont de moins de 10 à plus de 100 affaires par an, soit au total près de 700 affaires pour les 23 financeurs (y compris les procédures d'exécution), dont moins de 100 affaires d'arbitrage. Certains financeurs ont souligné que les chiffres fournis concernent les affaires en cours au cours d'une année donnée, qui durent généralement plus d'un an, tandis que d'autres ont axé leur estimation sur les nouvelles affaires par an. Comme la compréhension des participants qui ont fourni des estimations peut avoir été différente à cet égard, le chiffre total doit être interprété avec précaution.

La **valeur minimale d'une demande** financée par un tiers se situe entre moins de 1 million d'euros et 14 millions d'euros, selon plus de 70 % des personnes interrogées qui ont fourni une estimation. Une proportion similaire de participants ayant fourni une estimation a déclaré que la **valeur typique d'une demande financée par un tiers** se situait entre 5 millions d'euros et près de 300 millions d'euros. Cependant, plusieurs organismes de financement des litiges ont également déclaré des valeurs habituelles considérablement inférieures pour les demandes financées, ce qui reflète la diversité des pratiques de financement des litiges pour différents types de demandes et domaines du droit.

En revanche, le **rapport type entre l'investissement du financeur et la valeur du litige** est très cohérent. Ce ratio est le plus souvent considéré comme étant de 1:10, avec plus de 70% des participants ayant fourni une estimation indiquant que le ratio était compris entre 1:5 et 1:15. Interrogés sur le **montant habituel de l'investissement du financeur** du litige, la plupart des

[11] Voir la section sur la consultation pour une liste détaillée. Les entités répertoriées sont principalement des organismes de financement de litiges, mais également des assureurs, des cabinets d'avocats, des agrégateurs de demandes d'indemnisation et d'autres organisations impliquées dans le financement de litiges. L'étendue des activités et la couverture géographique des entités énumérées n'ont pas été vérifiées de manière indépendante.

répondants ont fourni des estimations comprises entre moins d'un million d'euros et 5 à 9 millions d'euros.

La **part de rémunération** généralement exigée par les financeurs de litiges se situe le plus souvent dans une fourchette de 20 à 30 %. Toutefois, les parties prenantes ont fait remarquer que la structure de rémunération des financeurs de litiges est souvent beaucoup plus sophistiquée et que la part de la rémunération peut varier et être modifiée pendant la durée du financement. Les accords de financement des litiges peuvent également prévoir des multiples des coûts engagés ou encourus à titre de rémunération du financeur, ou un mélange des deux - part de la rémunération et multiples des coûts.[12]

Dans le questionnaire, nous avons également demandé aux participants de préciser leurs informations concernant **l'origine du financement** fourni par le financeur du litige. La plupart des groupes de parties prenantes se sont accordés à dire que les informations à ce sujet étaient rares, que les pratiques de financement étaient « opaques », que diverses sources de financement étaient utilisées et que l'origine du financement était susceptible de varier d'un financeur de litiges à l'autre.

En ce qui concerne la question de savoir si les financeurs de litiges exercent une forme de **contrôle sur les procédures judiciaires**, les parties prenantes autres que les financeurs qui avaient une opinion ont répondu massivement par « oui », alors qu'une majorité de financeurs de litiges ont trouvé que « non » était une réponse appropriée. Malgré cela, un nombre significatif de financeurs de litiges ont reconnu qu'ils exerçaient une certaine forme de contrôle sur les procédures judiciaires. Les parties prenantes ont ensuite été invitées à indiquer le type de contrôle exercé par les financeurs de litiges, les formes de contrôle les plus fréquemment citées étant « l'accord pour le règlement », « le choix de l'avocat » et « l'accord sur la stratégie ». Les différents groupes de parties prenantes, y compris les financeurs de litiges, s'accordent à dire qu'il est possible pour le financeur de litiges de **retirer son financement au cours de la procédure judiciaire**.

Parmi les répondants qui avaient une opinion, une majorité de parties prenantes autres que les financeurs, et les financeurs de litiges, considèrent que les financeurs de litiges ont mis en place des **mesures de protection pour éviter les conflits d'intérêts**. À la question de savoir si l'accord de financement couvre généralement la question de la **responsabilité des coûts en cas d'échec** (« responsabilité des dépens »), la plupart des parties prenantes autres que les financeurs, et les financeurs de litiges, considèrent que la réponse est « oui », et précisent qu'il s'agit d'une responsabilité « limitée » ou « conditionnelle ».

Enfin, nous avons cherché à savoir dans quelle mesure les **accords de financement sont divulgués au tribunal**. Les réponses des participants étaient partagées : environ deux tiers des parties prenantes autres que les financeurs et près de la moitié des financeurs de litiges qui avaient une opinion ont répondu « non », et le tiers restant des parties prenantes autres que les financeurs, et une légère majorité des financeurs de litiges, qui avaient une opinion ont répondu « oui ». Dans les commentaires, plusieurs participants ont souligné que les accords de financement ne sont généralement pas divulgués au tribunal, avec un nombre limité d'exceptions nationales dans des circonstances spécifiques, généralement liées aux actions collectives, souvent dans le contexte de la transposition de la directive sur les actions représentatives (2020/1828).

[12] Il a été signalé que dans certains cas, un multiple plus élevé des coûts financés ou un pourcentage de l'indemnisation accordée est convenu avec le client.

Points de vue des parties prenantes sur les effets du TPLF

La partie suivante de la consultation concernait les opinions des parties prenantes sur les **effets des pratiques actuelles de TPLF dans l'UE**. La plupart des parties prenantes considèrent que les pratiques actuelles de TPLF dans l'UE n'ont que des effets positifs (34 %) ou qu'elles ont des effets à la fois positifs et négatifs (24 %). 17% des personnes interrogées n'ont vu que des effets négatifs, 4% n'ont vu ni effets positifs ni effets négatifs. Les autres n'avaient pas d'opinion ou n'ont pas donné de réponse. Les réponses varient considérablement d'un groupe de parties prenantes à l'autre. Seules les entreprises (autres que les cabinets d'avocats et les organismes de financement des litiges) et leurs organisations avaient une opinion majoritairement négative des effets du TPLF (8 répondants sur 10 avaient une opinion). Toutefois, une petite minorité des entreprises ayant répondu à l'enquête ont vu des effets positifs ou un mélange d'effets positifs et négatifs du TPLF. Dans les autres groupes de parties prenantes (financeurs de litiges, organisations de consommateurs, cabinets d'avocats/juristes et universitaires/chercheurs), la majorité des participants ayant exprimé une opinion ont estimé que les pratiques actuelles de TPLF dans l'UE avaient des effets positifs, ou des effets à la fois positifs et négatifs. Le petit nombre d'autorités publiques qui ont répondu à l'enquête avaient des avis divergents, la plupart n'ayant pas d'opinion ou ne voyant pas d'effets. Les membres du pouvoir judiciaire et les arbitres/médiateurs (chaque groupe comptant moins de 10 répondants), ainsi que les « autres » participants, ont le plus souvent estimé que les pratiques actuelles du TPLF dans l'UE avaient des effets à la fois positifs et négatifs.

Dans une question complémentaire, les participants ont été invités à indiquer les **effets positifs** de la pratique actuelle du TPLF dans l'UE qu'ils avaient observés. Les trois effets positifs les plus souvent observés sont les suivants :

- « Un meilleur accès aux procédures judiciaires pour les parties qui ne pourraient pas financer un litige autrement » (observé par 56% des participants)
- « La professionnalisation et l'expertise pour les affaires complexes fournies par le financeur » (34%) et
- « Effet de filtrage, les affaires ayant peu de chances d'aboutir n'étant pas financées » (28%).

Les participants qui ont observé des **effets négatifs** de la pratique actuelle du TPLF dans l'UE les ont précisés dans une question distincte. Quatre effets négatifs ont été le plus souvent mentionnés par les répondants (par 25% à 26% des répondants). Il s'agit de

- « La réduction de l'indemnisation du demandeur »
- « Des conflits d'intérêts liés au financement des litiges »
- « Influence abusive sur les décisions de fond et de procédure des bénéficiaires financés, y compris sur les règlements et les recours » et
- « Le financement de demandes frivoles dans le but d'obtenir un règlement extorqué ou d'autres formes d'abus ». Dans les entretiens que nous avons menés, les parties prenantes du monde des affaires ont fréquemment mentionné le risque de plaintes frivoles, qui se concentre souvent (mais pas uniquement) sur des domaines spécifiques de litiges (tels que les litiges en matière de brevets, les litiges entre actionnaires, les litiges en matière de responsabilité du fait des produits). Les entreprises interrogées ont décrit des affaires en cours ou passées les concernant qui auraient été organisées par des financeurs de litiges et/ou des fonds spéculatifs afin d'obtenir des accords élevés, en utilisant dans certains cas

les caractéristiques les plus appropriées des systèmes judiciaires nationaux pour exercer la pression la plus forte possible sur les défendeurs.

Avis des parties prenantes sur la nécessité d'une réglementation

La dernière partie de la consultation concernait l'opinion des parties prenantes sur la **nécessité de réglementer le TPLF** au niveau national ou européen. 29 % des participants ont répondu « oui, au niveau de l'UE », 25 % ont répondu « oui, aux deux niveaux » (UE et national), 4 % ont répondu « oui, au niveau national », ce qui porte à 58 % le nombre total de participants qui estiment qu'une réglementation est nécessaire. En revanche, 29 % des participants ne voient pas la nécessité d'une réglementation et les autres ne savaient pas ou n'ont pas répondu.

Une fois de plus, les points de vue diffèrent fortement entre les groupes de parties prenantes. Dans les groupes de parties prenantes « judiciaire », « entreprises », « universitaires/chercheurs », « autres » et « arbitres/médiateurs », plus de deux tiers des participants estiment qu'une réglementation est nécessaire, soit au niveau de l'UE, soit au niveau national, soit aux deux niveaux, et plus de la moitié des avocats/cabinets d'avocats ayant participé à l'enquête. En revanche, dans les groupes de parties prenantes que sont les organisations de consommateurs et les financeurs de litiges, seule une minorité s'est prononcée en faveur d'une quelconque forme de réglementation. Une majorité d'autorités publiques ont répondu « Ne sait pas ». Ceux qui ont fait valoir la **nécessité d'une réglementation** ont souvent fait référence aux effets négatifs associés, selon eux, au TPLF (voir ci-dessus). Alors que les parties prenantes (en particulier les entreprises) étaient en partie favorables à une **réglementation complète du TPLF conformément au projet de directive annexé à la résolution du Parlement européen**, d'autres, y compris des minorités d'organisations de consommateurs et de financeurs de litiges, étaient favorables à une **réglementation « équilibrée » ou « légère » du TPLF**, qui fournirait des règles de base, pas trop spécifiques, tout en veillant à ce que le TPLF reste une option viable. Les parties prenantes qui ne voient **pas la nécessité de réglementer le TPLF** au niveau européen ou national ont principalement fait valoir que, selon elles, rien ne prouve que le TPLF a des effets négatifs et qu'une réglementation trop stricte pourrait priver les plaideurs méritants des ressources financières nécessaires pour accéder à la justice et faire valoir leurs droits.

La dernière série de questions portait sur **l'efficacité des mesures** contenues dans le projet de directive annexée à la résolution du Parlement européen pour remédier aux éventuelles caractéristiques indésirables des pratiques actuelles du TPLF (le cas échéant). Une liste de mesures contenues dans le projet de directive a été fournie et les participants ont été invités à indiquer pour chaque mesure, sur une échelle de Likert à quatre niveaux, s'ils considéraient que la mesure n'était « pas du tout efficace », « plutôt pas efficace », « plutôt efficace » ou « très efficace ». Un score d'efficacité a été attribué à chaque élément, allant de 0 pour « pas du tout efficace » à 3 pour « très efficace », et sur cette base, un classement des mesures a été calculé en termes d'efficacité. Les exigences de transparence et évitement des conflits d'intérêts (article 13) ont été les mesures les mieux classées, suivies de l'adéquation des fonds propres (article 6) et de la responsabilité des dépens de la partie adverse (article 18). Toutefois, seules les exigences de transparence ont été considérées en moyenne comme « plutôt efficaces », tandis que toutes les autres mesures ont été considérées en moyenne comme moins efficaces. Dans l'ensemble, les scores moyens modérés en matière d'efficacité et les différences relativement faibles entre les scores d'efficacité des différentes mesures résultent dans une certaine mesure des différents points de vue sur l'efficacité entre les groupes de parties prenantes, de sorte que les scores contradictoires s'annulent. La note moyenne d'efficacité a donc été calculée pour l'ensemble des 14 mesures par groupe de parties

prenantes. Les différences dans les scores moyens d'efficacité entre les groupes de parties prenantes étaient beaucoup plus importantes que les différences dans les scores entre les mesures lorsque l'on examine l'ensemble de l'échantillon. Seules les entreprises et leurs organisations, ainsi que le petit nombre d'arbitres/médiateurs ayant répondu, ont considéré que les mesures du projet de directive annexé à la résolution du Parlement européen étaient en moyenne « plutôt efficaces ». Tous les autres groupes de parties prenantes ont attribué une note moyenne d'efficacité inférieure aux mesures, les financeurs de litiges étant les plus négatifs, évaluant les mesures en moyenne comme étant pire que « plutôt pas efficaces ». Cette évaluation est, dans une certaine mesure, cohérente avec les attitudes à l'égard de la nécessité d'une réglementation (développées plus haut).

À la lumière des résultats et des données recueillis dans le cadre de la recherche juridique et de la consultation, trois approches différentes sont examinées ci-après, accompagnées de leur raisonnement.

Aucune réglementation

Les experts nationaux et les parties prenantes favorables à « aucune réglementation » font valoir qu'il n'existe aucune preuve des effets négatifs de la TPLF et qu'une réglementation trop stricte pourrait effectivement empêcher toute activité de TPLF et, par conséquent, priver les plaideurs méritants des ressources financières nécessaires pour accéder à la justice et faire valoir leurs droits. Les principes existants du droit des contrats, les règles de procédure civile, la protection des consommateurs, les règles financières et bancaires et la législation sur les recours collectifs, ainsi que le contrôle des tribunaux et, dans certains États membres, des autorités de surveillance, sont jugés suffisants pour réglementer l'activité de TPLF. Les problèmes sectoriels spécifiques (liés par exemple aux litiges en matière de brevets ou, plus généralement, aux coûts des procédures civiles) devraient, d'après ce point de vue, faire l'objet d'amendements à la législation sectorielle concernée.

Une réglementation légère

Un nombre considérable d'experts nationaux et de parties prenantes sont favorables à une réglementation « équilibrée » ou « légère » du TPLF, qui fournirait des règles de base, pas trop spécifiques, tout en veillant à ce que le TPLF reste une option viable. Ils soutiennent que le système de règles actuel est un patchwork qui conduit à des résultats imprévisibles et à des risques plus élevés pour toutes les parties concernées. D'après eux, les demandeurs, les financeurs et les défendeurs sont tributaires de l'évolution imprévisible de la jurisprudence. Par ailleurs, compte tenu du développement croissant des activités du TPLF dans l'UE et du manque de transparence actuel, le fait de confier exclusivement aux tribunaux le contrôle et la surveillance des bailleurs de fonds pourrait faire peser une charge excessive sur le pouvoir judiciaire.

Des questions spécifiques sont identifiées comme nécessitant une réglementation : la transparence et la divulgation, la réglementation financière (règles sur l'adéquation des fonds propres) et la protection des consommateurs.

Il convient de trouver un équilibre dans la réglementation, en tenant compte des questions pratiques qui se sont posées, ainsi que de la réalité financière du marché du TPLF.

Une réglementation stricte

Les parties prenantes favorables à une réglementation complète (telle que le projet de directive annexée à la résolution du Parlement européen) font souvent référence aux effets négatifs qu'elles estiment associés au TPLF, en particulier : conflits d'intérêts et influence abusive sur les décisions de fond et de procédure, financement de demandes frivoles, réduction de l'indemnisation du demandeur, augmentation des demandes et du risque d'une société trop procédurière, augmentation des frais de justice et du prix des primes d'assurance, commercialisation des procédures judiciaires, distorsion du marché juridique, violations de la confidentialité. La réglementation est perçue comme un moyen de renforcer la confiance dans les opérateurs grâce à la transparence et à la sécurité juridique. D'autre part, une réglementation complète pourrait effectivement empêcher toute activité de TPLF, privant ainsi les plaideurs méritants des ressources financières nécessaires pour accéder à la justice.

ZUSAMMENFASSUNG (DE)

Das Justice and Consumers Evaluation Consortium (JCEC) hat unter der Leitung des British Institute of International and Comparative Law (BIICL) und Civic Consulting mit Unterstützung von Experten des Asser Institutes und Risk & Policy Analysts (RPA) eine Studie mit dem Titel "Mapping Third Party Litigation Funding in the European Union" durchgeführt (JUST/2023/PR/JCOO/CIVI/0016).

Ziel der Studie ist es, Informationen über die rechtlichen Rahmenbedingungen und Praktiken der Prozessfinanzierung durch Dritte in den Mitgliedstaaten der Europäischen Union und in ausgewählten Drittstaaten (CA, CH, UK, US) zu sammeln und zu analysieren. Die Ergebnisse der Studie dienen der Kommission als Grundlage künftiger politischer Entscheidungen zur Prozessfinanzierung, insbesondere in Folge der Entschließung des Europäischen Parlaments vom 13. September 2022 zur verantwortungsbewussten privaten Finanzierung von Rechtsstreitigkeiten („Entschließung des EP").[13]

Die Studie ist wie folgt aufgebaut:

Eine rechtliche Analyse basierend auf wissenschaftlicher Forschung und Länderberichten (einschließlich nationaler Interviews), in welchen die Situation in allen 27 EU-Mitgliedstaaten und in ausgewählten Drittstaaten (CA, CH, UK, US) dargestellt wird. Zu dieser Analyse trug auch eine Expertenrunde bei, in der erste Ergebnisse, unerwünschte Merkmale/Folgen der Prozessfinanzierung in den Mitgliedstaaten sowie die in der Entschließung des Europäischen Parlaments vorgeschlagenen Lösungen und Optionen für das weitere Vorgehen diskutiert wurden:

- **Länderberichte:** Die nationalen Experten führten eine umfassende Analyse der einschlägigen bestehenden und geplanten Rechtsvorschriften für die Prozessfinanzierung durch. Diese deckten ein breites Spektrum verschiedener Probleme ab, die im Zusammenhang mit der Prozessfinanzierung auftreten können.
- **Nationale Interviews:** Die nationalen Experten sammelten auch Informationen über die Praxis der Prozessfinanzierung in ihrem Mitgliedstaat, und führten unter der Kontrolle des BIICL-Teams drei bis fünf Interviews mit Interessenvertretern in diesem Bereich.
- **Synthese:** Die Ergebnisse der Länderberichte wurden zusammen mit den Ergebnissen der breit angelegten wissenschaftlichen Analyse und den Kommentaren der Expertenrunde analysiert und zusammengefasst, um die wichtigsten Merkmale, Gemeinsamkeiten und Unterschiede der Vorschriften zur Prozessfinanzierung in den ausgewählten Rechtsordnungen sowie die wichtigsten Probleme darzustellen. Besonderes Augenmerk wurde auch auf die Forderungsabtretung und die Finanzmarktregulierung/Investmentfonds gelegt.
- Eine **rechtsvergleichende Tabelle** stellt dar inwieweit nationale Vorschriften zur Prozessfinanzierung (falls vorhanden) mit den in der EP-Entschließung vorgeschlagenen Lösungen vereinbar sind. Zugleich wird eine Bewertung der Notwendigkeit und des Mehrwerts der vorgeschlagenen Lösungen vorgenommen.

Eine **umfassende Konsultation verschiedener Interessengruppen** die die Meinungen der wichtigsten Interessengruppen zur Regulierung und Praxis der Prozessfinanzierung darstellt und analysiert. Diese untersucht auch den Bedarf für eine Regulierung der Prozessfinanzierung, sowohl

[13] Entschließung des Europäischen Parlaments vom 13. September 2022 mit Empfehlungen an die Kommission zur verantwortungsbewussten privaten Finanzierung von Rechtsstreitigkeiten (2020/2130(INL))

auf nationaler als auch auf Unionsebene. Die Konsultation bestand zum einen aus einem allgemeinen Survey, der sich an folgende Zielgruppen richtete: Prozessfinanzierer, Anwälte/Kanzleien, sonstige Unternehmen, Verbraucherorganisationen und andere Vertreter von Verbraucher- und Bürgerinteressen, Behörden, Justiz, Schiedsrichter/Mediatoren Wissenschaftler/Forscher (sowie die Organisationen, die diese Interessengruppen vertreten). Die Konsultation wurde zum anderen durch gezielte Befragungen von Interessenvertretern der Wirtschaft und der Verbraucher, von Prozessfinanzierern sowie von Parteien ergänzt, die in Fälle involviert waren, in welchen eine Drittfinanzierung zum Einsatz kam (siehe oben).

Hauptergebnisse der rechtlichen Analyse

Existierende/ geplante Gesetzgebung

- In den meisten **EU-Mitgliedstaaten** gibt es keine spezielle Gesetzgebung zur Prozessfinanzierung durch Dritte, abgesehen von der Umsetzungsgesetzgebung zur Richtlinie (EU) 2020/1828 des Europäischen Parlaments und des Rates vom 25. November 2020 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (Verbandsklagerichtlinie, "RAD")[14], und hier insbesondere Artikel 10 RAD.
- Die ausgewählten **Drittstaaten** folgen unterschiedlichen Ansätzen zur Regulierung der Prozessfinanzierung. In Kanada und im Vereinigten Königreich gibt es keine Gesetzgebung, die konkret auf die Prozessfinanzierung abzielt. Die meisten Leitlinien wurden auf einer Einzelfallbasis durch die Rechtsprechung entwickelt. In den Vereinigten Staaten unterliegt die Regelung der Drittfinanzierung den konkurrierenden Zuständigkeiten der *State Courts* und *Federal Courts*, der einzel- und bundesstaatlichen Gesetzgebung, sowie den Regulierungsbehörden und Anwaltskammern. Gesetzgebung, Regulierung und Überwachung der Prozessfinanzierung findet auf allen Ebenen statt. In der Schweiz gibt es hierzu ebenfalls keine spezielle Gesetzgebung.
- Mangels spezieller Gesetzgebung unterliegt die Prozessfinanzierung durch Dritte **nationalem Vertragsrecht und Zivilprozessrecht. Verbraucherrecht,** einschließlich der Rechtsvorschriften über missbräuchliche Vertragsklauseln, kann zur Anwendung kommen, wenn ein Verbraucher Partei des Finanzierungsvertrags ist.
- Für Anwälte gelten zudem **die Regeln zur Berufsethik und zu anwaltlichen Berufspflichten:** Verschwiegenheits- und Loyalitätspflichten sowie die Pflicht, unabhängig zu bleiben.
- **Forderungsabtretung:** Die Abtretung von Forderungen ist in allen in dieser Studie ausgewählten EU-Mitgliedstaaten und Drittstaaten generell möglich und zulässig. Allerdings wurde das Zusammenspiel von Prozessfinanzierung und Forderungsabtretung in der Praxis nur in einigen Rechtsordnungen beobachtet und/oder diskutiert. In Rechtsordnungen, in denen *Champerty* noch existiert (Irland, Kanada), ist die Forderungsabtretung als Mittel zur Finanzierung entweder eingeschränkt oder verboten.
- **Finanzmarktregulierung / Investmentfonds:** Alle Länder verfügen über Vorschriften zur Banken- und Finanzmarktregulierung, die spezifische Zulassungsbedingungen, einschließlich

[14] Richtlinie (EU) 2020/1828 des Europäischen Parlaments und des Rates vom 25. November 2020 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG

einer angemessenen Eigenkapitalausstattung, vorschreiben. Diese könnten je nach Art oder Struktur der Regelungen möglicherweise auch für Prozessfinanzierer gelten. Die nationalen Experten konnten im Zusammenhang mit der Drittfinanzierung jedoch keine Probleme feststellen, die sich aus diesen Vorschriften ergeben.

Die rechtlichen Hauptprobleme

Die zunehmende Popularität der Drittfinanzierung hat unter Rechtswissenschaftlern, Praktikern und politischen Entscheidungsträgern heftige Debatten ausgelöst und bietet sowohl neue Möglichkeiten, als auch rechtliche Herausforderungen. In der Lehre wurden wegen potenziellen Interessenkonflikten, ethischer Problemen und dem Risiko leichtfertiger, ausschließlich von profitorientierten Geldgebern geführten Klagen[15] Bedenken geäußert. In den ausgewählten Ländern werden in der Lehre vor allem die nachfolgenden Problempunkte diskutiert:

- **Zulässigkeit und Qualifikation der Prozessfinanzierung:** unabhängig davon, ob es eine spezielle Gesetzgebung zur Drittfinanzierung gibt oder nicht, verbieten die meisten Rechtsordnungen die Prozessfinanzierung nicht (abgesehen von Irland, da diese dort als *maintenance and champerty* qualifiziert wird).
- **Unzulässige Verfahrenskontrolle durch die Prozessfinanzierer:** wie z. B. das Risiko, dass der Prozessfinanzierer die Finanzierungsvereinbarung einseitig kündigt, das Recht auf Zustimmung zu einem Vergleich fordert, sich in strategische Entscheidungen des Rechtsstreits einmischt, oder überhöhte Gebühren verlangt und damit dem Antragsteller ein wesentlicher Teil seiner Forderung vorenthalten wird.
- **Interessenkonflikte:** insbesondere im Verhältnis zwischen Anwälten der finanzierten Parteien und Prozessfinanzierern.[16]
- **Transparenz und Offenlegungspflichten:** werden als Lösungen zur Verringerung der Risiken von Interessenkonflikten diskutiert.
- **Notwendigkeit einer Regulierung:** In einigen Rechtsordnungen ist die Rechtslehre der Ansicht, dass eine fehlende Regelung der Prozessfinanzierung durch Dritte ein gewisses Maß an Verwirrung und Unsicherheit schafft, was zu Risiken für die Antragsteller führen kann, etwa wenn Prozessfinanzierer nicht über ausreichende finanzielle Mittel verfügen. Inwieweit die Prozessfinanzierung durch Dritte jedoch auf EU-Ebene geregelt werden sollte, ist Gegenstand einer ausführlichen Debatte.
- Auf nationaler Ebene werden zudem einige **spezifische Überlegungen** angestellt, z.B. in Deutschland im Zusammenhang mit Gewinnabschöpfungsklagen.

[15] Veljanovski, 'Third-Party Litigation Funding in Europe', 408, Jérôme Saulnier, Ivona Koronthalyova, and Klaus Müller, 'Responsible Private Funding of Litigation: European Added Value Assessment', in European Parliamentary Research Service (Hrsg.), (European Parliament, 2021), 20.

[16] Siehe "National Report for the United States": die Autorin, Prof Maya Steinitz, trat als *expert witness* im Burford/Sysco Fall auf. Siehe auch M. Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy And Funders' Intermeddling*, Cornell Law Review (erscheint 2025).

Vereinbarkeit von Vorschriften zur Drittfinanzierung mit der Entschließung des Europaparlaments

Die nationalen Experten haben auch zu der Frage Stellung genommen, ob ihr Rechtssystem Bestimmungen vorsieht, die den Massnahmen ähneln bzw. entsprechen, die das Europaparlament für eine Richtlinie zur Prozessfinanzierung vorgeschlagen hat.

- **Zulassungssystem (Art. 4)** und **Bedingungen für die Zulassung (Art. 5):** Die EU-Mitgliedstaaten und ausgewählten Drittstaaten haben keine spezifischen Bestimmungen, die Art. 4 und Art. 5 entsprechen. Zum Teil werden ähnliche Massnahmen getroffen, wenn Gerichte ein gewisses Maß an Kontrolle ausüben oder Finanzmarkt- und bankrechtliche Vorschriften Bedingungen für eine Zulassung von Prozessfinanzierern vorschreiben. Diese Bedingungen sind jedoch nicht einheitlich, variieren von Land zu Land und gelten je nach Art/Struktur des betreffenden Fonds möglicherweise nicht für Prozessfinanzierer.
- **Angemessene Eigenkapitalausstattung (Art.6):** Die Mitgliedstaaten haben nicht auf spezifische Bestimmungen hingewiesen, die mit Artikel 6 vereinbar oder gleichwertig sind. In einigen Rechtsordnungen können Prozessfinanzierer jedoch je nach ihrer Finanzierungsstruktur den allgemeinen Finanzmarktvorschriften unterliegen, einschließlich den Mindestanforderungen an das Anfangskapital.
- **Treuhänderische Pflichten (Art.7):** Polen und Italien berichten eine teilweise/begrenzte Vereinbarkeit ihrer Vorschriften mit den allgemeinen Regeln die für Investmentfonds gelten, unter die auch einige Prozessfinanzierer fallen könnten. Außerhalb der EU legt ein US-Bundesstaat (Arizona) den Geldgebern treuhänderische Pflichten auf. In Kanada sind die Prozessfinanzierer verpflichtet, eine Vereinbarung auszuhandeln, die nicht sittenwidrig (*unconscionable*) ist. Zudem muss die Kontrolle über den Rechtsstreit von den Begünstigten ausgeübt werden.
- **Befugnisse der Aufsichtsbehörden (Art.8):** Die EU-Mitgliedstaaten und die ausgewählten Drittstaaten haben keine spezifischen Bestimmungen, die mit Artikel 8 vereinbar oder gleichwertig sind, mit Ausnahme der Gesetzgebung im Finanzmarktrecht oder zur kollektiven Rechtsdurchsetzung für Verbraucher.
- **Untersuchungen und Beschwerden (Art.9)** und **Koordinierung zwischen den Aufsichtsbehörden (Art.10):** Die EU-Mitgliedstaaten und die ausgewählten Drittstaaten haben keine speziellen Bestimmungen, die mit Art. 9 und Art. 10 gleichwertig sind, mit Ausnahme der Regulierung von Finanzunternehmen in einigen Mitgliedstaaten (Dänemark, Schweden). Polen hält die interne Rechtslage im Zusammenhang mit kollektiven Rechtsbehelfen für Verbraucher und qualifizierten Einrichtungen für mit Art. 9 vereinbar.
- **Inhalt von Finanzierungsvereinbarungen (Art.12):** Es wurden außer in Deutschland keine spezifischen Bestimmungen gemeldet. Dort wurde in Umsetzung der Richtlinie über Verbandsklagen eine Obergrenze von 10 % für den Anteil des Prozessfinanzierers festgelegt. In allen Ländern gelten ansonsten die allgemeinen Grundsätze des Vertragsrechts.
- **Transparenzanforderungen und Vermeidung von Interessenkonflikten (Art.13):** Eine teilweise Vereinbarkeit nationaler Rechte mit diesen Vorgaben wird im

Zusammenhang mit der Umsetzung von Artikel 10 RAD gemeldet. Außerhalb der EU wird den Anforderungen über den Inhalt der Vereinbarung, eine gerichtliche Kontrolle (Kanada, Vereinigte Staaten), Verhaltens-/deontologische Regeln (Vereinigtes Königreich, Schweiz) und Marktdisziplin (Vereinigte Staaten) Genüge getan.

- **Ungültige Vereinbarungen und Klauseln (Art.14):** Keine spezifischen Regelungen. Es gelten allgemeine Vertragsgrundsätze. Teilweise Vereinbarkeit wird in Slowenien gemeldet.
- **Kündigung von Finanzierungsvereinbarungen (Art.15):** Es wurden keine speziellen Bestimmungen angezeigt. Die Frage wird im Rahmen der Vertragsfreiheit geregelt.
- **Offenlegung von Finanzierungsvereinbarungen (Art.16):** Eine teilweise Vereinbarkeit mit diesem Erfordernis wird aus den Mitgliedstaaten gemeldet, die die Verbandsklagerichtlinie umgesetzt haben (Artikel 10 Absatz 3 RAD). Im Allgemeinen besteht, abgesehen von Sammelklagen, jedoch keine Pflicht zur Offenlegung der Prozessfinanzierung.
- **Überprüfung von Finanzierungsvereinbarungen durch Gerichte oder Verwaltungsbehörden (Art.17):** Eine teilweise Vereinbarkeit mit diesen Vorgaben wird aus den Mitgliedstaaten gemeldet, die die RAD umgesetzt haben (Artikel 10 Absatz 3 RAD). Außerhalb der EU wird in Kanada und den Vereinigten Staaten im Zusammenhang mit Verbraucherklagen, Wettbewerbsrecht und/oder kollektiven Rechtsbehelfen eine teilweise Vereinbarkeit gemeldet.
- **Verantwortung für die Kosten der Gegenseite (Art.18):** Keine speziellen Vorschriften. Es gelten die allgemeinen zivilrechtlichen Verfahrensvorschriften.
- **Sanktionen (Art.19):** Die Mitgliedstaaten und ausgewählten Drittstaaten haben keine speziellen Bestimmungen für Prozessfinanzierer angezeigt, die mit Artikel 19 vereinbar oder gleichwertig sind. Aussnahmen bestehen in einigen Mitgliedstaaten im Zusammenhang mit der Regulierung von Finanzunternehmen (Schweden) und kollektiven Rechtsbehelfen für Verbraucher (Malta, Polen).

Hauptergebnisse der Konsultation verschiedener Interessenvertreter

Von den Befragten berichtete Praktiken der Prozessfinanzierer

Im ersten Teil der Konsultation wurde auf der Basis der Berichte von Prozessfinanzierern und anderen Interessengruppen die derzeitige Praxis der Prozessfinanzierung untersucht.[17] Die Ergebnisse zeigen, dass die Prozessfinanzierung in **verschiedenen Bereichen** eingesetzt wird: Handelsrecht, Zivilrecht, Wettbewerbs-/Kartellrecht und Verbraucherschutzrecht wurden als häufigste Bereiche für finanzierte Prozesse angeführt, an denen die Befragten (oder ihre Mitglieder) beteiligt waren. Fast 60 % der Befragten wussten von **Prozessfinanzierern, die in ihrem Land tätig sind.** Eine große Zahl von Interessenvertretern (häufig aus der Wirtschaft, mit einer kritischen Haltung zur Prozessfinanzierung) legte eine umfassende Liste von Prozessfinanzierern vor und benannte insgesamt fast 300 Unternehmen, die nach ihren Angaben in der EU im Bereich der Prozessfinanzierung tätig sind.[18] Viele dieser Prozessfinanzierer sind gleichzeitig in mehreren Mitgliedstaaten tätig. In den Interviews wiesen die Drittfinanzierer darauf hin, dass die Prozessfinanzierung in einigen EU-Mitgliedstaaten eine lange Tradition hat, vor allem in Deutschland und den Niederlanden. Auch Belgien, Frankreich, Österreich, Spanien, Portugal, Dänemark, Schweden und Italien wurden als Länder genannt, in denen Prozessfinanzierer aktiv sind (für weitere Einzelheiten siehe Länderberichte).

Über die **Zahl** der von Prozessfinanzierern in den EU-Mitgliedstaaten **finanzierten Fälle** gibt es nur wenige Daten. Dies wurde durch die Ergebnisse der Umfrage bestätigt, in der viele Beteiligte angaben, dass die Tatsache, dass ein Fall von einem Prozessfinanzierer finanziert wird, oft nicht bekannt ist. Dennoch hat eine beträchtliche Anzahl der Befragten Schätzungen zur Häufigkeit der Drittfinanzierung in ihrem Land vorgelegt. Die meisten Schätzungen wurden für die Niederlande, Deutschland und Belgien abgegeben. In den Niederlanden schätzten die Befragten die durchschnittliche Zahl der von Prozessfinanzierten finanzierten Fälle auf etwa 80 pro Jahr. Höhere Schätzungen wurden aus Deutschland und Österreich gemeldet, wobei einige Schätzungen bis in die Tausende gingen. Eine zweite wichtige Quelle zur Einschätzung der Anzahl der finanzierten Fälle sind die Prozessfinanzierer selbst. Insgesamt 23 Prozessfinanzierer machten Angaben zu ihrer Tätigkeit in der EU. Die angegebenen Zahlen liegen überwiegend bei weniger als 10 und mehr als 100 Fällen pro Jahr, und bei insgesamt fast 700 Fällen für die 23 Prozessfinanzierer (einschließlich Vollstreckungsverfahren). Davon waren weniger als 100 Schiedsverfahren. Einige Prozessfinanzierer wiesen darauf hin, dass sich die angegebenen Zahlen auf laufende Fälle in einem bestimmten Jahr beziehen, die in der Regel eine Dauer von mehr als einem Jahr haben, während andere ihre Schätzungen auf neue Fälle pro Jahr bezogen. Da die Befragten, die Schätzungen

[17] Auch wenn eine große Anzahl von Interessenvertretern an der Studie beteiligt war, die alle Mitgliedstaaten und Berufsfelder abdeckt (insgesamt 231 Teilnehmer, einschließlich der nationalen Interviews, die auf einem ähnlichen Fragebogen basierten), geben die Ergebnisse dieser Konsultation nicht unbedingt ein vollständiges Bild der Prozessfinanzierung in der EU wieder, sondern stellen vielmehr eine Zusammenfassung der Praktiken dar, die von den an der Studie teilnehmenden Prozessfinanzierern und anderen Akteuren beobachtet wurden.

[18] Siehe die detaillierte Liste in der „consultation section". Bei den gelisteten Einrichtungen handelt es sich zumeist um Prozessfinanzierer, aber auch um einige Versicherer, Anwaltskanzleien, Schadensregulierer und andere Organisationen, die an der Finanzierung von Rechtsstreitigkeiten beteiligt sind. Der Umfang der Tätigkeiten und die geografische Reichweite der aufgelisteten Einrichtungen wurden nicht gesondert überprüft.

vorgelegt haben, in dieser Hinsicht möglicherweise unterschiedliche Auffassungen zugrunde legten, ist die Gesamtzahl mit Vorsicht zu interpretieren.

Der **Mindestwert** einer drittfinanzierten Klage liegt nach Angaben von mehr als 70 % der Befragten, die hierzu eine Einschätzung abgaben, zwischen weniger als 1 Million Euro und 14 Millionen Euro. Ein ähnlicher Anteil der Befragten gab an, dass der **Wert** einer drittfinanzierten Klage **durchschnittlich** zwischen 5 Millionen Euro und fast 300 Millionen Euro liegt. Es gab jedoch auch mehrere Prozessfinanzierer, die deutlich niedrigere Durchschnittssummen angaben, was die Vielfalt der Prozessfinanzierungspraktiken für verschiedene Arten von Klagen und Rechtsgebiete widerspiegelt.

Im Gegensatz dazu gab es ein hohes Maß an Übereinstimmung im Hinblick auf das **durchschnittliche Verhältnis zwischen den Investitionen der Prozessfinanzierer und dem Wert der Forderung**. Dieses Verhältnis wird am häufigsten mit 1:10 angegeben, wobei mehr als 70 % der Befragten angaben, dass das Verhältnis zwischen 1:5 und 1:15 lag. Die typische Höhe der Investitionen des Prozessfinanzierers schätzten die meisten Befragten auf weniger als 1 Million Euro bzw. auf 5-9 Millionen Euro.

Der von Prozessfinanzierern üblicherweise geforderte Anteil liegt den Berichten zufolge meist zwischen 20 und 30 %. Die Interessenvertreter merkten jedoch an, dass die Vergütungsstruktur der Prozessfinanzierer oft weitaus komplexer ist und dass der Anteil variieren und sich während der Dauer der Finanzierung ändern kann. Prozessfinanzierungsvereinbarungen können auch ein Vielfaches der zugesagten oder angefallenen Kosten als Entschädigung für den Prozessfinanzierer vorsehen, oder eine Mischung aus beidem – dh. einen Anteil an der Entschädigung und ein Vielfaches der Kosten.

Im Fragebogen sollten die Befragten zudem auch Angaben über die **Herkunft der von den Prozessfinanzierern bereitgestellten Mittel** machen. Die meisten Interessengruppen waren sich einig, dass es hierzu kaum einschlägige Informationen gibt, dass die Finanzierungspraktiken „undurchsichtig" seien, dass verschiedene Finanzierungsquellen genutzt werden und dass die Herkunft der Mittel wahrscheinlich je nach Prozessfinanzierer variiert.

Auf die Frage, ob Prozessfinanzierer in irgendeiner Form **Kontrolle über die finanzierten Gerichtsverfahren** ausüben, antworteten die Beteiligten, die selbst keine Prozesssfinanzierer sind, überwiegend mit „Ja", während die Mehrheit der Prozessfinanzierer mit „Nein" antwortete. Dennoch bestätigte eine beträchtliche Anzahl von Prozessfinanzierern, dass sie eine gewisse Kontrolle über die finanzierten Gerichtsverfahren ausüben. In Antwort auf die Frage welche Art von Kontrolle ausgeübt wird, wurden am häufigsten die „Zustimmung zum Vergleich", die „Wahl des Anwalts" und die „Vereinbarung über die Strategie" genannt. Die verschiedenen Interessengruppen, einschließlich der Prozessfinanzierer, stimmten weitgehend darin überein, dass es dem Prozessfinanzierer möglich ist, **die Finanzierung während des Prozesses zu widerrufen.**

Von den Befragten, die hierzu eine Meinung äusserten, vertraten sowohl die Mehrheit der Interessengruppen, die keine Prozessfinanzierer sind, als auch die Prozessfinanzierer die Ansicht, dass letztere über **interne Schutzmaßnahmen zur Vermeidung von Interessenkonflikten** verfügen. Auf die Frage, ob die Finanzierungsvereinbarung in der Regel die **Haftung für die Kosten im Falle eines erfolglosen Verfahrens („Kosten der Gegenseite")** abdeckt, antworteten die meisten Interessengruppen und Prozessfinanzierer mit „Ja" und gaben an, dass es sich dabei um eine „begrenzte" oder „bedingte" Haftung handelt.

Schließlich wurde untersucht, **inwieweit Finanzierungsvereinbarungen dem Gericht gegenüber offengelegt werden.** Die Antworten der Befragten waren unterschiedlich: Etwa zwei Drittel der

Interessenvertreter, die keine Prozessfinanzierer sind, sowie fast die Hälfte der Prozessfinanzierer, die hierzu eine Stellungnahme abgaben, antworteten mit „Nein", während das verbleibende Drittel der Interessenvertreter, die keine Prozessfinanzierer sind, und eine knappe Mehrheit der Prozessfinanzierer, mit „Ja" antworteten. In den Kommentaren zu ihren Antworten betonten mehrere Befragte, dass Finanzierungsvereinbarungen in der Regel dem Gericht nicht offengelegt werden, wobei es hierzu bei Vorliegen bestimmter Umstände eine begrenzte Anzahl nationaler Ausnahmen gab. In der Regel stehen diese im Zusammenhang mit Kollektivklagen, häufig im Rahmen der Umsetzung der Verbandsklagerichtlinie (2020/1828).

Ansichten der Interessengruppen zu den Auswirkungen der Drittfinanzierung

Im nächsten Teil der Konsultation sollten die Interessenvertreter zu den **Auswirkungen der derzeitigen Praxis der Drittfinanzierung in der EU** Stellung nehmen. Die meisten Befragten waren der Ansicht, dass die derzeitige Praxis der Prozessfinanzierung in der EU entweder nur positive Auswirkungen (34 %) oder sowohl positive als auch negative Auswirkungen (24 %) hat. 17 % der Befragten sahen nur negative Auswirkungen, 4 % weder positive noch negative Auswirkungen. Der Rest hatte keine Meinung oder gab keine Antwort. Die Antworten waren je nach Interessengruppen sehr unterschiedlich. Nur die Unternehmen (mit Ausnahme der Anwaltskanzleien/Prozessfinanzierer) und ihre Organisationen äußerten sich überwiegend negativ zu den Auswirkungen der TPLF (8 von 10 Befragten die hierzu eine Meinung äußerten). Eine kleine Minderheit der Unternehmen stellte jedoch positive oder eine Mischung aus positiven und negativen Auswirkungen der Drittfinanzierung fest. In den anderen Interessengruppen - Prozessfinanzierer, Verbraucherorganisationen, Anwaltskanzleien/Rechtsanwälte und Akademiker/Forscher - vertrat die Mehrheit der Befragten die Auffassung, dass die derzeitigen Praktiken der Drittfinanzierung in der EU entweder positive Auswirkungen oder sowohl positive als auch negative Auswirkungen haben. Die wenigen Behörden, die an der Umfrage teilnahmen, waren unterschiedlicher Meinung, wobei die meisten keine Meinung äußerten oder keine Auswirkungen sahen. Vertreter der Justiz und Schiedsrichter/Mediatoren (auch hier gab es pro Gruppe weniger als 10 Antworten) sowie „sonstige" Befragte sahen am häufigsten sowohl positive als auch negative Auswirkungen der derzeitigen Praxis der Drittfinanzierung in der EU.

Nachfolgend wurden die Befragten zudem gebeten, die von ihnen beobachteten **positiven Auswirkungen** der derzeitigen Praxis der Drittfinanzierung in der EU zu präzisieren. Die drei am häufigsten beobachteten positiven Auswirkungen waren:

- Besserer Zugang zu den Gerichten für Parteien, die einen Rechtsstreit sonst nicht finanzieren könnten" (56 % der Befragten)
- 'Professionalisierung und Fachwissen des Prozessfinanzierers in komplexen Fällen" (34%) und
- 'Filterwirkung, da Fälle mit geringen Erfolgsaussichten nicht finanziert werden' (28%).

Diejenigen Befragten, die **negative Auswirkungen** der derzeitigen Praxis der Drittfinanzierung in der EU beobachteten, erläuterten diese wie folgt. Vier negative Auswirkungen wurden dabei von den Befragten am häufigsten hervorgehoben (von 25 % bis 26 % der Befragten):

- 'Geringere Entschädigung für den Antragsteller'
- 'Interessenkonflikte bei der Finanzierung von Rechtsstreitigkeiten'

- 'Unzulässige Einflussnahme auf materiell- und verfahrensrechtliche Entscheidungen der finanzierten Parteien, auch auf Vergleiche und Rechtsbehelfe" und
- 'Finanzierung unseriöser Forderungen mit dem Ziel, einen Vergleich zu erpressen, oder andere Formen des Missbrauchs'. Die Möglichkeit frivoler Klagen war ein häufig genanntes Anliegen der Interessenvertreter der Wirtschaft und konzentrierte sich häufig (aber nicht nur) auf Klagen in bestimmten Bereichen (wie etwa patentrechtliche Klagen, Klagen von Investoren, Produkthaftungsklagen). In diese waren die befragten Unternehmen als Beklagte in laufenden und früheren Verfahren verwickelt. Die Klagen wurden den Berichten zufolge von Prozessfinanzierern und/oder Hedgefonds organisiert, um hohe Vergleichssummen zu erzielen, wobei in einigen Fällen die am besten geeigneten Möglichkeiten der nationalen Rechtsordnungen genutzt wurden, um den größtmöglichen Druck auf die Beklagten auszuüben.

Notwendigkeit einer Regulierung nach Ansicht der Interessengruppen

Der letzte Teil der Konsultation betraf die Ansichten der Interessengruppen zur **Notwendigkeit einer Regulierung** der Prozessfinanzierung auf nationaler oder EU-Ebene. 29 % der Befragten antworteten mit „ja, auf EU-Ebene", 25 % mit „ja, sowohl auf EU- als auch auf nationaler Ebene und 4 % mit „ja, auf nationaler Ebene", womit sich der Anteil der Befragten, die einen Regulierungsbedarf sehen, auf insgesamt 58 % belief. Dagegen sahen 29 % der Befragten keinen Regelungsbedarf, der Rest hatte dazu keine Meinung oder machte keine Angaben.

Auch hier gingen die Meinungen zwischen den einzelnen Interessengruppen stark auseinander. In den Interessengruppen Justiz, Wirtschaft, Wissenschaft/Forschung, Sonstige und Schiedsrichter/Mediatoren sahen mehr als zwei Drittel der Befragten die Notwendigkeit einer Regulierung entweder auf EU- oder auf nationaler Ebene, oder auf beiden Ebenen. Gleiches gilt für mehr als die Hälfte der antwortenden Rechtsanwälte/Kanzleien. Im Gegensatz dazu sprach sich bei den Verbraucherorganisationen und Prozessfinanzierern nur eine Minderheit für eine Regulierung aus. Die Mehrheit der Behörden antwortete mit „Ich weiß nicht". Diejenigen, die sich für eine Regulierung aussprachen, verwiesen häufig auf die **negativen Auswirkungen**, die sie mit der Drittfinanzierung in Verbindung bringen (siehe oben). Während Interessenvertreter (vor allem aus der Wirtschaft) teilweise eine **umfassende Regulierung der Drittfinanzierung** befürworteten, die **mit dem Richtlinienentwurf im Anhang zur EP-Entschließung in Einklang steht,** sprachen sich andere, darunter eine Minderheit von Verbraucherverbänden und Prozessfinanzierern, für eine **„ausgewogene" oder „sanfte" Regulierung** der Drittfinanzierung aus, die grundlegende, nicht zu spezifische Regeln vorsieht, aber darauf achtet, dass die Drittfinanzierung eine praktikable Option bleibt. Diejenigen, die **keine Notwendigkeit** für eine Regulierung der Drittfinanzierung auf EU- oder nationaler Ebene sahen, führten zumeist das Argument an, dass es ihrer Ansicht nach keine Nachweise für negative Auswirkungen der Drittfinanzierung gebe und dass eine zu strenge Regulierung achtbaren Klägern die finanziellen Mittel für die klageweise Durchsetzung ihrer Rechte vorenthalten könnte.

Der letzte Abschnitt der gestellten Fragen bezog sich auf die **Wirksamkeit der Maßnahmen,** die in dem der EP-Entschließung beigefügten Richtlinienvorschlag zur Beseitigung möglicher unerwünschter Merkmale der derzeitigen Praktiken der Drittfinanzierung vorgesehen sind (falls vorhanden). Die Befragten wurden gebeten, für jede Maßnahme auf einer vierstufigen Likert-Skala anzugeben, ob sie die Maßnahme für „überhaupt nicht wirksam", „eher nicht wirksam", „eher wirksam" oder „sehr wirksam" halten.

Jedem Punkt wurde eine Wirksamkeitsnote zugeordnet, die von 0 für „überhaupt nicht wirksam" bis 3 für „sehr wirksam" reichte. Auf dieser Grundlage wurde eine Rangfolge der Maßnahmen in Bezug auf ihre Wirksamkeit festgestellt. 'Transparenzanforderungen und Vermeidung von Interessenkonflikten' (Artikel 13) war die am höchsten bewertete Maßnahme, gefolgt von ‚Angemessener Eigenkapitalausstattung' (Artikel 6) und ‚Verantwortung für die Kosten der Gegenseite' (Artikel 18). Allerdings wurden nur die Transparenzanforderungen im Durchschnitt als „eher wirksam" eingestuft, während alle anderen Maßnahmen im Durchschnitt als weniger wirksam angesehen wurden. Die insgesamt mäßigen Durchschnittswerte für die Wirksamkeit und die relativ geringen Unterschiede in den Wirksamkeitsbewertungen der verschiedenen Maßnahmen waren bis zu einem gewissen Grad das Ergebnis der unterschiedlichen Auffassungen über die Wirksamkeit in den Interessengruppen, so dass sich die gegensätzlichen Bewertungen gegenseitig aufhoben.

Die durchschnittliche Wirksamkeitsbewertung wurde daher für alle 14 Maßnahmen nach Interessengruppen berechnet. Die Unterschiede in den durchschnittlichen Wirksamkeitsbewertungen der Interessengruppen waren viel größer als die Unterschiede in den Bewertungen der einzelnen Maßnahmen bei Betrachtung der Gesamtergebnisse. Nur die Unternehmen und ihre Organisationen sowie die geringe Zahl der antwortenden Schiedsrichter/Mediatoren hielten die Maßnahmen des der EP-Entschließung beigefügten Richtlinienentwurfs im Durchschnitt für „eher wirksam". Alle anderen Interessengruppen bewerteten die Maßnahmen im Durchschnitt als weniger wirksam, wobei die Prozessfinanzierer diese am Negativsten bewerteten und die Maßnahmen im Durchschnitt als noch schlechter bewerteten als „eher nicht wirksam". Diese Ergebnisse stimmen bis zu einem gewissen Grad mit den Ansichten der Interessengruppen zur Notwendigkeit einer Regulierung überein (siehe oben).

Auf der Basis der Ergebnisse und Daten, die im Rahmen der wissenschaftlichen Analyse und der Konsultation gesammelt wurden, werden im Folgenden drei Regulierungsansätze mit ihren jeweiligen Begründungen betrachtet.

Keine Regulierung

Nationale Experten und Interessenvertreter, die sich für eine „Nichtregulierung" aussprechen, argumentieren, dass es keine Beweise für negative Auswirkungen der Drittfinanzierung gibt, dass eine zu strenge Regulierung jegliche Drittfinanzierung praktisch verhindern könnte und folglich achtbaren Streitparteien die finanziellen Mittel für den Zugang zur Justiz und für die Durchsetzung ihrer Rechte vorenthalten würden. Hier werden einerseits die bestehenden Vertragsrechtsprinzipien, das Zivilverfahrensrecht, Regeln zum Verbraucherschutz, Finanzmarkt- und Bankrecht sowie Rechtsvorschriften zum kollektiven Rechtsschutz, und andererseits die Kontrolle durch die Gerichte und in einigen Mitgliedstaaten auch durch Aufsichtsbehörden als ausreichend angesehen, um die Tätigkeit von Drittfinanzierern zu regeln. Spezifische Probleme in bestimmten Bereichen (z. B. im Zusammenhang mit patentrechtlichen Klagen, oder allgemeiner im Zusammenhang mit den Kosten von Zivilverfahren) sollten nach dieser Auffassung durch Änderungen der einschlägigen sektoralen Rechtsvorschriften gelöst werden.

Begrenzte Regulierung

Eine beträchtliche Anzahl von nationalen Experten und Interessenvertretern befürwortet eine „ausgewogene" oder „begrenzte" Regulierung der Drittfinanzierung, die grundlegende, nicht zu spezifische Regeln vorsieht, aber gleichzeitig garantiert, dass die Drittfinanzierung eine realisierbare Option bleibt.

Als Argument wird vorgebracht, dass das derzeitige Regelwerk ein Flickwerk ist, das zu unvorhersehbaren Ergebnissen und höheren Risiken für alle Beteiligten führen kann. Kläger, Drittfinanzierer und Beklagte können die Entwicklungen in der Rechtsprechung nicht vorhersehen. In Anbetracht der zunehmenden praktischen Relevanz der Drittfinanzierung in der EU und des derzeitigen Mangels an Transparenz könnte ein ausschließlicher Rückgriff auf die Gerichte zur Kontrolle und Überwachung von Geldgebern eine übermäßige Belastung für die Justiz darstellen.

In den folgenden Bereichen wurde ein Regelungsbedarf gesehen: Transparenz und Offenlegung, Regulierung des Finanzmarktes (Vorschriften zur Eigenkapitalausstattung) und Verbraucherschutz. Bei der Regulierung muss ein Gleichgewicht gefunden werden, das sowohl die praktischen Probleme als auch die finanzielle Realität des Marktes für eine Prozessfinanzierung durch Dritte berücksichtigt. Ein ausgewogener Ansatz auf der EU-Ebene würde den Zugang zu den Gerichten erleichtern, zur Kontrolle der Drittfinanzierung beitragen, gleichzeitig aber auch Missbrauch verhindern und die Fairness in Gerichtsverfahren wahren.

Umfangreiche Regulierung

Die Befürworter einer umfassenden Regulierung (wie z. B. des Richtlinienvorschlags im Anhang der Entschließung des Europäischen Parlaments) verweisen häufig auf die negativen Auswirkungen, die ihrer Meinung nach mit der Drittfinanzierung verbunden sind - insbesondere: Interessenkonflikte und unzulässige Einflussnahme auf materiell- und

verfahrensrechtliche Entscheidungen, Finanzierung unseriöser Klagen, Verringerung der Entschädigung für die Kläger, Zunahme von Klagen und Risiko einer übermäßig prozessfreudigen Gesellschaft, Anstieg der Prozesskosten und der Versicherungsprämien, Kommerzialisierung von Gerichtsverfahren, Verzerrung des Marktes für Rechtsdienstleistungen, Verletzung der Vertraulichkeit. Die Regulierung der Drittfinanzierung wird als eine Möglichkeit gesehen, durch Transparenz und Rechtssicherheit das Vertrauen in die Prozessfinanzierer zu stärken. Andererseits könnte eine umfassende Regulierung jegliche Prozessfinanzierung unterbinden, so dass achtbaren Klägern die finanziellen Mittel für den Zugang zu den Gerichten vorenthalten würden.

1 INTRODUCTION

This is the Final Report of the study on Mapping Third Party Litigation Funding in the European Union (request for services JUST/2023/PR/JCOO/CIVI/0016), conducted for DG Justice and Consumers of the European Commission by the Justice and Consumers Evaluation Consortium (JCEC). The team is led by the British Institute of International and Comparative Law (BIICL) and Civic Consulting, supported by National Experts, and senior experts from the Asser Institute and from Risk & Policy Analysts (RPA).

As required by the Terms of Reference, this Final Report presents a synthesis of the information collected in the course of the study. It contains a description of the legal solutions adopted by the Member States and the practices of TPLF. It presents stakeholder views on the regulation of TPLF and identifies major issues with TPLF. Additonally, the Final Report analyses the extent to which existing solutions address the concerns expressed in the EP Resolution[19] and outlines where those solutions are aligned with, or differ from, the concrete proposals in that Resolution. It finally presents views on the need for and the value added of particular regulatory solutions, including those proposed by the EP in its resolution.

[19] European Parliament, Responsible private funding of litigation, European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)).

2 BACKGROUND OF THE STUDY

The practice of Third-Party Litigation Funding (TPLF) has steadily grown in the EU.[20] In 2019, it was estimated that the European TPLF market size represented approximately 0.8 % of the total revenue of the legal services market.[21] This translates to approximately €1 billion from Member States.[22] This portion is projected to rise in line with the global growth of TPLF, leading to approximately €0.6 billion of additional market revenue in the EU by 2025.[23]

2.1 OBJECTIVES OF THE STUDY

The objectives of this study are:

- to collect and analyse the legal framework, practical operation and stakeholder opinions of TPLF and;
- to provide a preliminary assessment of TPLF and TPLF related regulations in the EU Member States and selected non-EU jurisdictions considering the solutions proposed in the EP resolution and its draft directive.

The study focuses on evidence, analysis and assessment.

The study is intended to assist the Commission in collecting information that would: (1) provide a picture of the actual activities of professional litigation funders and, (2) contribute to and facilitate the creation of appropriate policy measures in response to the EP resolution.

This study therefore presents:

- All relevant existing and planned legislation relating to TPLF from 27 EU Member States and 4 non-EU jurisdictions - Canada, UK, Switzerland and the United States;
- Data on the practical operation of TPLF in 27 Member States, Canada, UK, Switzerland and the United States.
- Opinions of stakeholders on the regulation and operation of TPLF in the 27 EU Member States, Canada, UK, Switzerland and the United States.
- A critical assessment of the degree of compatibility of TPLF practice in 27 Member States with the solutions proposed in the EP Resolution.

[20] J. Saulnier, K. Müller & I. Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021), section 2.1.

[21] Ibid.

[22] Ibid.

[23] Ibid. This projection was calculated based on a penetration rate of 4 % and a doubling of that rate at 8 %. The authors of the EAVA reached the view that this would equate to an annual growth rate, based on past trends, at 3.5 % on average per year. The authors noted and accepted that an average trend growth in the sector of 8 % over five years falls at the higher end of the projection margin.

2.2 RESEARCH METHODOLOGY

The study is structured around: National reports; national interviews; a broad stakeholder consultation; and an expert panel. These methodological elements are elaborated in the following sub-sections.

2.2.1 National reports

The national experts present the situation in all EU Member States and in the selected non-EU jurisdictions (CA, CH, UK, US). The experts were selected based on their experience with the jurisdiction in question, their knowledge in the area, their language capacities, and their capacity to identify and facilitate access to interlocutors (persons and entities) involved in litigation in which TPLF was used.

The national experts conducted an intensive desk research on the relevant existing and planned legislation applicable to TPLF in their jurisdiction, covering a broad range of aspects connected with TPLF. In particular, this included: legal admissibility and conditions of using TPLF in civil litigation, legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF, obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute, obligations of funders towards beneficiaries and vice-versa, distribution of awards, bearing adverse costs in lost cases and any planned legislation relevant to TPLF.

National experts also collected information on the practical operation of TPLF in their jurisdiction, including the characteristics of funder activity (types of disputes funded, predominant conditions of funding agreement), outcomes of funded cases including effective gains for beneficiaries and funders. In this context, any undesired features of current practice were identified and presented. This included features such as significant reduction of compensation for beneficiaries, undue influence on the procedural decisions of the funded beneficiaries regarding settlements and appeals or extorted settlements in implausible cases.

The national reports are structured so as to highlight the degree of compatibility of TPLF regulation in the Member States with the solutions proposed by the EP Resolution. This assessment allowed for the completion of the comparative table in the Synthesis Report. This table presents the degree of compatibility of TPLF regulation in the EU Member States with the measures proposed in the EP Resolution.

2.2.2 National interviews

The collection of information at Member State level included 3 to 5 interviews of relevant stakeholders, carried out by the national experts under the supervision of the BIICL team. The aim of these interviews was to obtain a description, on the basis of real examples, of the practices applied, contractual terms used, the existence of any judicial or administrative control or safeguards in third party funded cases and any needs regarding regulation of TPLF at the national level. Any undesired features of current practice were identified and presented.

Relevant stakeholders included litigation funders and their organisations; potential beneficiaries (including specific categories such as consumers), organisations potentially representing beneficiaries in collective actions; lawyers and law firms and their associations; judiciary, claimants and defendants.

The Consortium was aware that this task could be sensitive, as interlocutors may not have been keen to speak on the details of cases or the relations between different players. Additionally, funding agreements are not public. It is for this reason that national experts were entrusted with the task to carry out national interviews: they were selected for their ability to reach out to their domestic database, and built on existing professional relationships.

The use of national interviews achieved two objectives:

- They allowed national experts to supplement their national reports with unique insights and perspectives that may not have been captured through doctrinal research alone. Qualitative interviews thus allowed national experts to provide a more comprehensive view of TPLF in their jurisdiction.
- Secondly, national interviews form an integral part of the consultation of stakeholders: we considered the interview results in its analysis of stakeholder opinions, based on the national reports and the underlying data from the E-questionnaire for interviewees.

In consequence, the results of the national interviews have been being evaluated twofold: at a national level, where they fed into the National Reports, and overall, as part of the broadscale consultation in this study for the analysis of stakeholder opinions.

Interview methods

To achieve the requested deliverables, keeping in mind the objective of the study, and to ensure that all available pertinent information is collected, national experts interviewed key national stakeholders in two successive steps:

- Step 1- **E-questionnaire for interviewees**: An online questionnaire, tailored to the aims of the interview was made accessible to a selection of 3 to 5 key stakeholders (legal practitioners, businesses, organisations representing claimants and defendants, litigation funders, judiciary, and academics, involved with or researching TPLF). The online link to the national survey was: https://ec.europa.eu/eusurvey/runner/TPLFStudy

  The questionnaire included a mix of yes/no and multiple-choice questions, as well as open questions where these are required. It addressed concerns of all classes of stakeholders involved as well as all relevant aspects of this study.[24]

- Step 2 - semi-structured, **qualitative individual interviews**: these were conducted by face-to-face through an online platform such as Zoom or MS Teams with the stakeholders selected by the national expert.

  Interviews were preceded by the online questionnaire and structured with more flexibility as to open questions and possibility of in-depth discussion. Using the questionnaire as an interview guide allowed for a coherent evaluation of all findings. After the interviews had been written up, they were fed into the national reports. Where needed, answers to the online questionnaire could be adapted after the interview, if interviewees came to a different conclusion after the interview process.

[24] The questionnaire is complementary to the general stakeholder questionnaire.

This allowed for a coherent presentation of the findings across countries and across questions and issues raised.

Choice of stakeholders

The individual interviewees represented different categories of stakeholders to ensure a broad view on the situation. The experts were selected based on their capacity to identify and facilitate access to key interlocutors (persons and entities involved in litigation in which TPLF was used, as claimants or defendants, judiciary, practitioners, funders etc.).

BIICL is aware that within stakeholders, opinions, awareness, and expertise as to TPLF might vary greatly. National experts were aware that, when collecting opinions and information, the interests of the groups and persons consulted should be kept in mind. BIICL supervised the process of the national consultation, and the input received was cross-checked. BIICL endeavoured to distinguish and identify, in all deliverables, objective information, opinions of the stakeholders, and its own critical assessment.

84 national interviews were conducted and included in the online survey. Stakeholders' engagement across the Member States varied depending on how prevalent TPLF is in the jurisdiction in question. In jurisdictions where TPLF is more prevalent or quickly emerging (for instance DE, IT, LU), stakeholders, including legal professionals and industry representatives, were often more actively involved in discussions and initiatives related to litigation funding practices. In jurisdictions where TPLF is less common (for instance EE, FI, MT), national experts faced more challenges in gathering stakeholders' opinions.

2.2.3 Stakeholder consultation

In parallel to the national interview process, a separate interview process at EU level took place, focusing on EU level stakeholders, and selected Member State interviewees that could contribute to the broader EU picture. This process began during the inception phase of the study. Interviewees were selected from a predefined list of key stakeholder organisations as well as suggestions made by the Commission during the kick-off meeting (6 interviewees). A broader interview process was subsequently launched (in parallel to the EU stakeholder survey, see below), which covered business and consumer stakeholders, litigation funders, as well as clients and defendants of cases in which TPLF was used (in total an additional 22 interviewees).

The general stakeholder survey was launched on 11 June 2024 and remained open until 10 September 2024. The survey was targeted at the following stakeholder groups:

- EU business organisations and their member companies, who have been involved or expect to be involved in TPL-funded cases as defendants or as claimants, and organisations representing them;
- Litigation funders active in the EU and their organisations;
- Organisations that (potentially) benefit from TPLF, such as consumer organisations representing consumers in collective actions;
- Lawyers/law firms advising/representing claimants using TPLF and defendants in relevant cases and their organisations;
- Judiciary, especially judges who were involved in cases in which TPLF was used;

- Arbitrators/mediators;
- Academics researching TPLF

The survey, which was largely identical to the national survey, but separately circulated and administrated, was also implemented in the EU Survey tool, and widely distributed using email contacts from the Civic and BIICL stakeholder databases and the email functionality of the EU Survey tool. Recipients were invited to circulate the invitation to their members at national level who could provide competent answers to the survey due to their previous experience with TPLF. We followed the status of the answers in real time, and circulated several targeted email reminders. In total, 147 stakeholder organisations and individuals completed the survey.

2.2.4 Expert panel

The study team conducted an online expert round table on 10 October 2024. The panel focused on presenting initial findings (an overview of TPLF in selected jurisdictions, and initial results of the consultation), on potential undesired features of/consequences of the use of TPLF in the Member States, as well as solutions proposed in the EP resolution and options for the way forward. Information gathered during the panel informed the synthesis report.

Participants

Prof. Astrid Stadler, University of Konstanz

Prof. Peter Rott, University of Oldenburg

Prof. Cristina Poncibò, University of Turin

Prof. Burkhard Hess, University of Vienna

Prof. Xandra Kramer, Erasmus University Rotterdam and Utrecht University

Prof. Danguole Bubliene, President of the Supreme Court of Lithuania

Prof. Rachael Mulheron, Queen Mary University of London

Dr Vesna Lazic, Asser Institute

Dr Liljana Cvetanoska, RPA

EU COM: Jacek Garstka and Pia Lindholm, DG JUST

Prof. Eva Lein, BIICL/ UNIL

Dr Frank Alleweldt, CIVIC

Constance Bonzé, BIICL

Rhonson Salim, BIICL

3 LEGAL ANALYSIS

The legal analysis, based on desk research and national reports, presents the situation in all 27 EU Member States and in the selected non-EU jurisdictions (CA, CH, UK, US). The legal analysis is composed of a review of literature including doctrinal debates around different TPLF-related issues in the selected jurisdictions, and of the national reports.

3.1 REVIEW OF LITERATURE

3.1.1 Key instruments relevant to TPLF

EU level

Whilst recognising the use of TPLF in supporting consumer organisations to advance claims for consumer redress[25], the Commission has promulgated legislative safeguards for TPLF. At a horizontal level, the Commission's 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms (**Recommendation**) stipulated principles relating to disclosure on origin of funds, conflicts of interest, adequacy of funds (third party and claimant), prohibitions on third party influence in procedural decisions and charging of interests.[26] The objective of these principles was to ensure that the terms of financing do not create an incentive for abusive litigation or conflicts of interest.[27]

The European Commission 2018 implementation report of the Recommendation[28] noted that in relation to third party funding, most of the Member States did not regulate third party financing in accordance with the Recommendation's principles.[29] The Commission concluded that "the general lack of implementation means that unregulated and uncontrolled third-party financing can proliferate without legal constraints, creating potential incentives for litigation in certain Member States… ."[30]

As a response and as a follow-up in the consumer sector, Directives were adopted as part of the Commission's 'New deal for consumers' package. The main purpose of this new legislative package is to ensure more transparent rules and a fairer and more effective judicial system. As highlighted above, the issue of TPLF is addressed specifically in the RAD of that package. In redress cases, the RAD requires Member States to ensure that where a representative claim is funded by a third party, conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers.[31]

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[25] European Commission, Green Paper on Consumer Collective Redress, Brussels, 27.11.2008 COM(2008) 794 final, para. 51

[26] Rules 14-16, 32

[27] European Commission, 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), COM(2018) 40 final

[28] Ibid, s 2.1.6

[29] ibid

[30] ibid

[31] Article 10

The European Parliament has also been active in this space. The EAVA which accompanied the legislative-initiative report prepared by the European Parliament's Committee on Legal Affairs (JURI) on the responsible private funding of litigation noted that there is a need to ensure a necessary balance between improving claimants' access to justice and providing appropriate safeguards to avoid abusive TPLF in the EU.[32] Accordingly, the Parliament adopted EP **Resolution**).[33] The EP **Resolution** recommends the establishment of a system of authorisation for litigation funders. The goal of this system is to provide claimants with opportunities to use TPLF whilst retaining safeguards such as the introduction of corporate governance requirements, provision of supervisory powers to protect claimants and to ensure that funding is only provided by entities that are committed to complying with minimum standards in terms of transparency, independence, governance and capital adequacy, and to observing a fiduciary relationship vis-à-vis claimants and intended beneficiaries.[34] The EP **Resolution** ends by requesting the "Commission to closely monitor and analyse the development of third-party litigation funding in the Member States, both in terms of the legal framework and practice, with particular attention to be given to the implementation of Directive (EU) 2020/1828".[35]

ELI Principles on TPLF

The European Law Institute (ELI) has worked to develop a set of principles on TPLF which provides a source for further reflection on how to approach TPLF. The ELI Principles are grounded in the premise that TPLF improves access to justice and facilitates the private enforcement of the law.[36] The Principles "are intended to constitute a blueprint for guidance, decisions or light-touch regulation of the burgeoning Third Party Litigation Funding (TPLF) market."[37] The ambition of the Principles is to provide an alternative to the main approaches of *codes of conduct* and *hard regulation*. The Principles leave enforcement to States incorporating them into national legal systems. The ELI recognises the role of some self-regulation for the TPLF industry but takes the view that there is a limited use of this approach.[38] On the other hand, the ELI acknowledges the concerns regarding the effect of prescriptive regulation. Specifically, that such regulation "significantly affects the risk/reward balance for funders and may well lead to funders ceasing to offer funding in the regulated territory – with consequent impact on access to justice issues."[39] Those risks are sufficiently important that ELI suggests that prescriptive regulation is only appropriate where there is an identifiable problem or market failure.[40] ELI takes the view that "a

[32] J. Saulnier, K. Müller & I. Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021).
[33] European Parliament, Responsible private funding of litigation, European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))
[34] Ibid, para. 6
[35] N 11 (para. 14)
[36] ELI, "Principles Governing The Third Party Funding Of Litigation" (2024), pg. 19
[37] Ibid, Executive Summary, pg.11
[38] Ibid, pg. 12
[39] Ibid
[40] Ibid. ELI noted that: "A key driver for the calls for regulation has been the absence of transparency and the knowledge imbalance between funders and funded parties. … When assessing the conditions of the available funding options one thing which was consistent in different jurisdictions, was a concern as to the information asymmetry between the contractual parties and the potential imbalance of powers during the negotiations of the TPLF agreement's terms." (page 28)

workable answer lies not in mandating where the balance lies but making it possible for both sides of the [funding] transaction to properly assess the terms which they are discussing."[41]

At the core of the Principles is a recognition that TPLF agreements require careful consideration of the terms and a thorough understanding of their legal and financial implications.[42] Thus, the Principles have been drafted with the aim of providing aid to litigants, beneficiaries, courts, administrative authorities, arbitration bodies, legislators, funders, and their representative bodies.

The Principles centre around 12 principles regarding the conduct of funders and funded parties. These are:

Principle 1- Subject matter and Purpose	**Principle 7** - Capital adequacy
Principle 2 – Scope	**Principle 8** - Funders' fees
Principle 3 – Definitions	**Principle 9** - Confidentiality
Principle 4 – Promotional Materials	**Principle 10** – Control/Case Management
Principle 5 – Transparency	**Principle 11**- Termination
Principle 6 – Avoidance and Management of Conflicts of Interest	**Principle 12**- Dispute Resolution and Court Review/other Authorities

In support of the Principles, the ELI provides sample wordings and minimum content for TPLF agreements (where appropriate) to deal with particular issues raised in the Principles.

Principle 1 sets out the overarching rationale for all Principles. It limits their operation to within the constraints imposed by the applicable procedural (lex fori) and substantive (lex causae) laws.[43] The intention of this Principle seems to be an interpretative guide to manage uncertainties /contradictions in the application of the Principles.[44]

Principle 2 elucidates the types of proceedings (and party positions) that the Principles are envisaged to be applicable to. Specifically, the Principles are primarily for use in the context of litigation proceedings, irrespective of position of claimant and defendant. Particular considerations apply in consumer litigation and when the legal representative's remuneration is conditional on the outcome of the litigation. However, the Principle recognises that the Principles may also assist in the context of arbitration and other forms of dispute resolution.

Principle 3 provides interpretations of key terms used. It takes a liberal interpretation to the notion of 'funded party', framing such notion by reference to whether a party *receives the benefit* of an LFA, not whether such party is (or is not) a party to the LFA itself. On the other hand, it takes a narrow definition of the notion of third party funder, excluding entities that are different from the party providing the funds pursuant to the terms of the LFA, including where funds are provided by a parent or a related group company is not otherwise in the litigation funding business. The Principles are not meant to apply to contexts where funding is provided by campaigning organisations or 'conscience funders'.

[41] ibid, page 28.
[42] ibid
[43] Unless specifically incorporated into legislation or regulation.
[44] See for similar effect - CPR r 1.1 of England and Wales

Principle 4 clarifies the extent, and scope, of the obligations on funders vis a vis promotional materials. The Principle sets mandatory obligations regarding clarity, comprehensiveness and avoidance of misleading statements. It also mandates, as a minimum, that Funders must include a prominent statement that any party considering entering into any funding agreement *should seek independent* legal advice prior to concluding any agreement with the funder. It takes a discretionary approach to whether Funders should also include a list of sources of information regarding the issues involved in a LFA in its promotional materials.

Principle 5 regulates the disclosures that the Funded Party and Funder *must make* [emphasis added] to each other, to other parties to the litigation, and to the Court.[45] However, the operative word in the Principle ('should') indicates that the objectives can be 'read down' to be discretionary rather than mandatory.[46] Principle 5(1) deals with disclosure by the prospective Funder to the Funded Party and covers transparency vis-à-vis the Funded Party as to the identity of the Funder and the source of funds. The Principle also adopts an approach of requiring disclosure as provided for by the applicable law and to the extent provided for in the intended contract, but leaves room for the parties to agree a different balance on conflicts disclosure.

Principle 6 seeks to avoid and, where avoidance is not possible, to manage conflicts of interest. It covers two conflict contexts: 1) funder's conflicts through other business or the business of the ultimate source of funds and 2) conflicts with amongst legal team. The Principle contains obligations on the funder and it stipulates LFA elements that should be incorporated. Similar to Principle 5, the operative word in the Principle ('should') leaves room for a 'read down' of the adherence of the obligations contained therein.

Principle 7 seeks to provide reassurance to the funding party regarding a Funder's capital adequacy. It achieves this via a combination of positive obligations on the Funder plus stipulations as to the content of an LFA regarding capital. The sample wording provided stipulates that Third Party Funders maintain sufficient financial capability to meet the aggregate funding liabilities arising under all of their agreements in the next 24/36 months. Additionally, the Principle seeks to increase the transparency of the scope of capital coverage provided. The Principle stipulates that LFA should contain a delineation as to the Funder's liabilities to cover (i) appeal costs (ii) adverse costs orders and (iii) enforcement.[47] The Principle does not stipulate a set capital requirement on the basis that such limit may place a disproportionate burden on small funders and impose a large barrier to entry to the funding market.[48]

Principle 8 seeks to improve clarity and transparency as to the fees charged by a Funder and the extent to which the Funding Party will shoulder any costs and fees. In relation to Funders fees, a prescriptive approach was deemed as not suitable given different factors which apply in relation to different types of proceedings and litigants. As such, the Principle adopts the approach of focusing on provision of information in relation to fees and costs both for the Funded Party to understand, and to facilitate effective court review. It places the onus on the Funder to delineate the extent of any fees /costs covered by the Funder and it reinforces this obligation with two supplementary obligations – that the Funder explains the matters in clear and simple language to the Funded Party

[45] Ibid, page 39.
[46] See 5(1) to 5(3).
[47] Principle 7(2) (b)
[48] Ibid, pg.47

prior to entry into the Third Party Funding Agreement and that the Funder should be capable of providing evidence of its explanation of these matters to the Funded Party. [49]

Principle 9 sets out Third Party Funders' confidentiality duties. It takes the approach that all information and documentation should be maintained by Third Party Funders to the full extent permissible under applicable law. As such, proactive obligations are placed by the Principle on the Funder, including the maintenance of confidentiality by entities providing funding, but not party to the LFA, and who has access to confidential information.

Principle 10 focuses on the extent to which the Funder may control or influence proceedings. The overriding rationale of the Principle is that the ultimate decision-maker in relation to the funded proceedings is the Funded Party. However, the Principle recognises that Funders' control and/or influence in specific contexts are possible and directs that such entitlements (and their extent) are to be clearly stated within the LFA. This is reinforced by a requirement that the LFA must also set out a dispute resolution mechanism to apply in the event of disagreement over the exercise of the Funder's rights.[50] The Principle also retains an entitlement of the Funder to be regularly informed as the litigation progresses of the progress of the proceedings.[51]

Principle 11 provides guidance in relation to the parties' termination rights under a Third Party Funding Agreement. Unlike the approach taken in Principle 8 and 10, this Principle does not explicitly impose an obligation on the Funder to explain/proactively enable the Funded Party to understand the scope and nature of termination rights, leaving much of the burden of the Principle to clarity (and comprehensiveness) of the terminology in the LFA. Indeed the focus is on Funded Party being given *an adequate framework* for discussion and agreement of termination rights.[52]

Principle 12 clarifies the approach applicable to dispute resolution processes set out in the LFA. It sets out the way in which disputes are to be resolved. An LFA should specify an appropriate (fair, independent and transparent) resolution mechanism in respect of any conflict of interest or potential conflict of interest that may arise. [53] Principle 12(1)(b) addresses areas where expedited dispute resolution may be necessary. Principle 12(2) addresses the need for clarity as to likely court supervision outside the context of dispute resolution.

3.1.2 Main issues identified in doctrine by national research

The rise of TPLF has spurred vigorous debates among legal scholars, practitioners, and policymakers, offering both new opportunities and challenges to the legal system. The emergence of TPLF is recent and most private funders keep their activities discreet, inter alia to remain competitive, so information on the extent and the nature of the TPLF market remains limited.[54] Several studies have however been conducted recently and offer insights into the practical operations of TPLF.[55] In doctrine, concerns have been raised regarding potential conflicts of interest, ethical dilemmas, and the risk of frivolous lawsuits driven solely by profit-seeking

[49] Ibid, pg. 53
[50] Ibid, Principle 10(3). Funders rights regarding the acceptability of a settlement is specifically stated .
[51] Principle 10 (5)
[52] Page 60
[53] Principle 12(1)(a)
[54] Veljanovski, Cento, 'Third Party Litigation Funding in Europe', Journal of Law, Economics and Policy, Vol. 8 (2012) at 410.
[55] Such as Jérôme Saulnier, Ivona Koronthalyova, and Klaus MüLler, 'Responsible Private Funding of Litigation: European Added Value Assessment', in European Parliamentary Research Service (ed.), (European Parliament,, 2021), see provisional list of relevant literature below.

funders.[56] There are also concerns regarding the risk of funders charging excessive fees which consequently deprive the claimant of a substantial part of the award.[57]

National experts conducted thorough doctrinal research and comprehensive literature reviews within their respective jurisdictions to examine the relevant academic discourse on TPLF. Their findings are documented and compiled into detailed National Reports. This section highlights the issues that sparked the most significant doctrinal debates at national level, shedding light on areas of law that have generated substantial academic discussion across several jurisdictions. Conversely, jurisdictions that are not specifically mentioned in the following subsections are those where doctrinal discussions on these particular issues were either limited in scope or entirely absent. For a detailed presentation of the doctrinal discussion by jurisdiction, and specific domestic considerations, see the National Reports under Section 3.3.

Permissibility and qualification of TPLF

In EU Member States, the doctrinal debate on TPLF started to emerge during the last decade. Permissibility of TPLF is among the mains issues being discussed. In **Austria**, the Supreme Court (Oberster Gerichtshof, OGH) has held that TPLF is permissible under certain conditions.[58] The broad majority of the doctrine supports the case-law of the OGH and the permissibility of TPLF.[59] In **France**, the validity and classification of litigation funding agreements have been questioned in doctrine, as litigation funding agreements do not fall within a known category of contracts under French law. The validity of litigation funding agreements was implicitly confirmed by French courts, which refer to third party litigation funding agreements as "sui generis" contracts.[60] In **Germany**, the classification of the TPLF agreement within the system of contract law was discussed, as this classification is relevant, for example, in the area of unfair contract terms law. As the legislator has never introduced specific provisions for TPLF agreements, they need to be dealt with by reference to the existing categories of contracts. Most academic authors agree that the TPLF agreement comes closest to a partnership agreement in the terms of § 705 BGB, as both the claimant and the funder pursue the common goal of winning the case.[61] This classification has also been followed by the OLG München.[62] In **Portugal**, the admissibility of TPLF was questioned in doctrine in terms of its constitutional compatibility, in light of the constitutional guarantees of consumer rights,

[56] Veljanovski, 'Third-Party Litigation Funding in Europe', at 408, Jérôme Saulnier, Ivona Koronthalyova, and Klaus MüLler, 'Responsible Private Funding of Litigation: European Added Value Assessment', in European Parliamentary Research Service (ed.), (European Parliament, 2021), at 20.

[57] J. Saulnier, K. Müller & I. Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021) at 22, Tzankova, Ianika, 'Funding of mass disputes: lessons from the Netherlands', Journal of Law, Economics & Policy, 8 (3), 549-91 (2012) at 588.

[58] OGH, 23.02.2021, 4 Ob 180/20d, ECLI:AT:OGH0002:2021:0040OB00180.20D.0223.000; OGH, 27.2.2013, 6 Ob 224/12b, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.

[59] *Oberhammer*, Sammelklage, quota litis und Prozessfinanzierung, ecolex 2011, 972 ff.; *Klauser*, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, VbR 2013, 12-16; *Raunigg* zu OGH 25.3.2021, 2 Ob 10/21s; *Schuschnigg*, Prozessfinanzierer als Rechtsfreund?, ÖJZ 2022, 969 ff.

[60] Versailles Court of Appeal, 1 June 2006, Foris / Veolia, RG 05/01038 ; Cour de Cassation Civ.1ère, 23 November 2011, n°10-16770.

[61] For details, see Dethloff, NJW 2000, 2225, 2226 f.; Gsell and Stadler, JZ 2024, 989, 993. See also Hamos, Drittfinanzierte Gewinnabschöpfungsklagen, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2020, 1034, 1035; Scholl, § 56 Rechtsschutzversicherung und Prozessfinanzierung, in: Hamm (ed.), Beck'sches Rechtsanwalts-Handbuch, 12th ed. 2022, para. 251; Gsell and Stadler, JZ 2024, 989, 993.

[62] OLG München, 31.3.2015 – 15 U 2227/14, NJW-RR 2015, 1333, 1335. See also LG Köln, 4.10.2002 - 81 O 78/02, NJW-RR 2003, 426.

competition, and the fundamental right of access to the courts.[63] Although initial opinions were somewhat opposed,[64] recent legal doctrine supports a constitutional compatibility of TPLF with access to justice.[65] Academic stakeholders also contend that such agreements do not violate the principle of legal reserve (the equivalent of "no punishment without law" in Portuguese law), the principle of separation of powers, public order, or the prohibition against abuse of rights.[66] In **Lithuania**, because of the scarcity of legislative framework, the doctrine raises as an issue the legal nature of TPLF agreements. It is suggested that provisions on loans of the Civil Code of Lithuania should apply to TPLF agreements by analogy of law.[67]

- **Undue control of funders over the proceedings**

There are concerns about the funder's undue control over procedural strategy. In **Spain**, the risk of the funder unilaterally terminating the funding midway through the proceedings, or influencing the proceedings (especially in regards to the possibility of reaching an out-of-court settlement) is a recurrent concern.[68] In **Portugal**, the involvement of the funder in the litigation strategy, regarding decisions on settlement and on appeal, raised concerns. [69] In **Lithuania**, the doctrinal discussions revolve around the margin of control the third party may exercise over a client given its interest in a successful outcome of the proceedings and the business risk undertaken, especially because of adverse costs to be borne if the proceedings do not succeed.[70]

- **Reduction of compensation and frivolous claims**

There is recurrent discussion about the possibility of the funder incorporating an unfair or excessive rate of return that virtually deprives the litigant of their right to compensation[71]. In **Spain**, TPLF is perceived as fostering profit-motivated financial entities abusing the judicial process with

[63] Carlos Blanco de Morais/Mariana Melo Egídio, Da validade dos acordos de financiamento de contencioso por terceiro para a promoção de ações populares (RFDUL-LLR, LXIV, 2023, 1) 411.
[64] Assim, Paulo Otero, *Da dimensão constitucional dos acordos de financiamento ("litigation funding agreements") de ações populares indemnizatórias: um problema de abuso de direitos fundamentais* (Revista da Ordem dos Advogados, Lisboa, a. 82 n. 3-4, Jul.-Dec. 2022), 701-740 (724).
[65] Carlos Blanco de Morais/Mariana Melo Egídio, Da validade dos acordos de financiamento de contencioso por terceiro para a promoção de ações populares (RFDUL-LLR, LXIV, 2023, 1) *passim*.
[66] António Jorge Pina dos Reis Novais, *Financiamento de contencioso por terceiros e Constituição*, Revista da Faculdade de Direito da Universidade de Lisboa - Lisbon Law Review (Vol. 64, no. 2, 2023), 661-722.
[67] Raimonda Kundrotaitė, "Financing litigation costs: practical advice and international trends" [2021] *Arbitration: Theory and Practice* (Vol. VII), p. 85 <https://www.arbitrazas.lt/failai/_Zurnalas/2021/2021.7.Arbitrazas-Nr.7-R.-Kundrotaite.pdf> accessed July 24, 2024
[68] G. Ormazabal Sánchez, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288.
[69] Ricardo Silva Pereira, *Third-party funding e implicações éticas na relação com os árbitros* (Revista Internacional de Arbitragem e conciliação, no. 9, 2016) 95; Daniela Filipa Henriques Mendes, *Financiamento de litígios por terceiros* (2021), 48.
[70] Civil case no. e3K-3-105-701 [2024]; Civil case no. 3K-3-256-684 [2015]; Civil case no. 3K-3-582 [2009]; Civil case no. e3K-3-238-313 [2022] Resolution of the Supreme Court of Lithuania <https://www.infolex.lt/tp/2113912> accessed July 24, 2024 (value of the claim: EUR 725,945.49).
[71] G. Ormazabal Sánchez, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 271-304; AGUILERA MORALES, M., "Hacia un marco normativo europeo sobre la financiación de litigios" en MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro*, Atelier, Barcelona, 2022, p. 597.

unmeritorious claims.[72] The main (if not sole) interest of private funders in financing claims is monetary, and it seems reasonable to expect an increase in litigation if additional financing tools are implemented.[73] In **the Netherlands**, amongst the disadvantages pointed out in the literature are concerns of developing a compensation culture driven by profit-seeking funders, a fear of imposing unnecessary costs on the industry, developing a practice of filing unmeritorious claims forcing thereby defendants to enter into settlements in order to avoid litigation costs and reputational damages.[74] However, there does not seem to be empirical data demonstrating that the introduction of TPLF automatically increases the number of unmeritorious claims.[75] TPLF is a practice that entails risks for funders. Aspects of litigation can be difficult to predict, including the timing of the proceedings or the potential difficulties in collecting the award if the defendant is not solvent. Before financially supporting the claim, funders will usually conduct a thorough analysis of the estimated costs, the chances of success, and the financial situation of the defendant.[76] Cases seemingly without merit and with low probability of success are rejected via this screening process.[77] Although it is not commercially viable for private funders to support frivolous cases, it is not impossible that the possibility to rely on TPLF might be used strategically to reach a settlement. Part of the doctrine is however of the opinion that this issue remains marginal.[78]

Conflicts of interest

Another main concern surrounding TPLF is its potential to foster conflicts of interest,[79] in particular concerning the relationship between lawyers and funders. In most jurisdictions, lawyers are bound by (professional) obligations to avoid conflicts of interest, confidentiality and loyalty, and duties to remain independent.[80] Conflicts of interests may arise in situations where the lawyer had previous or ongoing cooperation with the funder, or is holding shares or ownership interest in a funder.[81]

In jurisdictions where legal literature pays very limited attention to TPLF, attention is still paid to deontological issues and potential conflicts of interests between lawyers and funders, for instance

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[72] Veljanovski, 'Third-Party Litigation Funding in Europe', at 408. N1 at 20

[73] Deborah R. Hensler, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?', *De Paul Law Review,* 63/2 (2014), 499-525 at 501 and 10

[74] Michelle Krekels and Nikki Nilwik, 'Is it time to regulate third-party litigation funding? European Parliament resolution on third-party litigation funding' (2024) 8 Ondernemingsrecht 1, 2.

[75] Brian T. Fitzpatrick, 'How Many Class Actions Are Meritless?', in Brian T. Fitzpatrick and Randall S. Thomas (eds.), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press, 2021) at 63, Hensler, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?', at 513, Paulien Van Den Grinten, Axel Halfmeier, and Vincent Smith, 'The Netherlands, a Forum Conveniens for Collective Redress? (II)', Record of the seminar organised on 5 February 2021 by the Amsterdam, Maastricht and Tilburg Universities, together with the Open University (The European Association of Private International Law, 2021)

[76] Stefaan Voet, 'Costs and Funding of Collective Redress Proceedings', in Astrid Stadler, Emmanuel Jeuland, and Vincent Smith (eds.), *Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution* (Edward Elgar, 2020) at 285

[77] Veljanovski, 'Third-Party Litigation Funding in Europe', at 445

[78] Ibid., at 446

[79] Hensler, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?', at 509

[80] Anthony J. Sebok, 'The Rules of Professional Responsibility and Legal Finance: A Status Update' (2022) 57 Wake Forest L Rev 777; Victoria A. Shanon, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) 36 Cardozo L. Rev. 861, 905 ff.

[81] Susanne Augenhofer and Adriani Dori, 'The proposed regulation of Third Party Litigation Funding – much ado about nothing?', Zeitschrift für das Privatrecht der Europäischen Union 198, 205; Anthony J. Sebok, 'The Rules of Professional Responsibility and Legal Finance: A Status Update' (2022) 57 Wake Forest L Rev 777, 812.

in **Belgium** and **Sweden**.[82] In **Portugal**, doctrinal discussion also arose surrounding the independence and impartiality of the funders involved. The relationship between the funder and the appointed lawyers is questioned, particularly concerning the ethical obligations to which the lawyers are bound. These obligations may be compromised, for example, by the disclosure of confidential information between the lawyer and the funder (thus breaching professional secrecy) or by the acceptance of instructions contrary to the client's interests (thus creating a conflict of interest and compromising the lawyer's autonomy).[83] In **France**, the strict rules on legal privilege and lawyer's obligation on confidentiality are deemed to have hindered the development of TPLF in the French market.[84] In **Spain, Italy, Luxembourg**, and **Sweden**, there are also concerns about ethical and deontological considerations over the work of the lawyer during the proceedings. [85]

In **Germany**, doctrinal discussion on TPLF centred around § 4 of the Legal Services Act (*Rechtsdienstleistungsgesetz*; RDG), according to which legal services which might have a direct influence on the fulfilment of another obligation to perform may not be provided if this jeopardises the due provision of the legal service. This provision is generally understood as a duty to avoid conflicts of interest. In 2021, the legislator confirmed a line of case law with an amendment of § 4 RDG, introduced with Act promoting consumer-friendly offers in the legal services market (*Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt*) of 10 August 2021.[86] In its explanations of the draft bill, the government explained that the mere fact that funders pursue commercial interests does not mean that those interests are in conflict with the interests of the clients.[87] The "clarification" is half-hearted though, as it only explains that pure TPLF without taking any influence on claims management or litigation as well as pure reporting duties are allowed but it does not really clarify where the line to undue influence on claims management or litigation is to be drawn.

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[82] Belgium: Dirk Van Gerven and Arie Van Hoe, 'Derdepartijfinanciering: ethische en deontologische kwesties', *b-Arbitra* 2017, n° 2, 225-251. Sweden: H. Bellander, "Från statlig rättsskipning till privat riskhantering – Mot en ökad användning a tredjemansfinansiering och riskavtal ...eller för" in A. Wallerman Ghavanini and S. Wejedal (eds), *Access to justice i Skandinavien* (Santérus, 2022), pp. 189-210; P. Westberg, *Civilrättsskipning I* (3rd ed) (Norsteds Juridik, 2021) pp.212-214.

[83] Ricardo Silva Pereira, *Third-party funding e implicações éticas na relação com os árbitros* (Revista Internacional de Arbitragem e conciliação, no. 9, 2016) 95; Daniela Filipa Henriques Mendes, *Financiamento de litígios por terceiros* (2021), 48.

[84] Alain Grec, Olivier Marquais, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France', (2020), 16, Asian International Arbitration Journal, Issue 1, pp. 49-68, at 63.

[85] M. Aguilera Morales, "Hacia un marco normativo europeo sobre la financiación de litigios" in MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro* (Atelier, 2022), p. 590; J. C. FERNÁNDEZ ROZAS, "El mercado emergente sobre la financiación privada de litigios responsable en la Unión Europea: un cauce para facilitar el acceso a la justicia a los ciudadanos y las empresas privadas", *La Ley Unión Europea* (2022), núm. 108; G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288; Conference organised in Luxembourg on 15 November 2022 by the *Conférence du Jeune Barreau de Luxembourg* and *Conférence Saint-Yves ;* Ianika Tzankova (2012), 'Funding of mass disputes: lessons from the Netherlands', Journal of Law, Economics & Policy, 8 (3), 549-91.at 550, Voet, 'Costs and Funding of Collective Redress Proceedings', at 289; H. Bellander, "Från statlig rättsskipning till privat riskhantering – Mot en ökad användning a tredjemansfinansiering och riskavtal ...eller för" in A. Wallerman Ghavanini and S. Wejedal (eds), *Access to justice i Skandinavien* (Santérus, 2022), pp. 189-210; P. Westberg, *Civilrättsskipning I* (3rd ed) (Norsteds Juridik, 2021) pp.212-214.

[86] Federal Gazette (*Bundesgesetzblatt*; BGBl.) 2021 I, 3415.

[87] Printed Matters of the Bundestag (Bundestags-Drucksache; BT-Drucks.) 19/27673, 40.

In the **United States**, the Burford/Sysco case accentuated concerns surrounding conflicts of interests, as the funder allegedly prevented the claimant from settling with the defendant.[88] Sysco was about to settle litigations funded by Burford when Burford initiated arbitration to enjoin the settlements. In the course of arbitration and subsequent litigation, Sysco learned that its counsel had, without Sysco's knowledge, told Burford he thought the settlement price was too low and that he suggested initiating arbitration against Sysco. Sysco alleged that the extent of its counsel's relationship with Burford, which spanned several cases, was never disclosed and that, consequently, it never had the chance to waive any potential conflicts. As a result, Sysco fired the law firm. No further action was taken, however, since Sysco and Burford ultimately settled their dispute. The law firm and the attorney involved deny that any breaches of professional responsibility and Sysco's allegations in that respect have not been decided by a bar association or court.

Transparency and disclosure

In light of concerns surrounding potential conflicts of interests, some scholars argue in favour of a certain level of transparency and disclosure.[89] Transparency and disclosure can be imposed by a regulatory framework, from the funding agreement or through the application of civil procedure rules . Transparency and disclosure are discussed as a methods to prevent conflicts of interest, for instance in **Sweden**.[90] The RAD requires full transparency towards the court about the source of funding, and based on that, the court will assess whether there is a conflict of interest.[91] During the expert panel, members of the Advisory Board advised caution about having transparency when it comes to court proceedings, as the defendant could use it to obtain strategic advantages, which might violate the principle of equality between the parties.

Need for regulation

In light of concerns surrounding TPLF, some scholars have argued for regulatory intervention.[92] In **France**, the lack of regulation of TPLF on the French market is deemed to create a certain degree of confusion and uncertainty, potentially leading to funders choosing not to operate in France.[93] Similarly, in Member States where TPLF activity is still limited, more guidance and possible regulation seem to be welcome.[94] In **the Netherlands**, some critics point out that in the absence of legislation there is a risk of the inability of claimants to ensure that the funders have sufficient financial means to comply with their obligations under the TPLF agreements. However, the extent to which TPLF should be regulated at the EU level is the subject of debate in literature. The draft

[88] See the National Report for the United States: the author, Prof Maya Steinitz, served as expert witness in the Burford/Sysco case. See also, M. Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy And Funders' Intermeddling*, Cornell Law Review (forthcoming 2025).

[89] Susanne Augenhofer and Adriani Dori, 'The proposed regulation of Third Party Litigation Funding – much ado about nothing?', Zeitschrift für das Privatrecht der Europäischen Union 198, 206.

[90] H. Bellander, "Från statlig rättsskipning till privat riskhantering – Mot en ökad användning a tredjemansfinansiering och riskavtal ...eller för" in A. Wallerman Ghavanini and S. Wejedal (eds), *Access to justice i Skandinavien* (Santérus, 2022), pp. 189-210; P. Westberg, *Civilrättsskipning I* (3rd ed) (Norsteds Juridik, 2021) pp.212-214.

[91] Recital 52 and Article 10 of Directive 2020/1828

[92] Ianika Tzankova (2012), 'Funding of mass disputes: lessons from the Netherlands', Journal of Law, Economics & Policy, 8 (3), 549-91.at 550, Voet, 'Costs and Funding of Collective Redress Proceedings', at 289

[93] Alain Grec, Olivier Marquais, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France', (2020), 16, Asian International Arbitration Journal, Issue 1, pp. 49-68, at 66.

[94] See for instance the National Report for Estonia.

directive annexed to the EP resolution and the risk of limiting access to justice by this 'one-size-fits-all' approach has triggered extensive discussion in Dutch literature. [95] In **Austria**, there is a doctrinal consensus that a regulatory framework as proposed by the EU Parliament is not needed.[96]

3.2 SYNTHESIS OF THE NATIONAL LEGAL RESEARCH

The synthesis presents the information collected in the course of the legal research. It contains a general description of the legal solutions adopted by the Member States and the practices of TPLF. Additionally, it analyses to what extent existing solutions address the concerns expressed in the EP Resolution and outlines where those solutions are aligned with or differ from the proposals in that Resolution. It also takes into account the key issues discussed during the expert panel.

3.2.1 Legislation applicable to TPLF

In their national reports, national experts detailed the legal framework which applies to TPLF (whether TPLF or non-TPLF specific legislation). In most of the EU Member States, there is no specific regulation of TPLF, except for the provisions implementing the RAD (specifically the implementation of Article 10 of the RAD, 'Funding of representative actions for redress measures'). The practice of TPLF thus operates within the general framework of national contract law and civil procedure. Consumer law, including legislation on unfair contract terms, applies if a consumer is a party to the agreement. Additionally, rules of ethics and professional conduct, in particular regarding conflicts of interests, apply to lawyers.

As specifically requested by the Commission, national experts have researched two non-TPLF specific legislative frameworks which can apply to TPLF: financial and banking regulation (including regulation of investment funds and anti-money laundering rules), and regulation of assignment of claims. Those rules, and how they interact with TPLF, are detailed in the national reports, and are synthesised below.

3.2.1.1 Existing or planned TPLF-specific legislation

- **EU Member States**

Austria: There is no comprehensive legislation regarding TPLF, except for the provisions implementing the RAD.[97] The Supreme Court (Oberster Gerichtshof, OGH) has constantly held that TPLF is permissible under certain conditions.[98] In particular, contractual relations exist only

[95] Michelle Krekels and Nikki Nilwik, 'Is it time to regulate third-party litigation funding? European Parliament resolution on third-party litigation funding' (2024) 8 Ondernemingsrecht 1, 2.

[96] *Asti/Redl*, Prozessfinanzierung: Ein Schlupfloch im Regulierungs-Dschungel?, RdW 2024, 16 ff. considering the proposal as an unnecessary attempt of overregulation. Recently, *Tanja Domej* addressed the proposal in her Expert Opinion for the 74th Deutschen Juristentag (2024) and clearly rejected the draft directive as far-fetched, too (pp. A 23 ff.).

[97] Section 6 (1) of the Law on Qualified Entities of July 17, 2024 (implementing the RAD) explicitly states: "The funding of a representative action by a third party is permitted".

[98] OGH, 23.02.2021, 4 Ob 180/20d, ECLI:AT:OGH0002:2021:0040OB00180.20D.0223.000; OGH, 27.2.2013, 6 Ob 224/12b, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.

between the client and the funder, not between the funder and the lawyer.[99] If these conditions are met, the funder is not considered a "Rechtsfreund" (a person providing legal services) and, therefore, the prohibition of success fees (section 879 (2) no 2 of the Civil Code (ABGB)) does not apply.[100] The contract between the funder and the client is subject to the general provision of Austrian law on abusive clauses.

Belgium: There is no comprehensive legislation regarding TPLF, except for the provisions implementing the RAD.[101] Funding arrangements are governed by the general rules of contract in the Belgian Civil Code. The content of the funding arrangement can be freely agreed upon by the parties, so long as it does not result in a violation of public policy. The Order of Flemish Bars issued a number of non-binding and deontological Recommendations on TPLF dealing with lawyer independence, lawyer's fees, information obligations of the lawyer and their impact on professional liability, intervention of the lawyer in the conclusion of the agreement with the funder, confidentiality and professional secrecy and disclosure of TPLF.

Bulgaria: There is no comprehensive legislation regarding TPLF, and TPLF is neither explicitly regulated nor explicitly banned. The RAD is still in process of implementation in Bulgarian legislation.[102] The general rules and principles of the Bulgarian Civil Procedural Code apply to TPLF.

Croatia: There is no comprehensive legislation regarding TPLF, except for the provisions implementing the RAD.[103] TPLF is primarily provided in Croatia through the assignment of claims.

Cyprus: Third-party litigation funding is neither regulated nor prohibited in Cyprus law, except for the provisions implementing the RAD.[104] Courts have held, in the context of enforcement of foreign judgments, that TPLF does not violate Cyprus public policy, insofar as it enables access to justice.[105]

Czech Republic: There is no comprehensive legislation regarding TPLF, except for the provisions implementing the RAD.[106] There are few cases and limited data available.

Denmark: Legislation on TPLF is limited to representative actions filed on behalf of consumers collective interest within the remit of the implementation of the RAD.[107] There is no general legislation of the legal admissibility and conditions of using TPLF in civil litigation in Denmark, but the Danish Supreme Court has, in a judgment from 2017, accepted the use of litigation

[99] § 6 (1), 2nd sentence of the Law on QE is based on this understanding of the legal relationships in TPLF.
[100] Raunigg zu OGH 25.3.2021, 2 Ob 10/21s, ecolex 2021/516; Schuschnigg, Prozessfinanzierer als Rechtsfreund, ÖJZ 2022, 969 ff.
[101] Belgian Act of 21 April 2024.
[102] A Bill on Representative Actions for Protection of Consumers Collective Interests is currently pending before Bulgarian Parliament.
[103] Act on Representative Claims for the Protection of Collective Interests and Consumer Rights of 25 June 2023, Official Gazette No. 59/23.
[104] Injunctions and Representative Actions for the protection of Collective Consumer Interests Law 2023.
[105] Kazakhstan Kagazy PLC v Arip, ECLI:CY:EDLAR:2022:A8.
[106] Law 179.
[107] Representative Act (406 2023).

funding based on a model close to TPLF,[108] and it is the general perception, that TPLF is legal in Denmark and governed by contract law.[109]

Estonia: There is no legislation or case law on TPLF in Estonia. Estonia has not yet transposed the RAD and there is no other legislation concerning the use of TPLF in litigation.

Finland: There is no comprehensive legislation regarding TPLF, except for the provisions implementing the RAD.[110] Third-party funding of collective actions is regulated and permissible when in line with the requirements set for designation of qualified entities in the Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities (DQEA).[111]

France: There are no specific legislative or regulatory provisions governing TPLF in France, nor does any provision of French law prohibit TPLF. A draft law implementing the RAD, currently being examined by the French Parliament, contains provisions on TPLF in the context of collective redress.[112]

Germany: Germany does not have a general legal regime on TPLF, thus TPLF is, in principle, allowed in Germany. There are, however, specific rules for certain players and for certain situations. In particular, lawyers are prohibited to offer litigation funding to their own clients. Germany has severely restricted TPLF of redress actions in the context of the implementation of the RAD with a 10% cap of the funder's share in the gains.[113]

Greece: Greece has no existing or planned legislation specifically addressing TPLF. The only relevant provision prohibits TPLF in representative actions.[114]

Hungary: Hungary has no current or planned legislation to regulate TPLF. For collective representative actions in consumer disputes, Act CLV of 1997 on Consumer Protection,[115] which reflects the provisions of the RAD, is the first legislative act in Hungary that mentions TPLF.

Ireland: TPLF is currently illegal in Ireland on the grounds that it constitutes maintenance and champerty. Reform of the law is being considered following the issue of the Law Reform Commission's consultation paper, *Third-Party Litigation Funding*, in July 2023.[116]

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[108] See U 2017.1815 H. The Supreme Court found no basis for overriding an agreement between a bankruptcy estate and another creditor to pay security for the costs of the action against a consideration for the security of 50% of the potential outcome of the case.

[109] See report from the Danish judicial think tank p. 47: Analyse-Erhvervslivets-adgang-til-domstolene.pdf (justitia-int.org)

[110] Class Actions Act, Ryhmäkannelaki 13.4.2007/444, amended to implement the RAD.

[111] As of October 2024, only one private actor, Kuluttajaliitto - Consumer Union, has passed the designation process in Finland.

[112] Draft law containing various provisions for adapting to European Union law in the fields of economics, finance, the environment, energy, transport, health and the movement of persons, Text No 352 (2024-2025) sent to the Senate on 18 February 2025.

[113] § 4 para. 2 no. 3 of the Act on Enforcement of Consumer Rights (*Verbraucherrechtedurchsetzungsgesetz*; VDuG).

[114] Law 5019/2023, Article 8, pursuant to which Article 10n of Law 2251/1994 is provided for that "Third-party legal funding is prohibited for representative action."

[115] 1997. évi CLV. törvény a fogyasztóvédelemről available at https://net.jogtar.hu/jogszabaly?docid=99700155.tv

[116] Law Reform Commission, *Third-Party Litigation Funding* (LRC CP 69 – 2023), available at https://www.lawreform.ie/_fileupload/consultation%20papers/lrc-cp-69-2023-third-party-funding-full-text.pdf

Italy: There are no specific legal provisions governing the practice of TPLF, except for the provisions implementing the RAD.[117] The practice of TPLF operates within the general framework of Italian contract law (Article 1322 of the Italian Civil Code dealing with atypical contracts) and civil procedure.

Latvia: There is no existing or planned legislation on TPLF, except for the provisions implementing the RAD.[118]. Cases where TPLF is used are limited, not publicly reported, and obligations of funders and beneficiaries are contractually and privately agreed upon.

Lithuania: The Lithuanian TPLF legislation exists only with regard to representative actions undertaken by qualified entities to protect the collective interests of consumers, following the implementation of the RAD.[119] From 1 January 2023, provisions on third parties who cover a litigant's arbitration costs are contained in the Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court ("VCAC Rules").[120] These Rules also cover requirements on disclosures.

Luxembourg: There is no specific legislation regarding TPLF in place. The only existing legal framework in the Luxembourg legal regime which refers to TPLF is the bill of law number 7650 on class actions (transposing the RAD), which is currently being discussed in the Luxembourg Parliament.

Malta: TPLF is not expressly prohibited in the Maltese jurisdiction, unless it is characterised as quota litis or champerty. The only piece of legislation that explicitly mentions and allows for TPLF (in limited circumstances) is the Representative Actions Act 2023 implementing the RAD, though there is a lack of a regulatory framework from the specific Act as well as Maltese law in general for TPLF.

The Netherlands: There is no statutory legislation that specifically regulates TPLF in the Netherlands, apart from the provisions implementing the RAD.[121] The 2020 Mass Damage Settlement in Collective Action Act (*Wet afwikkeling massaschade in collectieve actie* – WAMCA) provides for limited conditions on TPLF and are mainly focused on standards to be complied with by claiming organisations. The independence of representative organisations is ensured by the rules on transparency enacted following the implementation of the RAD. Similar standards and requirements can be found in the Claim Code and the WAMCA, and are normally scrutinised and assessed by the courts, to ensure a sufficient level of safeguards. No new legislation is planned.

Poland: There is so far no existing or planned legislation concerning TPLF. The recent amendment of the Collective Actions Act (CAA), implementing the RAD, contains provisions on disclosure,

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[117] Legislative decree transposing and implementing Directive (EU) no. 2020/1828 on representative actions for the protection of consumers' collective interests, [2020] OJ L 409, 1-27.

[118] The Latvian Consumer Rights Protection Law was amended to include a provision implementing Article 10 of the RAD.

[119] Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure of the Republic of Lithuania [2008] No. 137-5366 ("Lithuanian Implementation Law No. 137-5366"), art 31(27) <https://www.infolex.lt/ta/57888> accessed July 24, 2024

[120] Solveiga Vilčinskaitė, "Commercial Arbitration in 2022: Do Key Trends Make Arbitration an Attractive Alternative to Courts?" (*TeisėPro*, 20 January 2023) <https://www.teise.pro/index.php/2023/01/20/komercinis-arbitrazas-2022-aisiais-ar-del-pagrindiniu-tendenciju-arbitrazas-ir-toliau-lieka-patrauklia-alternatyva-teismams/> accessed July 24, 2024; Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court 2015, art 1, art 5, art 42 <https://www.arbitrazas.lt/failai/2022/2023_ENG_VCCA_Arbitration%20Rules.pdf> accessed July 24, 2024

[121] Representative Actions Directive Implementation Act (*Implementatiewet richtlijn representatieve vorderingen voor consumenten*).

transparency of and supervision over TPLF agreements.[122] These provisions only apply to representative actions for the protection of collective interests of consumers.

Portugal: There is no specific regulation of TPLF except for the provisions implementing the RAD.[123] The general framework of contractual freedom and the rules governing legal transactions under the Portuguese Civil Code apply to TPLF.

Romania: There is no specific regulation of TPLF except for the provisions implementing the RAD.[124] TPLF is generally deemed permitted according to the principle that in civil proceedings, everything that is not explicitly banned is allowed.[125] The principle of contractual freedom applies to TPLF,[126] as long as it does not infringe good morals or mandatory provisions of Law 51/1994 on the lawyer profession,[127] the Statute of the Lawyer Profession[128] or the Lawyers' Ethics Code.[129]

Slovakia: There is no specific regulation of TPLF except for the provisions implementing the RAD.[130] The practice of TPLF operates within the general framework of contract law and civil procedure.

Slovenia: TPLF in Slovenia is regulated through the Collective Actions Act[131], amended in December 2023[132]. The latest amendments to the Collective Actions Act completed the transposition of the RAD. The Slovenian Attorneys Act addresses conflicts of interest, with safeguards requiring attorneys to prioritize their clients' interests and prohibiting conflicting business activities.[133]

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[122] Collective Actions Act (Act of 24 July 2024 amending the Collective Actions Act and some other acts, Dziennik Ustaw (Journal of Laws) 2024, 1237).

[123] Decree-Law No. 114-A/2023.

[124] Law 414/2023 on representative actions for the protection of consumers' collective interests, published in the Official Gazette of Romania, Part I, no 1158/20.12.2023.

[125] Tamara Ungureanu 'Finanțarea litigiilor de comerț _internațional prin procedeul „Third party litigation funding' [2015] Revista Moldovenească de Drept Internațional și Relații Internaționale, 1, 125, 133; Cosmin Vasile and Alina Tugearu, 'Litigation 2025: Romania' (*Chambers Global Practice Guides*, 3 December 2024) <https://practiceguides.chambers.com/practice-guides/litigation-2025/romania> accessed 16 December 2024; Zamfirescu Racoti Vasile & Partners, 'Q&A: conducting litigation in Romania' (*Lexology*, 21 July 2023) <https://www.lexology.com/library/detail.aspx?g=b7d638f9-7bef-4609-a6d5-c1d1b8be48d7#:~:text=Litigation%20funding%20by%20a%20third,is%20not%20interdicted%20is%20permitted> accessed 16 December 2024.

[126] Yarina Laufer, 'Finanțarea de către terți a litigiilor. Impactul tendințelor europene asupra profesiei de avocat în România' (*Juridice*, 30 June 2023) <https://www.juridice.ro/692634/finantarea-de-catre-terti-a-litigiilor-impactul-tendintelor-europene-asupra-profesiei-de-avocat-in-romania.html> accessed 16 December 2024.

[127] Law 51/1995 for the organization and exercise of the lawyer profession, republished in the Official Gazette of Romania, Part I, no 440/24.06.2018.

[128] The Statute of the Lawyer Profession of 03.12.2011, published in the Official Gazette of Romania, Part I, no 898/01.12.2011.

[129] Annex to Decision no. 268/17.06.2017 of the Council of the National Union of Romanian Bar Associations.

[130] On July 25, 2023, the Act on Actions for the Protection of the Collective Interests of Consumers (the Class Action Act) came into force.

[131] Collective Actions Act (Zakon o kolektivnih tožbah (ZKolT-A), Uradni list RS, št. 55/17 in 133/23)

[132] Act amending the Collective Actions Act (Zakon o spremembah in dopolnitvah Zakona o kolektivnih tožbah (ZKolT-A), Uradni list RS, št. 133/23)

[133] Slovenian Attorneys Act (*Zakon o odvetništvu*), Official Gazette of the Republic of Slovenia, No. 94/2007.

Spain: There is no specific regulation of TPLF except for the proposed provisions in the draft law implementing the RAD.[134] However, as of December 2024 the Draft Law to implement the 2020 Directive was excluded from parliamentary discussion for political reasons.[135]

Sweden: There is no legislation on TPLF apart from the Swedish legislation implementing the RAD.[136] The practice of TPLF operates within the general framework of contract law and civil procedure.

Non-EU jurisdictions

Switzerland: TPLF is allowed in Switzerland although there is no specific legislation on the subject. Two landmark decisions of the Swiss Federal Court provide a basic framework for litigation practice (see BGE 131 I 223 and BG, 2C_814/2014).[137]

United Kingdom: There is no specific legislation on TPLF. In R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors [2023] UKSC 28 ('PACCAR'), the Supreme Court held that LFAs whereby the funder is entitled to a percentage of any damages recovered are "claims management services" and were covered by "damages-based agreement" requirements. This rendered LFAs with returns based on a percentage of the claimed amount subject to the DBA regulations. This made many LFAs unenforceable, forcing funders to renegotiate their LFAs with the funded party. Post-PACCAR, the funder's success fee in most re-negotiated LFAs is calculated on a multiple-of-costs basis. Cases are currently before the Court of Appeal to determine whether LFAs with returns based on a multiples are also subject to the DBA Regulations.

Canada: There is no existing legislation that directly addresses TPLF, nor any planned legislation. Most of the guidance has come from the development of the common law on a case-by-case basis.

United States: TPLF is not centrally regulated in the United States. It is subject to the overlapping jurisdiction of state and federal courts, state and federal legislatures, regulatory agencies, and bar associations. Legislation, regulation, and oversight of TPLF is being undertaken at each of those levels – much of it centred around the questions of when and whether TPLF should be disclosed; how to mitigate conflicts of interest created by TPLF (including the potential for claimants to lose control over their case to funders); and the identification of any foreign individuals, entities, or countries that may be providing the funding. At least 12 state legislatures and the U.S. Congress have passed or considered TPLF legislation.[138] Many federal and state courts have issued standing orders regarding litigation finance.

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[134] The 'Proyecto de Ley Orgánica de medidas en materia de eficiencia del Servicio Público de Justicia y de acciones colectivas para la protección y defensa de los derechos e intereses de los consumidores y usuarios', which was presented on 22 March 2024 and is still in the parliamentary procedure.

[135] See the National Report for Spain.

[136] Lag (2023:730) om grupptalan till skydd för konsumenters kollektiva intressen.

[137] In BGE 131 I 223, general Swiss private law provisions as well as the Federal Act on the Free Movement of Lawyers (FMLA) were ruled to be applicable to TPLF, and were considered to provide an adequate regulatory framework. In BG, 2C_814/2014, the Court focused on conflict of interests and Art. 12(a) and (c) FMLA.

[138] See the US National Report under "planned legislation".

3.2.1.2. Non-specific TPLF legislation

In their national reports, national experts present non-TPLF specific legislative frameworks which can apply to TPLF. This section presents an overview on the financial and banking regulations (including regulation of investment funds and anti-money laundering rules), and regulation of assignment of claims, which could interact with TPLF.

- ***Assignment of claims***

Rather than following a TPLF model, the sale or assignment of a claim might be appealing to both claimant and funder. The claimant might prefer to transfer the claim to another party so as not to engage in costly and time-consuming litigation. As to the funder, they might prefer to have control over the claim, including decisions about litigation strategy (i.e., settlement).[139] Assignment of claims is generally possible and permissible in all EU Member States and non-EU jurisdictions selected in this study. However, the practical interaction of assignments of claims with TPLF has been observed and/or discussed only in some jurisdictions, which are the ones detailed below.

In some civil law jurisdictions, funders can adopt a model where the claim is purchased outright and pursued by the purchaser, possibly aggregated to other similar claims so as to save costs. In **Germany**, claims that are subject to litigation may be assigned to the funder as security, which German law allows.[140] In **the Netherlands**, a claim can be transferred unless precluded by law or the nature of the right.[141] The transferability of a claim can be expressly excluded by agreement.[142] Within the Netherlands, TPLF funded cases generally are mass claims that are filed under the Dutch 3:305a collective action regime, as well as cases that use the assignment-model. In **Croatia**, classic (commercial) TPLF has been utilised in numerous cases and it has been, in all known cases, achieved through a purchase or assignment (predominantly) of the claim. Assignment is regulated by Civil Obligations Act ("COA"). COA allows creditors to assign their claims through contracts to third parties.

In **Italy**, the assignment of claims appears to be permitted within the legal system, as indicated implicitly by Article 1261 of the Italian Civil Code. What remains unclear is the procedural issue which may arise if the court, at the trial, becomes aware of the assignment of a claim to the funder before the court litigation. In fact, in such case, the plaintiff is claiming a right belonging to somebody else and this may represent a breach of Article 81 of the Italian Code of Civil Procedure ("Sostituzione Processuale"), according to which "nobody can claim the rights of somebody else". In practice, the funders prefer the practice of the assignment of rights over claims, as the former is perceived as less problematic and more feasible.

In **Spain**, the assignment of claims is common and permissible. However, case law has imposed a limit when it involves a future claim against a public administration, such as in the case of claims for liability against the State (an area, in turn, in which it may make sense to resort to third-party funding). Specifically, the Judgment of the Supreme Court (Administrative Chamber, 8th Section) no. 53/2020 of 22 January[143] has established that the claim arising from the liability of an

[139] International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018) at 40.
[140] See Ruby, A. III. 5. Prozessfinanzierung, in: Klinger (ed.), Münchener Prozessformularbuch, vol. 4 Erbrecht, 5th ed., 2021, para. 5. See also § 6 no. 1 of the model contract of LEGIAL.
[141] Art 3:83(1) of the Dutch Civil Code.
[142] Art 3:83(2) of the Dutch Civil Code.
[143] ECLI:ES:TS:2020:124

Administration can only be assigned once it has been finally recognised by the Administration itself or, if not, by a final judgment. Thus, it is impossible to assign the claim before it has been recognised to its original owner. According to this case law, the assignee could not be the one to initiate the corresponding administrative or judicial proceedings to recognise the claim and seek compliance and/or enforcement claim it. This effectively excludes this special form of TPLF with respect to public administrations.

In **Latvia**, pursuant to Article 1793 of the Civil Law[144] claims may be transferred from a former creditor to a new one by cession, which may take place: 1) pursuant to law, without an expression of intent from the former creditor; 2) pursuant to a judgment of a court; 3) pursuant to a lawful transaction, regardless of whether it was entered into by the creditor on the basis of a legal duty or voluntarily. The latter form is often used and commonly entails a creditor assigning the claim to a new one (usually, a credit collection company) who litigates with debtor.

In **Ireland**, as an alternative to pursuing legal proceedings with the assistance of TPLF a litigant may prefer to assign the claim to a third party in exchange for some suitable payment. However, as champerty rules are still applicable, the assignment of claims as means of funding might be limited or prohibited. Frequently, an assignment would provide the assignor of the claim with a guaranteed payment and transfer the risk of the litigation being unsuccessful to the assignee. However, the law on assignment in Ireland does not offer litigants much of a viable alternative to TPLF. The Supreme Court's decision in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*[145] effectively eliminates assignment as a means of funding almost all civil claims. Only if the right to sue being assigned is for the enforcement of a property right or liquidated debt or the assignee has a pre-existing interest in the assignor's claim will the validity of an assignment be recognised. The courts consider that the assignment of a claim in other circumstances amounts to trafficking in litigation which is not to be encouraged.

In the rest of the EU Member States, so far, most cases funded would appear not to be based on an assignment model. There are also few examples of international arbitration claims being arrogated in this way.[146]

In **Canada**, TPLF takes the form of passive investment with the litigation funder remaining at arm's length during the proceedings. However, in some cases, parties have ceded significant amounts of control of litigation proceedings in a bid to arrange financing. This is done through assigning causes of action. These funding arrangements are permitted in certain limited circumstances, but courts remain wary as champerty & maintenance laws apply. In *7779615 Canada Inc. v British Columbia Hydro and Power Authority,*[147] *(BC Hydro),* Reconcept GmbH, a German investment firm, advanced a loan to the plaintiff for a wind farm project. That loan was not repaid, which gave Reconcept control of the shares of the plaintiff according to the terms of the loan agreement, making Reconcept the sole shareholder. Reconcept then entered into a litigation funding agreement with the plaintiff and others against BC Hydro that entitled Reconcept to control the litigation. BC Hydro applied to strike out the claim, arguing that assigning one's claim to be handled and litigated by a third-party violated the rules of maintenance and champerty. The court ruled that an assignment of a cause of action in tort is possible where a plaintiff has an obvious and commercial interest in litigation that pre-dates the litigation agreement. The court found that the funder had a genuine

[144] Civil law [28.01.1937.] OJ 41. Available at https://likumi.lv/ta/en/en/id/225418-civil-law [visited 25.07.2024].
[145] [2019] IESC 44.
[146] International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018) at 41.
[147] 2023 BCSC 2094

and pre-existing interest in the litigation and, accordingly, held that the assignment was not tainted by maintenance or champerty. In that capacity, it was entitled to direct litigation even without the litigation funding agreements.

In the **UK**, the assignment of claims to a funder is used in family and insolvency disputes. The High Court has taken the view that family litigation funded by an adherent to the ALF's Code of Conduct would not present significant risk of corrupting justice. In *Akhmedova. v. Akhmedov* [2020] EWHC 1526 (Fam), the wife assigned all her rights to the funder. However, under the assignment, she retained full control over the litigation unless she defaulted in making a payment to the funder. The funder was consulted on decisions in the litigation and retained a right to consent on any settlement. The court did not view this arrangement as falling foul of the rules on champerty and maintenance.

- ***Financial regulations / investment funds***

All jurisdictions have existing banking and financial regulatory frameworks (including regulation of investment funds and anti-money laundering rules) that impose specific conditions for authorisation, including capital adequacy, that could potentially apply to litigation funders, depending on their nature/structure. The jurisdictions where the interaction of those regulations with TPLF has been discussed and/or observed in practice are listed below.

In **Bulgaria**, it would be possible in theory for an authorized or registered alternative investment fund to finance litigation proceedings as a form of high-risk investment, in which case the provisions of the Activity of Collective Investment Schemes and other Collective Investment Enterprises Act 2011 ("ACISCIEA")[148], and the regulations for its implementation, would apply to that activity. However, there is no publicly available information on whether an authorised or registered investment fund has financed any litigation proceedings in Bulgaria.

In the **Czech Republic**, the Act on Investment Companies and Investment Funds (Act No. 240/2013[149]) regulates the activities of investment funds, including risk management and transparency. As per this Law, investment funds involved in TPLF must comply with its provisions to ensure investor protection and proper fund operation. Furthermore, the Capital Market Act (Act No. 256/2004[150]) sets limits on how investment products, including those that could be potentially linked to litigation funding, can be marketed and sold, ensuring that only qualified investors have access to high-risk financial services. The Anti-Money Laundering Act (Act No. 253/2008[151]) requires due diligence and transparency regarding the origin of funds which also extends to TPLF funds, to ensure that illegal activities such as money laundering are prevented. Finally, the Foreign Investment Screening Law (Act No.3/2021[152]) even though it may not be directly related to TPLF, could affect such funding as it ensures that foreign investments, including those that may be interested in funding litigation in the Czech Republic, do not pose any threat to national security or public policy.

In **Denmark**, there is no specific regulation of funders or the funding industry of TPLF in Denmark, but - depending on how the funder is organised - general financial regulation may apply, including the Alternative Investment Fund Managers etc. Act (231 2024), which implement the Alternative

[148] The Activity of Collective Investment Schemes and other Collective Investment Enterprises Act 2011 (in Bulgarian) is available under this link https://lex.bg/bg/laws/ldoc/2135754011 accessed 27 September 2024
[149] https://www.zakonyprolidi.cz/cs/2013-240
[150] https://www.zakonyprolidi.cz/cs/2004-256
[151] https://www.zakonyprolidi.cz/cs/2008-253
[152] https://www.zakonyprolidi.cz/cs/2021-3

Investment Fund Managers Directive (2011/61/UE). Furthermore, a funder operating in Denmark may also be subject to the Danish Legal Advice Act (419 2006), which applies to anyone (apart from lawyers) who, for commercial purposes, conducts business with advice of a predominantly legal nature, when the recipient of the advice mainly acts outside his profession (a consumer).[153] A funder, which – as a part of funding one or more consumer claims – "advice of a predominantly legal nature" (the exact definition is not yet settled) will have to take into account the limitations, which follows from the Legal Advice Act.

In **Italy**, financial activities in the country are heavily regulated by the Italian financial authorities, including the Bank of Italy and the Italian Securities and Exchange Commission (CONSOB). Stakeholder data indicates that the entity 'Be Cause' is the sole funder with the legal form of a SICAV (Società di investimento a capitale variabile) regulated under Italian law. This distinction means that Be Cause is subject to specific financial regulations and requirements applicable to SICAVs in Italy. Unlike other fund structures, a SICAV is an open-ended collective investment scheme, which allows for a flexible capital structure where the capital varies according to investor subscriptions and redemptions.

In **Latvia**, presumably, in order to provide TPLF services, the financier will need to obtain a special licence from the supervisory authority and in Latvia this could be the Bank of Latvia. There are strict requirements for the investment funds' shareholders, board members, amount of capital etc. and to obtain license the fund must prove that those requirements are fulfilled. The fund must also draft an inner pack of documents covering, amongst others, items such as conflicts of interests, and transaction execution policies. Those requirements are very similar to Article 5 of the draft directive annexed to the EP resolution.

In **Luxembourg**, financial sector actors subject to the law of 12 November 2004 on combating money laundering and terrorist financing (the 12 November 2004 Law) must comply with three types of obligations: (i) customer due diligence, which involves identifying the client or the persons they represent and may require documentation justifying one's professional activity, address, and source of funds; (ii) adequate internal management requirements; and (iii) obligations to cooperate with and inform the authorities of any suspicion of money laundering activities, particularly concerning the origin of the funds or the purpose, nature, and procedure of a transaction. Additionally, the Luxembourg law of 25 March 2020 extends the scope of the 12 November 2004 Law and, in several respects, goes beyond the EU Directive 2018/843 (the 5th AML Directive), by requiring entities to consider recommendations from the Financial Action Task Force (FATF). In this framework, the funder's management company must take into account compliance with these AML/KYC regulations when dealing with risk management protocols, administrative task, and more.

In **Poland**, investment funds are regulated in Poland by the Act of 27 May 2004 on investment funds and management of alternative investment funds (Dziennik Ustaw of 2024, item 1034). The insurance companies are regulated by the Act of 11 September 2015 on insurance and re-insurance activities (Dziennik Ustaw of 2023, items 614, 656, 825, 1723, 1941). Both laws contain provisions concerning transparency of the activity of the funds and companies, their registration, competition law provisions and enforcement by the European Commission and the Office for the Protection of Competition and Consumers. According to Article 32a.1 of the Act on investment funds and management of alternative investment funds, investment funds are required to maintain technical

[153] Lawyers are instead covered by the Danish Bar and Law Society, Code of Conduct: Microsoft Word - AER 2022 01082022 allerettelseraccepteret (advokatsamfundet.dk).

and organizational measures to ensure that any conflicts of interests are prevented. They are also required to employ persons who will be in charge of such measures, and to train them appropriately. Insurance companies do not have such a duty according to the Act on insurance.

In **Sweden**, here is no specific regulatory oversight of funders or the TPLF industry. However, under the Currency Exchange and Other Financial Services Act ("OFFA")[154], so called other financial services are considered financial institutions that must register their operations with the Swedish Financial Market Regulator (Swe: Finansinspektionen) (FI). FI only conducts supervision of compliance with anti-money laundering regulations of such institutions. FI also conducts an ownership and management assessment in conjunction with the registration application (and thereafter annually). Changes in management or ownership should be reported to FI.[155] In the context of breach of anti-money laundering rules, FI may order the institution to correct its breach, or if a systematic breach takes place order the cessation of operation of the institution, OFFA Section 13. There are also rules on personal and corporate sanctions against the entity and its board members and CEO, OFFA Sections 14-23. One of the local funders has confirmed in the context of its interview for this project that it is registered with FI under OFFA. To the extent that the operations of a funder would be considered to fulfil the requisites for other regulated action on the financial market, other rules and regulation may apply to them.[156] However, there is so far no information that TPLF funders on the Swedish market would be under any other form of financial market regulation.[157]

In the rest of the EU Member States, financial and banking regulations exist, but no specific interactions with TPLF were reported. Outside of the EU:

In **Canada**, the *Companies Creditors Arrangement Act* (*CCAA*)[158] allows both recourse and non-recourse financing options. Recourse funding takes the form of debtor-in-possession (DIP) financing.[159] TPLF can also be approved as interim financing when the judge in the case determines that it is fair and reasonable and in line with the objectives of the *CCAA*. In the *Bluberi* case[160], the Supreme Court of Canada approved TPLF as interim financing under s 11.2 of the *CCAA*. It noted that while this funding differs from other, more common forms of interim financing, "where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage."[161] TPLF accomplishes the purpose of interim financing by allowing the debtor to realize on the value of its assets. In *Bluberi*, the single asset was a potential litigation claim of more than $200 million in damages against a creditor, Callidus.

[154] The Currency Exchange and Other Financial Services Act (Swe: Lag (1996:1006) om valutaväxling och annan finansiell verksamhet) available here: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-19961006-om-valutavaxling-och-annan_sfs-1996-1006/.
[155] See: https://www.fi.se/en/payments/apply-for-authorisation/currency-traders-or-other-financial-operations/.
[156] See the website of FI: https://www.fi.se/en/ for information financial market regulation in Sweden.
[157] See further analysis regarding the potential legal classification of TPLF in Skog and Persson pp. 133-144.
[158] *RSC 1985, c. C-36 (CCAA)*
[159] See for a brief explanation of DIP financing in a Canadian context: https://ca.practicallaw.thomsonreuters.com/w-025-1386?transitionType=Default&contextData=(sc.Default)
[160] *9354-9186 Québec Inc. v Callidus Capital Corp*, 2020 SCC 10 (*Bluberi*)
[161] *Bluberi*, ibid [96]

3.2.2 Degree of compatibility of TPLF regulation with the EP Resolution

The following comparative table presents the degree of compatibility of TPLF regulation in the EU Member States and selected non-EU jurisdictions with the measures proposed in the EP Resolution. Member States that are listed are jurisdictions where national experts reported 'compatibility', 'partial compatibility', or commented on the need for and the value added of the proposed measure. Member States that are not listed are jurisdictions where national experts reported 'no compatibility' (no domestic provision equivalent or similar).

Table 1: Comparative table presenting the degree of compatibility of TPLF regulation in the EU Member States and selected non-EU jurisdictions with the measures proposed in the EP Resolution

Measure (Art.)	Compatibility with the TPLF regulation
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	***EU Member States and the selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 4 and Art. 5. Partial compatibility is reported as courts exert a level of control. Partial compatibility is also reported where financial and banking regulations impose conditions for authorisation. These conditions are, however, not homogenous, vary between jurisdictions, and may not apply to funders depending on the nature/structure of the fund.*** **Estonia**: There is a list of authorised persons in the § 4974(1) of the Code of Civil Procedure. However, there is no plan to create a system for the authorisation and monitoring of the activities of litigation funders. Existing system seems to be sufficient (licencing all kind of credit and investment services according to the CCIA). **Italy**: No specific TPLF regulation. Italian Financial Regulation applies to SICAV (open-ended collective investment scheme), under which one litigation funder operating in Italy currently falls under. **Sweden**: Not a specific authorization system, but there is a general reporting and limited supervision system under the Currency Exchange and Other Financial Services Act (Swe: Lag (1996:1006) ("OFFA"). **The Netherlands**: There is no legislation on the authorisation system and the conditions, but the control entrusted to the judiciary meets the requirement. Thus, it may be considered unnecessary to introduce the legislation to this end. **Canada**: There is no legislation governing authorisation. However, the courts are entrusted to scrutinize and in class actions, approve, LFAs. Some of the litigation funders operating in Canada are members of the Association of Litigation Funders UK and subject to that association's Code of Conduct. **United Kingdom:** No specific legislation governing authorisation. However, the courts scrutinize LFAs. Funders who are members of the Association of Litigation Funders UK are subject to the association's Code of Conduct.

	United States: No licensing requirements in the U.S. analogous to those found in Article 4. TPLF legislation at the state level. At least 12 state legislatures and the U.S. Congress have passed or considered TPLF legislation. Lawmakers have in recent years introduced legislation which would require the disclosure of the participation of litigation finance in class and mass actions, the disclosure of the existence and identity of any foreign entity invested in a lawsuit, and disclosure of funding generally. There are no countrywide disclosure or reporting requirements for TPLF. **Switzerland:** No overseeing authority dedicated solely to Funders. A litigation funder does not, *per se*, entail the supervision of the FINMA – the supervising authority over the Swiss Financial Market. The existence of authorization and surveillance imperatives is rather dependent on the funder's corporate structure and business model. If the funder acts as an intermediary who manages funds accrued from open-ended collective investment schemes and injects them into judicial proceedings – in which case it should be subject to the Financial Institutions Act (FinIA), the Anti-Money Laundering Act (AMLA), the CISA, as well as the FINMASA.

Capital adequacy (Art.6)	***EU Member States and the selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 6. Funders may, depending on the structure of the fund, be subject general banking and financial regulations, including capital adequacy requirements. These regulations vary between jurisdictions and may not apply to funders depending on the nature/structure of the fund.*** **Estonia:** § 12 of the CCIA provides that the obligation to prove the amount of the capital in the process of authorisation is applicable to all service providers. **France:** Generally, investments funds in France are required to offer sufficient guarantees regarding their financial resources (Article L214-24-44 of the Monetary and Financial Code). **Sweden:** Limited requirements on litigating parties for collective actions. **Italy**: No specific TPLF regulation. Italian Financial Regulation applies to SICAV (open-ended collective investment scheme), under which one litigation funder operating in Italy currently falls under. **The Netherlands**: There is no legislative requirement of capital adequacy upon the funder, but the WAMCA imposes the capital requirement directly on the representative organisation. In addition to that, it is upon the Dutch judiciary to verify the capital adequacy. **Canada**: There exist no capital adequacy requirements or anything akin to such requirements in Canada. As some of the litigation funders operating in Canada are members of the Association of Litigation Funders UK, these funders are subject to the terms of the Code of Conduct. This includes a requirement members have at least 5M pounds capital or such other amount as stipulated by the association. The Code also imposes other requirements regarding overall financial liquidity, financial auditing, and reporting. **United Kingdom:** No regulated capital adequacy requirements. Funders who are members of the Association of Litigation Funders are subject to the Code of Conduct. Members must have at least £5M capital. The Code also imposes other requirements regarding overall financial liquidity, financial auditing, and reporting. **United States:** Securities and Exchange Commission rules require private equity funds to confidentially report on the percentage of their capital earmarked for litigation finance. Generally, there is no general capital adequacy requirement, nor any body with the power to verify capital adequacy, except when the funder might be subject to such requirement independently of whether it is engaging in litigation funding.

Fiduciary duty (Art.7)	***Members States have not reported TPLF-specific provisions compatible or equivalent to Art. 7. Poland and Italy report partial/limited compatibility with general investment fund regulation, under which some funders might fall. Outside of the EU, one US State (Arizona) imposes fiduciary duties on funders.*** **Italy**: Italian Financial Regulation applies to SICAV (open-ended collective investment scheme), under which one litigation funder operating in Italy currently falls under. **Poland**: Limited compatibility: 1. with regard to investment funds in general – investment funds are required to maintain technical and organisational measures to ensure that any conflicts of interests are prevented (Article 32a.1, Act of 27 May 2004). 2. With regard to qualified entities: the burden of ascertaining that funding by a third party does not compromise the Qualified Entity's impartiality and its ability to adequately represent and protect consumer interests has been placed solely on the Qualified Entity. The supervisory powers - the Head of the Office for the Protection of Competition and Consumers (HOPCC) has the power to determine whether or not an entity should be a Qualified Entity for the purposes of the Representative Actions under RAD. The entities are required to have in place adequate procedures to assess and address conflicts of interest between the entities, the funders and the consumers. **The Netherlands**: Prohibition of influence is already granted by the Directive as implemented in WAMCA, as well as in the 2019 Claim Code. **Canada:** Funders have an obligation to negotiate an agreement that is neither champertous nor unconscionable and that control of the litigation rests with the beneficiaries. **Switzerland:** No specific regime/procedures ensuring the respect of the funders' fiduciary duties. **United States:** Other than in Arizona, there are not yet fiduciary duties on funders in the United States. Working assumption so far has been that the ethical regulation of lawyers, including their fiduciary duties, serves as indirect regulation of funders.
Powers of supervisory authorities (Art.8)	***Members States and selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 8, except in some Member States in the context of financial regulation, or consumer collective redress.*** **Denmark**: No compatibility but a funder may – depending on the structure of the fund – be subject to general financial regulation, which is subject to the supervision of the Danish Financial Supervisory Authority. **Poland:** Limited compatibility: the burden of ascertaining that funding by a third party does not compromise the Qualified Entity's impartiality and its ability to adequately represent and protect consumer interests has been placed solely on the Qualified Entity. The supervisory powers - the Head of the Office for the Protection of Competition and Consumers (HOPCC) has the power to determine whether or not an entity should be a Qualified Entity for the purposes of the Representative Actions under RAD. Courts

	have the power to conduct an investigation if there are legitimate concerns about the Qualified Entity. **Sweden**: Only limited supervisory powers of the Swedish Financial Market Regulator under the Currency Exchange and Other Financial Services Act.[162] **The Netherlands**: The control entrusted to the judiciary is seen as meeting the requirement. **United States:** As there is no single regulator there is also no single complaints mechanism like the one described in Article 8. Similarly to Article 8(2), opposing parties (usually defendants) can bring a motion to the court in the funded case to challenge any aspect of the funding agreement if it affects their rights. **United Kingdom:** No single regulator or single public body complaints mechanism. Matters are raised with courts and Association of Litigation Funders.
Investigations and complaints (Art.9)	***Members States and selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 9, except in some Member States in the context of the regulation of financial entities.*** **Denmark**: No compatibility but a funder may – depending on the structure of the fund – be subject to general financial regulation, which is subject to the supervision of the Danish Financial Supervisory Authority. **Poland:** Limited compatibility - courts have the power to conduct an investigation if there are legitimate concerns about the Qualified Entity. **The Netherlands**: The control entrusted to the judiciary meets the requirement.
Coordination between supervisory authorities (Art.10)	***Members States and selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 10, except in some Member States in the context of the regulation of financial entities.*** **Sweden**: Coordination possible under the Currency Exchange and Other Financial Services Act (see Section 2.2 of the National Report), with other Member State authorities or ECB if mandated under EU Law. **The Netherlands**: The control entrusted to the judiciary meets the requirement.
Content of third-party funding agreements (Art.12)	***No TPLF-specific provisions reported. In all Member States and selected non-EU jurisdictions, general contractual principles under civil law apply.*** **Germany:** Control via unfair contract terms law that does not only apply in B2C but also in B2B contracts. A 10% cap on the funder's share applies in redress actions in the terms of the RAD. **The Netherlands**: Not in the legislation, but it is pursued in the case law.

[162] The Currency Exchange and Other Financial Services Act "OFFA" (Swe: Lag (1996:1006).

	Portugal: The share of the award or fees must be "fair and proportional" and not free to be determined (Article 10.º/6 of Decree-Law n.º 114-A/2023, of December 5th).
Transparency requirements and avoidance of conflicts of interest (Art.13)	***Partial compatibility is reported in the context of the implementation of Article 10 RAD Outside of the EU, compatibility is reported via LFA content and court scrutiny (CA, US), codes of conducts/deontological rules (UK, CH), and market discipline (US).*** **Poland**: Limited compatibility: 1. The duty to ensure disclosure of funding sources, and the duty to ensure that the interests of consumers in representative actions are adequately protected rests upon the Qualified Entity, and problems can be highlighted by the court and/or by the Head of the Office for the Protection of Competition and Consumers. 2. Supervisory powers - the Head of the Office for the Protection of Competition and Consumers has the power to determine whether or not an entity should be a Qualified Entity. Article 46h of the Act on the Protection of Competition and Consumers requires that such entities be independent from any third parties who could benefit financially from a representative action being brought and funded by a third party; the entities are required to have in place adequate procedures to address conflicts of interest between the entities, the funders and the consumers. The new Article 10aa of the CAA gives the court the power to conduct an investigation into the matter. **The Netherlands**: Obligation imposed on the interested organisations. Secured by WAMCA and the Claim Code 2019 and the case law. **Canada:** Yes. The extent varies by funder. Also, courts scrutinize and in class actions, approve, LFAs. In their consideration of LFAs in class actions, courts look to the terms of the LFA to determine whether the LFA interferes with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding. **Switzerland:** Federal Act on the Free Movement of Lawyers (FMLA) applies to conflicts of interest if lawyers are connected to a funder. Where personal interest of the funded party was deemed as minimal and the funded party acts as a mere vehicle for the interests of a third party, no right to action will exist. **United Kingdom:** Code of Conduct provides guidance on terms. LFAs have contained provisions that funded party takes advice from its lawyer only. Professional ethical obligations applicable to lawyers. **United States:** Re: Transparency - there is no analog to this in the U.S. The general philosophy is that market discipline, e.g., via reputation, addresses or creates incentives for funders to be good actors. Policy in U.S. jurisdictions requires that control over choices about how to conduct the litigation – including and especially when or whether to settle and for how much – remain with the claimholder. Re: Conflict -Some judges have instituted standing orders that require lawyers to certify that the funding agreement does not create conflicts. In the context of class and mass actions, courts in the U.S. take a very active role in supervising any aspect of the litigation that may negatively affect plaintiffs who are not well-positioned to assert their rights. Some state laws passed or recently under

	consideration explicitly prohibit certain kinds of conflicts (e.g. proposed law in Florida).
Invalid agreements and clauses (Art.14)	***No specific TPLF regulation. General contractual principles apply. Partial compatibility reported in one Member State (SI).*** **Slovenia**: Article 14(4) partially regulated (no specified cap, only reasonableness criterion). **Canada**: In cases in which courts have found that a LFA is champertous, the main concern has been that the return for the funder is unreasonable. Third party funders generally seek a share of the recovery in the 10-35% range. Some Canadian courts have used the Ontario *CPF* 10% levy as a benchmark to evaluate the fairness of returns to funders. Similarly, class action lawyers in Canada also use the CPF 10% levy as a guide for return to funders. *Maintenance and champerty applies*- a LFA can be found champertous is if the agreement gives too much control of the litigation to the funder. **United States:** No general licensing requirement for commercial litigation financiers in the U.S.. However, some state jurisdictions do require it. In the collective redress context, some judges are stepping in to ensure enough of the recovery goes to the plaintiffs. Judges supervise the fairness of settlements in this context as well. No nationwide minimum client recoveries or return caps. Legislatively, Montana caps recovery at 25% of the total claim proceeds. Florida's proposed law would cap a financier's share of the proceeds at 50%. Obligations on lawyers to avoid act in best inerests of client.
Termination of third-party funding agreements (Art.15)	***No TPLF-specific provisions reported. The issue is governed by the principle of contractual freedom.*** **Austria:** No, this provision would amount to an undue infringement of private autonomy. **Sweden**: In Sweden this is considered a matter of contractual freedom (note though general rules and principles of contract law, Section 2.4. of the National Report). **The Netherlands**: 2019 Claims Code is less stringent than Art. 15. **Canada**: Withdrawal of funding is possible in limited circumstances. Termination rights are negotiated in each funding agreement. Courts have approved LFAs with terms that give the funder the right to terminate funding with court approval. In one case, a funder's right to terminate the LFA was held to interfere with the lawyer and client relationship and the autonomy of the representative plaintiff. Similarly, courts have taken the approach that court approval is needed before the funder could suspend or terminate the LFA agreement. UK ALF Code of Conduct permits termination rights in some circumstances (mutual consent, material adverse change and breach of contract by the claimant). **United Kingdom:** UK ALF Code of Conduct permits termination rights in some circumstances (mutual consent, material adverse change and breach of contract by the claimant).

	Switzerland: A unilateral right to terminate a long-term contract "for important reasons" is provided for in contract law. **United States:** If "the underlying claim becomes commercially unviable, typically due to negative developments in caselaw, or in the case of a contractual breach by a counterparty," funding can be withdrawn unilaterally.
Disclosure of the third-party funding agreement (Art.16)	***Partial compatibility is reported in the Member States that have implemented the RAD (more specifically Article 10(3) RAD). In general, apart from collective claims, there is no duty to disclose TPLF (with some national exceptions presented below).*** **Austria:** Only under § 4 (4) Law on Qualified Entities, but no disclosure to the defendant who has no legally protected interest in such a disclosure. **Germany:** Only in relation to redress actions and skimming-off procedures. **Matla:** Partial compatibility in the context of the implementation of the RAD (the Malta Representative Actions Act 2023 requires qualified entities to disclose all sources of its funding as per Article 5(3)(f), 8(4)(b)(iii) and Article 11(3), but it does not specifically require the disclosure of the identity of the funders or existence of TPLF agreements.) **Slovenia**: Article 16(2) not compatible because courts always have to make the assessment ex officio and not based on the request of a party to the proceedings. So this makes the Slovenian regime even stricter than the proposed measure. **Sweden**: No with respect to court litigation. However, an exception for lawyer funding under the GPA, and potentially for consumer cases under the RAD-Act see Section 2.1 National Report. Note also the status in arbitration, where it is common that the identity of the funder is disclosed, Section 2.5 National Report. **The Netherlands**: No statutory obligation of a full disclosure, but the extent of the disclosure to the defendant seems to be in the discretion of the court. **Canada:** LFAs disclosed to court as part of class action and insolvency proceedings. In some provinces, applications for approval of LFAs in class actions must be on notice and a copy of the LFA ("subject to appropriate redactions"), has to be provided to the Defendant. In cases where funding is disclosed and approved, courts have consistently protected the commercial details. Note- Courts in the province of Quebec appear to be taking a different approach to pre-approval of litigation funding agreements in class actions, opting to reserve approval until the conclusion of the litigation. **United Kingdom:** LFAs disclosed in competition collective proceedings. **Switzerland:** There is no general duty to disclose the existence of a funding agreement in civil litigation. In arbitration proceedings with seat in Switzerland, there is no legal duty to disclose a funding agreement. **United States:** Variable approaches in states. In general, no requirement for disclosure, with some exceptions where specific court rules or a court order do require disclosure. Full disclosure of all funding arrangements in legislation in Wisconsin, Montana, and West Virginia. Some federal courts

	have local rules requiring TPLF disclosure. Some federal judges have disclosure requirements for matters over which they are presiding. Funding arrangements subject to discovery rules.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	***Partial compatibility is reported in the Member States that have implemented the RAD (more specifically Article 10(3) RAD). Outside of the EU, partial compatibility is reported in Canada and the US, in the context of consumer protection, competition claims, and/or collective redress. Specific domestic considerations are presented below.*** **Denmark:** No compatibility, but if a case is brought as a representative action under the Representative Action Act the court can demand that the approved organization refuse or make changes regarding the financing of the lawsuit. **Germany:** Only in relation to redress actions and skimming-off procedures. **Lithuania:** Applicable only for consumer class actions. If the court establishes that a conflict of interest is present, the court sets a deadline for eliminating the deficiencies in the claim. If it is impossible to eliminate these deficiencies, the court refuses to accept the claim. **Slovenia**: Partially regulated, courts always have to make the assessment ex officio and not based on the request of a party to the proceedings. So this makes the Slovenian regime even stricter than the proposed measure. **The Netherlands**: Yes, Article 3:305a par. 2 under a to f in combination with Article 3:305a par. 1 of the Code of Civil Procedure provides the possibility of a judicial review of the third-party funding agreement. **Canada:** LFAs disclosed to court as part of class action process. However, court approval is not required in private commercial claims. In those cases, the contract is the direct source of safeguards. **United Kingdom:** Courts scrutinise LFAs as part of the certification process in collective competition claims. **United States:** There is no common set of laws or regulations imposing uniform obligations on funders towards courts, public administration, or adverse parties.
Responsibility for adverse costs (Art.18)	***No TPLF-specific provisions reported. General civil procedural rules apply.*** **Denmark:** Based on the circumstances, a funder may be hold liable for adverse costs according to case law. **France:** No rule specific to TPLF but generally, under French law, the losing party is ordered to pay the costs, unless the court, by reasoned decision, awards all or part of the costs to another party (article 696 of the Code of Civil Procedure). **Germany:** No but there is the possibility of the court asking for security in the individual case. **The Netherlands**: No statutory regulation, but there is sufficient role of the judiciary to ensure the compliance with the criteria.

	Canada: Canada is a 'loser pays' jurisdiction. A standard feature of LFAs is that the funder will indemnify the funded party for any adverse costs order. Practice varies – some funding arrangements provide for payment by the funder of any adverse costs order, while other attach some conditions or limits. **United Kingdom:** Funder commitment assessed as part of scrutiny of LFA in Competition proceedings. Non-party cost orders can be requested by Defendant in litigation proceedings. **Switzerland:** In arbitration, funder not liable for the payment of costs in the award itself, or security deposits. Art. 108 CPC allows a party to charge unnecessary procedural costs to the person who caused them. **United States:** In general, each party pays their own litigation costs, save for civil rights cases with statutory fee shifts and instances where costs and fees are shifted as a sanction.
Sanctions (Art.19)	***Members States and selected non-EU jurisdictions have not reported TPLF-specific provisions compatible or equivalent to Art. 19, except in some Member States in the context of the regulation of financial entities, and consumer collective redress.*** **Malta**: Limited compatibility in the context of consumer collective redress. Article 19 of the Malta Representative Actions Act 2023 provides for sanctions where any party fails to comply with any order of the Civil Court, but does not contain provisions for sanctions that could be imposed by supervisory authorities. **Poland**: Limited compatibility. The duty to ensure disclosure of funding sources, and the duty to ensure that the interests of consumers in representative actions are adequately protected rests upon the Qualified Entity, and problems with this matter can be highlighted by the court and/or by the Head of the Office for the Protection of Competition and Consumers. The ultimate penalty for not following the requirements is the rejection of the suit, (court) and also withdrawing the entity from the list of Qualified Entities for the purposes of CAA (HOPCC). **Sweden**: Sanctions possible under the Currency Exchange and Other Financial Services Act ("OFFA") (see National Report).

3.3 NATIONAL REPORTS

This section presents the national reports from the EU Member States, and the selected non-EU jurisdictions (CA, CH, UK, US).

The national experts conducted intensive desk research on the relevant existing and planned legislation applicable to TPLF in their jurisdiction, covering a broad range of aspects connected with TPLF as well (*Sections 1 and 3 of the national reports*).

The collection of information includes 3 to 5 interviews of relevant stakeholders, carried out by the national experts under the supervision of the BIICL team. The national interviews are summarised in *Sections 3 and 4 of the national reports*.

Austria

Prof Burkhard Hess, University of Vienna

Executive Summary

- No specific TPLF does exist in legislation in Austria. However, TPF is generally accepted by the Austrian Supreme Court and was expressly recognized by the implementing law of the Representative Actions Directive (EU) 2020/1828 (RAD): section 6 (1) of the Law on Qualified Entities of 17 July 2024 (Law on QE).
- TPLF exists in consumer mass claims and in high value commercial cases (often in arbitration).
- A large majority of legal scholars endorse the case law of the Austrian Supreme Court. They reject the EU Parliament's proposed large legal framework of TPLF.
- Austrian law only knows one provision on TPLF. It concerns the funding of a representative action (Law on QE section 6).
- The funder may not instruct the client's lawyer, nor give legal advice itself. Its contract with the client is subject to general provisions on abusive clauses.
- Under the implementing law on the RAD, a Qualified Entity must disclose that TPLF is involved, but not produce the funding agreement to the court or the adverse party.
- The funder is contractually obliged to fund the litigation costs. It may terminate the contract when a substantial change of circumstance arises. It has a (limited) veto right regarding the settlement and amendment of claims. The beneficiary must provide information about the proceedings.
- After litigation costs are compensated (the so-called 'waterfall clause'), proceeds are shared between the funder and beneficiary. The funder must compensate the litigation costs.
- No additional legislation is planned. Possibly, the Law on QE (section 6) might be generally applied to litigation funding.
- There is no need for a specific supervisory framework as proposed by the EU Parliament or to limit the percentage of reward paid to the funder. For both, general review mechanisms are sufficient. Here, a cap of 50% applies. Debt collection companies should be controlled in a manner similar to Qualified Entities.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

In Austria, there is no comprehensive legislation regarding TPLF. However, the Supreme Court (Oberster Gerichtshof, OGH) has constantly held that TPLF is permissible under certain conditions.[163] Recently, the Austrian lawmaker implemented the Representative Actions Directive 1828/2020 ('RAD'). Section 6 (1) of the Law on Qualified Entities of July 17, 2024, explicitly states, '[t]he funding of a representative action by a third party is permitted'.[164] This statutory provision clearly reflects the principled, positive approach to litigation funding in Austria.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

In some types of cases, TPF is found. However, there is no empirical data available. Collective litigation of consumers is regularly funded by TPLF. In 2005, the OGH permitted the so-called Austrian collective litigation/class action.[165] In this constellation, individual consumers assign their claims against the trader to a consumer association (usually the Verein für Konsumenteninformation, or VKI). The association brings the individual claims collectively before the court,[166] and the lawsuit is funded by a TPLF.[167] Other areas of application are high value commercial claims (often in arbitration), and actions for avoidance in insolvency proceedings.[168] TPLF also offers portfolio funding to businesses.[169]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

An enquiry in the commercial register (Firmenbuch) revealed 19 TPLF companies, https://www.austrian-registers.com/query-services/business-register/search/Prozessfinanzierung.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No, usually TPLF contracts are confidential.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

[163] OGH, 23.02.2021, 4 Ob 180/20d, ECLI:AT:OGH0002:2021:0040OB00180.20D.0223.000; OGH, 27.2.2013, 6 Ob 224/12b, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.
[164] This provision stands in clear opposition to the German implementing law of the RAD where s 7(2) no 3 of the Law Implementing Consumer Rights caps the profit of the TPF at 10% of the claim.
[165] OGH, 12.7.2005, 4 Ob 116/05w, ECLI:AT:OGH0002:2005:0040OB00116.05W.0712.000.
[166] As a joinder of actions, Code of Civil Procedure (CCP Austria) s 227.
[167] OGH, 27.2.2013, 6 Ob 224/12b, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.
[168] OGH, 25.11.2014, 8 Ob 89/14t, ECLI:AT:OGH0002:2014:0080OB00089.14T.1125.000.
[169] Fremuth-Wolf, *Prozessfinanzierung - kurz und bündig erklärt* (Ecolex 2022) 802-806.

There is a large doctrinal discussion in Austria, the broad majority of which supports the case law of the OGH and the permissibility of TPLF.[170] There is also a consensus that a large regulatory framework such as the draft directive annexed to the EP resolution is not needed.[171]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The academic debate started after the millennium. There was discussion after the OGH's 2013 judgment permitting the funding of collective actions. Recently, the resolution of the EU Parliament on TPLF and the German implementing law of the RAD have been critiqued by many scholars.

2. Relevant legislation applicable to TPLF in your jurisdiction

Since 18 July 2024, the Law on Qualified Entities, implementing the RAD stipulates as follows:

> Section 3: Third party funding
>
> § 6. (1) The funding of a representative action by a third party is permitted. The qualified entity may make the participation of consumers to a representative action for redress measures conditional on the consumers entering into the contract agreed between the qualified entity and the third party funder.
>
> (2) The third party funder must neither be a competitor of the respondent nor economically or legally dependent on it.
>
> (3) Decisions of the qualified entity in connection with a redress action, including decisions on settlements, must not be unduly influenced by the third party funder to the detriment of the collective interests of the consumers concerned. The qualified entity shall avoid conflicts of interest and ensure that the protection of the consumers concerned is always at the center of its decisions.
>
> (4) If the qualified entity makes use of third party funding for a specific representative action, it must inform the court of this fact and the name of the third party funder. However, it does not have to submit or disclose the litigation funding agreement itself or its content to the court, but only in accordance with the court's orders in the proceedings before the Federal Cartel Prosecutor.[172]

This is the only legal provision of Austrian law that addresses TPLF.

[170] Paul Oberhammer, *Sammelklage, quota litis und Prozessfinanzierung* (Ecolex, 2011) 972 ff.; Alexander Klauser, *Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage* (VbR, 2013) 12-16; Raunigg zu OGH 25.3.2021, 2 Ob 10/21s; Wolfgang Kolmasch, *Schuschnigg Prozessfinanzierer als Rechtsfreund?* (ÖJZ, 2022) 969 ff.

[171] Armin Redl and Miriam AStl, *Prozessfinanzierung: Ein Schlupfloch im Regulierungs-Dschungel?* (RdW, 2024) 16 ff consider the draft directive annexed to the EP resolution an unnecessary attempt of overregulation. Recently, *Tanja Domej* addressed the draft directive annexed to the EP resolution in her Expert Opinion for the 74th Deutschen Juristentag (2024) and clearly rejected the draft directive as far-fetched, too (pp. A 23 ff.).

[172] Translated by the Institut für Zivilgerichtliches Verfahren, Vienna University.

2.1 Legal admissibility and conditions of using TPLF in civil litigation

TPLF is permitted in Austrian law. However, the funder is not permitted to instruct the lawyer nor give any legal advice to the client. Contractual relations only exist between the client and the funder, not between the funder and the lawyer.[173] If these conditions are met, the funder is not considered a 'Rechtsfreund' (a person providing legal services) and, therefore, the prohibition of success fees (s 879 (2) no 2 of the Civil Code (ABGB) does not apply.[174] The assessment of the claim (due diligence) by the funder is not considered a legal service, either.[175]

2.2 Regulatory oversight of funders/funding industry

Does not exist.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF - e.g. capital adequacy requirements

Does not exist.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflicts of interest etc).

Professional duties of lawyers (especially the Rechtsanwaltsordnung and the Winkelschreiberverordnung) do not apply to the funder who is not providing legal services.[176] However, the contract between the funder and the client is subject to the general provision of Austrian law on abusive clauses. There is no case law in this regard, yet.

No financial regulation is applied to TPF.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Section 6(2) of the Law on Qualified Entities prohibits any influence of the defendant (businesses) on the funder.

According to s 6(4) of the Law on Qualified Entities, the Qualified Entity (QE) must disclose the involvement of the funder to the court. However, the court cannot request the production of the funding agreement. The court can only request that the agreement be disclosed to the Federal Cartel Prosecutor (Kartellbundesanwalt). Yet, the Federal Cartel Supervisor supervises the QE, not the funder.

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[173] Obviously, s 6(1), 2nd sentence of the Law on Qualified Entities is based on this understanding of the legal relationships in TPLF.

[174] Raunigg zu OGH 25.3.2021, 2 Ob 10/21s, ecolex 2021/516; Kolmasch, *Schuschnigg, Prozessfinanzierer als Rechtsfreund* 969 ff.

[175] Handelsgericht Wien, 07.12.2011, 47 Cg 77/10, p. 12 – 16 of the judgment, confirmed by the Oberlandesgericht Wien, 23.8.2021, 3 R 41/12i., *Koller*, Eintritt und Sperrwirkung der Schiedshängigkeit, ecolex 2014, 1056 ff.

[176] OGH, 23.02.2021, 4 Ob 180/20d, ECLI:AT:OGH0002:2021:0040OB00180.20D.0223.000.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

According to s 6(4) of the Law on Qualified Entities, the QE (acting as the plaintiff in the proceedings) must only disclose to the court the involvement of TPLF. However, the court cannot request the production of the funding agreement. The court can only request that the agreement be disclosed to the Federal Cartel Prosecutor (Kartellbundesanwalt). However, the Federal Cartel Supervisor supervises the QE, not the funder. In these administrative proceedings, the Cartel Prosecutor may revoke the standing of the QE. These proceedings do not concern the funder.

2.7 Obligations of funders towards beneficiaries and vice-versa

There are no legal obligations. The mutual obligations are regulated by the funding agreement. These agreements are confidential.

The funder's main obligation relates to the provision of the funding. Usually, the agreement addresses the circumstances that might limit the funder's obligation, such as the dismissal of the claim, the disclosure of unknown facts, a change in the case law that is decisive for the litigation, or a major change in the creditworthiness of the respondent. In these circumstances, the funder may terminate the contract.

In addition, the beneficiary must provide information about the proceedings (he or she might also require the lawyer to provide information to the funder). Finally, the funder has a veto right regarding a potential settlement or an amendment of the claim (the veto-clause right might be limited to certain minimum and maximum amounts).

2.8 Distribution of awards and bearing adverse costs in lost cases

Again, this is regulated by the funding agreement. Typically, there is a waterfall clause, providing that the litigation costs are compensated first and that the rest of the proceeds are shared between the beneficiary and the funder according to a specified percentage.

Austrian procedural law follows the 'loser pays principle' (s 41 CCP Austria). Therefore, funding agreements provide for the compensation of litigation costs.

2.9 Planned legislation

At present, no additional legislation is discussed in the legal debate. However, it remains to be seen whether the transparency requirements of s 6 of the Law on QE will be generally applied to litigation funding. In the legal literature, there is a debate whether funds should be supervised by financial authorities as they provide for financial services.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*

Authorisation system (Art. 4)	No
Conditions for authorization (Art. 5)	No
Capital adequacy (Art.6)	No
Fiduciary duty (Art.7)	No
Powers of supervisory authorities (Art.8)	No
Investigations and complaints (Art.9)	No
Coordination between supervisory authorities (Art.10)	No
Content of third-party funding agreements (Art.12)	No
Transparency requirements and avoidance of conflicts of interest (Art.13)	No, only in a very limited extent under § 6 of the Law of QE, see supra at 2.
Invalid agreements and clauses (Art.14)	No
Termination of third-party funding agreements (Art.15)	No, this provision would amount to an undue infringement of private autonomy
Disclosure of the third-party funding agreement (Art.16)	Only under § 4 (4) Law on QE, but no disclosure to the defendant who has not legally protected interest in such a disclosure
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No
Responsibility for adverse costs (Art.18)	No
Sanctions (Art.19)	No

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

N/A

b. Minimum claim value in absolute terms (in million Euro)

N/A

c. Typical claim value in absolute terms (in million Euro)

N/A

d. Typical ratio between investment by the funder and claim value

N/A

e. Typical size of the investment by the litigation funder (in million Euro)

N/A

f. Origin of funding provided by the litigation funder

N/A

g. Share of compensation awarded typically demanded by litigation funders

N/A

h. Other conditions of the litigation funding agreement

N/A

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

N/A

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

N/A

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

N/A

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

No disclosure takes place. The only exception is s 6(4) of the 2024 Law on QE (see supra)[177], disclosure to the Federal Cartel Prosecutor (Kartellbundesanwalt). The agreement is never disclosed to the respondent.

[177] See supra text at fn 14.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *Choice of lawyer:* No, formally forbidden, but it is the right of the claims' collection. company or QE to choose the lawyer.
- *Consent for settlement:* Yes, veto right of the funder.
- *Consent for appea:,* Yes, veto right of the funder.
- *Consent for expert evidence:* Depending on the agreement and the funded case.
- *Informal agreement on strategy:* Usually yes, but depending on the case at hand.
- *Other forms of consent*

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

As both are repeat players, they are not in a formal contractual relationship, but are business contacts. This is especially the case when the lawyer advises the client to involve a litigation funder. Often, law firms already have references to litigation funders on their webpages.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

A change of the chances in the litigation (material change of the pertinent case law; disagreement with the client about litigation strategy – usually agreed in the funding contract)

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

A funder reported that it is a constant practice to not be in direct contact with the law firm directly involved in the case.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Yes

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

These agreements are usually confidential.

4. Stakeholder views on TPLF in your Member State

N/A

Glossary of abbreviations and acronyms

ABGB	Allgemeines Bürgerliches Gesetzbuch
CCP	Code of Civil Procedure
ÖJZ	Österreichische Juristenzeitung
OGH	Oberster Gerichtshof (Supreme Court of Austria)
QE	Qualified entity
RAD	Representative Actions Directive (EU) 1828/2020
VKI	Verein für Konsumentinformation

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Belgium

Prof Stefaan Voet, KU Leuven

Executive Summary

- TPLF is *terra incognita* in Belgium; it is not frequently used (because the legal costs of going to court are relatively low and the proceeds resulting from litigation or arbitration proceedings are low). On the other hand, it is not prohibited and is accepted. TPLF only seems to occur in large B2B (commercial and investment) arbitration cases and in collective cases (falling outside the scope of the consumer class action rules).
- The Belgian Act of 21 April 2024 (the Act) transposes the Representative Actions Directive (EU) 2020/1828 (RAD) and amends the 2014 class action rules. The Act does not regulate TPLF as such. It simply implements article 10 of the Directive.
- In June 2023, the Order of Flemish Bars (OVB) issued a number of (non-binding) Recommendations on TPLF. These (deontological) Recommendations deal with lawyers' independence, lawyers' fees, the information obligations of lawyers and their impact on professional liability, the intervention of the lawyer in the conclusion of the agreement with the funder, confidentiality and professional secrecy and disclosure of TPLF.
- Since there is no legislation or regulation about TPLF in Belgium, there is no supervision by public bodies or regulators.
- Given the lack of a statutory framework, funding arrangements are governed by the general rules of contract in the Belgian Civil Code. The content of funding arrangements can be freely agreed upon by the parties, as long as it does not result in a violation of public policy.
- There is no (public) information or reliable data available on the practical operation of TPLF in Belgium.
- The (interviewed) funder underlines (a) the importance of self-regulation, (b) that only a very limited of funding requests are accepted and (c) that funding modalities are always custom-made. The funder argues for a 'disciplining market mechanism' and stresses the important role of already existing gatekeepers (lawyers, courts and clients).
- The Order of Flemish Bars (OVB) underlines the importance of the existing legal ethics rules for lawyers in the context of TPLF. On the hand, the goal of the OVB Recommendations is to preserve the basic principles of the legal profession, but on the other hand, to provide a framework to avoid a competitive disadvantage in comparison to other countries. The president of the OVB argues that the existing market and normative framework are not yet crystallised. Stricter legislation is not yet required.
- As of today, Belgium's biggest consumer association (that can bring consumer class actions) has not used TPLF in their class action cases. They see it as an attractive avenue and it could become part of their EU strategy. They do not favour strict regulation, since the RAD already contains a number of safeguards.

- The (interviewed) lawyer states that Belgium is not a trigger country with respect to TPLF. He was only involved in two (arbitration) cases, in which there was a link to foreign jurisdictions. He does not favour the disclosure of funding agreements.

1. Introduction[178]

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Today, TPLF is *terra incognita* in Belgium. It is **not frequently used** and to date there is **no legislation**. On the other hand, and because the concepts of champerty and maintenance are not part of Belgian legal culture, TPLF is **not prohibited** in Belgium, it is **accepted** by most scholars and practitioners, and sometimes **used in a limited number of cases**. The admissibility of TPLF has not yet been reviewed by the Belgian courts.

There are two important factors. On the one hand, **the legal costs of going to court are relatively low** compared to the costs incurred in other jurisdictions (see *infra* no 3). On the other hand, **the proceeds resulting from litigation or arbitration proceedings are usually substantially lower** than in other jurisdictions (eg common law jurisdictions). For example, punitive damages are not available under Belgian law. As a consequence, litigation funders have shown limited interest in the Belgium market.[179]

Moreover, and this is undoubtedly also a factor that is relevant for funders in Belgium, **court cases can take a long time**. Depending on the complexity of the case and the territorial jurisdiction, it will take approximately one year following the submission of the claim for a decision to be rendered by a first-instance court in a commercial dispute.

There are no official statistics on the number of judgments that are appealed in Belgium. However, **appeal proceedings are very frequent**, which is again a relevant factor for funders in Belgium. Such proceedings may last between one and three years depending on the complexity and importance of the case and the court that exercises jurisdiction (the judicial backlog of the Brussels Court of Appeals is notorious – some case can take up to 5-6 years). As regards arbitral awards, the parties – by an express statement in the arbitration agreement or by a subsequent agreement – may exclude any application to set aside the award if none of them are neither a natural person having Belgian nationality or its domicile or habitual residence in Belgium, nor a legal person having its registered office, principal place of business or branch office in Belgium. In addition, awards rendered by an arbitral tribunal having its seat in Belgium may only be challenged for limited grounds exhaustively

[178] Inspiration for this subchapter (and part of subchapter 2) was found in Isabelle Berger and Hakim Boularbah, 'Litigation Funding Belgium', in Jonathan Barnes and Steven Friel (eds), *Lexology GTDT - Litigation Funding*, (Lexology, 2022) (see https://www.loyensloeff.com/2023-litigation-funding---belgium.pdf).

[179] 'The combination of these two factors means there is less incentive for litigants to seek third party funding than in other jurisdictions where the potential financial exposure is more significant. From the funder's perspective, the reasons set out above imply that capital deployment in a Belgian litigation matter will be relatively limited and may not meet the minimum thresholds of certain funders. In addition, damages awarded by Belgian courts tend to be comparatively low and so potential returns for funders are also at the lower end of the scale. For these reasons, the Belgian market has attracted limited interest from litigation funders.' Olivia de Patoul, 'Litigation Funding Overview – Belgium' *(Deminor Litigation Funding)* <https://www.deminor.com/en/litigation-funding/global-landscape/belgium/>.

mentioned in the Belgian Judicial Code (BJC). Challenges to an arbitral award generally last between one to two years.

There are no official statistics on **enforcement proceedings**. As a rule, judgments are immediately enforceable even if appeal proceedings are pending or may still be brought. In the absence of voluntary payment from the debtor, the intervention of a process server will be necessary to proceed to enforcement measures, such as the attachment and the sale of the debtor's property or other assets, garnishment of the debtor's receivables and bank accounts, etc. As arbitration proceedings are based on the mutual consent of the parties, arbitral awards often require less enforcement proceedings, although such proceedings are not unusual. Arbitral awards, whether foreign or domestic, may only be enforced after the competent court of first instance has granted enforcement following an *ex parte* application of the award creditor. The grounds for refusal of recognition and enforcement of arbitral awards are exhaustively listed in article 1721 of the Belgian Judicial Code.

Most civil and commercial procedures are funded by the parties. The following other options exist:

- Legal assistance insurance: the insurer bears the costs (including the lawyer's fees and costs, but also court fees, procedural indemnities and expert's fees) incurred in connection with the court proceedings of the insurance holder but has no interest in the financial outcome of the litigation (see the Belgian Insurance Act).[180]
- Loan or credit facility agreement: the debtor must repay to the creditor the funds placed at its disposal.
- Assignment of claims: the original creditor assigns the claim for less than its original worth to an assignee in exchange for an immediate payment from the third-party debt collector who becomes the holder of the claim and a party to the pending or forthcoming litigation proceedings.
- Legal aid: under strict conditions, a litigant may obtain legal aid from the state; legal aid exempts the litigant in whole or in part from having to contribute to the costs of the proceedings
- After-the-event (ATE) insurance: this is admitted and frequently used; it is usually offered by foreign insurance companies. However, if the funder has an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE insurance can also be included in the litigation funding agreement. Since TPLF agreements do not always cover the procedural and legal costs the litigant may be ordered to pay to the opposing party, the funded party frequently enters into an ATE insurance contract to have these costs covered.

As mentioned before, the legal costs of going to court in Belgium are relatively low compared to the costs incurred in other jurisdictions. This makes access to courts easier; hence there is **less need for TPLF**.

[180] Loi 4 avril 2014 relative aux assurances.

The costs of the proceedings that courts may order the losing party to pay to the successful party are exhaustively enumerated in article 1018 of the Belgian Judicial Code.[181] The principal costs of the proceedings are the following:

- Costs of service, filing and registration with the court registry; these costs are fixed and depend on the nature of the writ filed with the court and on the amount in dispute.
- Costs of judicial expertise and other measures of investigation.
- A registration fee of 3% on behalf of the tax authorities if the losing party is ordered to pay an amount exceeding 12,500 EUR.
- A procedural indemnity that is a flat-rate contribution to the lawyers' fees; its amount is set by the law and adjusted from time to time to account for inflation. Since 1 November 2022, the basic indemnity ranges from 225 EUR to 22,500 EUR for claims that can be appraised in monetary terms. If the claim cannot be appraised in monetary terms, the basic amount of the procedural indemnity is 1,800 EUR, These amounts may be decreased (to a minimum of 112,50 EUR) or increased (to a maximum of 45,000 EUR) by the court under specific circumstances, depending on different criteria, such as the financial capacity of the unsuccessful party, the complexity of the case, existent contractual compensation for the successful party or blatant unreasonable submissions.[182]

Moreover, the court fees in Belgium are very limited compared to other countries: 50 EUR for the justices of the peace and police courts; 165 EUR for the courts of first instance and the commercial courts; 400 EUR for the courts of appeal and 650 EUR for the Court of Cassation.[183]

In other words, the exposure to adverse party costs is limited to statutorily defined, incremental lump sums depending on claim value.

As a consequence of this system, courts may not order the unsuccessful party to pay the litigation funding costs of the successful party. Nevertheless, the intervention of a litigation funder could indirectly be taken into account by courts when fixing the procedural indemnity on the basis of the abovementioned criteria.

With regard to arbitration proceedings, article 1717, para 6 of the Belgian Judicial Code provides that the final award must fix the costs of the arbitration and decide which party shall bear what proportion of said costs. According to the abovementioned provision, these costs include arbitration costs as well as party costs, defined as 'the fees and expenses of the parties' counsel and representatives' and 'all other expenses arising from the arbitral proceedings' (unless otherwise agreed by the parties). It is generally considered that such costs must be reasonable. There are no (public) cases regarding arbitration proceedings having their seat in Belgium in which the unsuccessful party was ordered to pay the funding costs of the successful party. As article 1717, para 6 of the Belgian Judicial Code is drafted in general terms, one could argue that funding costs should be taken into consideration in the allocation of costs by the arbitral tribunal.

Unless a claim was specifically assigned to a litigation funder, the funder does not become a party to the funded proceedings as a result of the conclusion of a funding agreement. Accordingly, a court or an arbitral tribunal may not directly order a funder to pay for adverse costs. However, provided

[181] This principle is laid down in article 1017 Belgian Judicial Code.

[182] Article 1022 Belgian Judicial Code.

[183] Service Public Fédérale Finances, 'Droits de rôle' (*Indépendants & Professions libérales*) <https://finances.belgium.be/fr/independants_professions_liberales/droits-de-role>

that the litigation funding agreement contains an obligation of the funder to cover the adverse cost risk, the unsuccessful funded litigant has an enforceable claim against the funder for the payment of adverse costs.

Since 2014, Belgium recognises a consumer class action.[184] The law also applies to small and medium sized enterprises (SMEs). These proceedings may only be brought before the Brussels Commercial Court by a group of consumers or SMEs represented by non-profit organisations or public bodies against a company, and on the ground of an alleged violation of Belgian and European rules expressly provided for in the Belgian Code of Economic Law. The **Belgian Act of 21 April 2024 transposes the Representative Actions Directive**[185] and amends the 2014 rules.[186] The new rules simply implement article 10 of the Directive (regarding the funding of representative actions for redress measures). The new rules do not regulate TPLF as such. This will be discussed below (see *infra* subchapter 2).

In June 2023, the **Order of Flemish Bars** (the regulatory and representative body of the Dutch language Bars of Flanders and Brussels) issued a number of **(non-binding) Recommendations on TPLF**.[187] This will be discussed below (see *infra* subchapter 2).

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPLF is not regularly relied upon. In **consumer class actions** TPLF is not being used to date. TPLF is sometimes used in **large B2B (commercial and investment) arbitration cases**.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The largest litigation funder in Belgium is **Deminor Litigation Funding**.[188] Other players are **Nivalion**[189] and **Liesker Procesfinanciering.**[190]

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are **no (reliable) statistics** regarding TPLF in Belgium.

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[184] See Stefaan Voet, 'Class Actions in Belgium: Evaluation and the Way Forward' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 131-163.

[185] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4 December 2020, 1–27.

[186] Loi 21 avril 2024 modifiant les livres Ier, XV et XVII du Code de droit économique, et transposant la directive (UE) 2020/1828 du Parlement européen et du Conseil du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs et abrogeant la directive 2009/22/CE, Belgian Official Gazette 31 May 2024.

[187] Orde Van Vlaamse Balies, *Note : Recommendations Third-party funding,* approved by the general assembly of the Orde van Vlaamse Balies on 28 June 2023 <https://www.ordevanvlaamsebalies.be/nl/fetch-asset?path=ovb/Documenten/gerechtelijk-recht/Recommendations-Third-party-funding-EN.pdf>.

[188] Patoul, 'Litigation Funding Overview- Belgium'.

[189] Nivalion, 'Homepage' (*Nivalion*) <https://nivalion.com/en/>.

[190] Liesker, 'Homepage' (*Liesker*) <https://liesker.com/>.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Belgian legal literature pays very limited attention to TPLF. There is literature that gives an overview of current status and possibilities,[191] attention is paid to deontological issues[192] and one focuses on TPLF in arbitration proceedings[193] and class action proceedings.[194]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

To date no.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There is **no legislation or regulation about TPLF as such** in Belgium.

The **Belgian Act of 21 April 2024, transposing the Representative Actions Directive and amending the 2014 consumer class action rules,** implements article 10 of the Directive (regarding the funding of representative actions for redress measures).[195] The new rules do not regulate TPLF as such.

A Belgian consumer class action can only be brought by a legal entity (association) that is recognized by the competent minister. The association has to meet a number of criteria. One of these criteria is:

> '[t]he legal entity is independent and not influenced by persons who are not consumers, in particular companies, which have an economic interest in bringing a collective action for injunctive relief and/or compensatory relief, *including in the case of third-party financing*. To this end, the legal entity has procedures in place that prevent such influence and avoid

[191] Françoise Lefèvre, Peter Callens and Guillaume Croisant, 'Legality of third-party funding mechanisms under Belgian law' (2017) 1 b-Arbitra 35-65 and Alana Deprince, ''Third Party Litigation Funding' (TPLF): stand van zaken' (2017) 4 P&B 134-152.

[192] Dirk Van Gerven and Arie Van Hoe, 'Derdepartijfinanciering: ethische en deontologische kwesties' (2017) 2 b-Arbitra 225-251.

[193] Marijn De Ruysscher, 'Het ICC-arbitragereglement 2021' (2021) 1 P&B 3-9; Christopher Bogart, 'Third-Party Financing of International Arbitration' (2017) 2 b-Arbitra 315-325 and Werner Eyskens and Lauren Rasking, 'Third party funding in arbitration: Belgian state of play in a comparative perspective' in Dirk De Meulemeester et al., *Liber amicorum. 50 years of solutions - 50 ans de solutions - 50 jaar oplossingen. Cepani 1969 – 2019 (*Wolters Kluwer Belgium, 2019) 127-142.

[194] Françoise Lefèvre and Guillaume Croisant, 'Le « third party funding », une solution aux problèmes des coûts de l'action en réparation collective pour le représentant?' (2018) 4 TBH 327-352.

[195] Loi 21 avril 2024 modifiant les livres Ier, XV et XVII du Code de droit économique, et transposant la directive (UE) 2020/1828 du Parlement européen et du Conseil du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs et abrogeant la directive 2009/22/CE (1), Belgian Official Gazette 31 May 2024.

> conflicts of interest between its own interests, those of *its funders* and consumer interests'.[196]

Moreover:

> [t]the legal entity shall make public, in clear and understandable language, by appropriate means, in particular on its website, information demonstrating that it meets the criteria mentioned in 1° to 5°, as well as *information on its funding sources in general*, its organizational, governance and membership structure, its statutory purpose and its activitie's.[197]

Similar rules apply to class actions for SMEs.[198]

The class action is initiated before the commercial court by a petition. This has to mention 'whether or not the action for collective redress is financed by a third party. If so, the representative shall identify the funding third parties as well as the amounts funded'.[199]

Despite the possibility and admissibility of TPLF of class actions, this seems to be of **limited interest** since the Belgian Code of Economic Law provides that a court-appointed administrator must pay any compensation obtained directly to the members of the group under the court's supervision without any possibility for the litigation funder to receive a share of this compensation.[200] This implies that a litigation funder could, in principle, not take a share of the proceeds resulting from the collective action. However, in practice, there might be possibilities to structure a funding agreement in such a way as to overcome this obstacle.

Besides class actions, Belgian law also allows for **other instruments of collective redress**, in particular actions where numerous claimants act together and unite their claims in one single procedure,[201] or instances in which a third-party purchases various claims and initiates proceedings on behalf of the former claimants. In such proceedings, claimants and litigation funders may enter into litigation funding agreements and share the proceeds of the procedure.

In June 2023, the **Order of Flemish Bars issued a number of (non-binding) Recommendations on TPLF**.[202]

After a brief overview of the state of play of TPLF (ie the current regulatory initiatives worldwide and the importance of appropriate deontological), the OVB 'is considering the purpose of TPF and the role of the lawyer in it. The OVB's recommendations fit into that framework. These recommendations do not take a position on the controversies surrounding TPF.' The Recommendations apply not only to arbitration but to all forms of commercial TPLF. Further it is underlined that TPLF in Belgium as it stands is neither legally, nor deontologically, regulated.

The Recommendations consist of six sections.

- ***(1) Lawyer independence***

  The lawyer acts in complete independence and always defends the client's interests. The lawyer intervenes either as the lawyer of the funder, or as the lawyer of the litigant. The lawyer cannot

[196] Article XVII.1. s 1, 5° Belgian Code of Economic Law.
[197] Article XVII.1. s 1, 6° Belgian Code of Economic Law.
[198] Article XVII.1. ss 4, 5° and Article XVII.1. ss 4, 6° Belgian Code of Economic Law.
[199] Article XVII.42. ss 1, 6° Belgian Code of Economic Law.
[200] Article XVII.57-62 Belgian Code of Economic Law.
[201] Article 701 Belgian Judicial Code.
[202] Orde Van Vlaamse Balies, *Note*.

act simultaneously for both the funder and the litigant. The lawyer may not have any direct or indirect (financial) interests in a TPLF fund serving its clients. The lawyer may introduce funders to his clients and he may also introduce clients to the funders, as long as he does not receive any remuneration or other consideration for the presentation or referral. As a rule, the lawyer will not receive instructions from the funder. The lawyer is careful not to have contact with a funder without the presence of the litigant or without the express prior consent of the latter. Payment of the lawyer's fees by the funder does not prevent the lawyer's independence.

Comment: lawyers are often engaged by funders as part of the due diligence of a case. Certain funders work with the same lawyers on a regular basis, for example when putting together a group action or class action. In that context, the funder often seeks advice from a lawyer on the law of the country in which that lawyer operates. Thus, the funder becomes the lawyer's client. This prevents the lawyer from intervening in the same case as the plaintiff's or defendant's lawyer. The Recommendations clarify the interaction between the lawyer and the funder in light of the lawyer's independence.

- ***(2) The lawyer's fees***

  The lawyer may receive payment of fees directly from the funder. The lawyer does well to make adequate arrangements with the funder regarding the payment of his fees. The lawyer is transparent about this with the client. The lawyer's deontological obligations are without prejudice to the lawyer's obligation to comply with applicable legal obligations, eg under article 446*ter* of the Belgian Judicial Code, which prohibits a stipulation on fees linked solely to the outcome of the dispute.

  Comment: the agreements with the funder should preferably include not only the terms of payment, but also the choice of forum and applicable law for the resolution of any disputes over the fee. There is no deontological impediment to the lawyer agreeing to the application of foreign law or to a foreign forum, but he should make this choice consciously. Choosing a forum other than Belgian courts may be a barrier to the recovery of fees.

- ***(3) Information obligations of the lawyer and their impact on professional liability***

  It is good practice for the lawyer to inform the client about the possibility of invoking TPLF. The lawyer provides adequate information to the client and advises on the content of the funding agreement and its consequences. In arbitration disputes, the lawyer encourages the client to communicate the existence of TPLF and the identity of the funder and informs the client of the consequences of the lack of this information (ie, inter alia, the risk of annulment or refusal of the declaration of enforceability of the arbitral award due to a possible conflict of interest). The lawyer considers whether or not the communication regarding TPLF is mandatory. If the client refuses to give notice against the lawyer's advice, the lawyer will have to consider whether he or she can take on or pursue the case.

  Comment: as a professional practitioner, the lawyer has a special duty of disclosure. In some countries, the lawyer's failure to disclose the possibility of TPLF is considered professional misconduct. The Recommendations encourage the lawyer to adequately inform the client in order to not compromise his or her professional liability. When advising on whether or not to invoke TPLF, the lawyer draws the client's attention to issues such as: the role of the funder, including with regard to intervention in the choice of lawyer; the funder's role in ADR proceedings, in choosing arbitrators, mediators or other third parties; the funder's role in strategic decisions, in considering a possible settlement, the choice of law and forum clauses; the termination options of the agreement by the funder and their impact on the conduct of the

proceedings and, if applicable, on the funder's claim for reimbursement of the lawyer's fees already paid. The lawyer of the client entering into a third-party funding agreement in the context of a class action will ensure that the funding agreements are compatible with the governing rules in the class action and consider the impact on an opt-out. The funder will often wish to include provisions allowing it to terminate the funding agreement upon the discovery of new facts or loss of evidence, upon significant changes regarding the applicable law (eg a reversal of case law that will have a significant impact on the pending case), upon significant changes in the solvency of the opposing party, upon divergent views on the strategy in the case (eg regarding the acceptance or non-acceptance of a settlement agreement) or upon default by the funded party. In the latter case, this party will often be obliged to repay the amounts to the funder. TPLF is usually specific to each file. Since the funder has an interest in the outcome of the case, it will want to supervise and, in certain cases, control the proceedings. This can lead to a tension between the interests of the client and those of the funder. If the client opts for TPLF, he accepts this tension and the limitations inherent in TPLF. However, it does not seem to be a task for the Bar Association to draw up a manual for a model financing agreement, or to advise on the scope of the provisions that ideally belong in this agreement.

- ***(4) Intervention of the lawyer in the conclusion of the agreement with the funder***

  The lawyer's intervention in the negotiation of an agreement between the client and the funder is not prohibited. The lawyer ensures that the agreement with the funder does not contain provisions that could compromise his deontological obligations. It is good practice for the lawyer to clarify his brief when negotiating with the funder. It is also good practice to set out the consequences of the solutions prescribed by the funding agreement for cooperation with the client in a separate agreement with the client. It is appropriate for the lawyer to ensure that the agreements between the client and the funder take into account the lawyer's own rights and obligations regarding fees and expenses and professional liability. To this end, the lawyer may become a party to the agreement with the funder.

  Comment: the provisions that may cause particular tensions in cooperation with the lawyer under TPLF are, in particular: information rights of the funder: the manner of communicating to the funder the procedural documents and the documents received and exchanged during the proceedings, co-decision powers of the funder over the case, the possibility for the funder to supervise the case and co-decide on the case and obligations regarding transfer of funds received into and from the trust account of the lawyer.

- ***(5) Confidentiality and professional secrecy***

  The lawyer remains bound by professional secrecy. He shall not transfer any information to the funder without the client's prior consent to do so. Such consent may be included in the agreement with the client. Even then, the lawyer will only provide such information as is necessary to safeguard the client's interests. If the lawyer is acting jointly with a lawyer from a common law country, he is well advised to inform the client that in common law systems, disclosure of information to the funder may affect the client-attorney privilege, ie that such information will no longer be protected by this privilege. In some cases, it may therefore be useful to have the funder appoint its own attorney to defend its interests.

  Comment: the lawyer's professional privilege is fundamental to the exercise of the profession. On the other hand, it is common practice that funders wish to remain informed of all relevant events during the course of the dispute. The Recommendation meets this common practice. However, this Recommendation may encounter controversy among advocates of a very strict concept of

professional secrecy. The alternative would be, as the Paris Bar suggests, that under no circumstances can the lawyer pass on information about the case to the funder. In that case, it seems useful for the lawyer to warn the client about the consequences of any failure to disclose information to the funder. Further, before deciding to grant TPLF in a particular case, the funder will conduct research (due diligence) into the chances of success. For this purpose, he will want to gather information from the client. To avoid information, which the client conveys to the funder, being used against him, it is good practice for the lawyer to advise the client to enter into an adequate confidentiality agreement with the funder.

- ***(6) Disclosure of TPLF***

  Where TPLF is required to be disclosed, such as in the application of a law or an arbitration regulation, the lawyer should communicate vis-à-vis third persons identified in the applicable regulations the existence of a funding agreement and the name of the funder as well as any other information required as appropriate, as soon as possible. In doing so, the lawyer shall ensure that he obtains the necessary consent from his client and must comply with the applicable procedural rules, such as the rules of the arbitration institution governing the procedure. The lawyer shall inform the client of the implications of the applicable procedural rules on the financing agreement and on its content. The lawyer will not use the mandatory notice for dilatory purposes.

Above reference was made to article 446*ter* of the Belgian Judicial Code. This provision **prohibits contingency agreements under which the determination of the lawyers' fee depends exclusively on the outcome of the case to be litigated.**

Conversely, lawyers can be partly remunerated by a success fee defined as a percentage of the amount recovered by their clients. As a consequence, Belgian lawyers may enter into contingency fee agreements provided that their success fee is limited to a reasonable amount and that the fee arrangement agreed upon with their clients provides for a minimal remuneration independent of the outcome of the case.

These rules only apply to lawyers and not to litigation funders.

2.2 Regulatory oversight of funders/funding industry

As mentioned above, there is no legislation or regulation about TPLF in Belgium. Hence, there is, as a rule, **no supervision by public bodies or regulators**.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

Litigation funders do not provide financial services as regulated under Belgian law and falling under the supervision of the Belgian financial regulator. It is not a loan or a credit agreement because the funded party has no mandatory duty to repay the provided funds to the funder but only an obligation to share potential proceeds with the latter. Litigation funders cannot be seen as credit institutions since they do not publicly collect refundable deposits, nor make available credit facilities for their own account. TPLF is also not a legal protection insurance since in a litigation funding agreement – unlike under an insurance policy – no premium for the coverage of a future litigation risk is paid.

In some cases, it is considered that funds providing litigation could fall within the scope of the EU Alternative Investment Funds Managers Directive (AIFM Directive) implemented under Belgian law

by the AFIM Act.[203] The AIFM Directive defines alternative investment funds as any collective investment that raises capital from a number of investors to invest it in accordance with a defined investment policy for the ultimate benefit of the investors.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Given the lack of a statutory framework, funding arrangements are governed by the general rules of contract in the Belgian Civil Code. The content of the funding arrangement can be freely agreed upon by the parties, as long as it does not result in a violation of public policy.

According to Deminor, a funding agreement will usually include the following provisions:[204]

> 'The amount of the investment: the funding agreement will generally define the maximum commitment of the funder, the specific items that are included in the budget (legal fees for first instance and appeal, expert fees, adverse party costs, etc) and the conditions for drawdown of the budget. To avoid budget overruns, and depending on the type of case, funders may work with capped amounts per item or stage of the proceedings.
>
> Exposure to counterclaims: the funding agreement will specify whether the funding will cover the costs of defending a counterclaim and whether the funder will cover the financial exposure of a counterclaim.
>
> The funder's remuneration: this can be either a percentage of the recovered amounts, a multiple on the invested capital, or a combination of both. The agreement will also set out the 'payment waterfall,' which defines the priority of payments to the funder, the law firm (contingency) and the client. Practical arrangements for the distribution of the proceeds will also be provided for.
>
> The exchange of information: correspondence between clients and their lawyers, and any written material drafted for a client, are protected by attorney–client privilege. The lawyer, therefore, cannot disclose any of this to the funder without the client's express consent. Consequently, the funding agreement will regulate the exchange of information between the client, the lawyer and the funder. This enables the latter to be kept abreast of the progress of the case and to monitor its investment.
>
> Control or consent rights: to protect its investment, the funder will generally seek to have some degree of control over important decisions in a case, such as filing appeals, terminating proceedings or accepting settlements. Under Belgian law, a funder is not prohibited from having a veto right on certain decisions.
>
> Termination rights: in addition to termination for material breach, the funder and the client may also agree on a right for the funder to terminate the agreement if an event occurs that

[203] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1 July 2011, 1–73.
[204] Patoul, 'Litigation Funding Overview- Belgium'.

negatively impacts the prospects of the case, or an event that makes the case commercially unviable, or the agreement may even allow for termination for convenience.'

In collective actions – but as mentioned above, not falling under the scope of the 2014 class action rules – the funder will usually have a much more active role in managing and steering the litigation. The agreements between the funder and the individual clients will then generally be structured as a contract for services rather than a mere funding agreement, including provisions that enable the funder to manage the litigation.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

In the absence of any act on TPLF, **no legal provision imposes an obligation on the funded party to disclose the existence of a funding agreement**.

However, it is considered that in specific circumstances the principle of procedural loyalty justifies that the funded party discloses the existence of a funding agreement to the opposing party and to the court. Such disclosure would notably be necessary to ensure that there is no conflict of interest involving the third-party funder. Moreover, the disclosure of a funding agreement may be ordered by a court if the conditions required for the production of documents under article 877 of the Belgian Judicial Code are met (the existence of serious, precise and concordant presumptions that a party or a third-party is in possession of a document containing evidence of a relevant fact). This scenario, however, seems rather unlikely in relation to a funding agreement. As far as arbitration proceedings are concerned, it is considered that the principle of fairness of the debates enshrined in article 1699 of the BJC imposes a duty on the funded party to disclose the existence of a third-party funder, should the party be aware of potential conflicts of interest between the funder and one or several arbitrators. Potential conflicts of interest occur more frequently in arbitration proceedings since arbitrators may have worked before with third-party funders when acting as a lawyer.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

N/A.

2.7 Obligations of funders towards beneficiaries and vice-versa

N/A.

2.8 Distribution of awards and bearing adverse costs in lost cases

Since there is no regulation on TPLF, there are no specific rules regarding the amount of the funder's return. As a general rule, **the funder's profit should not exceed the litigant's share of the proceeds**. Usually, the funder's share is calculated based on a multiple of the funds contributed, a percentage of the proceeds or a combination thereof. In practice, the funder's success fee commonly ranges between 20-50% of the net proceeds (although sometimes caps apply).

2.9 Planned legislation

No.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

N/A.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	N/A
Capital adequacy (Art.6)	N/A
Fiduciary duty (Art.7)	N/A
Powers of supervisory authorities (Art.8)	N/A
Investigations and complaints (Art.9)	N/A
Coordination between supervisory authorities (Art.10)	N/A
Content of third-party funding agreements (Art.12)	N/A
Transparency requirements and avoidance of conflicts of interest (Art.13)	N/A
Invalid agreements and clauses (Art.14)	N/A
Termination of third-party funding agreements (Art.15)	N/A
Disclosure of the third-party funding agreement (Art.16)	N/A
Review of third-party funding agreements by courts or administrative authorities (Art.17)	N/A
Responsibility for adverse costs (Art.18)	N/A
Sanctions (Art.19)	N/A

3. Practical operation of TPLF in your jurisdiction

Besides what was mentioned above (see *supra* subchapter 2) and what is mentioned below (see *infra* subchapter 4), there is no (public) information available on the practical operation of TPLF in Belgium.

The website of Deminor mentions a handful of high-profile cases in Belgium where claimants benefited from TPLF:[205]

> 'A group of approximately 13,000 private investors filed claims in relation to accounting fraud at the speech technology company Lernout & Hauspie during its ensuing bankruptcy. The criminal proceedings led to the conviction of several managers and the auditor of the company. Civil proceedings are still pending against various defendants, including the auditor.
>
> A group of over 6,000 investors, both institutional and retail, filed litigation before the Belgian courts in the aftermath of the collapse of Fortis Bank (now Ageas NV/SA). This case was ultimately settled as part of the collective settlement agreement declared binding by the Court of Appeal of Amsterdam on 13 July 2018. This settlement, for a total amount of €1.3 billion, is the largest ever investor claim settlement in Europe.
>
> Currently, proceedings in appeal are pending in a case brought by thousands of retail investors in Arco, a financial holding company that invested mainly in the now-defunct Dexia Bank. Arco entered into liquidation in 2011. The investors are seeking damages from, inter alia, Arco, the Belgian state and Dexia's successor, Belfius Bank.'

4. Stakeholder views on TPLF in your jurisdiction

The main findings of the description above are echoed by the Belgian stakeholder views of TPLF in Belgium. Four stakeholders were interviewed: a funder active in Belgium, the Order of Flemish Bars Association (OVB) (the regulatory and representative body of the Dutch language Bars of Flanders and Brussels), *Test-Aankoop/Test-Achats* (the biggest consumer organisation in Belgium) and a lawyer from a law firm having (some) experience with litigation funding.

1. Interview with a funder[206]

From the outset, the funder underlined the importance of **self-regulation**. Reference was made to the European Litigation Funders Association (ELFA) that adopted a Code of Conduct in June 2022. On the other hand, self-regulation is not all-encompassing. Some form of regulation is needed, although priority (or at least a change) should be given to soft law first. Only when the latter fails or cannot tackle all problems, hard law should emerge. In that sense, the current mapping exercise is a good thing, since the study and resolution of the European Parliament (which was the direct cause for this exercise) contain a number of erroneous and inexistent assumptions.

Two general remarks regarding TPLF should be made. On the one hand, it should be realised that a litigation funder is **only one of the various actors involved in litigation** (next to the client, the lawyer and the court). On the other hand, **the kind of cases differ**. There are disputes

[205] Patoul, 'Litigation Funding Overview- Belgium'.

[206] The interview was conducted online on 25 April 2024. The funder requested anonymity.

between businesses and between business and states (especially in the field of arbitration) and there are (consumer or other) class action cases. The issues and problems differ according to the type of case.

The funder immediately stated that **TPLF almost does not exist in Belgium**. There are a number of reasons.

> First of all, compared to other jurisdictions, the cost of the Belgian judicial system is rather low, so there is little demand for litigation funding. Another (less positive) aspect is the slow functioning of justice. This is important because the duration element plays a role in determining the price (cost) of litigation. The fact that procedures can take a very long time can make it very expensive. The funder explored the market in Belgium. They came to the conclusion that there is an interest for TPLF but that commercially it is not very attractive.
>
> Two, the funding of class action procedures is *de facto* impossible because of the (very) limited standing. The act was written to suit Test-Aankoop/Test-Achats.
>
> Three, Belgium had a number of 'collective proceedings'. These are not class actions (representative actions). This also does not refer to the assignment model (where individuals transfer their claims to one SPV). It is about procedures where individual claims are bundled. This is uninvestable. Besides the fact that one needs an agreement with every claimant, Belgian courts are not able to deal with these kinds of procedures. Moreover, this model is abused by defendants who at every turn raise procedural defences, making these proceedings very thorny and lengthy. Reference was made to the *Arco* case with about 14,000 individual claimants, which was characterized by many individual procedural issues. As an aside, it is noted that the assignment model does not really have an added value. It has not really been tested in Belgium, and even if it is accepted as a valid option, a (burdensome) assessment of all individual damages is still needed.

The funder states that TPLF is only viable (easier) for **B2B arbitration** cases in Belgium. In exceptional cases, the same is true for (large) cartel cases. It is emphasised that TPLF could have an added value for **bankruptcy cases** and could be of interest for curators.

The conclusion of this, is that TPLF is interesting for professional actors, and not (or less so) for consumers. The Belgian Class Action Act 2014 does not pay sufficient attention to the funding and financing of class action procedures.

In 2023, the funder received about 600 funding requests worldwide. Only 0.1% of these requests were Belgian cases. 97% of these requests were rejected, while only **3-5% were accepted** (funding was provided in about 20 cases).

All requests (and most of them come from lawyers, not clients) are first analysed internally. In the case of a positive evaluation, the internal committee offers a non-binding proposal containing the proposed funding modalities. If this is accepted by the client, an external due diligence is conducted by the funder's own (external) lawyer. This is a second opinion usually focusing on a number of specific legal issues (prescription, causality, damage quantification, etc). Finally, and after a conflict-of-interest check, the funder decides autonomously whether they will fund the case or not.

The **funding modalities are always custom-made**. The funder is an equity investor. If there is no result, they lose the investment. If there is a positive result, they receive funds. First of all,

there is a return of capital (ROC). In class action cases, this can be a flat percentage of the recovery (e.g. 15%, 20% or 30%) or a more layered recovery (e.g. 20% on the first 10 million, 17% on the next, etc.). Second, there is fee that goes to the funder. This can be a percentage of the net return (between 5% to 30%). There is also a multiple on the investment which evolves over time according to the duration of the procedure. If the procedure is fast, then the multiple drops. If the procedure is slow then the multiple increases. In other words, the duration is taken into account.

In some jurisdictions (eg the Netherlands, the UK and Germany) **the court looks at the remuneration of the funder**. This is stressed as important. It is unwise to define or describe this in the law. This should belong to the discretionary powers of the court.

In more liberal jurisdictions (eg Belgium and the Netherlands) and in class action cases, a contract is concluded between the funder and the client in which the latter **gives a mandate to the funder to appoint a lawyer to conduct the proceedings and even to instruct the lawyer**. This model does not exist in the UK, Germany and the Netherlands (under the WAMCA regime).

In arbitration cases, **a strategy is usually submitted to the funder** who decides (and pays) on that basis. Thus, the client does not get a blank check. It is important to underline that many call on the funder not only as a litigation funder, but also because of its litigation experience. They use the funder as a partner, information source and advisor. A specific procedure is foreseen should a conflict arise between the client and the funder, but this is almost never applied.

In B2B arbitration cases, there is always **disclosure** of the fact that there is a litigation funder involved, in order to detect any conflicts of interest between an arbiter and the funder. In commercial cases before courts there is no such disclosure duty. The funder is in favour of such a rule. The fact that a funder is involved and the identity of the funder should be disclosed. It is underlined that in B2B arbitration cases, defendants always invoke incidents about the presence of a funder. They always want to know the content of the funding agreement and insist on a security for costs in case the plaintiff becomes insolvent. In all cases the funder was involved in, they never had to disclose the funding agreement and a security for costs was never ordered.

Whether TPLF should be **regulated** depends on the question whether there are real problems in the funding world. As mentioned before, the study and resolution of the European Parliament contain a number of erroneous and non-existent assumptions, for example that there are 'problems'. The basic fact is that when one compares the total amount of litigation funding in the EU vis-à-vis the total amount in the EU that comes from litigation funders, less than 1% comes from the latter. The question rises whether this is economically relevant. How can this lead to an inflation of costs?

The funder advocates allowing the market to play for 'bad' funders. After a couple of years, they will automatically be expelled from the litigation market. This is preferable to (strict) regulation. The rules that are suggested are very hard for a sector that is already very hard because it is a high-risk activity. It is extremely difficult to raise capital, in addition to the fact that investors set very high requirements for financiers. This alone separates the wheat from the chaff. What should be put in place is a **'disciplining market mechanism'** (similar to what applies to asset managers). The key question then is what a regulator can add. It is not in the interest of 'good' funders that there are 'bad' players because they can disturb (or even destroy) the market. There is a risk of contamination.

Moreover, there is an important role for **already existing gatekeepers**: lawyers and courts (that for example will verify if the funder has sufficient resources), and even clients. The first (important) due diligence is done by the client and his/her lawyer.

It is also crucial to safeguard the **freedom of contract**. It cannot be that strict rules, based on sometimes erroneous assumptions, seek to restrict that freedom.

2. Interview with the Order of Flemish Bars (OVB)[207]

As mentioned above, the Order of Flemish Bars issued a number of Recommendations on TPLF in June 2023. These Recommendations are discussed above.

Despite these Recommendations, **TPLF is not a common practice in Belgium**, at least it is not very visible. If problems arise, the president of the local bar (*stafhouder / bâtonnier*) is usually confronted with issues regarding **professional secrecy** and the **sharing of costs and fees**. In these two areas, from a legal ethics point of view, there is still much uncertainty.

Reference was made to one arbitration case where an issue arose regarding the lawyer's sharing of his professional secrecy with a funder. The lawyer in question was asked to sign a forum clause whereby any disputes between the client, the lawyer and the funder would be subject to arbitration by the Law Society in the UK. Since there was no guarantee that the lawyer's professional secrecy would be protected, the president of the local bar told him that he could not agree to this.

The goal of the aforementioned recommendations is to **preserve the basic principles of the legal profession** on the one hand, but to provide a framework to **avoid a competitive disadvantage** in comparison to other countries (e.g., the Netherlands and Germany) on the other. One does not want restrictive rules to make it difficult for a Flemish lawyer to use TPLF.

Nevertheless, TPLF **remains marginal** in Belgium. Unlike, for example, the Netherlands (that has a more robust collective redress framework), the claims here are rather small in size, the lawyers are cheaper and the jurisdiction is smaller. Except for the above anecdotal evidence, there are generally few deontological problems and few questions from practice. To date, the legal ethics department of the Order of Flemish Bars has not received a single question on this subject. The only exception is **arbitration**, where Belgium plays a leading role. There, TPLF is used occasionally.

Some of the aforementioned Recommendations on TPLF are addressed. It is emphasized that today they are recommendations. They are not (hard) deontological rules, although it is not precluded that there may be such rules in the future.

Independence

Either one is a lawyer for the funder or for the client. In both cases – and the most common is obviously the second case – the lawyer retains his absolute independence. He receives instructions from the client, not from the funder, unless the client makes the funder's instructions his own. The lawyer may have contact with the funder but

[207] The interview was conducted online on 29 April 2024.

always with the client present (transparency). The lawyer may receive fees from the funder. This in itself does not violate his independence.

Costs & fees

Regarding costs and fees, it is important that clear and transparent agreements are made, especially to the client. TPLF should not prejudice existing legal rules (see above).

Information duties

In arbitration cases, the use of TPLF must be disclosed to the arbitral tribunal because of a conflict of interests check. Unlike judges, those conflicts of interest can exist on the part of arbitrators (who are, in most cases, lawyers). Hence, there is an obligation of disclosure.

This disclosure is not a general obligation. For example, this is not required for the courts. It is emphasised that sometimes this is also not in the client's best interest. Disclosing the existence of TPLF could create a deep pocket feeling. This could have an impact on how the parties, and especially the court, looks at the case. It could jeopardise the case and could even be counterproductive for the judge, and thus not in the best interest of the client. In other words, the latter, and the agreement of the client, should take precedence. If it is in the client's interest, it can be disclosed if the client agrees. If it is not in the client's interest, it should not be disclosed if the client agrees.

Confidentiality & professional secrecy

These principles remain undiminished. Again, the client's best interests prevail. As a general rule, no information can be disclosed to the funder, even if requested or ordered by the client. In common law jurisdictions, this is different. If information is provided to the funder, the legal professional privilege no longer applies.

In light of the abovementioned non-mandatory disclosure of TPLF, the person who was interviewed (in a personal capacity and thus not on behalf of the Order of Flemish Bars) notes that one should not actually get involved in over-regulating TPLF. He speaks of **over-regulation within the EU** (a 'regulatory water head'). What is being proposed (eg the establishment of oversight bodies) is very **complex**. There is no need for a stringent regulatory framework.

In the TPLF sector there is self-regulation. Sometimes they ask for legislation (a normative framework) but mainly (a) as a quality label and (b) to exclude the 'bad players.' It is argued that **the existing market and normative framework are not yet crystallised,** so stricter legislation is, for the moment, not needed yet.

An important distinction must be made between consumer and non-consumer TPLF. For the former, it can be defended that legislation is useful. However, the market does not focus exclusively on consumers. The TPLF market focuses equally (and perhaps more) on so-called **sophisticated parties**: large parties with large resources. They sometimes dislike litigation because of the uncertain outcome. They do not always want to pay everything upfront and they want to spread the risk. One solution may be TPLF. However, and this is important, they **do not need protection (or at least need protection to a much lesser degree than consumers)** because they are sophisticated repeat players.

3. Interview with *Test-Aankoop/Test-Achats*[208]

Test-Aankoop/Test-Achats **has not used TPLF as of today in their class action cases**. All the class actions they have brought have been self-funded. That funding came from their general funds (including member contributions). They do not charge fees from class members. This is a big investment for *Test-Aankoop/Test-Achats*, since the costs are very high (management, communication, back office, lawyers, etc). The procedures also take a very long time (For example, *Dieselgate* took 7 years and is not yet settled). Consequently, one cannot bring all the cases for which a class action could be brought. **"We need to pick our battles."**

TPLF is an **attractive avenue** not only as a funding mechanism, but also as a leverage tool during settlement negations. It is not yet part of *Test-Aankoop's/Test-Achats'* culture, although it could eventually be part of their **EU (not national) strategy** (*Test-Aankoop/Test-Achats* brings most of their cases together with their Euroconsumers-colleagues). They do not really have an idea of exactly how it works (eg how much it costs and how long procedures with TPLF assistance take). On top of that, there is also **little supply**. Few funders have contacted *Test-Aankoop/Test-Achats* and there is a suspicion that those funders are not really looking for consumer associations.

Test-Aankoop/Test-Achats **does not really favour strict regulation.** There are already quite a few safeguards in the Representative Actions Directive. It is not favourable to start introducing additional safeguards on TPLF. One should not be too patronising. One should let the market play. It is important to have a **good competitive market**. If there is good competition between different funders, then that can reduce the cost for consumers.

4. Interview with a lawyer[209]

Unlike the Netherlands, Belgium is **not a trigger country** with respect to TPLF. It is not part of the litigation landscape. The lawyer refers to two cases in which TPLF was involved. In those two cases there was no disclosure of TPLF.

In the cases where it occurs in Belgium, there is **almost always a link to foreign jurisdictions**. In many cases, the funders are foreign players and a lawyer from abroad intervenes. The cases in which they intervene are post-arbitration cases, sovereign debt cases or cases where an award has been obtained against a State and an enforcement procedure is needed in Belgium. In all these cases, reporting to the foreign lawyer, who is closer to the TPLF intervention and can see and assess how the funds are used, is required.

Negotiations with funders are always very hard since they are **repeat players**.

The lawyer points out that in most cases, the funding agreement is concluded between the client and the funder. It is the client who appoints the funder. However, the client is represented by the lawyer who is paid by the funder. That lawyer sometimes does not have access to the funding agreement, which is odd and can lead to conflicts of interest.

The lawyer does not favour the **disclosure of funding agreements**. Certainly not vis-à-vis the counterparty. They do not need to know about the fees of their opponent's lawyers. In class action cases, disclosure is needed, but certainly not in general and for all other cases.

[208] The interview was conducted online on 13 May 2024.
[209] The interview was conducted online on 14 May 2024.

When asked whether regulation is necessary, the question is raised whether there are abuses that need to be regulated. The lawyer's experience shows that funders are sophisticated players who, for example, assist in thinking about the case.

Two examples that are similar to TPLF are (a) the insurer's leading role in litigation (being in charge of the litigation) and (b) indemnity litigation post M&A where it is often stipulated that if litigation arises, the seller must indemnify the buyer.

Glossary of abbreviations and acronyms

ADR	alternative dispute resolution
AIFM	Alternative Investment Funds Managers (Directive)
ATE	after-the-event (insurance)
BJC	Belgian Judicial Code
B2B	business to business
ELFA	European Litigation Funders Association
OVB	Orde van Vlaamse Balies (Order of Flemish Bars)
RAD	Representative Actions Directive
ROC	return of capital
SMEs	small and medium sized enterprises
TPLF	third party litigation funding

Table of legislation

Belgian Judicial Code

Belgian Civil Code

Belgian Code of Economic Law

Loi 4 avril 2014 relative aux assurances, Belgian Official Gazette 30 April 2024 (as amended)

Loi 21 avril 2024 modifiant les livres Ier, XV et XVII du Code de droit économique, et transposant la directive (UE) 2020/1828 du Parlement européen et du Conseil du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs et abrogeant la directive 2009/22/CE, Belgian Official Gazette 31 May 2024

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L174/1

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Bulgaria

Dr Valentina Bineva, Bulgarian Academy of Science

Executive Summary

- The concept of Third-Party Litigation Funding (TPLF) was until recently unknown in Bulgarian legal doctrine and practice. Although it is still underdeveloped, and only a minority of stakeholders are familiar with it, the number of court proceedings involving TPLF elements in Bulgarian legal practice has increased noticeably in the last three or four years. Nevertheless, TPLF is still not a mainstream practice in Bulgaria and the claims are of low value.
- Research conducted for the purposes of this report revealed certain trend towards changes in Bulgarian practice with regards to TPLF, namely:
  - In the past, TPLF was mainly found in lawsuits brought by representative organisations for protection of collective interests of consumers against unfair contractual terms or unfair commercial practices, whereas in the last three to four years, some companies seem to specialise in funding court proceedings in return for a fee as a percentage of amounts awarded by court decisions.
  - Bulgarian legal practice has already witnessed the first lawsuits financed through crowdfunding.
  - TPLF, as defined for the purposes of the current study, has traditionally been used for the protection of consumers rights and interests, mainly against unfair contractual terms or unfair commercial practices. Right now, the third-party litigation funding seems to be more focused on refunding overpaid interests and fees to fast loan companies[210]. TPLF's scope of application in Bulgaria also includes protection of environmental rights.
- TPLF is neither explicitly regulated, nor banned in Bulgarian legislation. Currently, there is no planned Bulgarian legislation in this area. Courts proceeding with TPLF aspects, identified in the course of this research, follow the general procedural rules. However, these rules are not suitable to address certain aspects of TPLF, such as conflicts of interest, transparency, liability for adverse costs, risks related to termination of funding, etc.
- The Representative Actions Directive (EU) 2020/1828 (RAD) is still in the process of implementation in Bulgarian legislation.

[210] This may be connected with the increasing number of such loans and legal problems connected with them, such as the presence of unfair clauses in the contracts of fast loan companies, excessive interest rates, penalties and fees, the lack of sufficient, accurate and timely pre-contractual information to make an informed decision to enter into a credit agreement or an annex to a credit agreement, the provision of incomplete contract forms for signature, and the small font size of important contract clauses. All of these are on the radar of Bulgarian institutions. See, for example, the Ombudsman of Republic of Bulgaria, 'Новини' (*Complaints*) < https://www.ombudsman.bg/bg/n/ombudsmanat-bezobraziyata-na-firmite-za-bar-2219> accessed 30 May 2024.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

The concept of Third-Party Litigation Funding (TPLF) was, until recently, unknown to Bulgarian legal doctrine and legal practice.[211]

Currently, in Bulgarian legislation, this concept is neither explicitly regulated, nor explicitly banned.

The research conducted for the purposes of this study has identified several proceedings before Bulgarian courts in the last couple of years that have some characteristics of TPLF (more details in the sections below). Due to the lack of specific legislation in this matter, these proceedings were heard in accordance with general rules of Bulgarian (civil) procedural law, which are not always suitable for legal relations in connection with TPLF, as these rules cannot address some aspects, such as conflicts of interest, transparency, risks of discontinuation of funding, etc.

A Bill on Representative Actions for Protection of Consumer Collective Interests Act for implementation of the Representative Actions Directive (EU) 2020/1828 is now pending before Bulgarian Parliament.[212] When this new Act enters into force, it will introduce a possibility for courts to review conflicts of interest in a representative action for compensation. Namely, where a representative action for compensation is funded by a third party, the court shall check for any conflicts of interest and determine whether the third-party funder detracts from the protection of the collective interests of consumers.

No other bills or legislation in force with regards to TPLF have currently been identified in Bulgaria.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

In Bulgaria, there is no legislation in force on TPLF.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

According to information currently available, there are some companies whose business activities could be considered third-party funding of legal proceedings. These are mainly companies specialised in refunding overpaid interests and/or fees for fast consumer loans[213].

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[211] The British Institute for International and Comparative Law, 'State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation' (Report, JUST/2016/JCOO/FW/CIVI/0099, European Commission, 2017) 133.

[212] National Assembly of the Republic of Bulgaria, 'Bills' (*Bills*) <https://www.parliament.bg/en/bills/ID/164707> accessed 27 September 2024.

[213] These are the companies operating the website 'За нас' (*Nadplatih*) <https://nadplatih.com/za-nas/> accessed 22 May 2024 , namely 'Tesdo EOOD' (*Registry Agency Portal*) <https://portal.registryagency.bg/CR/Reports/ActiveConditionTabResult?uic=206629393> accessed 22 May 2024; 'Themis Capital EOOD' *(Registry Agency Portal*) <https://portal.registryagency.bg/CR/Reports/ActiveConditionTabResult?uic=205870847> accessed 22 May 2024. More information about these group of companies and their activity is provided further in this report;. Another company with similar business activity is 'High School Entertainment EOOD ' (*Registry Agency portal*)

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

Such statistics are not available in Bulgaria and do not appear to exist.[214]

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources)

TPLF is a new topic in Bulgarian legal doctrine and practice and there are not many academic publications or in-depth doctrinal discussions about it, except for a few reports for academic conferences and short announcements in the press about the prepared EU legislation.[215]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources)

As mentioned earlier, TPLF itself has not yet been the subject of in-depth academic research and discussion in Bulgarian legal literature. It is touched upon mainly in connection with transposition of the Representative Actions Directive (EU) 2020/1828 into Bulgarian legislation and rarely as a separate topic of research.[216]

2. Relevant legislation applicable to TPLF in your jurisdiction

The Representative Actions Directive (EU) 2020/1828 has not yet been transposed into Bulgarian legislation. As mentioned earlier, a Bill on Representative Actions for Protection of Consumers Collective Interests is currently pending before Bulgarian Parliament but has not entered into force yet. Public consultations on this Bill between stakeholders and legal experts are ongoing.[217]

<https://portal.registryagency.bg/CR/Reports/ActiveConditionTabResult?uic=203885487> accessed 22 May 2024, operating the website 'Finback' (*Finback*) <https://finback.bg/faq/> accessed 22 May 2024.

[214] Annual reports of the Bulgarian Supreme Judicial Council do not include data for such proceedings – the reports are available at Bulgarian Supreme Judicial Council, 'Accounting reports' (*Supreme Judicial Council Webpage*) <https://vss.justice.bg/page/view/1082> accessed 22 May 2024.

[215] Deyan Dragiev ,'The legal regime for collective consumer actions under EU Directive 2020/1828 in the light of the special proceedings in the Civil Procedure Code' (*Civil Procedure European Law*, 27 March 2022) <https://www.challengingthelaw.com/grajdanski-proces/praven-rezhim-direktiva-2020-1828/> accessed 22 May 2024; Emil Radev, 'Private Litigation Funding – European Solutions For Fair Access To Justice' (The Law and Business in Contemporary Society Conference, 12 October 2022) <https://bnr.bg/varna/post/101719769/pravoto-i-biznesat-v-savremennoto-obshtestvo> accessed 22 May 2024;

Lyubomir Atanasov, 'The future of class actions lies in a radical reform of the Civil Procedure Code according to European standards' (*Lex.bg,* 8 June 2018) < https://news.lex.bg/guestpost> accessed 22 May 2022.

[216] Deyan Dragiev , 'The legal regime for collective consumer actions under EU Directive 2020/1828 in the light of the special proceedings in the Civil Procedure Code' (*Challenging the Law,* 27 March 2022) <https://www.challengingthelaw.com/grajdanski-proces/praven-rezhim-direktiva-2020-1828/> accessed 22 May 2024; Emil Radev, 'Private Litigation Funding – European Solutions For Fair Access To Justice,' (The Law and Business in Contemporary Society Conference, 12 October 2022) <https://bnr.bg/varna/post/101719769/pravoto-i-biznesat-v-savremennoto-obshtestvo accessed> 22 May 2024.

[217] Motivi LRA, Law on Representative Actions for Protection

2.1 Legal admissibility and conditions of using TPLF in civil litigation

In Bulgaria, using TPLF in civil litigation is neither explicitly regulated, nor banned. It appears admissible, subject to the general rules and principles of Bulgarian Civil Procedural Code.

2.2 Regulatory oversight of funders/funding industry

Bulgaria legislation in force does not provide for regulatory oversight of funders/funding industry of litigations.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF - e.g. capital adequacy requirements

The current Bulgarian legislation does not provide any special conditions for funders to carry out business activities. Practically, any natural or legal person may carry out such activity, subject to the Bulgarian general legislation in force that is applicable to such business activities.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflicts of interest, etc).

Despite the absence of an explicit legal regulation of litigation funding by third parties, certain provisions from Bulgarian legislation in force would apply to such activities, namely:

- Good faith requirement

Pursuant to article 3 of the Code of Civil Procedure 2008,[218] which is applicable to both civil and commercial cases, the participants in the court proceedings and their representatives, against liability for damages, shall exercise proceedings rights, granted to them, in good faith and accordingly to the good morals. The participants and their representatives shall state before the court only the truth. In the light of TPLF, this requirement would imply that such funding should be

of Consumers' Collective Interests' <https://www.mi.government.bg/files/useruploads/files/zashtita_na_potrebitelite/Motivi_LRA.pdf> accessed 22 May 2024; Motivi LRA, 'Law on Representative Actions for the Protection of Collective Interestsi of Consumers' <https://www.mi.government.bg/files/useruploads/files/zashtita_na_potrebitelite/Proekt_LRA.pdf> accessed 22 May 2024

https://www.parliament.bg/bg/bills/ID/164707 accessed 27 September 2024

https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=7124 accessed 27 September 2024

Opinion of the Association for Modern Trade on the Bill of Law on representative claims for the protection of the collective interests of consumers is available here:

https://moderntrade.bg/news/%D1%81%D1%82%D0%B0%D0%BD%D0%BE%D0%B2%D0%B8%D1%89%D0%B5-%D0%BD%D0%B0-%D1%81%D0%BC%D1%82-%D0%BF%D0%BE-%D0%BF%D1%80%D0%BE%D0%B5%D0%BA%D1%82%D0%B0-%D0%BD%D0%B0-%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD-%D0%B7%D0%B0/ accessed 22 May 2024

[218] Code of Civil Procedure 2008 (Bulgaria), available at, Bulgarian Government, 'Code of Civil Procedure' (*Lex.bg*) <https://lex.bg/laws/ldoc/2135558368> accessed 27 September 2024

used to ensure protection of existing and actually infringed or violated rights and not for profit/benefit.

- Conflicts of Interest

The Bulgarian legislation does not have uniform rules on conflicts of interest in the private and public sphere. A special law regulates this issue for persons holding public office[219] and there are separate provisions in the Commercial Act 1991 regarding the management bodies of commercial companies[220] and insolvency proceedings.[221] The fragmented provisions are the reason why the current legislation cannot provide adequate safeguards for avoidance of conflicts of interest in TPLF.

- Investment funds

The activity of investment funds in Bulgaria is regulated in the Activity of Collective Investment Schemes and other Collective Investment Enterprises Act 2011 (ACISCIEA),[222] which introduces the requirements of a number of acts of the European Union into Bulgarian legislation,[223] The ACISCIEA regulates collective investments in transferable securities, alternative investment funds management, venture capital funds, money market funds, long-term investment funds, and social entrepreneurship funds. It also provides requirements for authorisation or registration of these funds. The authorisation or registration in Bulgaria is entrusted to the Financial Supervision Commission, which publishes detailed statistics on issued authorisations and registrations of various types of investments funds on its website.[224]. In addition to authorisation and registration of investment funds, the ACISCIEA also regulates the powers of the Financial Supervision Commission as a supervisory authority (arts 3 and 3a), the compulsory administrative measure that the Financial Supervision Commission can take (Part II, Title 3, Chapter 23), coordination and cooperation with supervisory authorities in other EU member states (Part II, Title 4). Further to above, the ACISCIEA also introduces requirements to investment funds to take measures to prevent conflicts of interest (for example, arts 104, 105, 105a, 106, 190, 192, 218, 219, 220, and 222), to secure transparency (for example, arts 54(7), 235 (3)), for capital adequacy (for example, arts 92, 100, 199, 226), remuneration and fees (for example, arts 30, 108(4), 173, 221),[225] as well as sanctions for violation of legal requirements (Chapter 25).

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[219] The Anti-Corruption Act 2023 (Bulgaria), available at Bulgarian Government, 'Anti-Corruption Act' (*Lex.bg*) <https://lex.bg/bg/laws/ldoc/2137236963> accessed 27 September 2024.

[220] Articles 229, 236 (2) 3, 260ъ (2) of the Commercial Act 1991 (Bulgaria), available at Bulgarian Government, 'Commercial Act 1991' (*Lex.bg*) <https://lex.bg/laws/ldoc/-14917630> accessed 27 September 2024.

[221] Articles 646 (4) 1, 649 (4), 762 (3) 4, 789 (1) 5 and § 1 of the Additional Provisions of the Commercial Act 1991 (Bulgaria), available at Bulgarian Government, 'Additional Provisions of the Commercial Act 1991' (*Lex.bg*) <https://lex.bg/laws/ldoc/-14917630> accessed 27 September 2024.

[222] The Activity of Collective Investment Schemes and other Collective Investment Enterprises Act 2011 (Bulgaria), available at, Bulgarian Government, 'Activity of Collective Investment Schemes and other Collective Investment Enterprises Act 2011' (*Lex.bg*) <https://lex.bg/bg/laws/ldoc/2135754011> accessed 27 September 2024.

[223] These acts are listed in s2 and s2a of the Additional Provisions of the ACISCIEA, which is available (in Bulgarian) at Bulgarian Government, 'Additional Provisions of the ACISCIEA' (*Lex.bg*) <https://lex.bg/bg/laws/ldoc/2135754011> accessed 27 September 2024.

[224] Financial Supervision Commission, 'Statistics' (*Investment Activity*) <https://www.fsc.bg/investitsionna-deynost/statistika/> accessed 25 May 2024.

[225] Additionally, detailed provisions on remuneration and fees are included in Ordinance No 44 of 20.10.2011 on the requirements for the activity of collective investment schemes, management companies, national investment funds, alternative investment funds and entities managing alternative investment funds, which is available (in Bulgarian)

Theoretically, it would be possible for an authorised or registered alternative investment funds to finance litigation proceedings as a form of high-risk investment, in which case the provisions of the ACISCIEA, including the above listed ones, and the regulations for its implementation, would apply. However, right now there is no publicly available information indicating that an authorised or registered investment fund has financed any litigation proceedings in Bulgaria[226].

- Anti-money laundering rules

The Measures against Money Laundering Act 2018 ('MALAA') defines the measures for prevention of the use of financial system for money laundering purposes, as well as the organisation and control of the implementation of these measures.[227] Amongst others, these measures also apply to collective investment schemes and other undertakings for collective investment, which have obtained an authorisation or registration pursuant the terms and conditions of the ACISCIEA as well as to management companies and persons managing alternative investment funds, which are authorised or registered under the ACISCIEA. Hence, if an investment fund, authorised or registered under the ACISCIEA, acts as a third-party litigation funder, then the terms of the MALAA would apply to this activity as well.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure, and costs

In the absence of explicit and specific legislation, the TPLF could rely on the fundamental principles of the Civil Procedural Law as safeguards against illegality, conflicts of interest, and lack of transparency. These principles are as follows:

- The principle of lawfulness (art 5 of the Code of Civil Procedure) that requires the court to hear and decide the lawsuits in accordance with the exact meaning of the laws and in event of lack of law, on the common principles of the legislation, customs and morals;
- The principle of prohibition of abuse of rights/good faith requirement (art 3 of the Code of Civil Procedure). It is noteworthy that some legal authors consider the use of the civil

at Bulgarian Government, 'Ordinance No 44 of 20.10.2011' (*Lex.bg)* <https://lex.bg/laws/ldoc/2135757824> accessed 27 May 2024.

[226] More information on portfolios of some of the alternative investment funds authorized/registered in Bulgaria can be found on the following websites: [all last visited on 27.05.2024]: Karol Financial Group, 'Homepage' (*Karol Financial Group*) <https://karoll.bg/finansova-grupa-karol/> accessed 27 May 2024; Strategia Asset Management, 'Homepage' (*Strategia Asset Management*) <https://www.strategia-asset.com/index.php> accessed 27 May 2024; Silverline Capital 'Company Portfolio' (*Silverline Capital*) <https://silverlinecapital.net/bg/company-portfolio/> accessed 27 May 2024; Borg.bg, 'Homepage' (*Borg.bg*) <http://borg.bg/> accessed 27 May 2024; Vitosha Venture Partners, 'Our Portgolio' (*Vitosha Venture*) <https://www.vitosha.vc/portfolio> accessed 27 May 2024; VF Alternative Fund, 'Investment Strategy' (*VG Alternative AD*) <https://vfalternative.com/%do%bd%do%be%do%b2%do%b8%do%bd%do%b8/> accessed 27 May 2024; Innovation Capital, 'Portfolio' (*Innovation Capital*) <https://www.innovationcapital.bg/portfolio> accessed 27 May 2024; Morningside Hill Capital Management, 'Portfolio' (*Morningside Hill*) <https://www.morningsidehill.com/portfolio-bg> accessed 27 May 2024.

[227] The full text of the Measures Against Money Laundering Act 2018 (in Bulgarian) can be accessed at Bulgarian Government, 'Measures Against Money Laundering Act 2018' (*Lex.bg*) <https://lex.bg/bg/laws/ldoc/2137182924> accessed 27 September 2024.

process for obtaining illegal benefit and not for protection of existing rights that have been violated as an abuse of rights;[228]

- The principle of finding the truth (art 10 of the Code of Civil Procedure) that requires the court to provide the parties with an opportunity and assist them to find the facts of importance and relevant for deciding the case;
- The *ex-officio* principle (art of the Code of Civil Procedure), which states that the court perform *ex-officio* needed proceedings for the development and finalisation of the claim and monitor if the proceedings are admissible and dully performed by the parties. The court assists the parties to clarify the claim in factual and legislative aspect.

Additionally, art 8(3) of the Bill on Representative Actions for Protection of Consumer Collective Interests introduces the possibility for the court to review conflicts of interest in a representative claim for compensation. Under the provisions of the Bill, where a representative claim for compensation is funded by a third party, the court shall check for conflicts of interest and whether the third-party funder detracts from the protection of the collective interest of consumers.[229]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Bulgarian legislation in force does not provide for any specific obligations of funders and/or beneficiaries in cases of TPLF. General rules and principles of Bulgarian Civil Procedural Law would apply.

2.7 Obligations of funders towards beneficiaries and vice-versa

Bulgaria legislation in force does not provide for any specific obligations of funders towards beneficiaries and vice-versa. General rules and principles of Bulgarian Law would apply.

2.8 Distribution of awards and bearing adverse costs in lost cases

The Bulgarian Bar Act 2004 (art 36(4)) allows lawyers' remuneration to be agreed as a percentage of a certain interest with regards to the outcome of the case, except for the remuneration for defence in criminal cases and in civil cases with immaterial interest.[230]

No other specific rules on costs in litigations with characteristics of TPLF exist in Bulgarian legislation in force.

In the absence of explicit legislation, the general rules on litigation costs in civil proceeding would apply, namely:

[228] Zhivko Stalev et al *Bulgarian Civil Procedure Law* (9th ed, Ciela 2012) 90.

[229] 'Bill on representative actions for the protection of consumers' collective interests 2023 available at National Assembly of the Republic of Bulgaria, 'Bill on representative actions for the protection of consumers' collective interests' (*Legislation*) <https://www.parliament.bg/en/bills/ID/164707>accessed 22 May 2024.

[230] The Bulgarian Bar Act 2004 (in Bulgarian) is available at Bulgarian Government, 'Bulgarian Bar Act 2004) (*Lex.bg*) <https://lex.bg/bg/laws/ldoc/2135486731> accessed 27 September 2024.

- The fees paid by the plaintiff, as well as expenses for the proceedings and remuneration for one attorney, if the party had such, shall be paid by the defendant proportionally to the recognized part of the claim;
- If the defendant did not cause the lawsuit to be brought and if they admit the claim, the expenses shall be awarded to the plaintiff;
- The defendant also has a right to pretend payment of expenses made by them, proportionally by the denied part of the claim;
- The defendant is also entitled to expenses if the claim gets withdrawn and the proceedings are terminated;
- If the remuneration paid by the party for attorney is excessively high with respect to the actual legal and factual difficulty of the case, the court may, upon request of the opposite party, award a smaller amount of the expenses in this part thereof, but not less than the minimal amount as per the Bulgarian Bar Act 2004.[231]

2.9 Planned legislation

Except the Bill on Representative Actions for Protection of Consumer Collective Interests mentioned above, there is no information on other legislation planned in Bulgaria in the field of TPLF.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No TPLF regulation in Bulgaria
Capital adequacy (Art. 6)	No TPLF regulation in Bulgaria
Fiduciary duty (Art. 7)	No TPLF regulation in Bulgaria
Powers of supervisory authorities (Art. 8)	No TPLF regulation in Bulgaria
Investigations and complaints (Art. 9)	No TPLF regulation in Bulgaria
Coordination between supervisory authorities (Art. 10)	No TPLF regulation in Bulgaria
Content of third-party funding agreements (Art. 12)	No TPLF regulation in Bulgaria
Transparency requirements and avoidance of conflicts of interest (Art. 13)	No TPLF regulation in Bulgaria

[231] More rules on litigation fees and expenses are included in the Chapter Eight of the Code of Civil Procedure, which can be accessed here https://lex.bg/laws/ldoc/2135558368 accessed 27 May 2024

Invalid agreements and clauses (Art. 14)	No TPLF regulation in Bulgaria
Termination of third-party funding agreements (Art. 15)	No TPLF regulation in Bulgaria
Disclosure of the third-party funding agreement (Art. 16)	No TPLF regulation in Bulgaria
Review of third-party funding agreements by courts or administrative authorities (Art. 17)	No TPLF regulation in Bulgaria
Responsibility for adverse costs (Art. 18)	No TPLF regulation in Bulgaria
Sanctions (Art. 19)	No TPLF regulation in Bulgaria

3. Practical operation of TPLF in your jurisdiction

Additional research of Bulgarian case law has revealed very few court proceedings with certain elements of TPLF, as defined for the purpose of this Study, which can be divided into three main categories, namely:

1. Litigation funded by public campaigns, ie crowdfunding.[232] Some of the interviewed stakeholders are of the opinion that crowdfunding could be a very powerful instrument for facilitating access to justice, especially for cases of significant public interest.
2. Collective actions funded by consumer organisations.[233] One of the interviewed stakeholders expressed a view that the setup of procedural framework at the EU level for regulation, not only funding of collective actions by third parties, but the way collective actions are funded in general, would be of the greatest benefit. Further, they suggested that it would be in the reasonable collective interest of consumers to be protected by public funds (a public fund), as such cases protect not only collective interest of a group consumers that suffered damage, but also the public interest by easing the work of the judicial system, significantly improving the level of consumer protection and ensuring the proper functioning of the market. Further, the stakeholder pointed out that the issue of collective redress funding is of particular importance for the proper functioning of the collective redress mechanism. On one hand, the excessive limitation of funding possibilities for such cases poses insurmountable obstacles to consumer protection associations, because they cannot bear litigation costs and legal risks related to collective actions. As a result, the associations do not bring such actions (refrain from action)

[232] *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* [2021] Sofia City Court 266455 available at <https://sgs.justice.bg/bg/12543?from=&to=&actkindcode=&casenumber=6614&caseyear=2017&casetype=>accessed 25 May 2024

[233] *Consumers Legal Aid Association v EVN Bulgaria District Heating EAD* [2015] the Supreme Court of Cassation 125 (I Commercial Division) available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=0E06255ECCFC32B2C2257E9A0021371A> accessed 27 September 2024); *Consumers Legal Aid Association v Bulgaria Telecommunication Company AD* [2019] the Supreme Court of Cassation 13 (I Commercial Division) available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=5BF4375987B82931C225839B0045F709> accessed 27 September 2024; *Consumers Legal Aid Association v Profi Credit Bulgaria EOOD* [2019] the Supreme Court of Cassation 109 (II Commercial Division) available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=C2B423B3DCDB6CC0C2258454003904DE> accessed 27 September 2024; *Consumers Legal Aid Association v Praktiker EOOD* [2021] the Supreme Court of Cassation 60047 (II Commercial Division) available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=1CD99136E58C018DC22586FE003F897D> accessed 27 September 2024.

and the collective interest of consumers, the level of consumer protection in the country concerned as well as the proper functioning of the national market concerned, which is part of the EU common market, suffer. On the other hand, collective actions represent a powerful procedural tool that can be abused by a bad faith plaintiff to the detriment of a particular competitor of the collective action's funder. This would also have the effect of distorting the proper functioning of the national market concerned, which is part of the EU common market. As per one of the stakeholders, it is therefore desirable to regulate the funding of collective actions by creating special funds to which qualified consumer organisations have access. The purpose of these special public funds should be to finance collective actions, whether for injunctions, or for compensation. In this way, the collective interest of consumers would be protected with public funds, which is the maximum guarantee of the absence of conflicts of interest. Consumer protection associations would thus also have a dedicated resource, the use of which would be directed towards the specific objective of protecting the collective interest of consumers.

3. Litigations against fast loans companies for refund of interests overpaid by consumers (funded by third parties), which could be further categorized as two types, namely:

   - Funding company is the plaintiff - consumers transfer their claim to funding company and do not participate in litigations.[234] A group of companies, which among others includes also Tesdo EOOD and Themis Capital EOOD, operates website <https://nadplatih.com/> (hereafter 'the companies operating the website'). As explained on this website, one of the reasons for its existence and activity is that very often consumers do not have the financial capacity or the knowledge to defend their rights and demand refund of unlawfully high interest rates, penalties and fees paid to fast loan companies. On this website <https://nadplatih.com/>, consumers can easily check whether they have overpaid on their consumer loan. If this is the case, the companies operating the website could initiate court procedures for refund of overpaid interest rates, fees and penalties. For this purpose, consumers must transfer via cession their claims to the companies. Consumers do not pay anything until the companies operating the website collect refund from fast loan companies, with which consumers have contractual relation for loan. All costs of refund collection, including those of litigation (such as state fees, attorney's fees, travel expenses, etc) are covered by the companies operating the website, which pay all costs of court procedures. Such costs cover both non-litigation work (ie reviewing and retrieving loan documents, determining legal grounds and refund amounts, negotiating, preparing lawsuit documents, etc) and litigation efforts. In the event that the negotiations do not lead to positive results or results are unsatisfactory, the companies operating the website initiate court procedures to establish refund amounts, pay all costs and, if necessary, collect refund amounts through execution procedure. Such costs include state fees, lawyers' fees, experts' fees, etc. Notably, as per the information available on the websites <https://nadplatih.com>, consumers will not be obliged to reimburse the companies

234 *Tesdo EOOD v City Cash* [2023] Sofia District Court 21436 available at <https://srs.justice.bg/bg/12685?from=&to=&actkindcode=&casenumber=25330&caseyear=2022&casetype=< accessed 27 September 2024; *Tesdo EOOD v Profi Credit Bulgaria* [2023] Sofia District Court 19872 available at <https://srs.justice.bg/bg/12685?from=&to=&actkindcode=&casenumber=38942&caseyear=2022&casetype=> accessed 27 September 2024; *Themis Capital EOOD v Easy Asset Management AD* [2022] Sofia District Court 4676 available at <https://srs.justice.bg/bg/12685?from=&to=&actkindcode=&casenumber=2318&caseyear=2022&casetype> accessed 27 September 2024.

operating the website, including if the refund is not recovered. However, customers owe these companies a remuneration fee equal to a certain percentage of the actually refunded amount. This remuneration fee is only due upon actual refund (actual payment back). No other remuneration, fees or costs are due, including in the event that the amount is not refunded. The standard remuneration fee various between 35% and 45% of the refunded amount. If the consumer does not have a complete set of loan documents, then the fee is at the higher end of 45% of the amount refunded, due to increased/additional time and cost of collecting of all necessary documents.[235] One of the interviewed stakeholders stated that, even though it is allowed by Bulgarian law, such a procedural setup is associated with great practical and organisational difficulties.

- Funding company does not participate in litigations - these are litigations connect with the company High School Entertainment OOD.[236] The *modus operandi* is the same as the website <https://nadplatih.com/>, with one major difference - plaintiffs in these cases are the individual consumers themselves (ie there are no cession of their claims to High School Entertainment OOD) and the court's decision ordered a refund of overpaid interest/fees to the individual consumers and ordered that the refunded amounts be paid to a bank account of the third party High School Entertainment OOD (apparently, this is how High School Entertainment OOD could withhold its remuneration and expenses, prior transferring remining refund amounts to consumers).

Additional information on these cases is summarised in the notes that follow.

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

During the research conducted for this study, fifteen court proceedings with certain TPLF characteristics were identified in Bulgarian case law for the period 2015 until 2023. Typically, those were civil (consumer) law cases heard by courts. According to information provided by the Arbitration Court of the Bulgarian Chamber of Commerce and Industry, which is the oldest and one

235 Additional analysis of this topic is offered in a publication in an online news website, Boulevard Bulgaria, '200% penalty for quick loans: how the '*Spas Panchev*' amendment reached parliamnt' (*Boulevard Bulgaria News,* 24 November 2020) <https://boulevardbulgaria.bg/articles/200-neustoyka-za-barzi-krediti-kak-popravkata-spas-panchev-stigna-do-parlamenta> accessed 29 May 2024.

[236] *Individual (S.R.S) v Feratum Bulgaria EOOD* [2022] Pleven District Court 98 available at <https://pleven-rs.justice.bg/bg/9815?from=&to=&actkindcode=&casenumber=4762&caseyear=2021&casetype=> accessed 27 September 2024; *Individual (I.K.I) v Easy Asset Management AD* [2022] Dobrich District Court 1084 available at <https://dobrich-rs.justice.bg/bg/6525?from=&to=&actkindcode=&casenumber=319&caseyear=2022&casetype=> accessed 27 September 2024; *Individual (P.L.P) v Cash Credit Mobile EAD* [2022] Vratsa District Court 374 available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=408&caseyear=2022&casetype=> accessed 27 September 2024; *Individual (P.L.P) v Feratum Bulgaria EOOD* [2022] Vratsa District Court 484 available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=412&caseyear=2022&casetype=> accessed 27 September 2024; *Individual (P.L.P) v Feratum Bulgaria EOOD* [2022] Vratsa District Court 505 available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=414&caseyear=2022&casetype=> accessed 27 September 2024; *Individual (P.L.P) v Feratum Bulgaria EOOD* [2022] Vratsa District Court 601 available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=411&caseyear=2022&casetype=> accessed 27 September 2024; *Individual (P.L.P) v Cash Credit Mobile EAD* [2022] Vratsa District Court 732 available at https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=406&caseyear=2022&casetype= accessed 27 September 2024.

of the biggest in Bulgaria, no such arbitration cases have been heard so far (or at least third-party funding was not evident in any arbitration cases).

b. Minimum claim value in absolute terms (in million Euro)

Some identified TPLF cases are only for establishing of legal violations, not for damages. For example , a collective action was brought by a group of NGOs and individuals, organised under the name 'Group Clean Air' against the defendant of the Sofia Municipality for violations related to air pollution in the Bulgarian capital city of Sofia.[237]

One of the lawsuits brought by the Consumers Legal Aid Association was for compensation of damage caused to collective interests of consumers with an amount of 30,000 BGN (15,000 EUR).[238]

The value of claims against fast loans companies varies, with the minimum one being approximately 100 BGN (50 EUR)[239] and the highest one – approximately 9,600 BGN (4,800 EUR).[240]

c. Typical claim value in absolute terms (in million Euro)

See the information provided in the above section.

d. Typical ratio between investment by the funder and claim value

There is not sufficient information on funders' actual costs, which makes it difficult to accurately calculate the ratio between funder's investment and claims value. Litigation costs identified in the court decisions provide some indication of the size of the investment, but it is not clear whether or not these are all the funders' costs.

For example:

- In *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality*, the collective actions were only for establishing of legal violations, not for damages. Therefore, it is difficult to calculate the ratio. The total amount of court expenses claimed by the plaintiff was 3,470 BGN (approx. 1,800 EUR), which included 240 BGN (120 EUR) – state fees and 3,230 BGN (approx. 1,700 EUR) experts' remuneration. The advocates worked pro-bono.[241]
- In *Tesdo EOOD v City Cash,* the funder covered all litigation expenses (as per the available information the amount was approximately 6,000 BGN, i.e 3,000 EUR). Hence the funder's investment was 6,000 BGN, whereas the value of claims was in total 6,500 BGN, ie 3,000

[237] See *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* [2021].
[238] *Consumers Legal Aid Association v Praktiker EOOD* [2021] the Supreme Court of Cassation 60047 (II Commercial Division), available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=1CD99136E58C018DC22586FE003F897D> accessed 30 May 2024.
[239] *Individual (P.L.P) v Feratum Bulgaria EOOD* [2022] Vratsa District Court 601, available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=411&caseyear=2022&casetype=> accessed 29 May 2024. The claim seems to be funded by High School Entertaining, operating the website <https://finback.bg/>.
[240] *Tesdo EOOD v Profi Credit Bulgaria* [2023] Sofia District Court 19872, available at <https://srs.justice.bg/bg/12685?from=&to=&actkindcode=&casenumber=38942&caseyear=2022&casetype=> accessed 25 May 2024. The claim seems founded by TESDO EOOD, operating the website <www.nadplatih.com>.
[241] Chistvazduh, 'Clean Air Group' (*Chistvazduh*) <https://chistvazduh.spasisofia.org/dari/spisak-na-daritelite/> accessed 25 May 2024.

EUR (a fraction of claims with a total amount of 33,081 BGN, ie approximately 16,000 EUR). Thus, the ratio funder's investment to partial amount of joint claims was 1:1; the ratio funder's investment to full amount of joint claims was 1:5.

- In *Consumers Legal Aid Association v Praktiker EOOD,* the claim value was 30,000 BGN (15,000 EUR). Since the claim was dismissed, the plaintiff had to cover its own litigation costs (the courts decisions and other litigation materials do not include information on the amount of plaintiff's costs for all three instances) as well as the defendant's litigation costs (for all three instances 6,292 BGN, approximately 3,200 EUR). Due to lack of information about all litigation costs covered by the plaintiff, it is difficult to calculate the ratio for this case.
- Finally, in *Tesdo EOOD v Profi Credit Bulgaria,* the funder (the plaintiff) allegedly covered all litigation expenses,[242] but there is no information available on their value, hence it is hard to calculate the ratio. All actions were dismissed, thus the finder did not receive any portion of compensation. Additionally, the funder (the plaintiff) was required to pay litigation expenses for the defendant, valuing approximately 8,000 BGN (4,000 EUR). The funder (which was also the plaintiff), Tesdo EOOD invested money but did not get any remuneration and incurred some extra cost (the defendant's litigation expenses).

e. Typical size of the investment by the litigation funder (in million Euro)

As mentioned above, there is not sufficient information on funders' actual costs. Litigation costs identified in the court decisions provide some indication of the size of the investment, namely:

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – the court expenses (approximately 1,826 EUR for state fees and experts' remuneration) were covered by crowdfunding;[243]
- *Tesdo EOOD v City Cash* – information on the exact and full amount of the investment is lacking, but there are indications that it was approximately 6,000 BGN (3,000 EUR) based on the court decision regarding litigation costs;
- *Tesdo EOOD v Profi Credit Bulgaria* – information on the exact and full amount of the investment is lacking, but there are indications that it was approximately 10,000 BGN (5,000 EUR) – its own litigation expenses plus the defendant's expense for the dismissed portion of the claims.

f. Origin of funding provided by the litigation funder

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – as per confirmed information the source was crowdfunding (public campaign);
- *Tesdo EOOD v City Cash* – presumably by the plaintiff Tesdo EOOD own funds, however this has not been confirmed;

[242] As per information available on the website <www.nadplatih.com> operated by Tesdo EOOD
[243] The list of donors and sponsors is available at Chistvazduh, 'Clean Air Group' accessed 25 May 2024.

- *Tesdo EOOD v Profi Credit Bulgaria* - presumably by the plaintiff Tesdo EOOD own funds, however this has not been confirmed;
- *Consumers Legal Aid Association v Praktiker EOOD* – state subsidy granted to the plaintiff.

g. Share of compensation awarded typically demanded by litigation funders

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* - these collective actions were only for establishing of legal violations, not for damages, hence no share of compensation was discussed;
- *Tesdo EOOD v City Cash* – between 35% and 45% of the granted amount[244];
- *Tesdo EOOD v Profi Credit Bulgaria* – same as above case - between 35% and 45% of the granted amount.

h. Other conditions of the litigation funding agreement

No information is available.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it.

No information is available.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

No information is available.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – the collective actions for some of the alleged violations were upheld, some violations were dismissed. The court decision was not appealed and entered into legal effect;
- *Tesdo EOOD v City Cash* – the majority of the joint actions were upheld, few of them were dismissed;
- *Tesdo EOOD v Profi Credit Bulgaria* – the joint actions were dismissed;
- *Consumers Legal Aid Association v Praktiker EOOD* – the claim was dismissed.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

[244] As per information available on the website <www.nadplatih.com> operated by Tesdo EOOD/Themis Capital EOOD. The other website <www.finback.bg> does not specify publicly the percentage of funder's remuneration.

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – it was not disclosed and this matter was not raised in the court proceeding, either by the court, or by the defendant;
- *Tesdo EOOD v City Cash* – the merits of the case discussed that the claims at issue in the lawsuit were transferred from the original borrowers to the plaintiff via cession (assignment of claims), but did not discuss whether or how that lawsuit has been funded. This issue remained off the radar, since the company providing the financing was also the plaintiff legitimating its own legal interest in this lawsuit through cession (assignment of claims), and question of its interest in claim finding and the possible conflicts of interest was not discussed;
- *Tesdo EOOD v Profi Credit Bulgaria* – same as in *Tesdo EOOD v City Cash*.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- Choice of lawyer - Y for *Tesdo EOOD v City Cash* and *Tesdo EOOD v Profi Credit Bulgaria*; Y for *Consumers Legal Aid Association v Praktiker EOOD*; N for *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality*;
- Consent for settlement – N/A
- Consent for appeal – N/A
- Consent for expert evidence - Y for *Tesdo EOOD v City Cash* and *Tesdo EOOD v Profi Credit Bulgaria*; Y for *Consumers Legal Aid Association v Praktiker EOOD*; N for *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality*;
- Agreement on strategy - Y for *Tesdo EOOD v City Cash* and *Tesdo EOOD v Profi Credit Bulgaria*; Y for *Consumers Legal Aid Association v Praktiker EOOD*; N for *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality*;
- Other: It depends on circumstances. *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* - crowdfunding was initiated after the claims were submitted, hence the funders could not influence the claim nor strategy.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

- *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – based on the information published on the Group's official website as well as other media publications, the relationship was transparent and trust-based in this case;[245]

[245] More details are available in the comments in the official website (here https://chistvazduh.spasisofia.org/dari/spisak-na-daritelite/ accessed 25 May 2024, as well as in *Lex News,* 'Soifia Municipality Sentenced to Solve Air Pollution Problem in the Year' (*Lex.bg,* 9 November 2021) < https://news.lex.bg/%D1%81%D1%8A%D0%B4%D1%8A%D1%82-%D0%B7%D0%B0%D0%B4%D1%8A%D0%BB%D0%B6%D0%B8-%D1%81%D1%82%D0%BE%D0%BB%D0%B8%D1%87%D0%BD%D0%B0%D1%82%D0%B0-%D0%BE%D0%B1%D1%89%D0%B8%D0%BD%D0%B0-%D0%B4%D0%B0-%D1%80%D0%B5> accessed 30 May 2024; Zazemiata, 'Sofia Municipality failed to implement court ruling to prevent air pollution in Sofia. Citizens can seek compensation' (*For the Earth*, 7 December 2022) <https://www.zazemiata.org/so-se-provalia-za-vyzduha/>

- *Tesdo EOOD v City Cash* and *Tesdo EOOD v Profi Credit Bulgaria* – no information on this matter is available.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

It is difficult to answer this question as there is no legislation on the subject. Consequently, the regulation is left to the agreements between litigation funder and beneficiary. These agreements are not publicly available. Nevertheless, based on available information it can be concluded that:

- In *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – full withdrawal of funding was unlikely and impossible due to scheme of funding, ie crowdfunding;
- In *Tesdo EOOD v City Cash*, *Tesdo EOOD v Profi Credit Bulgaria* and *Consumers Legal Aid Association v Praktiker EOOD* – (theoretically) full withdrawal of funding was possible for any reason as the litigation funders were also the plaintiffs.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

No information is available on this matter. Conflicts of interest did not seem to be raised as concern or discussed in the court proceedings used as examples in the report.[246]

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- Limited liability: No
- Conditional liability: No
- No liability: Yes, namely:
  - *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* – no liability for adverse costs (mainly due to crowdfunding);
  - *Tesdo EOOD v City Cash* and *Tesdo EOOD v Profi Credit Bulgaria* - as per the information available on the website <www.nadplatich.com> the company paid all litigation costs, which included costs for reviewing and retrieving loan documents, determining legal grounds and amounts of overpayments, negotiating, preparing documents, etc. In the event that negotiations did not lead to a positive result, or the result was unsatisfactory, then company also covered litigation costs for establishing the amount of the overpayments and, if necessary, collecting it through the legal procedure. Such costs included state fees, lawyers' fees, experts' fees, etc. The customer was NOT obliged to

accessed 30 May 2024; Temida, 'Sofia's Dirty Air Case Becomes Case of 2021' (*Justice Awards 2021*, 7 December 2021) <Justice Awards> accessed 30 May 2024.

[246] *Tesdo EOOD v Profi Credit Bulgaria* [2023] Sofia District Court 19872; *Group of NGOs and individuals 'CLEAN AIR' v Sofia Municipality* [2021] Sofia City Court 266455; *Tesdo EOOD v City Cash* [2023] Sofia District Court 21436.

reimburse the company, including the case when the overpayment was not recovered.[247]

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No information is available on this matter.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No such examples are publicly available, however the websites <www.nadplatich.com> and <www.finback.bg> include some details on the relationship between the funders and the beneficiaries.

4. Stakeholder views on TPLF in your jurisdiction

For the purposes of this study, a few stakeholders in Bulgaria have been approached with a request for input on TPLF in Bulgarian legislation and legal practice as well as on the draft directive annexed to the EP resolution.[248] Some of them shared their experience and opinion on the topic.

The majority of contacted stakeholders are not aware of either any court proceedings funded by third parties in Bulgaria, or of the measures in the draft directive annexed to the EP resolution.

The contacted stakeholders that are familiar with the draft directive annexed to the EP resolution find the measures in the draft directive rather effective and express support for them.

At the same time, the interviewed stakeholders identified some extrajudicial procedures and other instruments that could be effective means for facilitating access to justice, such as: alternative dispute resolution schemes (ADR), Ombudsman, grievance systems managed by companies, legal cost insurance, legal aid, crowdfunding, and a public fund for litigation financing.

Some of the stakeholders even suggested that the potential of ADR has not been fully developed and used in Bulgarian legal practice due to some gaps and incoherence between legislative acts. For example the Consumer Protection Act 2005[249] has adopted an alternative dispute resolution (ADR) procedure, however it is not applied in practice due to a lack of relevant provisions in the Civil Procedure Code 2008 that would allow ADR bodies' decisions to be enforced.

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[247] *Nadplatih* <https://nadplatih.com/vaprosi-otgovori/> accessed 25 May 2024.

[248] Group Clean Air - NGOs and individuals initiated collective actions against the Sofia Municipality for not taking any measures against air pollution in the city; the litigation costs were partially covered by sponsors/donors (crowdfunding); Consumer Legal Aid Association, a non-profit organisation specialising in the provision of legal assistance to consumers, including actions to protect the collective interests of consumers (collective actions); the Dispute Resolution Center – Sofia; Commission for Consumer Protection; the National Mediation Association; Arbitration Court of the Bulgarian Chamber of Commerce and Industry; Tesdo EOOD/Themis Capital EOOD – companies operating the website <www.nadplatih.com> and offer services similar to third party funding of civil cases.

[249] The Consumer Protection Act 2005 (Bulgaria), available at Bulgarian Government, 'The Consumer Protection Act 2005' <https://lex.bg/laws/ldoc/2135513678 > accessed 27 September 2024.

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Code of Civil Procedure 2008

Anti-corruption Act 2023

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Measures against Money Laundering Act 2018

Bulgarian Bar Act 2004

Consumer Protection Act 2005

Bill on Representative Actions for Protection of Consumer Collective Interests 2023

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Consumers Legal Aid Association v EVN Bulgaria District Heating EAD [2015] the Supreme Court of Cassation 125 (I Commercial Division), available at <https://www.vks.bg/pregled-akt.jsp?type=ot-delo&id=0E06255ECCFC32B2C2257E9A0021371A> accessed 27 September 2024

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rs.justice.bg/bg/9815?from=&to=&actkindcode=&casenumber=4762&caseyear=2021&casetype=> accessed 27 September 2024

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Individual (P.L.P) v Feratum Bulgaria EOOD [2022] Vratsa District Court 484, available at <https://vratsa-rs.justice.bg/bg/5895?from=&to=&actkindcode=&casenumber=412&caseyear=2022&casetype=> accessed 27 September 2024

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Croatia

Dr Jadranka Osrečak, Zagreb School of Economics and Management

Executive Summary

- No legislation exists or is being developed concerning TPLF, other than the Act on Representative Claims for the Protection of Collective Interests and Consumer Rights (the Act). TPLF is mostly overlooked within the Croatian legal framework.
- Although Croatian practitioners and legislators generally lack awareness of TPLF, it has been employed in various litigations, primarily concerning individual claims for damages resulting from violations of consumer rights, as established by a judgment from the Commercial Court in Zagreb on July 4, 2013, no. P-1401/2012, and in labour disputes stemming from breaches of collective bargaining agreements concluded between the State and civil/public servants' trade unions.
- TPLF is primarily present in Croatia through the assignment of claims.
- An assignment contract is a consensual agreement that becomes executed when the old and new creditors agree on it, and the claim passes to the assignee without the need for further legal action to validate the assignment. The Civil Obligations Act requires notification of the debtor. However, failure to notify the debtor will not render the assignment contract invalid.
- The lack of regulation in this sector complicates the accurate assessment of the number of active funders in Croatia. This explains the absence of credible statistics concerning TPLF in Croatia.
- There is no significant doctrinal discussion on TPLF. In 2017, the Croatian political parties Živi Zid and SNAGA submitted a proposal (the Proposal) for the Act on the Protection of Debtors in Special Cases of Transfer of Claims. Despite not specifically addressing TPLF, the Proposal would have impacted TPLF by imposing restrictions on the assignment of claims to third parties, which would require the debtor's consent. The Proposal focused only on consumers as debtors.
- The Act on Representative Claims is the only law that addresses TPLF. The Act addresses TPLF solely in Article 28, which mandates the prohibition of conflicts of interest and requires transparency concerning funding sources. Article 28 prohibits funding of representative actions by competitors of the defendant and requires qualified entities or associations to provide, upon the court's request, a financial overview detailing the sources of funding utilised to support the representative action for damages.
- Croatian procedural law (the Civil Procedure Act) does not address third-party funding (TPF) and does not grant courts the power to require the funder to cover the costs of the procedure if the plaintiff loses the case (adverse costs). As to the procedural safeguards, apart from requirements stipulated in Article 28 of the Act on Representative Claims, with respect to transparency requirements and conflict of interest, there are no additional procedural safeguards.

1. Introduction

TPLF is not regulated within the Croatian legal framework. Consequently, there are no legal restrictions on the use of TPLF in civil litigation, except for those stipulated in the Act on Representative Claims for the Protection of Collective Interests and Consumer Rights of June 25, 2023,[250] which took effect on June 25, 2023 (Act on Representative Claims). Despite the general lack of awareness of practitioners and legislators regarding TPLF, it has been utilised in numerous cases, namely in cases involving consumers' rights (commercial TPLF) and labour disputes (strategic TPLF).

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

The Act on Representative Claims for the Protection of Collective Interests and Consumer Rights (Official Gazette No 59/23), which took effect on June 25, 2023, is the sole law currently in place regarding TPLF. The Act integrated Directive (EU) 2020/1828 from the European Parliament and the Council, dated November 25, 2020, concerning representative actions aimed at safeguarding the collective interests of consumers, into Croatian law. Aside from this Act, there is currently no legislation in place or being prepared regarding TPLF, as both practitioners and legislators lack a comprehensive understanding of its complexities, including its various types, characteristics, advantages, and disadvantages.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Although practitioners and legislators are generally unaware of TPLF, it has been employed in various cases that can be categorised into two main groups as outlined below. In the initial category of cases, TPLF primarily emerges from the assignment of claims through assignment contracts. The remuneration for funders is contingent upon the results of the cases they have funded. In the second group of cases, not covered by the EP resolution, TPLF is not motivated by profit and is provided at no cost.[251]

[250] Act on Representative Claims for the Protection of Collective Interests and Consumer Rights, Official Gazette No. 59/23 available at <https://narodne-novine.nn.hr/clanci/sluzbeni/2023_06_59_998.html> accessed 4 January 2025.

[251] The definition of a third-party funder, as outlined by the ICCA-Queen Mary Task Force Report on Third-Party Funding, is sufficiently inclusive to encompass scenarios in which trade unions offer financial support. A third-party funder is an individual or organisation that is not directly involved in a legal dispute but enters into an agreement with one of the parties, their affiliate, or their legal representative. The purpose of this agreement is to provide financial support or funding for all or part of the costs associated with the legal proceedings. This support or funding may be given in exchange for payment or reimbursement that is dependent on the outcome of the dispute, or it may be provided as a grant or in return for a premium payment. For further information, see The International Council for Commercial Arbitration, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (ICCA, Report No 4, 2018) <https://www.arbitration-icca.org/icca-reports-no-4-icca-queen-mary-task-force-report-third-party-funding> accessed 5 January 2025.

1. Cases related to damages arising from breaches of consumer rights as determined by a judgment of the Commercial Court in Zagreb of July 4, 2013, no. P-1401/2012. The judgment was issued in a legal case brought forth by Potrošač[252]-Croatian Consumer Protection Association.[253]

Second Foundation SPV Ltd, a private limited company with a share capital of 2,790.00 euros,[254] extended an offer in 2023 to numerous citizens, proposing the assignment of potential claims related to overpaid interest on loans denominated in Swiss francs. Second Foundation SPV Ltd proposed to cover all expenses related to court proceedings against the defendants, specifically the banks providing loans. The company is assuming the risk associated with these proceedings and offers potential assignors of the claim a share of the compensation upon successful recovery. The company offers the individuals who entered into an assignment agreement and assigned their potential claims to the company 75 percent of the collected compensation.[255] According to media reports, the company already filed more than a thousand of lawsuits.[256]

In 2019 Inkaso.HR Ltd extended an offer to consumers akin to that of the Second Foundation SPV Ltd. Inkaso.HR Ltd is a private limited company with a share capital of 1,858,120.00 euros[257].The company reported profits in both 2022 and 2023.[258]

In two cases initiated by Inkaso.HR, the defendants contested its legal standing.[259] In addressing the defendant's assertion regarding the plaintiff's legal standing, the first-instance court determined

[252] For more information on Potrošač, see its official web page, Potrošač, 'Novosti' (Home Page) <https://huzp.hr/category/novosti/> accessed 4 January 2025.

[253] The association Potrošač has initiated a lawsuit to protect the collective interests of consumers against the eight largest Croatian banks. The plaintiff aimed to safeguard the collective interests of consumers by requesting a declaration that the banks breached consumers' interests and rights by including invalid clauses in loan contracts that denominated the loans in Swiss francs and stipulated variable interest rates. The judgment (in Croatian) is available at https://www.iusinfo.hr/Appendix/DDOKU_HR/DDHR20191112N116_17_1.pdf accessed 4 January 2025.

[254] Information about the company retrieved from the Croatian Court Registry (publicly available). See Croatian Republic, 'Second Foundation SPV' (*Sudski Registrar, Business entity data)* <https://sudreg.pravosudje.hr/registar/f?p=150%3A28%3A0%3A%3ANO%3A28%3AP28_SBT_MBS%3A081446327> accessed 4 January 2025.

[255] Marko Perožić, 'Posto Prinosa Nije Puno Jer Ćemo Sigurno USPJETI' *Bloomberg Adria* (Croatia, 26 February 2024) <https://drugafundacija.hr/bloomberg-adria-12-posto-prinosa-nije-puno-jer-cemo-sigurno-uspjeti/254/> accessed 4 January 2025.

[256] Tomislav Pili, 'Zbog Rasplamsalog Sudskog Rata S Bankama Marko Rakar Izdao Obveznicu s 12 Posto Prinosa' *Lider Media* (Zagreb, 13 February 2024) <https://lidermedia.hr/biznis-i-politika/zbog-rasplamsalog-sudskog-rata-s-bankama-marko-rakar-izdao-obveznicu-s-12-posto-prinosa-155575> accessed 4 January 2025.

[257] Information about the company retrieved from the Croatian Court Registry (publicly available). See Croatian Republic 'Inkaso.Hr' (*Sudsdki Registrar, Business entity data*) <https://sudreg.pravosudje.hr/registar/f?p=150:28:0::NO:28:P28_SBT_MBS:03010598o> accessed 4 January 2025; Drempetić B,'Tvrtka Marka Rakara Otkupljuje Tražbine Za Kredite u Švicarskim Francima; Hub: Pazite Prilikom Davanja Podataka!' (27 April 2023) https://www.jutarnji.hr/vijesti/hrvatska/tvrtka-marka-rakara-otkupljuje-trazbine-za-kredite-u-svicarskim-francima-hub-pazite-prilikom-davanja-podataka-15330210 accessed 4 January 2025

[258] The Croatian Financial Agency (FINA) gathers and disseminates annual reports for companies that are registered in the court registry. Inkaso.HR reported a profit of 452,914.79 euros in 2023 and 346,437.00 euros in 2022, as per the published information. The annual turnover for 2023 amounted to 3,275,253.13 euros; however, the annual financial report does not clarify if this figure pertains to TPLF. The company has reported retained profit amounting to 3,886,066.58 euros; however, the origin of this profit remains unclear. See the annual financial report for 2023 at Croatian Financial Agency (FINA) 'Annual Financial Report 2023' (*RDFI*) <http://rgfi.fina.hr/JavnaObjava-web/pSubjektTrazi.do> accessed 4 January 2025.

[259] Judgment of the High Commercial Court of the Republic of Croatia no. Pž-502/2024-2, of 2 May 2024, available at <https://www.iusinfo.hr/sudska-praksa/VTSRH2024PzB502A2> accessed 2 January 2025; Judgment of the Commercial Court in Zagreb no. P-37/2021-29 of September 30, 2022.

that the assignment of the claim did not alter its identity. The court reasoned that the plaintiff, as the recipient of the claim and assignee, possessed all the rights of the assignor (loan beneficiary), irrespective of the assignment being made to a non-consumer.[260] This approach has been confirmed by the High Commercial Court of the Republic of Croatia in its role as an appellate court,[261] as well as by the Supreme Court of the Republic of Croatia.[262]

It is important to emphasise the absence of publicly available data concerning the number of litigious cases initiated by Inkaso.HR, Second Foundation SPV Ltd, and similar entities, as well as the objections raised by defendants and the decisions made by the courts. Despite the fact that many court decisions are accessible to the public, only the first letter of the parties' names is disclosed in these decisions.

2. Labour disputes (strategic TPLF)

Croatian trade unions provide financial assistance to its members by financing the legal fees of the attorney representing them. In these circumstances, trade unions have entire control over the procedure[263] and decide all crucial court-related choices, such as selecting a law firm to represent members in court proceedings, evaluating whether or not members should file an appeal, settle the case, and so on. Trade unions engage in these activities to advance the interests of their members and achieve their goals, which include gaining recognition and a stronger position in collective bargaining. Litigation financing is for legal actions resulting from breaches of collective bargaining agreements. Funding tends to be utilised to assist legal cases initiated by public and governmental servants. Trade unions fund many lawsuits based on the same legal grounds and directed against the state or public bodies, such as schools, hospitals, and agencies.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The absence of regulation in this industry makes it difficult to determine the exact number of operating funders in Croatia. Croatian laws do not contain provisions that address the issues outlined in articles 4, 5, 6, and 8 of the EP resolution. Consequently, there is a lack of publicly accessible data, and funders continue to be unclassified.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no reliable statistics regarding TPLF in Croatia.

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[260] Judgment of the Commercial Court in Zagreb no. P-37/2021-29 of September 30, 2022 quoted in the judgment of the High Commercial Court of the Republic of Croatia no. Pž-4768/2022-3, of 16 August 2023 https://www.iusinfo.hr/sudska-praksa/VTSRH2022PzB4768A3 accessed 22 December 2024.

[261] Judgment of the High Commercial Court of the Republic of Croatia no. Pž-4768/2022-3, of 16 August 2023 https://www.iusinfo.hr/sudska-praksa/VTSRH2022PzB4768A3 accessed 22 December 2024.

[262] Decision of the Supreme Court of the Republic of Croatia of 21 February 2024 no. Revd 158/2024-3. The Court rejected the defendant's motion for leave to revise against the judgment of the High Commercial Court of the Republic of Croatia no. Pž-4768/2022-3, of 16 August 2023, available at <https://www.iusinfo.hr/sudska-praksa/VSRH2024RevdB158A3> accessed 23 December 2024.

[263] This control likely originates from the internal regulations of trade unions; however, many unions restrict access to these regulations for non-members, rendering it impossible to provide a definitive response regarding how they implement control.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is no significant doctrinal discussion on TPLF, but it has been addressed in one PhD dissertation.[264]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Classic (commercial) TPLF has been utilised in numerous cases and it has been, in all known cases, achieved through a purchase or assignment (predominantly) of the claim. Assignment is regulated by Civil Obligations Act (COA).[265] COA allows creditors to assign their claims through contracts to third parties.[266]

In 2017, the political parties Živi Zid and SNAGA submitted a proposal for the Act on the Protection of Debtors in Special Cases of Transfer of Claims.[267] The Croatian Parliament rejected the proposal in June 2019.[268]

Despite not specifically addressing TPLF, the proposal would have significantly impacted it by imposing restrictions on the assignment of claims to third parties who pursue them in litigation, as previously discussed. Only obligatory relationships involving consumers as debtors were to be subject of the Act.

The Government of the Republic of Croatia provided the opinion on the proposal. In summary, the Government recommended to the Parliament that the proposal be rejected due to the following reasons. "The claim is an integral element of the assignor's property, and the determination of whether the creditor shall transfer it falls under the purview of contractual freedom and the dynamics between the assignor and the claim receiver (assignee). The proposal infringes on judicial jurisdiction and disproportionately encroaches on property rights and entrepreneurial and market freedoms, all of which are core economic rights and freedoms protected by the Constitution".[269]

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[264] Jadranka Osrečak, 'Third-Party Funding in Arbitration Proceedings ' (DPhil thesis, University of Zagreb, 2023) <https://urn.nsk.hr/urn:nbn:hr:199:026118> accessed 3 January 2025.

[265] 'Civil Obligations Act' (Zakon o obveznim odnosima, Official Gazette nos. 35/05, /41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 55/23) available at <https://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima> accessed 5 January 2025.

[266] The assignment of a claim is governed by articles 80 – 89 of the COA, serving as a method for altering an entity within an obligation relationship. An assignment is a contract through which a creditor (assignor) conveys its transferable claim to another individual (assignee); claims that are legally prohibited from transfer, those of a strictly personal nature, or claims that cannot be transferred under the law. The alteration of the creditor does not influence the identity of the initial relationship as the modification of creditors does not alter the essence of the obligation relationship. The assignment of the claim, unless otherwise agreed, does not necessitate the debtor's consent; however, the assignor is required to inform the debtor of the assignment. Consequently, the debtor is not involved in the contract regarding the assignment of the claim. The assignee acquires identical rights against the debtor as those held by the assignor prior to the assignment (including legal standing).

[267] Proposal of the Act on the Protection of Debtors in Special Cases of Transfer of Claims of 9 November 2017, available at <https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2022186> accessed 5 January 2025.

[268] ibid.

[269] ibid.

2. Relevant legislation applicable to TPLF in your jurisdiction

TPLF is not broadly acknowledged within the Croatian legal framework. Consequently, there are no legal restrictions on the use of TPLF in civil litigation, except for those stipulated in the Act on Representative Claims. The Act on Representative Claims itself did not affect any of the existing legislation such as the Civil Procedure Act. TPLF remains regulated only in one provision of the Act on Representative Claims.

2.1 Legal admissibility and conditions of using TPLF in civil litigation

The Act on Representative Claims addresses TPLF solely in article 28, which mandates the prohibition of conflicts of interest and requires transparency concerning funding sources. Article 28 prohibits the funding of representative actions by competitors of the defendant and requires qualified entities or associations to provide, upon the court's request, a financial overview detailing the sources of funding utilised to support the representative action for damages. The Act on Representative Claims in Article 28 also delineates indirect funding as matching contributions from members of qualified entities or donations, including donations from retailers or crowdfunding. It specifies that such indirect funding qualifies as third-party funding, provided it adheres to criteria concerning transparency, independence, and the absence of conflicts of interest.[270]

2.2 Regulatory oversight of funders/funding industry

There is no regulatory oversight of funders.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There is no special law or any legal framework that is applicable to funders with respect to determining the conditions for carrying out the economic activity of TPLF.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

As previously mentioned, TPLF is primarily present in Croatia through the assignment of claims.

Usually, the assignment contract is not different in time or form from a basic legal transaction. However, it can be, as it is a separate contract that is completely detached from the latter.

An assignment contract is a consensual agreement that becomes executed when the old and new creditors agree on it, and the claim passes to the assignee without the need for further legal action to validate the assignment. The Civil Obligations Act requires notification of the debtor. However, failure to notify the debtor, according to the decision of the High Commercial Court of the Republic

[270] Government of the Republic of Croatia, 'Proposal and Final Proposal of the Act on Representative Claims for the Protection of Collective Interests and Consumer Rights' (Draft law, 2-3 March 2023) available at <https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2027523> accessed 5 January 2025.

of Croatia (Decision no. Pž-3809/94 of July 9, 1996), will not render the assignment contract invalid.[271]

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Croatian procedural law (CPA) does not address third-party funding (TPF) and does not grant courts the power to require the funder (third-party not participating in litigation) to cover the costs of the procedure if the plaintiff loses the case (adverse costs).

As to the procedural safeguards, apart from requirements stipulated in article 28 of the Act on Representative Claims, there are no procedural safeguards with respect to transparency requirements and conflicts of interest.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Apart from the obligations arising from article 28 of the Act on Representative Claims, funders and beneficiaries do not have any other obligations towards courts, public administration or adverse parties of a dispute.

2.7 Obligations of funders towards beneficiaries and vice-versa

Funders only have obligations arising from the assignment of a claim. Beneficiaries of commercial TPLF also have no specific obligations apart from the obligations arising from the assignment agreement.

2.8 Distribution of awards and bearing adverse costs in lost cases

Publicly available information indicates that Second Foundation SPV Ltd intends to retain 25% of the awarded principle, interest, and litigation expenses following successful lawsuits.[272] No public data is available on the agreements negotiated for the allocation of awards between consumers and Inkaso.HR Ltd.

Publicly available data indicates that Second Foundation SPV Ltd and Inkaso.HR Ltd have executed assignment agreements with consumers and have filed claims for damages. Consequently, the liability for incurring adverse costs rests with Second Foundation SPV Ltd and Inkaso.HR Ltd.

2.9 Planned legislation

[271] Pavlović, M. (2021). Pravni učinci i posljedice promjena vjerovnika u obveznom odnosu IUS INFO. https://www.iusinfo.hr/strucni-clanci/pravni-ucinci-i-posljedice-promjena-vjerovnika-u-obveznom-odnosu accessed 6 January 2025

[272] Perožić M, 'Posto Prinosa Nije Puno Jer Ćemo Sigurno USPJETI' (Bloomberg Adria: 12, 26 February 2024) https://drugafundacija.hr/bloomberg-adria-12-posto-prinosa-nije-puno-jer-cemo-sigurno-uspjeti/254/ accessed 4 January 2025

The government, in its opinion on the proposal for the Act on the Protection of Debtors in Special Cases of Transfer of Claims, noted that the Republic of Croatia currently lacks a legal framework for entities specialising in debt collection. It indicated that the Ministry of Finance is analysing existing solutions in other European Union Member States and is in consultation with the European Commission. Following these analyses and consultations, the Ministry plans to develop a legislative proposal. The legislation could have implications for TPLF and funders.[273]

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	N/A
Capital adequacy (Art.6)	N/A
Fiduciary duty (Art.7)	N/A
Powers of supervisory authorities (Art.8)	N/A
Investigations and complaints (Art.9)	N/A
Coordination between supervisory authorities (Art.10)	N/A
Content of third-party funding agreements (Art.12)	N/A
Transparency requirements and avoidance of conflicts of interest (Art.13)	Partially Act on Representative Claims for the Protection of Collective Interests and Consumer Rights in article 28 para 1 and 5 provides: (1) If the litigation regarding the representative action is funded by a third party, it is necessary to ensure that: - Conflicts of interests are prevented (5) At the request of the court, the qualified entity will submit a financial overview with a list of sources of funds used to support the representative action for damages.
Invalid agreements and clauses (Art.14)	Partially

[273] Proposal of the Act on the Protection of Debtors in Special Cases of Transfer of Claims of 9 November 2017 https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2022186 accessed 5 January 2025

	The Act on Representative Claims for the Protection of Collective Interests and Consumer Rights in article 28 para 3 provides: (3) Funding of a representative action for damages by a competitor of the defendant or a person dependent on the defendant is prohibited.
Termination of third-party funding agreements (Art.15)	N/A
Disclosure of the third-party funding agreement (Art.16)	Partially The Act on Representative Claims for the Protection of Collective Interests and Consumer Rights in Article 28 para 5 provides: (5) At the request of the court, the qualified entity will submit a financial overview with a list of sources of funds used to support the representative action for damages.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Partially The Act on Representative Claims for the Protection of Collective Interests and Consumer Rights in Article 28 paras 4 and 5 provides: (4) Violations of the plaintiff's financial independence from paras 1 to 3 of this article shall be monitored by the court ex officio or at the request of the defendant until the decision becomes final. (5) At the request of the court, the qualified entity will submit a financial overview with a list of sources of funds used to support the representative action for damages.
Responsibility for adverse costs (Art.18)	N/A
Sanctions (Art.19)	N/A

3. Practical operation of TPLF in your jurisdiction

N/A

4. Stakeholder views on TPLF in your jurisdiction

N/A

It is crucial to highlight that strategic TPLF requires additional examination at the EU level. A brief overview of several issues is presented below to encourage discussion and support the argument for the need for further examination of the facts and analysis.

Croatian trade unions offer financial assistance to their members by funding the legal fees of a lawyer who represents them. Trade unions engage in such activities to advance both the interests of their members and their own objectives, which include pursuing strategic litigation and gaining recognition, ultimately leading to increased membership and a stronger position in collective bargaining.

This clearly aligns with the concept of a funder, as it involves a non-party providing funding to one of the parties in the dispute. However, since it remains unregulated, it raises serious questions with respect to the fundamental rights of potential claimants/parties funded by trade unions.

Moreover, there is an inadequate level of expertise and awareness of the precise definition of unethical conduct demonstrated by trade union leaders and law firms affiliated with trade unions, pertaining not only to TPLF but also to competition law.

This conclusion is further substantiated by the internal act of the Independent Union of Research and Higher Education Employees of Croatia described below and notifications available on the web sites of the Independent Union of Research and Higher Education Employees of Croatia and Police Union of Croatia (respectively, the Trade Unions)

The financial report of the Independent Union of Research and Higher Education Employees of Croatia discloses that the union initiated 4,200 legal actions on behalf of its members due to employers erroneously using a lower basic salary as the basis for salary calculations. Until the resolution of these proceedings, the union assumed responsibility for covering all costs incurred on behalf of its members, including lawyer fees and expert expenses. As a result, the union experienced a substantial rise in expenditure in 2021. As per the financial report, the sums specified were progressively reimbursed to the union as the lawsuits were resolved in favour of the members.[274]

[274] The Financial Report is available from: https://www.nsz.hr/wp-content/uploads/2022/07/Izvjestaj-Saborskog-odbora-za-financije-2022.pdf. The conclusions and approval of the Financial Report of the Supervisory Council of the Independent Union of Research and Higher Education Employees of Croatia is available from: https://www.nsz.hr/wp-content/uploads/2022/07/Izvjesce-Nadzornog-vijeca-za-cetverogodisnje-razdoblje.pdf. accessed 5 January 2025

The Independent Union of Research and Higher Education Employees of Croatia[275] adopted a 'Rulebook on providing legal assistance to trade union members' (the Rulebook).[276]

The regulations regarding the acquisition of legal aid by a trade union member are outlined in Chapter III of the Rulebook, specifically articles 7 to 11. On the other hand, the provision for legal assistance initiated by the Union is governed by Chapter IV of the Rulebook, specifically article 12.

The following is an excerpt of the previously mentioned provisions.

According to Article 7, paras 2 and 3, the Trade Union is responsible for providing all types of legal support to its members through its own employed lawyers. However, the Trade Union also has the option of choosing an external lawyer to give legal assistance to its members.

The regulations for a lawyer's representation are outlined in article 8. This article states that a member of the Trade Union may have a lawyer appointed by the Trade Union represent them in individual litigation before a competent court and in other proceedings. The decision to hire a lawyer for effective legal protection is solely determined by the Legal Service of the Trade Union, based on information provided by the member and other collected information.

The Legal Service of the Trade Union exercises oversight over the procedure, as mandated by article 9. At first glance, this article solely governs the procedure for acquiring legal aid from a lawyer. Nevertheless, a meticulous examination of article 9 unequivocally indicates that the Trade Union exercises complete authority over the conduct of its members in legal matters, as well as over the lawyer's actions. Article 9 regulates the authorisation of legal counsel, namely the act of granting a referral. This article states that if the Legal Services of the Trade Union determines that a member needs to be represented by a lawyer, it will provide a referral to the member. The referral will specify the member's name, the designated lawyer, and the type and extent of legal assistance that will be provided to the member. The member submits the referral to the lawyer assigned to handle the case, and the lawyer, as per the contract for business collaboration with the Trade Union, assumes responsibility for representing the member (thus, the lawyer cannot decline to act as representation) and charges the union for the costs incurred during the representation. Prior to commencing representation, a lawyer must get a referral that has been signed by both the Trade Union and the member seeking representation.

Article 10 of the Rulebook stipulates the impact of a signed referral on the rights and responsibilities of a Trade Union member. It establishes that the Trade Union has sole authority over the conduct of its members in court proceedings. As per this clause, when a member of the Union signs the referral provided by the Union, the member agrees that the lawyer will provide

[275] Notification of the Independent Union of Research and Higher Education Employees of Croatia, which is the largest higher education union in Croatia, regarding legal assistance reads as follows (available from https://www.nsz.hr/pravni-savjeti/; accessed 5 January 2025):
„As of November 2, 2022, all full members of the trade union can exercise their right to legal assistance and protection of their rights from the employment relationship by contacting the Bistrović law office to obtain general legal information and legal advice as follows:by sending an email to the address of the law office Bistrović, by calling 01 3357 570, every working day from 9 a.m. to 4 p.m. or by making an inquiry through the web interface of the trade union further down in this text.By contacting the law office directly, you automatically give permission to the lawyer to check your membership status for the purpose of providing legal assistance."

[276] Rulebook on providing legal assistance to trade union members https://www.nsz.hr/wp-content/uploads/2016/12/Pravilnik-o-pravnoj-pomoci-izmjene-i-dopune-11.1.2021.pdf accessed 6 January 2025

timely written reports to the Union (not to the member) about the legal steps taken based on the referral. The report must contain evidence pertaining to the action taken, such as a copy of the submission, minutes of the hearing, and copies of the decisions received. Additionally, if requested by the Trade Union (and not the member represented by the lawyer), a copy of any other document from the court's case file must be delivered to the Trade Union. It is important to note that the actions of the lawyer in question, according to article 10, do not constitute a violation of the obligation to maintain lawyer-client privilege.

Article 11 para 2 of the Rulebook grants the Trade Union further control over the court proceedings. According to this article, a member cannot terminate proceedings in which the member is represented by an in-house lawyer of the Trade Union, or a lawyer referred by the Trade Union, without a valid reason and without prior approval from the Legal Service of the Trade Union. This includes actions such as settling the case, withdrawing the lawsuit, waiving the claim, waiving the right to a legal remedy, or waiving an already declared legal remedy. If a member violates his obligations arising from article 11, para 2, the Trade Union is not obligated to continue to fund the costs associated with the procedure that resulted from this violation. Upon the Trade Union's request, the member is also obligated to reimburse the Trade Union for all funds provided by the trade Union for the purpose of conducting the court procedure, including any cash paid to the lawyer if the member was represented by a lawyer during the process. If the member neglects to fulfil this obligation, the Trade Union will commence court proceedings against this individual.

Article 12 of the Rulebook governs the provision of legal assistance initiated by the Trade Union and corresponds to the concept of barratry in Anglo-Saxon law. This article states that if the Trade Union plans to exercise free legal assistance to its members through multiple lawsuits, the Trade Union must first inform its members either by writing to its subsidiary or publishing instructions on its website regarding how to proceed with the initiative. If a member follows the Trade Union's instructions and submits the necessary documentation, it is deemed that the member requires legal assistance.

Similar behaviour can be seen in other trade unions; however, these unions lack the transparency exhibited by the Independent Union of Research and Higher Education Employees of Croatia, resulting in limited publicly available information regarding TPLF and the aforementioned issues. The two subsequent paragraphs offer some insights; however, it is important to highlight that much of the information is accessible exclusively to trade union members.

In 2021 alone, civil servants submitted a total of 15,548 requests to settle disputes amicably to municipal State Attorney Offices.[277] The obligation to file a request to settle the dispute amicably is a positive process condition stipulated in the Croatian Civil Procedure Act (Article 186a). According to article 186, any natural or legal person who intends to file a civil claim against the Republic of Croatia must place a request with the competent State Attorney Office. This obligation, *mutatis mutandis*, applies to the State.[278]

[277] See The Report of the State Attorney Office of the Republic of Croatia for 2021, available from: https://dorh.hr/hr/izvjesca-o-radu/izvjesce-o-radu-drzavnih-odvjetnistava-u-2021-godini accessed 5 January 2025

[278] Osrečak, J. Analyses of the request to settle disputes amicably in the Civil Procedure Act, Zagrebačka pravna revija, Vol. 5 No. 2 (2016), p. 186, available from: https://hrcak.srce.hr/clanak/257947 accessed 5 January 2025

The Police Union of Croatia has issued a statement detailing the events and practices that occurred. The key message conveyed by the Police Union to its members is that although there is no existing legal precedent favouring civil servants in similar cases, and the outcome of ongoing cases is uncertain, the Union has arranged for free legal representation from the law firm Rački and Colleagues. This ensures that all members who feel that they require legal assistance can access it. The Union's lawyers from the law firm Rački and Colleagues will promptly withdraw the claims filed by union members who pursued the lawsuit and are currently benefiting from free legal representation. This action aims to minimise the costs of the defendant (the Republic of Croatia), which will be claimed by the Municipal State Attorney Office in each proceeding and subsequently borne by the trade union members. Members who initiated the action and were represented by the law office due to the Union's provision of free legal aid will be exempt from bearing the expenses incurred by the Law Office Rački and Colleagues.[279]

Glossary of abbreviations and acronyms

COA Civil Obligations Act

CPA Civil Procedure Act

Table of legislation

Civil Obligations Act

Civil Procedure Act

Act on Representative Claims for the Protection of Collective Interests and Consumer Rights

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[279] Announcement of the Police Union of 15 November 2021 https://www.sindikatpolicije.hr/storage/upload/novosti/559_15-11-2021_clanovi_i_povjerenici_-_tuzbe_u_svezi_isplate_place_zbog_neuvecanja_osnovice_od_6_za_2016._godinu_-_opsirno_15520.pdf accessed 5 January 2025

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Cyprus

Prof Nikitas Hatzimihail, University of Cyprus

Executive Summary

- Cyprus law tends to follow the English tradition of civil litigation
- Third-party litigation funding is neither regulated nor prohibited in Cyprus law. Case law has held, in the course of enforcement of foreign judgments, that TPLF does not violate Cyprus public policy, insofar as it enables access to justice. The promise of third-party litigation funders to indemnify their promisee will be enforceable.
- TPLF is now expressly treated with regard to the representative actions in consumer claims, since the recent provision in national legislation implementing the EU Directive on Representative Actions for Consumer Claims.
- Whereas Cyprus law does not provide any framework for TPLF regulation, nothing in Cyprus law would contradict the measures contained in the draft directive annexed to the European Parliament resolution
- Empirical research has not unveiled any use of TPLF in Cyprus
- Stakeholders interviewed have appeared mostly unaware or sceptical of the institution of TPLF. Consumer associations have advocated for government funding of their representative actions, and the new Law now provides for such a possibility
- The Resolution could provide a soft-law instrument (and hard-law, in case of adoption by the EU as a Directive) in guiding use and acceptance of TPLF in Cyprus. Another step might come in the form of a Code of Conduct for Litigation Funders.

1. Introduction

Cyprus procedural law, as well as the law of obligations, follows the English common law tradition.[280] In the spirit of common-law civil procedure, Cyprus civil procedure draws on two sources: legislation provides the general framework, including matters of venue and subject matter jurisdiction, the status of judges and the principal rules as to the function of Courts, enforcement and evidence. The Civil Procedure Rules, adopted by the Supreme Court of Cyprus, govern the operation of civil proceedings. Until 2023, the Civil Procedure Rules in force were the ones promulgated in the first half of the 20th century, during British colonial rule.[281] In 2023, a new system of Civil Procedure Rules was promulgated by the Supreme Court, essentially adopting the new English system of civil procedure rules as it was transformed following the Wolf reforms. [282] Unlike in the English model, Cyprus civil litigation relies on the Rules as such and makes no use of Practice Directions. Also, unlike England/Wales and most common law jurisdictions, the judges of the Supreme Court bear sole responsibility for drafting new Rules.

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Third-party litigation funding would face an apparent legal vacuum in Cyprus. With the very recent exception of the Representative Actions Law, discussed below, no legislation is planned or contemplated. Cyprus courts have nonetheless never held that third-party funding of litigation would violate Cyprus public policy. The English doctrine of maintenance and champerty, which had been invoked to that effect, has been considered by trial courts, whose judgments should be regarded as having some persuasive value, especially as they draw on English and other Commonwealth case law for their doctrinal argumentation.

In 2022, the House of Representatives enacted the Injunctions and Representative Actions for the protection of Collective Consumer Interests Law 2023 (hereinafter "Representative Actions Law"), in implementation of the Directive 2020/1828. Article 15 of the new Law transposes Article 10 of the Directive.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

We were unable to locate even anecdotal evidence of TPLF practice in Cyprus.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

We were unable to locate even anecdotal evidence of operating third-party litigation funders in Cyprus.

[280] See Nikitas Hatzimihail, 'Cyprus as a Mixed Legal System' [2013] 6 Journal of Civil Law Studies 37; Nikitas Hatzimihail, 'On Law, Legal Elites and the Legal Profession in a (Biggish) Small State: Cyprus' in P. Butler & C. Morrris, Small States in a Legal World (Springer, 2017), 213-244;
[281] See the original as amended: https://www.cylaw.org/cpr.html
[282] See the original as amended: https://www.cylaw.org/ncpr.html

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No statistics are available and we were unable to discover even anecdotal evidence of TPLF practice.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There has been no discussion of TPLF until very recently. In a forthcoming collective volume on collective actions in Europe, in the light of implementation of Directive 2020/1828, Dr Michael Chatzipanagiotis (who prepared the initial draft for the Representative Actions Law) presents a Cyprus national report, to which we have had access and the ability to draw upon, which includes discussion of pertinent issues.[283] The author of the present report has also published two case notes on the two recent and more pertinent Cyprus decisions discussed below, for a national law journal, in Greek.[284]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

In 1974, the Kyrenia District Court, faced with a dispute in which the plaintiff had entered contracts for the sale of the same parcel of land with two different parties and the latter purchaser had agreed to indemnify plaintiff for any liability he might incur from the other party in the original contract, held that "champerty and maintenance must have the qualities attributed to them by the English Law, It must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary," offering as examples "betting, or encouraging unrighteous suits, or gambling in litigation." [285] If the agreement 'he neither unfair nor extortionate it is binding but not if it be extortionate or unconscionable.

In 2022, the Larnaca District Court, called to determine whether third-party funding of the claimant in proceedings before English courts violated the Cypriot public policy (*ordre public*) examined the evolution in English and Commonwealth case law.[286] It held that "the doctrine was intended to prevent cases where proceedings with ulterior motives were being prevent cases where proceedings with ulterior motives were being promoted which posed a risk to the proper administration of justice" and that, moreover, "litigation funding by third parties who are professionals in the field of litigation funding … is now fully accepted under the common law and is also considered to be in the public interest because it facilitates access to justice and is therefore not considered illegal or abusive. It is therefore even more obvious that since in Cyprus there has never been such a prohibition by law, a litigation funding agreement could not be interpreted as 'champertous' or

[283] Michael Chatzipanagiotis, 'Cyprus' in Tobias Lúhmann (ed.), *Collective Actions and Redress in Europe* (Beck, 2025), forthcoming.

[284] Nikitas Hatzimihail, 'Observations to *Kazakhstan Kagazy PLC v Arip*' [2024] 4 *Cyprus Law Review* (forthcoming), in Greek; Nikitas Hatzimihail, 'Observations to *PSJC National Bank Trust v Ananyev & ors*' [2024] 4 *Cyprus Law Review* (forthcoming), in Greek.

[285] *Xenophontos v Anastassiadou* (1974) JSC 578, 587.

[286] *Kazakhstan Kagazy PLC v Arip*, ECLI:CY:EDLAR:2022:A8, quoting extensively from Akhmedova v Akhmedov [2020] EWHC 1526 (Fam), and citing Quebec Inc (Blueberi) v Callidus Capital Corp [2020] SCC 10 (Canada), Saunders v Houghton [2009] NZCA 610, Contractors Bonding Limited v Waterhouse [2012] NZCA 399 (New Zealand), A Company v A Funder [2017] 2 CILR 710 (Cayman), Stiftung Salle v Butterfield Trust (Bermuda) Limited [2014] SC (Bda) 14 Com (Bermuda).

contrary to the public policy of the Republic of Cyprus."[287] The Court took notice of the emphasis placed in common-law case law on the funder's compliance with the Code of Conduct for Litigation Funders, which was met in the case at hand. No such Code exists in Cyprus.

2. Relevant legislation applicable to TPLF in your jurisdiction

The legislation most relevant to TPLF is Article 15 ("Funding of representative actions for redress and/or restitution measures") of the Injunctions and Representative Actions for the protection of Collective Consumer Interests Law 2023 (hereinafter "Representative Actions Law").[288] The Law implements the Directive 2020/1828 and the Law's Article 15 transposes the Directive's Article 10.

The Law namely vests the court seized with the action ("the Court") with the power to assess a potential conflict of interests between the third party and the subject of the representative action,[289] setting (non-exhaustive) criteria for such determination,[290] The Court is also vested with powers to require financial disclosures and provide injunctive relief.[291]

2.1 Legal admissibility and conditions of using TPLF in civil litigation

N/A

2.2 Regulatory oversight of funders/funding industry

[287] *Kazakhstan Kagazy PLC v Arip*, ECLI:CY:EDLAR:2022:A8.

[288] For the original text of the statute (in Greek) see https://www.cylaw.org/nomoi/indexes/2023_1_91.html. The text in English, as translated by Chatzipanagiotis, (n. 4), is as follows:

15. Funding of representative actions for redress and/or restitution measures

(1) *Notwithstanding the provisions of any other Law or Regulations issued pursuant thereto, where a representative action for redress and/or restitution measures is funded by a third party, the Court may assess whether there is a conflict of interest between the third party and the subject of the representative action.*

(2) *During the review conducted in accordance with the provisions of subsection (1), the Court may examine, inter alia, the following factors:*

(a) if the funding by third parties with a financial interest in the bringing or the outcome of the representative action for redress and/or restitution measures, divert the representative action away from the protection of the collective interests of consumers;

(b) if the decisions of qualified entities in the context of a representative action, including decisions on settlement, are unduly influenced by third parties in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action;

(c) if the representative action is not brought against a trader which is a competitor of the funding provider or against a trader on which the funding provider is dependent.

(3) *For the purposes of subsections (1) and (2), the Court may, inter alia, upon application or on its own motion:*

(a) order the qualified entity to provide a financial overview listing the sources of funding it is using to support the representative action;

(b) order appropriate measures, including requiring the qualified entity to prohibit or make changes to the relevant funding and, if necessary, rejecting the legal standing of the qualified entity in a specific representative action:

Provided that, if the legal standing of the qualified entity is rejected in a specific representative action, such rejection shall not affect the rights of the consumers concerned by that representative action.

[289] Representative Actions Law 2023, Art. 15(1).

[290] Ibid, Art. 15(2).

[291] Ibid, Art. 15(3).

N/A

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

N/A

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Cyprus law relies on the twin pillars of the English common law tradition and EU derivative law, when applicable. As to the latter, the Consumer Protection Law 2021 has now replaced previous legislation on unfair terms in consumer contracts and unfair commercial practices. As to the former, the common law of contracts provides certain institutions preventing abusive stipulations, including undue influence and unconscionability.

The main issue to consider here concerns the possibility of assignment of claims. The general outline of Cyprus law on assignment is similar to English law, notably with regard to contractual claims. Assignment of property rights (including claims for the recovery of debts) is in principle valid. Assignment of bare causes of action is in principle invalid, unless the assignee can show a sufficient interest in the right assigned. The court will determine in the individual case whether the assignment offends public policy. To quote again (older) Cyprus case law, "a transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realised from the litigation shall he divided between the transferor and the transferee is not per se void; but it will be void if the person financing does not believe the borrower's claim to be a good one, The real test in cases of this nature is whether the transaction is a bona fide purchase of a matter in dispute or one for the purpose of maintaining or proceeding with litigation." [292]

This could lead to the conclusion that the assignment of claims in the context of collective redress remains "a high-risk strategy,"[293] as the new understanding that such assignment does not violate the public policy of protecting the integrity of civil justice must overcome the traditional effect of champerty against the validity of any such agreement. The recent UK Supreme Court decision, holding that litigation funding agreements with parties playing no part in the litigation but expecting to be paid a share of damages recovered by the claimant are damages-based agreements,[294] must be seen in this light.

In any case, Cyprus law takes a more directly hostile approach to the contractual assignment of non-contractual claims for litigation purposes. Article 16 of the Civil Wrongs Law (Cap. 148) contains an explicit prohibition against the contractual assignment of tort claims ("The right of any remedy for, and any liability in respect of, any civil wrong shall not be assignable otherwise than by operation of law"). This constitutes an express departure from English tort law as it has subsequently developed

[292] *Xenophontos v Anastassiadou* (1974) JSC 578, 587 (Ioannides, PDC).
[293] Thus Chatzipanagiotis (n. 4).
[294] *Paccar Inc v Road Haulage Association Ltd* [2023] UKSC 28.

and has been treated as such in Cyprus case law. Thus, claims brought against a tortfeasor must be brought jointly by the injured party and their insurance company. [295]

The most relevant and very recent authority comes from the newly established Court of Appeals, in a case involving claims in tort or unjustified enrichment by two Russian banks who against certain of their officers and shareholders (the Ananyev family) for actions leading to certain loss-making loans.[296] Plaintiff appeared as the legal successor of one of the two original claimants, to whom these claims were assigned. The Court held that such a claim was barred under Article 16. Moreover, whereas claimants argued that the assignment in question was valid under the applicable Russian law, the Court held that Article 16 constitutes an overriding mandatory provision in the meaning of Article 16 of the "Rome II" Regulation.[297]

It has moreover been argued that assignment of litigation claims constitutes an instance of practicing as an advocate and therefore only an advocate or a law firm could be assigned court claims.

Cyprus does possess a growing market for investment funds, notably alternative investment funds. The Cyprus Securities and Exchange Commission (CySEC) is the regulatory authority entrusted with monitoring the funds market. As such, CySEC would have to approve the establishment of a fund aiming at providing third-party litigation funding, as well as monitoring the provision of such services by already operating funds. Given the present state of the law, such a fund would have to establish an actual legitimate interest in the case for which it is providing funding.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Article 15 of the Representative Actions Law 2023 provides that, without prejudice to any other laws or regulations, when a third party finances a representative action for redress measures, the Court may assess if there is any conflict of interest between the third-party regarding the subject matter of the action.[298]

Criteria for such assessment *include*:

1. Whether the funding by third parties with a financial interest in the bringing or the outcome of the representative action for redress and/or restitution measures, divert the representative action away from the protection of the collective interests of consumers;[299]
2. Whether the decisions of qualified entities in the context of a representative action, including decisions on settlement, are unduly influenced by third parties in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action; [300]

[295] See e.g. *Coucal Limited v. Scully*, ECLI:CY:EDLEF:2022:A118; *Royal Crown Insurance Company Ltd v. Trust International Insurance Company (Cyprus) Ltd*, ECLI:CY:EDLEF:2017:A138.
[296] *PSJC National Bank Trust v Ananyev & ors*, ECLI:CY:EF:2024:51, appearing in print in [2024] 4 *Cyprus Law Review* with a case note by Nikitas Hatzimihail.
[297] *PSJC National Bank Trust v Ananyev & ors*, ECLI:CY:EF:2024:51.
[298] Representative Actions Law 2023, Art. 15(1).
[299] Ibid, Art. 15(2)(a).
[300] Ibid, Art. 15(2)(b).

3. Whether the representative action is (not) brought against a trader which is a competitor of the funding provider or against a trader on which the funding provider is dependent.[301]

The Court is vested with the power "upon application of its own motion" to order the qualified entity to disclose a financial overview that lists sources of funds used to support the representative action.[302] Such power relates to the court's jurisdiction to determine a conflict of interest ("for the purposes of") but it does constitute a transparency requirement providing a ground for broader requirement for ethical and financial transparency.

The Law vests the Court with the power "to order appropriate measures." Namely, it can require the qualified entity (which pursues the representative action under the Law) to either outright refuse funding from the litigation funder under question, or to make changes to the funding arrangement. The Court could.[303] In more problematic csses, the court might even reject the legal standing of the qualified entity in a specific representative action.[304] In that last case, that rejection shall not affect the rights of the consumers concerned by that representative action.[305]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

N/A

2.7 Obligations of funders towards beneficiaries and vice-versa

N/A

2.8 Distribution of awards and bearing adverse costs in lost cases

N/A

2.9 Planned legislation

No legislation or regulatory instrument has at present been proposed or planned in Cyprus.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*

[301] Ibid, Art. 15(2)(c).
[302] Ibid, Art. 15(3).
[303] Ibid, Art. 15(3).
[304] Ibid, Art. 15(3).
[305] Ibid, Art.15(3) in fine.

Authorisation system (Art. 4) and conditions for authorization (Art. 5)	The only instance of TPLF under present Cyprus law concerns representative actions for the consumers' collective interests, under the Representative Actions Law 2023. With that exception, there is a strong public policy that would otherwise preclude TPLF. Should the EU decide to regulate TPLF, Cyprus would easily establish a system of authorization as provided for in the Resolution. In the (less likely) case where Cyprus decides to alter its own conception of judicial public policy and allow TPLF, it can be strongly expected that setting up a system of authorization with the requisite conditions would be a condition for such change to be approved.
Capital adequacy (Art.6)	N/A
Fiduciary duty (Art.7)	N/A
Powers of supervisory authorities (Art.8)	N/A
Investigations and complaints (Art.9)	N/A
Coordination between supervisory authorities (Art.10)	N/A
Content of third-party funding agreements (Art.12)	N/A
Transparency requirements and avoidance of conflicts of interest (Art.13)	A formal system of funders establishing and communicating policies, such as the one envisioned in Art. 13 of the Resolution) does not currently exist in Cyprus, but neither does any provision and legal institution which would prevent adoption of such provisions. In the meantime, as regars the one instance where TPLF is already provided for in Cyprus law, i.e. representative actions to protect consumers' collective interests, Art. 15 of the Representative Actions Law vests the adjudicating court with the power to determine possible conflict of interests and require the litigation funder to make financial disclosures. In exercising their power (and making a

	judgment) Cyprus courts are likely to make use of the Resolution's provisions
Invalid agreements and clauses (Art.14)	Compatible. As stated, there is a strong public policy in Cyprus law against third-party involvement in litigation and a Court would rule against the funder in any case listed in Art. 14 of the Resolution. Once again, the Resolution could provide standards to help a Court take a decision. Obviously, what is lacking at present (with the exception of consumer cases) is the power of a regulatory authority to preemptively vet a TPLF agreement.
Termination of third-party funding agreements (Art.15)	*N/A*
Disclosure of the third-party funding agreement (Art.16)	*N/A*
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Art of 15 of the Representative Actions Law 2023 provides for incidental review by the civil court adjudicating the representative action. Such review may be incidental but can cover the agreement in its entirety.
Responsibility for adverse costs (Art.18)	Under current Cyprus law, this would require the litigation funder to be brought into the proceedings as a party.
Sanctions (Art.19)	N/A

3. Practical operation of TPLF in your jurisdiction

There has been little to no evidence of cases involving third-party litigation funding in Cyprus. The main trial-instance case discussing TPLF, mentioned above, involves an application for enforcement of an English judgment, in which respondent and the court relied on especially English case law and practice.[306]

There are a few reasons for this. It must first be noted that Cyprus is a relatively small market, legal services included. Cyprus is of course a venue for international commercial litigation, yet until recently most such cases that ended in Cyprus courts involved interim relief or enforcement claims and were part of multi-jurisdictional disputes: Cyprus counsel therefore acted as local counsel, with

[306] *Kazakhstan Kagazy PLC v Arip*, ECLI:CY:EDLAR:2022:A8.

little involvement or knowledge of how litigation was funded. This may of course change in the near future as several tech start-ups and other multinational companies are moving their headquarters in Cyprus. There has moreover so far been very little civil litigation involving mass claims, whether consumer or tort. Any such cases did not involve significant costs, especially in their earlier stages. As to legal fees, empirical research indicates the regular use of contingency or special retainer arrangements: whereas "no win no pay" is not unheard of, a more common practice is that of a letter of engagement, where the counsel's fee is fixed as a percentage of the claim or the sum adjudicated, for plaintiff's counsel, or of the sum that was claimed but not adjudicated, for the defendant's counsel.[307] In the future, this could lead lawyers to solicit funding or to insure themselves from lost profits, but so far this does not appear to be the case.

As stated, no Code of Conduct exists in Cyprus, but then neither do local entities engaged in professional litigation funding. Cyprus case law has used the existence of a Code of Conduct in jurisdictions such as the UK to distinguish the continuing restrictive state of affairs in Cyprus, and Cypriot public policy, from the new UK regime, without intervening in foreign setting that was only incidentally relevant to the Cyprus legal order.[308] Establishment of a Code of Conduct would be a requirement for allowing TPLF in Cyprus; it would also help allow trust in a new institution, including in the emerging context of funding for consumers' representative actions.[309]

4. Stakeholder views on TPLF in your jurisdiction

Stakeholders interviewed have appeared mostly unaware or sceptical of the institution of TPLF. From the point of view of businesses, the creation of a litigation market might increase their liability risks.

Consumer organizations have sought the right to obtain government funding for representative actions to be brought by them under the Representative Actions Law, and such right was indeed granted to them, although scepticism was expressed.

Glossary of abbreviations and acronyms

CySEC Cyprus Securities and Exchange Commission

RAL Injunctions and Representative Actions for the protection of Collective Consumer Interests Law 2023 ("Representative Actions Law")

Table of legislation

Civil Wrongs Law Cap. 148

Contract Law Cap. 149

[307] An example of how such practice operates, drawn from tort litigation: counsel proceeds with the case without demanding advance payment from client; however, if a settlement offer is made that counsel regards as good, but the client wants to go all the way, risking the prospect of satisfactory compensation, counsel demands to be paid the legal fee stipulated or fixed by law.
[308] *Kazakhstan Kagazy PLC v Arip*, ECLI:CY:EDLAR:2022:A8.
[309] Hatzimihail (n. 5).

Consumer Protection Law 2021

Injunctions and Representative Actions for the protection of Collective Consumer Interests Law 2023

Civil Procedure Rules 2023

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, [2020] OJ L 409/1

Regulation (EC) 864/2007 of the European Parliament and Council on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40

Table of cases

Cyprus

Coucal Limited v. Scully, ECLI:CY:EDLEF:2022:A118

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PSJC National Bank Trust v Ananyev & ors, ECLI:CY:EF:2024:51

Royal Crown Insurance Company Ltd v. Trust International Insurance Company (Cyprus) Ltd, ECLI:CY:EDLEF:2017:A138

Xenophontos v Anastassiadou (1974) JSC 578

Other common law jurisdictions

Akhmedova v Akhmedov [2020] EWHC 1526 (Fam)

Paccar Inc v Road Haulage Association Ltd [2023] UKSC 28

Quebec Inc (Blueberi) v Callidus Capital Corp [2020] SCC 10

Saunders v Houghton [2009] NZCA 610

Contractors Bonding Limited v Waterhouse [2012] NZCA 399 (New Zealand)

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Czech Republic

Daniel Vencovský,and Dr Liljana Cvetanoska, RPA

Executive Summary

- The Czech Republic currently has no specific law dedicated to TPLF. However, Law 179, enacted in 2024, addresses some aspects of TPLF in the context of funding class actions.
- There is no available data to indicate whether TPLF is commonly used in the country.
- A few funders, including LitFin, CSCP, Wood&Co, and Process Partner, operate in the Czech Republic, but they mostly focus on cases in other countries such as France and Germany.
- Legal Framework: Law 179 outlines rules for TPLF in class actions, requiring transparency in funding arrangements (article 57) and ensuring that funders remain independent from defendants to avoid conflicts of interest (article 59). Article 15 restricts funders from influencing litigation in ways that could harm the interests of the group members involved in class actions. Additionally, article 58 mandates that plaintiffs disclose details about the real owners of third-party funders, particularly if the funder is a legal entity.
- Regulatory Oversight: The law imposes conditions preventing conflicts of interest by ensuring funders are not competitors or dependent on the defendants. Courts can also verify the real ownership of funders when legal entities are involved.
- Economic Activity: Law 179 does not impose specific conditions on the economic activities of TPLF funders, leaving the market largely under-regulated in this respect.
- Other Relevant Legislation: Other laws, such as the Act on Investment Companies and Investment Funds, the Capital Market Act, and the Anti-Money Laundering Act, indirectly affect TPLF practices by enforcing transparency, risk management, and the protection of investors.
- Types of Cases Funded: TPLF is not common in the Czech Republic, with funders usually focusing on cases abroad. According to estimates from stakeholders, there have been around 25-30 funded cases in the past three years, though most of these were in other jurisdictions.
- Claim Values: Funders like LitFin generally require a minimum claim value of €4 million for individual cases. In pro bono work, they may take on cases with claims as low as €100,000. For group litigation, claims typically start at around €100 million.
- Investment and Returns: While specific investment amounts vary by case, funders aim for a return of about three times their investment. Compensation shares typically range between 10-30%, with 25% being a common demand.
- Control Over Proceedings: Funders usually collaborate with plaintiffs and their lawyers, influencing decisions such as the choice of lawyer, settlement agreements, and strategy. However, funders do not exercise full control, and legal decisions seem to be made in collaboration with the plaintiffs.

- Conflicts of Interest and Liability: Safeguards are in place to prevent conflicts of interest in class actions. While there are no legal requirements for funders to disclose agreements to the court, these issues are typically addressed during initial court proceedings.
- Stakeholders expressed concerns that overregulating the TPLF market might discourage funders from engaging in the Czech Republic. They emphasised that flexibility is key to maintaining interest in funding cases, as excessive regulation could limit access to justice by making litigation funding less attractive.
- The Czech Republic's legal framework for TPLF is still developing, and most litigation funding activity occurs outside the country. Any future EU-wide regulations should take into account the differences across Member States and avoid imposing overly strict rules that could stifle the market.
- It is important to ensure that plaintiffs are protected from potential coercion by funders, particularly in settlement negotiations. There should also be flexibility in the regulation of award percentages, which should take into account the case's complexity, costs and risks in order to strike a fair balance between funders and plaintiffs.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no existing law specifically addressing TPLF in the Czech Republic. However, the Law 179 on collective civil court proceedings from 2024[310] touches upon some aspects of TPLF related to funding of class actions.[311]

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

The Law was adopted in February 2024 and there is not data available to answer whether it is regularly used yet.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are a few operating funders in the country: LitFin, CSCP, Wood&Co and Process partner,[312]but they rarely fund cases in Czechia. Their focus is largely on other countries, such as France, Germany etc.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

[310] https://www.psp.cz/sqw/text/tiskt.sqw?o=9&ct=523&ct1=0&v=PZ&pn=4&pt=1
[311] https://pojistnyobzor.cz/clanky/financovani-hromadnych-zalob
[312] LitFin Capital (www.litfin.cz), CSCP (www.cscp.cz), K&P LEGAL (https://wood.cz/insight/wood-company-umozni-investovat-do-financovani-soudnich-sporu-z-portfolia-spolecno/) and Proces Partner (www.procespartner.cz)

Considering that this is an underdeveloped legal area, there do not appear to be any publicly available statistics on the matter.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is very little discussion on TPLF in the Czech Republic. There are a few articles published on the webpages of some of the companies that work in this area, but the matter has not been quantitatively assessed. For example, Wood&Co have provided some background information on TPLF[313] and there are several interviews given by partners from LitFin,[314] but no academic studies focusing on this matter in the Czech Republic are available.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Aside from a few newspaper articles that have mainly focused on explaining what TPLF is,[315] or presenting it as a good business opportunity,[316] there are no discussions on the topic. There is an article that discusses the purpose of the draft law of collective civil court proceedings regarding TPLF, but this was not a widely spread debate.[317]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

Law 179[318] provides a framework for managing TPLF in collective legal actions. It mandates that plaintiffs disclose any third-party funding arrangements under article 57, ensuring transparency regarding the sources of financing. The Act also requires that funders remain independent from the defendant (article 59) to avoid conflicts of interest. Additionally, article 15 limits the influence of funders on the proceedings, preventing them from controlling the litigation in ways that could harm the group members' interests. Specifically, under article 15, a class action is permissible if it is not funded by a third party that is a competitor of the defendant, is dependent on the defendant, or that unduly influences them. In addition, article 58 deals with transparency regarding the real owners of third-party funders. If a funder is a legal entity, the plaintiff must provide details about its beneficial owners. This includes submitting records from the relevant registers, especially if the funder is foreign. The court can also verify the ownership independently. Article 64 addresses the plaintiff's potential reward in collective actions. It allows the plaintiff to request a percentage of the awarded

[313] https://wood.cz/insight/wood-company-umozni-investovat-do-financovani-soudnich-sporu-z-portfolia-spolecno/

[314] https://www.pravniprostor.cz/clanky/ostatni-pravo/rozhovor-ondrej-tylecek-financovani-soudnich-sporu-je-pro-kazdeho

[315] https://pojistnyobzor.cz/clanky/financovani-hromadnych-zalob

[316] https://www.e15.cz/videoporady/pfi-talks/soudni-spory-jako-byznys-poskozeni-casto-o-narocich-za-miliardy-ani-nevedi-1412289

[317] https://pojistnyobzor.cz/clanky/financovani-hromadnych-zalob

[318] https://www.zakonyprolidi.cz/cs/2024-179

performance or a lump sum as compensation, which can influence third-party funding arrangements depending on the case's success.

The Law 179 (articles 8) places conditions on legal admissibility to protect the interests of the group. The plaintiff appears in his own name in collective proceedings in the interests of the group. The plaintiff in a collective proceeding can only be a legal entity that is registered in the list of authorised persons according to the Act on Consumer Protection, or together several such persons.

2.2 Regulatory oversight of funders/funding industry

In addition to not permitting class actions funded by a third party that is a competitor of the defendant, the court considers the beneficial owners from the register of beneficial owners when funding is provided by a legal entity.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

Law 179 does not provide any conditions for carrying out economic activity of TPLF. From consultations with stakeholders, it seems that the market is underregulated for TPLF specifically.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

As discussed above, the real owners of funders in class action are checked by courts and courts can decide to stop funding if there is a conflict of interest in class actions linking the funder to the defendant. In addition to Law 179, there are several other laws that are indirectly linked to TPLF in the Czech Republic.

The Act on Investment Companies and Investment Funds (Act No. 240/2013)[319] regulates the activities of investment funds, including risk management and transparency. As per this Law, investment funds involved in TPLF must comply with its provisions to ensure investor protection and proper fund operation.

Furthermore, the Capital Market Act (Act No. 256/2004)[320] sets limits on how investment products, including those that could be potentially linked to litigation funding, can be marketed and sold, ensuring that only qualified investors have access to high-risk financial services.

The Anti-Money Laundering Act (Act No. 253/2008)[321] requires due diligence and transparency regarding the origin of funds which also extends to TPLF funds, to ensure that illegal activities such as money laundering are prevented.

Finally, the Foreign Investment Screening Law (Act No.3/2021)[322] even though it may not be directly related to TPLF, could affect such funding as it ensures that foreign investments, including those

[319] https://www.zakonyprolidi.cz/cs/2013-240
[320] https://www.zakonyprolidi.cz/cs/2004-256
[321] https://www.zakonyprolidi.cz/cs/2008-253
[322] https://www.zakonyprolidi.cz/cs/2021-3

that may be interested in funding litigation in the Czech Republic, do not pose any threat to national security or public policy.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Aside from the obligations to disclose conflicts of interest and real ownership of legal entities, the main procedural safeguard is that the sources of financing the class action are assessed by the court at the beginning of the process, when it decides on the admissibility of the class action. The calculation of the cost of proceedings is also regulated by Law 179.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

There are no specific rules included in Law 179 on obligations of funders towards other parties in the dispute, but there are obligations for plaintiffs to represent the interests of the groups in class action. The court assesses settlement proposals on these matters, ie settlements need to be approved by courts.[323]

2.7 Obligations of funders towards beneficiaries and vice-versa

This is not regulated.

2.8 Distribution of awards and bearing adverse costs in lost cases

This is not regulated.

2.9 Planned legislation

No information on additional legislation affecting TPLF directly is available.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Please note that even though there is regulation on some of the issues below for class actions, there is no regulation for individual cases, hence the answers below.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not in place
Capital adequacy (Art.6)	Not in place

[323] https://www.twobirds.com/en/trending-topics/consumer-class-actions/current-collective-action-landscape-map/czech-republic

Fiduciary duty (Art.7)	Not in place
Powers of supervisory authorities (Art.8)	Not in place
Investigations and complaints (Art.9)	Not in place
Coordination between supervisory authorities (Art.10)	Not in place
Content of third-party funding agreements (Art.12)	Not in place
Transparency requirements and avoidance of conflicts of interest (Art.13)	Not in place
Invalid agreements and clauses (Art.14)	Not in place
Termination of third-party funding agreements (Art.15)	Not in place
Disclosure of the third-party funding agreement (Art.16)	Not in place
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Not in place
Responsibility for adverse costs (Art.18)	Not in place
Sanctions (Art.19)	Not in place

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

According to the interviewees and brief mentions of the applicability of TPLF in the Czech Republic, there are very few cases in the country. Funders usually fund cases outside the Czech Republic. Interviewees were unable to provide an estimated number. However, some interviewees provided a number that within the past three years they had approximately 25-30 cases in total, but in different jurisdictions.

b. Minimum claim value in absolute terms (in million Euro)

There is no specific regulation on the minimum claim value. However, for LitFin, which operates in many jurisdictions but is based in the Czech Republic, the minimum claim for individual cases is 4 million euros, but they assess cases on individual basis and this may vary, according to their website.[324] Some funders are also taking on pro bono work and cases with a lower minimum claim of 100, 000 euros when doing pro bono work. For group litigation, the starting claim is around 100 million euros or more.

[324] https://litfin.capital/single-case-funding/

c. Typical claim value in absolute terms (in million Euro)

Aside from the figures provided regarding the minimum value, no additional information was provided by the interviewees.

d. Typical ratio between investment by the funder and claim value

The typical ratio between the investment by the funder and the claim value varies on a case by case basis. Generally, funders seem to aim for returns of around three times the investment. According to interviewees, regulation of this ratio is unnecessary as it may affect the competition between the funders and the market. Thus, they recommend that it should be left unregulated in a similar manner as other investment business areas. Plus, some interviewees seem to see a potential risk emerging from overregulation, as they pointed out that in this case, there may not be sufficient interest in TPLF which may negatively affect access to justice.

e. Typical size of the investment by the litigation funder (in million Euro)

An estimated number between one and ten million was given by an interviewee, but they pointed out that one has to take into consideration that the case can be settled in one year or ten years, which affects how these decisions are made.

f. Origin of funding provided by the litigation funder

Some names were provided, but we are awaiting permission on what we can share and what level of anonymity those that provided this information require.

g. Share of compensation awarded typically demanded by litigation funders

The average according to interviewees is 25%, but it can vary between 10-30% depending on specific circumstances.

h. Other conditions of the litigation funding agreement

Other conditions of the litigation funding agreement are related to legal merits, estimated length of the case, insolvency risks of the counterparty, what the cost is, what the potential return is, specifics of the jurisdictions etc.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

This is assessed on an individual basis.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

N/A.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

According to an interviewee, their average success rate is 9 out of 10 cases, but they could not recall specific effective gains.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

There is no requirement to do so in Czech legislation and no comments were provided on this issue.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *Choice of lawyer*
- *Consent for settlement*
- Consent for appeal
- Consent for expert evidence
- Agreement on strategy
- Other: The overarching comment was that funders work together with plaintiffs and have internal agreements and that decisions on how to proceed with a specific case are done in collaboration with the funder, plaintiffs and lawyers.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

No information was provided.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

The interviewees were not aware of such instances. However, there was a mention of issues with lawyers, who acquire clients without the proper knowledge of the field of law, or without having sufficient funding, which then creates issues later on regarding funding.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

No information was provided, however for class actions there is legislation in the Czech Republic to prevent this.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No information was provided.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Not publicly available.

4. Stakeholder views on TPLF in your jurisdiction

None of the stakeholders were closely familiar with the EP resolution and were unable to comment on it.

Table of legislation

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Capital Market Act 2004 (Czech Republic) s 256/2004 Coll. https://www.zakonyprolidi.cz/cs/2004-256 accessed 25 September 2024.

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Denmark

Dr Anders Schäfer, Copenhagen University

Executive Summary

- In Denmark, legislation about TPLF is limited to representative actions filed on behalf of consumers collective interest within the remit of EC Directive on Representative Actions for the Protection of the Collective Interests of the Consumers (EU) 2020/1828.
- TPLF is used both in litigation and arbitration, including liability claims, commercial disputes, insolvency and market abuse, but TPLF is (still) not 'regularly used' in either litigation or in arbitration.
- There is no general regulation on the legal admissibility and conditions of using TPLF in civil litigation, but the Danish Supreme Court has accepted a funding model like TPLF. It is is the general perception that TPLF is legal in Denmark.
- A representative action brought on behalf of the general interest of consumers under the Representative Actions Act, which implements the Representative Actions Directive (2020/1828), is subject to several limitations regarding who can fund which cases and the funder's ability to influence the proceeding.
- A representative action brought under chapter 23 a in the Danish Administration of Justice Act, which is the general regulation for representative actions in Denmark, does not include specific limitations regarding the use of TPLF. However, the court may order a group representative to provide security for legal costs to the adverse party. It is the group representative who decides under which regulation a representative action should be brought, if both regulations apply.
- So far, TPLF has not been used to fund a representative action in Denmark either under the Representative Act, or under the Administration of Justice Act, chapter 23 a.
- There is no specific regulation of third-party funders or the funding industry of TPLF in Denmark, but a funder may – depending how the funder is organized – be subject to financial regulation, including the Alternative Investment Fund Managers Act, which implements the Alternative Investment Fund Managers Directive (2011/61/UE).
- If a funder – as part of the funding process of consumer claims – gives advice of a predominantly legal nature, then the funder will (also) be subject to the Danish Legal Advice Act, which includes limitations regarding the use of TPLF.
- There are no specific procedural safeguards regarding potential conflicts of interest, transparency, disclosure, and costs when it comes to TPLF in litigation. A party is not obligated to disclose a funding agreement or inform whether the proceeding is funded by a third-party funder.
- In arbitration, the parties have a duty to disclose any third-party funding to minimise the risk of justifiable doubts regarding the arbitrator's impartiality and independence.

- Since September 2022, the former ban against *pactum de quota litis* in the Danish Bar Associations Code of Codex has been revoked. Today, lawyers in Denmark are, therefore, able to enter into a share-based fee agreement and offer a funding model like TPLF. However, a lawyer can only enter into such a fee-agreement if the lawyer is able to maintain independence and integrity under the Code of Conduct.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

In Denmark there is no general legislation on TPLF. Legislation on TPLF is limited to representative actions brought on behalf of the collective interest of consumers under the Representative Act (406 2023),[325] which implements Directive (EU) 2020/1828). Apart from that, there is no existing or planed legislation of TPLF.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

The use of TPLF is still a new thing in Denmark, but the number of cases in which TPLF is used is increasing. However, TPLF cannot yet claim to be 'regularly relied upon' and the number of funded cases in relation to the total number of litigations and arbitrations in Denmark still represent a very small part.

TPLF is used in litigation and arbitration cases, including insolvency, commercial law, and market abuse. Some of the biggest (based by claim size) and most profiled cases where TPLF has been or are used are the following:

- Noreco Oil: An insurance claim raised by a Norwegian energy company against several insurance companies due to damages to a drilling rig;[326]
- Vestas Wind Systems: A liability claim raised by shareholders against Vestas Wind Systems for damages due to misleading information about accounting and earnings;[327]
- O.W. Bunker: A billion DKK liability claim raised by several bankruptcy estates in the O. W. Bunker Group against former management and advisors etc;[328]
- Danske Bank: A billion DKK liability claim raised by shareholders against Danske Bank and Thomas Borgen (former managing director of Danske Bank);[329]
- Novo Nordisk A/S: A liability claim raised by shareholder of Novo Nordisk A/S against the company for damages due to market manipulation;[330] and,

[325][325] Lov om adgang til anlæggelse af gruppesøgsmål til beskyttelse af forbrugernes kollektive interesser (retsinformation.dk)
[326] Analyse-Erhvervslivets-adgang-til-domstolene.pdf (justitia-int.org), p. 50.
[327] Analyse-Erhvervslivets-adgang-til-domstolene.pdf (justitia-int.org), p. 50.
[328] Ekstern procesfinansiering skaber nye udfordringer - Gorrissen Federspiel
[329] Danske Bank | Deminor Cases en
[330] Novo Nordisk A/S Shareholder Action - Omni Bridgeway

- Greenland Minerals: A multibillion DKK mining arbitration claim raised by the mining company Greenland Minerals against Greenland and the United Kingdom of Denmark.[331]

TPLF is also used in smaller and less profiled cases, but the exact numbers of cases funded is unknown.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Both international and Nordic based funders are operating in Denmark. The international funders seem primarily involved in cases regarding large claims (ie a claim size exceeding 10 million Euro). The Nordic funders, however, serve a broader range of cases (ie a claim size exceeding 1 Euro DKK).

International funders operating in Denmark include:

- Omni Bridgeway
- Deminor
- Therium
- Burford Capital
- Redress Solution
- Nivalion

Nordic funders operating in Denmark include:

- Litigium Capital
- Kapatens

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no reliable statistics regarding TPLF in Denmark, which is partly due the fact that TPLF is not subject to disclosure in court (see below).

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

So far, TPLF has only been subject to limited academic discussion.[332] The main issues discussed are:

- The lawyer and the relationship to the client and the funder;
- Risk of abuse litigation/arbitration;
- Funders control over the litigation/arbitration;

[331] GAR reports on Burford-funded mining arbitration claim | Burford Capital

[332] See Christensen, L. H.,"Procesfinansiering i konkurs, Erhvervsjuridisk Tidsskrift (ET.2017.252), report from the Danish judicial think tank Justitia, p. 47: Analyse-Erhvervslivets-adgang-til-domstolene.pdf (justitia-int.org), Schäfer, Anders, Forbrugers adgang til erstatning – Om forbrugerhåndhævelse af konkurrenceretten, Karnov Group (2023), p. 522-528.

- Disclosure; and,
- Security for legal costs.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

TPLF has caused some debate and the use of TPLF has been criticised for causing a more aggressive litigious environment.[333] Danish pension companies, including ATP Group – Denmark's largest pension and processing company – have also rejected opportunities to invest in TPLF.[334]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There is no general legislation on the legal admissibility and conditions of using TPLF in civil litigation in Denmark, but the Danish Supreme Court has, in a judgement from 2017, accepted the use of litigation funding based on a model close to TPLF.[335] It is the general perception that TPLF is legal in Denmark and governed by contract law.[336]

However, a rrepresentative action brought on behalf of consumers' collective interests under the Representative Action Act (406 2023), which implements the Representative Actions Directive (2020/1828), is subject to specific rules regarding the legal admissibility and conditions of using TPLF.

Firstly, a representative action may be funded by a third party, but to avoid conflict of interest an organisation cannot bring a representative action for recovery against a business that is a competitor of the representative action's funder, or against a business that the representative action's funder is dependent on.[337]

Secondly, funding by third parties that have an economic interest in the bringing, or the outcome, of the representative action for redress measures may not divert the representative action away from the protection of the collective interests of consumers.

Thirdly, decisions made by approved organisations in connection with a representative action for redress, including decisions to enter a settlement, must not be influenced by a third party in a way that would harm the collective interests of the consumers who have signed up for the representative action.

The court monitors these questions if the defendant raises justified doubts. For the assessment, the court can order the organisation to provide, within a reasonable period, an overview of the sources

[333] Tredjepartsfinansiering af danske retsopgør vækker skepsis (advok atwatch.dk)
[334] Danske pengetanke vender søgsmål-spekulanter ryggen (finans.dk)
[335] See U 2017.1815 H. The Supreme Court found no basis for overriding an agreement between a bankruptcy estate and another creditor to pay security for the costs of the action against a consideration for the security of 50% of the potential outcome of the case.
[336] See report from the Danish judicial think tank p. 47: Analyse-Erhvervslivets-adgang-til-domstolene.pdf (justitia-int.org)
[337] A20230040630 (1).pdf

of funding used to support the representative action. The court can demand that the organisation refuse or make changes regarding the financing of the lawsuit.

Only representative actions brought on behalf of the general interest of consumers under the Representative Actions Act (406 2023) are subject to the specific TPLF regulation. Parallel with the Representative Actions Act, it is also possible to bring a representative action under chapter 23 a of the Danish Administration of Justice Act (1655 2022), which applies to almost all types of civil (and not just consumer) claims. Chapter 12 a is not subject to specific TPLF regulation, but the court may – as an exemption to the general rule – order a group representative, or the group members, to provide security for legal costs to the adverse party.

The group representatives decide under which regulation a representative action should be brought if both regulations apply. So far, TPLF has not been used to fund a representative action in Denmark either under the Representative Action Act, or under the Administration of Justice Act.

Both the Representative Actions Act and the Administration of Justice Act, chapter 23 a, are based on an opt-in model, but under the Administration of Justice Act, the Danish Consumer Ombudsman may also bring a representative action based on the opt-out model under certain circumstances. However, so far, the Consumer Ombudsman has never brought a representative action, either under the Representative Actions Act,or under the Administration of Justice Act, which is probably due to, inter alia, financial constraints.

It should be noted in this regard that it would not be likely to use TPLF in cases brought on behalf of consumers by the Consumer Ombudsman, either under the opt-in nor under the Opt-Out model.

2.2 Regulatory oversight of funders/funding industry

There is no specific regulation of funders or the funding industry of TPLF in Denmark, but – depending on how the funder is organised – general financial regulation may apply, including the Alternative Investment Fund Managers etc. Act (231 2024), which implements the Alternative Investment Fund Managers Directive (2011/61/UE).

Furthermore, a funder operating in Denmark may also be subject to the Danish Legal Advice Act (419 2006), which applies to anyone (apart from lawyers) who, for commercial purposes, conducts business involving advice of a predominantly legal nature, when the recipient of the advice mainly acts outside his profession (a consumer).[338] A funder, which – as a part of funding one or more consumer claims – provides 'advice of a predominantly legal nature' (the exact definition is not yet settled) will have to take into account the limitations which follow from the Legal Advice Act (see below).

Finaly, if a funder is funding consumer cases, the funder will also be subject to general consumer regulations.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

[338] Lawyers are instead covered by the Danish Bar and Law Society, Code of Conduct: Microsoft Word - AER 2022 01082022 allerettelseraccepteret (advokatsamfundet.dk).

There is no specific TPLF regulation regarding eg capital adequacy requirements, but if the fund is subject to the Alternative Investment Fund Managers etc. Act, the regulation includes requirements for remuneration, risk management, reporting, transparency, depository, valuation, organisation etc.

All managers of alternative investment funds can apply for approval to manage alternative investment funds. However, an approved manager must have an initial capital of 125,000 euros and self-managed funds must have an initial capital of at least 300,000 euros.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

It follows from s 36 of the Danish Contract Act (193 2016) that an agreement can be modified or set aside in whole or in part if it would be unreasonable or contrary to fair dealing to enforce it. Accordingly, a third-party funding agreement may be set aside if it is considered unreasonable. However, s 36 of the Danish Contract Act is seldom used in commercial cases.

As mentioned, the Danish Legal Advice Act (419 9 2006) may apply if a funder – as part of the funding process of consumer claims – gives advice of a predominantly legal nature. If so, it would be forbidden for the funder to calculate the fee as a share of the profit the consumer may obtain (*pactum de quota litis)*, in contrast to the Danish Consumer Ombudsman's interpretation of the Act.

Lawyers also used to be subject to a ban against *pactum de quota litis* both in commercial and consumer cases, distinguishing from the former Code of Conduct of the Danish Bar and Law Society. The codex was changed in September 2022, when the general ban against *pactum de quota litis* was removed. Today, lawyers are, therefore, allowed to enter into share-based fee agreements, but it is still very unsure to what extent a lawyer can enter into such agreements and at the same time maintain independence and integrity under the code of conduct.

Finally, as mentioned, financial regulation including the Alternative Investment Fund Managers etc. Act (231 2024), which implements the Alternative Investment Fund Managers Directive (2011/61/UE), may apply to TPLF (see 2.2)

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Litigation

In litigation, there are no specific procedural safeguards regarding potential conflicts of interest, transparency, disclosure and cost when it comes to TPLF. A party is not obligated to disclose a funding agreement or disclose whether the proceeding is funded by a third-party funder.

Arbitration

With respect to disclosure of a funders' involvement in arbitration, the Danish Institute of Arbitration's rules from 13 April 2021, state that parties have a duty to disclose any third-party

funding to minimise the risk of justifiable doubts regarding the arbitrator's impartiality and independence, distinguished from art 20 (4).[339]

Furthermore, at the request of a party, the Arbitral Tribunal may decide that another party shall provide security for any costs, which the Arbitral Tribunal may impose upon this other party in a final award. Failure by the other party to provide security may cause the Arbitral Tribunal to close or stay the processing of that party's claims, except for claims for dismissal or acquittal, (see section 12, subsection 3).

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

There are no specific obligations on funders and beneficiaries towards courts, public administration and adverse parties of a dispute apart from (as just mentioned) in arbitration where parties have a duty to disclose any third-party funding.

2.7 Obligations of funders towards beneficiaries and vice-versa

There are no specific TPLF obligations of funders towards beneficiaries and vice versa. However, if the funder is funding one or more consumer claims, general consumer regulation will apply.

2.8 Distribution of awards and bearing adverse costs in lost cases

There is no specific regulation regarding TPLF and the funders responsibility to bear *adverse cost* in lost cases. A TPLF-agreement does not in general imply that the funder is liable for legal costs.

However, according to case law, a parent company may be held liable for legal costs imposed on a subsidiary if the parent company has financed a legal case on behalf of the subsidiary without ensuring that the subsidiary also has sufficient financial resources to pay any legal costs to the other party if the case is lost.[340] It is likely that the case law regarding parent companies' liability can be applied also to TPLF funders. Therefore, a funder may be held liable to pay adverse costs if the funded party is not able to pay adverse costs, but this is not a general rule. So far there are no publicly available decisions regarding founders' liability to pay adverse costs if the case is lost.

The court can, on the request of the defendant, demand that a plaintiff domiciled outside the EU provides security for legal costs (cf. section 321 in the Danish Administration of Justice Act). Furthermore, according to case law a transfer of a claim (for example from a bankruptcy estate to an 'empty' company) may be considered a circumvention of the rules on court costs, in which case, plaintiffs domiciled inside the EU must provide security for the court costs on the request of the defendant.[341]

There is no specific regulation regarding TPLF distribution of awards, but if the Danish Legal Advice Act (419 2006) applies (see the conditions above), it would be illegal for the funder to receive trust

[339] 4304611-regler-for-voldgift_04-2021_uk_web.pdf (voldgiftsinstituttet.dk)
[340] The Danish Supreme Court's decision of 19 January 2018 in case 80/2017. See also U.2018.1487H.
[341] U.2017.2439H and U.2022.5027V.

funds on behalf of the consumers.[342] As mentioned, the Legal Advice Act only applies if the funder provides advice to consumers of a predominantly legal nature.

2.9 Planned legislation

There is no planned legislation regarding TPLF.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No compatibility, but a funder may – depending on the structure of the fund – be subject to general financial regulation, including authorisation.
Capital adequacy (Art.6)	No compatibility but a funder may – depending on the structure of the fund – be subject to general financial regulation, including a minimum initial capital requirement.
Fiduciary duty (Art.7)	No compatibility.
Powers of supervisory authorities (Art.8)	No compatibility.
Investigations and complaints (Art.9)	No compatibility but a funder may – depending on the structure of the fund – be subject to general financial regulation, which is subject to the supervision of the Danish Financial Supervisory Authority.
Coordination between supervisory authorities (Art.10)	No compatibility.
Content of third-party funding agreements (Art.12)	No compatibility.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No compatibility.
Invalid agreements and clauses (Art.14)	No compatibility.

[342] As an example, the Danish Consumer Ombudsman has in April 2024 reported a Danish Company (Futurum-Law ApS) to the police for violating the law on legal advice by accepting trust funds on behalf of a consumer. The consumer had compensation paid to Futurum-Law and the company only paid the amount to the consumer after offsetting its own salary.

Termination of third-party funding agreements (Art.15)	No compatibility.
Disclosure of the third-party funding agreement (Art.16)	No compatibility.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No compatibility but if a case is brought as a representative action under the Representative Action Act, the court can demand that the approved organisation refuse or make changes regarding the financing of the lawsuit.
Responsibility for adverse costs (Art.18)	Based on the circumstances a funder may be hold liable for adverse costs according to case law.
Sanctions (Art.19)	No compatibility.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

The typical cases funded by TPLF in Denmark include cases regarding civil law, commercial law, business/enterprise, intellectual property and insolvency.

There is no data regarding the number of cases funded by TPLF per year in Denmark over the last 3 years. However, based on the interviews, I would estimate that in Denmark approximately 3-5 cases are funded by TPLF per year (2-3 for arbitration and 1-2 for litigation).

b. Minimum claim value in absolute terms (in million Euro)

2-4 million Euro.

c. Typical claim value in absolute terms (in million Euro)

The typical claim value seems to include a broad spectrum of claims between 10-50 million Euro.

d. Typical ratio between investment by the funder and claim value

1:10.

e. Typical size of the investment by the litigation funder (in million Euro)

1-2 million Euro.

f. Origin of funding provided by the litigation funder.

Family offices and private investors.

g. Share of compensation awarded typically demanded by litigation funders

Between 20-40 %.

h. Other conditions of the litigation funding agreement

N/A.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Based on the interviews, the general opinion seems to be that TPLF funders have an acceptable level of risk and they do not generally invest in baseless claims.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

No information.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

So far most of the cases, where it is publicly known that TPLF has been used, have been lost. The effective gains for beneficiaries and funder in these cases have therefore been negative. There are most likely also a few cases funded by TPLF but not publicly known, which have been won or successfully settled. However, there is no data on how many such cases exist, since TPLF is not disclosed in court.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

No - only in arbitration.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

X Consent for settlement

X Consent for appeal

- ☐ *Consent for expert evidence*
- ☐ *Agreement on strategy*

- *Other [Text]*

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

A relationship that can create uncertainty regarding who is the lawyer's real client – the client or the funder.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

The issue is subject to contract law and it depends on the wording of the funding agreement and under which circumstances a funder may withdraw funding during the litigation process.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

No and it is probably because funders do not consider themselves a 'party' in the funded case.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

Yes, no liability.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Yes.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No

4. Stakeholder views on TPLF in your jurisdiction

The general view is that the measures in the draft directive annexed to the EP resolution go too far. It is also the general view that some form of regulation of TPLF is needed and the regulation needs to come from EU, but is should be limited to regulation regarding:

- Disclosure;
- Funders' liability for adverse legal costs; and,

- Funders' ability to withdraw the funding.

Table of legislation

Danish Legislation and regulation

Administration of Justice Act 2022 1655

Alternative Investment Fund Managers etc. Act 2024 231

Contract Act 2016 193

Representative Actions for the Protection of Consumers Collective 2023 406

Legal Advice Act 2006 419

Danish Institute of Arbitration's rules April 2021

Danish Bar and Law Society, Code of Conduct 2022

EU Legislation

Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

Directive 2011/61 of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers

Table of cases

Danish Supreme Court

A under konkurs mod Jyske Bank A/S, March 23 2017, Case 266/2015, U 2017 1815 H

Van der Boom Holding B.V. mod Erhvervsstyrelsen, Moderniseringsstyrelsen og Forsvarsministeriet, January 19, Case 80/2018, U.2018.1487H.

NT 2014 ApS mod Region Syddanmark, May 2 2017, Case 149/2016, U.2017.2439H

Court of Appeal of Eastern Denmark

A ApS mod B, December 16 2021, Case BS 7626/202, U.2022.5027V.

Bibliography

Christensen, L. H., "Procesfinansiering i konkurs", Erhvervsjuridisk Tidsskrift, ET.2017.252

Justitia, "Analyse Erhvervslivets adgang til domstolene", report

Schäfer, Anders, "Forbrugers adgang til erstatning – Om forbrugerhåndhævelse af konkurrenceretten" (Karnov Group 2023)

Estonia

Prof Irene Kull, University of Tartu

Executive Summary

- There is no legislation or case law on TPLF in Estonia. Current legal regulation does not give any right to represent collective interests of consumers by claiming damages.
- Estonia has also not yet transposed the Representative Action Directive, although a draft law was released in in 2023 and has passed its first reading in the Parliament (Riigikogu). Rules on TPLF will be regulated in § 497[7] and § 497[8] of the dCCP and § 60[3] of the dCPA. Provisions in the draft laws follow the content of art 10 of the Directive verbatim.
- There are no significant doctrinal discussions on TPLF, as the draft law has not attracted particular interest. To date, there is one study and one article in an Estonian law journal, both of which describe TPLF very briefly. Given the small size of the Estonian consumer base, TPLF is probably not of much interest as a commercial activity. Also, the lack of information seems to be a problem.
- According to the draft law, the Supreme Court will supervise the sources of funding for collective actions in court proceedings. In the absence of specific rules on supervision, the general provisions apply. Supervision is performed under the general rules, depending on the type of funders. The draft law does not foresee the creation of separate supervisory bodies, which would mean that the Financial Supervisory Authority would have to supervise if the service is one of the licensed services (over investment firms, fund managers, investment funds, creditors and credit intermediaries).
- Non-TPLF legislation provides a number of protective rules (void unfair standard terms, unfairness of commercial practices and marketing, prohibitions on misleading advertising) which may influence TPLF practice in the future. Also, existing regulations applicable to legal entities providing the funding service may prevent abuse of consumers' weaker position. Rules on contractual agreements seem to also be sufficient to provide fair solutions.
- It is difficult in general to assess the compatibility of TPLF regulation with the measures in the draft directive annexed to the EP resolution. However, a plan to create a system for the authorisation and monitoring of the activities of litigation funders seems to be contrary to the general attitude in small countries in order to keep the system simple and efficient.
- Assessing the degree of compatibility of future TPLF regulation in Estonia with measures in the draft directive annexed to the EP resolution, one may take the view that they are appropriate and should not conflict with the existing legal system. The only measure that is not suitable for Estonia as a very small country is the suggestion to create a separate supervisory authority for service providers.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Existing legislation

In Estonia, legislation on TPLF is completely absent in the current law. Estonia has not yet transposed Directive on Representative Actions for the Protection of the Collective Interests of Consumers 2020/1828 (hereinafter the Directive)[343] There is no other legislation concerning the use of TPLF in litigation.

Planned legislation

The possibility of third-party financing provided for in the Directive will be transposed by a draft Act amending the Code of Civil Procedure and other Acts (Establishment of a Collective Representation Procedure) (334 SE), initiated by the Government of the Republic of Estonia on 23 October (from 24/10/2023). The first reading of the draft Act ended on 13 February 2024. The draft Act has to pass two readings, followed by a third reading ending with a final vote on the adoption.[344] The draft was based on an academic analysis carried out by Professor K Sein and Dr.iuris U. Volens.[345] The rules regulating collective representative actions will be added to the Code of Civil Procedure (dCCP) and to the Consumer Protection Act (dCPA).

Under the draft law, the right to bring national collective representative actions is granted to the Consumer Protection and Technical Regulatory Authority, the Financial Supervision Authority, the Data Protection Inspectorate and the competent entities on the list maintained by the Ministry of Economic Affairs and Communications, as well as to competent entities that may be admitted to the procedure by the court on an *ad hoc* basis. A cross-border collective action may only be brought by a competent entity which has been previously designated by a Member State of the European Union and is included in a list of competent entities made available by the European Commission.

The term 'third party" has been replaced by 'person not involved in the proceedings' (in Estonian "*menetlusväline isik*"), as third party has a specific procedural meaning in the current procedural law which does not coincide with the definition of third party used in the Directive.[346] In Estonia, the procedure chosen is action-by-petition (§ 475 ff of the dCCP), which is why the law uses the term 'action' instead of 'claim.'

Under the draft law, the scope of the new regulation would not be limited to infringements committed in the European Union or consumer rights legislation in the annex to the Directive, but, rather, it should be broader and allow for representative actions in all cases where the trader's infringement has harmed or is likely to harm the collective interests of consumers or data subjects.

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[343] Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.

[344] Riigikogu kodu- ja töökorra seadus (Riigikogu Rules of Procedure and Internal Rules Act) 2003, §§ 110, 111. https://www.riigiteataja.ee/en/eli/504062020005/consolide.

[345] Urmas Volens, Karin Sein, 'EL esindushagide direktiivi Eesti õigusesse ülevõtmise analüüs' [2023] [Analysis of the transposition of the European Union representative actions directive into Estonian law]. https://www.just.ee/uuringud.

[346] According to the § 212 and § 213 of the CCP third person is a party to the proceeding who may have an independent claim or participate in the proceedings without any claim.

The use of TPLF will be regulated by two provisions, namely § 497[7] and § 497[8] of the dCCP. A collective representative action for the determination of individual remedies brought by a competent entity may be funded by matching contributions or donations from members of the organisation, including from traders in the context of CSR initiatives or crowdfunding, provided that such funding is transparent, independent and avoids conflicts of interest.

In addition, where the funding of a representative action for the determination of individual remedies brought by a competent entity is agreed in such a way that the funder is entitled to a share of the compensation payable to consumers or data subjects, in the event of a successful representative action, the funder may not be entitled to a share of more than 30 percent of the compensation payable. Consumers and data subjects would be informed about such a model of representative action funding and its conditions before joining the procedure.

Under the draft law, the competent entity would have the right to charge consumers, or data subjects joining a representative action for the determination of individual remedies, a fee for joining the representative action of an amount that does not prevent the effective exercise of the consumer's or data subject's rights.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPLF does not exist in current legislation.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are no operating funders in Estonia.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no reliable statistics regarding TPLF in Estonia.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is one general study on the transposition of the European Union representative actions directive into Estonian law (see fn 4) and one article,[347] published in the Estonian law journal *Juridica,* which summarises the central principles of the draft directive and examines what changes will be made to Estonian law when the draft directive is adopted. However, the authors do not discuss the means of financing, or other options, offered by the draft directive. Also, the Explanatory Note to the draft law does not provide any comments or discussion on the topic. The lack of interest in the subject may also be linked to the fact that the Consumer Protection and Technical Regulatory Authority is likely to be the main body defending consumers' interests (considering the small population of Estonia), so there is no problem with the possibility of representative actions being funded by third parties. According to the interviews, practitioners are quite sceptical concerning the popularity of third-party financing. Also, the lack of information seems to be a problem.

[347] Katrin Martson, Karin Sein, 'Esindushagid Eestis – kas midagi täiesti võimatut?' [2019] 8 Juridica 603.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

To our knowledge, there is no information about any debate at a doctrinal or political level concerning the TPLF.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

According to the draft law, the relevant provisions will be added to the CCP and CPA to transpose the rules on TPLF into Estonian law. According to § 497[7](1) of the dCCP, representative action for redress measures may be funded by a third party meeting the conditions laid down in the law. A collective representative action may be funded by equal contributions or donations from the members of the organisation, including from traders in the context of CSR initiatives or crowdfunding, provided that such funding is transparent, independent and avoids conflicts of interest. Consumers and data subjects must be informed of such a model of representative action funding and its conditions before they join the procedure (§ 497[7](4) of the CCP).

According to the draft law, if a collective action for the determination of individual remedies is financed by a person outside the proceedings, conflict of interests must be avoided (§ 497[7](2) of the CCP). Where the third-party funder has a financial interest in the filing or outcome of the collective representative action, it is prohibited from doing any of the following to avoid a conflict of interest:

> (1) improperly influence the entity having jurisdiction in the representative action, including settlement decisions, in a manner that would be detrimental to the collective interests of consumers or data subjects joined in the representative action;
>
> 2) finance a representative action against a competitor or a person on whom the funder depends;
>
> (3) otherwise divert a representative action from the protection of the collective interests of consumers.

Where the funding of a representative action has been agreed in such a way that the funder is entitled to a share of the compensation payable to consumers or data subjects in the event of a successful representative action, the funder may not agree to be entitled to a share of more than 30 per cent of the compensation payable. In the study on the implementation of representative actions, there is a remark that, to the extent that performance fees are allowed under Estonian law, in practice it may be more expedient for private legal entities to have consumer claims assigned to them by means of technological solutions than to have to apply for competent entity status on an ad hoc basis and prove the origin of the funding for their proceedings. All in all, this may mean that the use of representative actions will remain primarily the domain of the public entities (like the Consumer Protection and Technical Regulatory Authority), while private parties will find it easier to use the legal-tech model.[348]

[348] See Urmas Volens, Karin Sein, 'EL esindushagide direktiivi Eesti õigusesse ülevõtmise analüüs' [2023] [Analysis of the transposition of the European Union representative actions directive into Estonian law], p. 23. https://www.just.ee/uuringud.

2.2 Regulatory oversight of funders/funding industry

As collective representative actions may be financed by contributions or donations from members of the organisation, including from traders' donations to CSR initiatives or crowdfunding and there are no specific regulations concerning the regulatory oversight, supervision is performed under the general rules depending on the type of funders.

Finantsinspektsioon (Estonian Financial Supervisory Authority) carries out state supervision over banks, insurance companies, insurance intermediaries, investment firms, fund managers, investment and pension funds, payment institutions, e-money institutions, creditors and credit intermediaries, and the securities market. Subjects to the supervision are only allowed to operate under activity licences granted by Finantsinspektsioon. According to § 2(1) of the Financial Supervision Authority Act (FSAA),[349] state financial supervision (hereinafter financial supervision) means supervision over the subjects of state financial supervision and the activities provided for in FSAA, the Credit Institutions Act, the Creditors and Credit Intermediaries Act, the Insurance Activities Act, the Investment Funds Act, the Funded Pensions Act, the Securities Market Act, the Motor Insurance Act, the Payment Institutions and E-money Institutions Act, the Covered Bonds Act and the Securities Register Maintenance Act, and legislation established on the basis thereof.

As there are no funders established in Estonia, it is difficult to define what regulatory oversight can be used or will be needed. It seems that there is no need to change the existing system that Finantsinspektsioon will carry out supervision over the funders whose services belong to the licenced services in the future. An overview of existing regulatory oversight will be described below.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There is no special legal framework applicable to funders.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict-of-interest etc).

Abusive clauses, transparency

The Law of Obligations Act (LOA)[350] consists of regulations on unfair standard terms which apply to all contracts, including consumer contracts. The list of unfair standard terms which are void in consumer contracts are provided for in § 42(3) of the LOA. In addition to that, § 42(1) of the LOA defines the general rule on invalidity of the unfair standard terms. Unfairness is presumed if a standard term derogates from a fundamental principle of law or restricts the rights and obligations arising for the other party from the nature of the contract, such that it becomes questionable as to whether the purpose of the contract can be achieved. Transparency of terms shall be assessed before the assessment of substantive fairness. This means that if the term is considered a standard

[349] Finantsinspektsiooni seadus (Financial Supervision Authority Act) 2001. https://www.riigiteataja.ee/en/eli/518122023006/consolide.

[350] Võlaõigusseadus (Law of Obligations Act) 2002. https://www.riigiteataja.ee/en/eli/ee/506082024002/consolide/current.

term, its incorporation into the contract and its transparency must be checked before the court begins to review substantive fairness (the so-called 'two-step' fairness test). Compliance with the requirement of transparency in its narrower meaning (use of plain and intelligible language or presentation) under § 37(3) of the LOA should be checked after it has been established that the standard term has become part of the contract (§ 37(1) LOA). A term is non-transparent if its content, wording, or presentation is so uncommon or unintelligible that the other party cannot reasonably have expected such a term to be included in the contract, or if the party cannot understand the term without considerable effort (§ 37(3) LOA).

The assessment of the unfairness of contract terms relating to the main subject matter of the contract or the price and remuneration is implemented into § 42(2) of the LOA. The exemption for terms relating to main subject matter and price or remuneration, however, is of limited scope, since these terms are subject to transparency controls – both formal and substantive.

Unfair commercial practices and marketing.

Directive 2005/29/EU on unfair commercial practices is implemented into the Consumer Protection Act (CPA).[351] According to § 14(1) of the CPA, the offering, sale and marketing in any other manner, of goods and services to consumers, shall follow good trade practice and be honest regarding consumers. A list of unfair commercial practices can be found in § 16 and aggressive commercial practices in § 18 of the CPA. State supervision over the safeguarding of the rights granted to consumers concerning unfair commercial practices and marketing is exercised by the Consumer Protection and Technical Regulatory Authority. The Consumer Protection and Technical Regulatory Authority has the right to issue a precept to a provider of information society services and to request the removal of information provided through an online interface, restriction of access to an online interface or include a warning for consumers upon accessing online interface (§ 62 of the CPA).[2] However, the public enforcement of these provisions remains an exception rather than the rule, as there is considerable shortage of both financial and personnel resources.

Misleading advertising

The use of TPLF may be affected by the rules establishing general requirements on advertising. According to the Advertising Act (AA),[352] an advertisement which in any way misleads or is likely to mislead the persons to whom it is directed, or whom it reaches, and which, by reason of its misleading nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor of the person placing advertising, is prohibited (§ 4 of the AA). Advertising must accord with the requirements provided in § 3(4) of the AA outlining special requirements applicable to the advertising of financial services (§ 29 of the AA). State supervision over compliance with the requirements provided for in AA and legislation established on the basis thereof, shall be exercised by the Consumer Protection and Technical Regulatory Authority. The Financial Supervision Authority exercises supervision over compliance with the requirements regarding advertising of financial services provided to customers by the subjects of financial supervision. In addition, the Bar Association[353] exercises supervision over compliance of advertising

[351] Tarbijakaitseseadus (Consumer Protection Act) 2016. https://www.riigiteataja.ee/en/eli/527122023008/consolide.
[352] Reklaamiseadus (Advertising Act) 2008. https://www.riigiteataja.ee/en/eli/507112023004/consolide.
[353] Advokatuuriseadus (Bar Association Act) 2001. https://www.riigiteataja.ee/en/eli/524012023005/consolide.

by attorneys with the requirements provided for in the AA, the legal practices of and adherence to the rules of professional ethics by attorneys (§ 3 of the Bar Association Act).

Entities which have state supervisory power must follow the provisions provided for in the Law Enforcement Act from 2014,[354] if not provided for otherwise in special laws. However, even if it is difficult to assess how effective legal regulation and enforcement procedure is, it has to be mentioned that Estonian regulators have had good experiences when cooperating with traders.

Estonian traders are eager to use the opportunity to consult the regulator before publishing their advertisements. Similar and very beneficial cooperation exists with several advertising and marketing companies and media portals. The effectiveness of out-of-court settlements and solutions can also be confirmed by the low number of litigation cases. For example, there were approximately 20 court cases from 2008-2023 concerning unfair commercial practices and advertising.[355] However, no information is available about the results of the supervisory activities.

The effectiveness of supervision depends not only on the activity of the agencies themselves, but also on consumer attitudes. The results of the survey carried out in 2023 show that,[356] comparing consumer awareness in 2023 and 2021 (for questions that have been asked before), the trends in the last two surveys are broadly similar. However, when compared to 2012, consumers have become significantly more aware and informed about their rights. In 2012, 56% knew their rights as a consumer (strongly agree 11%, partly agree 45%), in 2023, 87% (21% and 66% respectively) and in 2021, 91% (22% and 69% respectively).

Regulation on restrictions concerning legal entities

There are no provisions in the current law specifically regulating forms of financing collective claims. Pursuant to § 497⁴(1) of the dCCP, a collective representative action may be brought by a legal person that is included in the list of competent entities (maintained by order of the minister responsible for the field) or on an ad hoc basis. Considering that consumer organisations are not able to actively defend consumers' rights before the courts while resources of public entities are limited, ad hoc legal entities will mainly bring collective actions on behalf of consumers. Legal entities representing consumer interests on an ad hoc basis may or may not have a profit-making purpose.[357] Their use should not be limited to a particular field or economic sector. It is for the court hearing the case to verify that the relevant criteria are met and to decide on the admissibility of the ad hoc entity.

A collective representative action may be financed by equal contributions or donations from the members of the organisation, including from traders in the framework of social responsibility

[354] Korrakaitseseadus (Law Enforcement Act) 2014. Available in English at: https://www.riigiteataja.ee/en/eli/504012016003/consolide.

[355] There is no specific research. The fact is based on published data at: https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html.

[356] Lia Lepane ja Ülo Mattheus, 'Tarbijate hoiakud ja teadlikkus tarbijaõigustest Eestis (tarbijate hinnangute alusel)' 2023 [Consumers' attitudes and awareness of consumer rights in Estonia (based on consumer assessments] https://ttja.ee/sites/default/files/documents/2024-01/Tarbijate%20teadlikkusest%20ja%20hoiakutest%20Eestis%202023.pdf.

[357] See Urmas Volens, Karin Sein, 'EL esinduhagide direktiivi Eesti õigusesse ülevõtmise analüüs' [2023], p. 22.

initiatives (SRI) or crowdfunding. Donors can provide funding either through a legal form or through contracts.

Forms of profit-making companies are regulated in the Commercial Code (CC).[358] The list of companies is a closed list: general partnership, limited partnership, private limited company, public limited company or commercial association (§ 2(1) CC). If the financing is based on only contracts, the LOA applies.

Financing may be provided through an investment fund, the establishment and operation of which is regulated by the Investment Fund Act (IFA).[359] An investment fund can be set up either as a contractual fund, a limited company or a limited partnership. An investment fund is a legal person or a pool of assets in which the capital of a number of investors is held with a view to investing it in accordance with a defined investment policy for the benefit of, and in the collective interests of, those investors. In order to act as a management company, a company must hold a management company licence or register with the Financial Supervision Authority (§ 3(2) IFA). General requirements for the application for authorisation of management companies are provided in §§ 313-321 of the IFA. According to the Investment Funds Act, a fund can be established as a common fund or founded as a public limited company or limited partnership. Provisions governing the establishment of foundations can be found in the Investment Funds Act.

Financing by credit contracts

Credit agreements are governed by the LOA (§§ 396-421). If the credit is granted or intermediated in the course of economic or professional activities, the Creditors and Credit Intermediaries Act (CCIA)[360] applies. It does mean that granting credit is a licenced business. A consumer is a natural person who does not operate in economic or professional activities and is not a creditor. It is not allowed to operate as a creditor or intermediary without authorisation by the Financial Supervision Authority (§ 10(1)(2) CCIA). However, there is no general control of market participants.

A credit institution may operate as a publicly limited company or commercial association and the provisions of law regarding public limited companies or savings and loan associations shall apply thereto (§ 3 (1) CIA).[361] A limited company is the form of business with the highest capital requirement (at least € 25 000) and must have a multi-level governance structure.

Financing through crowdfunding platforms

According to the Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (the Regulation),[362] most providers of crowdfunding services in Estonia must apply for a licence (from the Financial Supervision Authority). In order to be eligible for a licence, service providers must meet the legal requirements. In order to comply with the requirements,

[358] Äriseadustik (Commercial Code)1995. https://www.riigiteataja.ee/en/eli/ee/527022024004/consolide/current.

[359] Investeerimisfondide seadus (Investment Funds Act) 2017. https://www.riigiteataja.ee/akt/121062024041?leiaKehtiv.

[360] Krediidiandjate- ja vahendajate seadus (Creditors and Credit Intermediaries Act) 2015. https://www.riigiteataja.ee/en/eli/502092024001/consolide.

[361] Krediidiasutuste seadus (Credit Institutions Act) 1999. https://www.riigiteataja.ee/en/eli/503092024006/consolide

[362] Regulation (EU) 2020/1503 of the European Parliament and of the Council on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ L 347/1.

managers must also fill in questionnaires to check their compliance with the requirements for managers of credit institutions. In addition, a completed and signed questionnaire from the Financial Supervision Authority must be submitted by the managers. The requirements set out in the Regulation are complemented by the Financial Supervision Authority's indicative guidance.[363] The providor's own resources must be at least € 25 000, or one quarter of the fixed overheads fixed in the accounts for the previous financial year – whichever is greater. The crowdfunding service provider may subcontract part of the activities to third parties (outsourcing). The outsourcing is governed by the Financial Supervision Authority's indicative guidance[364].

Rules on assignment of claims

Under the current law, the claims may be assigned without the consent of the obligor, except if it is prohibited by law, or if the obligation cannot be performed for the benefit of any other person but the original obligee without altering the content of the obligation (§ 164(1) LOA). Upon assignment of a claim, the new obligee assumes the position of the original obligee (§ 164(2) LOA). If an obligee notifies an obligor of assignment of the claim to a new obligee, the assignment is deemed to have occurred in respect of the obligor even if the claim was actually not assigned, or the assignment is invalid. The same applies if the obligee has issued a document concerning assignment of the claim and the new obligee submits the document to the obligor (§ 179 LOA).

The claim may be assigned for a fee or free of charge. It may also be agreed in the contract that the assignment is for the sole purpose of debt collection and that, if the claim is satisfied, the assignee will pay the assignor an agreed share of the satisfied claim. As a rule, the assignment of a claim for the purpose of debt collection might be subject to an agreement to return the claim if the claim is not satisfied.

In the case of a sale or assignment for a fee, the assignee generally assumes the risk of satisfaction, ie if the claim is satisfied, it does not incur any liability towards the original owner of the claim. If the claim is not satisfied, it has no right to demand repossession of the claim. The assignment of a claim for the purpose of debt collection is not regulated by the law, but by settled case law which has arisen by analogy with the provisions governing factoring (§§ 256-249 LOA).

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

There are no special rules concerning the procedural safeguards conflicts of interest, transparency, disclosure and costs specifically applicable to TPLF.

Below is an overview of the provisions in the draft which contain the procedural guarantees mentioned above.

[363] Financial Supervision Authority's indicative guidance on 'Supervision policy on the provision of crowdfunding services ' 2023 https://www.fi.ee/sites/default/files/2023-02/Finantsinspektsiooni%20järelevalvepoliitika%20ühisrahastusteenuse%20osutamisele_ingliskeelne%20versioon_KINNITATUD.pdf.

[364] Financial Supervision Authority's indicative guidance on Requirements for outsourcing by the subject of financial supervision 2024 https://www.fi.ee/sites/default/files/2024-03/FI%20soovituslik%20juhend%20Nõuded%20finantsjärelevalve%20subjekti%20poolt%20tegevuse%20edasiandmisele_MUUDETUD.pdf.

A third party may finance the proceedings if the requirements as to conflict of interest, transparency, disclosure and costs under § 497 (3) of the dCCP are met.[7] For instance, the court will allow a collective representative action to be brought by a legal person that has established a procedure to prevent the possible influence of non-consumers, economic operators and third parties funding the representative action and to prevent conflicts of interest for itself, its funders and consumers (§ 497(2)3 dCCP).[4]

Procedural safeguards are stipulated under § 497[8] of the dCCP and in § 60[3] of the dCPA. The competent legal entity shall submit ta financial statement listing the sources of funding and containing information enabling the court to assess whether the funding complies with the statutory conditions to the court. . The court may examine the information and control evidence gathered on the financing of the competent entity without disclosing it to the person concerned, if this is necessary for the protection of business secrets or personal data. The court has the power to order the competent entity to modify the funding, or withdraw the prohibited funding. If the deficiencies are not remedied in time, the court will dismiss the collective action. Such a right is available to the court if the competent entity acts in a conflict of interest or fails to explain the funding, if the funding arrangement is contrary to the interests of consumers or data subjects, or if the fee for joining a procedure set by the competent entity prevents consumers from effectively exercising their rights.

General rules on the amount of the cost of joining a claim will be stipulated in § 60 if the dCPA.[5] The competent entity, acting as a legal person, shall have the right to charge the consumer or data subject joining a representative action for the determination of individual remedies a fee for joining the representative action in an amount that does not prevent the effective exercise of the rights of the consumer or data subject.

Considering the very general wording of these provisions, it is difficult to assess how these rules will work in practice and how competent the courts are in assessing the compliance of financing with law.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

According to the draft law, the CPA will be amended with § 60,[4] which regulates the notification obligation of the competent entity. According to the § 60(2) of the dCPA,[4] the competent legal entity shall publish information enabling consumers or data subjects to make an informed choice as to whether to join a collective redress procedure, including information on the funding model and the terms and conditions of a representative action where a representative action for the determination of remedies is funded by a third party on its website. Information shall also be published in media or using other means, if needed.

The competent units shall cooperate with the Consumer and Technical Surveillance Authority exchange the information and disseminate best practices and experience in dealing with cases where a breach of the law by a trader has harmed, or is likely to harm, the collective interests of consumers or data subjects.

2.7 Obligations of funders towards beneficiaries and vice-versa

There are no such legal rules in existing Estonian law and no information about any future developments.

2.8 Distribution of awards and bearing adverse costs in lost cases

According to the draft law, § 144 of the CCP will be amended for costs of informing consumers or data subjects in connection with collective actions and the costs of informing consumers or data subjects about the ruling granting a collective action, or confirming a compromise in such manner and within such time as the court considers appropriate (§ 497 of the dCCP).[20]The costs of informing consumers or data subjects shall be awarded by the court to the extent justified and necessary (§ 172(13) of the CCP).

An agreement in which the consumer or data subject undertakes to reimburse the costs of proceedings awarded against the petitioner, or to pay other costs of the competent entity in the event of the rejection of a collective action, is null and void (§ 60 of the dCPA).[3]

§ 172 of the CCP will be amended with subparagraphs which provide that in the case of a collective representative action, the costs of the proceedings shall be borne by the aggrieved person whose infringement gave rise to the action. If the collective action is dismissed, the costs of the proceedings shall be borne by the applicant. The court may decide that the costs, in their entirety or in part, are to be borne by a certain party to proceedings if this is fair considering the circumstances. The court may consider, among other factors, if the party has filed an unjustified motion, argument or item of evidence (§ 172 of the CCP). The same applies if the application for collective redress included both a request for a declaration of infringement and a request for the determination of individual remedies, or an order granting a request for a declaration of infringement which has the legal effect of an interlocutory decision.

2.9 Planned legislation

As Estonia has not yet implemented the Representative Action Directive into its national legislation, all references in this report are based on planned legislation. There is no information yet about future developments.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Estonia does not have any TPLF regulation. Answers are based on existing law and draft law which is in the Parliament.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Art 4 – Yes and no.There is a list of authorised persons in the § 497(1) of the dCCP.[4]However, there is no plan to create a system for the authorisation and monitoring of the activities of litigation funders. Existing system seems to be sufficient (licencing all

	kind of credit and investment services according to the CCIA). Art 5 – No, there is no requirement on specific authorisation in draft laws.
Capital adequacy (Art.6)	Yes and no. § 12 of the CCIA provides that the obligation to prove the amount of the capital in the process of authorisation is applicable to all service providers. In addition, a limited company is the only form of business with the highest capital requirement (at least € 25 000).
Fiduciary duty (Art.7)	No, there are no such requirements in law in force. However, it would be welcomed by courts.
Powers of supervisory authorities (Art.8)	No, there are also no plans to establish an independent public supervisory authority. It seems to be too burdensome to small MS.
Investigations and complaints (Art.9)	No plans to reporter's knowledge.
Coordination between supervisory authorities (Art.10)	No, but it accords with the general policy of coordination between different authorities.
Content of third-party funding agreements (Art.12)	No, the content of the contract is not regulated. However, it seems to fit into existing legislation providing protective rules and limiting freedom of contract. However, a written format seems to be old-fashioned and will provide less protection than expected. It is more important to ensure that the contract can be reproduced in writing.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No, however, these requirements are extremely necessary to guarantee equal justice.
Invalid agreements and clauses (Art.14)	No, however, these requirements are extremely necessary to guarantee equal justice.
Termination of third-party funding agreements (Art.15)	No, however it can be transposed into the Estonian legal system with some modifications.

Disclosure of the third-party funding agreement (Art.16)	No, however it will be a useful provision.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No, however it is a very important addition to the Directive while the Directive is not very specific.
Responsibility for adverse costs (Art.18)	No, there are no such provisions in law in force. This seems to be useful.
Sanctions (Art.19)	No specific rules, but can be added to CCIA.

All explanations, guidance and possible solutions are welcome. More guidance is needed for judges, especially in countries where such funding is not available.

3. Practical operation of TPLF in your jurisdiction

There is no TPLF practice in Estonia.

4. Stakeholder views on TPLF in your jurisdiction

According to the interviews, nobody has been involved in a case where TPLF was used. One of the stakeholders (an attorney) is aware of litigation funders operating in Estonia who advertised its services to the law office (Omni Bridgeway (https://omnibridgeway.com/about/overview). The stakeholder's opinion is that there might be the following positive outcomes:

1) Typically, an interest-bearing loan must be repaid no matter what happens in the case. If, for example, the case is lost at trial, the borrower is still obligated to pay back the loan, with interest. Because funding is typically non-recourse, a return on investment is collected only if the case is successful. In addition to avoiding the debt obligation that exists with a traditional loan regardless of the outcome of the dispute, claimants who use litigation finance are also relieved of the burden of ongoing principal and interest payments. Litigation finance is also immune from rising interest rates.
2) It allows lawyers, claimants, and companies the flexibility to withstand low-ball settlement offers on meritorious claims, thus enhancing the likelihood that the dispute will be resolved based on the strength of the legal claim, rather than based on the relative financial strength of the parties.

However, he expressed his opinion that it is difficult to assess its effectiveness, but out-of-court dispute resolution entities can provide a wider access for individuals to obtain solutions. As the courts in Estonia are overburdened, some out-of-court dispute resolution entities established in Estonia like the Consumer Dispute Committee have become reliable institutions. The procedure in out-of-court dispute resolution entities is much faster and cheaper.

Also, another stakeholder (financial supervisory office) expressed the opinion that financing by third parties is not regulated on a level which may provide security against damaging outcomes for consumers.

Glossary of abbreviations and acronyms

AA	*Advertising Act*
CC	*Commercial Code*
CIA	*Credit Institutions Act*
CCIA	Creditors and Credit Intermediaries Act
dCPA	*draft Consumer Protection Act*
dCCP	*draft Code of Civil Procedure*
CCP	*Code of Civil Procedure*
CPA	*Consumer Protection Act*
CSR	Corporate Social Responsibility
Directive	Directive (EU) 2020/1828
FSAA	*Financial Supervision Authority Act*
GPCCA	*General Part of Civil Code Act*
IFA	*Investment Fund Act*
LOA	*Law of Obligations Act*

Table of legislation

Advertising Act 2008

Bar Association Act 2001

Code of Enforcement Procedure 2006

Commercial Code 1995

Consumer Protection Act 2016

Credit Institutions Act 1999

Creditors and Credit Intermediaries Act 2015

Financial Supervision Authority Act 2001

Financial Supervision Authority's indicative guidance on Supervision policy on the provision of crowdfunding services 2023

Foundation Act 1996

General Part of the Civil Code Act 2002

Investent Funds Act 2017

Law Enforcement Act 2014

Law of Obligations Act 2002

Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1

Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ L 347/1

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Finland

Prof Katja Weckström, University of Eastern Finland

Executive Summary

- Third Party Litigation Funding (TPLF) does not exist in Finland. There is a lack of economic incentive, since the Damages Act limits compensation to direct losses due to personal injury or property damage. Pure economic loss cannot be recovered. In addition, there is a strong culture of collective organisation in Finland, in which interest organisations will support their members in litigation.
- In this report, third-party funders (TPFs) refers to actors that cover the costs of litigation for others without receiving direct financial return from clients. TPFs can be understood in four categories: 1) organisations with a contractual or statutory purpose to support their members in litigation (TPF1); private funders that support private interest organisations (TPF 2); 3) law firms that may recover litigation costs from public funds (criminal cases) or private insurance policies of their clients (TPF 3); and 4) private insurance companies (TPF 4).
- Third-party funding (TPF 1 and 2) of collective actions is regulated and permissible when in line with the requirements established for designation of qualified entities in the Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities (DQEA). As of October 2024, only one private actor, Kuluttajaliitto - Consumer Union, has passed the designation process in Finland. The DQEA designates seven public authorities as qualified entities that may file for injunctive relief in domestic and cross-border representative actions.
- Apart from the Class Actions Act, the Finnish legislation has no general provisions for horizontal collective redress mechanisms, only generic provisions on joinder of claims, as provided in the Code of Judicial Procedure. Sectoral mechanisms are available in the consumer sector, where both injunctive and compensatory claims have been possible since 2007. There are no cases that have reached court.
- In private actions, there are no rules against a third party paying for litigation costs. A general rule of freedom of contract sets no formal requirements on contracts, the assignment of rights, or authorisation. This general rule applies, unless there is specific legislation limiting it. Authorisation or assignment of claims brings the assignee full rights to represent and act on behalf of the assignor in court under the Contracts Act ss 10 and 26. The DQEA constitutes special legislation for representative actions in consumer sector.
- The Vastaamo-case involves a general data breach and failed extortion attempts that resulted in the online publication of the personal medical records of 33 000 clients of the largest mental health service provider in Finland. Criminal, administrative and civil proceedings for damages are pending. These are likely pilot cases with precedential value in terms of mass litigation.
- The Finnish system encourages strong public supervisory powers combined with out-of-court settlement and works well. There is limited value of added litigation in consumer matters,

where recovery of damages is limited. A Consumer Ombudsman model could be advisable for EU-level enforcement in cross-border disputes.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

'Third Party Litigation Funding (TPLF)' does not exist in Finland mainly for two reasons: 1) limited recovery potential and 2) strong alternatives for recovery of litigation costs. First, Sec. 5:1 of the Finnish Damages Act limits awards of compensation to direct damages from personal injury or property damage that the victim has suffered.[365] Finnish law does not recognize punitive damages or compensation for pure economic loss. Second, there is a strong culture of interest advocacy linked to union membership and collective management organisations that include litigation insurance in membership benefits. Litigation insurance is also included in most home insurance policies available on the market.

Following extensive preparation and debate, the Finnish legislature opted **not** to significantly change the system, when implementing the Representative Actions Directive (RAD) in 2022.[366] While private actors, since 2023, may be designated as qualified entities to represent a group of consumers, there are strict conditions relating to the non-profitable nature of the activity. To avoid confusion, **third-party funding (TPF)** in the Finnish report refers to an arrangement in which a third party carries the litigation costs **without expectation of a share in the financial recovery**. Four categories of TPFs may be distinguished: 1) private interest organisations with a contractual or statutory purpose to support their members in litigation (TPF 1); 2) private funders that support private interest organisations (TPF 2); 3) law firms that may recover litigation costs from public funds (criminal cases) or private insurance policies of their clients (TPF 3) and 4) private insurance companies (TPF 4).

Third-party funding (TPF 1 and 2) of collective actions is allowed, in line with the requirements set for designation of qualified entities in the Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities (DQEA).[367] An external funder may not be a competitor of the defendant. An external funder may not influence the decisions of the plaintiff in a way that is contrary to the collective interests of consumers. If there are reasonable grounds to suspect that there is undue influence on the plaintiff or that the external funder is a competitor to the defendant, the court may order the plaintiff to provide information on external funding received. One requirement for maintaining designation as a qualified entity is transparency in terms of external funding received. If the plaintiff does not provide an account for the funding, or it turns

[365] Vahingonkorvauslaki 412/1974
Unofficial translation from 2010: Damages Act
https://www.finlex.fi/en/laki/kaannokset/1974/en19740412_20101051.pdf
[366] HE 111/2022 vp., 5.
[367] Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities (DQEA), Laki kuluttajien yhteisiä etuja edistävien järjestöjen nimeämisestä oikeutetuiksi yksiköiksi (1102/2022). Entered into force 25.6.2023. Unofficial translation available: https://www.finlex.fi/en/laki/kaannokset/2022/en20221102

out that funding has been arranged in violation of terms and the plaintiff does not rectify the situation, the court may rule the action inadmissible (Class Action Act, CAA 2a). For Finnish qualified entities, the Ministry of Justice shall revoke the plaintiff's designation as a qualified entity under the DQEA. As of October 2024, only one private actor, Kuluttajaliitto - Consumer Union, has passed the designation process in Finland. The DQEA designates seven public authorities as qualified entities.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

No. There are no cases yet, since the only private designated qualified entity was approved in early 2024. Finnish legislation has no general provisions for horizontal collective redress mechanisms, only generic provisions on joinder of claims, as provided in the Code of Judicial Procedure.[368] Sectoral mechanisms are available in the consumer sector, where both injunctive and compensatory claims have been possible since 2007.[369] Prior to this, the legislation for collective redress mechanisms was prepared for over a decade since the early 1990s. The original objective of the legislation was to cover both business-to-consumer relations and environmental damages. However, a collective redress mechanism for environmental damages was eventually left out, primarily due to the lack of any suitable public authority to handle such cases, as well as a possible issue with the rights of certain registered associations to file a secondary claim in such matters.[370]

As provided in the Representative Injunctive Measures Act (RIA)[371] s 5, the Consumer Ombudsman, the Finnish Competition and Consumer Authority (KKV), the Financial Supervisory Authority (FIN-FSA), the Finnish Transport and Communications Agency (Traficom), the Finnish Medicines Agency (Fimea), the National Supervisory Authority for Welfare and Health (Valvira) and Data Protection Omdusman (DLA) are, as qualified entities, entitled to file a representative claim in a matter that falls within their respective jurisdiction.

In the collective interest of consumers, a designated qualified entity, appointed by the Ministry of Justice, can file a representative injunctive claim in a matter that falls within its statutory purpose. The designation of qualified entities is regulated in the DQEA.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

No data is available on any pending cases.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No.

[368] Oikeudenkäymiskaari 1.1.1734/4. See also Frände et all. Prosessioikeus (2017), 555.
[369] As provided in the Class Action Act (Ryhmäkannelaki 13.4.2007/444).
[370] In collective claims based on environmental damages, the court's decision would be binding only to the claimants and the defendant. HE 154/2006 vp., 31.
[371] The Act on Representative Actions for Injunctive Measures, Laki kieltotoimenpiteitä koskevista edustajakanteista 1101/2022.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

No. The risks associated with TPLF were discussed in the Government Bill for the DQEA implementing RAD. The regulatory choice was made to limit representative actions to the consumer sector with strict criteria for designation of private qualified entities.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Prior to the government bill proposing the Class Actions Act of 2006, the legislation for collective redress mechanisms was in the process of being prepared since the early 1990s. The original objective of the legislation was to cover both business-to-consumer relations and environmental damages. However, a collective redress mechanism for environmental damages was eventually left out, primarily due to the lack of any suitable public authority to handle such cases, as well as a possible issue with the rights of certain registered associations to file a secondary claim in such matters.[372]

A case involving a large-scale data breach of Psychotherapy Center Vastaamo's client records has received significant publicity in Finland.[373] Vastaamo was the largest provider of mental health therapy services in Finland and where many public health authorities referred their clients for therapy. The data breaches involving 33 000 clients occurred in 2018-2019 and became public in 2020, when the personal medical records of the 33 000 clients were published on the Tor-network. The defendant responsible for the criminal hacking and extortion of Vastaamo and its clients was sentenced to prison in 2024. An appeal is pending. The leadership of Vastaamo was also under investigation for a data breach by the Data Protection Ombudsman and the CEO was found guilty of a data protection crime in 2023. Vastaamo was dissolved due to bankruptcy in 2021. The case relating to damages was relegated to its own trial and has yet to start. At present, two law firms specialising in the recovery of criminal damages have provided a free dispute-settlement-procedure for the victims.[374] Settlement with the defendant, prior to conviction, was reached for 1200 victims.[375] Some victims have, however, committed suicide, or suffered severe personal injury, economic loss such as loss of income, or been subject to identity theft because of the publication of personal data. These cases will likely be subject to trial, since the damages may exceed the standardised amounts payable under the Criminal Damage Act.[376] One victim successfully recovered damages in the insolvency proceedings of Vastaamo, in which the court agreed that

[372] In collective claims based on environmental damages, the court's decision would be binding only to the claimants and the defendant. HE 154/2006 vp., 31.

[373] The State Treasury has started processing claims for damages under the Criminal Damage Act on 25.9.2024. A mass claim procedure has been developed for this purpose https://www.valtiokonttori.fi/palvelut/korvaus-ja-vahinkopalvelut/vastaamo/ In English https://www.valtiokonttori.fi/en/service/vastaamo/

[374] The website urging victims to sign up and claim damages for suffering is open to victims until the decision by the Court of Appeal in 2025 https://vastaamonuhrit.fi/?gsid=ce6629ca-9160-4725-81ec-23d82d2f936f All victims are entitled to standard damages that will be paid by the State, if the defendant is indigent.

[375] "Jo 1 200 Vastaamo-asiakasta on sopinut korvauksista Aleksanteri Kivimäen kanssa – juristit kannustavat lisää uhreja mukaan" Uutissuomalainen 9.3.2024 available at https://www.ess.fi/uutissuomalainen/6616952

[376] "Juristit penäävät Vastaamo-uhreille tavallista suurempia korvauksia valtiolta: "Taulukot roskakoriin"" MTV3 Uutiset 14.9.2024 available at https://www.mtvuutiset.fi/artikkeli/juristit-penaavat-vastaamo-uhreille-tavallista-suurempia-korvauksia-valtiolta-taulukot-roskakoriin/9007572#gs.gadqd9

standard damages of 1500 euros for criminal extortion were not applicable to this case.[377] The police have seized personal funds of 10 million euros from the CEO of Vastaamo. Attorney fees can be recovered in two ways (when the defendant is indigent): 1) Legal aid for recovery from the Crime Victims fFnd at the State Treasury[378] and/or 2) private home insurance policies including litigation insurance in other proceedings.[379]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

Finnish law has recognized class actions since 2007,[380] since 2007. However, no cases have been litigated. Prior to the implementation of RAD, the Consumer Ombudsman had exclusive jurisdiction to seek redress. The DQEA sets criteria (in line with RAD provisions) for private organisations to apply for designation as a qualified entity (DQE). An organisation promoting the collective interests of consumers may be designated by the Ministry of Justice to bring class actions (4a §1.2 CAA).

The criteria for designation are set out in the DQEA that entered into force on 25 June 2023. The organisation must be a registered association with the statutory purpose that demonstrates a legitimate interest in protecting consumer interest within the meaning of RAD Annex 1. As any association under Finnish law, the entity's activity must have a non-profit character; it must not engage in activities to generate profit or other direct economic benefit for its members or otherwise where the activity is primarily for economic purposes (§ 2 Association Act).[381] The association must be solvent, independent and not influenced by persons other than consumers, especially traders or external funding providers that have an economic interest in bringing representative actions (TPF 3 and 4). It must have established procedures to prevent outside influence and prevent conflicts of interests between itself, external funders and the interest of consumers (§ 3 DQEA). Its activities must be transparent, which includes publishing information about its organisational, management and membership structure, its statutory purpose, its activities and sources of funding. The entity must have had actual public activity in the protection of consumer interests for twelve months prior to submitting the application for designation as a qualified entity (3 §1.2 DQEA). The Ministry of Justice shall revoke the designation if the information changes after designation and the entity no longer satisfies the criteria (§ 5 DQEA). The criteria for designation of qualified cross-border representative actions are the same as for domestic actions (§ 3 DQEA). The government bill

[377] The decision of the Helsinki Court of Appeal in bankruptcy proceedings is not published, but referred to in "Juristit penäävät Vastaamo-uhreille tavallista suurempia korvauksia valtiolta: "Taulukot roskakoriin"" MTV3 Uutiset 14.9.2024 available at https://www.mtvuutiset.fi/artikkeli/juristit-penaavat-vastaamo-uhreille-tavallista-suurempia-korvauksia-valtiolta-taulukot-roskakoriin/9007572#gs.gadqd9

[378] Rikosvahinkolaki 1204/2005 https://www.finlex.fi/fi/laki/ajantasa/2005/20051204 No translation available.

[379] Form for victims indicating the types of injury that may entitle recovery for damages https://vastaamonuhrit.fi/wp-content/uploads/2024/04/esitietolomake2024.pdf

[380] Finnish law applies the Class Actions Act (as amended when implementing RAD) to domestic and cross-border representative actions. Hence, the term class action (ryhmäkanne) is used, when referring to the Finnish system pre- and post RAD. The term representative action (edustajakanne) is used when referring to the RAD or its implementation specifically. This is to be terminologically distinguished from group complaints (ryhmävalitus), which is available to consumers in summary proceedings in the Consumer Dispute Board (public service, non-binding decisions).

[381] Yhdistyslaki 503/1989.
Association Act, unofficial translation from 2002: https://www.finlex.fi/fi/laki/kaannokset/1989/en19890503

indicates that in setting these strict criteria, it specifically uses member state discretion under article 3(4) RAD to limit representative actions to specific actors and sectors.[382]

2.2 Regulatory oversight of funders/funding industry

Private entities must apply to the Ministry of Justice for designation as a qualified entity for the purpose of representing consumers and comply with the transparency requirements relating to third party funding (DQEA). These requirements apply also after designation and the DQE-status can be challenged in proceedings for a collective action. Hence, there is no direct supervision of funders, but strong supervision of designated qualified entities that may lose standing to pursue collective actions, if the court finds that there is any inappropriate influence by TPF 2 in any given case. At present, only one private entity, the Consumer Union-Kuluttajaliitto, has been designated as a private qualified entity in Finland.[383] It is important to distinguish between 'funders' and private DQEs, since DQEs must be non-profit organisations. DQEs may receive general TPF, but cannot collect case-specific funding. It is not possible to acquire designation as a qualified entity for ad hoc actions in Finland.[384]

In private actions, there are no rules against a third party paying for litigation costs. It is common practice for unions to support members that litigate employment cases or collective rights management organisations to support cases that involve artists rights based on authorisation (TPF 1).[385] A general rule of freedom of contract sets no formal requirements on contracts, assignment of rights or authorisation. This general rule applies, unless there is specific legislation limiting it, eg requiring written contracts, witnesses or formally standardised content. Authorisation or assignment of claims brings the assignee full rights to represent and act on behalf of the assignor in court per the Contracts Act ss 10 and 26. The DQEA limits representative actions in consumer cases to those private entities that satisfy set criteria and are approved by the Ministry of Justice. The Consumer Ombudsman has standing to bring representative actions for damages in the Helsinki District Court and for injunctive relief in the Market Court. The RAD only added a cross-border layer to the Consumer Ombudsman's already existing broad jurisdiction. Several public authorities have standing to bring a representative action for injunctive relief in the Market Court for domestic and cross-border actions. This complements their administrative power to consumer rights subject matter, although they already have supervisory authority over all actors in their respective sectors under specialised legislation.[386]

Legislation poses no limitations on funding of injunctive claims, and, as there are no general provisions or limitations in regard to third party funding in the Finnish legal system, it is considered permitted.[387] However, as the qualified entities have to fulfil the criteria provided in the Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities

[382] HE 111/2022 vp., 14 and 61.
[383] https://oikeusministerio.fi/en/representative-actions
[384] HE 111/2022 vp., 14 and 61.
[385] Laki varallisuusoikeudellisista oikeustoimista (oikeustoimilaki) 13.6.1929/228.
Translation: Contracts Act https://www.finlex.fi/en/laki/kaannokset/1929/en19290228_19990449.pdf
[386] The Consumer Ombudsman, the Finnish Competition and Consumer Authority (KKV), the Financial Supervisory Authority (FIN-FSA), the Finnish Transport and Communications Agency (Traficom), the Finnish Medicines Agency (Fimea), National Supervisory Authority for Welfare and Health (Valvira) and Data Protection Ombudsman (DLA) are as qualified entities entitled to file a representative claim in a matter that falls within their respective jurisdiction. DQEA Sec. 5.
[387] HE 111/2022, 55.

(DQEA) s 3, the DQE is required to be independent and not influenced by persons other than consumers, in particular by traders or external funding providers, who have an economic interest in bringing any representative action. Undue influence could, for example, occur when one trader finances and, with this funding, directs the activities of a consumer association in such a way that the association's objective is to scrutinise and hinder the activities of the trader's competitors. The organisation's independence would not, on the other hand, be jeopardised if it received, for example, direct grants from the state or project financing. In Finland, the activities of several organisations are generally supported by the state with a grant or funding from various foundations. Financial support from an umbrella organisation is likewise allowed.[388]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

Not applicable. Capital adequacy requirements only apply to DQEs.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Representative actions can only be filed by a DQE, where members of the class assign the case for litigation to the DQE.

In cases involving traffic accidents, it is standard practice that car owners assign their claims to insurance companies, since the insurance company ultimately carries the cost under the mandatory insurance policy (TPF 4).

The standard homeowner insurance includes a litigation insurance policy, which as noted in the Vastaamo-case with 33 000 victims, may become relevant in mass injury cases. Note that there is no contract on a share of the profit between the attorney and the victim, but the reverse, a reduction of risk for the victim to carry litigation costs and to employ counsel. Insurance companies hence are major third-party funders (TP4), since the attorney costs per victim are billed to the respective insurance companies. Large companies may have several thousand victims involved in the same case.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Injunctive measures may not be brought together with redress measures within a single representative action. This is due to limitations in jurisdiction and the fact that collective injunctive claims are processed in the Market Court (§ 3 RIA) while collective redress claims are processed in the District Court of Helsinki (§ 3 CAA).

As a general procedural principle, injunctive measures do not require authorisation from the affected consumers, since public QEs have independent jurisdiction to supervise companies in their respective sectors. As the objective of injunctive measures is to prevent further infringements on collective interests of consumers, all consumers are considered to benefit from their use. Therefore,

[388] HE 111/2022, 77.

injunctive measures do not follow the opt-in principle adopted for collective redress measures as provided in the Act on Class Actions. The Market Court can, based on a claim by a qualified entity, prohibit the trader from continuing a practice that violates the collective interests of consumers. Unless it is unnecessary for specific reasons, the Market Court may issue the injunction on pain of a fine (§ 10.1 RIA) Such an injunction may be issued temporarily, in which case the injunction stands until the matter is resolved or the Market Court declares otherwise (§ 10.2 RIA). A temporary injunction may be required in situations where the collective interest of consumers calls for immediate intervention, as is the case when essential interests of consumers are at risk, or the practice is otherwise exceptionally egregious.

Collective representative action for injunctive measure suspends the limitation period during the process of representative action for the affected consumers. In this case, the debt expires at the earliest one year after the end of processing (§ 11 RIA). This ensures that consumers entitled to redress have a reasonable time in which to prepare and process their claim.[389]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

The oversight is directed to DQEs, not funders.

2.7 Obligations of funders towards beneficiaries and vice-versa

The oversight is directed to DQEs, not funders.

2.8 Distribution of awards and bearing adverse costs in lost cases

The loser-pays rule applies to all proceedings in Finland (CJP). The losing party is liable for their own legal costs as well as the reasonable lawyer's fees for the other party. Class members are not liable for lawyer's fees (CAA § 17).

The loser-pays rule applies to proceedings in the Market Court and the Helsinki District Court. The court will confirm reasonable costs and lawyer's fees, which in a class action will be substantial. There is not a cap on fees as such, but all reasonable costs and attorney fees are included. The persons represented are not liable for the costs, when public authorities act as plaintiffs. The rules on costs are the same in individual cases.

2.9 Planned legislation

No.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

[389] HE 111/2022 vp, 73.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No specific TPLF regulation, apart from the rules implementing the RAD. An external funder may not be a competitor of the defendant.
Capital adequacy (Art.6)	No specific TPLF regulation
Fiduciary duty (Art.7)	No specific TPLF regulation
Powers of supervisory authorities (Art.8)	No specific TPLF regulation
Investigations and complaints (Art.9)	No specific TPLF regulation
Coordination between supervisory authorities (Art.10)	No specific TPLF regulation
Content of third-party funding agreements (Art.12)	No specific TPLF regulation. General contractual principles under Finnish civil law apply.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No specific TPLF regulation, apart from the rules implementing the RAD. An external funder may not influence the decisions of the plaintiff in a way that is contrary to the collective interests of consumers.
Invalid agreements and clauses (Art.14)	No specific TPLF regulation. General contractual principles under Finnish civil law apply.
Termination of third-party funding agreements (Art.15)	No specific TPLF regulation. General contractual principles under Finnish civil law apply.
Disclosure of the third-party funding agreement (Art.16)	No specific TPLF regulation
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No specific TPLF regulation
Responsibility for adverse costs (Art.18)	No specific TPLF regulation. General Finnish civil procedural law apply.
Sanctions (Art.19)	No specific TPLF regulation

3. Practical operation of TPLF in your jurisdiction

TPLF as defined by the study is not allowed in Finland.

4. Stakeholder views on TPLF in your jurisdiction

TPLF as defined by the study is not allowed in Finland.

Glossary of abbreviations and acronyms

CAA	Class Actions Act
CJP	Code of Judicial Procedure
DLA	Data Protection Ombudsman
DQEA	Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities
DQE	Private designated qualified entity
Fimea	the Finnish Medicines Agency
FIN-FSA	the Financial Supervisory Authority
KKV	the Finnish Competition and Consumer Authority
QE	Public designated qualified entity
RAD	Representative actions directive
RIA	Act on Representative Actions for Injunctive Measures
TPLF	Third party litigation funding (financial return on verdict)
TPF	Third-party funding (no financial return on verdict)
Traficom	the Finnish Transport and Communications Agency
Valvira	National Supervisory Authority for Welfare and Health

Table of legislation

Association Act, Yhdistyslaki 503/1989

Class Actions Act, Ryhmäkannelaki 13.4.2007/444

Code of Judicial Procedure, Oikeudenkäymiskaari 1.1.1734/4

Contracts Act, Laki varallisuusoikeudellisista oikeustoimista (oikeustoimilaki) 13.6.1929/228.

Criminal Damages Act, Rikosvahinkolaki 1204/2005

Damages Act Vahingonkorvauslaki 412/1974

DQEA, Act on the Designation of Organisations Promoting the Collective Interests of Consumers as Qualified Entities, Laki kuluttajien yhteisiä etuja edistävien järjestöjen nimeämisestä oikeutetuiksi yksiköiksi (1102/2022).

RIA, The Act on Representative Actions for Injunctive Measures, Laki kieltotoimenpiteitä koskevista edustajakanteista 1101/2022.

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France

Constance Bonzé, BIICL

Executive Summary

- The French TPLF market is still small but has grown over the past decade.
- There are no specific legislative or regulatory provisions governing TPLF in France, nor does any provision of French law prohibit TPLF.
- Cases typically funded in France are arbitration cases, commercial and investment, with minimum claims of 2-4 million euros. The use of third party funding in litigation is currently limited.
- Third party funding has been the subject of a number of practical guides and ethical codes drawn up within an institutional but non-binding framework (ICC, French National Bar Council, Paris Bar Council).
- The validity of litigation fundings agreements has been implicitly confirmed by French courts, which refer to third party litigation funding agreements as "sui generis" contracts.
- Funders' remuneration can be reduced by the court if found disproportionate in light of the funder's obligations.
- Certain French rules are not compatible with the use of the TPLF, such as the strict application of legal privilege and lawyer's obligation on confidentiality. More generally, the lack of proper regulation of TPLF on the French market creates a certain degree of legal uncertainty.
- A draft law implementing the Representative Actions Directive (EU) 2020/1828, currently being examined by the French Parliament, contains provisions on TPLF in the context of collective redress. The draft law allows TPLF to support a collective claim, and provides for rules on conflict of interests.
- Majority of interviewees are in favour of regulation at EU level. Reasons mentioned for regulation are the need to establish standardised practices on the funding market, to mitigate the risk of legal uncertainty, to properly identify and vet funders active in the EU, to allow the funding industry to be more legitimate by reducing doubt as to origin of funds, purpose of the funding, and risks of conflicts of interests.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There are no specific legislative or regulatory provisions governing TPLF in France, nor does any provision of French law prohibit TPLF. A draft law implementing the Representative Actions Directive (EU) 2020/1828 (RAD), currently being examined by the French Parliament, contains provisions on TPLF in the context of collective redress.[390]

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Cases typically funded in France are arbitration cases, commercial and investment, with minimum claims of 2-4 million euros. The use of third party funding in litigation is extremely limited for several reasons: the duration of legal proceedings, the relatively low costs of proceedings, and the absence of punitive damages.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The following funders operate in France: Deminor, Fortress, Profile Investment, IVO Capital Partners, Bench Walk, Omni Bridgeway.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no statistics available.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

The doctrinal discussion surrounding TPLF is still limited in France, as the use of TPLF has mostly been confined to international arbitration. The validity and classification of litigation funding agreements have been questioned in doctrine, as litigation funding agreements do not fall within a known category of contracts under French law. The validity of litigation fundings agreements was implicitly confirmed by French courts, which refer to third party litigation funding agreements as "sui generis" contracts. [391]

The doctrine has recognised the capacity of third party funding to increase access to justice in international arbitration.[392] Third party funding offers a remedy for the economic imbalance

[390] Draft law containing various provisions for adapting to European Union law in the fields of economics, finance, the environment, energy, transport, health and the movement of persons, Text No 352 (2024-2025) sent to the Senate on 18 February 2025.

[391] Versailles Court of Appeal, 1 June 2006, Foris / Veolia, RG 05/01038 ; Cour de Cassation Civ.1ère, 23 November 2011, n°10-16770.

[392] Klaus Sachs, 'La protection de la partie faible en arbitrage', Gazette du Palais, 17 juillet 2007 ; Eric Loquin, 'La partie impécunieuse et les conséquences de l'impossibilité pour elle de payer les frais d'arbitrage', RTDCom. Revue

between parties, which has sometimes justified the setting aside of arbitration awards for infringement of the right of access to justice and the principle of equality between the parties.[393]

The lack of proper regulation of TPLF on the French market is deemed to create a certain degree of confusion and uncertainty, potentially leading to funders choosing not to operate in France.[394] The strict rules on legal privilege and lawyer's obligation on confidentiality are also deemed to have hindered the development of TPLF on the French market.[395]

The question of disclosure of funding has been cited by some as necessary to respect the rights of the defence and to prevent any conflicts of interest or interference with the proper conduct of the proceedings.[396]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Third party funding has been the subject of a number of practical guides and ethical codes drawn up within institutional but non-binding frameworks. The ICC issued a practical guide on third party funding in arbitration in 2014,[397] and amended its rules in 2021 to include, for the first time, a disclosure rule regarding third-party funding.[398] In 2015, the French National Bar Council ("*Conseil National des Barreaux*") issued a resolution and practical guidelines to pave the way for the establishment in France of funds dedicated to the financing of litigation, while reiterating the principle of the independence of the lawyer vis-à-vis the third-party funder.[399]

The Paris Bar Council issued a report and recommendations on third party funding.[400] The report identified four potential negative impacts of TPLF: on the risk of conflicts of interest when the funder and the funded party disagree on litigation strategy, on the lawyer's duty of loyalty to their client, on their independence with regard to the fund and, regarding the respect for professional secrecy.[401] The report thus calls for increased vigilance from the lawyer towards their ethical obligations: lawyers must ensure that they do not implement instructions from the third-party

trimestrielle de droit commercial et de droit économique, 2006, n°02, p. 308 ; Dominique Hascher cited by Niki K. Kerameus (Kerameus & Partners, Athènes) in 'Financement de contentieux par un tiers (Third Party Funding), Journée d'étude organisée par le Collège européen de Paris en collaboration avec le Laboratoire d'économie de l'Université Panthéon-Assas Paris II, le Centre de recherche en droit économique de l'Université de Nice Sophia Antipolis et l'Association française des juristes d'entreprise, Paris 2 avril 2012', Cahiers de l'Arbitrage, 1 April 2012, n°2, at 457.

[393] Paris Court of Appeal, 17 November 2011, 09/24158 (under Articles 1520 paragraphs 4° and 5° of the French Code of Civil Procedure).

[394] Alain Grec, Olivier Marquais, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France', (2020), 16, Asian International Arbitration Journal, Issue 1, pp. 49-68, at 66.

[395] Alain Grec, Olivier Marquais, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France', (2020), 16, Asian International Arbitration Journal, Issue 1, pp. 49-68, at 63.

[396] Séverine Menétrey, 'Le financement privé des actions collectives : perspective comparative et enjeux européens' Revue internationale de droit économique, 2018, pp. 499-515.

[397] ICC France, 'Guide pratique sur le financement de l'arbitrage par les tiers (Third Party Funding)', 2014.

[398] Article 11(7) of the 2021 ICC Arbitration Rules.

[399] Conseil National des Barreaux, 'Le financement de procès par des tiers', Resolution adopted during the session of 20 and 21 November 2015.

[400] Ordre des Avocats du Barreau de Paris, 'Le financement de l'arbitrage par les tiers ("Third party funding")', 21 February 2017.

[401] Ibid. at 5.

funder that are not endorsed by their client.[402] The lawyer remains bound by their obligations of assistance, representation, advice and loyalty towards the funder party, who remains their sole client.[403]

The issue of confidentiality and legal privilege is also in discussion in the context of TPLF. A funding agreement often expressly provides that the funder shall be kept informed of any developments in the proceedings. However, under French law, lawyers are bound by an obligation of professional secrecy subject to disciplinary sanctions by the Bar and to criminal sanctions.[404] The lawyer cannot be released from this obligation by the client or anyone else.[405] Even with the client's consent, the lawyer may not reveal to a third party the content of a meeting with the client.[406] Thus in principle, regardless of the provisions in the funding agreement, the lawyer of the funded party may not communicate directly with the funder. Information about the proceedings can only emanate from the funded party. When it comes to TPLF, it can be expected that the funder will prefer the lawyer as a more knowledgeable and professional interlocutor. Those strict rules on legal privilege in France are deemed to have hindered the development of TPLF on the French market.[407] In the absence of proper guidance or regulation, some authors suggest it should be up to lawyers to adhere strictly to ethical principles, or to disregard them to a greater or lesser extent in the interests of efficiency, having considered all the associated risks.[408]

Other issues surrounding TPLF were discussed in jurisprudence. The Paris Court of Appeal ruled that the extension of an arbitration clause to a third-party funder (so as to effectively make the funder a co-claimant) requires exceptional circumstances.[409] The disclosure of the existence of the third-party funder, the fact that the funder's interest is not solely financial, and the fact that their funding activity is only occasional, are not considered to be exceptional circumstances.[410]

The amount of remuneration of third-party funders, and the possibility for courts to reduce it, was also discussed before French courts. The *Cour de Cassation* ruled, in an inheritance dispute, that a third-party funding agreement with a 30% remuneration could be reduced by the court if found disproportionate in light of the funder's obligations.[411] The Paris Court of Appeal ultimately reduced the funder's remuneration to 15%, in view of the extent and duration of the service rendered.[412]

2. Relevant legislation applicable to TPLF in your jurisdiction

[402] Ibid.
[403] Ibid. at 9.
[404] Imprisonment and fines under article 226-13 of the French Criminal Code.
[405] Article 4 of Decree no. 2023-552 of 30 June 2023. See also Cour de cassation, 1re civ., 6 April 2005, n° 00-19245.However, the client may lift the secrecy obligation by voluntarily handing over a document to the judge: Cour de cassation, crim., 29 May 1989, n° 87-82073.
[406] Cour de cassation, crim., 27 October 2004, n° 04-81513.
[407] Alain Grec, Olivier Marquais, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France', (2020), 16, Asian International Arbitration Journal, Issue 1, pp. 49-68, at 63.
[408] Catherine Kessedjian, Le financement de contentieux par un tiers, Third Party Litigation Funding, Editions Panthéon Assas
(2012), Collection « Colloques », 207, para. 94.
[409] Paris Court of Appeal, 25 January 2022, No RG 20/12332.
[410] Ibid at 72.
[411] Cass. Civ. 1, 23 November 2011, No 10-16.770.
[412] Paris Court of Appeal, 17 October 2012, No. 11-22443.

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There are no provisions specifically regulating the use of TPLF in civil litigation in the current French legal system. General rules on contracts and obligations apply.

French courts implicitly acknowledged the validity of funding agreements in both arbitration and litigation, referring to the agreement as a "sui generis" contract.[413] The funder's remuneration can be subject to reduction by the court if the fee is found to be disproportionate in view of the extent and duration of the service rendered.[414]

A couple of provisions dealing with TPLF are currently being examined by the French Parliament in the context of the implementation of the Representative Actions Directive (EU) 2020/1828.[415] The draft law provides that a collective claim is not admissible if the claimant is influenced by, or in a situation of conflict of interest with, a third party to the proceedings, in conditions likely to harm the interests of the persons represented.[416] Representative entities are required to be independent and uninfluenced by non-consumers, in particular professionals, with an economic interest in bringing any representative action, including where funded by third parties.[417] To this end, representative entities most adopt written procedures to prevent and manage conflicts of interest.[418] Representative entities are also required to make available to the public, in clear and comprehensible terms, in particular on their website, information including the sources of their funding in general.[419] The draft law does not explicitly provide for a rule allowing courts to require disclosure of funding, as the French Ministry of Justice considered Articles 138, 139 and 142 of the French Code of Civil Procedure (relating to the production of documents held by a third party) were sufficient to meet the RAD requirements.[420]

2.2 Regulatory oversight of funders/funding industry

There is no such regulation in France.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There is no such regulation in France.

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[413] Versailles Court of Appeal, 1 June 2006, Foris / Veolia, RG 05/01038 ; Cour de Cassation Civ.1ère, 23 November 2011, n°10-16770.

[414] Paris Court of Appeal, 17 October 2012, No. 11-22443: the Court reduced the funder's remuneration from 30% to 15%.

[415]Draft law No 352. The legislative process can be consulted here: https://www.senat.fr/dossier-legislatif/pjl24-352.html

[416] Draft law No 352 at Article 14.V.A.

[417] Draft law No 352, Article 14.X.B.5°.

[418] Ibid.

[419] Draft law No 352, Article 14.X.B.6°.

[420] Report No. 631 on behalf of the Committee on Sustainable Development and Regional Planning on the Draft Law, following the accelerated procedure, containing various provisions for adapting to European Union law in the economic, financial, environmental, energy, transport, health and movement of persons fields, available in French at: https://www.assemblee-nationale.fr/dyn/17/rapports/cion-dvp/l17b0631_rapport-fond

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

- Abusive clauses

General provisions of contract law apply to funding agreements. The applicable provisions depend on the nature of the parties involved. In contracts concluded between professionals and non-professionals or consumers, terms are deemed unfair if their purpose or effect is to create, to the detriment of the non-professional or consumer, a significant imbalance between the rights and obligations of the parties to the contract (Article L212-1 of the Consumer Code). For contracts concluded between professionals, Article L. 442-1, I, 2° of the Consumer Code applies: any person engaged in the production, distribution or provision of services who, in the course of commercial negotiations or the conclusion or performance of a contract, subjects or attempts to subject the other party to obligations which create a significant imbalance in the rights and obligations of the parties, shall be liable for damages. The notion of "significant imbalance" is left to the interpretation of the court.

Article 1171 of the Civil Code, an innovation of the 2016 reform of contract law,[421] is a general provision designed to prohibit unfair terms which creates a significant imbalance between the rights and obligations of the parties to the contract, and that do not relate either to the main subject matter of the contract or to the adequacy of the price to the performance. Article 1171 applies to contracts concluded between professionals that do not fall within the scope of Article L. 442-1, I, 2° of the Consumer Code, to contracts between professionals and non-professionals that do not fall under Article L212-1 of the Consumer Code, and to private individuals contracting with each other. Article 1171 for instance applies to finance leases concluded by credit institutions and finance companies for their banking and related operations defined in Article L. 311-2 of the Monetary and Financial Code.[422]

- Conflict of interests

The profession of lawyer is regulated and subject to strict professional and ethical rules. Lawyers shall perform their duties with independence: i.e. not guided by personal interest or external pressure.[423] Lawyers shall also respect the principle of loyalty: they may not advise or defend two parties whose interests are likely to conflict.[424] Lawyers' duty of professional secrecy is public, absolute, general and unlimited in time. A lawyer may not be relieved of this obligation by his client or by any authority or person whatsoever, except in the cases provided for by law.[425] This strict rule on professional secrecy is a direct issue for TPLF, as funders will rather exchange with lawyers on the proceedings. In the absence of proper guidance, some suggest it should be up to lawyers to adhere strictly to ethical principles, or to depart from them in the interests of efficiency, having considered all the associated risks.[426]

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[421] Order no. 2016-131 of 10 February 2016 reforming the law of contracts, the general system and proof of obligations.
[422] Cour de cassation, com., 15 January 2020, n° 18-10512.
[423] Article 3 of Decree no. 2023-552 of 30 June 2023.
[424] Ibid.
[425] Article 4 of Decree no. 2023-552 of 30 June 2023.
[426] Catherine Kessedjian, Le financement de contentieux par un tiers, Third Party Litigation Funding, Editions Panthéon Assas
(2012), Collection « Colloques », 207, para. 94.

- Investment funds

In France, investment funds are regulated by the Monetary and Financial Code, and their formation is subject to approval by the Financial Markets Authority ("Autorité des marchés financiers"). Investments funds are required to offer sufficient guarantees as regards their organisation, their technical and financial resources, and the professional integrity and experience of their managers.[427]

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

- Conflicts of interest

Professional and ethical rules apply to lawyers (see under 2.4). In the context of the implementation of the Representative Actions Directive (EU) 2020/1828, a collective claim is not admissible if the claimant is influenced by, or in a situation of conflict of interest with, a third party to the proceedings, in conditions likely to harm the interests of the persons represented.[428]. Representative entities are required to be independent and uninfluenced from funders.[429] To this end, representative entities are required to adopt written procedures to prevent and manage conflicts of interest.[430]

- Disclosure

Under French law, there is currently no specific requirement to disclose funding. The court may order a party or a third party to the proceedings to produce documents upon request of a party (Articles 138, 139 and 142 of the French Code of Civil Procedure). In the context of the implementation of the Representative Actions Directive (EU) 2020/1828, representative entities are required to make available to the public, in clear and comprehensible terms, in particular on their website, information including the sources of their funding in general.[431] The draft law does not explicitly provide for a rule allowing courts to require disclosure of funding, as the French Ministry of Justice considered Articles 138, 139 and 142 of the French Code of Civil Procedure were sufficient to meet the RAD requirements.[432]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

There is no such regulation specific to TPLF in France.

2.7 Obligations of funders towards beneficiaries and vice-versa

[427] Article L214-24-44 of the Monetary and Financial Code.
[428] Draft law No 352 at Article 14.V.A.
[429] Draft law No 352, Article 14.X.B.5°..
[430] Ibid.
[431] Draft law No 352, Article 14.X.B.6°.
[432] Report No. 631 on behalf of the Committee on Sustainable Development and Regional Planning on the Draft Law, following the accelerated procedure, containing various provisions for adapting to European Union law in the economic, financial, environmental, energy, transport, health and movement of persons fields, available in French at: https://www.assemblee-nationale.fr/dyn/17/rapports/cion-dvp/l17b0631_rapport-fond

There is no such regulation specific to TPLF in France.

2.8 Distribution of awards and bearing adverse costs in lost cases

Under French law, the losing party is ordered to pay the costs, unless the court, by reasoned decision, awards all or part of the costs to another party (article 696 of the Code of Civil Procedure). The court takes into account the fairness or the economic situation of the convicted party (article 700 of the Code of Civil Procedure). When it comes to collective redress, this financial risk associated with the very limited resources of qualified entities makes the introduction of certain actions very difficult, if not impossible.[433]

The draft law implementing Directive (EU) 2020/1828 provides that the court may order the defendant to pay an advance on costs not included in the expenses incurred by the claimant in the action.[434]

2.9 Planned legislation

The draft law No 352 implementing the Representative Actions Directive (EU) 2020/1828is currently being examined by the French Parliament, and contains provisions on TPLF in the context of collective redress. [435]

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No
Capital adequacy (Art.6)	No rules specific to TPLF, but generally, investments funds in France are required to offer sufficient guarantees regarding their financial resources (Article L214-24-44 of the Monetary and Financial Code)
Fiduciary duty (Art.7)	No
Powers of supervisory authorities (Art.8)	No
Investigations and complaints (Art.9)	No

[433] Lafond, Pierre-Claude (2016) 'L'action de groupe française ou l'art de rater une belle occasion', Revue internationale de droit comparé, 68 (2), 319-340, 325.
[434] Draft law No 352, Article 14.V.A.2°.
[435]Draft law No 352. The legislative process can be consulted here: https://www.senat.fr/dossier-legislatif/pjl24-352.html

Coordination between supervisory authorities (Art.10)	No
Content of third-party funding agreements (Art.12)	No
Transparency requirements and avoidance of conflicts of interest (Art.13)	Partially: the draft law implementing the RAD requires representative entities to be independent and uninfluenced from funders, and to adopt written procedures to prevent and manage conflicts of interest (Art 14.X.B.5° of draft law No 352).
Invalid agreements and clauses (Art.14)	No
Termination of third-party funding agreements (Art.15)	No
Disclosure of the third-party funding agreement (Art.16)	Partially: generally, the court may order a party or a third party to produce documents upon request of a party (Articles 138, 139 and 142 of the French Code of Civil Procedure). The draft law implementing the RAD provides that representative entities are required to make available to the public, in clear and comprehensible terms, in particular on their website, information including the sources of their funding in general (Art 14.X.B.6 of draft law No 352)°.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No
Responsibility for adverse costs (Art.18)	No rule specific to TPLF but generally, under French law, the losing party is ordered to pay the costs, unless the court, by reasoned decision, awards all or part of the costs to another party (article 696 of the Code of Civil Procedure).
Sanctions (Art.19)	No

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Cases typically funded in France are:

- Arbitration cases (majority of cases funded according to all stakeholders interviewed): commercial arbitration opposing two companies for breach of contract or similar dispute; investor-state arbitration opposing an SME and a State or a State-owned entity.
- Collective claims: securities claim by shareholders who suffered losses following illegal activities of listed companies; breaches of GDPR; breaches of antitrust laws at EU and national levels.
- Commercial litigation: to enforce contracts and agreements between companies.
- Enforcement proceedings.

There are no statistics available but, as reference, the average number of cases funded per year for the funder interviewed was 3 per year, of which 2 arbitration cases.

b. Minimum claim value in absolute terms (in million Euro)

2-4

c. Typical claim value in absolute terms (in million Euro)

Answers vary greatly from 5-9 to 300 or more. Funder answered 2-39 for their own activity.

d. Typical ratio between investment by the funder and claim value

1:10 to 1:20.

e. Typical size of the investment by the litigation funder (in million Euro)

2-4.

One of the lawyers interviewed who has been involved as both claimant and defendant in cases involving TPLF in the EU specified than the investment can vary whether it is a national or international arbitration or whether the claim is raised before a local jurisdiction (cheaper than an arbitration proceeding). But other criteria must also be considered: complexity of the case, needs for a financial expert / technical expert, etc.

f. Origin of funding provided by the litigation funder

Stakeholders had limited information but generally, origin of funding varies: most funders raise funds with qualified or professional investors, some invest their own money.

g. Share of compensation awarded typically demanded by litigation funders

20-30%. It depends on the complexity of the case and the potential incurred risk identified.

Funder interviewed mentioned their compensation is tailored to each case, and typically includes a multiple multiple based calculation or a percentage-based calculation evolving over time, but is always below 30%.

h. Other conditions of the litigation funding agreement

Stakeholders who answered the question are involved in practice in the drafting of litigation funding agreements, i.e. funders and lawyers.

In most cases, in the litigation funding agreement, the funded party is required to:

- Inform the funder of all developments in the case,
- Inform the funder of all settlement proposals,
- Consult with the funder in the event of a change of counsel and/or change of strategy,
- Not initiate other proceedings against the opposing party without the prior agreement of the funder,
- Ensure that the cash flows and the designated bank account for disbursements and recoveries remain identified and known to all parties.

In most cases, in the litigation funding agreement, the funder:

- Cannot control the proceedings,
- Is required to respect the secrecy of all confidential information provided during the proceedings,
- Cannot require repayment if the case is lost (it is part of the risk incurred by the funder).

In general, the funder and the funded party reach an agreement based on a strategy which cannot be challenged or reviewed without the approval of both parties. Any breach of the above obligations may lead to the freezing of all future disbursements pending the resolution of the issue, and in the most adverse cases to the termination of the funding agreement and the return of capital paid plus a penalty in worst cases.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

All stakeholders interviewed answered positively. The threshold varies depending on funders, but funders will typically look for a probability of success of minimum 60-70%. In assessing the acceptable level of risk, funders will consider:

- The merits of the claim,
- The strategy and potential outcomes: a possible path to a short-term settlement or a longer-term success with identified obstacles and possible delays,
- The theory behind the calculation of damages,
- The solvency and available assets of the defendant,
- Other impact related factors including the sectors and countries involved.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Funders interviewed answered the target IRR for their investors is 12% net. This IRR includes insurance coverage which the funder obtains for their fundings, and which leads to a significant profit share with the insurance companies they work with.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

Answers vary. One law firm answered funded cases are mostly successful cases in their experience. The funded party receives the agreed-upon portion of the settlement or award, which is generally around 60 to 80% of the net proceeds after deduction of the fees, costs, and funder's share. The funder generally receives a multiple of their investment or a percentage of the award. Return on investment is around 20-30% when the case is successful and subject to the easy enforcement of the award. One funder stated their first investment has a 66% loss rate, and their most successful case to date allowed the liquidator of a company to recover 70% of the amounts lost and subject of the litigation.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Funding agreements are not disclosed to the court according to all stakeholders interviewed. In arbitration, it is gradually more common to disclose the existence of a funding agreement to the arbitral tribunal to ensure transparency and to avoid conflicts of interest. However, the content of the agreement usually remains confidential.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

X Consent for settlement

☐ *Consent for appeal*

☐ *Consent for expert evidence*

X Agreement on strategy

X Other [Text]

Answer depending on the stakeholders. One law firm and one funder answered funders do not exercise control over the proceedings. Another law firm answered funders cannot take control of the proceedings, but often exercise a certain degree of supervision over the proceedings: approving/challenging a procedural strategy with the funded party and its counsel, be regularly informed of the legal expenses incurred to ensure the budget is respected and funds are being used efficiently, be informed of any substantial information/fact that could affect the procedural strategy established (for instance, change of the lawyer, proposal to settle, etc).

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

Interviewees described the relationship as a collaboration / partnership, as the funder and the plaintiff's lawyers both have a common interest to see the case succeed. One funder interviewed

added that the plaintiff's lawyer plays a key role in the balance of the funding agreement. The plaintiff's lawyers:

- Agree with their client on the modalities of information sharing with the funder so as to respect all applicable ethical rules and requirements, then
- Ensure relevant information is effectively transmitted to the funder (for instance as describe above, a settlement opportunity),
- Manage the disbursement and receipt of funds on a separately designated bank account.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes, the funder will terminate the funding agreement (and possibly ask for a reimbursement of the capital already provided) in case of a breach by the funded party of their obligations agreed upon in the funding agreement, including:

- Not sharing relevant information to the proceedings,
- Change of counsel without informing the funder,
- Change of strategy without informing the funder,
- Change or removal of the designated bank account without informing the funder,
- Bad faith behaviour by the funded party in the due diligence and case process.

The conditions of a withdrawal of funding vary depending on what was agreed in the funding agreement.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Yes, safeguards are inserted in the funding agreement and include:

- In case of arbitration, the funder shall not have direct or indirect interests with the members of the arbitral tribunal,
- The funder shall not finance the plaintiff in one litigation, and the defendant in another litigation,
- The funder shall not interfere with the interest of the funded party,
- The funder shall ensure there is no conflict of interests with co-funders (if there are).

One funder mentioned they run an internal "conflicts check" before accepting to finance a claim. This check includes ensuring that no conflicts exist with previously funded cases and the people and entities involved (including arbitral tribunal members, in arbitration cases).

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

X Limited liability

X Conditional liability

X No liability

Interviewees have encountered funding agreements with all three different types of liability. In most cases: "no liability" and "limited liability", as the risk incurred by the funder would then be much higher otherwise.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Yes. TPLF agreements are frequently insured in the event of an unfavorable decision. The aim is to mitigate the risk. Funders include ATE coverage in the funding agreement either by the fund itself or through a separate ATE Insurance policy.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No example of funding agreement was provided.

4. Stakeholder views on TPLF in your jurisdiction

Majority of interviewees are in favour of regulation at EU level. Reasons mentioned for regulation are the need to establish standardised practices on the funding market, to mitigate the risk of legal uncertainty, to properly identify and vet funders active in the EU, to allow the funding industry to be more legitimate by reducing doubt as to origin of funds, purpose of the funding, conflicts of interest risk and availability of the funds.

Answers vary as to the effectiveness of the measures in the draft directive annexed to the EP resolution. Articles 4, 5, 6, 7 in the draft directive gathered some consensus, as they were deemed 'rather' to 'very effective' by all interviewees. The rest of the provisions divided more, mostly depending on the nature of the stakeholder. The funder, law firm involved with TPLF, and an academic deemed Article 16 (disclosure of the third-party funding agreement) 'not at all' to 'rather not effective', while a judge and an academic consider the provision 'rather' to 'very effective'. The funder agrees with the disclosure of the existence of funding and certain key terms to ensure that the case is well funded to completion. However, they are of the opinion that certain details of the funding agreement fall within the scope of business secrecy or legal strategy, and their disclosure should remain an exception. The funder and law firm involved in litigation funding deemed Article 18 (responsibility for adverse costs) as 'rather not effective' to 'not at all effective'. The judge and academics are in favour of the provision ('rather' to 'very effective').

The establishment of administrative authorities (as referred to in Chapter V of the draft directive) was deemed as the right approach by the funder interviewed. They note however that it would be necessary to ensure these authorities have the financial and human resources to work effectively. Without this, there is a serious risk that the duration of legal proceedings will increase sharply, to the detriment of litigants.

As to other measures considered to be effective: one academic and one lawyer previously involved in a fund were of the opinion that there should be a distinction between third party funding agreements concluded with professional clients and those concluded with non-

professionals/consumers. Funding agreements concluded with non-professionals should be covered by Articles 12 to 18 of the draft directive, while agreements with professionals should be left to be freely negotiated by the parties. The lawyer previously involved in a fund was also of the opinion that certain pre-existing financing entities should be applied a "grandfather clause" (be exempt for any new regulation on TPLF as they are already regulated by other instruments): for instance, alternative investment fund managers regulated by the AIFMD Directive, or entities regulated by the MiFID II Directive.

Other funding instruments were deemed to be able to provide some level of support. One lawyer previously involved in a fund and one academic consider them as or more effective than TPLF to facilitate access to justice, as TPLF is a financing tool reserved for highly sophisticated matters with a strong probability of success. Another academic noted the efficiency of legal cost insurance for small claims dispute value, and crowdfunding for notorious disputes with a sensitive public interest. On the other hand, one funder and one law firm were of the opinion they are not as effective as TPLF in facilitating access to justice because they are limited in scope and availability (legal aid, legal cost insurance, philanthropic funding); they are subject to budgetary constraints (public funds); they rely on the ability to engage and mobilise a large number of supporters (crowdfunding); they cannot deploy significant capital within a reasonable time frame and with a truly non-recourse structure such as what is provided today by funders.

Extrajudicial procedures are deemed to be potentially effective to seek redress. However, one academic noted that in France, ODR is used in specific sectors: consumer and labour claims, mainly small claims values. One law firm mentioned those procedures cannot really compare to TPLF as they are based on a voluntary effort to reach an agreement, and some decisions rendered within the frame of such alternative methods can be non-binding. One funder mentioned cases that are presented to funders have most often failed to be resolved through ADR.

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Germany

Prof Peter Rott, University of Oldenburg

Executive Summary

- TPLF is, in principle, allowed in Germany. There are only sector-specific rules in consumer law that explicitly allow or restrict TPLF.
- TPLF has been used for around 20 years but is still not a widespread phenomenon. Relevant areas are individual claims with a high value, such as commercial law, succession law and medical liability cases; collective actions by consumer organisations; (legal tech) claims management; and cases brought by insolvency estate administrators.
- Funders are mainly national, although with rise of legal tech claims management, foreign funders have entered the German market.
- TPLF is not normally laid open. Therefore statistics about its use in practice are unavailable.
- Doctrinal discussions mainly turned on whether the use of TPLF by a legal service provider creates conflicts of interest, which the legislator recently clarified normally not to be the case, unless the funder can take too much influence on the lawsuit. This issue has become relevant in relation to third-party funded legal tech claims management, as under German law, not only the claims management service would be unlawful but also the assignment of the claim to the service provider would be void, and consequently the service provider would not have legal standing for the litigation.
- A very special debate arose in the context of skimming-off actions by consumer organisations where the Federal Supreme Court thought TPLF to constitute abuse of the law. Meanwhile, the legislator explicitly allowed TPLF in this area if the Federal Office of Justice agrees.
- Otherwise, Germany has severely restricted TPLF of redress actions in the terms of the Representative Actions Directive with a 10% cap of the funder's share in the gains, thereby making TPLF highly unlikely in this area.
- There is no regulatory oversight as TPLF is neither classified as a (regulated) legal service nor as credit or insurance. Lawyers are prohibited to act as funders for their clients.
- The German funders scene is highly diverse in terms of the areas in which they are active and the minimum amounts of claims. Typically, compensation typically ranges from 20 to 35% but it can be higher or lower, depending on risk. One common system is a combination of a share of 30% for gains up to 500,000 Euro and a share of 20% for the gains that exceed 500,000 Euro.
- Generally speaking, no interviewee pointed out any difficulties with "classic" TPLF, such as in commercial law, succession law and medical liability cases, and therefore most interviewees did not see any need for regulation at the EU or national level.
- Similarly, interviewees did not see any risk of frivolous collective actions by consumer organisations, not least as they are tightly scrutinised before they are registered as "qualified

consumer organisations" that have legal standing for such actions, and closely monitored thereafter.

- The only area where some interviewees called for regulatory oversight and transparency is the ever growing area of (legal tech) claims management, such as the myRight litigation and high-value cartel law cases.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Germany does not have a general legal regime on TPLF, thus TPLF is, in principle, allowed in Germany. There are, however, specific rules for certain players and for certain situations. In particular, lawyers are by and large prohibited to offer litigation funding to their own clients, and TPLF has been severely restricted for the new redress actions of qualified consumer organisations under the German implementation of the Representative Actions Directive (EU) 2020/1828.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

For the purposes of this report, it is necessary to distinguish classic TPLF from TPLF that is used in the context of legal tech claims management.

1. Classic TPLF is said to have first been introduced in Germany in 1988 or 1989. In 2000, it was still be considered a novelty,[436] and in 2018, a succession law journal celebrated 20 years of TPLF.[437] Indeed, in 1998, the first professional funder, FORIS AG,[438] started its business in Germany.

TPLF was introduced because there are situations in which the claimant either cannot afford the litigation fees or shies away from taking the full risk of litigation and in which no viable alternatives are present. First, legal aid is limited to persons with low income, and hardly available at all for companies. Second, while many Germans have legal insurance, that insurance does not cover all types of claims, for example in the areas of succession law and company law.[439] Nowadays, it is an established mechanism, and it has been suggested that lawyers are under a duty to point out the possibility of TPLF to clients that have difficulties, or hesitate to take the risk, of financing their law-suits themselves.[440] No case is known in which a funder has not honoured their obligations.[441] However, TPLF is still not a wide-spread phenomenon.

[436] See Dethloff, Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung, Neue Juristische Wochenschrift (NJW) 2000, 2225.
[437] See Krüger, Und tatsächlich, Geld stinkt nicht! – zum 20. Geburtstag der Prozessfinanzierung, Erbrecht (ErbR) 2018, 241.
[438] https://www.foris.com/prozessfinanzierung/.
[439] See Dethloff, NJW 2000, 2225 f.
[440] See Everberg, in: Veith et al. (eds), Der Versicherungsprozess, 5th ed., 2023, § 3 para. 90.
[441] See Gsell and Stadler, Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsinitiativen, Juristenzeitung (JZ) 2023, 989, 990.

Classic TPLF is mainly used in four types of situations. Whereas some funders, such as FORIS AG, are all-rounders, others are specialised in certain areas of law.

The first type of cases are individual claims with a high value and therefore high litigation costs. Examples are succession law cases[442] and medical negligence cases but also commercial cases, in particular when small and medium enterprises litigate against big players in the market.

The second type of cases are mass harm cases, and in particular those that are led by legal tech claims management companies that offer no-win-no-fee arrangements to their clients. In this area, we find two business models. The "normal" way is that the (non-lawyers) claims management company acquires customers through a web-site and tries to enforce their claims out of court, against a fee. If they do not succeed, they may (or may not) pass the claim on to a law firm that they cooperate with and that will then take the case to court. The claims management company either indemnifies the client themselves against the litigation costs, or they arrange for TPLF. In the latter case, the client will sign a contract with the funder but will never himself get in touch with them. Another, rarer, business model is that the legal tech platform provider only acts as intermediary between the client and a law firm but additionally as funder who indemnifies the client against the litigation costs. Here, one case of insolvency of an intermediary is known, which resulted in clients having to bear the litigation costs, of which they are still the primary debtor, themselves.[443]

TPLF arrangements in the field of legal tech claims management services have been discussed highly controversially before courts, and the legislator has then amended the Legal Services Act, although without finally clarifying the law (see infra, at 1.5).

The third type of cases are from the realm of consumer law, namely, skimming-off actions brought by consumer organisations against traders.

A fourth type of cases are claims by insolvency estate administrators, for example against former CEOs, that cannot be financed from the insolvency estate itself.[444] Indeed, the funder LEGIAL explicitly addresses insolvency estate administrators on their website.[445]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are funders operating in Germany. The German Lawyers Association (Deutscher Anwaltsverein; DAV) published a list of funders, which in May 2022 counted 18 funders, without claiming to be complete,[446] some of which are domiciled in other EU or non-EU countries.

[442] See, for example, Krüger, ErbR 2018, 241.

[443] Vgl. Marcinkowski, Probleme mit Prozessfinanzierern: Legal Tech-Unternehmen insolvent, https://www.swrfernsehen.de/marktcheck/probleme-mit-prozessfinanzierern-legal-tech-unternehmen-insolvent-100.html.

[444] For an example, see BGH, 16.12.2021 – IX ZB 24/21, Neue Juristische Wochenschrift - Rechtsprechungsreport (NJW-RR) 2022, 332.

[445] https://www.legial.de/prozessfinanzierung/sicher-durch-den-prozess.

[446] DAV, Prozessfinanzierer: Tipps für Anwaltspraxis und ein aktueller Marktüberblick, https://anwaltsblatt.anwaltverein.de/de/themen/kanzlei-praxis/prozessfinanzierer-tipps-fuer-anwaltspraxis-und-ein-aktueller-marktueberblick#tabelle.

Legal tech claims management companies that operate with TPLF are explicitly not considered in that list, as their business model differs from classical TPLF in that it is a (usually) non-negotiable part of the service.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No, as TPLF is not regulated. Another reason is that TPLF, as an internal matter between the claimant and the funder, does not normally need to be laid open in the court, and it is normally not laid open, thus courts will often not be aware of TPLF.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

1. One question of interest is the classification of the TPLF agreement within the system of contract law, as this classification is relevant, for example, in the area of unfair contract terms law. The legislator has never introduced specific provisions for TPLF agreements, so that they need to be dealt with by reference to the existing categories of contracts. Most academic authors agree that the TPLF agreement comes closest to a partnership agreement in the terms of § 705 BGB, as both the claimant and the funder pursue the common goal of winning the case,[447] and the OLG München has followed that classification.[448]

2. Otherwise, doctrinal discussion on TPLF centred around § 4 of the Legal Services Act (*Rechtsdienstleistungsgesetz*; RDG), according to which legal services which might have a direct influence on the fulfilment of another obligation to perform may not be provided if this jeopardises the due provision of the legal service. This provision is generally understood as a duty to avoid conflicts of interest. In relation to TPLF, defendants such as Volkswagen AG and academics that provided legal counsel to them had argued that the claimant, financialright GmbH (myRight), acted in breach of § 4 RDG because it used a funder (Burford Capital) to back its claims management on behalf of more than 35,000 clients on a no-win-no-fee basis.[449] They submitted that there was a risk that the funder would influence the activities of the financialright GmbH to the disadvantage of myRight's clients, in particular, when it might come to a settlement, and that such a risk was a breach of § 4 RDG, which made the assignment of the clients' claims to financialright GmbH unlawful in the terms of § 134 of the Civil Code (*Bürgerliches Gesetzbuch*; BGB). Due to the failed assignment, they submitted, financialright GmbH was not the owner of the claims and did not have legal standing to enforce them in court.[450]

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[447] For details, see Dethloff, NJW 2000, 2225, 2226 f.; Gsell and Stadler, JZ 2024, 989, 993. See also Hamos, Drittfinanzierte Gewinnabschöpfungsklagen, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2020, 1034, 1035; Scholl, § 56 Rechtsschutzversicherung und Prozessfinanzierung, in: Hamm (ed.), Beck'sches Rechtsanwalts-Handbuch, 12th ed. 2022, para. 251; Gsell and Stadler, JZ 2024, 989, 993.

[448] OLG München, 31.3.2015 – 15 U 2227/14, NJW-RR 2015, 1333, 1335. See also LG Köln, 4.10.2002 - 81 O 78/02, NJW-RR 2003, 426.

[449] On the business model, see Hartung, Prozessfinanzierung und das RDG, Anwaltsblatt Online 2019, 353.

[450] See, for example, *Henssler*, Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?, NJW 2019, 545, 549; Greger, Das "Rundum-sorglos-Modell": Innovative Rechtsdienstleistung oder Ausverkauf des Rechts?, Monatsschrift des deutschen Rechts (MDR) 2018, 897, 899 f.

While these authors could convince a number of lower instance courts,[451] the Federal Supreme Court (*Bundesgerichtshof*; BGH) decided differently. In its first landmark decision on no-win-no-fee arrangements offered by the legal tech company (then) LexFox (now Conny) that offered both the claims management and the funding, the court held that, first, the claims management company did not perform two different obligations but that financing the claim was part of the service provided, and second, that the interest of clients and funders were generally congruent in that both benefit from the highest possible outcome of the claims management, including litigation if needed, as the funder's fees are represented by a percentage of the gains.[452]

In a later decision of 2021, the BGH recognised that, in the individual case, claims management service providers might rather lean towards a settlement than their clients, as the service providers bear the full litigation risk, but held that even an agreement that allowed the service provider to settle with the defendant while not allowing the client to opt out was not necessarily unlawful in the terms of § 4 RDG. Rather, clients might have a damage claim under § 280 para. 1 BGB if that settlement was not in their best interest[453] (which they would have to prove).

The same logic was then applied by the Higher Regional Court (*Oberlandesgericht*; OLG) München to TPLF.[454]

In 2021, the legislator confirmed this line of case law with an amendment of § 4 RDG, introduced with Act promoting consumer-friendly offers in the legal services market (*Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt*) of 10 August 2021.[455] New § 4 sentence 2 RDG reads:

"Such jeopardisation [of the due provision of the legal service] is not already to be presumed to exist on account of reporting obligations to a litigation funder existing on the basis of a contract with that litigation funder."

In its explanations of the draft bill, the government explained that the mere fact that funders pursue commercial interests does not mean that those interests are in conflict with the interests of the clients.[456]

The "clarification" is half-hearted though, as it only clarifies that pure TPLF without taking any influence on claims management or litigation as well as pure reporting duties are certainly allowed but it does not really clarify where the line to undue influence on claims management or litigation is to be drawn. In this context, it is worth noting that the legislator has also introduced in § 13b RDG an information obligation of the claims management service provider in relation to agreements with a third party funder, if applicable. This shall allow consumers to make an informed decision in favour

[451] See, for example, AG Köln, 2.2.2019 – 142 C 448/18, Beck-Rechtsprechung (BeckRS) 2019, 23894, on flightright, arguing that there was no provision in the contract that allowed the client to reject a settlement. Other courts saw a breach of § 4 RDG since the relevant contract allowed the client to opt out of a settlement but allowed the claims management service provider to levy a fee in this case; see LG Ingolstadt, 7.8.2020 – 41 O 1745/18, BeckRS 2020, 18773. See also LG Augsburg, 27.10.2020 – 11 O 3715/18, BeckRS 2020, 30625; LG Ansbach, 29.3.2021 – 3 O 16/21, BeckRS 2021, 6742; LG Trier, 14.4.2021 – 5 O 549/20, BeckRS 2021, 9041; LG Rottweil,10.5.2021 – 2 O 525/20, BeckRS 2021, 12055.

[452] See BGH, 27.11.2019 – VIII ZR 285/18, NJW 2020, 208, 231 ff. For detailed discussion, see Tolksdorf, "Sammelklagen" von registrierten Inkassodienstleistern - eine unzulässige Erscheinungsform des kollektiven Rechtsschutzes?, Zeitschrift für Wirtschaftsrecht (ZIP) 2019, 1401, 1408 f.

[453] See BGH, 13.7.2021 – II ZR 84/20, NJW 2021, 3046, 3054.

[454] See OLG München, 18.7.2022 – 21 U 1200/21, BeckRS 2022, 17969.

[455] Federal Gazette (*Bundesgesetzblatt*; BGBl.) 2021 I, 3415.

[456] Printed Matters of the Bundestag (Bundestags-Drucksache; BT-Drucks.) 19/27673, 40.

of or against third party funding of their litigation.[457] At the same time, this reduces, according to the government, the need to protect consumers against not so significant influence of the funder on the litigation through § 4 RDG as consumers can decide themselves whether or not they want to take the risk that is associated with TPLF.[458] As examples for unlawful use of TPLF, the government mentioned the situations in which the funder reserves the right to negotiate with the defendant or in which the funder has veto rights in relation to a settlement.[459] § 4 sentence 2 RDG has not yet been subject to case law.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

1. Beyond the above-mentioned discussion on § 4 RDG, there has been a debate at both doctrinal and political level around TPLF in the context of the skimming-off action under § 10 Unfair Commercial Practices Act (*Gesetz gegen unlauteren Wettbewerb*; UWG).[460] The skimming-off procedure is a procedure, by which certain qualified consumer organisations can sue traders who breached unfair commercial practices law to the disadvantage of consumers to pay the unlawfully gained profits into the state budget. Thus, such traders shall lose the advantage that they gained over their honest competitors. Skimming-off actions used to be risky, as the claimant consumer organisation had to prove the trader's intentional breach of the UWG. Therefore, some claimants engaged a funder, with the consent of the Federal Office of Justice (*Bundesamt für Justiz*; BfJ) that represented the state budget. Quite unexpectedly, in 2018 the BGH held this practice to constitute abuse of the law in the terms of 242 BGB (the general provision on good faith).[461] Following an expert opinion of *Helmut Köhler* commissioned by the defendant telecommunications service provider,[462] the court argued that § 10 UWG was not meant to serve the commercial interests of litigation funders. Reacting to the argument that without TPLF, consumer organisations could not reasonably initiate skimming-off actions, the BGH held that obviously the legislator had not wanted to introduce a more effective instrument. Commentators speculated that the court appears to have been afraid of the rise of an American-style litigation industry.[463]

The decision was widely criticised for political reasons (relating to the ineffectiveness of the skimming-off procedure) as well as for doctrinal reasons,[464] and even the OLG Schleswig refused to follow the line of the BGH.[465] Indeed, it was hard to understand why an allowed activity – TPLF – that the BfJ had consented to should amount to abuse of law, ultimately protecting a trader that had intentionally engaged in unfair commercial practices and was allowed to keep its unlawful gains.

[457] BT-Drucks. 19/27673, 46.
[458] ibid., 40.
[459] ibid.
[460] English translation available at https://www.gesetze-im-internet.de/englisch_uwg.
[461] See BGH, 13.9.2018 - I ZR 26/17, NJW 2018, 3581, confirmed by BGH, 9.5.2019 - I ZR 205/17, GRUR 2019, 850.
[462] That opinion is not published but an article based on it, see Köhler, Gewerblich finanzierte Gewinnabschöpfungsprozesse: Ende eines Geschäftsmodells, Wettbewerb in Recht und Praxis (WRP) 2019, 139 ff.
[463] See Hoof, Missbrauch des Rechtsmissbrauchs zu Lasten des Verbraucherschutzes?, Verbraucher und Recht (VuR) 2021, 163.
[464] See, for example, Feck, Anmerkung, VuR 2019, 27; Hamos, GRUR 2020, 1034 ff.; Scherer, Gewerbliche Prozessfinanzierung, VuR 2020, 83 ff.; Hoof, VuR 2021, 163 ff.
[465] See OLG Schleswig, 14.2.2019 - 2 U 4/18, VuR 2019, 270.

The discussion has recently been ended by the decision of the legislator to overturn the position of the BGH and to amend § 10 UWG so as to allow TPLF of skimming-off actions explicitly if the BfJ agrees to the funding agreement (thereby accepting reduced gains for the state budget).

At the same time, the need of availability of TPLF in that area has greatly decreased as the legislator has introduced a new provision that lowers the costs of such actions. In German law, court fees and lawyers' fees are fixed by law, depending on the value of the claim (unless the parties agree otherwise). In any way, the losing party that has to bear the winning party's lawyers' fees does not need to pay more than the amount that the law provides for, irrespective of any agreement between the winning party and their lawyers. For skimming-off procedures, a new cap of 410,000 Euro was introduced.[466] This means that even if the real value of the claim is much higher, court fees and lawyers' fees are still calculated on the basis of a fictitious value of the procedure of 410,000 Euro. Given the fact that only consumer organisations have legal standing that receive funding from the state budget, they will often be able to initiate litigation without external funding.

2. A parallel skimming-off procedure exists in cartel law. § 34a Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; GWB) was modelled in line with § 10 UWG in ist original form so that, presumably, the BGH would have regarded TPLF in that area as abuse of law as well; there is no case law, as consumer organisations have not used § 34a GWB yet.[467] Curiously, unlike § 10 UWG, § 34a GWB was not amended to explicitly allow TPLF in cartel law but courts could still follow the logic of § 10 UWG as that provision shows that the legislator does not object to TPLF in skimming-off procedures (and has never done so, against the view of the BGH).

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There are only few explicit rules dealing with the admissibility and conditions of using TPLF in civil litigation, and they all have been adopted recently in the context of consumer protection.

One example is indeed the rules that have been established in the context of the implementation of the Representative Actions Directive. According to § 4 para. 2 no. 3 of the Act on Enforcement of Consumer Rights (*Verbraucherrechtedurchsetzungsgesetz*; VDuG), third party financers must not be promised more than 10% of the gains of redress actions. In fact, industry and trade associations had lobbied for a general prohibition of third party funding. While the government initially found this unconvincing and did not include such a prohibition in its draft law, the liberal party managed in the last minute to negotiate said restriction into the law, which is far below the usual share of 25% to 35% of the gains, depending on the risk of the individual litigation.[468] Academic authors as well as an interviewed funder, however, pointed out that TPLF is not viable in redress actions as designed by the German legislator anyway. Germany has introduced an opt-in requirement for redress actions. The funding agreement, however, must be concluded at a time when it is unknown how many consumers will opt in, and therefore what the potential gains are.[469] Moreover, it is the

[466] See new § 51 para. 2 sent. 2 GKG.
[467] See Hormkohl, Kartellrechtliche Kollektivklagen nach dem Verbandsklagenrichtlinienumsetzungsgesetz: (K)ein Meilenstein?, Neue Zeitschrift für Kartellrecht (NZKart) 2024, 2,
[468] See Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, VuR 2023, 321; Gsell and Stadler, JZ 2023, 989.
[469] See Stadler, VuR 2023, 322.

consumers that must agree to the funding agreement as they will ultimately pay the funder from their gains. Whether that agreement could be connected with the opt-in declaration is questionable, as nothing in the law indicates that such a requirement could be imposed on the consumer.[470] Finally, the law requires the claiming consumer organisation to produce the funding agreement to the court. This entails the risk that the defendant will also demand and obtain insight into this agreement and can thus adjust his litigation strategy.

It should be noted though that the German legislator has limited the litigation costs of redress actions by introducing a cap of 300,000 Euros for the value of the claim from which the court fees and the lawyers' fees are calculated, as explained above (at 2.1). Moreover, in many cases, for example under unfair contract terms law, qualified entities can pursue the strategy of first initiating a (cheap) injunction procedure and then, if they succeeded, bring a redress action on the solid basis of the decision in the injunction procedure.

2.2 Regulatory oversight of funders/funding industry

There is no specific regulatory framework for the funding industry. The prudential supervision regimes for credit and insurance do not apply as the TPLF agreement is not classified that way.[471] Moreover, TPLF is not considered to be a legal service so that the Legal Service Act does not apply to funders.[472] This is although funders of course assess the legal situation but they do so for their own risk assessment, even if they communicate the result to their potential clients.[473]

The only regulatory aspect relates to the regulated profession of lawyers, which has traditionally prohibited lawyers to fund litigation of their own clients, with certain exceptions. According to § 49b para. 2 Federal Lawyers Order (*Bundesrechtsanwaltsordnung*; BRAO), no-win-no-fee arrangements and contingency fees are unlawful, unless other legislation provides otherwise. Over time, certain exceptions have been introduced, to which we will turn below.

Although § 49b para. 2 BRAO does not mention TPLF, TPLF agreements are considered unlawful if they are used to circumvent the prohibition of no-win-no-fee arrangements.[474] Thus, the KG Berlin held a TPLF agreement to be unlawful because the acting lawyer held a 90% share of the funder company.[475] The OLG München held a TPLF agreement to be unlawful where the acting lawyers did not hold shares of the funder company but received, through a specific company law construction, 75% of its profits.[476] In contrast, the LG München rejected unlawfulness where the acting lawyers only had a minority share in the funding company, arguing that they therefore were

[470] See Röthemeyer, Das Verbraucherrechtedurchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage, VuR 2023, 332, 334 f.; Kern and Uhlmann, Kollektiver Rechtsschutz 2.0? Möglichkeiten und Chancen vor dem Hintergrund der Verbandsklagen-RL, Zeitschrift für Europäisches Privatrecht (ZEuP) 2022, 849, 866.

[471] See Dethloff, NJW 2000, 2225, 2226.

[472] Vice versa, if the funder actually advises the client, he acts in breach of the RDG, see LG Köln, 4.10.2002 - 81 O 78/02, NJW-RR 2003, 426.

[473] See AG Berlin-Wedding, 8.1.2020 – 22c C 233/19, BeckRS 2020, 88. For concerns against the classification in this case, see Skupin, Zur Abgrenzung von Rechtsdienstleistung und Prozessfinanzierung, Gewerblicher Rechtsschutz und Urheberrecht in der Praxis (GRUR-Prax) 2020, 250.

[474] See, for example, Dethloff, NJW 2000, 2225, 2228; Henssler, Aktuelle Praxisfragen anwaltlicher Vergütungsvereinbarungen, NJW 2005, 1537, 1540.

[475] KG, 5.11.2002 – 13 U 31/02, BeckRS 2002, 30291741.

[476] OLG München, 10.5.2012 – 23 U 4635/11, NJW 2012, 2207.

not able to influence the activities of the funder decisively.[477] On appeal, the OLG München confirmed that the TPLF agreement was not unlawful and generally doubted the validity of the approach of concluding from participation in the funding company to the unlawfulness of the funding agreement. The court argued that the funding agreement had a much broader scope of application than what was prohibited by § 49b para. 2 BRAO, as it did not only concern the lawyers' fees but also the court fees and, most importantly, the defendant's lawyers' fees. It also pointed out that the unlawfulness of the TPLF agreement would be detrimental for the client as the client would – unexpectedly – have to bear the full risk of the litigation. The OLG München therefore advocated a solution whereby a potential breach of the law of the profession (§ 49b para. 2 BRAO) is sanctioned within the law of the profession but does not impact on the validity of the TPLF agreement between the client and the funder.[478]

With regard to the area of consumer claims, where legal tech start-ups are now dominating enforcement in certain areas of law, such as air passengers rights, it should be noted that the legislator has somewhat relaxed the rules on no-win-no-fee arrangements for lawyers. According to § 4a RVG, such arrangements are now allowed where the mandate relates to a monetary claim of up to 2,000 Euro, or where the mandate relates to out-of-court debt collection, or where, in the individual case, the client would otherwise be prevented from enforcing his or her claim. In these cases, where no-win-no-fee arrangements are allowed, obviously no circumvention by way of TPLF is possible.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements.

No such rules exist in Germany.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

1. As mentioned above, § 4 RDG limits the use of certain arrangements in TPLF, although the problems that § 4 RDG wants to address seem to be limited to consumer claims management services. An interviewee from a funder explained that the funder never intervenes in litigation in any way but rather safeguards its interests by making sure that even in the case of a low settlement, they will receive a minimum amount of fees beyond the share of the gains.

2. Unfair contract terms law can also play a role, in particular where consumers are party to a funding agreement.[479] In the case of a standard term, according to which a client who opts out of a settlement still has to pay the fee they would have to pay from the settlement, the OLG München saw unfairness under § 308 no. 7 BGB.[480] Under this provision, a standard term, according to which, in the case of the rescission or termination of the contract by the other party, the user can claim an

[477] LG München, 16.4.2014 - 4 O 12628/11, BeckRS 2015, 12716.
[478] OLG München, 31.3.2015 – 15 U 2227/14, NJW-RR 2015, 1333.
[479] Note that under German law, unfair contract terms law is not limited to business-to-consumer relationships. However, the standards of unfairness are different in commercial relationships.
[480] See OLG München, 18.7.2022 – 21 U 1200/21, BeckRS 2022, 17969.

inadequately high fee for services rendered is unfair. Otherwise, TPLF agreements do not seem to have been subject to unfair contract terms case law.

3. In one case, nullity of a TPLF agreement due to potentially excessive fees was discussed under the heading of immorality (§ 138 para. 1 BGB). *Bruns* once suggested that a fee of 50 % of the gains was immoral;[481] a point of view that was rejected by most others that argue that fees are mainly related to the risk of the individual case.[482] The OLG München followed the latter opinion, accepting a share of 50 % in the individual case.[483] This also seems to correspond with the practice of funders, at least outside the realm of the mass-scale standardised enforcement of consumer claims.[484]

4. Often, the claims that are subject to litigation are assigned to the funder as security; which German law allows.

5. TPLF has also, indirectly, played a role in unfair commercial practices law. According to § 8c UWG, abusive claims are prohibited. § 8c para. 2 UWG lists a number of instances in which the abusiveness of a claim is assumed, among them claims that predominantly serve to establish a claim to compensation of expenses or of legal expenses or payment of a contractual penalty against the infringer. At first glance, this has nothing to do with TPLF but the BGH has established that TPLF is indicator for abusiveness if an injunction claim is funded that does not as such aim at monetary compensation which could be shared with a funder. In such a case, funding indicates that the real purpose of the claim is not to stop the unfair commercial practice but to obtain an undertaking from the trader and to invoke penalties from breaches of that undertaking in the future; which should not be the purpose of an injunctive action.[485] It should be noted though that TPLF does not need to be laid open to the court, and normally it is not, so that the "problem" only arises if the defendant obtains knowledge of the funding agreement and informs the court.[486]

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

The only areas where procedural safeguards exist are redress actions where TPLF must be disclosed and the agreement laid open to the court (§ 4 para. 3 VDuG), and skimming-off procedures under § 10 UWG where the beneficiary must first obtain approval of the TPLF agreement by the *Bundesamt für Justiz*.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Not applicable.

2.7 Obligations of funders towards beneficiaries and vice-versa

[481] See Bruns, Das Verbot der quota litis und die erfolgshonorierte Prozeßfinanzierung, JZ 2000, 232.
[482] See *Homberg*, Erfolgsorientierte Prozessfinanzierung, 2006, 170 f.
[483] OLG München, 31.3.2015 – 15 U 2227/14, NJW-RR 2015, 1333, 1336.
[484] Interview with a funder.
[485] See KG, 3.8.2010 - 5 U 82/08, Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR) 2010, 688; KG, 8.7.2008 - 5 W 34/08, MMR 2008, 742.
[486] Interview with a judge.

The core obligation of funders is to indemnify beneficiaries against the litigation costs, usually through all available instances, and also to bear the costs for the execution of the claim if the execution is promising. The TPLF agreement specifies the costs that the claimant's lawyer can charge. The lawyer often gets an extra fee for his communication with the funder.[487]

Beneficiaries have numerous obligations towards funders. Initially, they have to inform the funder fully about the claim and all circumstances that are relevant for the litigation, and the same applies during litigation whenever new circumstances occur.

Generally, they (or their lawyers) have to choose the most economic and least risky way of litigating. Certain decisions need approval by the funder. These include all measures that increase costs, the waiver of the claim or of parts of it, the withdrawal of the lawsuit, the appeal against a court decision, and settlements.[488]

2.8 Distribution of awards and bearing adverse costs in lost cases

In Germany, the loser-pays principle applies. Thus, if the case is won, the defendant has to pay the court fees and the claimant's lawyer's fees. However, compensation of the lawyer's fees is limited. It is determined by the court in accordance with a table that is provided by the law. In practice, in difficult cases the client and the lawyer often agree on a higher fee. The difference between the higher fee and the fee in accordance with the table rests with claimant and will be borne by the funder. The same applies vice versa to the defendant's lawyer's fees if the case is lost.

If the case is won, the funder can first claim compensation of their expenses and then a certain share of the remaining gains, as agreed upon in the contract.[489] Typically, the claimant's lawyer will obtain the gains and organise the distribution between the funder, the claimant and himself.[490]

If the case is lost, the funder bears the court fees, the claimant's lawyer's fees and the defendant's lawyer's fees; the latter at determined by the court in accordance with the table.

2.9 Planned legislation

Currently, the German government has no plans to regulate the funding industry as such.

2.10 Assessment of the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No
Capital adequacy (Art.6)	No

[487] ibid. See, for example, § 3 no. 4 of the model contract of LEGIAL.
[488] See, for example, § 7 no. 4 of the model contract of LEGIAL.
[489] See Frechen and Kochheim, Fremdfinanzierung von Prozessen gegen Erfolgsbeteiligung, NJW 2004, 1213, 1214. See, for example, § 5 nos 2 and 3 of the model contract of LEGIAL.
[490] See, for example, § 5 no. 6 of the model contract of LEGIAL.

Fiduciary duty (Art.7)	
Powers of supervisory authorities (Art.8)	No
Investigations and complaints (Art.9)	No
Coordination between supervisory authorities (Art.10)	No
Content of third-party funding agreements (Art.12)	Control via unfair contract terms law that does not only apply in B2C but also in B2B contracts.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No
Invalid agreements and clauses (Art.14)	No
Termination of third-party funding agreements (Art.15)	
Disclosure of the third-party funding agreement (Art.16)	Only in relation to redress actions and skimming-off procedures
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Only in relation to redress actions and skimming-off procedures
Responsibility for adverse costs (Art.18)	No but there is the possibility of the court asking for security in the individual case.
Sanctions (Art.19)	No

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

As mentioned above, TPLF does not need to and usually is not laid open in court. Thus, there are no statistics available in relation to the number of cases funded per year.

Typical types of cases are, as mentioned, above, high-value individual claims, for example in succession law, medical liability law or between companies; mass-claims such as in the Volkswagen diesel scandal; and litigation by consumer organisations under § 10 UWG.

b. Minimum claim value in absolute terms (in million Euro)

According to the data provided by the DAV, minimum claim values vary greatly between funders. Normally, the minimum value claim is 50,000 or 100,000 Euro but there are funders that fund claims of 3,000 Euro, whereas others are only interested in claims above 1 Million Euro.[491]

c. Typical claim value in absolute terms (in million Euro)

As there are no statistics, that question cannot be answered.

d. Typical ratio between investment by the funder and claim value

As there are no statistics, that question cannot be answered.

e. Typical size of the investment by the litigation funder (in million Euro)

Funders on the German market vary greatly in their size, and so does the size of their investment.

f. Origin of funding provided by the litigation funder

Normally, funders have their own capital stock but they arrange for second funders when their own limits are exceeded. Typically, those second funders are reinsurance companies.[492]

g. Share of compensation awarded typically demanded by litigation funders

Some funders apply fix rates, whereas others do not apply a standard ratio but calculate their offers in accordance with the particularities of the individual case, which are meticulously scrutinised. According to the DAV, compensation typically ranges from 20 to 35% but it can be higher or lower, depending on risk. One common system is a combination of a share of 30% for gains up to 500,000 Euro and a share of 20% for the gains that exceed 500,000 Euro.[493]

In the area of skimming-off procedures under § 10 UWG where compensation is factually paid from the state budget, typical compensation is said to be up to 20%.[494]

h. Other conditions of the litigation funding agreement

Normally, the claimant has to assign his claim to the funder as security.[495]

[491] See the overview by DAV.
[492] Interview with a funder stakeholder.
[493] See, for example, § 5 no. 3 of the model contract of LEGIAL.
[494] See *Loschelder*, Zur Zulässigkeit einer Prozessfinanzierung bei Durchsetzung von Gewinnabschöpfungsansprüchen gem. § 10 UWG, in Ahrens et al. (eds), Festschrift für Wolfgang Büscher, 2018, 513, 516.
[495] See Ruby, A. III. 5. Prozessfinanzierung, in: Klinger (ed.), Münchener Prozessformularbuch, vol. 4 Erbrecht, 5th ed., 2021, para. 5. See also § 6 no. 1 of the model contract of LEGIAL.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Generally speaking, funders are said to be willing to provide funding it the probability of success is at least 70%. The main factors to be considered are the likelihood of success in court and the liquidity of the defendant.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

This is said not to be a relevant criterion.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

As TPLF is normally not laid open, this is unknown, and funding arrangements are subject to the secrecy duty of lawyers.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

As mentioned above, they are normally not. There are two exceptions.

1. The first one is, until now and probably also in future, of a theoretical nature. It relates to redress actions in implementation of the Representative Actions Directive where TPLF is most unlikely to happen. Under § 4 para. 3 VDuG, the claimants have to lay open how they finance the law-suit. If TPLF is involved, they need to lay open the agreement with the funder.

2. The second relates to claimants that have expressly been founded as litigation vehicles, thus, as companies that collect claims to enforce them collectively in court. In principle, there is no legal provision, for example in the Civil Procedural Code (*Zivilprozessordnung*; ZPO), to lay open how they finance a claim. However, there has been case law in the past in relation to the company Cartel Damage Claims (CDC) that appears to factually force such claimants to disclose TPLF.

CDC had collected claims against a cement cartel worth 114 million Euros and brought them before the German courts. Victims had assigned their claims to CDC so that CDC acted as owner of the claims. The courts did not accept that route of enforcement and held that the assignments of the claims were invalid because CDC, according to the courts, did not have the financial means to pay the defendants' lawyers' fees in the case of the rejection of the claims. Thus, the assignment model would have shifted the litigation risk unreasonably towards the defendants, which the courts held to be immoral under § 138 BGB.[496] This argument can be defeated by showing that litigation is backed by TPLF; which implies that the claimant would have to disclose TPLF to the court.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings?

Yes, and academic literature regards this as well justified.[497]

[496] See LG Düsseldorf 17.12.2013 – 37 O 200/09, NZKart 2014, 75; OLG Düsseldorf 18.2.2015 – VI-U (Kart) 3/14, NZKart 2015, 201.
[497] See Gsell and Stadler, JZ 2024, 989, 995.

If yes, please indicate what type of control:

- *Choice of lawyer*

Usually, it will be the claimant's lawyer that approaches the funder. Some funders explicitly only react if lawyers contact them.[498] Even LEGIAL that addresses lawyers, insolvency estate managers and individual claimants on their website only communicates with the lawyer before and during funding.[499] The funder will not interfere with the choice of lawyer.[500]

- *Consent for settlement*

Yes, see 2.

- *Consent for appeal*

Not directly, but usually the funder reserves the right to terminate the contract after a negative judgment.

- *Consent for expert evidence*

In principle, costs for expert evidence are covered by the TPLF agreement. However, approval may be necessary for unexpected costs.

- *Agreement on strategy*

The lawyer and the funder will often cooperate to form a litigation strategy, and the funder has sometimes been considered to be a "sparring partner" for the lawyer in doing so.[501] The funder takes influence in the sense that they will only fund litigation upon their approval of the statement of claim.[502]

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

As mentioned above, it is normally a cooperative relationship. The claimant's lawyer is the only one to communicate with the funder.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Generally speaking, termination is possible in the case of a serious breach of the claimant's obligations under the funding agreement.[503] Moreover, funders reserve their right to terminate the contract under certain negative circumstances, such as the rejection of the claim by the court or a public authority, indication of rejection by the court, relevant new case law, legislative amendments, the loss of evidence or the deterioration of the defendant's solvency. In such a case, the funder will

[498] See ARMIDA, https://www.service-armida.de.
[499] See, for example, LEGIAL, https://www.legial.de/prozessfinanzierung/sicher-durch-den-prozess; advofin, https://www.advofin.at/finanzierung.
[500] See the website of LEGIAL, https://www.legial.de/prozessfinanzierung/sicher-durch-den-prozess.
[501] See Krüger, ErbR 2018, 241.
[502] See, for example, § 3 no. 7 of the model contract of LEGIAL.
[503] See Gsell and Stadler, JZ 2024, 989, 997. See also OLG Frankfurt, 2.7.2020 – 1 U 67/19, Neue Juristische Online-Zeitschrift (NJOZ) 2020, 1394.

bear all the costs that have arisen until termination of the funding agreement, and the claimant can continue the law-suit at his own risk, or with a new funder.[504] Funders also reserve their right to terminate the funding agreement if the claimant does not accept a proposed settlement that the funder agrees with. Thus, the claimant is not forced to accept the settlement but he will have to compensate the funder as if he had accepted it.[505]

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

I am not aware of specific safeguards.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")?

The funder is only liable to their contracting partner, the client, whom he promises to indemnify against the costs for the defendant's lawyers. There is no direct liability towards the defendant.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

The funding agreement does not usually include such a requirement but funders may use ATE insurance in their own interest.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

The model funding agreement of LEGIAL is available at https://www.legial.de/sites/default/files/2020-07/legial-prozessfinanzierung-mustervertrag-2007.pdf.

4. Stakeholder views on TPLF in your jurisdiction

The stakeholder views reflect the fact that there is no coherent regulation of TPLF in Germany but that there are certain areas of law where TPLF may play a role in terms of making claims unlawful or abusive. Most of the interviewees only had experience with TPLF in certain situations, which shaped their views. For example, the interviewed judge only had been confronted with TPLF in regard to the question of whether a claim under unfair commercial practices law was abusive (in the terms of § 8c UWG) due to the use of TPLF (see supra, 2.4.), and he therefore was in favour of a duty to disclose TPLF. Likewise, the lawyer who represented defendants in litigation initiated by legal tech claims management companies was in favour of such a duty, as TPLF with too much influence on the part of the funder may render their claims unlawful in the terms of § RDG. In contrast, the funder interviewee and the lawyer that has sometimes recommended TPLF to his client had "classic" TPLF in mind when they answered the questionnaire. This is the reason why the results of

[504] See § 9 of the model contract of LEGIAL.
[505] See § 8 of the model contract of LEGIAL.

the questionnaire differ greatly between interviewees, and they must be interpreted on that background.

Generally speaking, no interviewee pointed out any difficulties with "classic" TPLF, and therefore interviewees did not see any need for related legislation at the EU level. The prevailing view is that the German funders were solid businesses, and although there have been individual cases of disagreement on fees, in particular, this was not an indication for a need to regulate funders. Thus, those interviewees that are either active in classic TPLF as funders or that have, as lawyers, recommended TPLF to their clients in classic cases of TPLF considered the initiative of the European Parliament as exaggerated in the sense that it addresses TPLF in general, whereas problems, if any, are limited to specific new types of TPLF, namely TPLF in connection with claims management companies. One interviewee raised concerns about foreign funders entering the German market and being possibly less reliant but again, this development does not concern "classic" TPLF (see infra).

Interestingly, and despite the political debates that led to the introduction of the above-mentioned 10% cap on TPLF fees in the area of redress actions under the German implementation of the Representative Actions Directive, none of the interviewees accused vzbv and the consumer centres of the Länder of irresponsible use of the new instrument, or its predecessor, the model declaratory action (*Musterfeststellungsklage*), with or without TPLF. Even the representative of industry pointed out that they would not object to TPLF in that area, or in the area of skimming-off actions under § 10 UWG, due to the fact that only these responsible claimants have legal standing for such actions. Again, the only concern related to foreign qualified entities that might act differently.

The one area where some interviewees, in particular the industry representative and the lawyer acting for defendants in such actions, showed strong objections against TPLF, or against the activity as such, is the area of (legal tech) claims management companies that are founded for the purpose of collecting claims and bringing them in large-scale litigation, supported or even suspected to be steered by funders. Relevant cases are the myRight litigation against Volkswagen AG and cartel damage claims. Here, said interviewees feel that it is not a claimant who fears the litigation risk and therefore looks for a funder but that the initiative is with the funder who searches, or even founds, a claimant company that then actively collects individuals or companies that may have damage claims against the targeted defendant that they assign to the claimant company. This is also the area where the German legislator has already taken legislative action by, on the one hand, regulating claims management companies more densely (although not necessarily sufficiently densely, from the perspective of consumers[506]), and where § 4 RDG still sets limits to the influence of funders on the law-suit although the legislator made it clear that funding such actions is lawful.

It is in the light of these preliminary remarks that the perspectives of stakeholders on the draft directive annexed to the European Parliament resolution are summarised hereinafter.

Only those stakeholders that think of funding of legal tech claims management companies argued in favour of any kind of authorisation and supervision, without however having evidence of any problems related to funding that have arisen until now and that could have been controlled by supervisory authorities.

Transparency-related regulation received the most support by stakeholders, and this is caused by the specificities of German law described above. First, the interviewed judge is in favour of a duty to

[506] For an analysis of further needs, see Rott, Verbraucherpolitischer Handlungsbedarf bei Legal Tech?, 2023, https://www.vzbv.de/sites/default/files/2024-02/23-12-02_vzbv_Gutachten_Legal-Tech.pdf.

lay TPLF open to courts, as TPLF may render injunction procedures under unfair commercial practices law unlawful (§ 8c UWG), and second, the industry representative and the lawyer acting for defendants were in favour of such a duty as TPLF could make claims management unlawful under the Legal Services Act (§ 4 RDG).

Funders themselves, consumer organisations and the lawyer who was involved in classic TPLF see no need for regulation at either EU level or national level beyond what Germany has introduced anyway.

Glossary of abbreviations and acronyms

AG Amtsgericht

BeckRS Beck-Rechtsprechung

BfJ Bundesamt für Justiz

BGB Bürgerliches Gesetzbuch

BGBl. Bundesgesetzblatt

BGH Bundesgerichtshof

BRAO Bundesrechtsanwaltsordnung

BT-Drucks. Bundestags-Drucksache

CDC Cartel Damage Claims

ErbR Erbrecht

GRUR Gewerblicher Rechtsschutz und Urheberrecht

GRUR-Prax Gewerblicher Rechtsschutz und Urheberrecht in der Praxis

GWB Gesetz gegen Wettbewerbsbeschränkungen

JZ Juristenzeitung

LG Landgericht

MDR Monatsschrift des deutschen Rechts

MMR Zeitschrift für IT-Recht und Recht der Digitalisierung

NJOZ Neue Juristische Online-Zeitschrift

NJW Neue Juristische Wochenschrift

NJW-RR Neue Juristische Wochenschrift – Rechtsprechungsreport

NZKart Neue Zeitschrift für Kartellrecht

OLG Oberlandesgericht

RDG Rechtsdienstleistungsgesetz

UWG Gesetz gegen den unlauteren Wettbewerb

VDuG Verbraucherrechtedurchsetzungsgesetz

VuR Verbraucher und Recht

WRP Wettbewerb in Recht und Praxis

ZEuP Zeitschrift für Europäisches Privatrecht

ZIP Zeitschrift für Wirtschaftsrecht

ZPO Zivilprozessordnung

Table of legislation

Act on Enforcement of Consumer Rights (*Verbraucherrechtedurchsetzungsgesetz*; VDuG)

Civil Code (*Bürgerliches Gesetzbuch*; BGB)

Civil Procedural Code (Zivilprozessordnung; ZPO)

Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; GWB)

Court Fees Act (*Gerichtskostengesetz*; GKG)

Federal Lawyers Order (*Bundesrechtsanwaltsordnung*; BRAO)

Legal Services Act (*Rechtsdienstleistungsgesetz*; RDG).

Unfair Commercial Practices Act (*Gesetz gegen unlauteren Wettbewerb*; UWG)

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Greece

Prof Alexandra Mikroulea and Triantafyllia Mavridopoulou, Athens University

Executive Summary

- Greece has no existing or planned legislation specifically addressing Third Party Litigation Funding (TPLF). The only relevant provision prohibits TPLF in representative actions, introduced with the implementation of Directive 2020/1828 into Greek legal order. Some funding arrangements in Greece resemble TPLF but differ from the European definition.
- TPLF is not explicitly banned for individual claims but may conflict with Article 110 of the Civil Procedure Code, which emphasizes equality of parties in legal proceedings.
- There are currently no known TPLF funders operating in Greece. No reliable statistics are available on the impact or use of TPLF.
- The debate focuses on potential conflicts with procedural equality and court perceptions. Consumer associations supported TPLF during the transposition of Directive 2020/1828, advocating for its use to cover litigation costs. Lawmakers prohibited TPLF in representative actions to prevent potential abuse. Broader discussions on TPLF remain theoretical, reflecting societal skepticism towards the commercialization of legal claims.
- Non TPLF specific legal framework that can theoretically apply TPLF in Greece include: the Lawyers' Code, which regulates lawyer remuneration and client protection; the Greek Civil Code, which governs the assignment of claims and sets conditions on their transferability, influenced by securitization and debt management laws.
- In civil procedures: litigation costs are usually borne by the initiating or losing party, and rules exist to ensure fair cost distribution.
- Stakeholders, including consumer organizations, academics, and legal professionals, report no direct experience with TPLF.
- Mixed views on TPLF: some see it as a tool to improve access to justice, others express concerns about ethical risks and conflicts of interest. Recognized alternatives, such as legal aid and crowdfunding, are seen as insufficient in practice. Alternative Dispute Resolution (ADR) are viewed as useful for low-value claims, but considered less effective for complex cases.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

At present, there is no existing or planned legislation on Third Party Legal Funding (TPLF) in Greece. The only relevant provision was introduced during the incorporation of Directive 2020/1828 into Greek law which explicitly provided that the third-party funding of representative actions is prohibited[507].

In Greece, the situation regarding third party funding of individual claims is somewhat unclear. Although such funding is not expressly prohibited, it has been argued in legal theory that it may conflict with basic principles of the Civil Procedure Code, particularly Article 110 of Civil Procedure Code, which emphasizes the equality of the parties in legal proceedings[508]. The concern is that third party legal funding could potentially disrupt this balance by providing one party with an undue advantage[509].

Despite these theoretical concerns, there is no specific legal framework regulating third party litigation funding in Greece. This applies also to arbitration cases.

It should also be noted that there are forms of funding present in Greece that are similar, though not fully identical, to the definition of third party litigation funding as outlined in the resolution of the European Parliament.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

For individual actions, operationally, the most relevant form of financing part of the costs of litigation that exists in Greece, resembling TPLF, is the institution of lawyer funding schemes in the form of contingency fee agreements[510]. According to Article 60 of the Lawyers' Code, it is permissible to enter into a written agreement that makes the lawyer's remuneration conditional on the outcome of the trial or the result of the work, as well as to assign or transfer part of the subject matter of the trial as remuneration. This form of agreement, however, cannot exceed 20% of the subject matter of the litigation, or 30% if more than one lawyer is involved.

Notably, such agreements apply only when the lawyer undertakes to conduct the trial until final judgment without receiving any fee in the event of failure. Despite these arrangements, the lawyer

[507] Law 5019/2023, Article 8, pursuant to which Article 10n of Law 2251/1994 is provided for that "Third-party legal funding is prohibited for representative action."

[508] Code of Civil Procedure, Article 110 is provided for that "1.The parties have the same rights and obligations and are equal before the court.2. The parties have the right to attend all discussions of the case, even when they are held in camera, and must be summoned for this purpose in accordance with the provisions of the law.3. The parties are obliged to appear in person before the court when summoned for this purpose.»

[509] Niki Kerameos and Apostolia Vasilakopoulou, Third Party Legal Funding in Litigation and Arbitration, DEE 10/2012, Nomiki Viliothiki, 915-924

[510] A.Tsavdaridis, Three's a crowd? Third-party arbitration funding, Lexology, 20.07.2024, available at https://www.lexology.com/library/detail.aspx?g=5e0ce6b3-c8e0-4b18-842f-03a7614c40aa

does not automatically acquire the agreed percentage of the litigation's subject matter, but rather has a claim against the client, which is satisfied upon a favorable final judgment[511].

Although this form of litigation funding is similar to TPLF in that it involves financing the costs of litigation by an entity other than the party with the disputed claim, it differs fundamentally in purpose. This kind of lawyer funding scheme is primarily a method of lawyer remuneration for legal services provided, regulated to protect clients from speculative pursuits by lawyers. In contrast, TPLF is an investment made by a third party, who weighs business risks with the aim of making a profit from the litigation's outcome[512].

Moreover, the institution of legal aid in Greece is distinct from TPLF. Legal aid provides state assistance to economically disadvantaged citizens to ensure access to justice, without consideration for the nature or validity of the claim. The state does not receive remuneration from legal aid recipients, whereas in TPLF, the third-party funder seeks a return on investment contingent on the litigation's success[513].

Lastly, TPLF is also distinct from loan agreements where the lender retains a claim for repayment regardless of the litigation's outcome. In TPLF, the financier's return is contingent on a successful litigation outcome, and they receive no repayment if the litigation fails[514].

In summary, while there is no specific legal framework for TPLF in Greece, the most analogous practice is the lawyer's funding scheme provided for under Article 60 of the Lawyers' Code. This practice, however, is a form of legal remuneration rather than an investment, fundamentally differing from TPLF's nature and objectives.

As previously mentioned, Article 10n of Law 5019/2023 explicitly prohibits third-party funding for representative actions.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

TPLF is not applicable in Greece. Consequently, there are no operating funders in the jurisdiction.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

TPLF is not applicable in Greece. As a result, there are no available statistics regarding TPLF in the jurisdiction.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

[511] Niki Kerameos and Apostolia Vasilakopoulou, Third Party Legal Funding in Litigation and Arbitration, DEE 10/2012, Nomiki Viliothiki, 915-924

[512] Ibid.

[513] Ibid.

[514] Vasiliki Marazopoulou, Third party legal funding in arbitration- Especially the case of the Greek legal order in the light of international developments, EfADPolD, 11/2022 , p. 1288-1301

Regarding the institution of TPLF in Greece, there has been significant doctrinal discussion, primarily focused on its potential conflict with mandatory rules of Civil Procedure Code[515]. Theoretical concerns have been raised about TPLF conflicting with Article 110 of the Code of Civil Procedure, which enshrines the fundamental principle of equality of the parties before the courts. Article 110 states:

1. "*The parties shall have the same rights and the same obligations and shall be equal before the courts.*"
2. *"The parties shall have the right to be present at all discussions of the case, even when they are held in camera, and shall have the right to participate in all discussions of the case and shall be summoned for that purpose in accordance with the provisions of the law."*
3. *"The parties are required to appear in person at the hearing when summoned to appear before the court for that purpose.*"

This principle aims to balance interests and address the any inequality that may exist between the parties, thereby ensuring equality of arms.

In particular, the procedural principle of equality is not intended to ensure financial parity between the parties, meaning that third-party funding does not inherently violate this principle simply because one party receives external financial support. However, concerns arise when the institution's role extends beyond mere financial assistance to one party in pursuing its legal claim. If this involvement indirectly strengthens the funded claim to the detriment of the opposing party's claim, it could be argued that the principle is indirectly infringed. This is because, in practice, the funder typically conducts a thorough review of the case and makes a business assessment of the likely outcome before choosing to invest. By financing the claim, the funder may enhance its strength in various ways, potentially influencing the court's perception. As a result, a claim that has undergone such scrutiny may be presented in court in a way that biases the judge, particularly if the pre-assessment was conducted by a well-known financing company[516].

Additionally, the debate surrounding TPLF intensified during the transposition of Directive 2020/1828 into Greek legal order. While a specific provision prohibiting the financing of representative actions by third parties was ultimately introduced in Law 5019/2023, there were notable comments during the consultation phase[517]. Consumer associations argued in favor of TPLF, suggesting it would significantly help cover litigation costs[518]. However, the Greek legislator explicitly stated that the regulation aimed to prevent practices of abusive representative actions or

[515] Niki Kerameos and Apostolia Vasilakopoulou, Third Party Legal Funding in Litigation and Arbitration, DEE 10/2012, Nomiki Viliothiki, 915-924

[516] Niki Kerameos and Apostolia Vasilakopoulou, Third Party Legal Funding in Litigation and Arbitration, DEE 10/2012, Nomiki Viliothiki, 915-924

[517] Law 5019/2023, Explanatory Memorandum, available in Greek at https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/12205355.pdf

[518] Ibid. In particular, consumer associations support during the consultation process that the high cost of representative actions poses a significant challenge for them, as they are non-profit organizations with limited revenues, mainly derived from membership fees. The lengthy and expensive legal procedures at all three levels of the justice system further exacerbate this issue, often taking six to seven years to reach a collective decision. Unlike the suppliers they challenge, which are typically large companies with substantial financial resources and organized legal teams, consumer associations largely rely on voluntary efforts to protect consumer rights and interests, especially those of vulnerable groups. Therefore, they advocate for a combination of funding sources to support their efforts, including public funding, contributions from non-governmental organizations and foundations, and limited fees collected from consumers.

their financing by competing companies, hence the prohibition on third-party funding of representative actions[519].

In summary, the doctrinal discussion in Greece has highlighted the potential conflicts between TPLF and the principles of civil procedure, with particular emphasis on maintaining the balance and equality of the parties in legal proceedings[520].

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The discussion on TPLF has been so far theoretical without reference to specific cases or incidents. There has been significant discussion and ad-hoc legislation regarding assignment of bad loans to lawyers[521]. During the Greek financial crisis, the number of bad loans and bad debt increased significantly, and the question arose whether it was permissible for lawyers to act as collectors, buy these debts and proceed to actions in court in their own name. Specific legislation was introduced regulating the activity of debt collection and management of bad loans. Although not directly relevant with TPLF, it shows that Greek society is somewhat skeptical towards trade and financing of claims.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

Not applicable in Greece.

2.2 Regulatory oversight of funders/funding industry

Not applicable in Greece.

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[519] Ibid.

[520] Niki Kerameos and Apostolia Vasilakopoulou, Third Party Legal Funding in Litigation and Arbitration, DEE 10/2012, Nomiki Viliothiki, 915-924

[521] According to Article 60 par. 1 of the Lawyers' Code the assignment or transfer of a portion of the subject matter of proceedings is allowed, provided that it does not exceed 20% of the total, or 30% if more than one lawyer is involved in the case at hand. Additionally, Article 60 par. 3 of the Lawyers' Code specifies that the assignment of part of the claim to cover legal fees must be announced to the debtor by notifying them of the relevant agreement before the claim is paid. However, during the crisis period, some lawyers began acting as collection agencies, despite explicit prohibitions, by notifying and pressuring consumers to settle their debts. This practice violates Law 3758/2009, particularly Article 9 par. 4, which prohibits creditors from assigning overdue receivables to third parties for collection. In response, the Athens Bar Association condemned these abusive and illegal practices by passing a resolution to amend the Code of Conduct for Lawyers. The amendment adds such practices to the list of disciplinary offenses, subjecting any lawyer or law firm that engages in harassment to strict disciplinary action by the Athens Bar Association. Under this amendment, lawyers are prohibited from verbally harassing a debtor, especially by phone, more than once. They may only inform the debtor of the debt and explore the possibility of an out-of-court settlement. If the debtor does not respond or refuses to repay, the lawyer must proceed with a written out-of-court demand or take the necessary legal actions on behalf of their client. In particular see Article 41 of Code of Conduct for Lawyers.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

Not applicable in Greece.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Although TPLF is not directly regulated by Greek law, several complementary provisions within the legal framework could influence its application.

- Abusive Clauses and Transparency

Under Article 60 of the Lawyers' Code, lawyer fees are subject to a quantitative limit: they cannot exceed 20% of the case's subject matter. This limit increases to 30% if more than one lawyer is involved in the case.

In specific cases, as provided for by Article 60 par. 2 of Lawyers' Code, such as those involving car damage, expropriation, wages, overtime, night work, work on Sundays or holidays, bonuses, leave compensation, termination of employment contracts, or salary claims by permanent civil servants, any agreement between a lawyer and client that ties the lawyer's remuneration to the outcome of the case must be reported to the Bar Association and recorded in a special register.

It is important to note that, for the agreement to be valid, Article 60 par. 1 of Lawyers' Code explicitly requires that it must be in written form.

- Avoidance of Conflict of Interest

Additionally, the Lawyers' Code outlines certain professional obligations. Under Article 37 of Lawyers' Code, a lawyer is required to accept any case unless it presents a conflict of interest with another client. Consequently, lawyers must avoid cases where a conflict of interest exists. Article 38 further imposes an obligation of confidentiality, requiring lawyers to maintain strict confidentiality regarding any information entrusted to them by their clients during the course of their work. Failure to adhere to these obligations can result in disciplinary and criminal sanctions.

- Assignment of Claims

In Greece, the assignment of claims is governed by a detailed set of rules in the Greek Civil Code, providing a clear framework for how a creditor can transfer their rights to another party. Under Article 455, the creditor can assign a claim to a third party through a contract without needing the debtor's consent. However, according to Article 460, this transfer is only effective against the debtor or any third party once it has been properly communicated to the debtor.

Following the assignment, Article 457 obligates the assignor to provide the assignee with all necessary information and relevant documents to enforce the claim. If only a portion of the claim is assigned, the assignor must supply certified copies of the documents, though the assignee may request to see the originals. Additionally, if requested by the assignee, the assignor must draft a public document formalizing the assignment, with the associated costs borne by the assignee.

Article 458 stipulates that the assignment also transfers any ancillary rights associated with the claim, such as mortgages, guarantees, or pledges securing the claim. These rights, along with any

privileges inherent to the claim, automatically pass to the assignee. However, personal privileges linked to the original creditor do not transfer.

Accrued interest on the claim is transferred unless otherwise agreed upon by the parties, as specified in Article 459. It's important to note, under Article 460, that the assignment is not binding on the debtor or third parties until it has been officially notified. If the debtor pays off the debt or enters into an agreement with the assignor before being notified of the assignment, they are released from further obligation, as stated in Article 461.

Once the assignment is effective, the debtor assumes the same obligations to the assignee as they had to the original creditor, in accordance with Article 462. Article 463 allows the debtor to raise any defenses they had against the assignor prior to the notification of the assignment. Additionally, counterclaims existing at the time of notification can be used for set-off, even if they were not yet due.

Certain limitations apply to the assignment of claims. Articles 464 and 465 state that claims that cannot be seized or are inherently tied to the creditor's personal attributes are not assignable. Moreover, Article 466 holds that if the creditor and debtor have agreed that a claim is non-assignable, this agreement is binding, except when the assignee acquires the claim through a document that does not mention non-assignability.

Regarding the assignor's liability, Article 467 states that if the assignment is made for consideration, the assignor is only responsible for ensuring the existence of the claim. In the case of a gratuitous assignment, the assignor bears no responsibility for the claim's existence. If the assignor explicitly assumes liability for the debtor's solvency, this responsibility generally pertains only to the debtor's solvency at the time of the assignment, unless the obligation is conditional, in which case it applies at the time of payment, according to Article 468.

Finally, Article 469 clarifies that when claims are transferred by law, the original creditor bears no liability to the new creditor for the existence of the claim or the debtor's solvency. Article 470 states that the provisions governing the assignment of claims similarly apply to the transfer of other rights unless otherwise specified by law.

Additionally, the legal framework for the securitization and management of overdue claims in Greece is shaped by several key laws that govern the transfer, collection, and administration of such claims. In particular, Law 3156/2003 plays a pivotal role by allowing the securitization of overdue claims under the conditions provided in the said law. According to Article 10 of Law 3156/2006, claims intended for securitization must be transferred through a written sale contract between the transferor and the acquirer.

In this context, the "transferor" is defined as a merchant with a residence or registered office in Greece or abroad, provided they maintain an establishment in Greece. The "acquirer" is a legal entity or entities established solely for the purpose of acquiring business claims for securitization in accordance with this law, often referred to as a "special purpose company." The acquirer itself issues the bonds.

Furthermore, Article 10 par. 6 of Law 3156/2003 specifically states that "claims transferred for securitization purposes may be claims against any third party, including consumers." This provision allows creditors to consolidate overdue claims into financial instruments, which can then be sold to investors, thus enhancing liquidity and spreading risk.

However, the Greek legislature has also placed specific limitations on the assignment of overdue claims, particularly to regulate debt collection practices. Article 9 par. 4 of Law 3758/2009 introduces

a prohibition on the assignment of overdue claims in cases where the assignee is responsible for collecting the claim and then returning the collected funds to the original creditor. This restriction was implemented to curb the potential for abuse by debt collection agencies and to ensure fairer treatment of debtors.

Furthermore, the sale and management of credits in Greece are tightly regulated. Under Law 5072/2023, only licensed Loan and Credit Claim Management Companies are authorized to engage in these activities. The licensing process is overseen by the Bank of Greece, ensuring that only qualified entities can operate in this sector. Important to be noted that Article 115 of Law 5072/2023 also grants these licensed companies the authority to take legal action and participate in pre-bankruptcy and insolvency proceedings, even though they are not the original creditors. This ensures that credit management is conducted within a structured and legally compliant framework, providing protection for both creditors and debtors.

It is important to note that, under Article 60 par. 1 Lawyers' Code, any assignment or transfer of litigation proceeds is strictly prohibited and considered null and void if it exceeds the amount or value to which the lawyer is entitled as their fee. Additionally, pursuant to Article 60 par. 3 of Lawyers' Code the assignment of a portion of the claim to cover the lawyer's fees must be notified to the debtor by informing them of the relevant agreement at any time before the claim is paid.

2.5 *Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs*

Not applicable in Greece.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Not applicable in Greece.

2.7 Obligations of funders towards beneficiaries and vice-versa

Not applicable in Greece.

2.8 Distribution of awards and bearing adverse costs in lost cases

In Greek civil procedure, the distribution of awards and the bearing of adverse costs in lost cases are governed by specific provisions aimed at allocating the financial responsibilities associated with litigation. According to Article 173 of Civil Procedure Code, the party initiating the main or ancillary proceedings must advance the fees associated with these proceedings. Any party filing an appeal is responsible for advancing the fees for the first discussion of the appeal. In alimony proceedings, the party obligated to provide alimony may also be required to advance the plaintiff's costs, up to €300, at the judge's discretion. For cases involving certain serious crimes, the defendant may be required to advance the plaintiff's costs up to €600, at the judge's discretion.

If the law does not specify the exact costs to be advanced, Article 174 of Civil Procedure Code states that the judge presiding over the case determines them. Receipts for advanced fees and expenses must be submitted to the court registrar when the case is heard, or an action is attempted.

According to Article 175 of Civil Procedure Code, if a party fails to advance the required fees and costs, they are considered to have failed to appear in court. The principle of defeat, outlined in Article 176 of Civil Procedure Code, typically requires the losing party to pay the costs. If an application is dismissed, the applicant is deemed to have been unsuccessful.

In cases of partial victory and partial defeat, Article 178 of Civil Procedure Code specifies that the court will apportion costs proportionately. The judge may impose the entire costs on one party if the portion rejected by the other party is minimal or if the claim amount depended on judicial discretion or expert assessment. Special cases, covered under Article 179 of Civil Procedure Code, allow the court to set off costs in disputes between spouses or close relatives, or where the legal interpretation was particularly difficult. Article 180 of Civil Procedure Code addresses situations involving multiple parties; if several parties are ordered to pay costs, they share equal liability, but the court may apportion costs based on each party's share in the dispute.

For appeals, Article 183 of Civil Procedure Code mandates that costs for bringing and hearing an appeal are borne by the losing party, whether the appeal is accepted or rejected. Defaults and postponements are dealt with in Article 184 of Civil Procedure Code, which imposes costs on the party responsible, unless caused by the opposing party. Court settlements are typically borne equally by both parties unless they agree otherwise, as stated in Article 187 of Civil Procedure Code. Article 188 of Civil Procedure Code specifies that if a procedural act is withdrawn or waived, the withdrawing party bears the costs. If an action is accepted, costs are awarded against the accepting party.

Only necessary court costs for the conduct and defense of the trial are awarded, including stamp duties, lawyer fees, and expenses for witnesses and experts, as per Article 189 of Civil Procedure Code. The court includes the obligation to pay costs in its final decision, specifying the amount if the list of costs has been submitted, according to Article 191 of Civil Procedure Code.

The above-mentioned provisions ensure that the financial burden of litigation is distributed fairly, holding the losing party accountable for costs while providing mechanisms to determine and advance necessary fees. The aim of the Greek legislator is to promote fairness and accountability in legal proceedings.

2.9 Planned legislation

There is not any planned legislation in Greece.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	N/A
Capital adequacy (Art.6)	N/A
Fiduciary duty (Art.7)	N/A
Powers of supervisory authorities (Art.8)	N/A

Investigations and complaints (Art.9)	N/A
Coordination between supervisory authorities (Art.10)	N/A
Content of third-party funding agreements (Art.12)	N/A
Transparency requirements and avoidance of conflicts of interest (Art.13)	N/A
Invalid agreements and clauses (Art.14)	N/A
Termination of third-party funding agreements (Art.15)	N/A
Disclosure of the third-party funding agreement (Art.16)	N/A
Review of third-party funding agreements by courts or administrative authorities (Art.17)	N/A
Responsibility for adverse costs (Art.18)	N/A
Sanctions (Art.19)	N/A

3. Practical operation of TPLF in your jurisdiction

Due to the lack of specific regulations governing third-party litigation funding in Greece and the absence of its practical implementation, all of the requested data of this section are currently unavailable. It should be noted that all interviewees confirmed both the absence of an appropriate legal framework and the non-implementation of TPLF in Greece.

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Not applicable.

b. Minimum claim value in absolute terms (in million Euro)

Not applicable.

c. Typical claim value in absolute terms (in million Euro)

Not applicable.

d. Typical ratio between investment by the funder and claim value

Not applicable.

e. Typical size of the investment by the litigation funder (in million Euro)

Not applicable.

f. Origin of funding provided by the litigation funder

Not applicable.

g. Share of compensation awarded typically demanded by litigation funders

Not applicable.

h. Other conditions of the litigation funding agreement

Not applicable.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Not applicable.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Not applicable.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

Not applicable.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Not applicable.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

Not applicable.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

Not applicable.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Not applicable.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Not applicable.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

Not applicable.

- *Limited liability*
- *Conditional liability*
- *No liability*

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Not applicable.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Not applicable.

4. Stakeholder views on TPLF in your jurisdiction

The stakeholder views on the measures in the draft directive annexed to the EP resolution and the current practices in Member States reveal a range of perspectives on TPLF. The interviewees, representing consumer organizations, academics, and legal professionals, consistently reported no direct involvement in TPLF cases within the EU and were generally unaware of litigation funders operating in Greece. They also noted a lack of existing TPLF legislation, highlighting a regulatory gap. A consumer organization representative further explained that funding for consumer associations in Greece is strictly regulated and does not include TPLF, relying instead on membership fees, government subsidies, and other limited sources.

Regarding the effects of TPLF, stakeholders identified both positive and negative impacts. On the positive side, TPLF was seen as a valuable tool that improves access to court procedures for parties unable to afford litigation costs, providing essential infrastructure and digital tools to support collective actions. Legal professionals noted that TPLF can act as a deterrent against companies engaging in unfair practices or marketing unsafe products, thereby enhancing consumer protection. However, concerns were raised about potential negative effects, such as funders seeking access to confidential information through court-ordered disclosures, which could compromise ethical standards in litigation.

When considering alternatives to TPLF, such as legal aid, public funds, philanthropic funding, crowdfunding, and legal cost insurance, most interviewees agreed that these could potentially be as effective in facilitating access to justice. However, a representative from a consumer organization pointed out that these alternatives are rarely available in practice, suggesting a gap between theoretical options and their practical application.

Opinions on the effectiveness of extrajudicial procedures, such as ADR, ODR, public or private Ombudsman services, and company-managed grievance systems, were mixed. Consumer advocates acknowledged the value of ADR/ODR as a cost-effective and efficient pathway for low-value claims but argued that these mechanisms might lack the resources and capacity to handle complex collective actions. On the other hand, some academics and legal professionals viewed ADR mechanisms as potentially offering faster and more adequate compensation in certain contexts, though they emphasized that these methods are not always directly comparable to TPLF-supported litigation.

The economic impact of TPLF, such as increased costs of litigation or legal insurance, was largely unobserved by the interviewees, suggesting that TPLF's influence on broader economic factors cannot be estimate in Greece given the lack of TPLF application.

Stakeholders expressed differing views on the need for regulation of TPLF. A consumer organization representative argued that current frameworks provide adequate oversight and that further regulation could create unnecessary barriers, potentially limiting funding options without addressing real issues, such as the insufficient availability of funds for consumer associations. Conversely, other stakeholders, including academics and legal professionals, highlighted the absence of TPLF legislation in Greece, and advocated for regulation at the national or EU level. They stressed the need for clear legal guidance on fundamental aspects of TPLF.

Regarding the effectiveness of the measures in the draft directive annexed to the EP resolution, opinions were divided. Some stakeholders were critical, arguing that the proposed measures might impose unnecessary restrictions, particularly in contexts where TPLF has not posed significant issues. A consumer organization representative noted that the real challenge lies in the lack of funding for consumer associations, and additional regulations might only serve to exacerbate this problem. In contrast, other interviewees generally supported the proposed measures, especially those focused on transparency, conflict of interest avoidance, and oversight of funding agreements. However, there were concerns about specific measures, such as the termination of funding agreements and court or administrative review processes, which some stakeholders viewed as potentially ineffective or insufficiently detailed.

To address these concerns, one academic suggested that a more specific regulation outlining the procedural effects of TPLF, particularly concerning the conclusion and termination of agreements, would be beneficial. They criticized the draft directive annexed to the EP resolution as overly general and argued that clearer, more detailed guidelines would help legislative bodies within Member States navigate the complexities of TPLF regulation effectively.

In conclusion, the interviews highlighted a range of stakeholder perspectives on TPLF and the proposed measures in draft directive annexed to the EP resolution. While there is broad recognition of TPLF's role in enhancing access to justice, stakeholders emphasized the need for a balanced approach that fosters fairness and transparency without stifling funding opportunities. Going forward, the development of clearer and more specific regulatory frameworks at both the national and EU levels may be necessary to address stakeholder concerns and ensure that TPLF operates within ethical and effective parameters.

Table of legislation

Civil Procedure Code as consolidated by Presidential Decree 503/1985, Government Gazette A' 182

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A Tsavdaridis, 'Three's a Crowd? Third-Party Arbitration Funding' (Lexology, 20 July 2024) https://www.lexology.com/library/detail.aspx?g=5e0ce6b3-c8e0-4b18-842f-03a7614c40aa accessed 21 August 2024

Hungary

Dr Andrea Fejős, University of Essex

Executive Summary

- Hungary has no current or planned legislation to regulate third party litigation funding (TPLF)
- Doctrinal discussion is absent.
- There have been no notable cases and TPLF is generally unknown to courts
- The interviewees were enthusiastic about the potential of TPLF to enable access to courts for a range of disputes, including commercial law and consumer law areas.
- TPLF is entirely unregulated in Hungary, and as such there are no rules on admissibility and conditions for using TPLF in civil litigation.
- There is no dedicated regulatory body to oversee the TPLF industry and no specific capital adequacy rules.
- The relationship between the funders and the beneficiaries is regulated by contract. Without lex specialis rules, there is no specific intervention in this contractual relationship. The content of funding agreements may significantly vary.
- In the absence of specific rules, there are no procedural safeguards against conflict of interest, and that would deal with questions of transparency, disclosure and costs.
- In the absence of specific rules, the existence of a funding agreement between the party to the dispute and the funder does not have to be disclosed to the court, and possibly cannot be approved by the court. These matters are settled in the contract, and general contract law rules apply. Courts are not familiar with TPLF.
- In the absence of specific rules, the court cannot refer to third parties for cost allocation, the judgment is not enforceable in relation to the third- party funder.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

No. In Hungary, there is no specific legislation (lex specialis) nor specific provisions in the existing legislation of more general applicability (lex generalis) that would deal with TPLF.

Neither have there been notable disputes arising from TPLF.[522]

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Although there is no legislation, the number of cases suitable for TPLF is believed to have risen in recent years. These are especially competition damages claims.[523] The several cases that involved TPLF in the past were competition law claims and damages claims.[524]

In the absence of specific rules, theoretically, all types of cases are eligible for TPLF.[525]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are no major players on the market, some investment firms and consultancy firms offer litigation finance on a case-by-case basis.[526] The news reported in 2020 that DLA Piper teamed up with London based Aldersgate Fund[527] to provide litigation funding for DLA Piper Hungary clients, including the potential of covering 100% of the costs. There also seems to be a specialised litigation funding company, CREDITALE[528] a German company that specialises in financing competition law cases that advertises on the Hungarian market. TPLF funders are usually companies based abroad.[529]

Some law firms openly advertise to act as intermediaries to find litigation funders.[530]

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[522] Dániel Dózsa, 'Queritius Litigation Funding Comparatie Guide' (Mondaq, 14 November 2023), available at <https://www.mondaq.com/finance-and-banking/1285388/litigation-funding-comparative-guide> accessed 27 September 2024

[523] Ibid

[524] Ibid

[525] Ibid

[526] Ibid

[527] 'Perfinanszírozási alapot indít ügyfelei számára a DLA Piper' (Üzletem.hu, 14 August 2020) available at <https://uzletem.hu/jogadokonyveles/perfinanszirozasi-alapot-indit-ugyfelei-szamara-a-dla-piper> accessed 27 September 2024

[528] CREDITALE, 'Frequent Questions and Answers' available at <https://www.creditale.com/en/litigationfunding-faq.html>accessed 27 September 2024

[529] István Varga, Viktor Előd Cserép, 'Hungary in Litigation 2024' (Chambers and Partners, 5 December 2023) available at <https://practiceguides.chambers.com/practice-guides/litigation-2024/hungary> accessed 27 September 2024;

[530] See e.g. Szecskay Law Firm available at <https://szecskay.com/hu/expertise/vitarendezes/> accessed 27 September 2024; LFB Law Firm available at <https://lfblegal.hu/en/what-we-do/>accessed 27 September 2024

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No official statistics or other sources could be used to obtain statistical data.

It is believed there were a few cases and that TPLF is not yet prevalent in Hungary.[531]

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is no significant doctrinal discussion on TPLF in Hungary.

The search of keywords 'third party funding' and 'perfinanszírozás' (litigation funding, the term that is used more broadly to depict third party funding in Hungary) was entered into key databases: "matarka.hu', 'szakkcikkadatbazis.hu' and the Hungarian Parliamentary Collection, which individually and together provide comprehensive access to academic writing, including research papers and books. In addition, an online search was undertaken with the above keywords and other related words to look for anything not included in the databases. It seems that only four papers in Hungary focus on this topic. Most of the writing discusses the solutions for TPLF in other countries, and only the paper by Boros discusses the Hungarian situation significantly.[532] The paper by Kárpáti has some mention[533], and Meier's two papers focus on the Swiss situation and are written from a practitioner's perspective.[534]

The area of collective redress is well-researched, and some academics refer to TPLF in their writing.[535]

The main points raised by academia are the following:

- Kárpáti talks about the potential of regulated TPLF to increase Hungary's competitiveness in the region hosting international commercial arbitration proceedings.[536]
- Boros highlights the usefulness of TPLF in enabling Hungarian citizens to have access to justice as their constitutional right.
- Udvary raises the problem of abusing TPLF for pursuing competition law violations by a competitor or its proxy.[537]

[531] Dózsa.
[532] Sándor Boros, 'Third party funding Magyarországon és az angolszász jogrendszerben' [2022] 11 Jogtudományi Közlöny 442
[533] Péter Kárpáti, 'A perfinanszírozás egyes kérdései a nemzetközi választott bírósági eljárásokban' [2022] 8 (4) Fontes Iuris 37
[534] Katalin Meier'A perfinanszírozás kérdése svájci szemszögből' [2017] 17 (2) Európai Jog 17; Katalin Meier, 'A perfinanszírozás kérdése a nemzetközi választottbírósági eljárásokban svájci szemszögből' [2017] 61 (7-8) Külgazdaság 85
[535] E.g. Sándor Udvary, 'Collective litigation tools in the Hungarian legal system' in Rita Simon and Hana Müllerová (eds), *Efficient Collective Redress Mechanism in Visegrad 4 Countries; An Achievable Target?* Rita Simon and Hana Müllerová (eds). (Institute of State and Law of the Czech Academy of Sciences, 2019) available at <https://www.ilaw.cas.cz/upload/web/files/books/Visegrad_Manuscript.pdf>accessed 27 September 2024
[536] Kárpáti 43-44
[537] Udvary 91

While less academically discussed, TPLF is an important practical question. The online search revealed several blog writings, mini-reports or information on the websites of law firms that discuss TPLF.[538]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

No. There is very little discussion on doctrinal and the above search did not reveal any debate about TPLF on a political level. The question is mostly discussed by practitioners, as mentioned above.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

TPLF is entirely unregulated in Hungary, and as such, there are no rules on the admissibility and conditions for using TPLF in civil litigation. The main procedural rules applicable to TPLF are in Act CXXX of 2016 on the Code of Civil Procedure.[539]. Without specific rules, the relationship between the funder and the beneficiary is regulated by the contract between them, including whether to disclose the existence of TPLF. Hungarian courts have no rights related to that contract without specific provisions to this effect.

The Civil Procedure Act is the main act that contains procedural rules, whether it is an individual or a collective action. It introduced the category of collective actions and public interest actions (actio popularis). These can be commenced for claims arising out of:

- Consumer contracts
- Employment contracts
- Environmental claims, damages caused by environmental pollution

Public interest lawsuits can only be initiated upon specific statutory authorisation for the protection of rights of a determinable group of people. Typically, this statutory authorisation will be in the act that regulates the substance of the claim, which provides the legal basis for the action.[540] For

[538] Dózsa; Istvan Varga, Cserép; LexMundi (no contributor names), Hungary in Lex Mundi Global Attorney-Client Privilege Guide (25 March 2020) <https://www.lexmundi.com/guides/lex-mundi-global-attorney-client-privilege-guide/jurisdictions/europe/hungary/>accessed 27 September 2024; Bird &Bird, Hungary has already a collective action regime in place at <https://www.twobirds.com/en/trending-topics/consumer-class-actions/current-collective-action-landscape-map/hungary>accessed 27 September 2024; Rebeka Hevesi, Zsolt Okanyi, CMS, Class actions in Hungary (3 February 2022) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/hungary>accessed 27 September 2024

[539] 2016. évi CXXX. törvény a polgári perrendtartásról available at <https://net.jogtar.hu/jogszabaly?docid=a1600130.tv> accessed 27 September 2024

[540] See for more Andrea Fejős and Ágnes Herczeg, Hungary-Report in State of Collective *redress in the EU* (European Commission, 2017) available at <https://ec.europa.eu/newsroom/just/items/612847/en*in the context of the implementation of the Commission Recommendation>accessed 27 September 2027*

instance, for consumer claims, Act V of 2013 on the Civil Code[541] contains rules on collective actions against the use of unfair terms.

For collective representative actions in consumer disputes, Act CLV of 1997 on Consumer Protection[542] is the first legislative act in Hungary that mentioned TPLF. This act implemented Directive 2020/1828. Article 10 of the Directive is included into Article 38/E that was inserted into Act CLV of 1997 with Act LXI of 2022; in force from 25 June 2023. The Hungarian solutions are aligned with the Directive's.

Connected to civil litigation is an arbitration proceeding based on Act LX of 2017 on Arbitration.[543] Neither these nor the Rules of Procedure of the Permanent Court of Arbitration[544] at the Hungarian Chamber of Commerce and Industry of 2019 regulate TPLF.

2.2 Regulatory oversight of funders/funding industry

There is no dedicated regulatory body to oversee the TPLF industry. Depending on what kind of firm acts as TPLF, the following rules might apply:

1) Credit institutions and financial enterprises

Act CCXXXVII of 2013 on credit institutions and financial enterprises[545] regulates financial institutions that are credit institutions and financial enterprises. These provide financial services listed in Article 3:

a) taking deposits and receiving other repayable funds from the public;

b) credit and loan operations;

c) financial leasing;

d) money transmission services;

e) issuance of electronic money;

f) issuance of paper-based cash-substitute payment instruments (for example traveler's checks and bills printed on paper) and the provision of the services related thereto, which are not recognized as money transmission services;

g) providing surety facilities and guarantees, as well as other forms of banker's obligations;

h) commercial activities in foreign currency, foreign exchange - other than currency exchange services -, bills and checks on own account or as commission agents;

i) financial intermediation services;

j) safe custody services, safety deposit box services;

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[541] 2013. évi V. törvény a Polgári Törvénykönyvről available at <https://njt.hu/jogszabaly/2013-5-00-00>accessed 27 September 2024

[542] 1997. évi CLV. törvény a fogyasztóvédelemről available at https://net.jogtar.hu/jogszabaly?docid=99700155.tv

[543] 2017. évi LX. törvény a választottbíráskodásról available at <https://net.jogtar.hu/jogszabaly?docid=a1700060.tv> accessed 27 September 2024

[544] MKIK VB Eljárási szabályzat 2019 available at <https://mkik.hu/mkik-vb-eljarasi-szabalyzat2019-09-01>accessed 27 September 2024

[545] 2013. évi CCXXXVII. törvény a hitelintézetekről és a pénzügyi vállalkozásokról available at <https://njt.hu/jogszabaly/2013-237-00-00>accessed 27 September 2024

k) credit reference services; and

l) purchashing receivables.

They also provide financial auxiliary services:

a) currency exchange activities;

b) operation of payment systems;

c) money processing activities;

d) financial brokering on the interbank market;

e) activities for the issue of negotiable credit tokens.

Credit institutions can also pursue insurance mediation services in addition to financial services (Section 7(b) in which case they will be defined as financial enterprises (Section 9(1)(a)).

Section 2 provides some exclusions. TPLF is not explicitly mentioned and cannot be inferred from any of the exceptions.

Given the detailed list of financial and auxiliary services, TPLF needs to fall under these to be within the scope of the Act. If within the scope, the financial institution must be authorised to provide the specific service and will be subject to the usual conduct of business and prudential supervision by the Hungarian National Bank.

TPLF does not currently fall under any of the categories above,[546] however, parts of the service provided by TPLF may be covered by the above, such as the provision of loans, guarantees and deposit services or acting as a financial intermediary.[547]

2) Insurance undertakings

TFPL may be provided by insurance companies. In that case, Act LXXXVIII of 2014 on insurance business[548] applies. The Act regulates insurance and reinsurance services offered by companies domiciled in Hungary and the insurance services they provide. Insurance companies must be authorised, and their operation is supervised by the Hungarian National Bank. In this case, TPLF would have to be classified as an insurance product, and the rules of part 3 of the act would apply. This includes minimum requirements related to the contract's content (section 121), and firms have prudential capital maintenance requirements.

3) Law firms

Act LXXVIII of 2017 on the professional activities of attorneys-at-law[549] regulates the provision of legal services and the organisations performing the professional activities of an attorney-at-law as well as the oversight of professional activities by the Hungarian Bar Association.

The professional activities of attorneys-at-law are listed in Section 2(1) to include legal representation, legal counselling, document drafting etc, the list is exhaustive and litigation funding is not mentioned. Section 3(1) lists ancillary professional services of attorneys of law, such as

[546] Dózsa

[547] Varga, Cserép

[548] 2014. évi LXXXVIII. törvény a biztosítási tevékenységről available at <https://njt.hu/jogszabaly/2014-88-00-00>accessed 27 September 2024

[549] 2017. évi LXXVIII. törvény az ügyvédi tevékenységről available at <https://njt.hu/jogszabaly/2017-78-00-00>accessed 27 September 2024

insurance consultancy or fiduciary asset management. However, none of these talk about litigation funding for investment purposes. This leads to the conclusion that law firms cannot act as litigation funders.

4) Investment funds

Investment funds as potential litigation funders are not explored in theory or in practice. Collective investment funds are regulated by government Decree 78/2014 on investment and leading rules of collective investment forms.[550] The decree has been recently modified, with changes coming into effect on 1 July 2024. As a result, there are four main types of funds based on their primary asset categories: securities funds, real estate funds, venture capital funds and mixed funds (Section 1/B). In addition, there are a total of fourteen categories of investment funds within the four types (Section 1/C). These categories were already known in the market, and some of the categories were previously regulated. [551] The new decree provides separate asset composition and ratio rules for each investment fund category. For instance, equity funds must invest at least 80% of their assets in shares, and the majority of the funds must invest in some form of government bonds up to at least 3%-5% of their assets. Litigation funding is neither excluded nor specifically included in the Decree. However, the activity will have to fit under the existing collective investment forms and comply with the asset composition ratio rules. Investment funds are supervised by the Hungarian National Bank based on Act CXX of 2001 on Capital Markets and are subject to capital adequacy rules.[552]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

No capital adequacy requirements are specially designed for TPLF firms; however, if a firm qualifies as a credit institution, a financial enterprise, an investment firm or an insurance undertaking, relevant capital maintenance requirements will apply, as above. Litigation funding will have to fall under one of the activities regulated by the acts, i.e. be classed as a credit activity or an insurance product and, as such, will be subject to capital requirements that apply to the relevant product or service, which might not consider the special features of litigation funding.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

The relationship between the funders and the beneficiaries is regulated by contract. Without lex specialis rules, there is no specific intervention in this contractual relationship. The general rules in the Civil Code apply, some of which are relevant to TPLF.

[550] 78/2014. (III. 14.) Korm. rendelet a kollektív befektetési formák befektetési és hitelfelvételi szabályairól available at <https://njt.hu/jogszabaly/2014-78-20-22>accessed 27 September 2024

[551] Erika Papp, Eszter Török, 'Hungary established categorisation of investment funds and introduces new investment rules' (CMS Law-Now, 22 March 2024) available at <https://cms-lawnow.com/en/ealerts/2024/03/hungary-establishes-categorisation-of-investment-funds-and-introduces-new-investment-rules>accessed 27 September 2024

[552] 2001. évi CXX. törvény a tőkepiacról avalable at <https://njt.hu/jogszabaly/2001-120-00-00>accessed 27 September 2024

Unfair terms/abusive clauses

Directive 1993/13/EC on Unfair Contract Terms is implemented into the Civil Code in a way to extend the scope of application of its rules onto business-to-business contracts. Section 6:102 regulates unfair contract terms and Section 6:103 regulates unfair contract terms in consumer contracts. Section 6:102 contains the test of fairness, the exception for the main subject matter and the adequacy of the price, the mandatory terms exception and the circumstances to consider when assessing the unfairness of the term. These implement the Directive verbatim and are only applicable to standard terms. Breaching the terms of Section 6:102 makes the contract avoidable. Section 6:103 contains provisions applicable only to consumer contracts, containing departures from the Directive and making the terms contrary to this provision void. The terms in a consumer contract are void if they are found unfair because they are not transparent, and the applicability of the rules is extended to individually negotiated terms. Section 6:104 contains the indicative list of unfair terms that apply only in consumer contracts, and the provision's wording would suggest a black list rather than a grey list. Section 6:105 and Section 6:106 attach actio populis to the provisions laying down the substantive rules for consumer contracts and commercial contracts, respectively.

The above consumer protection rules would only apply if the TPLF contract is concluded by the consumer as one of the contracting parties. The notion of the consumer is not defined in the Civil Code, but looking at other available definitions, the conclusion would be that a consumer is a natural person who concludes the TPLF contract outside their trade, profession or business; in other words, for financing a dispute that arose from their consumer contract. Consumer protection provisions clearly emerged for small transactions that consumers conclude for their own consumption and on their own without legal and professional advice. However, in the absence of specific exclusion to the effect of high-value transactions, or legal advice, we should assume that the rules apply for TPLF contracts that are concluded with the help of a lawyer and that are for higher-value transactions, provided the contracting party is a consumer, within the meaning of the above definitions.

Transparency

In terms of transparency, Section 6:62(1) may be relevant, which contains the principle of mutual cooperation and a duty to inform, which binds the parties during negotiation, during contract conclusion, during the performance of the contract and after the ending of the contract. Following the conclusion of the contract, the party who suffers loss due to a breach of this principle will have a right to obtain damages. Although this duty is mandatory, the parties cannot exclude it; it only extends to important circumstances related to the contract. What is an important circumstance of the TPLF contract will depend on the court's interpretation.

Act 2017 of LX does not contain rules on transparency.

Conflict of interest

The Civil Code contains no rules on contracts related to conflict of interest, and as per below, there are no procedural safeguards against conflict of interest in TPLF arrangements.

Assignment of claims

Assignment of claims is an important practical problem and a well-researched area in Hungary, however, without establishing a connection with TPLF.[553] Albeit not used for TPLF, it has a potential to play a role. The Hungarian Civil Code in Chapter XXVIII regulates the assignment of claims

[553] See e.g. Páter Gárdos *Az engedményezés* (Elte Eötvös Kiadó Kft., 2010)

(engedményezés), in principle declaring freedom to assign claims (Section 6:193(1)), but the subject of the assignment is the specific claim and not a position in the original contract itself.[554] Given this limitation, the Hungarian Civil Code seems to support the 'sale of claim' when the funder would effectively purchase the claim and then pursue its performance in its own right, which does not support TPLF.[555]

If legal constructions whereby the assignment of claims can be used for TPLF following the 'assignment of claims for collection only' model[556] is also possible but further rules are applicable, An important restriction is, also in the context of TPLF, that claims linked personally to the assignee cannot be assigned to third parties.

A type of contract connected to an assignment contract is a factoring contract. Factoring is similar to assignment contracts as in both contracts the claim is being assigned to a third party. The difference between the two is that an assignment contract is usually used for a one-off assignment, whereas factoring is used for assigning continuous claims, the proceeds of which belong to the party who assigned the right to collect.[557] Given its continuous nature, it comes closer to the 'assignment of claims for collection only' construction, which is a possible legal construction for TPLF. However, factoring contracts trigger the entering of the debtor's identity into the security interest register. In the absence of registration, the claim shall not pass to the factor despite the assignment, and the factor shall have the same rights on the claim as a pledgee whose lien established upon a claim has not been registered in the security interest register (Section 6:406). Given this limitation, the funder might have no incentive to use this construction for TPLF.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

In the absence of specific rules, there are no procedural safeguards against conflict of interest, and that would deal with questions of transparency, disclosure and costs.

In Hungary, costs incurred in relation to the lawsuit include:

- procedural fees
- lawyers fees
- the cost of evidence taking, e.g. expert fees, and
- any other costs such as translation costs.

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[554] See Péter Gárdos, 'Gondolatok az engedményezés megújult szabályairól' [2023] 9-10 Gazdaság és Jog 3, see also SmartLegal Schmidt and Partners, 'Hungary: What claims can the assignee litigate against the debtor?' available at <https://www.smartlegal.hu/publication/hungary-what-claims-can-the-assignee-litigate-against-a-debtoré>accessed 27 September 2024

[555] 'Sale of claim' means that the claim is purchased outright and pursued by the purchaser in return for a price. Jérôme Saulnier, Klaus Müller with Ivona Koronthalyova, 'Responsible private funding of litigation. European added value assessment' (European Parliament, March 2021) 44 available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf>accessed 27 September 2024

[556] 'Assignment of claims for collection only' means that a claim is assigned by the creditor to a third party for purposes of collection in return for a fee. Ibid

[557] Péter Miskolczi Bodnár 'Egyes atipikus szerződések' [1997] 5 (1) Gazdaság és Jog 8

In the absence of TPLF rules, TPLF agreements can include all the above costs, and to even extend to enforcement costs.[558]

The court will allocate all costs in proportion to the win. e.g. is 60% of the claimed amount is awarded to the claimant, 60% of the claimant's costs will be covered by the defendant, whereas 40% of the defendant's costs will be covered by the claimant. There are correction mechanisms in place. For instance, if the expense was caused unreasonably by one of the parties, it must bear that expense irrespective of the final decision. There are also various cost allowances based mainly on social background; and specific regulations apply to state-related parties which can modify the sum of the incurred costs (depending on the type of allowance).[559]

Based on Section 17 of Act LXXVIII of 2017, which regulates attorneys' fees, the general principle is that the attorney fees are determined freely between the parties to the contract, and the fee can also be agreed to be lumpsum. Success fees (ügyvédi tevékenység eredményességéhez köttött munkadíj) are explicitly permitted by Section 17(3); however, any fees higher than 2/3rd of the total of attorney fees (ügyvédi megbízasi díj) are not enforceable. The agreed success fee includes the attorney fees (fees chargeable by attorneys for the work they have performed) without the costs of the procedure, which are payable as part of the attorneys' fees, and that part of the attorneys' fees, which the attorney renounced without compensation. Success or contingency fees are neither explicitly allowed nor prohibited in the 32/2003 Decree of the Ministry of Justice on lawyers' fees[560] in the court process, used by courts to rule on the costs of the process.

The wording 'ügyvédi tevékenység eredményességéhez köttött munkadíj' allows for both success fees and contingency fees. Scholars and practitioners usually refer to contingency fees only.[561] Dózsa differentiates the two, referring to success fees with the above cap, and pointing out the market standard of contingency fees, which is around 10-20%[562]

Success fees are usually proposed if:

- The case is complex and considering the claimed amount, the legal fees would be disproportionate,
- The claimed amount is extremely high, when firms typically offer discounted rates for possible future profits.

Success fees are most commonly used as a risk-sharing tool by law firms.[563] Apart from larger commercial disputes, in practice, lawyers' preference seems to be on hourly rate fees, which are not outcome or success dependent, given that the outcome of the process is often difficult to foresee, especially if the outcome is dependent on expert opinion.

Damages- based agreements are also possible.[564]

In the absence of specific rules, TPLF fees are not regulated nor capped. Given that courts are not concerned with the source of funding and do not consider TPLF, the costs of acquiring TPLF (e.g. administrative costs to apply for such funding) cannot be recovered when the costs are allocated by

[558] Verga, Cserép
[559] Dózsa
[560] 32/2003. (VIII. 22.) IM rendelet a bírósági eljárásban megállapítható ügyvédi költségekről <https://njt.hu/jogszabaly/2003-32-20-06>accessed 27 September 2024
[561] Varga, Cserép, Udvary 92
[562] Dózsa
[563] Ibid
[564] Ibid

the court.[565] Likewise, the court cannot render a decision that would involve a third- party litigation funder.[566]

In fact, it may be relevnt that according to Section 17(2) of Act LXXVIII of 2017 without the consent of the obligor, attorneys' fees and expenses claims cannot be assigned to third parties who are not entitled to know attorney-client privileged information that is necessary to enforce such claim (except if an enforceable deed has been issued for the claim).[567]

It may also be relevant for TPLF cases that in limited situations, courts may also order the claimant to provide security for procedural costs.

1) this would apply when the claimant is not a resident of Hungary and the defendant so requests. Exceptions apply in case of a specific provision to this effect in an international agreement, when the court grants the claimant full cost exemption or in case of some specific lawsuits. The court will specify the amount of security required, considering the defendant's foreseeable costs and the amount of claim already accepted by the defendant.
2) the other case is when the claimant submits a request for an interlocutory injunction, and the other party demonstrates the possibility that the ordering of the injunction would influence its position, potentially giving rise to damages claim in case of the claimant's successful injunction claim.

Security is a special procedural measure and may be provided in cash, bank guarantees, securities, or non-cash instruments. [568]

After the event (ATE) insurance is not prohibited but is not usually used. Insurance packages covering legal costs are generally limited to certain predetermined activities (e.g. car accidents) or types of contracts (e.g. employment contracts).[569]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

In the absence of specific rules, the existence of a funding agreement between the party to the dispute and the funder does not have to be disclosed to the court and possibly cannot be approved by the court. These matters are settled in the contract, and the rules of the Civil Code will apply.

Given that funders are not party to the dispute, courts have no power to make decisions that would affect them.

Under Hungarian law, only the claimant has standing to pursue a legal claim. Therefore, the claim must be assigned to the funder to be a party to the dispute. In principle, as above under 2.4, there are no legal limitations on the assignment of claims, which are regulated by the Civil Code.[570] Funders who do not have claims assigned to them are not a party to the dispute. They can only attend hearings as a public audience, if allowed.[571]

[565] Dózsa, Udvary 92
[566] Dózsa
[567] Varga, Cserép
[568] Dózsa
[569] Ibid
[570] Ibid
[571] Ibid

Agreements on specific contract terms that are typical for TPLF contracts, such as veto rights, e.g. on a choice of legal counsel or on the rights of the funder to influence the litigation, may be valid if they are not contrary to the general rules on contract, especially unfair terms. However, given that these clauses are very specific, the enforceability of such contract clauses is uncertain.[572]

Equally, the applicability of the rules of damages for breach of contract (including liquidated damages clauses) for breaching funding agreements has not yet been tested by Hungarian courts.[573]

2.7 Obligations of funders towards beneficiaries and vice-versa

In the absence of specific rules, this relationship is regulated via a contract between a funder and a beneficiary, and these may significantly vary.[574]

There are no procedural safeguard that would protect the parties to the contact, or that would empower the litigation funder to protect their investment by exercising influence over the dispute. For instance, there are no rules on whether the funder can terminate the legal finance contract before the end of the litigation or rules on forcing the litigant to comply with the terms of the contract.[575]

The absence of specific rules also means that both claimants and defendants can use TPLF, and both types appear in practice.[576]

Finally, there may be a relevant procedural principle that potentially limits the applicability of TPLF. Section 2(1) proclaims as one of the fundamental principles of Hungarian civil procedure the principle of free disposition, according to which parties are free to dispose of the claims they raise in court proceedings. This unwritten rule amounts to the spirit of Hungarian law that prohibits third-party standing, which essentially means the prohibition of interference of these parties into the dispute, which would, in the case of TPLF mean minimal interference in procedural matters such as a right to appeal.[577]

2.8 Distribution of awards and bearing adverse costs in lost cases

In the absence of specific rules, the general rule of the loser pays rule applies under Section 83(1) and (2) of the Civil Procedure Act. The court cannot refer to third parties for cost allocation; the judgment is not enforceable in relation to the third-party funder.[578] TPLF remains a legal transaction that remains a contractual matter between the parties and is outside the scope of the disputes to which they relate.[579] Boros finds this problematic, especially if the contract contains a provision that the costs of the other party are not included among the costs that the funder would cover.[580]

[572] Ibid
[573] Ibid
[574] Cf Ibid
[575] See Dózsa.
[576] Varga, Cserép
[577] Boros 450
[578] Ibid
[579] Dózsa
[580] Boros 450

2.9 Planned legislation

None

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	*NA*
Capital adequacy (Art.6)	*NA*
Fiduciary duty (Art.7)	*NA*
Powers of supervisory authorities (Art.8)	*NA*
Investigations and complaints (Art.9)	*NA*
Coordination between supervisory authorities (Art.10)	*NA*
Content of third-party funding agreements (Art.12)	*NA*
Transparency requirements and avoidance of conflicts of interest (Art.13)	*NA*
Invalid agreements and clauses (Art.14)	*NA*
Termination of third-party funding agreements (Art.15)	*NA*
Disclosure of the third-party funding agreement (Art.16)	*NA*
Review of third-party funding agreements by courts or administrative authorities (Art.17)	*NA*
Responsibility for adverse costs (Art.18)	*NA*
Sanctions (Art.19)	*NA*

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

We cannot speak of typical cases funded in Hungary, given that TPLF is in its infancy. However, the general conclusion derived from the interviews is (also confirmed by the scarce literature) that TPLF is more used in arbitration than in civil litigation cases. Given that 3/2013 Opinion on the Unification

of Law of the Supreme Court declares unfair[581] and thus null and void arbitration clauses in consumer contracts, arbitration cases using TPLF are business-to-business (commercial) cases.

b. Minimum claim value in absolute terms (in million Euro)

This question remained unanswered.

c. Typical claim value in absolute terms (in million Euro)

This question was not answered.

d. Typical ratio between investment by the funder and claim value

This question was not answered.

e. Typical size of the investment by the litigation funder (in million Euro)

This question was not answered.

f. Origin of funding provided by the litigation funder

It was noted that most funders would be companies resident outside Hungary.

g. Share of compensation awarded typically demanded by litigation funders

This cannot be answered.

h. Other conditions of the litigation funding agreement

NA

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

NA

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

NA

[581] 3/2013. számú PJE határozat, Kúria, available at <https://kuria-birosag.hu/hu/joghat/32013-szamu-pje-hatarozat>accessed 27 September 2024

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

NA

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Funding agreements are not disclosed to the courts. One of the interviewees with 25 years of experience as a judge has never come across a TPLF agreement in their work.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

NA

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

NA

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Based on the above research, this question would be settled in the contract.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Based on the above research, this is settled in the contract, and there are no other procedural or substantive safeguards as TPLF is not regulated.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

NA

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Based on the above research, ATE is possible, but it is not usually used, so the conclusion would be that TPLF contracts usually do not include ATE.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

There are no such examples.

4. Stakeholder views on TPLF in your jurisdiction

Stakeholder views vary depending on the area of law the stakeholder is specialised in. Those handling commercial cases are of the opinion that rules are not needed; these are powerful commercial parties who can negotiate and settle their own affairs in the contract. Any intervention into that relationship is, therefore, not necessary. Market forces will be sufficient to regulate that relationship. On the other hand, those, more consumer/weaker party focused who did not have in mind solely high-value commercial disputes with experts involved welcomed the draft directive annexed to the EP resolution and found many of its measures particularly useful. Should similar rules be adopted and perhaps TPLF more widely available, they saw great potential for TPLF to help access to justice for a range of disputes involving a range of parties, including consumers.

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Ireland

Prof David Capper, Queen's University Belfast

Executive Summary

- TPLF is currently illegal in Ireland on the grounds that it constitutes maintenance and champerty.
- Reform of the law is being considered following the issue of the Law Reform Commission's consultation paper, *Third-Party Litigation Funding*, in July 2023.
- Two statutory reforms to the law have been placed on the statute book but not yet brought into force. These anticipate the use of TPLF in international commercial arbitrations and representative actions on behalf of consumers if TPLF becomes legal.
- The view of the national report author and the interviewees is that most of the provisions of the draft directive annexed to the EP Resolution would be workable in themselves in Ireland. However this cannot be said for placing funders under fiduciary duties. Furthermore the overall level of regulation that the draft directive anticipates could result in TPLF in Ireland being stillborn in the event that it was legalised.

1. Introduction

There is no comprehensive existing legislation on TPLF in Ireland. As explained below TPLF is currently regarded as illegal. The issue has been the subject of a very comprehensive review by the Law Reform Commission[582] from which legislation may emerge. The current position with regard to that report is that it generated such a very significant response that the consultation period was extended. The Commission is currently considering the responses and will issue a further paper later that may contain recommendations.

In anticipation of potential change section 124 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 has inserted a new section 5A of the Arbitration Act 2010 allowing TPLF in international commercial arbitrations, but this provision has not yet been brought into force. Section 27 of the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 implements Article 10 of Directive (EU) 2020/1828 (the Representative Actions Directive) so that if TPLF becomes lawful in Ireland it will be regulated in accordance with that Directive. A little more detail will be provided on this legislation and the Law Reform Commission's report below.

It follows from the above that TPLF is not used in any cases in Ireland, there are no operating funders in the jurisdiction, and consequently no relevant statistics. There has been significant doctrinal discussion of TPLF in Ireland in the context of explaining why it is illegal. This in turn has led to considerable debate at doctrinal and political levels. The report now turns to this.

Case law on TPLF in Ireland

The starting point for any exposition of the law on TPLF in Ireland is the ancient common law doctrines of maintenance and champerty. The Law Reform Commission (LRC) defines maintenance as possessing the following four cumulative elements:-

(1) A person or entity is a party to a legal dispute;

(2) A person or entity who is not a party to that legal dispute ('the funder') assists the party in bringing or continuing that legal dispute;

(3) The funder does not have an independent and legitimate interest in the outcome of the legal dispute; and

(4) The funder cannot rely on one of the recognised exceptions to maintenance.[583]

Champerty is a sub-species of maintenance containing all four of the above elements with the following additional factor that the funder stipulates that they will receive a share of or profit from any award if the legal dispute is successful for the funded party.[584]

The Statute Law Revision Act 2007 preserves these doctrines as well as the crimes and torts of maintenance and champerty. This is in contrast to the position in England and Wales where sections 13(1) and 14(1) of the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty in that jurisdiction, although section 14(2) of the 1967 Act preserves the rule of public

[582] Law Reform Commission, *Third-Party Litigation Funding* (LRC CP 69 – 2023).
[583] Law Reform Commission, *Third-Party Litigation Funding* (LRC CP 69 - 2023), **2.5**.
[584] *Ibid*, **2.6**.

policy invalidating litigation support arrangements constituting maintenance and champerty.[585] In England and Wales the courts have developed the law on maintenance and champerty by judicial decision to the point where TPLF does not constitute maintenance or champerty so long as the funder does not attempt to take over the running of the litigation.

The Supreme Court of Ireland has recently held that the provision of financial support from a litigation funder to enable a party to civil litigation to bring civil proceedings in the ordinary courts constitutes unlawful maintenance and champerty.[586] This means that commercial TPLF is effectively illegal in Ireland so far as proceedings in the civil courts are concerned. Precisely how far this prohibition goes is not entirely clear. Contrasting views have been expressed in common law jurisdictions on whether non-court-based forms of dispute resolution such as arbitration are subject to maintenance and champerty,[587] although the Courts and Civil Law (Miscellaneous Provisions) Act 2023 – which inserts a new section 5A into the Arbitration Act 2010 - will provide that the offences and torts of maintenance and champerty do not apply to international commercial arbitration or in related proceedings.

Some forms of non-commercial litigation support would not be subject to the full rigour of maintenance and champerty. The LRC thought that crowdfunding would not be champertous as contributors would be earning no profit from their financial support.[588] Financial support from a family member or from charitable motives would not likely amount to maintenance unless a profit was to be derived in which case the support would cross the line demarcating maintenance from champerty.

There has been some judicial activity in Ireland regarding the action in tort for maintenance and champerty. In *O'Keeffe v Scales*[589] the Supreme Court refused to allow a case to be stayed on the ground that it was being unlawfully maintained. The defendant could sue the maintainer in tort after the proceedings were over. In *GE Capital Woodchester Ltd v Staunton Fisher Ltd*[590] Ms Justice O'Regan suggested that if it is clear and obvious that the maintained proceedings are an abuse of the process of the court, dismissal of the proceedings may be warranted. There seems to be no reported case where damages were awarded but damages were claimed in *GE Capital Woodchester*[591] and *Atlas GP v Kelly*.[592] In *GE Capital Woodchester* Ms Justice O'Regan doubted obiter comments in the House of Lords' judgment in *Neville v London Express Newspaper Ltd*[593] that damages for maintenance required proof of special damage. Damages would not be limited to the costs of the action.[594] LRC's research turned up no instances of prosecution for the crimes of maintenance and champerty in the history of the State.[595]

[585] Section 17 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 enacts essentially equivalent provisions for Northern Ireland as exist in England and Wales.
[586] *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27.
[587] *Ibid*, **2.9-2.16**.
[588] *Ibid*, **1.58**.
[589] [1998] 1 IR 290.
[590] [2016] IEHC 172, [38].
[591] [2016] IEHC 172.
[592] [2022] IEHC 443.
[593] [1919] AC 368.
[594] [2016] IEHC 172, [11].
[595] Law Reform Commission, *Third-Party Litigation Funding* (LRC CP 69 – 2023), **2.44**.

Lawyers in Ireland are permitted to enter into 'no foal, no fee' agreements with clients and these are commonly used in personal injury cases.[596] 'No foal, no fee' is a term borrowed from the horse breeding industry. If the lawyer does not secure a win in court or a favourable out of court settlement no fee is payable by the client. The client would still be liable to pay the successful defendant's costs although in many cases it would be practically impossible to recover them. This contrasts with the position in England and Wales, where lawyers are permitted to enter into conditional fee agreements with clients under sections 58 and 58A of the Courts and Legal Services Act 1990 and contingency fee agreements under the Damages-Based Agreements Regulations 2013. However any conditional or contingency fee arrangement that does not comply with the applicable statutory provisions is likely to be declared unenforceable on the grounds of maintenance and champerty.[597] The English position is that the statutory exceptions to maintenance and champerty do not permit further development of the common law. Courts in Ireland, despite being generally more hostile to litigation funding schemes tainted by maintenance and champerty, were freer here to make some concession to access to justice.

As an alternative to pursuing legal proceedings with the assistance of TPLF a litigant may prefer to assign the claim to a third party in exchange for some suitable payment. Frequently this would provide the assignor of the claim with a guaranteed payment and transfer the risk of the litigation being unsuccessful to the assignee. The Supreme Court's decision in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*[598] effectively eliminates assignment as a means of funding almost all civil claims. Only if the right to sue being assigned is for the enforcement of a property right or liquidated debt or the assignee has a pre-existing interest in the assignor's claim will the validity of an assignment be recognised. The courts consider that the assignment of a claim in other circumstances amounts to trafficking in litigation which is not to be encouraged. In *McCool v Honeywell Control Systems Ltd*[599] the Supreme Court considered that assigning a company's claim to its majority shareholder and managing director would probably be legitimate. In *Scully v Coucal Ltd*[600] the Court of Appeal held that a judgment obtained in Poland could not be enforced in Ireland under the recast Brussells Convention. The Polish judgment was vitiated by maintenance and champerty and this made its enforcement in Ireland contrary to public policy.

There is a long-standing exception to the prohibition on assignment that operates in favour of the liquidator of an insolvent company. Section 559 of the Companies Act 2014 includes within the property of a company in liquidation "any right of action by the company or liquidator under the provisions of this Act or any other enactment." Section 614 provides for the vesting of an insolvent company's property in the liquidator and section 627 allows the liquidator to sell company property by public auction or private contract. This allows the liquidator to assign a right of action to raise money for creditors. In the England and Wales Court of Appeal decision of *Re Oasis Merchandising Ltd*[601] it was held that the equivalent provision in that jurisdiction did not extend to rights of action specifically vested in the liquidator, such as avoidance provisions relating to preferences, transactions at an undervalue and wrongful trading. The Report of the Company Law Review Group

[596] *McHugh v Keane*, unreported 16 December 1994 (High Court); *Synnott v Adekoya* [2010] IEHC 26 (Ms Justice Laffoy); *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27, [54] (Chief Justice Denham).
[597] *Awwad v Geraghty & Co* [2000] 3 WLR 1041; *Diag Human SE v Volterra Fietta* [2023] Costs L.R. 1511; D. Capper, 'Hybrid Conditional Fee Agreement Invalidated (Completely)' (2024) 43(2) *CJQ* 99.
[598] [2019] IESC 44.
[599] [2024] IESC 5
[600] [2024] IECA 104.
[601] [1997] 2 WLR 764.

pointed out that the definition of property is wider in Ireland, including any right of action by the liquidator. However, some clarification by way of statutory amendment would be welcome.[602]

A major issue in the field of TPLF is the court's discretion to award costs to a successful defendant in funded litigation against the funder. As Ireland firmly set her face against TPLF in *Persona Digital* it is easy to think that it cannot have made any contribution to this issue. This, however, is not the case, as the Supreme Court's decision in *Moorview Development Ltd v First Active Plc*[603] demonstrates. Here a third-party costs order was made against the principal shareholder of an insolvent company who had caused the company to pursue entirely meritless legal proceedings against the defendant. This was a very clear abuse of the company's separate legal personality and limited liability. If the proceedings had been successful the principal shareholder would have enjoyed the fruits of the litigation. If unsuccessful he would not have been liable for the costs. *Moorview* and the subsequent decisions of the Supreme Court in *WL Construction Ltd v Chawke and Bohan*[604] and *Eteams International v Bank of Ireland*,[605] have emphasised that defendants seeking a third-party costs order should generally seek security for costs against a claimant company where there are doubts about its ability to meet a costs order, and should also give prior notice to any likely funder of litigation of an intention to seek a third party costs order if the defendant prevails. If TPLF is introduced in Ireland, perhaps following the LRC's consultation paper, the courts seem well on their way to developing suitable principles to address this issue.

Summary

In summary, TPLF is essentially unlawful in Ireland on the ground that it constitutes maintenance and champerty. In consequence there are no third-party litigation funders based in Ireland. Litigation would not likely be stayed on the grounds of maintenance and champerty. But the funder would not be able to enforce its entitlement to be paid in the event of the litigation being successful, and could potentially be sued by the defendant after the proceedings concluded, in principle whether they were successful or unsuccessful. A third-party costs order would almost certainly be made against the funder if the litigation failed. Some not-for-profit kinds of litigation support would not constitute champerty but may amount to maintenance. The law on assignment in Ireland does not offer litigants much of a viable alternative to TPLF. The 'no foal, no fee' agreement is the one area where the courts in Ireland have developed the law in a way that is friendly to access to justice. In England the courts have taken the line that as the legislature has provided lawyer remuneration packages that would otherwise have been unenforceable at common law there is no scope for further development of the common law. In 2023 the LRC produced an impressively detailed consultation paper on TPLF and this may bring significant change in the near future. Some reforms, several of which are EU-driven, have been introduced, and these will be discussed below.

2. Relevant legislation applicable to TPLF in Ireland

Applicable Legislation

[602] Report of the Company Law Review Group (December 2021), **8.3**.
[603] [2018] IESC 33.
[604] [2019] IESC 74.
[605] [2020] IESC 23.

Although TPLF is currently illegal in Ireland there is a measure of anticipation about reform. In both the *Persona Digital* and *SPV Osus* cases Mr Justice Frank Clarke indicated that if the legislature simply ignored the question of enacting legislation to allow TPLF the courts may have no alternative but to develop the common law in ways similar to other jurisdictions. The Law Reform Commission has issued a detailed report on TPLF and is currently working on a further paper responding to comments made by consultees on the original paper. Further detail on the LRC's consultation paper and other reform proposals will be provided below. It should not be assumed that there definitely will be TPLF in Ireland. The judicial comments above were only to the effect that if the legislature took no action at all the courts may have to act. If the legislature decides not to reform the law even after a LRC recommendation for reform the courts are likely to respect this decision.

Two legislative provisions with TPLF implications have made it on to the statute book. Neither are currently in force but each will regulate aspects of the TPLF area if TPLF becomes legal in Ireland. Section 124 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 inserts a new section 5A into the Arbitration Act 2010, and makes two complementary reforms. First, it permits (subject to conditions that may be prescribed by regulations made by the Minister of Justice) TPLF in international commercial arbitrations and any proceedings arising out of them "before a court of competent jurisdiction performing any of the functions provided for in the (UNCITRAL) Model Law." Second, it expressly provides that the offences and torts of maintenance and champerty do not apply in international commercial arbitrations or in related proceedings.

Article 10 of Directive (EU) 2020/1828 on representative actions in collective consumer disputes ('the Representative Actions Directive') requires EU Member States to regulate the operation of third-party funding in such actions if third-party funding is permitted by national law. There is no requirement that third-party funding be permitted by national law. Section 27 of the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 implements Article 10 "insofar as (TPLF is) permitted in accordance with law." If third-party funding of representative actions becomes lawful the Court is to ensure, having regard to the matters specified in section 27(2), that conflicts of interest are prevented, and that third-party funding does not operate so as to divert the representative action from the collective interests of consumers. The matters listed in section 27(2) are undue influence by the funder on the settlement of proceedings, and not permitting the action to be brought against a defendant who is a competitor of the funder. By section 27(3) the funder is to provide the Court with a financial overview that specifies the sources of funds used to support the action. Where the Court is not satisfied about the compliance of the funding arrangements with section 27 it must refuse permission for the funder to bring the representative proceedings unless satisfactory changes are made.

Theoretically Applicable Legislation

It is possible that the Consumer Rights Act 2022 could render a contract term that allowed a litigation funder to terminate the funding agreement arbitrarily and for no reason an unfair contract term where the litigation funding agreement is made with a consumer. A litigation funding agreement would appear to meet the definition of 'service' in section 2 of the 2022 Act as this includes financial or other professional services. A 'consumer' is defined as an individual acting for purposes wholly or mainly outside their trade, business, craft or profession. Section 130 defines a contract term as unfair if contrary to the requirement of good faith it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Part 1 of Schedule 5 provides two indicative examples of potentially unfair termination clauses. One is where the term allows a trader to dissolve the contract on a discretionary basis not also granted to the

consumer. The other is where the trader is allowed to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds to do so. The practical effect of these provisions is likely to be exceedingly small. Litigation funding agreements are only entered into where they offer the funder an opportunity to make serious amounts of money. Civil proceedings on behalf of consumers are only likely to offer the prospect of making large profits where they are group proceedings of some kind. Under the Representative Actions Directive the funding agreement would have to be made with the 'entity' bringing the proceedings. This would not be a consumer.

Again to the extent that funded parties are consumers the transparency requirement originating in the Unfair Contract Terms Directive (93/13/EEC) would apply.

Some Australian judicial decisions offer support for the proposition that litigation funding agreements could be regulated investment funds. The definition of 'investment instrument' in the Irish Investment Intermediaries Act 1995 and the Investment Compensation Act 1998 speaks mainly of corporate securities so that it seems unlikely that a court would find that they had any application to litigation funding agreements. Where a litigation funder is a listed company that funds disputes by means of operations involving financial instruments the Central Bank of Ireland would exercise a regulatory role over the funder under the European Union (Markets in Financial Instruments) Regulations 2017.[606]

Proposals for Reform

In 2020 the *Report on the Review of the Administration of Civil Justice* chaired by the former President of the High Court Mr Justice Peter Kelly recommended permitting TPLF in bankruptcy proceedings and those relating to company liquidation, receivership and administration. In December 2021 the Company Law Review Group similarly recommended TPLF for corporate insolvency proceedings, subject to further examination by the LRC.

The LRC's consultation paper was published in July 2023. It makes no recommendations for reform, rather summarising the arguments for and against change in relation to the main issues in this field. Chapter 3 considers the arguments for and against TPLF in Ireland, beginning with the arguments against reform. A fundamental question is whether TPLF and wider assignment of claims would lead to the commodification of justice. Five principal arguments against change were identified:-

1. That it would encourage the bringing of vexatious and meritless claims.
2. That funded parties would be under compensated because they would have to give up a large share of their damages.
3. That legal costs would be increased.
4. That insurance premiums and business costs would increase.
5. That it would not be appropriate for all types of dispute.

Four principal arguments in favour of legalising TPLF are:-

1. That it would expand access to justice.
2. It would improve equality of arms between parties with lesser and greater resources.

[606] Implementing the second Markets in Financial Instruments Directive ('MIFID II'), Directive 2014/65/EU.

3. It would increase the pool of assets for creditors in insolvency proceedings.
4. It would address an anomaly in the law where corporate entities can effectively engage in TPLF by issuing shares or transferring the ownership of the company.

Chapter 4 considers three possible ways of legalising TPLF:-

1. The 'preservation' approach. This would abolish the crimes and torts of maintenance and champerty while preserving the rules of public policy making transactions vitiated by maintenance and champerty unenforceable.
2. The 'abolition' approach which would abolish maintenance and champerty altogether.
3. The 'statutory exception' approach. This would preserve the crimes and torts of maintenance and champerty but create statutory exceptions permitting TPLF in certain circumstances.

Chapter 5 discusses different ways of regulating TPLF. The aim of regulation should be:-

(a) To reduce the financial and other risks that TPLF might create for those who use it and for non-funded parties.

(b) To protect and enhance the proper and efficient administration of justice.

Five different regulatory models, in ascending order of control are:-

1. A voluntary self-regulating regime where the TPLF sector regulates itself.
2. An enforced self-regulatory regime where the state reserves a more intrusive role if self-regulation proves insufficient.
3. A regulatory regime in which the court certifies whether TPLF arrangements in the proceedings are fair.
4. A regulatory regime administered by an existing regulator.
5. A regulatory regime administered by a new and specialist regulator.

Chapter 6 examines six issues that will likely arise in the regulation of TPLF:-

1. Should TPLF be prohibited in certain types of dispute?
2. To what extent should there be disclosure relating to the existence and identity of the third-party funder and the terms of the funding agreement?
3. Mechanisms to address excessive funder control of proceedings, such as:-
   (a) Amending legal practitioners' ethical frameworks to reflect the more complex tripartite relationship between client-lawyer-funder.
   (b) Expanding the definition of 'misconduct' in section 50 of the Legal Services Regulation Act 2015 so that ceding control of a dispute to a third-party funder becomes potentially subject to disciplinary sanctions.
   (c) Empowering the court to assess whether a funded representative action has diverted from consumers' collective interests.
4. The measures that may need to be introduced to deal with a funder possibly becoming insolvent in the course of a dispute. This has implications for whether the funded party can

continue with the claim and for the defendant recovering its costs. Security for costs' regimes and minimum capital adequacy requirements are considered.

5. Unilateral withdrawal by funders from TPLF agreements.
6. The under-compensation issue. Should there be a cap on funders' level of return on investment? Should funding costs and returns be part of normal legal costs recovery?

Chapter 7 considers assignment. It is noted here that many jurisdictions that have liberalised the law on professional TPLF still retain restrictions on the assignment of a right to sue for unliquidated damages.

3. Practical operation of TPLF in Ireland

As TPLF is currently illegal in Ireland section 3 is effectively not applicable.

4. Stakeholder views on TPLF

The Need for TPLF

There was broad acceptance among interviewees that TPLF would further access to justice in Ireland. Litigation costs are beyond the means of the average litigant and the adverse costs order that usually follows from unsuccessful litigation is potentially financially crippling. However there was some doubt as to exactly how much TPLF would actually improve this situation. Third party funders generally only fund dispute resolution proceedings where there are good prospects of securing a healthy return on their investment. In the usual case of a claimant suing a defendant for damages most third party funded proceedings are high value commercial claims. These claimants have access to justice rights too but the fact remains that obtaining the right to fund this kind of dispute would not bring about revolutionary change in the numbers of persons enabled to take legal proceedings. Outside of these high value commercial claims the 'no foal, no fee' agreement enables many claimants to overcome the problem of paying their own lawyers' fees. They would still be liable for their opponents' costs if the claim was lost but frequently a costs order against a personal litigant is in practical terms unenforceable. One area where access to justice could be obtained for ordinary litigants is in respect of collective representative proceedings. The claims are usually small and the litigants are of limited means but there are enough of them to create 'critical mass' and make funding commercially attractive from the funder's perspective.

Regulation

As the Law Reform Commission contended the regulatory framework for TPLF should serve two broad policy goals:-

(1) To reduce as far as is reasonable and possible, the financial and other risks that third-party funding and funders might create for those who use third-party funding services and, indeed, for non-parties to funded disputes;

(2) To protect and enhance the proper and efficient administration of justice.[607]

The draft directive effectively resolves one issue the LRC has been grappling with – can TPLF be self-regulated? The Directive requires an independent public regulator so if TPLF is introduced in Ireland this is the kind of system Ireland will have to adopt. Interviewees observed that in England, where a self-regulation regime applies, a significant number of litigation funders are not even members of the Association of Litigation Funders and do not subscribe to that body's Code of Practice. The judgment of the United Kingdom Supreme Court in *R (on the application of Paccar Inc and others) v Competition Appeal Tribunal*[608] can be understood as a judicial expression of concern about the scale and significance of the regulatory issues that are left entirely to the market to police. It was also observed by interviewees that fully regulated TPLF markets around the globe are rare if they even exist at all.

There was support for the 'gatekeeping' function in articles 4-5 of the draft directive. The principal area of discussion concerned the regulation of TPLF *after* a funder has obtained their licence to operate within the jurisdiction. Most specific regulatory rules that are proposed were considered to have merit in and of themselves although concern was expressed about their potential cumulative effect. A decision would have to be taken by the legislature to introduce TPLF in Ireland. If it could only operate within the context of a heavy-handed and prescriptive regulatory regime there could be a risk that the industry never establishes any significant presence in the jurisdiction. It is considered that the draft directive's provisions as a whole are excessive and could well render TPLF in Ireland stillborn. Although economically thriving Ireland is a small country. At least initially litigation funders would be likely to come from other jurisdictions, many from the United Kingdom, and those originating in that country would not be subject to a regulatory regime like the one provided by the draft directive. Owing to these doubts about whether TPLF might even get started in Ireland, and also because the LRC's consultation paper has revealed a significant division of opinion about TPLF, it was felt by one interviewee that there may be merit in equipping a regulator with powers that would not necessarily be used initially but could be rolled out if experience showed they might be useful.

An important regulatory issue is whether a bespoke regulator for the sector should be created or whether the regulation of TPLF should be added to the portfolio of regulatory functions currently discharged by an existing regulator. Existing regulators in Ireland that might take TPLF on include the Central Bank, the Legal Services Regulatory Authority, and the Competition and Consumer Protection Commission. A bespoke regulator might be more likely to have the relevant expertise but the uncertainty surrounding the extent to which TPLF will become established in Ireland could result in the creation of a regulator with very little to do. On balance giving the job to an existing regulator might be better.

Minimum Capital Base

In principle it is accepted that litigation funders need to be adequately capitalised so that they can meet their responsibilities to funded parties and under third party costs orders in favour of successful defendants. In practice, however, it is difficult to pinpoint an amount at which minimum capital should be set. Furthermore, and as the Law Reform Commission suggested, it is not clear

[607] Law Reform Commission, *Third-Party Litigation Funding* (LRC CP 69 – 2023), **5.2**.
[608] [2023] UKSC 28.

how compliance with the capital adequacy requirement could be monitored and enforced outside an intrusive licensing regime administered by the regulator.[609]

Issues Relating to Funding Agreements

The question of fiduciary duties owed by funders will be deferred until the more specific issues relating to the funding agreement are discussed.

Content of Funding Agreement

Article 12 of the draft directive seems appropriate. In particular interviewees agreed with Article 12.d that any award recovered in the proceedings should first be paid to the funded party before the deduction of any amount due to the funder or other person.

Conflict of Interest

Interviewees agreed with Article 13 of the draft directive. The Law Reform Commission did not specifically discuss this issue. One interviewee was of the view that litigation funders should not be permitted to fund litigation against a defendant in which they had an investment stake. The view was also expressed that litigation funders should not be allowed to fund litigation for a collateral purpose, such as to crush a defendant who was a competitor. Information that comes to light in discovery should not be used for the funder's collateral purpose.

Invalid Agreements and Termination

Articles 14 and 15 are discussed together because the issues they present are closely connected. We all agree that funders should not be permitted to micromanage disputes that they support. In general they should provide the financial support and then leave it to the funded party and their legal advisers to make the decisions about how the dispute is to be handled. Very often micromanagement of cases would be unnecessary as the funded party and their legal representatives would willingly avail of the expertise funders possess and extensive consultation would characterise the parties' working relationship. We are not opposed to prohibitions on funders influencing what claims shall be advanced and how the financial support provided shall be spent. Funders can limit the amount of money they provide and this should be sufficient to protect them against wasted expenditure. We also agree with the observation of the Law Reform Commission that lawyers' ethical obligations should mostly be sufficient to protect their clients against excessive litigation control by funders.

However, it is important to bear in mind that the funded party is on something of a 'pig's back' with regard to legal expenses. Their own lawyers' costs are covered by the funder and responsibility to pay the successful defendant's costs if the case is lost is also shifted to the funder. So where what appears to the funder to be a satisfactory settlement offer is rejected by the client the funder is faced with the potential risk of earning no remuneration from the funded claim and liability to a third-party costs order. We believe that where an apparently reasonable settlement offer is made the funder should be entitled, subject to safeguards to be discussed below, to terminate the funding

[609] Law Reform Commission, *Third Party Litigation Funding* (LRC CP 69 – 2023), **6.51-53**.

agreement. Professional indemnity insurers often enjoy a similar right under indemnity insurance policies. Article 15 of the draft directive requires the funder to obtain either the client's informed consent to withdrawal from the case or the permission of the court. We do not think that the funder's interests would be adequately protected either by the client's lawyers reinforcing the advice that this is a good settlement offer or by securing the permission of the court. The client's lawyers cannot withdraw from the case if the client won't settle even though their right to be paid may be dependent on obtaining a victory in court or a settlement. If the funder requests the permission of the court to terminate the agreement the court's ability to adjudicate the dispute in future is likely to be compromised. So the safeguard for the client where the funder seeks to terminate the funding agreement should instead be an arbitration of this issue by some other neutral third party. In England and Wales this would likely be an independent King's Counsel appointed by the Chair of the Bar Council, as envisaged by the Association of Litigation Funders' Code of Practice. We believe that the advice we are offering here carries special weight because there is currently no TPLF in Ireland. If funders could not terminate funding agreements in these circumstances the risk that TPLF never experienced a beginning in Ireland would be increased.

We agree that a funder should be allowed to withdraw from litigation that has a low probability of success, no matter whether that should have been apparent from the beginning or has now become apparent. The same sort of neutral independent adjudication of this as envisaged above would be appropriate.

In general we are happy with the 40% cap on the funder's 'cut' of money recovered from the litigation. We do think there is a case for permitting some funded parties, such as large commercial organisations, to allow their funders a greater share of the recovery.

Funders' Fiduciary Duties

We do not think that imposing fiduciary duties on litigation funders is a sound idea. We recognise that in the legal relationship between funder and client specific problems may arise. But these are adequately addressed in the proposals above as repointed in this report. The kind of fiduciary duties Article 7 of the draft directive speaks of are very open ended, wide ranging, and uncertain in scope. They take no account of the legitimate commercial interests of litigation funders. They are examples of the kind of onerous regulation of TPLF that could result in litigation funders steering clear of Ireland as a place to do business. The right way to regulate the funder-client relationship is the pathway chosen by the Law Reform Commission. Specific issues should be identified and provided for. Imprecise and onerous obligations should be avoided.

Disclosure

We agree with the proposals in Article 16 of the draft directive about disclosure of the existence of TPLF and the identity of the funder to the court and the defendant. Disclosure to the court should be of an unredacted copy of the funding agreement. Disclosure of existence and identity is probably sufficient so far as the defendant is concerned. The contents of a litigation funding agreement would be extremely useful to the defendant, probably to the point of disclosing information the defendant should not have. It probably keeps matters simple and straightforward if no attempt is made to determine what contents of a funding agreement should be disclosed to the defendant and

what should be redacted. To the extent provided by Article 16 we agree with the Law Reform Commission that disclosure is essential.[610]

Review of Third-Party Funding Agreement

The powers conferred upon courts and administrative authorities by Article 17 of the draft directive appear to be very extensive. However, they are geared towards ensuring that litigation funders comply with applicable legal obligations. To that extent these can be considered unobjectionable, except where we think the obligations proposed in the Directive are unsuitable.

Third-party Costs' Orders

In a high costs jurisdiction like Ireland we think it essential that the court has power to order the funder to pay the costs of the successful defendant where the case it funds is lost. A practically unenforceable costs order in favour of the defendant may inflict significant hardship upon that party, and may well cause injustice. In principle the person who brought this about is the one who should pay for it. We support Article 18 of the draft directive. While it does not contain any presumption in favour of a third-party costs order there is nothing that would bar Ireland from adopting this presumption. As explained above the case law on third-party costs orders is quite well developed in Ireland already and useful guidance could also be obtained from the extensive English and Welsh case law on this subject.

We also support Article 14.5 of the draft directive so far as it would prohibit clauses in litigation funding agreements limiting the funder's liability for the defendant's costs. We think that a strong case can be made for a term in the litigation funding agreement that obliges the funder to pay the defendant's costs. Although the defendant could not rely on this clause as it is not a party to the litigation funding agreement it would assist the funder to know that if it did pursue the claimant for costs the latter could seek to enforce this contractual indemnity against the funder.

Sanctions

We agree with the provisions of Article 19 and have no specific comment to make.

Glossary of abbreviations and acronyms

LRC	Law Reform Commission
TPLF	Third Party Litigation Funding

Table of legislation

European Union

[610] Law Reform Commission, *Third Party Litigation Funding* (LRC CP 69 – 2023), **6.18-6.29**.

Markets in Financial Instruments Directive (MIFID II) (EU) 2014/65

Representative Actions Directive (EU) 2020/1828

Unfair Contract Terms Directive 93/13/EEC

Ireland

Arbitration Act 2010

Companies Act 2014

Consumer Rights Act 2022

Courts and Civil Law (Miscellaneous Provisions) Act 2023

European Union (Markets in Financial Instruments) Regulations 2017

Investment Compensation Act 1998

Investment Intermediaries Act 1995

Legal Services Regulation Act 2015, s50

Representative Actions for the Protection of the Collective Interests of Consumers Act 2023

Statute Law Revision Act 2007

Northern Ireland

Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968

United Kingdom

Courts and Legal Services Act 1990

Criminal Law Act 1967

Damages-Based Agreements Regulations 2013

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Ireland

Atlas GP v Kelly	[2022] IEHC 443
Eteams International v Bank of Ireland	[2020] IESC 23
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McCool v Honeywell Control Systems Ltd	[2024] IESC 5
McHugh v Keane 16 December 1994)	(unreported, High Court,

Moorview Development Ltd v First Active Plc	[2018] IESC 33
O'Keeffe v Scales	[1998] 1 IR 290
Persona Digital Telephony v Minister for Public Enterprise	[2017] IESC 27
Scully v Coucal Ltd	[2024] IECA 104
SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd	[2018] IESC 44
Synnott v Adekoya	[2010] IEHC 26
WL Construction Ltd v Chawke and Bohan	[2019] IESC 74

United Kingdom

Awwad v Geraghy & Co	[2000] 3 WLR 1041
Diag Human SE v Volterra Fietta	[2023] Costs LR 1511
Neville v London Express Newspaper Ltd	[1919] AC 368
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Report on the Review of the Administration of Civil Justice (Dublin, 2020)

Italy

Prof Cristina Poncibò, University of Turin

Executive Summary

- Third-Party Litigation Funding (TPLF) is still in its early developmental stages in Italy, especially when compared to its more established role in other EU jurisdictions, such as Germany and the Netherlands. Despite the slow emergence of TPLF in the Italian market, it has become an area of growing interest among scholars, legal practitioners, and international funders.
- The current market landscape is characterized by a small number of players that operate in different ways, including both domestic start-ups and large international companies, many of which are based outside Italy and provide funding to Italian litigants from abroad.
- The regulatory framework surrounding TPLF in Italy remains unclear. There are no specific legal provisions governing the practice of third-party funding, which creates uncertainty for both funders and law firms seeking financial support for litigation. In addition, there are no publicly reported cases of TPLF being used in Italy, primarily because funding agreements are not disclosed in court proceedings: this lack of transparency makes it difficult to track how widespread the use of TPLF is in Italy or to analyse its impact on case outcomes. The non-disclosure of funding agreements also creates obstacles in assessing the role of funders in litigation and determining whether third-party funding influences legal strategies, settlements, or outcomes.
- Italy's legal market is a fertile ground for the expansion of TPLF in large-scale litigation, particularly in the areas of mass torts, antitrust damages, and collective redress. Cases involving mass torts, such as product liability claims, as well as antitrust damages, often require significant financial investment due to the complexity of the legal issues and the extensive evidence required. Italian law firms often lack the resources to fund these types of high-cost, high-stakes cases, creating a significant opportunity for third-party funders to step in and provide financial support.
- Collective redress for damages also offers substantial potential for TPLF. Funders can provide the necessary financial backing to cover legal fees, expert witnesses, and other costs, enabling claimants to pursue their cases on a collective basis. This trend could significantly reshape the Italian mass litigation landscape, making the "Italian class action" more accessible before Italian courts.
- Additionally, another promising area for TPLF growth in Italy is the assignment of rights, especially in relation to transportation disputes under EU law.[611] Digital platforms and Apps have been developed to enable consumers to seek compensation for delays in air and rail travel. These apps allow consumers to assign their substantive rights under EU regulations efficiently, often at a lower cost, and with greater ease than traditional legal avenues. This is particularly relevant in a market like Italy, where EU Consumer Law has been under-enforced, and

[611] G. Afferni., 'La cessione del credito risarcitorio per violazione del diritto antitrust' (2017) Dir. Comm. Int., 909.

consumers have struggled to assert their rights. The assignment of rights in these cases provides funders with an opportunity to back high-volume, low-value claims, which, when aggregated, present a more financially viable option for litigation funding.

- In conclusion, although TPLF is still in its early stages in Italy, there is some potential for growth. Regulatory uncertainty and a lack of transparency have slowed market development, but emerging trends, such as the rise of digital platforms for small-value consumer claims and the increased demand for funding in mass torts, antitrust damages, and collective redress cases, point to a promising future. As Italy's litigation funding market matures, the role of TPLF could expand significantly, particularly if the provision of guidance, such as, for example, the ELI Principles on Third Party Funding of Litigation, is introduced to enhance transparency and provide greater legal certainty for funders and litigants alike, particularly in cases involving natural persons and consumers.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

In Italy, there is currently no specific existing or planned legislation directly regulating Third-Party Litigation Funding ('TPLF'). The practice of TPLF operates within the general framework of Italian contract law (Article 1322 of the Italian Civil Code dealing with atypical contracts) and civil procedure.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPLF has emerged in 1986 in supporting an Italian public agency SACE (Servizi Assicurativi e Finanziari per le Imprese) facing challenges in enforcing a judgment against resistant counterparties. Today, TPLF is predominantly utilized in commercial, financial and securities disputes, particularly in cases where significant legal fees and resources are necessary to pursue a claim effectively. Precisely, it is possible to confirm that TPLF is commonly employed in Italy in these main areas according to the interviews:

- Commercial Disputes

Commercial disputes encompass a wide range of legal matters, including contract disputes, business torts, intellectual property conflicts, and more.

- Securities Litigation

Securities disputes involve allegations of fraud, misrepresentation, insider trading, securities manipulation, and other violations of securities laws.

- Antitrust damages

In addition to commercial and securities disputes, TPLF is also increasingly utilized in other areas, and, particularly, for cases concerning antitrust damages.[612] Private antitrust enforcement in Italy is governed by both national and EU laws. Key legislation includes the Italian Competition Law (Law No. 287/1990), which prohibits anticompetitive agreements and abuse of dominant position, and relevant EU regulations and directives. Additionally, Directive 2014/104/EU provides a framework for damages actions for antitrust violations in Italy.[613]

Italian jurisdiction, especially in cases involving truck associations, has experienced a notable trend towards forum shopping, as litigants and their funders seek favorable venues for their claims. These cases - involving private antitrust damages for truck associations - are largely being litigated before courts in the Netherlands. The choice of Dutch courts reflects the strategic preference of claimants to leverage the Netherlands' judicial environment, which is perceived as more favorable for complex cartel and competition-related litigation. This trend underscores the broader phenomenon of cross-border forum shopping, where claimants from Italy and other jurisdictions[614] seek to benefit from procedural and substantive advantages in foreign courts, such as those in the Netherlands (e.g. the airfreight (for example, the action for damage following on the EU decision about the cartel in the airfreight market[615]).

- The Italian "Class action" ("Dei Procedimenti collettivi")

There is a growing interest in the possibility of leveraging TPLF to address mass harm experienced by citizens (Article 840-bis and followings of the Italian code of civil procedure).[616] However, the effectiveness of TPLF in mass litigation remains somewhat uncertain in Italy.[617] Interestingly, Article 840-bis of the Italian code of civil procedure introduces new contingency fees favoring the common representative of the class and the lead claimants' lawyer (in Italian: "quota lite") and this may serve

[612] Lex Capital, 'Antitrust and litigation funding: an ever-closer union in Europe and Italy', (2023), https://www.lexcapital.it/en/antitrust-and-litigation-funding-an-ever-closer-union-in-europe-and-italy/

[613] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349, 1-19, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104

[614] F. Marcos, 'Trucks Cartel Damages Claims: Thousand and Odd Judgments issued by Spanish Appeal Courts' (2023) 1 Zeitschrift für Europäisches Privatrecht, https://ssrn.com/abstract=4255889

[615] EC Decision C (2010) 7694 final relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (Case COMP/39258 - Airfreight). See also the judgment of the airfreight cartel before the CJEU (General Court) (2022), https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-03/cp220053en.pdf

[616] Articles 840-bis and followings of the Italian Code of Civil Procedure. Please note that this mechanism is different from the consumer collective redress mechanism introduced on 09.03.2023, when Italy's Council of Ministers approved the legislative decree transposing and implementing Directive (EU) no. 2020/1828 on representative actions for the protection of consumers' collective interests [2020] OJ L 409, 1-27, https://eur-lex.europa.eu/eli/dir/2020/1828/oj
The legislative decree includes, as part of the Italian Consumer Code, the concept of national representative action and, as an entirely new element, cross-border representative actions, which may be brought before an Italian court by one or more qualified bodies from other member states, or brought in another member state by a qualified body also jointly with other qualified bodies from different member states. Code of Civil Procedure.

[617] A. Giussani, 'Class actions e finanziamento delle liti' (2022) 2: 1 Rivista Trimestrale di Diritto e Procedura Civile, 303.

as an incentive to promote potential class actions. Consequently, it is anticipated that law firms may gain a stronger position within the litigation market. [618]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Based on desk research and interviews, the following key players are active in the TPLF market in Italy:

- Lex-Capital is an Italian-established company. It focuses on providing third-party litigation funding primarily within Italy. This company is relatively new in the Italian market, catering specifically to the local demand for TPLF. The company is particularly active in the field of antitrust damages. Website: https://www.lexcapital.it/en
- Libra Claims is a branch of a global litigation funding firm. It operates in multiple jurisdictions, including Italy. Website: https://libra.claims/en
- BE-Cause is an Italian-established firm. It operates within Italy, providing litigation funding and other legal financial services. BE-Cause is a new player in the Italian TPLF market, aiming to meet the needs of Italian litigants. Website: https://www.because.law
- OmniBridge is a global litigation funder with a significant presence in many countries, including Italy. It is not an Italian-established company, but it operates in Italy as a branch of the larger global entity. Website: https://omnibridgeway.com
- Deminor is another global litigation funding firm with operations in Italy. Webmail: https://www.deminor.com/en

Libra Claims and Lex Capital are Italian-based new legal entities that often also work as claims aggregators. OmniBridge and Deminor are global litigation funders with offices in some of the member states of the EU. It also appears that Nivalion[619], another global litigation funder, with main office in Switzerland, is not active to date, but is potentially a new player in the emerging Italian TPLF market.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are not reliable statistics regarding TPLF in Italy. TPLF market in Italy is indeed emerging, not mature. It is relatively small and still developing. While there are key players providing funding services, such as the before mentioned Lex-Capital, BE-Cause, OmniBridge, Libra Claims, and Deminor, the practice is not yet as widespread or established as in other jurisdictions. The TPLF market in Italy is gradually growing, with increasing recognition and utilization in commercial disputes, arbitration, and high-value litigation cases (e.g. securities disputes).

[618] G. Afferni, 'La nuova azione di classe antitrust' (2021) 3 Mercato. conc. reg., 437. Id., '"Opt-In" Class Action in Italy: Why are they Failing?' (2016) JETL, 82.

[619] Nivalion AG, https://nivalion.com/en

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Yes, there is significant doctrinal discussion on TPLF in our jurisdiction. The research team of Turin Law Department has prepared two comprehensive studies, based on desk research and qualitative analysis, about TPLF. The first ("Fund-IT") focuses on the Italian market for TPLF[620] and the second explores the European market for TPLF.[621]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

TPLF has been discussed extensively in academic and legal circles and the discussions have predominantly focused on its regulatory framework, ethical considerations and deontology, economic impact, and implications for access to justice.[622]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

In Italy, the validity of TPLF in civil litigation depends largely on the terms and conditions outlined in the funding agreement. As long as the agreement is legally sound and does not violate any fundamental legal principles or public policy, TPLF agreements are generally considered valid and enforceable.

2.2 Regulatory oversight of funders/funding industry

In Italy, regulatory oversight of funders and the funding industry in the context of TPLF is still developing. While TPLF is generally permissible, there is a lack of specific regulations governing this practice. As a result, there is currently limited regulatory oversight over funders and the TPLF industry. Additionally:

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[620] E. D'Alessandro, *Prospettive del Third-Party funding in Italia* (Ledizioni 2019), https://iris.unito.it/bitstream/2318/1702103/1/THIRDPARTY_web.pdf

See also E. D'Alessandro, 'Third Party Litigation Financing in Italy' (2018) ZZPInt, 52. ID., 'Prospettive del third-party funding nel processo civile italiano: il progetto fundIT e le iniziative del Parlamento europeo' (2022) 2 Riv. trim. dir. proc. civ., 273.

[621] E. D'Alessandro, C. Poncibò (eds), *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, Research Paper (2021) for the EPRS, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf

[622] M. C. Paglietti, 'Il mercato delle controversie. Il third-party litigation funding come strumento di finanziamento responsabile dell'accesso alla giustizia' (2023) 6:1 Banca Borsa Titoli di Credito, 8-21. M. C. Paglietti, 'Prospettive del third party funding nel processo civile italiano: il progetto fundIT e le iniziative del Parlamento europeo' (2022) 1 Rivista Trimestrale di Diritto e Procedura Civile, 273. G. De Nova, 'The impact of a Litigation Funding Agreement on Commercial International Arbitration with seat in Italy' (2019) 4:1 Rivista dell'Arbitrato, 815.

- When a TPLF funder operates in the legal form of a Società di Investimento a Capitale Variabile (SICAV), it shall comply with the regulatory landscape governed by Consob[623] and the Bank of Italy.[624] Investors in such SICAVs can rely on the regulatory framework to protect their interests and ensure the fund's sound operation. Based on our research it seems that only the funder "Be Cause" has the legal status of SICAV under Italian Law.
- If a TPLF agreement is akin to an insurance product, it would necessitate compliance with IVASS (Institute for the Supervision of Insurance) regulations. This means the agreement would need to meet stringent requirements regarding the terms of the contract, the solvency of the issuing entity, and the protection of the insured party's interests. However, in practice, the analogy of a TPLF agreement to an insurance product appears to be rare or non-existent in Italy.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

The EU Litigation Funders Association indicates that the majority of funders are increasingly focusing on capital adequacy and governance, reflecting the need for sound financial practices in a complex legal environment.

It is important to note that funders tend to often acknowledge that their activity resembles that of a business, wherein they provide equity co-investment or venture capital. However, they usually deny categorizing it as finance or insurance in Italy. As noted before, only a funder is established in the legal form of a SICAV under the supervision of the Consob and Bank of Italy (eg Be Cause).

The legal framework governing funders' activities also depends on how the litigation funding agreement (LFA) is classified. Should the agreement be considered a bank loan, the funder would need to adhere to banking regulations applicable to credit activities, especially if the funder is a bank. Alternatively, if categorized as insurance, the funder must comply with insurance laws, though this classification presents certain ambiguities in our system. In the absence of specific rules, if the agreement cannot be classified as either a bank loan or insurance, and if the funder is likely a company, the applicable rules would be those set forth by the legislator for that particular type of company.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict-of-interest etc).

Although the Italian jurisdiction does not provide for TPLF-specific provisions, various non-TPLF-specific legal frameworks can affect the practice. These include: the provisions governing financial transactions, market conduct, anti-money laundering, corporate law, insurance law, data protection, and EU/Italian Consumer Law (B2C).

- Banking Law and Financial Law

[623] Legislative Decree 58/1998, Testo unico delle disposizioni in materia di intermediazione finanziaria (TUF), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-02-24;58

[624] Legislative Decree 385/1993, Testo unico delle leggi in materia bancaria e creditizia (TUB), https://www.bancaditalia.it/compiti/vigilanza/intermediari/Testo_Unico_Bancario.pdf

The Italian Supreme Court addressed a pivotal question concerning the burgeoning field of litigation funding in Italy: whether companies that acquire rights and litigation claims are required to be registered under Article 106 of Legislative Decree No. 385/1993, commonly known as the "Testo Unico Bancario" (TUB), which regulates banking activities. The interpretation of Article 106 of the TUB determines whether companies involved in litigation funding activities fall within the scope of banking regulations and are thus subject to registration requirements and oversight by banking authorities. The Italian Supreme Court has considered that these companies shall not be registered under Italian banking law (TUB).[625]

Financial activities in Italy are heavily regulated by the Italian financial authorities, including the Bank of Italy and the Italian Securities and Exchange Commission (CONSOB). In the light of our research with the stakeholders, it seems that Be Cause is the sole funder with the legal form of a SICAV (Società di investimento a capitale variabile) regulated under Italian law. This distinction means that Be Cause is subject to specific financial regulations and requirements applicable to SICAVs in Italy. Unlike other fund structures, a SICAV is an open-ended collective investment scheme, which allows for a flexible capital structure where the capital varies according to investor subscriptions and redemptions.

- Anti-Money Laundering (AML) Regulations

Italy has robust anti-money laundering (AML) laws in place to prevent financial crimes. These laws require financial institutions and entities engaging in significant financial transactions to implement measures to detect and report suspicious activities.

- Corporate Law

Funders must ensure that their operations align with ethical standards and corporate governance principles. This includes maintaining accurate records, ensuring accountability, and upholding the rights of stakeholders involved in the funding process.

- Insurance Law

Insurance Law becomes applicable in litigation funding agreements structured as insurance contracts. Precisely, if the litigation funding agreement is structured as an insurance contract, the handling of conflicts of interest falls under the purview of Article 183.1 of the Italian Insurance Code and the regulations established by Ivass, particularly Article 35 of Ivass Regulation 2 August 2018 no. 41. Under this framework, the funder is obligated to take all reasonable measures to prevent situations that may lead to conflicts of interest. Additionally, they must inform the funded party of any potential adverse consequences and manage these situations effectively to minimize the risk of harm.

- EU/Italian Consumer Law

It is important to underline that the involvement of natural persons, such as consumers, alongside professionals in litigation funded by third parties highlights the diverse landscape of funding sources. It is worth noting that natural persons/consumers shall be specifically protected in TPLF cases. For example, EU/Italian consumer laws ensure that consumers and businesses entering into TPLF agreements are fully informed about the terms and conditions of the funding arrangement. Indeed, TPLF is relatively rare for individual consumers and small claims but is witnessing - according to the interviewees - growing interest in private antitrust damages and collective redress consumer

[625] Italian Supreme Court, III Section, Judgement No. 30866 held on 20.02.2024, https://www.ilcaso.it/giurisprudenza/archivio/30866.pdf

cases. In any case, this dynamic underscore the critical role of third-party funding in promoting access to justice, enabling claimants-whether individuals or corporation-to pursue legitimate grievances without the prohibitive financial burden that litigation entails.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

The Italian Code of Civil Procedure and the Italian Civil Code contain several provisions that raise pertinent questions about TPLF:

- Confessions and Authorizations (Art. 2730 et seq. of the Civil Code)

A key concern is whether the funded party can freely confess under these provisions. The potential requirement for the funder's 'authorization' before making any confession raises doubts about the extent to which the funder might influence the litigation strategy. If the funded party must seek approval from the funder, this could hinder their ability to act in their own best interests, thus complicating the fundamental tenets of legal representation.

- Intervention of the Funder (Art. 105(2) of the Code of Civil Procedure)

Scholars have debated whether a funder can intervene spontaneously in the proceedings. If funders are allowed to intervene, their involvement may directly affect the direction and outcome of the case, leading to questions about the independence of the litigants and their legal counsel.

- Direct Payment of Costs (Art. 94 of the Code of Civil Procedure)

The uncertainty surrounding whether a court can compel the funder to pay the costs of the proceedings presents another critical issue. If funders can be held liable for costs, it may influence their willingness to invest in litigation, thereby affecting access to justice for potential claimants.

- Disclosure Requirements

Perhaps one of the most significant gaps in the current legal framework is the absence of any requirement for the disclosure of the existence or terms of financing agreements. This lack of transparency not only complicates the assessment of TPLF's role in the legal process but also poses challenges for the effective administration of justice. Without clear guidelines on what must be disclosed, parties may operate in an environment that lacks the necessary oversight to ensure fair legal practices.

The ethical implications of TPLF are further complicated by the provisions of the Code of Ethics of the Italian Bar Association. These regulations provide critical guidance on the relationships between lawyers and their clients, particularly when the client is financed by a third party.

- Lawyer-Client Relationship (Art. 23 of the Code of Ethics of the Italian Bar Association)

A pressing question is whose 'exclusive interests' the lawyer is obligated to serve when the client is a funded party. This ambiguity can lead to conflicts of interest, particularly if the funder seeks to exert influence over legal strategy or settlement decisions. The lawyer's primary duty is to their client; however, the presence of a funder may complicate this relationship, raising ethical dilemmas about loyalty and representation.

- Prohibition on Contingency Fees (Art. 13(4) of Law 247/2012)

Another significant ethical concern arises from Article 13(4) of Law 247/2012, which prohibits lawyers from receiving remuneration that is linked to a share of the property subject to the

litigation. If funders are essentially providing financial backing in exchange for a portion of the settlement, this could create a scenario where the funding arrangement contravenes existing legal regulations governing lawyer compensation.

The remuneration structures within TPLF arrangements reveal significant challenges, particularly regarding the duration of cases. For instance, cartel cases can extend over 10 years, posing substantial financial and strategic risks for both claimants and funders.

- Conflicts of interest

While conflicts of interest between funders and funded parties are recognized concerns, there are no specific procedural safeguards in place to address them comprehensively. This lack of regulation increases the risk of conflicts affecting the integrity of the legal process and the interests of the funded party.

Thus, the issue of conflict of interest in an Italian litigation funding agreement mainly raises concerns regarding the validity and enforceability of the contract. According to Italian civil law, contracts can be rescinded if they are found to be voidable due to factors such as, for example, fraud. However, simply including a clause in the agreement stating that the funded party is aware of potential conflicts of interest may not suffice to prevent the funded party from later invoking such conflicts.

The Italian Civil Code outlines rules regarding conflicts of interest primarily in the context of agency relationships. Therefore, applying these rules to litigation funding agreements, which involve different dynamics, may lead to uncertainty regarding their applicability and effectiveness in addressing conflicts of interest between funders and funded parties.

If a conflict of interest arises and the funded party wishes to challenge the validity of the contract, they may have limited recourse under current legal provisions. While the funded party could potentially claim avoidance of the contract due to mistake or fraud, the applicability of these remedies in the context of litigation funding agreements remains uncertain.

- Disclosure of TPLF agreement

Under Italian law, the parties are not required to disclose the agreements concluded with third parties to finance their dispute or those relating to the fee agreed with their lawyer. In this respect, it is worth noting that Italian contract law incorporates the principles of fairness and good faith in contractual relationships.[626] Thus, TPLF agreements in Italy shall comply with these principles and any clauses that are deemed excessively onerous or unfair to the litigant may be challenged in court. For example, clauses that grant the funder excessive control over litigation decisions, or impose disproportionate financial obligations on the litigant could be invalidated. No case-law of litigation based on the breach of the principles of contractual fairness, or good faith, has been reported before the Italian courts to the date of this draft national report.

- Disclosure of the correspondence between the funder and the funded party

The correspondence shared between the funded party and the funder lacks specific confidentiality protections. When correspondence occurs between parties or their legal representatives, it falls upon the involved lawyers to designate it as confidential. In instances where correspondence occurs

[626] *M. Lupano,* 'Prospettive del third party funding in Italia', *in E. D'Alessandro (ed) Prospettive del Third-Party funding in Italia (Ledizioni 2019), 39-40, https://iris.unito.it/bitstream/2318/1702103/1/THIRDPARTY_web.pdf*

between the lawyers representing the funded party and the funder, the decision to classify it as confidential rests with the legal representatives. However, under the current Article 48 of the Italian Lawyers' Code of Conduct, lawyers are prohibited from producing, recording in procedural documents, or disclosing the content of such correspondence to the court. Additionally, lawyers are not permitted to provide a copy to the assisted party. It is important to note that this prohibition is solely a matter of ethical standards. Despite this prohibition, if the correspondence is presented in court, the judge retains the discretion to consider it in their decision-making process.

- Allocation of costs and expenses

The allocation of costs and expenses in litigation funding agreements is largely determined by the terms negotiated between the parties. In the absence of specific provisions in the funding agreement, the funder assumes the initial costs typically borne by the funded party in Italian civil proceedings. These expenses encompass various aspects, including legal fees, court fees, notification costs, and expert opinions. Although funding agreements often lack detailed breakdowns of expenses, the funder is obligated to cover all necessary costs associated with the legal representation of the funded party. However, the funder is not liable for excessive or unnecessary expenses. Costs are deemed excessive if alternative procedural strategies with equal chances of success, but lower costs are feasible. It is important to note that, in the Italian jurisdiction, the legal strategy is usually determined by the funded party in collaboration with their legal counsel, not by the funder. Upon successful litigation, the counterparty typically reimburses the costs, which are then passed to the funder according to the funding agreement. Conversely, if the funded party loses, the funder indemnifies them against the counterparty's claims and covers the reimbursement costs.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

The following obligations may apply in the Italian jurisdiction.

- Obligations Towards the Courts

In Italy, parties involved in litigation are not required to disclose any TPLF arrangements to the court.

The court has the authority to require the parties to disclose TPLF agreements. However, the courts are usually refrain from scrutinizing TPLF agreements to ensure they do not undermine the fairness of the proceedings.

- Obligations Towards Public Administration

TPLF providers in Italy are subject to financial regulations only if they are recognized as financial entities. When classified as such, they must comply with the regulations set by national financial authorities like the Bank of Italy and the Italian Securities and Exchange Commission (CONSOB).

- Obligations Towards Adverse Parties

Both funders and beneficiaries must ensure that all representations made during litigation are truthful and accurate. This includes the presentation of evidence, witness statements, and legal arguments. Deceptive practices can lead to sanctions and undermine the legitimacy of the funded claim.

2.7 Obligations of funders towards beneficiaries and vice-versa

In TPLF arrangements, both funders and beneficiaries assume distinct obligations outlined within the funding agreement.

On the one hand, funders, who provide financial support to litigants, bear significant responsibilities towards beneficiaries, ensuring the integrity and success of the litigation process. Their primary obligation lies in furnishing adequate financial resources to cover all legal expenses associated with the litigation. This generally includes lawyer fees, court costs, and expert witness fees, among others. Furthermore, funders often wield decision-making authority concerning settlement offers and litigation strategy. Confidentiality is another critical obligation for funders. As they gain access to sensitive information about the beneficiary's case during the due diligence process, maintaining confidentiality is paramount.

On the other hand, beneficiaries, who receive financial support from funders, also carry significant obligations towards them. Transparency is key for beneficiaries, who must provide accurate and timely information about the progress of the litigation. This includes sharing case developments, settlement offers, and potential risks, fostering open communication with the funder. In concrete, this entails attending meetings, providing documents, and facilitating communication with legal counsel as needed. Additionally, in TPLF agreements, beneficiaries generally agree to pay a percentage of the litigation proceeds as a success fee upon a favorable outcome.

2.8 Distribution of awards and bearing adverse costs in lost cases

- Distribution of awards

The funding agreement typically stipulates the division of the award between the beneficiary and the funder, reflecting the financial terms negotiated between the parties. A fundamental aspect of the distribution involves repaying the funder for the financial support provided during the litigation. This repayment often includes the initial funding amount, plus an agreed-upon success fee or percentage of the award.

- Bearing of adverse costs

In cases where the litigation is unsuccessful, and the beneficiary incurs adverse costs, the funding agreement addresses the allocation of these costs and the associated financial responsibilities. Thus, depending on the terms of the funding agreement, the funder may assume liability for adverse costs incurred by the beneficiary. It is worth noting that some funding agreements may include a cap on the funder's liability for adverse costs.

2.9 Planned legislation

As of now, there is no planned legislation specifically addressing litigation funding in Italy. The regulatory landscape governing litigation funding remains largely uncharted, with no imminent legislative proposals aimed at formalizing or regulating this practice.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No specific TPLF regulation. Italian Financial Regulation applies to SICAV (open-ended collective investment scheme), under which one litigation funder operating in Italy currently falls under.
Capital adequacy (Art.6)	No specific TPLF regulation. Italian Financial Regulation applies to SICAV.
Fiduciary duty (Art.7)	No specific TPLF regulation. Italian Financial Regulation applies to SICAV.
Powers of supervisory authorities (Art.8)	No.
Investigations and complaints (Art.9)	No.
Coordination between supervisory authorities (Art.10)	No.
Content of third-party funding agreements (Art.12)	No specific TPLF regulation. General contractual principles under Italian civil law apply.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No.
Invalid agreements and clauses (Art.14)	No specific TPLF regulation. General contractual principles under Italian civil law apply.
Termination of third-party funding agreements (Art.15)	No specific TPLF regulation. General contractual principles under Italian civil law apply.
Disclosure of the third-party funding agreement (Art.16)	No.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No.
Responsibility for adverse costs (Art.18)	No specific TPLF regulation. General Italian civil procedural law apply.
Sanctions (Art.19)	No.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

In Italy, the minimum and typical claim values in absolute terms, measured in million Euros, are not publicly disclosed or readily accessible. This information is typically governed by the terms and conditions outlined in litigation funding agreements, which are often kept confidential between the parties involved. As a result, there is a lack of comprehensive statistics or data regarding minimum and typical claim values in litigation funding cases.

Due to the absence of publicly available information, conducting statistical analysis or establishing standardized figures for minimum and typical claim values becomes challenging. Instead, analyzing litigation funding cases on a case-by-case basis becomes the only feasible method for understanding the range of claim values and their associated characteristics in Italy.

The only interviewee to provide commentary on these data, Lex Capital, has reported five instances of litigation funding, specifically in the areas of antitrust damages and financial litigation. Other stakeholders have corroborated this information, indicating that there are fewer than five cases per year in total.

Generally, by assuming the risk of an uncertain litigation outcome, they heavily depend on portfolio third-party litigation funding strategies and robust due diligence processes. All funders have also confirmed their practice of using portfolio TPLF by referring to a funding arrangement where a litigation funder invests in a portfolio of legal cases rather than funding individual cases separately. In this approach, multiple legal cases are grouped together into a portfolio, and the funder provides financial support for all cases within the portfolio. This allows for diversification of risk, as gains from successful cases can offset losses from unsuccessful ones.

b. Minimum claim value in absolute terms (in million Euro)

See the answer under letter a.

c. Typical claim value in absolute terms (in million Euro)

See the answer under letter a.

d. Typical ratio between investment by the funder and claim value

See the answer under letter a.

e. Typical size of the investment by the litigation funder (in million Euro)

See the answer under letter a.

f. Origin of funding provided by the litigation funder

Litigation funders may be backed by large corporations or investment funds. These corporations set aside capital specifically for litigation funding purposes, either as a way to diversify their investments or to support cases that align with their strategic interests.

g. Share of compensation awarded typically demanded by litigation funders

In TPLF the share of compensation that litigation funders typically demand varies depending on several factors, such as the complexity of the case, the amount of funding provided, and the level of risk involved. However, the general range of compensation typically sought by funders falls between 30% to 50% of the awarded amount or settlement, with some exceptions depending on the specifics of the case.

h. Other conditions of the litigation funding agreement

While the primary focus of litigation funding agreements (LFAs) is often on the share of compensation awarded, these agreements also encompass a range of other critical conditions that govern the relationship between the litigant and the funder. One of the primary conditions often included in litigation funding agreements pertains to the control over the legal strategy. Although the claimant remains the principal party in the litigation, funders may seek to exert some level of influence over the legal decisions, particularly if they are investing significant financial resources into the case. Another significant condition found in many LFAs is the inclusion of termination rights. Funders often want to protect their investments by including provisions that allow them to terminate the agreement under specific circumstances. Confidentiality is another common condition included in litigation funding agreements. Funders typically require that the details of the funding arrangement, as well as sensitive information regarding the case, remain confidential. Litigation funding agreements often specify reporting and communication obligations between the litigant and the funder. Funders may require regular updates on the progress of the case, including any significant developments, changes in strategy, or emerging challenges. Finally, LFAs typically include detailed provisions regarding the costs and expenses associated with the litigation.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors considered to establish it.

In the context of Italian court proceedings, funding claims with a value below €52,000 is not economically viable for the funder.[627] The associated costs and potential returns from these smaller claims do not justify the investment. Consequently, funders find it financially unfeasible to support claims under this threshold. However, for claims that exceed €52,000, the scenario changes. Funding becomes economically viable only when the claim value surpasses €125,000. At this higher value, the potential returns outweigh the costs, making it a profitable venture for funders. This threshold indicates that for court proceedings, only significant legal claims ensure a sufficient financial return on investment.[628]

The economic viability of funding claims within Italian domestic arbitration presents a different set of considerations. Similar to court proceedings, funding arbitration claims with a value below €26,000 is not economically viable. The costs associated with arbitration, combined with the lower potential returns from smaller claims, do not make it a feasible option for funders. Within the range of €26,000 to €52,000, the economic viability of funding arbitration claims is more nuanced. Funding becomes economically profitable only in a limited number of cases, specifically when the claim value

[627] U. Merlone & M. Lupano, 'Third party funding: The minimum claim value' (2022) 296(2) European Journal of Operational Research, 738-747, https://ideas.repec.org/a/eee/ejores/v296y2022i2p738-747.html
[628] U. Merlone & M. Lupano, 2022, 738-747.

is at least €40,000. This suggests that while there is potential for profitability within this range, it is not guaranteed, and funders must carefully evaluate individual claims to determine their viability.[629]

For arbitration claims that exceed €52,000, funding becomes economically viable if the claim value is equal to or higher than €70,000. This threshold is lower than that required for court proceedings, reflecting the different cost structures and potential efficiencies associated with arbitration. Arbitration often involves fewer procedural complexities and can be more cost-effective than court proceedings, which accounts for the lower threshold for profitability.[630]

In summary, the economic viability of funding legal claims in Italy is contingent upon meeting specific value thresholds, which differ based on whether claims are pursued through court proceedings or domestic arbitration. For court proceedings, claims must exceed €125,000 to be considered profitable, whereas for domestic arbitration, claims are viable if they are valued at €70,000 or more. [631] However, it is important to note that the assignment of rights or consumer cases is regarded as a separate category, distinct from these thresholds.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

- MoC

In the context of TPLF in Italy, MoC may be relevant due to the significant risks and extended timelines often associated with litigation. Italian legal proceedings can be protracted, requiring funders to commit capital for extended periods. As such, achieving a high MoC is essential to justify the investment. A high MoC compensates for the duration and risk, reflecting the successful selection and management of funded cases. This metric is straightforward and provides a clear picture of the absolute return, making it a valuable tool for funders assessing the potential profitability of their investments.

- IRR

IRR is applied In Italy for evaluating the efficiency of investments. Given the often-lengthy nature of Italian legal proceedings, IRR helps funders understand the annualized performance of their investments, making it easier to compare the profitability of different cases or portfolios. A higher IRR indicates a more efficient use of capital, reflecting quicker and potentially more lucrative resolutions of funded cases. This is particularly valuable in the Italian market for litigation where legal outcomes can be unpredictable and timelines can vary significantly.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The primary outcome for funders is a financial return on their investment. Successful cases can yield substantial returns, particularly if the claim values are high and the legal process is efficiently managed. By funding multiple claims, funders can diversify their risk across a portfolio of cases before the Italian courts. In successful cases, beneficiaries receive a portion of the awarded damages or settlement. While a significant share goes to the funder to cover their investment and return, the plaintiffs can still gain financially, often securing compensation that might have been unattainable

[629] U. Merlone & M. Lupano, 2022, 738-747.
[630] U. Merlone & M. Lupano, 2022, 738-747.
[631] U. Merlone & M. Lupano, 2022, 738-747.

without funding support. Unfortunately, there is a lack of data about TPLF cases in Italy and, thus, it is difficult to evaluate the outcomes of funded cases.

L. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

In court proceedings, the funded party is not obligated to present a copy of the funding agreement. Typically, requests from the counterparty to produce the funding agreement are unlikely to be granted unless the document is crucial for establishing the facts of the case, as determined by case law. However, in disputes arising between the funder and the funded party regarding the fulfilment of their obligations under the agreement, the production of the funding agreement becomes necessary. It is worth noting that many funding agreements include confidentiality clauses, prohibiting disclosure to third parties, including the counterparty. Despite these confidentiality agreements, the court retains the authority to order the production of the document. If such an order is issued, the party complying with it cannot be held liable for breaching the confidentiality agreement. This provision ensures that legal obligations take precedence over confidentiality agreements in court proceedings.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

X Consent for settlement

X Consent for appeal

X Consent for expert evidence

X Agreement on strategy

Other [Text]

It is important to note that, in the Italian jurisdiction, the extent of control exerted by litigation funders can vary significantly from one agreement to another. The specific terms and conditions outlined in each funding agreement determine the level of control granted to the funder.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

In Italy, the relationship between litigation funders and plaintiff's lawyers can vary depending on the specifics of each case and the terms outlined in the funding agreement. Generally, litigation funders often work closely with plaintiff's lawyers to navigate legal proceedings effectively. This collaboration may involve strategic discussions, coordination on case strategy, and communication regarding key decisions such as settlement negotiations and appeals.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

In the context of TPLF it is indeed possible for a litigation funder to withdraw funding during the litigation process. However, such a decision is generally governed by specific conditions outlined in the LFA.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

There are not specific Italian codes of conduct tailored specifically for litigation funders. However, many litigation funders worldwide adhere to ethical standards and best practices to mitigate conflicts of interest.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *X No liability*

If the litigation funder does not participate in court proceedings, they are generally not held responsible for costs under Article 94 of the Italian Code of Civil Procedure. This article specifies that costs are typically ordered against specific individuals or entities, such as beneficiary heirs, tutors, trustees, or legal representatives who actively represent or assist parties in court.

In cases where the funded party faces an unsuccessful outcome, they are typically liable for covering the costs. However, as per the terms outlined in the funding agreement, the funder can be required to provide the necessary funds to fulfil this obligation on behalf of the funded party.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No, according to the information available, litigation cost agreements typically do not include the requirement for After the Event (ATE) insurance. However, the inclusion of ATE insurance can vary depending on the specific terms and conditions outlined in each litigation cost agreement.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No, there are not publicly available examples of funding agreements used by litigation funders. The lack of accessibility to such agreements indeed poses a challenge, as it limits our understanding of their specific terms and conditions.

4. Stakeholder views on TPLF in your jurisdiction

TPLF funders in Italy have emphasized in their interviews the significant differences between funding litigation with proper funds and acting as claims aggregators without utilizing their own financial resources. They have also highlighted the distinctions between these practices and the assignment of rights, which appears to be more promising within the jurisdiction. Precisely:

- TPLF

While stakeholders have welcomed efforts to enhance transparency and accountability in TPLF, they have expressed reservations about certain measures in the draft directive annexed to the EP resolution.

Italian stakeholders, including legal professionals, consumer advocates, and TPLF providers, have voiced concerns in interviews regarding: (i) the proposed cap on the percentage of success fees and (ii) the significant intervention on contractual autonomy in drafting the TPLF agreement. Precisely, stakeholders have raised objections to the perceived encroachment on contractual autonomy, arguing that TPLF agreements should be subject to the same principles of freedom of contract as other commercial transactions. Interventions that restrict the flexibility of parties to negotiate funding terms could stifle innovation and impede the development of the Italian TPLF market.

However, stakeholders acknowledge the need for a nuanced approach to regulating TPLF that balances the benefits of enhanced access to justice, particularly in cases involving collective redress for consumers, with the potential legal risks associated with unfettered TPLF practices.

There is a large consensus among Italian stakeholders that supports the adoption of soft law principles to guide TPLF funders under the supervision of public authorities. Among these initiatives, the European Law Institute (ELI) Principles on TPLF are gaining considerable attention among Italian stakeholders.[632] The ELI Principles may offer an EU-wide guidance for funders on how to structure funding agreements, manage risks, and ensure fair treatment of plaintiffs. This may include recommendations on disclosure of funding terms, conflict of interest policies, and procedures for resolving disputes between funders and plaintiffs.

- Assignment of claims

The assignment of claims appears to be permitted within the legal system, as indicated implicitly by Article 1261 of the Italian Civil Code. This article outlines the conditions under which such assignments would render a contract void and potentially lead to damages. Specifically, it highlights scenarios where the assignee holds a position of authority or professional involvement with the court, such as being a judge or lawyer, to prevent conflicts of interest. However, this restriction does not apply when the assignee is a third party who does not fall within the aforementioned categories.

Therefore, what remains unclear is the procedural issue which may arise if the court, at the trial, becomes aware of the assignment of a claim to the funder before the court litigation. In fact, in such case, the plaintiff is claiming a right belonging to somebody else and this may represent a breach of Article 81 of the Italian Code of Civil Procedure ("Sostituzione Processuale"), according to which "nobody can claim the rights of somebody else".

In practice, the funders prefer the practice of the assignment of rights over claims, as the former is perceived as less problematic and more feasible.

- Assignment of rights

There is a growing interest in Italy in the total or partial assignment of rights within the context of TPLF, as evidenced by interviews.[633] Recently, the Italian Supreme Court (Corte di cassazione) has affirmed that a consumer is entitled to assign his/her credit to obtain the reimbursement for flight delays under the EU Regulation No. 261/2004.[634] This means that Italian consumers, who have experienced flight delays and are entitled to compensation under the said EU Regulation No.

[632] ELI Third Party Funding of Litigation (2024), https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-third-party-funding-of-litigation

[633] G. Afferni, 2017, 909.

[634] Council Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, [2004] OJ L 46, 1–8, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004R0261

261/2004, can transfer their right to receive reimbursement to another party. This assignment allows for greater flexibility in managing claims and seeking redress for the inconvenience and financial losses incurred due to flight delays. The Court of Cassation has recognized and uphold the validity of such assignments, providing a legal avenue for individuals to pursue compensation for flight delays through assigned credits.[635] Consequently, agencies (Apps, digital platforms) specializing in the recovery of compensation for flight delays, such as for example AirHelp, are proliferating rapidly. These agencies offer services to assist passengers in obtaining compensation for flight disruptions, including delays, cancellations, and denied boarding. However, it is important to recognize that these agencies often retain a significant portion of the recovered damages as their fee for providing their services.

Glossary of abbreviations and acronyms

After the Event (ATE) insurance

Court of Justice of the European Union (CJEU)

European Commission (EC)

European Union (EU)

Italian Securities and Exchange Commission (CONSOB)

Litigation Funding Agreement (LFA)

Società di Investimento a Capitale Variabile (SICAV)

Testo Unico Bancario (TUB)

Testo Unico Finanziario (TUF)

Third-Party Litigation Funding (TPLF)

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Latvia

Dr Inga Kačevska, University of Latvia

Executive Summary

- TPLF is allowed but there is no existing or planned legislation concerning TPLF in Latvia. There are a few provisions regarding TPLF in the consumer collective claims' legislation, but it has not been tested in practice as of publication as it was recently adopted.
- There are no officially operating funders, no reported cases, and no doctrinal discussions; however, there might be cases when parties use a third party to sponsor their litigation. For example, very often, especially before the Supreme Court, the court fees are paid by the law firms, but the content of the third-party funding agreements are not disclosed.
- There are general rules that might be applicable to TPLF cases but it is hard to assume how exactly they apply due to lack of practice.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

No, there is no existing or planned legislation in Latvia.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Not applicable.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

No, there are no officially operating funders in Latvia.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No, there are no reliable statistics regarding TPLF in Latvia.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

No, there are only a few very general overview articles regarding TPLF and the EP Resolution published by law firms.

In Latvia, litigants are not obliged to disclose the source of litigation funding, either to the court or to other litigants, which should make third-party litigation funding particularly attractive. The lack of practice could be explained by the fact that, in Latvia, the absolute majority of claims are for relatively small sums and rarely reach a size that could justify an institutional investor taking on the risks of litigation. In Latvia, potential claimants may also approach institutional litigation funders abroad, but they should always be aware of the low availability of funding.[636]

A law firm confirmed that, in Latvia, third-party funding of litigation is not regulated. However, the rules of procedure rules do not prohibit the claimant from paying the costs of the proceedings from the funds of other parties. [637]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

[636] Indārs E.P., "Tiesvedības finansēšana no trešās personas līdzekļiem" (*PWC,* 16 August 2022) <https://mindlink.lv/tiesvedibas-finansesana-no-tresas-personas-lidzekliem-1-13322> accessed 6 June 2024.

[637] Valts Nerets & Kristers Pētersons, "iTiesibas.lv: Trešās personas finansējums tiesu procesiem" (*Sorainen,* 14 March 2024) <https://www.sorainen.com/lv/publikacijas/itiesibas-lv-tresas-personas-finansejums-tiesu-procesiem/> accessed 6 June 2024.

No, there have been no debates.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There is no general legal framework regarding TPLF, its admissibility, or its conditions; however, the existing legal framework does not forbid TPLF. Therefore, even if in practice there might be cases where TPLF is used, they are not publicly reported and obligations of funders and beneficiaries, and the distribution of the costs, are privately agreed to.

When transposing Directive (EU) 2020/1828, the Consumer Rights Protection Law[638] was amended and new provisions regarding TPLF were included. These amendments came into effect on 15 October 2023.

> *Article 26. Funding of consumer class actions provides the following:*
>
> *(1) The qualified entity shall ensure that:*
>
> *1) the decisions of the qualified entity in relation to a consumer class action, including settlement decisions, are not unduly influenced by a third party in a manner that would prejudice the collective interests of the consumers who are the subject of that action;*
>
> *2) the consumer class action is not brought against a defendant who is a competitor of the financier or against a defendant on whom the financier is dependent.*
>
> *(2) The qualified entity shall be obliged to disclose to the court and the Consumer Rights Protection Centre a financial statement indicating the sources of the funds used to support the consumer class action, if the court or the Consumer Rights Protection Centre has reasonable doubts as to whether the conditions referred to in paragraph (1) of this Article have been complied with.*
>
> *(3) Subject to the conditions referred to in paragraphs (1) and (2) of this Article, the court and the Consumer Rights Protection Centre shall have the right to require the qualified entity to refuse or make changes in relation to a specific funding and, if necessary, to reject the status of qualified entity in a specific consumer class action. Where the status of qualified entity is refused in a particular consumer class action, this refusal shall not affect the rights of the consumers who are the subject of that action.*

Now, in accordance with the law, a "qualified entity" can be required to disclose the existence of a TPLF agreement if the court or the Consumer Rights Protection Centre requests it. But there is no such practice so far as a "qualified entity" was only designated on 19 March 2024 and there have not been collective redress cases yet.

2.2 Regulatory oversight of funders/funding industry

As there are no official funders, there is no regulatory oversight.

[638] Consumer Rights Protection Law [18.03.1999] OJ 104/105 <https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law> accessed 25 July 2024.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

No legal framework.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

There are no rules or only very general provisions, and it is hard to predict whether those rules would apply to TPLF.

There are no explicit rules requiring the disclosure of the source of financing in litigation. Practice shows that it is common for example for law firms to pay the state fee on behalf of their clients.

Assignment of claims is very popular. Pursuant to Article 1793 of the Civil Law,[639] claims may be transferred from a former creditor to a new one by cession, which may take place: 1) pursuant to the law, without an expression of intent from the former creditor; 2) pursuant to a judgment of a court; 3) pursuant to a lawful transaction, regardless of whether it was entered into by the creditor on the basis of a legal duty or voluntarily. The latter form is used more often. For example, the creditor assigns the claim to a new creditor (usually, a credit collection company) who then litigates the claim against the debtor.

There are very strict anti-money laundering rules. The Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing[640] is applicable to financial institutions (including investment funds, consumer creditors, etc.), and also to lawyers. The Law provides that customer due diligence shall be conducted before establishing the business relationship or before an occasional transaction if, for example, the amount of transactions of the customer (or the total sum of several seemingly linked transactions) is EUR 15,000 or more.

There are alternative investment funds and investment management companies that are licensed and supervised by the national Bank of Latvia. In order to provide TPLF services, the financier would presumably need to obtain a special licence from the supervisory authority and in Latvia, this could be the Bank of Latvia. There are strict requirements regarding the investment funds' shareholders, the board members, the amount of capital, etc, to obtain a license. Any fund would need to prove that those requirements are fulfilled, and would have to draft a set of documents, including, a statement of conflicts of interests, transaction execution policy and others. Those requirements are very similar to those in Article 5 of the EP's recommendations for a draft model directive.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

[639] Civil law [28.01.1937] OJ 41 <https://likumi.lv/ta/en/en/id/225418-civil-law> accessed 25 July 2024.

[640] Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing [2008] OJ 116 <https://likumi.lv/ta/en/en/id/178987-law-on-the-prevention-of-money-laundering-and-terrorism-and-proliferation-financing>.

Article 1 of the Civil Law provides that: "Rights shall be exercised and duties performed in good faith". This is a general clause whose application often depends upon each particular case.

Regarding procedural safeguards, there are also general rules included in the Civil Procedure Law.[641] For example, Article 9.[1] states that the parties, third persons, and representatives on behalf of the person they are representing shall provide to a court true information regarding the facts and circumstances of a case. Article 74(6)[1] provides that parties shall exercise their rights and perform their obligations in good faith.

Article 73.[1] allows the court to impose procedural fines if a participant to a case uses rights and obligations in bad faith or disrespects a court.

In one recent case at the Supreme Court, applicants lodged an appeal, while at the same time requesting an exemption to pay the court fee on the grounds of their poor financial situation. However, applicants did not submit evidence of their economic situation. In several previous decisions, the Riga Regional Court consistently referred to the requirement to submit evidence supporting the financial situation of the persons, but the applicants ignored this by repeatedly submitting complaints and applications. The Supreme Court found that "Section 74.[1] (6) of the Civil Procedure Law obliges litigants (parties) to exercise their rights and perform their obligations in good faith. In turn, Article 1 of the Civil Code, contains the principle of good faith, which requires every person to exercise his individual rights in good faith, *i.e.* in good faith and for the pursuit of legitimate aims, in the interest of society as a whole. The conduct of a litigant aimed at delaying the hearing of a case cannot be regarded as good faith, is inadmissible, and, in fact, constitutes "procedural hooliganism"". The Supreme Court also referred to Article 73.[1] of the Civil Procedure Law providing for the remedies that can be applied in cases where the court finds that a litigant has exercised his rights and obligations in bad faith, including by deliberate acts (or omissions) aimed at delaying the hearing of a case or a particular matter.[642]

Hypothetically, TPLF cases could implicate these same articles.

In another recent case, the Supreme Court judges confirmed that the court fee (and security deposit), established by the Civil Procedure Law, is a mandatory payment for the administration of justice in civil matters and the goal of the mandatory payments is to deter persons from filing unfounded complaints, as the security deposits are not refunded if the complaint is rejected. However, in accordance with the conclusions of the Constitutional Court,[643] the exercise of the right to a fair trial cannot be made dependent on a person's financial means. Thus, the law shall ensures that a person who does not have sufficient financial means also has access to the court providing for the full or partial exemption of such a person from the obligation to make a certain payment.[644] Previously, this provision of the Civil Procedure Law was applicable only to natural persons (Article 43(4)).

So even if a party uses TPLF, the other party can ask the court to waive the court fee. The reverse is also true: not all cases require funding, because everyone has the right to a fair trial.

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[641] Civil Procedure Law [14.10.1998.] OJ 326/330 <https://likumi.lv/ta/en/en/id/50500-civil-procedure-law> accessed 27 July 2024.
[642] Case No. C30773316 [26.02.2024] Supreme Court of Latvia <www.at.gov.lv/downloadlawfile/9842> accessed 27 July 2024.
[643] Case No. 2022-05-01 [17.02.2023] Constitutional Court of Latvia <www.satv.tiesa.gov.lv/en/cases/?case-filter-years=&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=2022-05-01. accessed 27 July 2024.
[644] Case No. C30430121 [19.09.2023] Supreme Court of Latvia < www.at.gov.lv/downloadlawfile/9523> accessed 27 July 2024.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

No explicit rules.

2.7 Obligations of funders towards beneficiaries and vice-versa

No explicit rules.

2.8 Distribution of awards and bearing adverse costs in lost cases

Article 41 of the Civil Procedure Rules provides that the court shall adjudge the reimbursement of all court expenses paid by the party for the benefit of which the judgment is given from the opposing party to the former party. If a claim has been satisfied in part, the reimbursement of sums shall be adjudged to the plaintiff in proportion to the extent of the claims satisfied by the court, but to the defendant in proportion to the part of the claims dismissed.

2.9 Planned legislation

No legislation planned.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not compatible as there is no such regulation.
Capital adequacy (Art.6)	Not compatible as there is no such regulation.
Fiduciary duty (Art.7)	Not compatible as there is no such regulation.
Powers of supervisory authorities (Art.8)	Not compatible as there is no such regulation.
Investigations and complaints (Art.9)	Not compatible as there is no such regulation.
Coordination between supervisory authorities (Art.10)	Not compatible as there is no such regulation.
Content of third-party funding agreements (Art.12)	Not compatible as there is no such regulation.

Transparency requirements and avoidance of conflicts of interest (Art.13)	Not compatible as there is no such regulation. However, partially it is regulated in above cited Article 26.[31] of the Consumer Rights Protection Law
Invalid agreements and clauses (Art.14)	Not compatible as there is no such regulation.
Termination of third-party funding agreements (Art.15)	Not compatible as there is no such regulation.
Disclosure of the third-party funding agreement (Art.16)	Not compatible as there is no such regulation. However, it is partially regulated in above cited Article 26[31] of the Consumer Rights Protection Law
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Not compatible as there is no such regulation. However, it is partially regulated in above cited Article
Responsibility for adverse costs (Art.18)	Not compatible as there is no such regulation.
Sanctions (Art.19)	Not compatible as there is no such regulation.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

There is no publicly available information regarding any cases. But in practice, especially in cassation, (instance at the Supreme Court) the law offices pay for the state fee on behalf of their clients.

b. Minimum claim value in absolute terms (in million Euro)

No provisions, no practice.

c. Typical claim value in absolute terms (in million Euro)

Not applicable

d. Typical ratio between investment by the funder and claim value

Not applicable.

e. Typical size of the investment by the litigation funder (in million Euro)

Not applicable.

f. Origin of funding provided by the litigation funder

Not applicable.

g. Share of compensation awarded typically demanded by litigation funders

Not applicable.

h. Other conditions of the litigation funding agreement

Not applicable.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Not applicable.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Not applicable.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

Not applicable.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

There is no such requirement even if such agreement is concluded.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *X Choice of lawyer*
- *X Consent for settlement*
- *X Consent for appeal*
- *Consent for expert evidence*
- *X Agreement on strategy*
- *Other [Text]*

Presumably litigation funders could influence the control over the legal proceedings as the relationship between the party and litigation funder is confidential and the funder is interested in the outcome of the case.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

Not applicable.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Not applicable.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

No information.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

No information

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No information

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No, there are no templates available.

4. Stakeholder views on TPLF in your jurisdiction

The stakeholders in Latvia have limited information, practice, and knowledge about TPLF and even though opinions differ (due to representation of different sectors), they are rather sceptical about the measures in the draft directive annexed to the EP resolution.

Thoughts were divided as to whether there is a need for authorization, capital adequacy, or fiduciary duty. As of now, in theory, when anyone can be a funder such strict rules for licensing could limit the opportunity to get the funding.

The stakeholders agreed that the content of third-party funding agreements shall be disclosed. However, stakeholders representing law firms were very concerned about disclosing such funding agreement and allowing the courts or administrative authorities to review such agreements.

All stakeholders agreed that provisions on transparency requirements and avoidance of conflicts of interest are rather effective.

In general, the stakeholders confirmed that other instruments can be as effective as TPLF to facilitate access to justice.

Table of legislation

Consumer Rights Protection Law [18.03.1999] OJ 104/105 <https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law> accessed 25 July 2024

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Lithuania

Prof. Solveiga Vilčinskaitė, Mykolas Romeris University

Executive Summary

- TPLF legislation is limited in Lithuania, subject to the regulation of third-party funding for collective interests' protection of consumers. With this, Lithuania has implemented the Representative Actions Directive (EU) 2020/1828 into its domestic framework.
- Agreements that provide a litigant with third-party funding for claims unrelated to consumers' collective interests are regulated by general provisions of the Civil Code of Lithuania (for instance, notions of good faith, reasonableness, application of loan institute by analogy, etc.).
- The Supreme Court of Lithuania acknowledges a legal gap in Lithuanian legislation regarding TPLF. Nonetheless, the Lithuanian judiciary still awards compensation for expenses incurred by third funders from the party that lost the dispute.
- As for arbitration, provisions on third-party funders and requirements on their disclosures were added to the Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court on 1 January 2023.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

The Lithuanian TPLF legislation exists only with regard to representative actions undertaken by qualified entities to protect the collective interests of consumers.[645] It implements the Representative Actions Directive (EU) 2020/1828 into the Lithuanian domestic framework, specifically, Article 10 of the Directive (EU) 2020/1828 which requires Member States to ensure that third-party funding of a representative action does not dispel the interests of consumers.[646]

On 1 January 2023, provisions on third persons who cover a litigant's arbitration costs and requirements on their disclosures of the Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court ("VCAC Rules") have entered into force.[647]

Lithuania has no TPLF legislation in relation to other types of claims.[648] Insofar, the general provisions on contracts under the Civil Code of Lithuania apply to funding agreements (*e.g.*, good faith principle).[649] Despite the absence of special legislation on TPLF agreements and their performance, Lithuanian courts still award litigants reimbursement of expenses incurred by third parties, governed by general principles of law, and attributable to the agency principle. Namely, it is a legal principle that *"qui fact per alium, facit per se"* ("he who acts through another does the act himself").[650] Currently, the TPLF legislative initiatives are not on the Lithuania's parliamentary agenda.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

[645] Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure of the Republic of Lithuania [2008] No. 137-5366, art 31(27) <www.infolex.lt/ta/57888> accessed 24 July 2024 (Lithuanian Implementation Law No. 137-5366).

[646] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.

[647] Solveiga Vilčinskaitė, "Commercial Arbitration in 2022: Do Key Trends Make Arbitration an Attractive Alternative to Courts?" (*TeisėPro*, 20 January 2023) <www.teise.pro/index.php/2023/01/20/komercinis-arbitrazas-2022-aisiais-ar-del-pagrindiniu-tendenciju-arbitrazas-ir-toliau-lieka-patrauklia-alternatyva-teismams/> accessed 24 July 2024; Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court 2015, art 1, art 5, art 42 <www.arbitrazas.lt/failai/2022/2023_ENG_VCCA_Arbitration%20Rules.pdf> accessed 24 July 2024.

[648] Albertas Šekštelo, "Financing of litigation costs - is it necessary to amend the Code of Civil Procedure?" (*TeisėPro*, 8 December 2021) <www.teise.pro/index.php/2021/12/08/a-sekstelo-bylinejimosi-islaidu-finansavimas-ar-butina-keisti-civilinio-proceso-kodeksa/> accessed 24 July 2024.

[649] Raimonda Kundrotaitė, "Funding for arbitration proceedings: what a disputant seeking funding needs to know" (*TeisėPro*, 27 November 2020) <www.teise.pro/index.php/2020/11/27/r-kundrotaite-arbitrazo-proceso-finansavimas-ka-turi-zinoti-finansavimo-siekanti-ginco-salis/> accessed 24 July 2024.

[650] Civil case no. e3K-3-105-701/2024 [2024] Resolution of the Supreme Court of Lithuania <www.infolex.lt/tp/2240559> accessed 24 July 2024 (value of the claim: EUR 14,702); Civil case no. 3K-3-256-684/2015 [2015] Resolution of the Supreme Court of Lithuania <www.infolex.lt/tp/1045723> accessed 24 July 2024; Civil case no. 3K-3-582/2009 [2009] Resolution of the Supreme Court of Lithuania <www.infolex.lt/tp/145506> accessed 24 July 2024 (value of the claim: EUR 6,130).

As indicated above, the TPLF legislative framework applies only to collective consumer actions and arbitrations at the Vilnius Commercial Arbitration Court.

Since 2020, Lithuanian judicial practice has been scarce, with one case of consumers' collective interests being represented in court.[651] Under Article 32 of the Law of Lithuania on the Protection of Consumer Rights, the State Consumer Rights Protection Authority ("SCRPA")[652] was empowered to bring a claim on behalf of consumers.[653] In the cited case (e2A-179-580/2022), the SCRPA applied to the court in an effort to protect collective consumer interests. The only aspect the Lithuanian adjudicator noted about litigation costs was that the SCRPA is discharged from the payment of the court fee, as permitted under the Civil Procedure Code of Lithuania for governmental authorities.[654]

Thus, there is no practical case in which the issues of representation of collective consumer interests financed by a third party were raised in accordance with the Representative Actions Directive (EU) 2020/1828.

As for arbitration, the VCAC does not officially publish the texts of its decisions, given confidentiality requirements (Article 6 of the VCAC Rules). Therefore, its data is publicly unavailable for assessment.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Governmental institutions do not maintain any statistical data on TPLF operating funders in Lithuania. According to unofficial statistics provided by the Lithuanian Investment Managers' Association, there is only one operating funder in Lithuania that conducts TPLF as its primary economic activity.[655] Lithuanian judicial practice reveals that litigants opt for enhancement of their litigation costs from trade unions or credit institutions.[656]

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

Lithuania has no governmental authority responsible for gathering and updating data on the number of TPLF funders.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

[651] Civil case no. e2A-179-580/2022 [2022] Decision of the Vilnius District Court <www.infolex.lt/tp/2098874> accessed 24 July 2024.

[652] "About Authority" (*State Consumer Rights Protection Authority (SCRPA)*, 23 April 2024) <https://vvtat.lrv.lt/en/about-authority/> accessed 24 July 2024.

[653] Law on Consumer Protection of the Republic of Lithuania [1994] No I-657 <www.infolex.lt/ta/60792#X17a7af758dbc4a8da16d489c2565135f> accessed 24 July 2024.

[654] Civil case no. e2A-179-580/2022 [2022].

[655] "The First Third Party Funder Established in the Region Will Seek 25% Profit" (*Baltic Litigation Fund*, October 23, 2021) <https://baltifund.com/news/the-first-third-party-funder-established-in-the-region-will-seek-25-profit/> accessed 6 March 2025.

[656] Civil case no. e3K-3-105-701 [2024]; Civil case no. 3K-3-256-684 [2015]; Civil case no. 3K-3-582 [2009]; Civil case no. e3K-3-238-313 [2022] Resolution of the Supreme Court of Lithuania <www.infolex.lt/tp/2113912> accessed 24 July 2024 (value of the claim: EUR 725,945.49).

The doctrinal discussions revolve around the margin of control the third party may exercise over a client given its interest in a successful outcome of the proceedings and the business risk undertaken, given the adverse costs to be borne by the third party if the proceedings do not succeed.[657] Given the scarcity of legislative framework, the doctrine raises as an issue the legal nature of TPLF agreements. It has been suggested that provisions on loans of the Civil Code of Lithuania should apply to TPLF agreements by analogy of law.[658]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Lithuanian legal scholars and practitioners have debated on the need for special legislative regulation on TPLF. As a possible solution, some have suggested the introduction of provisions on TPLF into the Civil Procedure Code of Lithuania, which would avoid legal uncertainty in awarding litigation expenses covered by third parties in civil proceedings.[659]

2. Relevant legislation applicable to TPLF in your jurisdiction

Provisions on third-party funding, contained in Representative Actions Directive (EU) 2020/1828, have been implemented in the Lithuanian national framework through Article 31(27) of the Lithuanian Implementation Law No. 137-5366.[660]

The latter provision specifically addresses the question of conflict of interests, which is mandatory for the implementation of Article 10 of the Representative Actions Directive (EU) 2020/1828. Under Article 31(27) of the Lithuanian Implementation Law No. 137-5366, remedial action funding is prohibited where the third party, providing the funding, is a competitor of, or dependent on, the entrepreneur being sued. It precisely coincides with the wording of Article 10(2)(b) of the Representative Actions Directive (EU) 2020/1828.

In principle, provisions of the EP Resolution[661] are reflected in the Lithuanian legislation to the extent the provisions coincide with the Representative Actions Directive (EU) 2020/1828, implemented by Lithuania. The EP Resolution could serve as a basis for the Lithuanian legislative draft in other litigation domains unrelated to collective consumer protection. Nevertheless, there is no planned legislation on the Parliament's agenda concerning TPLF.

2.1 Legal admissibility and conditions of using TPLF in civil litigation

The Lithuanian legislation neither fully regulates nor prohibits TPLF. The Supreme Court of Lithuania awards TPLF compensation under Lithuania's Civil Procedure Code as expenses incurred by a party to the dispute itself. Essentially, the Supreme Court of Lithuania acknowledges that the Civil Procedure Code of Lithuania contains a gap for TPLF and applies the law by analogy while

[657] *Ibid.*

[658] Raimonda Kundrotaitė, "Financing litigation costs: practical advice and international trends" (2021) Arbitration: Theory and Practice Vol. VII, 85 <www.arbitrazas.lt/failai/_Zurnalas/2021/2021.7.Arbitrazas-Nr.7-R.-Kundrotaite.pdf> accessed 24 July 2024.

[659] Šekštelo.

[660] Lithuanian Implementation Law No. 137-5366.

[661] European Parliament resolution of [2022] with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) OJ C 125/2 (EP resolution).

considering matters related on the TPLF compensation. In addition, the Supreme Court of Lithuania pronounces that a third-party funded litigant, which seeks reimbursement of the litigation costs from the opposing party, shall provide proof regarding the actually incurred amounts, for instance, by certificates and invoices on services provided.[662]

2.2 Regulatory oversight of funders/funding industry

There is no regulatory oversight over the TPLF industry in Lithuania.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF - e.g. capital adequacy requirements

No legal requirements on capital adequacy are imposed upon funders (such as minimum capital requirements, insurance schemes, etc.). However, funders may rely on general provisions regulating the establishment of legal entities or the registration of entrepreneurs (natural persons). For instance, the capital of a public limited liability company must be not less than EUR 25,000, and the capital of a private limited liability company must not be less than EUR 2,500. Other corporate types of entrepreneurship do not require minimum capital authorisation.[663]

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc)

Not applicable.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Based on the Representative Actions Directive (EU) 2020/1828, Article 31 of the Implementation Law[27] imposes duties on qualified entities representing collective consumer interests to ensure that:

a) financing does not create a conflict of interest;

b) financing does not have a negative impact on the protection of the collective interests of consumers;

c) decisions regarding the conduct of the case, including decisions on the conclusion of a settlement agreement, do not depend on the interests of the third party funding the claim (*inter alia*, remedial action funding is prohibited where the third party providing the funding is a competitor of or dependent on the entrepreneur being sued); and

d) the presence of third-party funding is indicated in the claim and submitted to the court.

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662 Civil case no. e3K-3-105-701 [2024]; Civil case no. 3K-3-256-684 [2015]; Civil case no. 3K-3-582 [2009]; Civil case no. e3K-3-238-313 [2022].

663 Law on Companies of the Republic of Lithuania [2000] No. VIII-1835 <www.infolex.lt/ta/68110> accessed 24 July 2024; Darius Šoparas, "When Is Authorized Capital Required?" (*Saskaita*, 18 April 2024) <https://saskaita123.lt/lt/blog/kada-yra-butinas-reikalingas-istatinis-kapitalas/> accessed 24 July 2024.

As a procedural safeguard, the court examines whether the qualified entity has complied with its duties under Article 31 of the Implementation Law. If the court finds that one of the criteria is lacking, the court may impose the following sanctions:

a) set a deadline for eliminating the deficiencies in the lawsuit;

b) refuse to accept the claim; or

c) leave the accepted claim unexamined.

By analogy, Article 5(1) of the Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court stipulates that the party must, within seven days from the formalisation of the contract with the funder, inform the secretariat, the arbitration court, and the parties to the case about the existence of such a contract and the funder. If a party discloses the said information after the formation of the arbitral tribunal, each arbitrator must, within fifteen days from such disclosure, report in writing all the circumstances that may raise reasonable doubts about his independence or impartiality.[664]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Applicable only to consumer class actions. Remedial action funding is prohibited where the third party providing the funding is a competitor of or dependent on the entrepreneur being sued.

2.7 Obligations of funders towards beneficiaries and vice-versa

The Lithuanian Implementation Law No. 137-5366 does not determine the obligations of funders towards beneficiaries and *vice versa*. VCAC rules do not determine funders' obligations towards beneficiaries and *vice versa* as well.

2.8 Distribution of awards and bearing adverse costs in lost cases

Lithuanian Implementation Law No. 137-5366 does not regulate the distribution of awards and who bears the adverse costs in lost cases. Under Article 42(2) of the VCAC Rules, the Arbitration Court may take into account the funder's presence when deciding on arbitration costs and their distribution.

2.9 Planned legislation

Third-party funding for other litigation domains is not currently on Lithuania's parliamentary agenda Some scholars and practitioners suggest that TPLF provisions should be included in the Civil Procedure Code of Lithuania but it still remains within the ambit of discussions.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

664 Vilčinskaitė.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorisation (Art. 5)	There is no regulatory oversight.
Capital adequacy (Art. 6)	There is no capital adequacy requirement.
Fiduciary duty (Art. 7)	The Court shall ensure that the funder of a consumer class action is precluded from a conflict of interests. This rule is not applicable to other spheres of litigation.
Powers of supervisory authorities (Art. 8)	There are no supervisory authorities.
Investigations and complaints (Art. 9)	Not applicable.
Coordination between supervisory authorities (Art. 10)	Not applicable.
Content of third-party funding agreements (Art. 12)	Not applicable.
Transparency requirements and avoidance of conflicts of interest (Art. 13)	Applicable only to consumer class actions. Remedial action funding is prohibited where the third party providing the funding is a competitor of or dependent on the entrepreneur being sued.
Invalid agreements and clauses (Art. 14)	Not applicable.
Termination of third-party funding agreements (Art. 15)	Not applicable.
Disclosure of the third-party funding agreement (Art. 16)	Applicable only for consumer class actions.
Review of third-party funding agreements by courts or administrative authorities (Art. 17)	Applicable only for consumer class actions. If the court establishes that a conflict of interest is present, the court sets a deadline for eliminating the deficiencies in the claim. If it is impossible to eliminate these deficiencies, the court refuses to accept the claim.
Responsibility for adverse costs (Art.18)	Not applicable.
Sanctions (Art.19)	Not applicable.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

For the last 3 years, there were only 2 known cases that were funded by third-parties (two investment and commercial arbitration cases).

b. Minimum claim value in absolute terms (in million Euro)

10-14

c. Typical claim value in absolute terms (in million Euro)

10-14

d. Typical ratio between investment by the funder and claim value

1:10

e. Typical size of the investment by the litigation funder (in million Euro)

1-1.9

f. Origin of funding provided by the litigation funder

Regional private investors

g. Share of compensation awarded typically demanded by litigation funders

30%

h. Other conditions of the litigation funding agreement

Disclosure of the facts (merits) of the dispute and contesting parties

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Acceptable threshold for probability of success should be 80%. The TPLF funder requests disclosure of the facts (merits) of the dispute as do contesting parties for the purpose of the risk assessment. The likelihood of whether TPLF is provided to the client depends on the dispute's meritoriousness.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Around 25% return

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

This information was not disclosed given confidentiality considerations.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Arbitration institutions may require the disclosure of the agreements before proceeding on to the merits. As for the civil litigation in courts, the Civil Procedure Code of Lithuania contains a gap for TPLF, so the agreement may be disclosed for the purpose of furthering litigation costs reimbursement rather than with the aim of precluding conflicts of interest.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- ☐ *Choice of lawyer*
- X *Consent for settlement*
- X *Consent for appeal*
- ☐ *Consent for expert evidence*
- X *Agreement on strategy*
- ☐ *Other [Text]*

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

The interviewees believed the funder should be able to contact the plaintiff's lawyers and discuss strategy of the dispute with them.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes, if the party violates its obligations under the funding agreement.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

The prevention of conflict of interests occurs in accordance with internal procedures of the funder.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- Limited liability

- o Conditional liability
- X No liability

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Given confidentiality considerations, such agreements remain undisclosed.

4. Stakeholder views on TPLF in your jurisdiction

There is no specific regulation on TPLF in Lithuania; however, in practice, third party funding of litigation costs on behalf of a party to the proceedings are acceptable. The only regulation available in Lithuania concerning TPLF was established in the VCAC rules and it is only applied in arbitration cases. The VCAC rules are relatively new (amended in early 2023) so examples of practical application are scarce as of publication.

Stakeholders see the need for TPLF regulation at the EU level rather than at the national level in order to avoid market distortion. For smaller countries, common regulations would be useful to prevent significant differences in the terms proposed by third-party funders, first and foremost due to market size. In stakeholders' view, certain general guidelines and principles (on an EU level) could be useful as a standard to prevent extreme practices concerning TPLF.

Most concerningly, stakeholders unanimously noted the possible ineffectiveness of measures in Art. 4 and Art. 5 of the draft model directive accompanying the EP Resolution, determining the authorisation system and conditions for authorisation.

Overall, stakeholders agree that measures in the draft model directive accompanying the EP Resolution shed light and guarantee legal certainty to the parties on whether, and on what conditions, the costs will be recoverable, alongside transparency and conflict of interest compliance in the TPLF process.

Glossary of abbreviations and acronyms

EP Resolution - European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))

Implementation Law - Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure of the Republic of Lithuania [2008] No. 137-5366

SCRPA - State Consumer Rights Protection Authority

VCAC Rules - Rules of the Arbitration Procedure of the Vilnius Commercial Arbitration Court 2015

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Luxembourg

Laure-Hélène Gaicio-Fievez, BSP

Executive Summary

- TPLF is becoming increasingly relevant in Luxembourg due to ongoing discussions and planned legal frameworks, such as bill of law number 7650 on class actions and the ongoing discussion on EU Parliament's resolution on responsible funding of 2022.
- Bill of law number 7650 on class actions, transposing EU Directive 2020/1828, is the first legal framework expressly referencing TPLF in Luxembourg. The aim of the bill is to improve access to justice for consumers, particularly by introducing the possibility of having a class action financed from a private third party. Supervision of such private third party is expressly mentioned, as well as impartiality requirements. However, the draft is still subject to review and there are ongoing discussions on whether it will be accepted in its current form or if additional amendments will be necessary.
- No specific legislation is in place yet. To our knowledge, no case law exists on this topic either. Relevant provisions include the Civil Code, the law on the legal profession (LPA), and the Bar Association Rules (RIO).
- Interviews with stakeholders revealed that information on the types of cases funded, claim values, or the number of cases funded per year is largely unavailable due to confidentiality practices and limited TPLF presence. Stakeholders largely agree that TPLF regulation is necessary to protect the legal system from conflicts of interest, abuse, and speculative claims. The ongoing debate on Luxembourg's class action bill, which includes provisions addressing TPLF, may serve as the basis for future regulation.
- Participants also suggest that Luxembourg could benefit from adopting regulatory best practices to foster investor confidence and maintain the integrity of the legal system while promoting TPLF as a legitimate practice.
- Ethical concerns centre however around potential conflicts of interest, transparency, privileged communications, and control over litigation strategy. Funders may exert influence over key legal decisions such as the choice of lawyer, settlements, or appeals, although they often maintain a hands-off approach after due diligence. Indeed, while TPLF is not yet regulated in Luxembourg, some ethical principles from bar rules, such as confidentiality and the duty to act in the client's best interest, could theoretically be impacted by the existence of a funder.
- Furthermore, the absence of mandatory disclosure of funding agreements to courts raises additional concerns about transparency, though certain arbitration rules could impose disclosure obligations. Funders generally do not assume liability for adverse costs unless contractually agreed.
- All the participants agree however that the benefits of third-party litigation funding include expanding access to justice, enabling financially constrained parties to pursue legitimate claims, and fostering legal innovation. TPLF also has the potential to enhance the attractiveness of Luxembourg as a legal and financial hub by allowing for the efficient resolution of disputes and

promoting fairness in litigation. Additionally, it can help level the playing field between smaller claimants and well-funded opponents.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Despite its nascent presence, TPLF lacks explicit legislative oversight in Luxembourg.

Consequently, the majority of the interviewed parties considered that absence of a dedicated regulatory framework engenders uncertainty, potentially impeding the full realization of TPLF's benefits.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

To the best of our knowledge, mostly in investor-state and commercial arbitration, in commercial matters as well as for enforcement of arbitral awards and judgments.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Yes, around 3 or 4 leading players are currently operating in Luxembourg.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No statistics are available.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Yes, in fact a conference was recently held on that subject (conference held on the 15th of November 2022 and organised by the *Conférence du Jeune Barreau de Luxembourg (*Young Bar Association) and *Conférence Saint-Yves* (a professional group of Catholic lawyers working in Luxembourg*)*). If all participants were rather in favour of TPLF, one participant, a lawyer and former President of the Luxembourg bar, raised concerns regarding self-regulation of the industry*:*

> "*We cannot afford to let the industry regulate itself. Active steps must be taken to protect all parties involved.*"

More specifically, fears from an ethical standpoint exist and will be described here below (regarding the degree of control over the litigation strategy, the fee arrangements, and ethical issues for lawyers).

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

At the conference organised in Luxembourg on 15 November 2022 by the *Conférence du Jeune Barreau de Luxembourg* and *Conférence Saint-Yves*, several points were discussed.

The primary ethical concerns include privileged information, litigation strategy, legal fees, and frivolous claims.

1. First, in the absence of any rule to that extent, client-attorney privilege may be at risk when third-party funders are involved.
2. Second, there is debate over who controls litigation and settlement strategy: the lawyer, client, or funder. This can lead to tensions, as funders may seek to influence proceedings to protect their investment, which could conflict with the lawyer's duty to act in the client's best interest. Additionally, lawyers advising both the funder and client may face conflicts of interest.
3. Finally, the disclosure of funding agreements raises questions about transparency in court, though no consensus has been reached on whether mandatory disclosure is necessary or how it would affect judicial attitudes.

Such discussion confirms doubts already casted in a number of articles, such as '*Third-Party Litigation Funding in Luxembourg: current practice and future developments*'.

2. Relevant legislation applicable to TPLF in your jurisdiction

Ongoing discussions, particularly in the context of class actions legislation, signal a growing recognition of TPLF's significance within the Luxembourg legal sphere.

"*The Luxembourgish market is in its infancy. We have not seen many cases in Luxembourg, but I do see a potential It's not just a question of what we do*," explained a representative for a leading third-party litigation funder.

Indeed, at the national level, there is currently no specific legislation. The principle of contractual freedom applies for the time being. The only existing legal framework in the Luxembourg legal regime which refers to TPLF is the bill of law number 7650 on class actions, which is currently being discussed in the Luxembourg Parliament (transposing EU Directive 2020/1828). This bill of law will authorise class actions in consumer matters.

The overall aim of the bill is to improve access to justice for consumers, particularly by introducing the option to finance class actions through funding from private third parties. Interestingly, the bill expressly addresses the supervision of third-party class action financing. It stipulates that funders are prohibited from influencing the clients' decisions and allows the court to request a financial overview if there are any concerns about potential conflicts of interest.

Currently, the bill is still under discussion and its drafting may evolve during the Parliamentary phase.

The ongoing discussions in Parliament are crucial, as they will determine the final shape and effectiveness of the bill. Stakeholders, including legal professionals, consumer advocates, and funding firms, are likely to continue their lobbying efforts to influence the bill's provisions.

In conclusion, while the bill presents a promising step towards enhancing consumer access to justice through third-party funding, its future remains uncertain.

2.1 Legal admissibility and conditions of using TPLF in civil litigation

As there is no legislation in regards to TPLF, the latter must comply with the general rules regarding contracts provided by articles 1101 and subs. of the Civil Code. If the beneficiary of the TPLF is a consumer, the regulation protecting consumers should equally apply.

Finally, TPLF must comply with Luxembourg public order.

2.2 Regulatory oversight of funders/funding industry

At present, since third-party litigation funding is not regulated under Luxembourg law, third-party litigation funding generally escapes any type of supervision by public bodies.

The current bill of law number 7650 on class actions does not provide either for a regulatory oversight of funders/ funding industry.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF (e.g., capital adequacy requirements)

There is no specific legislation regulating TPLF; therefore, this matter is not addressed.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g., legislation on abusive clauses, transparency, avoidance of conflict of interest, etc.).

When discussing issues related to TPLF, it is essential to consider the law governing the legal profession (Loi du 10 août 1991 sur la Profession d'Avocat, as amended, hereafter the "LPA") and the Luxembourg Bar Association Rules (Règlement Intérieur de l'Ordre des Avocats, "RIO").

Article 6(2) of the LPA stipulates that lawyers will only defend cases in which they believe '*in their soul and conscience*." Article 33(2) prohibits lawyers from assisting parties with conflicting interests, and Article 33(4) mandates that lawyers must freely exercise their profession to "*defend justice and truth*.'

In the context of a Luxembourg lawyer's involvement in TPLF, several distinctions need to be made:

- The relationship between the funder and the lawyer, which typically has no direct impact on the litigation.
- The relationship between the lawyer and the other parties, which does not inherently raise ethical issues related to TPLF.
- The relationship between the lawyer and the funded party, which raises significant ethical concerns.

Article 38(1) of the LPA and the Luxembourg Bar Association Rules dictate transparent fee structures, fairness in fee allocation, and compliance with professional standards, in consequence

of which a Luxembourg lawyer shall always respect ethical rules and consideration when entering into a fee agreement with a client or advising one on entering into an agreement with a funder.

Finally, it must be reminded that the Bar Association has the power to reduce the fees charged by a lawyer if they are deemed excessive, power that is not excluded in the case of TPLF.

In addition to what has already been discussed, anti-money laundering and terrorism financing (AML) provisions play a crucial role in the TPLF industry. In recent years, fund managers operating in Europe have begun establishing their funds in jurisdictions that offer various benefits while adhering to these rules and newly emerged regulations, such as the Alternative Investment Fund Managers Directive 2011/61/UE (AIFMD), implemented in Luxembourg by the law of 12 July 2013 on AIFM (the AIFM Law).

In the Luxembourg context, financial sector actors subject to the law of 12 November 2004 on combating money laundering and terrorist financing (the 12 November 2004 Law) must comply with three types of obligations: (i) customer due diligence, which involves identifying the client or the persons they represent and may require documentation justifying one's professional activity, address, and source of funds; (ii) adequate internal management requirements; and (iii) obligations to cooperate with and inform the authorities of any suspicion of money laundering activities, particularly concerning the origin of the funds or the purpose, nature, and procedure of a transaction.

Additionally, the Luxembourg law of 25 March 2020 extends the scope of the 12 November 2004 Law and, in several respects, goes beyond the EU Directive 2018/843 (the 5th AML Directive), by requiring entities to consider recommendations from the Financial Action Task Force (FATF).

In this framework, the funder's management company must take into account compliance with these AML/KYC regulations when dealing with risk management protocols, administrative task, and more.

Finally, in case the beneficiary of the TPLF is a consumer, it will benefit from the protection provided by consumers' law, including protection against an abusive clause.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

During the conference organised in Luxembourg on 15 November 2022 by the *Conférence du Jeune Barreau de Luxembourg* and *Conférence Saint-Yves*, it was discussed how ethical issues would put lawyers "*between a rock and a hard place*." The primary concern is the relationship between the lawyer and the financed party. Sacrosanct professional secrecy could be compromised during the monitoring of proceedings by the finance company as any communication outside the lawyer-client relationship is not protected by professional secrecy.

Strategic decisions related to the proceedings or settlement represent another area of potential conflict. Thus in regard of settlements it was added by a speaker representing a famous Litigation Funder that: '*Due to the structure of our pricings (multiple of the budget tied to duration) combined with the waterfall provision (= rule of distribution of the awarded and enforced claim: the funder first receives reimbursement of its outlay/investment, then the funder receives the success fee as stipulated and calculated according to the LFA, the remainder goes to the funded party) we can maintain a strict hands-off approach in the event of settlements. The funded party is free to accept any settlement offer since the funder's interests are safeguarded in any event.'*

An additional ethical consideration for legal practitioners involved in TPLF is the preservation of privileged communication and confidentiality.

Critical questions were also raised about who truly determines litigation strategy in TPLF arrangements, highlighting the potential conflict where a funder's interests may diverge from those of the client. Moreover, legal practitioners must uphold their fiduciary duties to clients, ensuring that decisions regarding litigation strategy are made in accordance with their clients' goals and priorities, rather than solely based on the preferences of funders or other external stakeholders. This can create a delicate balance where lawyers must navigate potential conflicts of interest to maintain ethical standards and client trust.

With regards with fees and costs, TPLF agreements necessitate meticulous scrutiny to ensure alignment with ethical norms, legal regulations, and professional obligations. Lastly, TPLF agreements necessitate careful consideration of various factors, including the allocation of legal costs, indemnification for unsuccessful litigation, and potential liabilities arising from frivolous proceedings. Clarity in fee arrangements, risk-sharing mechanisms, and adherence to ethical guidelines are paramount to mitigate legal, financial, and reputational risks for all involved parties.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

No such obligation is currently existing.

2.7 Obligations of funders towards beneficiaries and vice-versa

As TPLF is not regulated in Luxembourg, no such obligation is currently existing.

2.8 Distribution of awards and bearing adverse costs in lost cases

No regulation or obligation exists. Adverse costs is however a hot topic of discussion, mostly addressed by Arbitration Rules of institutions.

2.9 Planned legislation

The only existing legal framework in the Luxembourg legal regime which refers to TPLF is the bill of law number 7650 on class actions, which is currently being discussed in the Luxembourg Parliament (transposing EU Directive 2020/1828). This bill of law will authorise class actions in consumer matters.

The overall aim of the bill is to improve access to justice for consumers, particularly by introducing the option to finance class actions through funding from private third parties. Interestingly, the bill expressly addresses the supervision of third-party class action financing. It would add a new article L. 513-1 to the *Code de la consummation*, stipulating that funders are prohibited from influencing the clients' decisions and allows the court to request a financial overview if there are any concerns about potential conflicts of interest. The final version of the bill could significantly impact the regulation of third-party litigation funding (TPLF) in Luxembourg.

Currently, the bill is still under discussion and its drafting may evolve during the Parliamentary phase.

Furthermore, the opposition expressed by the Luxembourg Consumers' Union ("ULC") cannot go unnoticed. In fact, several aspects of the recent amendments proposed were criticized:

- The introduction of government-approved mediators makes mediation a paid service, costing €57 per hour, unlike the previously free service from the Consumer Mediator.
- Provisions for amicable settlements have been removed, although the government maintains that parties can still settle disputes amicably.
- The law now aligns with the 2020 EU directive, excluding disputes related to rentals and certain construction issues from collective actions. The ULC however insists that all consumer contract issues should be eligible for collective action.
- Only accredited organizations can initiate actions, with no financial assistance specified. The ULC calls for legal aid to avoid potential infractions for improper transposition of the directive.

The ULC supports only one amendment: the inclusion of financial services within the scope of collective actions, alongside energy, telecommunications, health, and the environment.

Moreover, the future of the bill remains uncertain, as it was introduced by the previous government, which underwent a change last year. The shift in leadership and policy priorities may affect the likelihood of the bill moving forward, as the new administration may not share the same level of commitment to it or could even introduce amendments that alter its original intent.

In conclusion, while the bill presents a promising step towards enhancing consumer access to justice through third-party funding, its future remains uncertain.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

As mentioned above, there currently is no legislation on TPLF in Luxembourg.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art.5)	*N/A*
Capital adequacy (Art.6)	*N/A*
Fiduciary duty (Art.7)	Lawyers in Luxembourg must uphold their fiduciary duties to clients, ensuring that decisions regarding litigation strategy are made in accordance with their clients' goals and priorities, rather than solely based on the preferences of funders or other external stakeholders. Such provisions are provided for in the LPA and the Bar Association Rules.

	Indeed, Article 6(2) of the LPA stipulates that lawyers will only defend cases in which they believe "in their soul and conscience." Article 33(2) prohibits lawyers from assisting parties with conflicting interests, and Article 33(4) mandates that lawyers must freely exercise their profession to "defend justice and truth."
Powers of supervisory authorities (Art.8)	At present, since third-party litigation funding is not regulated under Luxembourg law, third-party litigation funding generally escapes any type of supervision by public bodies.
Investigations and complaints (Art.9)	*N/A*
Coordination between supervisory authorities (Art.10)	*N/A*
Content of third-party funding agreements (Art.12)	*N/A*
Transparency requirements and avoidance of conflicts of interest (Art.13)	*N/A*
Invalid agreements and clauses (Art.14)	*N/A*
Termination of third-party funding agreements (Art.15)	*N/A*
Disclosure of the third-party funding agreement (Art.16)	N/A
Review of third-party funding agreements by courts or administrative authorities (Art.17)	*N/A*
Responsibility for adverse costs (Art.18)	*N/A*
Sanctions (Art.19)	*N/A*

3. Practical operation of TPLF in your jurisdiction

Please note that most of our interviewees had no or little information on the questions below, namely due to the following reasons:

- Data is not publicly available as litigation funders tend to keep these matters confidential.
- In Luxembourg, TPLF activity is contained and, when present, it's mostly focused on the enforcement phase, therefore costs are more reduced.
- LFAs are not disclosed.

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

The majority of professionals answered that no statistics are available, as TPF is not very developed in Luxembourg yet and the agreements concluded are usually confidential.

b. Minimum claim value in absolute terms (in million Euro)

The majority of professionals we consulted indicated that no specific statistics are available. The minimum claim value is generally determined by the internal criteria of each funder, which may vary depending on their risk appetite, available resources, and the size of the claims. Different funders apply distinct metrics and standards in this regard.

c. Typical claim value in absolute terms (in million Euro)

As with the minimum claim value, the typical claim value is contingent on the funder's internal criteria, risk tolerance, and resources. Each funder employs different metrics and standards, making it difficult to provide a uniform figure.

d. Typical ratio between investment by the funder and claim value

There is no fixed rule, although the industry's standard "rule of thumb" of a ratio of 10:1 between the claim value and the costs is generally applicable.

e. Typical size of the investment by the litigation funder (in million Euro)

Similarly, as above, the typical size of the investment is contingent on the funder's internal criteria, risk tolerance, investment strategy and resources. Each funder employs different metrics and standards, making it difficult to provide a uniform figure.

f. Origin of funding provided by the litigation funder

Funders usually are backed up by both institutional and private investors, with the formers often being displayed on the funder's website.

g. Share of compensation awarded typically demanded by litigation funders

Although there is no fixed rule, the percentage of the award claimed by the funder generally lies between 20% and 40%.

h. Other conditions of the litigation funding agreement

Each Litigation Funding Agreement is a tailor-made contract adapted to the specific needs of that specific case. Combined with the secrecy of the agreements, only the parties to such agreements usually have access to them. For this reason, we do not dispose of any element regarding it.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Each funder has a different 'appetite' for risks, notably related to its financial capacity, to the investment strategy, the specific elements of the case and the jurisdiction.

As for the probability of success, funders carry out a meticulous due diligence before deciding whether to invest in a case or not; therefore, it can be considered that the hypothesis of a case being successful is relatively high if a funder has decided to invest in it.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

These are elements that we do not dispose of, as they are confidential to the parties involved in the transaction.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

These are elements that we do not dispose of, as they are confidential to the parties involved in the transaction.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

In principle, Luxembourg law does not oblige a party to a litigation to disclose a funding agreement to the opposing party or the court. One could argue that the disclosure of a funding agreement could be ordered by a court if the conditions required for the production of documents are met. This seems very unlikely to happen, as the defendant would need to prove that the funding agreement may have an impact on the decision of the judge on the merits.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

In principle, clients are completely free in regard to their choice of counsel. In practice, however, it is accepted that a third-party funder may present a funded party with its choice of counsel if the funded party is not yet represented and seeks advice from the funder in this regard. Also, it is common practice to stipulate in the funding agreement that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace his or her lawyer, funding will only be further granted if the new lawyer is approved by the funder.

As a matter of principle, the litigant's lawyer should however be independent from the third-party funder and must be able to act freely of any instructions from the latter.

X *Consent for settlement*

The control usually covers the minimum amount for a settlement to be entered into.

- *Consent for appeal*
- *Consent for expert evidence*
- *Agreement on strategy*
- *Other [Text]*

Overall, some funders adopt a less intrusive role once the funding agreement has been signed and thorough due diligence has been undertaken, although the potential for influence remains.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

It is a delicate relationship, mostly regulated by contractual provisions in the litigation funding agreement and by the bar rules, as it is prescribed that '*in the exercise of his profession, a lawyer is master of his own means*'.

A participant highlighted the potential conflict where a funder's interests may diverge from those of the client. For example, a decision that satisfies the client might not satisfy the funder, who might prefer an appeal. This situation places the lawyer in a challenging position, potentially held responsible for decisions influenced by external interests.

As legal practitioners have a duty to act in the best interests of their clients, whose interests might differ from the ones of the funders, balancing these competing interests requires legal professionals to exercise judgment, discretion, and communication skills to align the interests of all parties involved (especially regarding settlements).

Moreover, legal practitioners must uphold their fiduciary duties to clients, ensuring that decisions regarding litigation strategy are made in accordance with their clients' goals and priorities, rather than solely based on the preferences of funders or other external stakeholders.

As this relationship entails divergent objectives between funders, claimants, and legal representatives, raising questions about control over litigation strategy, settlement negotiations, and case management as early as possible is paramount to ensure that lawyers will not incur into conflicts when acting in the best interests of their clients (under Luxembourg law, particularly Article 33(1) of the LPA, it is stated that '*dans l'exercice de sa profession, l'avocat est maître de ses moyens*,', meaning the lawyer retains the right and duty to represent the client as they deem fit. This provision emphasizes that lawyers control the proceedings.).

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Usually these scenarios are regulated in the Litigation Funding Agreement (LFA), often providing for termination rights for the funder in cases where the claimant and/or the lawyer have provided false information that was deemed as essential for the funder to fund the case, or if circumstances change so drastically that it would be impossible for the funder to maintain the funding in place at the same conditions as initially agreed upon.

In particular, the funder we interviewed commented in that regard that: "*the funder can terminate the LFA ex nunc if the funded party has committed a material and irremediable breach or has not remedied a remediable breach within the notice period. Other than that, a termination is only possible*

if the proceeds will likely be insufficient to reimburse the full amount of the investment. It should be noted that any termination leads to the full loss of the funder's investment – a termination is the worst that can happen to a funder and will only be done if there is no reasonable prospect to receive at least the amounts invested. These rules apply equally to the funded party."

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Unknown.

From our experience, safeguards to avoid conflicts of interest are generally in place, but the specifics of these safeguards are not detailed.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- o *Limited liability*
- o *Conditional liability*

X *No liability*

LFA usually provides for no liability policies; however, it is also possible to provide for conditional liability at certain conditions.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

It is not a requirement, but collaboration between funders and insurers is more and more common.

s. Are there any examples of a funding agreement used by litigation funders publicly available? If yes, could you please provide a copy.

No examples exist.

4. Stakeholder views on TPLF in your jurisdiction

Participants to the survey said to be aware of funders currently acting in Luxembourg.

However, there is no publicly available data on the average number of cases funded by TPLF per year over the last three years, nor on the specific details regarding their funding practices, such as types of cases typically funded, minimum claim values, or typical claim values.

Similarly, information on the typical ratio between investment by the funder and claim value, the typical size of investments, the origin of funding, and the share of compensation awarded to litigation funders is also unavailable. Consequently, we do not have details on the conditions of litigation funding agreements, acceptable thresholds for probability of success, or acceptable levels of risk.

Regarding the financial of funders, no information is accessible. The outcomes of funded cases, including effective gains for beneficiaries and funders, remain unknown. Additionally, the extent to which funding agreements are disclosed to the court is unclear.

It is observed that litigation funders often exercise control over legal proceedings, including the choice of lawyer, consent for settlement, appeal, and expert evidence, as well as agreement on strategy. The relationship between the litigation funder and the claimant's lawyers is typically contractual.

The participants to the survey believe that the undesired features should be covered by a legislation whether European or national.

Glossary of abbreviations and acronyms

EP - European Parliament

LPA - Loi sur la profession d'avocat

TPLF - Third-Party Litigation Funding

CSSF - Commission de Surveillance du Secteur Financier

ATE - After the Event

MoC - Multiple-on-Capital

IRR - Internal Rate of Return

IBA - International Bar Association

ICC - International Chamber of Commerce

Table of legislation

Luxembourg Legislation

Luxembourg Civil Code

Loi du 12 juillet 2013 relative aux gestionnaires de fonds d'investissement alternatifs

Law of 10 August 1991 on the legal profession

Law of 12 July 2013 on Alternative Investment Fund Managers

Law of 12 November 2004 on Combating Money Laundering and Terrorist Financing

Law of 25 March 2020 establishing a central electronic system for retrieving data concerning payment accounts and bank accounts identified by an IBAN number and safe-deposit boxes held by credit institutions in Luxembourg

Bill of law number 7650 on class actions in consumer law

Règlement Intérieur de l'Ordre (RIO), Luxembourg Bar Association Rules as adopted by the Council of the Association at its meeting on 9 January 2013

Luxembourg Consumer Code

European Legislation

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L 174

European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation [2022] OJ C 125

International legal sources

International Bar Association (IBA) Rules

International Chamber of Commerce (ICC) Rules 2021

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Malta

Dr Jean-Pierre Gauci, BIICL

With many thanks to Tiffany Chan and Emma Wang for their assistance in the preparation of this report.

Executive Summary

- TPLF is not expressly prohibited in the Maltese jurisdiction, unless it is characterised as quota litis or champerty both of which are expressly prohibited by provisions of the Civil Code and the Code of Organisation and Civil Procedure.
- The only piece of legislation that explicitly mentions and allows for TPLF (in limited circumstances) is the Representative Actions Act 2023 which was enacted to transpose into Maltese law the provisions of the Representative Actions Directive.
- Even in the context of the Act, the reference to 'without prejudice to…' raises various concerns about the effectiveness of the provisions of the Act.
- There is a lack of a regulatory framework from the specific Act as well as Maltese law in general for TPLF.
- Key concerns that experts consider to be behind the lack of TPLF in Malta include: the legislative framework; the education and awareness of judges and lawyers; and the conservative approach to damages in the Maltese court system (making the financial feasibility of TPLF and related schemes questionable).

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Third-Party Litigation Funding (TPLF) is not explicitly prohibited in Malta unless characterized as quota litis or champerty, both of which are illegal under Maltese law (Civil Code Article 986(1) and Code of Organisation and Civil Procedure (COCP) Article 83).

Article 986(1) of the Civil Code, interestingly titled 'Champerty' provides that: 'Stipulations quotae litis are void.'

Article 83 of the COCP (titled: Advocates not to enter into or make agreements or stipulations quotae litis) provides that: 'Advocates shall not, either directly or indirectly, enter into or make any agreement or stipulation quotae litis.'

Lawyers are strictly barred from entering into such arrangements.

Article 83 of the COCP does not distinguish between conditional fee arrangements and contingent fees, leaving TPLF's compatibility with such schemes unclear.

Litigious rights can be legally transferred under specific conditions (Civil Code Articles 1469–1484). However, profit-making from such transfers is limited, with exceptions only for rights arising from commercial transactions (Commercial Code Article 118).

Beyond the Representative Actions Act (RAA), TPLF is not regulated in Malta. TPLF does not qualify as a loan or lending agreement, nor is it recognized as a regulated investment. TPLF entities do not meet the criteria for financial institutions.

The Arbitration Act is silent on TPLF. Soft law instruments, such as the 2014 IBA Guidelines, may indirectly address disclosure in arbitration.

TPLF is explicitly covered in limited circumstances under the RAA 2023, aligning with the EU Representative Actions Directive. It mandates safeguards against funder influence and requires disclosure of funding sources.

While Malta allows certain slivers of TPLF under specific circumstances, its overall approach is characterized by a lack of regulatory clarity. Champerty remains persona non grata, litigious rights are transferable but constrained, and procedural rules are notably absent. TPLF operates in Malta more as a hypothesis than a fully embraced reality.

Summary: TPLF is not expressly prohibited in the Maltese jurisdiction, unless it is characterised as quota litis or champerty. The only piece of legislation that explicitly mentions and allows for TPLF (in limited circumstances) is the RAA 2023, though this specific Act as well as Maltese law in general lack a regulatory framework for TPLF.

Champerty is illegal in Malta:

Maltese Civil Code Article 986. (1): 'Stipulations quotae litis are void.'

- The term quota litis and champerty appears to be interchangeable under Maltese law. In fact, this article is titled "Champerty".

- Note that quotae litis arrangements are historically understood to be with the advocate/lawyer of the case concerned, and champerty concerns arrangements with an unrelated third-party financer.

Code of Organisation and Civil Procedure (COCP) Article 83: 'Advocates shall not, either directly or indirectly, enter into or make any agreement or stipulation quotae litis.'

- Quotae litis arrangements are commonly categorised into either conditional fee arrangements or contingent fee arrangements. The former refers to when the lawyer receives an upscale premium amount in case of success, which is unrelated to the damages awarded by the judgment, and the latter allows the lawyer to receive a share of the judgment's outcome.
- A 2007 Report by the UK Civil Justice Council on the 'Future Funding of Litigation' noted that Malta operates a conditional fee arrangement (p73).
- TPLF is more similar to contingent fee arrangements as the third-party funders will typically seek a share of the judgment proceeds. However, Article 83 does not distinguish between conditional and contingency fee arrangements, and it is **unclear whether TPLF falls under its catch**.

A recent development is the transposing of the EU Representative Actions Directive into the **Representative Actions Act 2023** for the protection of the collective interests of consumers. The Act **explicitly allowed for the possibility of TPLF in these class action claims,** but only on the condition that the qualified entities bringing these claims have 'established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers' (Section 5(3)(e)), and that they make publicly available, inter alia, information about the sources of its funding (Section 5(3)(f)).

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

The Representative Actions Act 2023 is the only Maltese legislation that explicitly provides for the operation of TPLF; however, as it is a very recently enacted piece of legislation (25 June 2023), no action has been brought on its basis so far.

Reliance on the TPLF in Malta: The RAA 2023 explicitly provides for the operation of TPLF but was only enacted on 25 June 2023. No actions have yet been brought under this legislation. Beyond this act, TPLF is not explicitly regulated or prohibited in Maltese law, and its use in cases remains unclear due to a lack of data or reported examples. Stakeholders note that there is no TPLF experience in Malta, although (1) there are some other informal, small-scale funding happening in local cases supporting the bringing of cases, and (2) funded cases abroad may have an impact in Malta, especially in the context of the Brussels II Regulation. Importantly, it seems that such impacts have come up in the context of gaming given the prevalence of the industry in Malta.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Vannin Capital is a Malta-based and registered TPLF company but primarily focuses on the Far East and Australian jurisdiction. There is no information indicating that it operates within the Maltese jurisdiction. http://www.litigationfunding.com.mt/about-us.php.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

Data is very limited, if not entirely unavailable, on TPLF in Malta. For example, the EP Study on 'Responsible private funding of litigation' contains some data on the litigation costs of each EU country but none on Malta. A 2011 Working Paper by the ANU Centre for Law and Economics on "Third Party Litigation Funding in Australia and Europe" also contains information on whether TPLF is available in 24 of the EU Member States except for Malta and Estonia (p36).[665]

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

No, there is no significant doctrinal discussion on TPLF in Malta. The topic has not sparked debate, likely due to its minimal presence and the lack of an established framework or historical use.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The issue of TPLF is not one that is regularly discussed in the Maltese context, and therefore, no specific issues have caused debate.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

TPLF is expressly permitted under the Representative Actions Act 2023 for class actions that protect the collective interests of consumers, as required by Directive (EU) 2020/1828. Qualified entities must avoid conflicts of interest with funders and meet disclosure requirements, but the framework is not comprehensive. Critically, even here, the Act makes reference to these provisions being 'without prejudice to any other provision in any other law prohibiting third party litigation funding'.

Conditions of using third-party funders in this context are not comprehensive but they generally concern the obligation of qualified entities to avoid conflict of interests with the funders as well as disclosure requirements.

2.2 Regulatory oversight of funders/funding industry

No regulatory framework has been put in place for the operation of funders. The RAA does not mention the need for establishing supervisory authorities in governing TPLF.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF (e.g., capital adequacy requirements)

[665] Barker GR, 'Third Party Litigation Funding in Australia and Europe' (2011) Centre for Law and Economics ANU, <https://ssrn.com/abstract=2034625 or http://dx.doi.org/10.2139/ssrn.2034625> accessed 4 March 2025.

Not specified in the RAA.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g., legislation on abusive clauses, transparency, avoidance of conflicts of interest, etc.).

Although TPLF does not technically fall within the ambit of the Financial Institutions Act of Malta, principles contained within may arguably still affect TPLF in practice. For example, Article 5(1)(c) requires companies to have sound and prudent management, robust governance arrangements with transparent lines of responsibility and adequate internal control mechanisms, inter alia.

The general rules established in the Civil Code and the Code of Organisation and Civil Procedure apply to the TPLF context, including in the framework of the RAA (as a result of the 'without prejudice' clause).

Moreover, **litigious rights may, however, be transferred legally in Malta**, which might allow for the concept of 'broad' third-party litigation funding to function within the jurisdiction. ('Broad' in the sense that the ownership has changed, contrasted with 'narrow' TPLF where the funder simply assists the claimant with funding). Specifically, an individual who acquired a litigious right through a commercial transaction might be able to profit under the arrangement by virtue of Article 118 of the Commercial Code, albeit in very limited circumstances (see below):

- **Civil Code** Articles 1469-84 – Generally, litigious rights may be considered as transferable property:
    - 'The assignment or sale of a debt, or of a right or of a cause of action is complete, and the ownership is ipso jure acquired by the assignee as soon as the debt, the right or the cause of action, and the price have been agreed upon, and, except in the case of a right transferable by the delivery of the respective document of title, the deed of assignment is made' (Article 1469)
    - Article 1471 emphasises the importance of giving notice when a right has been transferred – the right may not be exercised unless the debtor (the person against whom the right is given) is properly notified, either by judicial act or by the assignor or by the assignee of the right.
- **Article 1483** deals specifically with the assignment of litigious rights, but even though it allows the transfer of litigious rights per se, it states that after the assignment, the **debtor may obtain his release by reimbursing the assignee the price of the assignment – this goes against the whole profitable idea of the TPLF mechanism.** The article provides that: where a litigious right has been assigned, the debtor in the obligation may obtain his release from the assignee by reimbursing to him the actual price of the assignment together with the expenses and interest to be reckoned from the day of the payment of the said price by the assignee.
    - Only exception is if the assigned litigious right arises from a commercial transaction, per **Article 118 of the Commercial Code**. The article provides that: 'The right competent to a debtor under article 1483 of the Civil Code, in the case of assignment of a litigious right, **cannot** be exercised where the litigious right so assigned arises from a commercial transaction'.
    - **This would aid in the purchase of litigious rights in order to make a profit, but arguably is hardly enough of an exception to build a solid foundation for TPLF**.

- However, apart from the rules related to champerty and litigious rights, **regulation of TPLF is absent in the Maltese legal context:**
  - Under the **Banking Act**, TPLF does not fall under any definitions of loans or lending agreements.
  - Under the **Investment Services Act,** TPLF is not recognised as a type of regulated investment. Second Schedule provides an exhaustive list of 12 instruments considered investment under Maltese law (transferable securities, money market instruments, derivative instruments, contracts, and agreements, etc.). These do not appear to be related to TPLF.
  - Under the **Financial Institutions Act**, TPLF companies would also not fall under the definitions of credit facility or financial institutions, and, therefore, would not be regulated by the Act.
  - Procedural rules**: COCP** is silent on TPLF. The Civil Code is also silent except for the illegalisation of champerty.
  - The **Arbitration Act** is also silent on TPLF specifically, which is potentially problematic as over 40% of arbitration claims in the UK secured or explored funding by third party funders. Though soft law instruments such as the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration suggests that those who bear a direct economic interest in the award may be considered to bear the identity of the party to the arbitration (Standard 6(b)), and that the funded party would need to disclose such information during the arbitral process at the earliest opportunity (Standard 7(a)).

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

- Conflict of interest and transparency

Article 5(3)(e) RAA 2023 requires that qualified entities (for the purpose of bringing representative actions) has 'established procedures to prevent [the influence of third-party funders] as well as to prevent conflicts of interest between itself, its funding providers and the interest of consumers.'

Article 119(2)(b) also prohibits the bringing of representative actions against a defendant that is a competitor of the funder or a defendant on which the funder is dependent.

- Disclosure

The RAA requires qualified entities to disclose all sources of its funding as per Article 5(3)(f), 8(4)(b)(iii) and 11(3). But it does not specifically require the disclosure of the identity of the funders or existence of TPLF agreements.

- Cost

The RAA does not provide for the power of courts to make cost orders against funders.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Not specified.

2.7 Obligations of funders towards beneficiaries and vice-versa

Not specified.

2.8 Distribution of awards and bearing adverse costs in lost cases

Not specified.

2.9 Planned legislation

Unable to find any planned legislation in Malta on TPLF.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State i.e., the Malta Representative Actions Act 2023*
Authorisation system (Art. 4) and conditions for authorization (Art.5)	**Low**. While the RAA permits third party funding activities, the Act does not specifically call for a system for the authorization and monitoring of the activities of litigation funders. It also has no mention of the need for an independent supervisory authority tasked with granting authorizations to litigation funders based on the conditions listed in Article 5.
Capital adequacy (Art.6)	**Low**. The RAA does not specify that the financial resources and liquidity of third-party litigation funders need to be verified by supervisory authorities as sufficient for all debts and liabilities arising from the TPLF arrangements.
Fiduciary duty (Art.7)	**Low**. The RAA does not specify that litigation funders shall have the governance and internal procedures in place to ensure that they observe a fiduciary duty of care, and to act in a fair, transparent manner, in the best interests of the claimants/intended beneficiaries even in the event of conflicts of interest.
Powers of supervisory authorities (Art.8)	**Low.** As the RAA does not mention the need for establishing supervisory authorities in governing TPLF, powers of or mechanisms supporting these authorities per Article 8 are also not mentioned.
Investigations and complaints (Art.9)	**Low**. No complaints procedure has been set up under the RAA specifically for the investigation of complaints against the litigation funders by the supervisory authorities.
Coordination between supervisory authorities (Art.10)	**Low**. The RAA does not provide for the duty for supervisory authorities to coordinate with those of other Member States in granting authorization and monitoring activities of litigation funders.

Content of third-party funding agreements (Art.12)	**Low.** The RAA is silent on what TPLF agreements shall entail or make reference to.
Transparency requirements and avoidance of conflicts of interest (Art.13)	**Medium.** While the RAA does not require litigation funders to establish policy and internal processes for the avoidance and resolution of conflicts of interest or impose on them a duty of disclose, it does require that qualified entities (for the purpose of bringing representative actions) has 'established procedures to prevent [the influence of third-party funders] as well as to prevent conflicts of interest between itself, its funding providers and the interest of consumers' (Article 5(3)(e) RAA). Article 119(2)(b) also prohibits the bringing of representative actions against a defendant that is a competitor of the funder or a defendant on which the funder is dependent.
Invalid agreements and clauses (Art.14)	**Medium(?).** The RAA does not contain any provision regarding the circumstances in which TPLF agreements are to be deemed invalid, such as where agreements containing clauses that grant a funder the power to influence decisions of a claimant in relation to the proceedings shall have no legal effect. However, Article 11(2)(a) of the EAA provides that the decisions of qualified entities (claimants), including decisions on settlement, 'shall not be unduly influenced by a third party in a matter that would be detrimental to the collective interests of the consumers concerned by the representative action'.
Termination of third-party funding agreements (Art.15)	**Low.** The RAA does not contain any provision prohibiting the unilateral termination of a TPLF agreement by a funder within C's informed consent or with sufficient notice given.
Disclosure of the third-party funding agreement (Art.16)	**High.** The RAA requires qualified entities to disclose all sources of its funding as per Article 5(3)(f), 8(4)(b)(iii) and Article 11(3). But it does not specifically require the disclosure of the identity of the funders or existence of TPLF agreements.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	**Low**. The RAA does not contain provisions on the duty of courts or administrative authorities to conduct reviews on the impact of funding agreements and impose relevant penalties.
Responsibility for adverse costs (Art.18)	**Low.** The RAA does not provide for the power of courts to make cost orders against funders.
Sanctions (Art.19)	**Medium.** Article 19 of the RAA provides for sanctions where any party fails to comply with any order of the Civil Court, but does not contain provisions for sanctions that could be imposed by supervisory authorities.

3. Practical operation of TPLF in your jurisdiction

Case Types and Statistics: Existing information suggest the non-practice in the TPLF Space; No clear data on types of cases funded; TPLF activity appears nascent and largely unreported. No statistics available on the average number of TPLF-funded cases or arbitration cases in the last three years.

Financial Metrics: No data on minimum or typical claim values in Malta. No reported ratio between the funder's investment and claim value. No data on typical investment sizes by litigation funders. Vannin Capital's funding origin remains unclear for local operations. Given that TPLF is not practiced in Malta, no information on financial metrics is available.

Compensation and Conditions: Given that TPLF is not practiced in Malta, no information on compensation and conditions is available. No data available on the percentage of awarded compensation typically demanded by funders. Lack of information on the detailed terms of litigation funding agreements.

Risk Management and Returns: No information on acceptable success probabilities or risk assessment criteria. No data on MoC or annualized IRR in Malta-funded cases.

Outcomes and Gains: No data on case outcomes or effective gains or beneficiaries and funders in Malta. No clear information on whether funding agreements cover adverse costs or the nature of the liability (e.g., limited, conditional, or no liability).

Disclosure and Control: No specific data on the extent of disclosure of funding agreement to courts in Malta. No confirmation on funders exercising control over legal proceedings. Common areas of potential control include choice of lawyer and consent for settlement, appeal, expert evidence, or strategy.

Funder-Lawyer Relationship: No data on how funders interact with plaintiff's lawyers.

Termination of Funding: No information on whether funders can withdraw funding during litigation and under what circumstances.

Safeguards: No specific information on funder safeguards to prevent conflicts of interest. No data on whether funding agreements include After the Event insurance.

Publicly Available Funding Agreements: No example of publcily available TPLF agreements were identified.

4. Stakeholder views on TPLF in your jurisdiction

Stakeholders consulted for the purposes of this research identified 3 key reasons behind the lack of TPLF in the Maltese context. These are:

- The Legislative Framework – as outlined above the legislative framework is either non-existent or prohibiting in the context of litigation funding.
- The Knowledge and Attitudes of Judges and Lawyers – there is a lack of awareness of litigation funding considerations and if they are to arise they will be set aside because judges and lawyers are not socialised with the ideas and practice of litigation funding in this way. Culturally there is no appetite for the sort of mass claims that would result in the sort of funding that TPLF would be engaged for.
- Levels of Damages – Maltese courts tend to award limited/conservative amounts in damages making TPLF in the Maltese context financially unfeasible/unattractive.

Stakeholders noted that this might be a missed opportunity in terms of cases being litigated in Malta and indeed various firms, especially commercial firms addressing commercial law issues have some interest in TPLF and may be linked to cases funded under TPLF schemes in other jurisdictions.

Glossary of abbreviations and acronyms

ANU Australian National University

COCP Code of Organisation and Civil Procedure

EAA European Accessibility Act

EP European Parliament

EU European Union

IBA International Bar Association

IRR Internal Rate of Return

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TPLF Third-Party Litigation Funding

Table of legislation

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The Netherlands

Dr Vesna Lazic and Dr Jos Hoevenaars, Asser Institute

Executive Summary

- No statutory legislation specifically regulates TPLF. The Code of Conduct for Dutch Lawyers does prohibit contingency fees. Apart from oversight on funders as investment firms, there is no regulatory oversight for third party funders. The WAMCA provides limited conditions on TPLF, which are mainly focused on standards to be complied with by claiming organisations. The independence of representative organisations is ensured by the rules on transparency of the Representative Actions Directive (EU) 2020/1828. Similar standards and requirements can be found in the Claim Code and the WAMCA, and are normally scrutinised and assessed by the courts, to ensure a sufficient level of safeguards. No new legislation is planned. The WAMCA will be evaluated in 2025.
- TPLF in the Netherlands is used in individual actions as well as increasingly in collective procedures. Since mass claims for damages were made possible in 2020, there is a steady stream of particularly scattered damages claims that make use of TPLF. The Netherlands is a relatively attractive jurisdiction for litigation funders. There are a couple of domestically based funders, but most of the funders active in the Netherlands are internationally operating providers that finance mass claims.
- Except for class actions, there is no public data available on the actual use of litigation funding in the Netherlands. Generally, the Dutch market for third party litigation funding appears to be expanding gradually.
- Main doctrinal discussions focus on a proper balance between a wider use of the TPLF in order to enhance access to justice, on the one hand, and the need for reducing the risks associated with the TPLF, such as conflicts of interest, abusive litigation and disproportionate benefits to litigation funders, on the other.
- Interviewees agree that there is a built-in risk to TPLF in attracting unwanted practices, yet there is disagreement as to the extent to which such undesired practices are already taking place, as well as whether further regulation is needed to combat that.
- Interviewees on both sides of the debate question whether the measures in the draft directive annexed to the EP resolution are the right approach to addressing what they consider to be current shortcomings. Defendant lawyers especially criticize instances where the funder and the claiming vehicle appear to be one and the same, and where there are no 'real' clients, but question whether the measures in the draft directive annexed to the EP resolution would remedy those practises. Claimant lawyers anticipate that the measures, especially a system based on permits for funders, will have a negative impact on claiming parties' possibilities for obtaining funding.
- There is general agreement that minimum regulation, especially rules around transparency requirements, could provide for much needed clarity regarding the rules governing litigation

funders and result in a level playing field. Guidance for courts on what is and what is not allowed could remedy this and potentially speed up procedures.

- All respondents agree that, since the TPLF market is international by nature, any regulation should reflect that, and it should also be done at the supranational level.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no statutory legislation that specifically regulates TPLF in the Netherlands. The relationship between the funder and the representative is set out in a TPLF-agreement. Accordingly, the relevant provisions of the Civil Code on the general law of contract apply. In addition, there is the 2019 Claim Code, which is a soft law instrument, as the result of self-regulatory initiatives to cope with the issue of 'quality control' of ad hoc foundations.[666]

However, the litigation funding is affected by the legislation on collective proceedings. The collective action has been part of the Dutch statutory law since 1994 by a change introduced in the Civil Code. The provisions of Art 3:305a (old) were introduced to enable the filing of multiple similar claims in one legal action. The purpose was to enhance efficiency and to reduce costs in such cases, the number of which was growing steadily. However, only requests for declaratory judgments and injunctive relief were available remedies, whereas claims for monetary damages were excluded. The Law on Collective Mass Claims Settlement Act (Wet afwikkeling massaschade – WCAM) was enacted in 2005 (hereinafter: WCAM or 2005 Law). It introduced the legal framework for reaching settlements with respect to compensatory redress in mass damage cases. It gives parties the possibility to apply to the Amsterdam District Court to declare a mass settlement agreement which is binding on an opt-out basis.

In order to improve legislative framework in that respect, the 2020 Mass Damage Settlement in Collective Action Act (Wet afwikkeling massaschade in collectieve actie – WAMCA) (hereinafter: WAMCA or 2020 Law) came into force on 1 January 2020. It introduced the possibility for representative organisations (foundation or other association) to file collective claims for damages on an opt-out basis (under Art. 3:305a of the Dutch Civil Code - DCC).

WAMCA provides for rather stringent standing and admissibility requirements.[667] In particular, it strengthens the criteria for the admissibility of a representative organisation and for the settlement of the collective damage claim (Articles 3:305a to 305e of the DCC and Title 14A of the Code of Civil Procedure - CCP).

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[666] Ianika Tzankova and Xandra Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands', in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 5.

[667] The similarity of interests is amongst admissibility requirements for both damage and non-damage actions. The interests that are intended to be protected by the claim must be similar so that they are susceptible to being dealt with in a collective manner. According to the relevant case law, this condition is met when the claims can be decided in one procedure with no need to consider the special circumstances of the individual parties' interests *Stichting Proefprocessenfonds Clara Wichmann et al* (HR, 9 april 2010) ECLI:NL:HR:2010:BK4547, r.o. 4.3.2 and *Plazacasa B.V.* (HR, 26 februari 2010) ECLI:NL:HR:2010:BK5756, r.o. 4.2).

Before the WAMCA was enacted, admissibility requirements were governed solely by the 2011 Claim Code – which is a set of voluntary rules (soft law). When the Claim Code was revised in 2019,[668] it introduced, *inter alia*, the provisions on TPLF which were partially codified in WAMCA.[669] The 2020 Representative Action Directive (hereinafter; Directive or RAD) has been implemented by the Representative Actions Directive Implementation Act (*Implementatiewet richtlijn representatieve vorderingen voor consumenten*), which came into force on 25 June 2023.

The WAMCA had already complied with most of the Directive's requirements, so that only a few adaptations were needed. One such adjustment to the Civil Code is introducing the requirement that litigation may not be financed by a funder who is a competitor of the opposing party or a funder who is dependent on such a party, if it concerns an action to protect a legal interest as referred to in Art. 2 para 1 of the Directive (Art 3:305 para 2 CC).

Another addition to the Civil Code is providing the conditions for the so-called "cross-border representative actions" (Art. 3:305e CC). This is a collective claim brought by a consumer organisation in an EU Member State other than the one in which the organisation is established, within the meaning of Art. 4 of the Directive. It sets out the requirements which a foundation or association must meet in order to be designated as a qualified entity to participate in cross-border representative actions. Further rules on designation and the application procedure are set out in the Decree of Qualified Entities for Cross-border Representative Action – *Besluit bevoegde instanties grensoverschrijdende representatieve vorderingen* – of 13 July 2023.

Finally, Art. 1018f of the Code of Civil Procedure (CCP) was adjusted so as to introduce the opt-in possibility for persons with no domicile or residence in the Netherlands. With respect to the latter, the last sentence of the fifth paragraph does not apply. Thus, the decision brought in collective action will be binding on non-Dutch residents if, in addition to the written notification, they have also informed the registry by a written notification that their interests are not represented in a collective or an individual action, based on similar questions of fact and law for the same event or events and against the same defendant in another Member State of the European Union or another State party to the Agreement on the European Economic Area.

The Netherlands was one of the first Member States to implement the Directive. In fact, the vast majority of the Directive standards were already complied with in the existing legislation. A very few adjustments of the Civil Code and the Code of Civil Procedure were required, as explained.[670]

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

[668] Bert van Delden et al., 'Claimcode 2019' (2019) Boom Juridisch.

[669] Parliamentary Papers II 2016/17, 34608, n 3, 6 (MvT), par. 4.2.

[670] For empirical research on the WAMCA, see, Joeri Klein and Koen Rutten, 'Vier jaar WAMCA – een tweede kwantitatieve analyse' (2023) Finch Dispute Resolution and Deminor Litigation Funding; Joeri Klein, Koen Rutten and Caspar Vermande, 'Vier jaar WAMCA – een derde kwantitative analyse' (2024) Finch Dispute Resolution and Deminor Litigation Funding; Karlijn Van Doorn, 'Drie-en-een-half-jaar collectieve (schadevergoedings)acties: Een inhoudelijke analyse van het centraal register voor collectieve vorderingen' (2024) 2 Nederlands juristenblad 84. See also, Jacob Van der Tang, 'Recht doen aan het belang van gedupeerden: Aspecten van procesfinanciering die van belang kunnen zijn bij de vorming en invulling van een rechterlijk toetsingskader ter beoordeling van vergoedingen aan derden financiers van collectieve vorderingen', in *Geschriften vanwege de Vereniging Corporate Litigation 2021-2022 (Vol. 178* Serie Van der Heijden Instituut, Wolters Kluwer Nederland B.V 2022) 329-353.

Whereas in many jurisdictions TPLF is used mainly in individual actions, in the Netherlands there is a growing use of it in collective actions after WAMCA 2020 came into force.[671] TPLF in WAMCA cases is, to date, exclusively used in claims for damages. There are a number of important judgments on the interpretation of the WAMCA, particularly on the admissibility and funding requirements.

The Netherlands has been a rather popular venue for anti-cartel litigation and settlements, class actions and, more recently, international debt restructurings that include mass litigation claims, privacy related claims against large Tech companies. This is primarily due to many international (holding) companies in the Netherlands, its rather effective class action settlement mechanism and the enforceability of judgments in the EU Member States on the basis of the Brussels Ibis Regulation.[672]

So far, except securities litigation for institutional investors and anti-cartel claims, litigation finance as an alternative form of corporate finance does not seem to be popular in the Netherlands.[673]

In contrast to some other European states, such as Austria, Germany and UK, there is still a rather limited use of TPLF in insolvency proceedings.[674]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Today, there are a couple of Netherlands-based litigation funders,[675] such as *Liesker Litigation Finance* (founded in 2011), *Redbreast* (founded in 2015), *Capaz Litigation Funding* (founded in 2016), *Weiss Capital*, and *Omni Bridgeway* merging in 2019 with *IMF Bentham*. *Liesker Litigation Funding* was founded in 2011 and is known for litigation financing to the broader public of private individuals and small to medium-sized enterprises. It is stated in the literature that it will finance claims starting from €150,000 and that it has successfully financed its growth through crowdfunding.[676] *Redbreast Litigation Finance*, founded in 2015, finances high-value litigation and arbitration. In 2021, it started a fund to fund exclusively Dutch class actions. *Omni Bridgeway* has become known for its successful enforcement of judgments and arbitral awards in countries in which the enforcement proved to be particularly difficult. More recently, it provides the funding for anti-cartel class actions and high-value litigation, arbitration and class actions. It merged with *IMF Bentham* at the end of 2019, becoming thereby one of the major players on the global litigation finance market.[677]

Also, there are many internationally operating litigation funding providers that finance mass claim[678] dispute resolution in the Netherlands (e.g., *Shell, Converium* and *Fortis*). It is on public record

[671] Van der Tang, 336.
[672] Rein Philips, 'Netherlands' in Simon Latha (ed), *Third Party Litigation Funding, Law Review* (6th edn, Law Business Research Ltd 2022), 131.
[673] Id .132.
[674] In general, on the practice and case law on the WAMCA, see Dennis Horeman and Machteld De Monchy (eds), *Unlocking the WAMCA, A Practical Guide the New Collective Action Regime in The Netherlands* (3rd edn, De Brauw Blackstone Westbroek 2024) and Arthur Boitelle and Paul Olden, 'Een handleiding voor de WAMCA' (2024) 18(4) Ondernemingsrecht 100.
[675] For an updated list see, Xandra Kramer et al, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?*, (Eleven 2024) 65-66, referring to an overview at 65, footnote 158.
[676] Ibid.
[677] Ibid.
[678] Ibid.

that investor, consumer (e.g., Dexia and VW litigations) and competition (e.g., *Air cargo, Sodium Chlorate* and *Trucks cartels*) matters are financed through TPLF.[679]

In fact, the WAMCA register illustrates that a majority of third-party funders involved in Dutch class actions are based outside of the Netherlands. They include major global funders such as *Fortress, Therium, Woodsford* and *Innsworth*. For some time, US claimant law firms, such as *Bernstein Litowitz Berger & Grossmann* and *Grant Eisenhofer,* have been holding a prominent position in funding class action in the Netherlands. A number of other US claimants law firms, e.g., *Hausfeld, Scott+Scott, Pogust Goodhead* and *Milberg* have recently also entered the Dutch litigation finance market. In addition to that, a number of individuals and organisations, such as *Adriaan de Gier* of *De Gier Business Law, Pieter Lijesen* and *Consumenten Claim* have become successfully engaged in organising or conducting funded consumer class actions.[680]

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

Except for class actions, there is no public data available on the actual use of litigation funding in the Netherlands. Generally, the Dutch market for third party litigation funding is expanding gradually. TPLF has become a common and widely used tool for lawyers and their clients with insufficient funds to initiate legal proceedings. Therefore, it has become a usual practice for law firms to explore potential claims in order to reach out to funders and interest organisations.[681]

More data is available on the class actions in the Netherlands through a public register[682] in which claims filed in new collective actions have to be registered. The register was introduced by the WAMCA. The previous legislative scheme applies to claims filed before 15 November 2016. As already explained, there was no possibility of filing a claim for collective damages under the previous legal framework. Instead, it offers only the possibility to obtain a determination of liability and a court-approved collective settlement on an opt-out basis.

The total number of registrations of class actions does not seem to have moved much in either direction. However, with the new cases that claim for damages currently around 5 annually, the number of collective actions that do not claim for damages seems to have declined.[683] This is likely due to the stricter admissibility requirements that are included under the WAMCA.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is abundant caselaw in the Netherlands on the topic. Indeed, these judgments trigger publications which comment on and discuss them.[684] Also, the European Parliament resolution of

[679] Tzankova and Kramer, 12. On other major foreign players currently active on in the Dutch market, see, Kramer et al, 66.
[680] Philips, 132.
[681] Id. 131.
[682] Centraal register voor collectieve vorderingen <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen> accessed 19 August 2024. On the empirical research related to the Central register see, Van Doorn. However, in the literature some errors in the Central Register have been signaled, see, Klein, 4.
[683] Kramer et al., 94-96.
[684] Xandra Kramer and *Eduardo Silva de Freitas,* 'International tech litigation reaches the next level: collective actions against TikTok and Google' (*Conflict of Laws .net*; 12 March 2024) <https://conflictoflaws.net/2024/international-tech-litigation-reaches-the-next-level-collective-actions-against-tiktok-and-google/> accessed 13 August 2024;

13 September 2022 including the measures in the annexed draft directive has prompted a debate in the literature. In particular, it is questioned whether the aim is likely to be achieved by the measures in the draft directive. The measures seek to establish a proper balance between a wider use of the TPLF in order to enhance access to justice, on the one hand, and the need for reducing the risks associated with the TPLF, such as conflicts of interest, abusive litigation and disproportionate benefits to litigation funders, on the other. Since the scope of the European Representative Actions Directive is narrowed down to representative actions on behalf of consumers on specific matters identified therein (Art. 2 of the Directive), the measures in the draft directive annexed to the EP resolution aim at filling a legislative gap with respect to other types of action. The draft directive annexed to the EP resolution is broader in scope, covering all types of actions and claims. This aspect is often raised in the context of the criticism of certain stringent requirements of the draft directive. These criteria are not limited to collective actions that involve consumers or victims of human rights violations. Instead, they are meant to equally apply to all funded disputes, including those in commercial litigation and arbitration. The risk of limiting access to justice by this 'one-size-fits-all' approach[685] has triggered a vivid discussion in the literature.

As main advantages of TPLF perceived in the literature are: it enhances the access to justice,[686] it can be a method for providing a level playing field for the parties in cases of economically stronger position of the defendants,[687] it improves the bargaining powers of the claimants in reaching any settlement, and accordingly facilitates dispute resolution in general,[688] it may improve the procedural position of a claimant or rather ease the procedural impediments.[689] Also, the availability of the TPLF may affect the parties' positions before the claims arise.[690]

Although the operation of funders is driven by economic considerations, funders are getting involved in climate litigation and provide pro-bono funding and crowdfunding litigation. This increases access to justice for all claimants and not just for the claimants who already have a winning case.[691]

Amongst the disadvantages pointed out in the literature are concerns of developing a compensation culture driven by profit-seeking funders, the fear of imposing unnecessary costs on the industry, of developing a practice of filing unmeritorious claims forcing thereby defendants to enter into settlements in order to avoid litigation costs and reputational damages, as well as the issue of conflicts of interest between different actors. Also, some critics point out that in the absence of legislation there is a risk of the inability of claimants to ensure that the funders have sufficient

Eduardo Silva de Freitas, 'Who can bite the Apple? The CJEU can shape the future of online damages and collective actions' (Conflict of Laws.net, 18 January 2024) <https://conflictoflaws.net/2024/who-can-bite-the-apple-the-cjeu-can-shape-the-future-of-online-damages-and-collective-actions/> *accessed 13 August 2024; Eduardo Silva de Freitas, 'First strike in a Dutch TikTok class action on privacy violation: court accepts international jurisdiction' (Conflict of Laws, 13 December 20222)* <https://conflictoflaws.net/2022/first-strike-in-a-dutch-tiktok-class-action-on-privacy-violation-court-accepts-international-jurisdiction-2/> *accessed 13 August 2024.*

[685] Michelle Krekels and Nikki Nilwik, 'Is it time to regulate third-party litigation funding? European Parliament resolution on third-party litigation funding' (2024) 8 Ondernemingsrecht 1, 2.

[686] Ilija Tillema, 'Dutch Collective actions and the rise of entrepreneurial actors: Navigating between access to justice and a claim culture' in Xandra Kramer et al, *Frontiers in civil justice* (Edward Elgar Publishing 2022), 245.

[687] Anatoli van der Krans, 'Third Party Litigation Funding: de voordelen, aandachtspunten en aanbevelingen om risico's te beheersen', (2018) 2(26) Onderneming en Financiering 30, 33-34.

[688] Kramer et al, 62.

[689] Krekels and Nilwik, 3.

[690] Kramer et al, 62.

[691] Krekels and Nilwik, 3.

financial means to comply with their obligations under the TPLF agreements. The extent to which TPLF should be regulated at the EU level is also the subject of debate in the literature. [692]

A major concern of the EP seems to be a lack of transparency within which the litigation funders operate. When rendering their decision, the courts may be unaware of the arrangements made on the allocation of the amount awarded and that consequently a disproportionate part will end up with the funders at the expense of claimants, which is particularly problematic in an opt-out collective action system.[693]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

See previous answer. No further specific issues of debate are identified.

2. Relevant legislation applicable to TPLF in your jurisdiction[694]

2.1 Legal admissibility and conditions of using TPLF in civil litigation

As stated under 1., no statutory legislation specifically regulates TPLF in the Netherlands. Since the funder and the representative enter into a TPLF-agreement, general provisions of contract law govern the relationship between them. The 2019 Claim Code, which is a kind of soft law, provides for certain standards with which a litigation funding is expected to comply. The Claim Code, a self-regulatory initiative on good governance, came into effect in 2011 and was updated in 2019. Its provisions are meant to give represented parties more clarity and guarantees on the foundations that act on their behalf. Additionally, it has also been used as a guideline for courts to assess the representative admissibility of an interested organization. As of 2019, its principles and explanatory comments cover also TPLF. The fact that the interested organisation relies on TPLF should be publicly disclosed, as well as the nature of their relationship with the funder. The same holds true for the outlines of the funding arrangement.[695]

As to the funding of **individual claims**, in the Netherlands there is no legislation on the conditions of the admissibility of third-party funders in civil litigation. Accordingly, there are no particular legislative restrictions on litigation funding or on the degree of control that a funder can assume in the proceedings it finances. The general provisions of contract law contained in the Dutch Civil Code govern the agreements between a funder and a litigant. Funders and litigants can exercise their contractual freedom to regulate their legal relationship, provided they adhere to overriding mandatory rules and public policy.

Dutch Civil Code does not incorporate the doctrines of maintenance and champerty known in Common law jurisdictions or corresponding concepts. The fact that a funding agreement is governed by the general rules of contract implies a rather high degree of the parties' freedom in

[692] The overview is provided in Krekels and Nikwik, 3, with the references to the literature.
[693] See Consideration K of the Recommendations, Official Publication, C 125/2.
[694] Certain parts of this section are based on the research carried out by Dr. Erlis Themeli, who was a member of the Asser Team until 30 April 2024.
[695] Xandra Kramer and Ilja Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165, 179.

drafting their funding agreement, provided always that the contract does not run contrary to public policy, including basic principles of procedural law such as due process.[696] Yet it should be noted that the Code of Conduct for Dutch Lawyers prohibits contingency fees. Accordingly, lawyers cannot finance a litigation process with the hope of recovering costs and gaining profit in case of success. However, it is permitted to agree that lawyers receive additional remuneration in the case of a successful outcome.

As already explained under 1., the legal framework for **collective actions** affects TPLF through the provisions relating to admissibility criteria for interest organisations, such as foundations and associations. They are contained in the Act on Collective Damages in Class Actions (WAMCA) which entered into force on the 1st of January 2020. The provisions of WAMCA are codified in the Dutch Civil Code under Article 3:305a and a number of other provisions. They provide that a foundation or association may file claims for damages on behalf of the victims, insofar as they represent the victims' interests according to their statutes. Individuals suffering damages may opt out of this scheme in accordance with the procedures established by law. The claim for damages represents the entire class of persons suffering the damage. Organisations representing the claims are required to have sufficient financial means to bring the claim. They may be financed by third-party litigation funders to file the claims, but the funders may not be part of the board of these organisations. Likewise, it is not permitted that the persons having any financial interests in the outcome of the claim are in the board of the organisation that files the claim for damages. Moreover, according to the explanatory notes to Article 3:305a, the courts have the right to review funding agreements in order to determine whether the third-party funder may adversely affect the interests of the claimants. Nevertheless, the details of the arrangement between the third-party funder and the organisation are not the subject to an explicit regulation.

If an organisation or company collects claims on an opt-in basis, Article 3:305a does not apply. Consequently, in this type of mass claims third-party funders may have more freedom in negotiating their compensation agreements.

WAMCA strengthens the criteria for admissibility and for the settlement of the collective damage claim (Articles 3:305a to 305d of the Dutch Civil Code and Title 14A of the Code of Civil Procedure), including the scope criteria. There are a number of important judgments on the interpretation of the WAMCA, particularly on the on the admissibility and funding requirements.

The admissibility requirements were strengthened in order to safeguard a proper representation of the beneficiaries in collective actions. They are set out in Article 3:305a par. 2 under a to f DCC. As it follows from the legislative history,[697] these requirements, together with the so-called safeguard requirement under Article 3:305a par. 1 DCC, confer the discretion to the courts to declare inadmissibility when TPLF could negatively affect the interests of the intended beneficiaries.[698]

The similarity of interests is part of the admissibility requirements for both damage and non-damage actions. The interests that are intended to be protected by the claim must be similar so that they are susceptible to being dealt with in a collective manner. According to the relevant case law, this condition is met when the claims can be decided in one procedure with no need to consider the special circumstances of the individual parties' interests.[699]

[696] Philips, 133.
[697] Parliamentary Papers II, 11-12.
[698] Krekels and Nilwik, 4.
[699] HR, r.o. 4.3.2 and HR, r.o. 4.2.

According to Art 3:305a para 1 DCC, one of the requirements is that organisations, such as foundations and associations, must demonstrate that they are sufficiently representative, that they have expertise, experience, capacity and sufficient financial resources to conduct collective actions. A foundation or association with full legal capacity may institute legal proceedings aimed at protecting similar interests of other persons, insofar as it represents these interests in accordance with its articles of association and these interests are sufficiently safeguarded (Art 3:305a para 1 Civil Code). Also, it has to show that it represents in a procedure a sufficiently large part of the interested group of parties.[700]

One of the prerequisites is a sufficiently close connection with the Dutch legal order. The rationale of this requirement under Art 3:305a para 3 of the Civil Code, the so-called 'scope rule', is to prevent the filing of foreign claims with no or an insignificant link with the Netherlands.[701] The scope rule is sometimes questioned in the literature, particularly for its potential conflict with the prohibition of discrimination under Article 18 TFEU. Besides, it may result in the inadmissibility of claims even in cases where the Dutch court would have international jurisdiction.[702]

The judgments of Dutch courts are an important source in interpretation and application of the requirements of admissibility including the representativeness of the representative organisations

[700] It follows from Article 3:305a paragraphs 1 to 3 of the Dutch Civil Code that the foundation must meet the following requirements:
a. the legal action instituted is intended to protect similar interests of other persons, these interests are represented in accordance with the articles of association and these interests are sufficiently safeguarded (Article 3:305a paragraph 1 of the Dutch Civil Code),
b. the foundation is sufficiently representative (Article 3:305a, opening words of paragraph 2 of the Dutch Civil Code),
c. the foundation has a supervisory body (Article 3:305a, paragraph 2, under a of the Dutch Civil Code),
d. The foundation has appropriate and effective mechanisms for the participation or representation in decision-making of the persons whose interests are intended to be protected by the legal action (Article 3:305a, paragraph 2, under b of the Dutch Civil Code),
e. the foundation can finance the procedure and sufficient control over the legal action lies with the foundation (Article 3:305a, paragraph 2, under c of the Dutch Civil Code),
f. the foundation has an accessible internet page on which the information listed in Article 3:305a, paragraph 2, under d, numbers 1 to 9 is available (Article 3:305a, paragraph 2, under d of the Dutch Civil Code),
g. the foundation has sufficient experience and expertise with regard to instituting and conducting legal proceedings (Article 3:305a, paragraph 2, under e of the Dutch Civil Code),
h. the foundation is not for profit (Article 3:305a, paragraph 3, under a of the Dutch Civil Code),
i. the legal claim has a sufficiently close connection with the Dutch legal sphere (Article 3:305a, paragraph 3, under b of the Dutch Civil Code),
j. the foundation has made sufficient efforts to achieve what has been claimed by conducting amicable consultation (Article 3:305a, paragraph 3, under c of the Dutch Civil Code),
k. representative organisations may not be financed by a person who is a competitor of the person against whom the action is directed Article 3:305a, paragraph 3, under f of the Dutch Civil Code).

[701] Parliamentary Papers II.

[702] Cathalijne van der Plas, 'De collectieve actie 2.0 in grensoverschrijdende zaken: het territoriaal ontvankelijkheidsvereiste onder de loep' (2019) 3 NIPR 537.

(see, e.g., *Vattenfal,*[703] *Airbus SE*,[704] *Google,*[705] *Tik-Tok,*[706] *Rabobank*[707]). A future CJEU ruling upon the pending request submitted on 20 December 2023 by the District Court of Amsterdam for preliminary ruling to the CJEU (*Apple Ireland*)[708] is expected to provide valuable insights on a number of issues pertaining to international jurisdiction in the context of collective actions. Determining the place of damage in the case of an online violation of competition, compatibility of the national rules on consolidation of collective actions with Art. 7(2) of the Brussels Ibis Regulation, and determining territorial jurisdiction, are amongst the questions posed.

2.2 Regulatory oversight of funders/funding industry

There is no regulatory oversight for third party funders. However, third party funders may be categorised as investment firms by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten* - AFM) in accordance with the Act on Financial Supervision (*Wet op het financieel toezicht* – Wft*)*.[709] In this case, third party litigation funders would be required to obtain a licence from the AFM and follow the provisions of the Wft and related regulations. The definition of Article 1:3 of the Wft may include third party funders in the Netherlands.

According to the literature referring to EPRS Report,[710] after the United Kingdom, the Netherlands has the highest number of active litigation funders.[711]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

What is stated supra under 1 of this section and in the previous section regarding the legal admissibility and conditions of using TPLF applies here, as well. As already mentioned, regarding funding of individual claims there is no specific legislation, but general contract law applies. There are no statutory conditions applicable to funders and the conditions for carrying of their economic activity.

Under the WAMCA, applicable to collective actions, the obligation to comply with the necessary requirements is imposed upon the representative organisations and not on funders.

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[703] *Vattenfal* (District Court Amsterdam, 25 October 2023), C/13/716600/HA ZA 22-332.
[704] *Airbus SE* (District Court The Hague, 23 September 2023) ECLI:NL:RBDHA:2023:14036, Rechtbank Den Haag, C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313 (rechtspraak.nl).
[705] *Google* (District Court Amsterdam, 27 December 2023) ECLI:NL:RBAMS:2023:8425 relating to international jurisdiction, territorial jurisdiction, applicable law, funding aspects/admissibility requirements.
[706] *Tik Tok Technology Limited et al* (District Court Amsterdam, 25 October 2023) ECLI:NL:RBAMS:2023:6694 (international jurisdiction; relationship between GDPR and Bibis); *TikTok* (DC Amsterdam, 10 January 2024) case 702849 / HA ZA 21-526 (rechtspraak.nl) (follow up decision – since the required adjustments to the funding agreement had been made, the representative organisations was held admissible; previous interim judgment that the claim for immaterial damages is inadmissible is confirmed).
[707] *Rabobank* (Court of Appeal Amsterdam, 5 March 2024) ECLI:NL:GHAMS:2024:451.
[708] *Apple* (District Court Amsterdam, 20 December 2023) ECLI:NL:RBAMS:2023:8330.
[709] Financial Supervision Law, BWBR0020368 (wetten.nl) <https://wetten.overheid.nl/BWBR0020368> accessed 19 August 2024.
[710] Jérôme Saulnier, Klaus Müller and Ivona Koronthalyova, 'Responsible private funding of litigation. European added value assessment' (2021) European Parliament Research Service.
[711] Kramer and Tillema, 175.

Article 3:305a of the Dutch Civil Code (or WAMCA) provides for a list of requirements that representative organisations need to meet to qualify as a legal representative before Dutch courts. Such organisations must have a supervisory body, a mechanism for the participation of the persons represented by this organisation, sufficient funds to cover the costs of legal proceedings, and sufficient experience and expertise in the establishment and conduct of the WAMCA procedure.

For transparency purpose it is required that these legal entities have an internet page where they publicly make available the following information: the articles of association of the legal entity, the governance structure of the legal entity, the most recent report of the supervisory body, the most recent report of the management, the remuneration of directors and the members of the supervisory board, the objectives and working methods of the legal entity, an overview of the status of ongoing proceedings and their outcomes, as well as an overview of how a person join or leave the class action. If a contribution is requested from the persons whose interests the legal action serves to protect, insight into the calculation of this contribution must be provided.

Representative organisations may not be financed by a person who is a competitor of the person against whom the action is directed.

Article 3:305e (2)(b) requires interest groups to identify a source of funding that they have in case of mass claims. As a consequence, they are required to identify any third-party funder and all the financial support provided by this funder.

Also, representative organisations are under the obligation to ensure that there are sufficient resources to bear the costs of filing an action, "with control of the action sufficiently vested in its constituency".[712] Thus, the WAMCA imposes capital adequacy requirements directly on the representative organisation, and not on the funder.[713]

In the Netherlands the judiciary has been taking "the role of examining the legitimacy and soundness of TPLF-agreements and the involvement of funders in collective actions under the WAMCA".[714] Some of the supervisory functions were conferred to the judiciary in the Netherlands in the process of the implementation of the Directive. Verifying the capital adequacy is amongst such supervisory powers of the judiciary.[715] As pointed out in the literature, the court hearing the case will be in the best position to assess the financial capacity of the representative organisation in the admissibility phase of the proceedings.[716] Seemingly, the courts often order the submission of the TPLF-agreement and assess if the representative organisation has the financial capacity to pursue the action.[717] As rightly suggested, a verification by the court should be possible at all times, regardless of how/in which form representative organisations prove to have sufficient resources to bear the costs of filing the claim. If during the proceedings the financial capacities of the representative organisation appear doubtful, the court may at all times require proof of solvency. In this way, it is ensured that the representative organisation remains solvent throughout the proceedings.[718]

[712] Krekels and Niklwik, 6.
[713] Ibid.
[714] Krekels and Niklwik, 5, referring to the case against *Vattenfall NV et al.* (District Court Amsterdam, 1 February 2023) ECLI:NL:RBAMS:2023:403), the cases against *Airbus SE et al* (District Court The Hague, 29 March 2023) ECLI:NL:RBDHA:2023:4111 and the cases against *Tik Tok Technology Limited et al*.
[715] Ibid.
[716] Krekels and Nikwil, 6.
[717] Ibid.
[718] Ibid.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

As already mentioned, according to Article 3:305a, representative organisations cannot be financed by a party who is a competitor of the defendant.

Further requirements should be those found in the contract law provisions.

Third party funders may need to comply with anti-money laundering and financing of terrorism legislation (*Wet ter voorkoming van witwassen en financieren van terrorisme* - Wwft).[719] Article 3 of the Wwft obliges any institution to conduct a customer due diligence in case it engages in a transaction exceeding 15,000 Euro. Third party funders should consider who is the ultimate beneficiary of the funding they provide, and report any suspicious use of their funds.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

The independence of representative organisations is ensured by the rules on transparency in Articles 4(3) and 10(2) of the Directive. Also, these rules can be found in the 2019 Claim Code[720] and the WAMCA. The latter ensures that the interests of the persons for whom the action is filed are safeguarded.[721] These standards and requirements provided under the Claim Code and the WAMCA are normally scrutinised and assessed by the courts,[722] so that there is a sufficient level of safeguards to deal with potential conflicts of interest.

Disclosure

Article 3:305a par. 2 under a to f, in combination with Article 3:305a par. 1 of the Code of Civil Procedure, provides the possibility of a judicial review of the third-party funding agreement. The explanatory documents the WAMCA state that review of the agreement should be marginal, and that the agreement does not have to be shared with the defendants.[723] In addition to that, the agreements may be reviewed by a third party, which can also be asked to review the agreement instead of the court.

Yet, there is a number of cases in which it was held that the agreements had to be, to a certain extent, revealed to the defendants.[724] Accordingly, a limited disclosure of the agreement to the defendants seems to be the approach accepted by the Dutch courts, even though this obligation is not imposed either by the law or the legislative history. It should be mentioned, however, that there

[719] Wet ter voorkoming van witwassen en financieren van terrorisme, BWBR0024282 (wetten.nl) <https://wetten.overheid.nl/BWBR0024282> accessed 19 August 2024.

[720] See e.g., the principle three requiring that the third party funding agreement must contain provision ensuring the autonomy and independence of the board and supervisory board of the representative organisation and the lawyer.

[721] Krekels and Nikwil, 8.

[722] *TikTok Technology Limited et al*, where the Court found the conflict of interests due to connection between the interest organisation and the funder, since one of the members of the former was in the board and a shareholder of the latter.

[723] Parliamentary Papers II, 11-12, 20 and Parliamentary Papers II 2017/18, 34608, n 6, 12.

[724] *Tik Tok Technology Limited et al*, (District Court Amsterdam, 26 July 2023) ECLI:NL:RBAMS:2023:5504, par. 2.2; *Airbus SE* par. 2.1.

is no obligation to a full discovery. In particular, the details of the commercial arrangements and the parts concerning the relationships between the representative organisation and their lawyers do not have to be disclosed to the defendants.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

See previous answer relating to disclosure.

2.7 Obligations of funders towards beneficiaries and vice-versa

The Directive in Article 10 limits the influence of the funder on the litigation. The same is ensured in the 2019 Claim Code (e.g., principles three and seven) and in the WAMCA.[725] Both the 2019 Claim Code and the WAMCA require the representative organisations to control the proceedings.[726] These provisions limiting the influence of the funder in the proceedings proved sufficient in practice to prevent funders from unduly influencing the litigation.[727]

2.8 Distribution of awards and bearing adverse costs in lost cases

The courts are competent to examine and rule on the agreed success fees between funders and representative organisations.[728] Thus, in *TikTok*,[729] the court referred to the preceding rulings setting a percentage of 25% of the damages awarded as a maximum of the funders' compensation. Further, the Court put forward a criterion of a reasonable proportion between the funder's compensation and the amount it funded. In that respect, it made known its intention to limit the funder's compensation to a percentage of the amount of damages awarded to the beneficiaries so as not to exceed an amount equal to five times the funder's investment. Before the actual decision was to be taken, the parties had been given the opportunity to submit their positions on the intended ruling of the Court.

The adverse costs are awarded generally at a significantly lower amount than the actual costs incurred.[730] In addition, under the WAMCA, the court may impose fines upon the representative organisations and their funders in case of filing manifestly unfounded claims. Thereby, "the court may, when there is proof of the unsoundness of the claim, multiply the salaries of the opposing party's attorney at the expense of the representative organisations (and their funders) by a maximum of fivefold".[731] Even though the adverse costs are generally rather low, in case of funding unmeritorious cases they may be significantly increased. Article 3:305a(2) in conjunction with Article

[725] Article 3:305a par. 2 under e and Article 3:305a par. 3 under a, requiring that the bord members of the representative organisation must be professionals with no financial interest in the outcome of the case.
[726] Claimcode 2019, principle 3; Dutch Civil Code (DCC), Article 3:305a par. 2 under c.
[727] See e.g., *Airbus SE*; *TikTok Technology Limited et al* (The Court permitted the interest organisation to adjust the third party agreement so as ensure that there is a sufficient degree of independence with the funder).
[728] See e.g., *TikTok Technology Limited et al*; see also, Amsterdam Court of Appeal 2018, ECLI:NL:GHAMS:2018:368, rendered under the previous collective action regime WCAM.
[729] Ibid.
[730] Dutch Code of Civil Procedure (DCCP), Article 237; See also Krekels and Nikwil, 11.
[731] Krekels and Nikwil, 11, n. 135, referring to Article 1018l par. 1 of the Code of Civil Procedure.

1018c par. 5 of the WAMCA ensures that capital adequacy is always reviewed before examining the merits of the claim. [732]

2.9 Planned legislation

As described above, the Netherlands has a complex approach to TPLF. Whilst there is no legislative framework for the financing of individual claims, the financing of mass claims is regulated by the WAMCA, which was adopted in early 2020. Article 5 of the law that introduced the WAMCA to the Dutch Civil Code provides for an evaluation of the law five years after its adoption. Accordingly, the Ministry of Justice must carry out an evaluation of the WAMCA after 1 January 2025. Minister Weerwind announced to carry out this evaluation in the first half of 2025.[733]

Current parliamentary debate on the WAMCA has been focused on a need to review the existing requirements for legal standing of the representative organisations. At the same time, there is an ongoing debate amongst members of the parliament having different opinions on the need of amending the WAMCA.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	There is no legislation on the authorisation system and the conditions, but the control entrusted to the judiciary meets the requirement. Thus, it may be considered unnecessary to introduce the legislation to this end.
Capital adequacy (Art.6)	There is no legislative requirement of capital adequacy upon the funder, but the WAMCA imposes the capital requirement directly on the representative organisation. In addition to that, it is upon the Dutch judiciary to verify the capital adequacy.
Fiduciary duty (Art.7)	Prohibition of influence is already granted by the Directive as implemented in WAMCA, as well as in the 2019 Claim Code.
Powers of supervisory authorities (Art.8)	See answer to Arts. 4 and 5

[732] Ibid.

[733] Tweede Kamer, 'Plenaire Verslagen 2023-2024, No. 39' <https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail/2023-2024/39> accessed 19 August 2024.

Investigations and complaints (Art.9)	See answer to Arts. 4 and 5
Coordination between supervisory authorities (Art.10)	See answer to Arts. 4 and 5
Content of third-party funding agreements (Art.12)	Not in the legislation, but is pursued in the case law
Transparency requirements and avoidance of conflicts of interest (Art.13)	Obligation imposed on the interested organisations. Secured by WAMCA and the Claim Code 2019 and the case law
Invalid agreements and clauses (Art.14)	No legislation or case law
Termination of third-party funding agreements (Art.15)	2019 Claims Code is less stringent than Art. 15
Disclosure of the third-party funding agreement (Art.16)	No statutory obligation of a full disclosure, but the extent of the disclosure to the defendant seems to be in the discretion of the court.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Yes, Article 3:305a par. 2 under a to f in combination with Article 3:305a par. 1 of the Code of Civil Procedure, provides the possibility of a judicial review of the third-party funding agreement.
Responsibility for adverse costs (Art.18)	No statutory regulation, but there is sufficient role of the judiciary to ensure the compliance with the criteria.
Sanctions (Art.19)	No statutory regulation

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Within the Netherlands, TPLF funded cases generally are mass claims that are filed under the Dutch 3:305a collective action regime, as well as cases that use the assignment-model. The common denominator in these claims is that the aggregated interest that is litigated can be expressed in a significant monetary value. Typically, these are cases that have low risk and high potential returns for funders. These include so-called 'follow-on' actions based on competition and/or cartel violations. Lately we also see shareholder/securities, data breach/privacy, product liability, environmental and personal injury claims. With regards to the collective actions for damages, which can be filed since the WAMCA was enacted in 2020, these are cases with scattered damages and enough injured parties to make the amounts claimed a sufficiently interesting investment for litigation funders.

Interviewees give differing answers to the question of the average number of cases that are funded by TPLF in the Netherlands each year. The answers vary from dozens, to at least hundreds of cases

annually. If we look at the most recent empirical research, the number of TPLF cases under the WAMCA regime typically hovers between 5 and 10 cases annually. For the other types of cases no empirical research is available. Arbitration cases are by nature hidden from outside view; therefore, none of the interviewees were able to give an estimate for those cases.

b. Minimum claim value in absolute terms (in million Euro)

In response to the question of the minimum claim value that the interviewees observe in practice, the answers vary widely from 2-4 million, through 20-29 million, all the way up to more than 50 million Euros. These answers seem to depend both on whether persons interviewed act more on behalf of claimant or defendants, as well as which segment of the claim sector they operate in. Claimant lawyers refer to much lower values than defendant lawyers.

c. Typical claim value in absolute terms (in million Euro)

Most respondents agreed that due to the widely varying nature and characteristics of TPLF funded claims, it is difficult to speak of 'typical' claim value. Most therefore answered with 'I don't know'. Those that did give an answer regardless of this fact tended to estimate the value in the higher realm, above 30 million Euro.

d. Typical ratio between investment by the funder and claim value

Similar to the previous answer, interviewees were hesitant to mention a 'typical' ratio due to the varying nature of claims and the varying outcomes of investment negotiations. Those that put a number on it, mentioned ratios of 1:20 and higher.

e. Typical size of the investment by the litigation funder (in million Euro)

Although the answers to the question of typical size of investment also varied, the range of answers lies between 2 and 15 million euros.

f. Origin of funding provided by the litigation funder

While the true origin of the funding remains unknown in many cases, interviewees typically point to large international private investment funds that use litigation funding as one part of their investment diversification. Occasionally, foreign law firms are mentioned as funders.

g. Share of compensation awarded typically demanded by litigation funders

The answers to this question are both based on experience from the past (pre-WAMCA), as well as recent developments regarding collective actions for damages. However, the percentages for the latter type of proceeding are based on the percentages claimed by the funders and included in the funding agreement, and not on actual compensation after a claim was won. None of the TPLF funded damages claims under WAMCA have reached a final judgment, therefor these numbers are not yet confirmed. Interviewees agree that typically the share of compensation lies between 20% and 30% and is never higher than 50%. Under the new Dutch 3:305a regime, according to one

interviewed lawyer, the percentage has moved closer to 20%, with a minimum of a multiple of the original investment of the funder.

h. Other conditions of the litigation funding agreement

Typically, funding agreements are limited to the procedure in one instance, with renewed negotiation for possible appeal. Other clauses that can be included according to interviewees are: scaled returns, a fixed fee of a multiple of the original investment, funding by providing a loan plus interest, funders claiming the possible remaining awards (*cy pres* part) of a claim, or split percentage over main fee plus interest.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Funders vet cases before funding. The due diligence they do to ensure that they only fund promising claims is considered adequate by some of the interviewed, and quite serious by others. One interviewed defendant lawyer remarked that there are instances where they consider the vetting insufficient and that there is a 'small but significant minority' of funded cases that have no reasonable chance of success.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Only one of the interviewees was able to answer this question, mentioning a minimum MoC of 2.5.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The interviewees agree that this varies widely from case to case. Some claims have been deemed inadmissible (but are currently under appeal). As for the WAMCA claims for collective damages, most cases are still ongoing. It is therefore too early to tell what outcomes should be expected since no TPLF funded collective damage claim has received a final judgment.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

There are no rules that require full disclosure, and as mentioned above this is at the discretion of the court. In practise, the interviewees state, it depends on the willingness of the court to engage with the subject. Increasingly, especially in collective action cases, the courts demand disclosure. If and when it is ordered, Dutch courts tend to order full disclosure, usually with the exception of the available budget and sometimes with the exception of the pricing provisions.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

All interviewees, both claimant and defendant lawyers, agree that litigation funders exercise some form of control over the legal proceedings, with choice of lawyer, consent for settlement and consent for appeal mentioned by all of them. Agreement on strategy and consent for expert advice are only mentioned by the defendant lawyers.

The difference in additional context to these question lies in whether the respondents consider these forms of control as 'undue' or not. Defendant lawyers especially criticize practises where the ties between claim vehicles and funders appears to be too close, calling the origine of these types of claims 'a fable' and these claims a form of private enforcement for commercial gains in which the funders basically control everything. They contend that, given a lack of regulation, funders will do what they can in their own interest. This purportedly is especially the case when funders themselves appear to be the ones setting up the claim foundations.

Claimant lawyers are much less critical of practices where funders have some say in certain aspects of the legal action. For instance, funders are considered to have a legitimate interest in ensuring that the case is litigated by a qualified and experienced lawyer and that consent for both appeal and possibly settlement are a normal part of funding negotiation. They do not agree that funders have influence over the legal strategy and contend that in practice funders tend to have a reasonably hands-off approach.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

Answers by defendant lawyers range from the fairly neutral 'business partners' to 'regular buddies'. While they agree that it varies from case to case and between funders, their main concern is that, in their view, especially in the larger cases, the relationship appears very close and that plaintiff lawyers appear to view the funder as their actual client.

Claimant lawyers downplay this influence. While they agree that funders assert some control over the process, for instance when it comes to the choice of lawyer, there is no undue influence on the proceedings and funders tend to have a 'hands off' approach. From their perspective the interests of the injured parties prevail and that they are the clients, while funders are not.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

A full withdrawal while proceedings are in process is only possible in limited and exceptional cases and only for reasons of default, according to the interviewees. However, funders will typically commit only to funding per instance. So, if appeal is considered part of the litigation process, funders can indeed decide to withdraw.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

The interviewees conclude that many of the funders do have safeguards in place, at least on paper. The key question is whether they are in any way enforced. Very few arrangements are independent and there is no independent complaints board, no transparency and no oversight. It is therefore difficult to know to what extent these safeguards actually work. One claimant lawyer contends that funders apply internal 'Chinese walls' between different parts of the organization, yet that real insight on this is difficult. It is mentioned that, since investment funds may be categorised as investment firms, they would fall under the supervision of the Dutch authorities, especially the Authority for the Financial Markets (*Autoriteit Financiële Markten* - AFM), and they, as mentioned above, would have to comply with rules as stipulated by the Act on Financial Supervision (*Wet op het financieel toezicht* – Wft*)*.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

No. As mentioned above, cost orders in the Netherlands tend to be only a fraction of the real costs incurred during proceedings. Therefore, adverse costs are not an issue in the Netherlands.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No. As mentioned above, cost orders tend not to be of any significant value. Therefore, ATE insurance does not play a role in the Netherlands.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No, but there are some indications as to their contents that can be gathered from recent caselaw in which the court has required limited disclosure of the agreement(s), as discussed above.

4. Stakeholder views on TPLF in your jurisdiction

While all interviewees agree that there is a built-in risk to TPLF in attracting unwanted practices, there is disagreement as to the extent to which such undesired practices are already taking place, as well as whether further regulation is needed to combat that.

While some asses most of the measures as having a possibility of being effective, provided they are implemented adequately, others view the measures as unnecessarily cumbersome. Interviewees on both sides of the debate question whether the measures in the draft directive annexed to the EP resolution are the right approach to addressing what they consider to be current shortcomings. Defendant lawyers especially criticize instances where the funder and the claiming vehicle appear to be one and the same, and where there are no 'real' clients, but question whether the proposed measures would remedy those practises. A prohibition of practises where funders are involved in the establishment of claim vehicles should therefore be included in future regulations.

Claimant lawyers anticipate that the proposed measures, especially the establishment of supervisory bodies and the related administrative burden, will lead to cost increases of already very costly legal procedures. They also fear that a system based on permits for funders will have a negative impact on claiming parties' possibilities for obtaining funding.

Both sides of the debate agree that rules around transparency requirements could help in preventing abuses. However, claimant lawyers also view as problematic the extent to which defendant parties use the admissibility stage of collective actions under WAMCA and their review of the relationship and agreements between funders and claiming parties. The practice of contesting all possible aspects of the funding agreement before the court is viewed as merely

intended to prolong proceedings and increase costs for claiming parties. Regulation that would further increase the possibilities for these practises are therefore considered undesirable. On the other hand, defendant lawyers consider especially the disclosure of funding agreements to the defending parties as necessary for effectively regulating TPLF practises.

Glossary of abbreviations and acronyms

WCAM or 20025 Act- Collective Mass Claims Settlement Act (Wet afwikkeling massaschade)

WAMCA or 2020 Act - 2020 Mass Damage Settlement in Collective Action Act (Wet afwikkeling massaschade in collectieve actie

DCC - Dutch Civil Code

CCP - Code of Civil Procedure

RAD - 2020 Representative Action Directive

AFM - Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*)

Wtf - Act on Financial Supervision (*Wet op het financieel toezicht)*

Wwft – Act on Anti-money laundry and financing of terrorism legislation (*Wet ter voorkoming van witwassen en financieren van terrorisme*)

EPRS Report - European Parliament Research Service Report

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Dutch Civil Code

Dutch Code of Civil Procedure

Representative Actions Directive Implementation Act (*Implementatiewet richtlijn representatieve vorderingen voor consumenten*)

Claim Code of 2019

Decree of Qualified Entities for Cross-border Representative Action - *Besluit bevoegde instanties grensoverschrijdende representatieve vorderingen* of 13 July 2023

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Poland

Dr Magdalena Tulibacka, Emory University

Executive Summary

- No legislation on TPLF has been introduced in Poland, and no such legislation is planned in the near future.
- TPLF is not prohibited in Poland. It is covered by general rules of contract law, with freedom of contract as the leading principle, subject to any legal provisions (see below – for instance concerning contractual clauses, or antitrust law), and the general principle of proper social relations (similar in scope and interpretation to good faith).
- The recent amendment of the Collective Actions Act (CAA), implementing the RAD Directive, contains provisions on disclosure, transparency of and supervision over TPLF agreements. These provisions only apply to representative actions for the protection of collective interests of consumers.
- TPLF is rarely used in Poland. It has been used in international commercial arbitration proceedings. Also, anecdotal evidence suggests that it is being used in high profile individual litigation, such as large-stakes divorces. Further anecdotal evidence suggests that collective actions (in Poland since 2010) have not attracted TPLF because of their complexity and delays.
- Transparency of the TPLF agreements seems the most important issue for stakeholders who spoke of the Polish market for TPLF.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is so far no existing or planned legislation concerning solely TPLF. However, the recent amendment of the Collective Actions Act (Act of 24 July 2024 *amending the Collective Actions Act and some other acts*, Dziennik Ustaw (Journal of Laws) 2024, 1237), implementing the EU Directive on Representative Actions (RAD) 2020/1828, has certain requirements related to the third party funders, disclosure and transparency of funding agreements, eliminating conflicts of interests and eliminating potential violations of competition law (see below).

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPLF usage is on the rise, albeit it is still not very common. There is plenty of interest from investors – especially foreign investors - in the litigation funding market. Poland, as a relatively stable economy, is an attractive investment target. On the other hand, investors' concerns are related to the length of judicial proceedings and problems with judicial independence and rule of law.

The cases that attract this type of funding involve large entities and significant amounts of money.

There is some anecdotal evidence of such funding provided to parties (especially female parties) of large-value divorce proceedings.

The first type of cases where litigation funding was offered related to international investment arbitration. In 2020 Prairie Mining Ltd secured US$18 million to pursue international investment arbitration compensation claim against Poland for an alleged breach of its obligations under the Bilateral Investment Treaty between Australia and Poland and the Energy Charter Treaty.734 The funding was provided by LCM Funding UK Limited, a subsidiary of Litigation Capital Management Limited (company listed on the London Stock Exchange).735

Competition law cases also started attracting TPLF. In February 2020, Polish company Magna Polonia SA and Regera Sarl based in Luxembourg concluded a litigation finance agreement.736 The total cost of financial support that would be reimbursed by the Luxembourgian entity was €1.5 million. The agreement was structured as a contract of sale of a debt conditional upon obtaining a final judgement where the debt was confirmed and made payable to Magna Polonia. The case was brought by Magna Polonia against Emitel SA and pertained to alleged violations of competition law by the latter. It was settled in 2021.

There has been much less interest in funding smaller claims and consumer cases. Furthermore, the existing class action procedure did not seem attractive to funders because of its novelty and the length of the proceedings. Thus, investors who are looking into funding smaller claims are rather

734 Source: https://www.lexology.com/library/detail.aspx?g=a340a63a-87b2-4060-8be1-6f1f7bf8f25b#footnote-012 (Accessed on May 31st 2024).

735 https://markets.ft.com/data/announce/detail?dockey=1323-14596649-7IEBUTKOS1O1LKOR3FPKC5QHEA (Accessed on May 31st, 2024).

736 Source: http://magnapolonia.com.pl/raport-biezacy-5-2020/ (Accessed on May 31st, 2024).

interested in developing portfolios of similar individual claims (source: personal experience - conversations with funders).

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The funders operating in the rest of Europe also offer their services in Poland. In addition to the two mentioned above, the notable ones are Augusta Ventures, Burford Capital, and Woodsford Litigation Funding. JDP (a law firm based in Warsaw) noted in 2023 that they advised a major litigation fund on a multimillion investment in a portfolio of consumer claims in Poland.737 They did not disclose the name of the litigation fund.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

The topic is not within the sphere of interests of the Ministry of Justice or another reliable source of data. Thus, there are no reliable statistics, and in fact any information about funding offered or provided is very difficult to come across.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

As the litigation funders are entering the market, Polish scholars are beginning to discuss the legal, economic and social implications of the new phenomenon. While until recently there was no law specifically targeting the funders and the funding agreements, authors comment on how the existing law (including contract law, consumer law, business law and competition law) as well as ethical rules governing the legal professions (the Code of 'Advocates' Ethics and the Code of Ethics of 'Attorneys-at-law') can apply to them. It has been noted that nothing in Polish law prohibits such funding agreements. Scholars tested possibilities of including funding agreements within the scope of existing 'named contracts' in the Civil Code, such as a loan or a donation, but concluded that those agreements have certain unique features that do not allow such an inclusion.738 Thus, the general principle of freedom of contract applies to them. Polish Civil Code contains the principle of freedom of contract in Article 353.1: '*contracting parties are free to structure the contract according to their wishes as long as the contents and purpose of the contract do not run contrary to the nature of the relationship, to the law and to the general principle of proper social relations*'. Within these limitations the parties can conclude funding agreements (see however, one scholar who argues that certain clauses in TPLF contracts – such as exceedingly high rates of return – can be contrary to the general principle of proper social relations: Kruczkowski739). It is also possible that such contractual clauses may be deemed unfair according to Articles 385.1 et seq. of the Civil Code (although the law on unfair clauses only applies to clauses that were not individually negotiated, which is perhaps difficult to envisage in contracts on litigation funding, see below).

737 https://jdp-law.pl/en/successes/jdp-advised-a-litigation-fund-in-a-multimillion-pln-investment-in-consumer-claims-in-poland/.

738 Zaleska-Koziuk, 'Finansowanie sporow o prawa majatkowe przez osobe trzecia (third - party funding). Zarys problematyki', Prawo i Wiez No. 3, (33) September 2020, 101, 131-162.

739 Zenon Kruczkowski 'Poland'. The Third Party Litigation Funding Law Review, 2017

Polish legal system draws inspiration from the German and the French systems, and these also do not prohibit such funding arrangements.740 Furthermore, as noted by Kaja Zaleska-Korziuk,741 neither the Polish Code of Civil Procedure,742 nor the Law on the Court Costs743 require parties to always pay their own costs and fees.

Polish scholars also reviewed the main types of TPLF, their features and any ethical, legal and economic concerns presented in Western literature. The purpose of such scholarly papers is thus to introduce and explain this phenomenon to the Polish audience.744

Third party funding remains an attractive option for large arbitration cases – the first monograph on the topic of TPF was thus focused on funding of arbitration – Zaleska-Korziuk published a comprehensive analysis of such funding agreements.745

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Some discussion arose around the role of the funder in the proceedings, with one scholar considering the role as that of an intervener.746 According to the Code of Civil Procedure, Article 76, anyone who has a legal interest in the case being won by one of the parties can enter the proceedings as an intervener alongside this party. It is yet unclear whether a position of a TP funder would in fact be deemed to satisfy the requirement of having a legal interest in the case being won, but it is possible that courts could affirm this possibility. Funders would thus be able to make a statement to the effect that they wish to join the proceedings as interveners. Joining the proceedings as an intervener may be objected by either party, and the court will reject the intervention if it finds no legal interest on the part of the intervener. Once they join the proceedings, interveners have the power to take any adequate procedural steps as long as they do not contravene any steps or statements taken by the party joined by them. While legally this may be possible in the future, it is not very likely that many funders will be willing to become interveners. First of all, funders tend to be interested in maintaining confidentiality of the funding agreements. This will not be possible if the funder needs to prove their legal interest in the case. Further, as Zaleska-Korziuk confirms, joining the proceedings as an intervener may well create additional obligations of the funders – for instance regarding costs shifting, albeit as a matter of principle only parties can be required to cover the costs of the winning opponent in litigation. Article 107 of the Code of Civil

740 T. Waszewski, „Poland", [in:] Litigation Funding 2017, red. Steven Friel, Jonathan Barnes, 50-54. Law Business Research Ltd, 2017; Z. Kruczkowski, „Poland". The Third Party Litigation Funding Law Review, 2017.
741 'Finansowanie sporow o prawa majatkowe przez osobe trzecia (third - party funding). Zarys problematyki', Prawo i Wiez No. 3, (33) September 2020, 101.
742 Code of Civil Procedure, Act of 17 November 1964, the Journal of Laws 1964, No. 43, item 296, later amended.
743 Act on Court Costs in Civil Cases of 28 July 2005, the Journal of laws 2005, No. 167, item 1798, later amended.
744 P. Okonska, "Finansowanie sporow sadowych przez podmiot trzeci - perspektywa polska" (third party litigation funding - Polish perspective) Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2024, no 1, (13) 47-62; D. Horodyski, M. Kierska, „Third Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement" Zeszyty Naukowe Towarzystwa Doktorantów UJ Nauki Społeczne, nr 19 (2017): 63-80), Z. Kruczkowski, „Poland". The Third Party Litigation Funding Law Review, 2017; A. Moskal, „Problem ujawnienia finansowania przez osoby trzecie w międzynarodowym arbitrażu inwestycyjnym" ADR. Arbitraż i Mediacja, nr 3 (2018): 69-76).
745 Kaja Zaleska-Korziuk 'Charakter prawny umowy o finansowanie postepowania arbitrazowego przez osobe trzecia (third party funding)', C.H. Beck, 2022.
746 Kaja Zaleska-Korziuk, 'Finansowanie sporow o prawa majatkowe przez osobe trzecia (third - party funding). Zarys problematyki', Prawo i Wiez No. 3, (33) September 2020.

Procedure allows the court to award the winning party the costs that were incurred as a result of the specific activities of the intervener. The latter would be required to cover such costs.

Other problems highlighted in literature concern the relationship between the funder and the lawyer representing the funded party. There are concerns about the risk of conflict of interest. Polish 'advocates' and 'attorneys-at-law' are covered by their respective ethics rules – the Codes of Ethics for Advocates (2021)747 and the Code of Ethics for Attorneys-at-Law (2023).748 These rules do not refer specifically to third party funders, but they contain norms concerning confidentiality of the client's information and conflict of interest.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

TPLF is allowed in Poland, as specified above. It is not subject to any specific laws concerning TPLF exclusively. However, the new amendment of the Collective Actions Act (CAA, 2009, amendment of 2024), which implements the RAD Directive into Polish law, covers some aspects of TPLF. Thus, TPLF is regulated there only as far as it is provided for representative actions for the protection of collective interests of consumers. Further requirements concerning TPLF are contained in the Act for the Protection of Competition and Consumers (APCC, also amended by the same Act), with regard to the principles of registration, operation and funding of the Qualified Entities for the purpose of representative actions for the protection of collective interests of consumers.

The new Articles 6,4, 6.5 and 6.6 of the CAA require that if TPLF is used to fund the representative action (whether for injunction or compensation) for the protection of collective interests of consumers, the funding agreement must be attached to the claim document. Further, Article 46d of the APCC requires that Qualified Entity inform the Head of the Office for the Protection of Competition and Consumers before it brings a representative action under CAA.

The control of TPLF is focused on ensuring transparency and openness – the funding agreement must be disclosed and attached to the claim brought by the Qualified Entity. In fact, the burden of ascertaining that funding by a third party does not compromise its impartiality and its ability to adequately represent and protect consumer interests has been placed solely on the Qualified Entity. The supervisory powers over this issue were entrusted to the Head of the Office for the Protection of Competition and Consumers (HOPCC has the power to determine whether or not an entity should be a Qualified Entity for the purposes of the Representative Actions under RAD – as per Article 46h of the Act on the Protection of Competition and Consumers. Article 46h.5 requires that such entities be independent from any third parties, especially traders, who could benefit financially from a representative action being brought and funded by a third party; the entities are required to have in place adequate procedures to assess and address conflicts of interest between the entities, the funders and the consumers). Information about their operation, and about the procedures in place to ensure independence, must be available to the public (normally on the website of the Entity).

Further, there is a possibility for the court, at any stage of the proceedings, to assess whether there are doubts concerning the Qualified Entity's independence with regard to its funding in the

747 http://www.nra.pl/admin/wgrane_dokumenty/20210701kodeksetykiadwokackiejtekst-jednolity.pdf
748 https://kirp.pl/wp-content/uploads/2023/02/kodeks-etyki-radcy-prawnego-i-regulamin-wykonywania-zawodu.pdf

particular case. The new Article 10aa of the CAA gives the court the power to, if it has legitimate concerns with whether requirements in Article 46h5 of the APCC are met by the Qualified Entity, conduct an investigation into the matter. The Qualified Entity must cooperate with the investigation and disclose sources of its funding, including funding of the specific case or more general sources. If the court decides that a third party funding the specific case is influencing the decisions of the Entity, including those concerning a settlement, to the detriment of the consumers involved in the case, or if the third party funder is a competitor of or is dependent upon the defendant in the case, it can request the Entity to rectify the problem by rejecting the funding or changing the conditions or the source of funding within a specific period of time. If the changes are not made, the court can require that the Entity inform the members of the class about the problem and the court's requests. If the Entity does not carry out the changes required within six months, the court will reject the representative action.

Further, Article 46f.2 of the APCC requires that if Qualified Entities are funded by third parties (traders or groups of traders), remuneration for those third parties cannot exceed 30% of the amount won by the funded claimant in the specific representative action for the protection of collective interests of consumers.

Article 46f3 of the APCC specifies that if Qualified Entities are funded by third party traders or groups of traders, their activities are to be governed by the Act of 24 April 2003 on charities and volunteers (Dziennik Ustaw of 2003, item 97, no. 873). This Act regulates the activities of non-governmental organizations, charities and volunteers. It covers their tax responsibilities, their organization, transparency in their operations, and accountability for their expenses. The relevant ministry responsible for the specific area of activities plays the supervisory role. Further, the Charites Committee (governmental body) coordinates their work and the cooperation between charities and governmental entities. The responsibilities related to transparency and good governance are much greater with regard to organizations that receive public funding. Organizations not receiving public funding (such as consumer organizations or other bodies that can be Qualified Entities for the purposes of the CAA) do not have specific obligations with regard to prevention of conflicts of interest.

2.2 Regulatory oversight of funders/funding industry

The amended Collective Actions Act contains specific transparency requirements described above (again – they only apply to representative actions for the protection of collective interests of consumers). The information about TPLF in each specific case, together with the text of the funding agreement, must be provided to the court. Further, as specified above, the Head of the Office for the Protection of Competition and Consumers (HOPCC) is in charge of determination that the independence of Qualified Entities that receive funds from third parties is not threatened. As the HOPCC is in charge of antitrust enforcement as well as consumer law enforcement, it is possible funding arrangements will be reviewed both from both perspectives. The funders could potentially be in violation of either Article 6 of APCC (collusive practices) or Article 9 of APCC (abuse of dominant position).

Further, HOPCC is also the entity whose role it is to enforce the rules on unfair contractual terms – thus funding agreements can be reviewed for the presence of such terms (see, however, remarks in section 2.4). According to Article 23b1 APCC the HOPCC issues decisions confirming that contractual clauses are unfair and thus do not bind consumers.

There is no specific oversight of litigation funding industry in any other legislation. See above as for the requirement in the APCC (Article 46f.2) that remuneration for TPLF should be exceed 30% of the sum won by the claimant in representative action.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

No such legal framework exists for litigation funders.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Some of the existing law that applies to TPLF was mentioned above, also in the part covering academic disputes.

As for the law on abusive clauses – Poland implemented the Unfair Contract Terms Directive by amending its Civil Code – introducing Articles 385.1 et seq. In common with the UCT Directive, only individually negotiated clauses are subject to the fairness control. Further, the burden of proving that clauses were individually negotiated rests upon a party who would benefit from such a position. It seems unlikely that litigation funding agreements will be within the scope of control, as they tend to be individually negotiated. However, if an agreement or certain clauses were not individually negotiated but rather offered to consumers with no opportunity to negotiate, Articles 385.1 et seq. will apply. According to Article 385.1, of the Civil Code, contractual clauses in consumer contracts do not bind consumers if they were not individually negotiated, if they frame the consumer's rights and obligations in a manner contrary to 'proper social relations' (a general clause in Polish law very close to the principle of good faith) and significantly infringe the consumers' interests. Another interesting aspect of funding agreements and the potential for application of the rules on unfair contractual clauses is that the funding agreements are usually concluded between the funder and the entity bringing the representative action. Such an entity is not a consumer. In such cases, funding agreements will be subject to the general rules of contract law, including freedom of contract as regulated by Article 353.1 of the Civil Code – parties can shape the contract any way they require, as long as its contents and aim do not run contrary to the nature of the contract, to law, and to the principles of social cooperation.

There is so far no law requiring disclosure of sources of funding of litigation to the other party or to the court, other than the ACA and the APCC examined above

Investment funds are regulated in Poland by the Act of 27 May 2004 on investment funds and management of alternative investment funds (Dziennik Ustaw of 2024, item 1034). The insurance companies are regulated by the Act of 11 September 2015 on insurance and re-insurance activities (Dziennik Ustaw of 2023, items 614, 656, 825, 1723, 1941). Both laws contain provisions concerning transparency of the activity of the funds and companies, their registration, competition law provisions and enforcement by the European Commission and the Office for the Protection of Competition and Consumers.

According to Article 32a.1 of the Act on investment funds and management of alternative investment funds, investment funds are required to maintain technical and organizational measures to ensure that any conflicts of interests are prevented. They are also required to employ persons

who will be in charge of such measures, and to train them appropriately. Insurance companies do not have such a duty according to the Act on insurance.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

There are concerns about the risk of conflict of interest. Polish advocates and attorneys-at-law are covered by their respective ethics rules – the Codes of Ethics for Advocates (2021)749 and the Code of Ethics for Attorneys-at-Law (2023).750 These rules do not refer specifically to third party funders, but they contain norms concerning confidentiality of the client's information and conflict of interest. As for the confidentiality requirement, paragraph 19 of the Advocates' Code of Ethics (2021) provides that the requirement cannot be waived by the express permission by the client (the Attorneys-at-Law Code does not contain this limitation). Thus, it seems that even if the funded client wished to disclose to the funder some details related to the case, the advocate would be violating the Code of Ethics if he or she disclosed these details to the funder. It is not clear what consequences would follow the disclosure by the client. As for the conflict of interest – both Codes contain rules to the effect that lawyers cannot undertake activities that could jeopardize their independence, their ability to maintain confidentiality, or cause any conflict of interest.

Please see above as regards requirements concerning the Qualified Entities.

As for investment funds and insurance companies, see above.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Please see above with regard to the potential status of a funder as an intervener. Without this formal status, funders have no specific obligations with relation to the court, the administration or the opposing parties. The burden of disclosing the funding agreement rests upon the Qualified Entity – see above. Also, see above with regard to the maximum level of compensation for the funder from the beneficiary (30%).

Further, there is a possibility that legal and procedural position of funders may change due to cession or a subrogation of a debt. Both these concepts are regulated in the Civil Code (Articles 509 and 518 respectively), and they involve a substitution of one creditor by another. While subrogation can be done when it is allowed or required by law, it can also happen when it is for the benefit of the debtor (then it is necessary to obtain the debtor's consent to subrogation). Cession, on the other hand, involves monetary claims as well as any other rights and no consent of the debtor is required.

2.7 Obligations of funders towards beneficiaries and vice-versa

The obligations of funders and the beneficiaries in the TPLF agreement will be governed by the freedom of contract as specified above. It is as yet uncertain how exactly the obligations of funders towards beneficiaries and vice versa will be discharged in practice, as the amended CAA only recently came into force. As mentioned above, the duty to ensure disclosure of funding sources, and

749 http://www.nra.pl/admin/wgrane_dokumenty/20210701kodeksetykiadwokackiejtekst-jednolity.pdf
750 https://kirp.pl/wp-content/uploads/2023/02/kodeks-etyki-radcy-prawnego-i-regulamin-wykonywania-zawodu.pdf

the duty to ensure that the interests of consumers in representative actions are adequately protected rests upon the Qualified Entity, and problems with this matter can be highlighted by the court and/or by the Head of the Office for the Protection of Competition and Consumers. The ultimate penalty for not following the requirements is the rejection of the suit, (court) and also withdrawing the entity from the list of Qualified Entities for the purposes of CAA (HOPCC).

2.8 Distribution of awards and bearing adverse costs in lost cases

Poland respects the loser-pays rule, with the attorney fees recoverable by the winner regulated by a statute-established tariff The level of recovery depends on the type of case, its value and its complexity. These matters are regulated in two Regulations of the Minister of Justice: the Regulation of 22 October 2015 on the payment rates for attorneys-at-law services (Dziennik Ustaw of 2018, item 265), and the Regulation of 22 October 2015 on the payment rates for advocates' fees (Dziennik Ustaw of 2024, item 1964. The maximum rate for cost-shifting purposes in a civil case for both attorneys-at-law and advocates is 25,000 PLN. The minimum rate can be increased by the court if the case was particularly complex.

All the other costs – such as court fees, expert fees, translation costs – are recoverable in full from the losing party.

There are no specific norms concerning TPLF for cost-shifting purposes.

2.9 Planned legislation

NA

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	No
Capital adequacy (Art.6)	No
Fiduciary duty (Art.7)	Limited compatibility: 1. with regard to investment funds in general – see Article 32a.1, Act of 27 May 2004 on investment funds and management of alternative investment funds. 2. With regard to qualified entities: the burden of ascertaining that funding by a third party does not compromise the QE's impartiality and its ability to adequately represent and protect consumer interests has been placed solely on the QE. The supervisory powers - the Head of the Office for the Protection of Competition and

	Consumers (HOPCC has the power to determine whether or not an entity should be a Qualified Entity for the purposes of the Representative Actions under RAD – as per Article 46h of the Act on the Protection of Competition and Consumers. Article 46h.5 requires that such entities be independent from any third parties, especially traders, who could benefit financially from a representative action being brought and funded by a third party; the entities are required to have in place adequate procedures to assess and address conflicts of interest between the entities, the funders and the consumers). The new Article 10aa of the CAA gives the court the power to, if it has legitimate concerns with whether requirements in Article 46h5 of the APCC are met by the Qualified Entity, conduct an investigation into the matter.
Powers of supervisory authorities (Art.8)	Limited compatibility: see directly above.
Investigations and complaints (Art.9)	Limited compatibility: see above.
Coordination between supervisory authorities (Art.10)	No
Content of third-party funding agreements (Art.12)	No
Transparency requirements and avoidance of conflicts of interest (Art.13)	Limited compatibility: 1. See above - the duty to ensure disclosure of funding sources, and the duty to ensure that the interests of consumers in representative actions are adequately protected rests upon the Qualified Entity, and problems with this matter can be highlighted by the court and/or by the Head of the Office for the Protection of Competition and Consumers. 2. The supervisory powers - the Head of the Office for the Protection of Competition and Consumers (HOPCC has the power to determine whether or not an entity should be a Qualified Entity for the purposes of the Representative Actions under RAD – as per Article 46h of the Act on the Protection of Competition and Consumers. Article 46h.5 requires that such entities be independent from any third parties, especially traders, who could benefit financially from a

	representative action being brought and funded by a third party; the entities are required to have in place adequate procedures to assess and address conflicts of interest between the entities, the funders and the consumers). The new Article 10aa of the CAA gives the court the power to, if it has legitimate concerns with whether requirements in Article 46h5 of the APCC are met by the Qualified Entity, conduct an investigation into the matter.
Invalid agreements and clauses (Art.14)	No
Termination of third-party funding agreements (Art.15)	No
Disclosure of the third-party funding agreement (Art.16)	Limited compatibility: see above – the duties rest upon the QE.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Limited compatibility – see above.
Responsibility for adverse costs (Art.18)	No
Sanctions (Art.19)	Limited compatibility: As mentioned above, the duty to ensure disclosure of funding sources, and the duty to ensure that the interests of consumers in representative actions are adequately protected rests upon the Qualified Entity, and problems with this matter can be highlighted by the court and/or by the Head of the Office for the Protection of Competition and Consumers. The ultimate penalty for not following the requirements is the rejection of the suit, (court) and also withdrawing the entity from the list of Qualified Entities for the purposes of CAA (HOPCC).

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Commercial arbitration cases. Large divorce cases. No information about average number of cases.

b. Minimum claim value in absolute terms (in million Euro)

No data

c. Typical claim value in absolute terms (in million Euro)

No data

d. Typical ratio between investment by the funder and claim value

No data

e. Typical size of the investment by the litigation funder (in million Euro)

No data

f. Origin of funding provided by the litigation funder

Funds of investment companies.

g. Share of compensation awarded typically demanded by litigation funders

No data

h. Other conditions of the litigation funding agreement

No data

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

No data

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

No data

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The funding case which I reported on here was settled. No other official information was obtainable.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Not currently. See above for recent amendments.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *Choice of lawyer*
- *Consent for settlement*
- *Consent for appeal*
- *Consent for expert evidence*
- *Agreement on strategy*
- *Other [Text]*

No data – these things are confidential.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

No data

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

No data. Probably will depend on funding contract.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

No data

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

No data

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No data

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No such agreements were made public so far.

4. Stakeholder views on TPLF in your jurisdiction

My respondent was very happy about the transparency and disclosure requirements. His point was that there are plenty of opportunities for conflict of interest and other abuses if the agreements are not disclosed.

Glossary of abbreviations and acronyms

HOPCC – Head of the Office for the Protection of Competition and Consumers

APCC – Act on the Protection of Competition and Consumers

CAA – Collective Actions Act

RAD Directive – EU Directive on Representative Actions

Table of legislation

Amendment of the Collective Actions Act (Act of 24 July 2024 *amending the Collective Actions Act and some other acts*, Dziennik Ustaw (Journal of Laws) 2024, 1237),

Act of 11 September 2015 on insurance and re-insurance activities (Dziennik Ustaw of 2023, items 614, 656, 825, 1723, 1941).

Act on Court Costs in Civil Cases of 28 July 2005, the Journal of laws 2005, No. 167, item 1798, later amended; current version available at Dziennik Ustaw of 2024, item 959, no. 1236,

Act of 27 May 2004 on investment funds and management of alternative investment funds (Dziennik Ustaw of 2024, item 1034)

Act of 24 April 2003 on charities and volunteers (Dziennik Ustaw of 2003, item 97, no. 873, current version available in Dziennik Ustaw of 2024, item 834).

Code of Civil Procedure, Act of 17 November 1964, the Journal of Laws 1964, No. 43, item 296, later amended; current version available at Dziennik Ustaw of 2024, item 1061, no. 1037,

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Anna Moskal, 'Problem ujawnienia finansowania przez osoby trzecie w międzynarodowym arbitrażu inwestycyjnym' (disclosure of third party funding in international investment arbitration), ADR. Arbitraż i Mediacja, nr 3 (2018): 69-76).

Patrycja Anna Okonska, 'Finansowanie sporow sadowych przez podmiot trzeci - perspektywa polska' (third party litigation funding - Polish perspective) Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2024, no. 1, (13) 47-62

Tomasz Waszewski, 'Poland', in Steven Friel, Jonathan Barnes (eds.) *Litigation Funding* 2017, 50-54. Law Business Research Ltd, 2017

Kaja Zaleska-Koziuk, *Charakter prawny umowy o finansowanie postepowania arbitrazowego przez osobe trzecia (third party funding) (*the legal nature of a contract for third party funding of arbitration) C.H. Beck, 2022.

Kaja Zaleska-Koziuk, 'Finansowanie sporow o prawa majatkowe przez osobe trzecia (third - party funding). Zarys problematyki', Prawo i Wiez No. 3, (33) September 2020, 101

Portugal

Prof Catarina Monteiro Pires, University of Lisbon

Executive Summary

- Portugal recently introduced rules for TPLF under Decree-Law No. 114-A/2023. It focuses only on class actions aimed at protecting consumer interests.
- The law doesn't cover other types of lawsuits, leaving a gap in oversight for individual and commercial cases.
- The law requires disclosure of funding agreements to courts, ensuring transparency and preventing hidden agendas. But these rules only apply to class actions, not other types of litigation.
- Funders cannot control key decisions – like choosing lawyers or accepting settlements. The plaintiff must remain in charge.
- Several major players are active in Portugal's TPLF market. They tend to focus on big-ticket disputes like consumer class actions and cross-border commercial arbitration.
- There are no comprehensive statistics on TPLF use in Portugal. Most insights come from market participants and individual case studies.
- Critics argue that TPLF may infringe on constitutional rights or compromise the independence of the legal process. Proponents believe it expands access to justice, especially for those without deep pockets.
- Portugal's limited framework highlights the need for EU-wide rules to ensure consistency, transparency, and fair funder practices across all Member States.
- This report has reached several conclusions, including the need to:
  - Establish a comprehensive framework to harmonize rules and eliminate confusion across Member States.
  - Require full disclosure of funding agreements in all forms of litigation—not just class actions—to prevent hidden conflicts of interest.
  - Implement safeguards to ensure funders do not control litigation strategies or decisions, preserving the autonomy of the litigant.
  - Define guidelines on funder fees, especially in cases involving vulnerable parties, to avoid exploitative arrangements.
  - Set financial stability requirements to ensure funders have the resources to sustain long and complex legal cases.
  - Prohibit clauses that give funders undue influence over litigation, ensuring they cannot push for settlements against the plaintiff's best interests.

- Introduce specific safeguards to prevent funders from imposing excessive fees on consumers and ensure fair.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Since 2023, the practice of third-party funding for litigation has been explicitly regulated in Portugal. This legal framework is established by Decree-Law No. 114-A/2023, dated December 5, which is limited to class actions aimed at protecting consumer interests. This decree became effective nationwide on November 10, 2023.

The preamble of Decree-Law No. 114-A/2023 highlights the reform's intentions regarding third-party litigation funding. It states: «To ensure transparency in third-party funding of class actions, plaintiffs are required to provide the court with the funding agreement, including a financial summary detailing the sources of funding used to support the class action. This agreement, as stipulated by this decree-law, must guarantee the independence of the plaintiff and the absence of conflicts of interest»[751].

Decree-Law No. 114-A/2023 possesses a distinct systematic structure, wherein the topic of Third-Party Litigation Funding (TPLF) is addressed solely in Chapter III and within a single article (Article 10), among the twenty-five articles constituting the regime. The organization of the decree is as follows:

Chapter I

General Provisions

Article 1- Object

Article 2 - Scope of Application

Article 3 - Definitions

Article 4 - Competent Authority and National Contact Point

Article 5- Holders of the Right to Initiate Collective Actions

Article 6 - Active Legitimacy of Associations and Foundations

Chapter II

Cross-Border Class Actions

[751] https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=3730&tabela=leis&ficha=1&pagina=1&so_miolo=

Regarding the specific regime of Third-Party Litigation Funding (TPLF), Article 10, under the heading "Funding of Class Actions for Redress Measures," stipulates the following:

> Article 10
>
> *Funding of Class Actions for Redress Measures*
>
> «1 - When entering into a funding agreement related to the pursuit of a class action with third parties, and in order to assess compliance with the subsequent provisions of this article, the plaintiff of the class action must provide the court with an authenticated copy of the agreement, drafted in a clear and easily understandable manner in Portuguese, including the following elements:
>
> a) A financial summary enumerating the sources of funding used to support the class action;
>
> b) The various costs and expenses that will be borne by the third-party funder.
>
> 2 - Whenever the funding agreement referred to in the previous number is subject to amendments, additions, or supplementary agreements, the plaintiff must submit the amended agreement in its new version to the court.
>
> 3 - The funding agreement mentioned in paragraph 1 must guarantee the independence of the plaintiff and the absence of conflicts of interest.
>
> 4 - For the purposes of the previous number, the plaintiff is considered independent of the third-party funder if they are solely responsible for making all decisions related to the class action, guided by the principle of defending the interests at stake. This includes, specifically, the selection of legal representatives, the definition of procedural strategy, and decisions to initiate, pursue, desist, settle, appeal, or not appeal, and generally, to perform or not perform any procedural act within the class action.
>
> 5 - The funder of the class action cannot impose, prevent, or influence in any way the decisions mentioned in the previous number. Any clauses to the contrary are null and void, particularly those requiring any authorization or consultation with the third-party funder before making a decision, or that associate any disadvantageous consequence for the plaintiff with making any of these decisions.
>
> 6 - The funding agreement related to a class action in which the plaintiff exercises the powers of representation provided for in paragraph 1 of Article 15 of Law No. 83/95, of August 21, as currently amended, cannot foresee a remuneration for the funder that exceeds a fair and proportional value, assessed in light of the characteristics and risk factors of the class action in question and the market price of such funding.
>
> 7 - Class actions initiated by a plaintiff who has entered into a funding agreement are inadmissible when at least one of the defendants in the action is a competitor of the funder or is an entity on which the funder depends.
>
> 8 - In cases where there is a violation of the provisions in paragraphs 3, 5, and 7, the court shall invite the plaintiff, within a specified period, to reject or make changes to the third-party funding to ensure compliance with the violated norm, and must declare the plaintiff's lack of standing if the necessary changes are not made within the established period.

> 9 - When the plaintiff's standing is rejected under the circumstances provided in the previous number, such rejection does not affect the rights of the holders of the interests covered by the class action in question. The Public Prosecutor's Office may substitute the plaintiff and proceed with the action.»

Until the implementation of Decree-Law No. 114-A/2023, dated December 5, there was no explicit regulation of Third-Party Litigation Funding (TPLF) within Portuguese jurisdiction. This was notwithstanding the general substantive and procedural rules applicable to any legal transaction between private entities. At the same time, the Portuguese legislation regulating the right to procedural participation and class actions (Law No. 83/95, of August 31, as corrected by Rectification No. 4/95, of October 12, and amended by Decree-Law No. 241-G/2015, of October 2) did not reference litigation funding agreements.

Litigation funding encompasses various costs, which can be referenced under Portuguese legislation regulating procedural costs in judicial processes (Decree-Law No. 34/2008, of February 26, as amended). Under this legislation, procedural costs include: (1) court fees, which are the amounts due for initiating proceedings in Portuguese judicial courts, (2) charges, and (3) party costs, which cover the fees paid to the respective legal representative. All these costs can legitimately be covered by a third party, in accordance with the general standing rule regarding the payment of debts by third parties.

The dominant view in Portugal categorizes third-party funding agreements within the general framework of contractual freedom, subject to the general rules governing legal transactions, which are broadly regulated in Book I (General Part) of the Portuguese Civil Code (1966), specifically Articles 217 to 294[752].

Nevertheless, the commercial development of TPLF activities within the national territory requires economic operators to adhere to licensing regulations applicable to any business, from both commercial and tax registration perspectives.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

The rise of TPLF in Portugal mirrors global trends, where jurisdictions are increasingly adopting regulatory frameworks to support and govern third-party funding, recognizing its role in enhancing access to justice and balancing the scales between financially unequal parties in litigation.

The funding of judicial litigation generally concentrates on two main phenomena: firstly, on "mass" litigation, such as the funding of class actions; and secondly, on arbitral litigation, particularly international commercial disputes, which typically result in individual actions.

There is no restriction against extending this funding mechanism to other types of litigation, including judicial litigation with condemnatory requests, arbitral litigation with condemnatory requests, litigation in the context of singular enforcement (executive action), litigation in the context of universal enforcement (insolvency), or other types[753].

[752] https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=3730&tabela=leis&ficha=1&pagina=1&so_miolo=

[753] CATARINA MONTEIRO PIRES, *Litígios financiados: conversão de créditos conexos com litígios em ativos financeiros, em particular em ações arbitrais* (2024), 1-4 .

In the realm of arbitration, the focus tends to be on international commercial arbitration and investment arbitration.

In Portugal, it is recognized that the Public Prosecutor's Office, and even the legal aid system – particularly in the form of exemptions from court fees and other procedural charges, or the appointment and compensation of court-appointed lawyers or public defenders (Article 16 of Law No. 34/2004, of July 29, as amended) – do not constitute economically viable alternatives for effectively conducting complex actions, especially those seeking compensation.[754]

In such court claims, specialized assistance is required from attorneys (lawyers representing the parties), as well as other specialized agents (e.g., experts), who undertake costly due diligence work to assess the risks of the actions and the likelihood of success of the claims[755].

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Based on direct information from the leading market players in Portugal, several funders are active at the national level. These include (1) Nivalion[756], (2) Luminate[757], (3) Augusta[758], (4) Consumer Justice Network, (5) Omni Bridgeway[759], (6) Hausfeld[760], (7) Cartel Damages Claims[761], (8) Anlex, (9) Lexfinance[762] and (10) PLA Litigation Funding[763].

There is no further available information on the exact number of funders operating within the country. This is because the Economic Activity Code (64921), which is presumed applicable in this context, does not directly relate to the operations of these specific entities. Instead, it broadly covers any company involved in investment activities.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no official statistics on Third-Party Litigation Funding (TPLF) within the Portuguese jurisdiction. The available information is solely based on direct testimonies from national market participants.

There has been a noticeable expansion in the number of cases utilizing third-party funding since 2020.

TPLF is particularly proliferating in contexts such as civil class actions initiated by private consumer associations. This trend is especially evident in cases involving competition law violations.

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754 CARLOS BLANCO DE MORAIS/MARIANA MELO EGÍDIO, *Da validade dos acordos de financiamento de contencioso por terceiro para a promoção de ações populares* (RFDUL-LLR, LXIV, 2023, 1) 405-442 (410); available here: https://repositorio.ul.pt/handle/10451/62156).

755 FERNANDO AGUILAR DE CARVALHO/CONSTANÇA BORGES SACOTO, *The Third Party Litigation Funding Law Review* (5th ed., Law Business Research, 2021) 161-221 (162).

756 This is the company's website: https://nivalion.com/en/

757 Founded by the Omidyar Group. This is the company's website: https://www.luminategroup.com/

758 This is the company's website: https://www.augustaventures.com/

759 This is the company's website: https://omnibridgeway.com/

760 This is the company's website: https://www.hausfeld.com/

761 This is the company's website: https://carteldamageclaims.com/

762 This is the company's website: Lex Finance / Arbitration Financing (lex-finance.com)

763 This is the company's website: PLA Litigation Funding - Litigation funders Madrid (pla-spain.com)

The number of such actions is consistently on the rise.

For instance, a class action was brought by Ius Omnibus against Mastercard, filed in the Competition, Regulation, and Supervision Court on December 2, 2020. Ius Omnibus, a consumer protection association, initiated the action based on Mastercard's anti-competitive practices that harmed consumers. Notably, this case was funded by Nivalion[764].

Another notable case involves a class action brought by Ius Omnibus against TikTok. In April 2023, Ius Omnibus filed a class action in the Lisbon District Court to protect children under 13 residing in Portugal against TikTok's illegal practices and to restore legality. Ius Omnibus is represented by the law firms Sousa Ferro & Associados and Pais de Vasconcelos & Associados. This action is funded by the Augusta group[765].

A third significant case involves another class action brought by Ius Omnibus against Sony. On August 3, 2023, Ius Omnibus filed a class action in the Competition, Regulation, and Supervision Court of Santarém (TCRS) to defend Portuguese consumers harmed by Sony's anti-competitive practices related to the PlayStation. Ius Omnibus is represented by the law firms Sousa Ferro & Associados and Pais de Vasconcelos & Associados. This action is also funded by the Augusta group[766].

Another notable case involves a class action in the Competition, Regulation, and Supervision Court (TCRS) to defend Portuguese consumers harmed by Apple's anti-competitive practices, as alleged in various pending lawsuits in other jurisdictions (including the United States, United Kingdom, and the Netherlands). This action aims to end Apple's anti-competitive practices that artificially maintain its monopoly in providing its services, harming the variety and quality of apps and content available in the market, and to compensate consumers for the increased prices paid through the Apple App Store. Ius Omnibus is represented by Sousa Ferro & Associados, with the action funded by the Augusta group, based in the United Kingdom[767].

A fifth significant case involves a class action filed by Ius Omnibus on March 21, 2022, in the Competition, Regulation, and Supervision Court (TCRS) to defend Portuguese consumers harmed by Google's anti-competitive practices, as alleged in various pending lawsuits in other jurisdictions. This action aims to end Google's anti-competitive practices that artificially maintain its near-monopoly in distributing Android apps and in-app content, stifling innovation and quality in these markets, and to compensate consumers for the increased prices paid through the Google Play Store. Ius Omnibus is represented by Sousa Ferro & Associados and PRA – Raposo, Sá Miranda & Associados. This action is funded by the Augusta group, based in the United Kingdom[768].

A sixth significant case involves two class actions filed by Ius Omnibus on October 30-31, 2023, in the Competition, Regulation, and Supervision Court of Santarém (TCRS) to defend Portuguese consumers harmed by the anti-competitive practices of MEO and Nowo, identified in the Competition Authority's (AdC) decision on December 2, 2020, and confirmed by the Lisbon Court of Appeal on February 20, 2023. These cases are funded by the Augusta group, a specialized litigation funding entity[769].

[764] https://iusomnibus.eu/pt/ius-omnibus-v-mastercard-pt/
[765] https://iusomnibus.eu/pt/ius-omnibus-v-tiktok-menos-13/
[766] https://iusomnibus.eu/pt/ius-omnibus-v-sony-playstation-pt/
[767] https://iusomnibus.eu/pt/ius-omnibus-v-apple-app-store-pt/
[768] https://iusomnibus.eu/pt/ius-omnibus-v-google-play-store-pt/
[769] https://iusomnibus.eu/pt/cartel-das-telecomunicacoes-meo-nowo/

Finally, a significant case involves a class action filed on May 10, 2021, in the Lisbon District Court by the consumer protection association Ius Omnibus. This action seeks compensation for all owners of light vehicles of the Alfa Romeo, Jeep, Fiat, and Lancia brands with diesel engines homologated under Euro 5 and Euro 6 standards (up to Euro 6c), due to Fiat Chrysler Automobiles' use of illegal manipulation devices, which the Court of Justice of the European Union confirmed as prohibited on December 17, 2020 (Case C-693/18). Ius Omnibus is represented by Pais de Vasconcelos & Associados. This action is funded by Consumer Justice Network B.V., a funder composed of lawyers and litigation funders from the Netherlands and the United States, with proven experience in funding class actions related to Dieselgate[770].

This provides an overview of the current landscape of ongoing litigation in Portugal.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There are numerous points of contention at the national level regarding Third-Party Litigation Funding (TPLF), which will be outlined below. This is particularly relevant given the clear absence of the doctrines of *champerty and maintenance* in Portuguese legal system.

A first discussion concerns the admissibility of the mechanism itself in terms of its constitutional compatibility, in light of the constitutional guarantees of consumer rights, competition, and the fundamental right of access to the courts[771]. Although initial opinions were somewhat opposed[772], recent legal doctrine supports constitutional compatibility with access to justice[773]. Authors also contend that such agreements do not violate the principle of legal reserve, the principle of separation of powers, public order, or the prohibition against abuse of rights[774].

A second discussion regards the independence and impartiality of the agents involved. We highlight three different issues.

In arbitration proceedings, the main issue regards arbitrator's independence and appointment[775].

In both arbitration and judicial disputes, the relationship between the funder and the appointed lawyers is questioned, particularly concerning the ethical obligations to which the lawyers are bound. These obligations may be compromised, for example, by the disclosure of confidential information between the lawyer and the funder (thus breaching professional secrecy) or by the

[770] https://iusomnibus.eu/pt/ius-omnibus-v-stellantis-fiat-chrysler-automobiles-pt/

[771] CARLOS BLANCO DE MORAIS/MARIANA MELO EGÍDIO, Da validade dos acordos de financiamento de contencioso por terceiro para a promoção de ações populares (RFDUL-LLR, LXIV, 2023, 1) 411.

[772] Assim, PAULO OTERO, *Da dimensão constitucional dos acordos de financiamento ("litigation funding agreements") de ações populares indemnizatórias: um problema de abuso de direitos fundamentais* (Revista da Ordem dos Advogados, Lisboa, a. 82 n. 3-4, Jul.-Dec. 2022), 701-740 (724).

[773] CARLOS BLANCO DE MORAIS/MARIANA MELO EGÍDIO, Da validade dos acordos de financiamento de contencioso por terceiro para a promoção de ações populares (RFDUL-LLR, LXIV, 2023, 1) *passim*.

[774] ANTÓNIO JORGE PINA DOS REIS NOVAIS, *Financiamento de contencioso por terceiros e Constituição*, Revista da Faculdade de Direito da Universidade de Lisboa - Lisbon Law Review (Vol. 64, no. 2, 2023), 661-722.

[775] TITO ARANTES FONTES, *O financiamento de litígios por terceiros : à independência e imparcialidade dos árbitros, Estudos comemorativos dos 30 anos do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa e arbitragen comercial* (coord. António Menezes Cordeiro, Almedina: Lisboa, 2019), 1060; RICARDO SILVA PEREIRA, *Third-party funding e implicações éticas na relação com os árbitros* (Revista Internacional de Arbitragem e conciliação, no. 9, 201), 95.

acceptance of instructions contrary to the client's interests (thus creating a conflict of interest and compromising the lawyer's autonomy)[776/777].

Finally, the involvement of the funder in the litigation strategy, regarding decisions on settlement and on appeal, may also raise doubts.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

As mentioned in the previous section, there are specific issues that have sparked substantial doctrinal debate. The most significant issues have been addressed in the previous section.

No purely political debates are known.

In addition to the debates identified in the previous section, we draw your attention to two additional issues.

The first note concerns the legal nature of third-party litigation funding agreements.

The notion that they are merely loan contracts (known in Portugal as «mútuo») has been set aside. The fundamental inadequacy of TPLF contracts for this classification stems from their non-recourse nature, where the funded party is not necessarily bound to repay the capital, thus disqualifying them as loan contracts.

Other seemingly related arrangements, such as insurance contracts, particularly legal protection insurance, which covers «the costs of providing legal services, including the defence and representation of the insured's interests, as well as expenses arising from a judicial or administrative process»[778], also fail to encompass TPLF contracts. This issue extends to litigation in arbitral proceedings.

Regarding the comparison to insurance contracts, the parallel fails firstly due to the existence of the insurance premium, a necessary element of the latter contract, which is always owed in exchange for risk coverage[779]. The absence of an insurance premium in third-party funding agreements highlights this distinction. Furthermore, insurers typically do not assume control over the case: they simply cover expenses and fees up to the covered capital limit and, if necessary, appoint a lawyer who will establish direct and exclusive contact with the insured, with no further intervention[780]. Conversely, the funder is potentially allowed much greater control.

Other comparisons, in determining the nature of the contract, have been proposed, such as joint venture contracts[781] (as provided in Decree-Law No. 231/81, of July 28) or simple derivatives, are also debated.

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[776] RICARDO SILVA PEREIRA, *Third-party funding e implicações éticas na relação com os árbitros* (Revista Internacional de Arbitragem e conciliação, no. 9, 2016) 95.

[777] DANIELA FILIPA HENRIQUES MENDES, *Financiamento de litígios por terceiros* (2021), 48.

[778] Article 167 of the Decree-Law no. 72/2008, of April 16th.

[779] CLÁUDIA SOFIA RODRIGUES CARVALHO, cit., p. 31 e ss.; DUARTE GORJÃO HENRIQUES, *Third party funding ou o financiamento de litígios por terceiros em Portugal* (Revista da Ordem dos Advogados, Lisboa, a.75 n.3-4, jul.-dec. 2015), 573-624 (615).

[780] DUARTE GORJÃO HENRIQUES, *Third party funding ou o financiamento de litígios por terceiros em Portugal* (Revista da Ordem dos Advogados, Lisboa, a.75 n.3-4, jul.-dec. 2015) 613.

[781] With an opposing view, see ANTÓNIO PINTO LEITE, *Third-Party Funding as a Joint Venture and not as a mere finance agreement: the independence and impartiality of the arbitrators* (VII Congresso do Centro de Arbitragem Comercial,

The second note regards the funder's remuneration, as well as its contingent nature, which also may raise legal questions.[782]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

As noted, since 2023, the practice of third-party funding for litigation has been explicitly regulated in Portugal. This legal framework is established by Decree-Law No. 114-A/2023, dated December 5, which pertains to class actions aimed at protecting consumer interests. This decree became effective nationwide on November 10, 2023.

Other types of actions, for which the possibility of TPLF is not explicitly provided, raise more significant doubts.

Generally, the primary concerns are:

- The prohibition of usury (Article 282 of the Portuguese Civil Code), specifically considering that when funded parties are typically in financially vulnerable situations, the contract they enter into with the funder is subject to the prohibition of usurious transactions;
- The offense against good morals (Article 282 of the Portuguese Civil Code), questioning whether litigation funding is merely a way to exploit the justice system for the economic gain of third parties;
- More broadly, the limits of private autonomy concerning the privatization of justice, where third-party funding of litigation in exchange for a percentage of the action's results seems to underscore the idea of commodifying rights or transforming the right to legal action into a tradable asset[783].

Despite these reservations, there is currently no barrier to the admissibility of TPLF in civil litigation, although its practice is conditioned by the issues identified in the main doctrinal debates: (1) the validity of the funding contract, subject to the general rules of legal transactions, (2) the impartiality of arbitrators, particularly if appointed by the funder, and (3) the respect for deontological duties by the lawyer when a funder is involved. Additionally, the funder has a duty to collaborate with the court to uncover the truth and disclose the funding agreement, a legal duty prescribed for class actions in consumer law but extendable to other lawsuits.

There are other concerns that are not addressed by this legal regime. For instance, in arbitration proceedings, other legal issues may be considered, such as (i) disclosure by the Parties of the existence of a TPF during the proceedings (ii) regulation of supervening conflicts of interests in case of supervening agreement with a TPF (iii) interference of the TPF in the conduct of the proceedings by the Parties.

Almedina: Coimbra, 2013),105-113; also, ALEXANDRA MENDES GONÇALVES, *O Third Party Funding na Arbitragem Comercial*, 93-96.

[782] See, CLÁUDIA SOFIA RODRIGUES CARVALHO, *Non-Recourse Funding Agreements em Portugal: natureza e obstáculos* (Porto, 2021) (https://repositorio.ucp.pt/handle/10400.14/36669)

[783] DUARTE GORJÃO HENRIQUES, *Third party funding ou o financiamento de litígios por terceiros em Portugal* (Revista da Ordem dos Advogados, Lisboa, a.75 n.3-4, jul.-dec. 2015) 621-622.

2.2 Regulatory oversight of funders/funding industry

Currently, there is no regulation or form of regulation specifically addressing the activity of litigation funding itself.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There is no specific framework for the economic activities carried out by funders, which results in the absence of dedicated requirements for engaging in this activity, at least exclusively.

Indeed, attempts have been made to subject these funding entities to the regulations governing credit institutions and financial companies, as outlined in Decree-Law No. 298/92 of December 31, in its current version (the general regime for credit institutions and financial companies)

Firstly, regarding the entities themselves, it must be determined whether this financing activity requires licensing by the supervisory authorities overseeing banking and financial activities. From the range of provisions in this legal regime, it is challenging to classify third-party funders within any of the established categories of credit institutions or financial companies.

Additionally, the financial agreements do not align with the types of financial contracts specified in banking legislation, which are listed in Article 2-A of the same decree, unless one equates litigation funding agreements to a "securities contract" (assuming litigation is defined as a "security") or to a futures and forward contract, or even to a swap or options contract (assuming the requirements for such contracts are met in the context of arbitration finance).

Integrating TPF into any of these activities is debatable, and prevailing legal doctrines tend to view it negatively.[784].

Consequently, TPLF activities do not require any specific licensing[785].

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

The regulatory framework that indirectly affects Third-Party Litigation Funding (TPLF) in Portugal is primarily focused on ensuring ethical standards among the various participants in the legal process, such as lawyers, arbitrators, and the parties involved in litigation. These regulations aim to prevent conflicts of interest and ensure transparency in all related interactions.

Regarding the role of a third party as an investor, it cannot be fulfilled by investment funds. According to Portuguese law, investment funds are independent entities that pool the savings of investors (referred to as Participants) to invest in assets. They operate under principles of risk

[784] DUARTE GORJÃO HENRIQUES, *Third party funding ou o financiamento de litígios por terceiros em Portugal* (Revista da Ordem dos Advogados, Lisboa, a.75 n.3-4, jul.-dec. 2015) 614 and DANIELA FILIPA HENRIQUES MENDES, *Financiamento de litígios por terceiros* (2021) 55.
[785] DUARTE GORJÃO HENRIQUES, *Third party funding ou o financiamento de litígios por terceiros em Portugal* (Revista da Ordem dos Advogados, Lisboa, a.75 n.3-4, jul.-dec. 2015) 615.

diversification and the exclusive interest of the Participants, aiming to provide potentially higher returns than individual investments.

Equity investment funds primarily invest in stocks, bonds, or other securities, and this does not include investment in legal actions (for the list of admissible securities, refer to Decree-Law No. 486/99, dated November 13).

Lawyers in Portugal must adhere to the Statute of the Portuguese Bar Association (Law No. 145/2015, of January 10th, EOA), as amended, which imposes rigorous ethical standards designed to uphold the integrity of the legal profession. This includes rules to prevent conflicts of interest and ensure the independence and impartiality of legal practitioners.

The prohibition of *quota litis* agreements ((Article 106(2) EOA), which prevents lawyers from being compensated based on the case outcome, applies solely to lawyers. This rule is crucial for ensuring that lawyers' decisions and advice remain impartial and are not influenced by financial considerations.

However, this prohibition does not apply to TPLF agreements. Consequently, funders and funded parties are not restricted by this rule, allowing funders to receive a portion of the litigation proceeds without violating the ethical standards that apply to lawyers. This distinction underscores the need for clarity about the roles and responsibilities within TPLF arrangements to avoid ethical pitfalls.

Lawyers are also mandated to defend their clients' rights and interests with full technical autonomy and responsibility (Article 81(1) EOA). This means that the lawyer's primary duty is to their client, and they must always act in their client's best interests. This provision ensures that lawyers remain independent of any external influence, including from third-party funders. It safeguards the client's interests by ensuring that legal advice and actions are based solely on professional judgment and not external pressures.

The requirement for lawyers to perform their duties independently and impartially is fundamental (Article 89). Lawyers must avoid any undue influence from external parties, including funders, ensuring that their professional judgment remains unbiased.

This rule reinforces the integrity of the legal process by ensuring that legal practitioners are not swayed by financial incentives from funders, thereby maintaining the trust and confidence of their clients.

Lawyers are bound by a strict obligation of confidentiality regarding all information related to their clients (Article 92 EAO). This duty is paramount and cannot be compromised by the existence of a TPLF contract.

The confidentiality requirement ensures that sensitive information remains protected and that the client's privacy is upheld, regardless of the funding arrangements. This protection is vital for maintaining the integrity of the attorney-client relationship and the overall fairness of the legal process.

Regarding the conduct of arbitrators, the Portuguese Arbitration Law (LAV) mandates in Article 9(3) that arbitrators must be independent and impartial. This principle is critical to ensuring the fairness and integrity of the arbitration process. Independence and impartiality prevent bias and ensure that decisions are made based on the merits of the case, free from external influences.

The duty of disclosure, outlined in Article 13(1) LAV, complements this requirement by obliging arbitrators to reveal any circumstances that might affect their independence or impartiality. This

duty is essential for maintaining transparency and trust in the arbitration process. It includes disclosing any financial or personal interests that could create a conflict of interest.

Specifically, if an arbitrator has knowledge of their funder, they are required to disclose this information. This obligation ensures that all parties are aware of any potential biases that could affect the arbitrator's judgment. By mandating such disclosures, the law aims to uphold the highest standards of fairness and impartiality in arbitration proceedings.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Currently, there are no specific mechanisms in place that directly address the concerns regarding conflicts of interest, transparency, and disclosure related to Third-Party Litigation Funding (TPLF) contracts. The only exception is the obligation to submit the TPLF contract in cases of mass litigation within the realm of Consumer Law, as previously discussed. This limited requirement highlights the need for more comprehensive regulations to ensure that TPLF arrangements are transparent and free from conflicts of interest.

The lack of regulatory frameworks addressing these issues is a significant gap that has been widely acknowledged and criticized by Portuguese legal scholars. This deficiency underscores the need for legislative reforms to introduce procedural safeguards that can effectively manage potential conflicts of interest, ensure transparency, and mandate adequate disclosure.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Any individual involved in a legal dispute may be required to provide information as part of the duty of procedural cooperation. This duty is broad and can extend to any third party, ensuring that the necessary information is available to facilitate the legal process.

Outside of this general duty, funders and beneficiaries of Third-Party Litigation Funding (TPLF) do not have any specific, direct obligations towards the court, the Public Administration, or the opposing party in a dispute. This lack of direct responsibility can lead to a need for clearer regulations to ensure accountability and transparency in TPLF arrangements.

2.7 Obligations of funders towards beneficiaries and vice-versa

The obligations between funders and beneficiaries are primarily established by the terms of the funding agreement. This contract delineates the rights and responsibilities of each party, forming the core of their relationship. The clarity and thoroughness of these agreements are crucial, as they set the expectations and obligations that govern the funding arrangement. Both parties rely on these contractual terms to define their roles and to manage their interactions effectively.

2.8 Distribution of awards and bearing adverse costs in lost cases

The distribution of awards and the responsibility for adverse costs in cases that are lost is a complex issue often debated among legal scholars.

Fundamentally, these matters are governed by the terms of the funding agreement and the specific model employed. According to the law, the funded party is responsible for its own payment obligations, but the funding agreement may specify different arrangements for covering costs at the end of the litigation, particularly in the event of an unfavorable outcome. This contractual flexibility allows parties to negotiate terms that suit their needs while adhering to legal requirements.

2.9 Planned legislation

Currently, there are no known public initiatives or parliamentary projects aimed at introducing new regulations for Third-Party Litigation Funding (TPLF)[786]. It is important to note that the legislative process within the Government is not public, which means that any potential developments or proposals might not be immediately known.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal
Capital adequacy (Art.6)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal
Fiduciary duty (Art.7)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal
Powers of supervisory authorities (Art.8)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal
Investigations and complaints (Art.9)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal
Coordination between supervisory authorities (Art.10)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal

[786] From this searchable engine: https://www.parlamento.pt/ActividadeParlamentar/Paginas/IniciativasLegislativas.aspx

Content of third-party funding agreements (Art.12)	It establishes some new requirements that are compatible with the current TPLF regulation in Portugal. Some requirements are not compatible: in Portugal the share of the award or fees must be "fair and proportional" and not free to be determined (Article 10.º/6 of Decree-Law n.º 114-A/2023, of December 5th)
Transparency requirements and avoidance of conflicts of interest (Art.13)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal.
Invalid agreements and clauses (Art.14)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal.
Termination of third-party funding agreements (Art.15)	It establishes new requirements that are compatible with the current TPLF regulation in Portugal.
Disclosure of the third-party funding agreement (Art.16)	It establishes some new requirements that are compatible with the current TPLF regulation in Portugal.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	It establishes new rules that are compatible with the current TPLF regulation in Portugal.
Responsibility for adverse costs (Art.18)	It establishes new rules that are compatible with the current TPLF regulation in Portugal.
Sanctions (Art.19)	It establishes new sanctions that are compatible with the current TPLF regulation in Portugal.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

In the past three years, the number of cases funded by third-party litigation funding (TPLF) in various jurisdictions has varied significantly, with funders typically handling between 4 and 20 cases per year. Arbitration cases, while consistently funded, represent a smaller portion of the total, with numbers ranging from 1 to 5 arbitration cases annually.

For example, one funder reported managing an average of 15-20 cases per year, of which 5 are arbitration cases, while another reported handling around 10 cases annually, with 3 being arbitration

cases. In contrast, some funders manage fewer cases overall, with one interviewee funding an average of 4 cases per year, including 1 arbitration case.

A few interviewees did not provide specific details about the number or types of cases funded. Despite these variations, arbitration remains a consistent but lesser part of the TPLF landscape compared to other types of cases.

b. Minimum claim value in absolute terms (in million Euro)

In terms of the minimum claim value for cases considered for third-party litigation funding (TPLF), responses from interviewees indicate a range from less than 1 million to 14 million euros, with most minimum claim thresholds falling between 2 and 9 million euros.

Several funders reported a minimum claim value of between 5 and 9 million euros, while others set lower thresholds. One interviewee mentioned a minimum claim value of 2 to 4 million euros, and another indicated that their minimum was below 1 million euros. At the higher end, one respondent requires a minimum claim value of 10 to 14 million euros.

c. Typical claim value in absolute terms (in million Euro)

The typical claim values for cases funded through third-party litigation funding (TPLF) vary significantly, ranging from 20 million euros to over 300 million euros, depending on the funder and the case profile.

One funder indicated that typical claims involve values of 300 million euros or more, while another operates with claims typically ranging between 40 and 49 million euros. Some funders reported a broader range, with one respondent mentioning claims between 50 and 99 million euros, while another indicated typical values ranging from 10 to 99 million euros. Additionally, there was a case where multiple options were cited, with claims ranging from 20 to 49 million euros.

d. Typical ratio between investment by the funder and claim value

One funder stated they did not know the ratio, while another specified it as being more than 1:20. Two respondents reported a ratio of 1:10. One funder mentioned that this ratio is not a relevant criterion for their decision-making process.

e. Typical size of the investment by the litigation funder (in million Euro)

Regarding the typical size of investment by litigation funders, the amounts generally range between less than 1 million euros and 9 million euros.

Several funders reported typical investment sizes between 2 and 4 million euros, while others cited broader ranges, from 2 to 9 million euros. One respondent mentioned investments of less than 1 million euros.

f. Origin of funding provided by the litigation funder

The sources of funding for litigation funders exhibit a wide range of financial origins. Some funders obtain capital from established litigation finance companies, highlighting partnerships with key players in the litigation funding market. Many rely on private investors and family offices, indicating a preference for more personal or bespoke investment sources. Additionally, some funders secure capital from institutional investors, including investment funds and professional investors, which may consist of wealthy families and family offices.

Moreover, a few funders described the origin of their funding as variable, depending on the specific funder or case, with sources ranging from large-scale investment firms to individual wealthy families. Overall, the funding landscape for litigation is characterized by a combination of professional investment sources, private wealth, and established litigation finance firms, with funders often utilizing a mix of these options to support their operations.

g. Share of compensation awarded typically demanded by litigation funders

The share of compensation typically demanded by litigation funders varies significantly among providers. The range generally falls between 14% and 70% of the awarded compensation.

One funder indicated a typical demand of 30%, while another specified a higher range, requiring 70% or more. Responses also included a range of 30% to 50% from one interviewee, reflecting a moderate approach to compensation demands. Additionally, another funder mentioned a share ranging from 14% to 30%.

h. Other conditions of the litigation funding agreement

The conditions of litigation funding agreements reveal a variety of practices among funders, focusing on balancing the protection of their investments and the autonomy of the plaintiffs.

One funder noted that their agreement terms align with those in other jurisdictions, emphasizing a relatively hands-off approach. They do not exert significant control over the case, lacking veto rights over settlements and control over the legal strategy employed by the plaintiffs. In certain situations, they may require the assignment of the legal claim as a guarantee, but this reflects standard practice rather than an unusual stipulation. Conversely, another funder stressed that their terms ensure total independence for plaintiffs in managing their cases, allowing funded parties to retain control over legal strategies and settlement decisions.

A distinctive pricing model was described by one funder, which includes a waterfall provision. This mechanism dictates the distribution of any awarded compensation, where the funder first recoups their initial investment before receiving a success fee. This structure protects the funder's interests while allowing the funded party the freedom to accept any settlement offer. This flexibility reassures plaintiffs that they are not bound by the funder's preferences when it comes to settlements.

Termination clauses are also critical aspects of these agreements. One funder explained that they have the right to terminate the agreement if the funded party commits a material and irremediable breach or fails to remedy a remediable breach within a specified notice period. This means that if a serious issue arises that cannot be fixed, the funder can withdraw their support. Additionally, termination is permitted if there is a lack of reasonable prospects for recovering the full amount of the investment. Importantly, if a termination occurs, the funder faces the risk of losing their entire

investment, which highlights the high stakes involved. This provision serves as a protective measure for the funder but also places pressure on both parties to ensure compliance with the agreement terms.

Overall, the sentiment among funders appears to support the autonomy of plaintiffs. By allowing funded parties to make settlement decisions without interference, funders can build stronger relationships based on trust. This hands-off approach may enhance the likelihood of favorable outcomes, as plaintiffs feel more empowered to pursue strategies that they believe will best serve their interests.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

When it comes to the existence of an acceptable threshold for the probability of success in litigation funding, there are varied approaches among funders, reflecting different levels of risk tolerance and assessment strategies.

Several funders indicated that they have a threshold for acceptable probability of success. One funder specified a threshold between 60% and 70%, while another set their threshold at 50%. Another funder confirmed the existence of such a threshold but did not provide a specific percentage. In contrast, one funder noted that they do not utilize an acceptable threshold for probability of success.

Additionally, one funder emphasized a higher threshold of at least 70%, suggesting a more conservative approach to risk. This indicates that funders typically consider various factors, such as the strength of the legal argument, historical case outcomes, and the expertise of the legal team, when establishing their thresholds for the probability of success.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

When discussing the concepts of Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR) in litigation funding, the responses from funders varied significantly.

Several funders indicated that they do not utilize MoC or IRR metrics in their assessments. Specifically, two funders stated explicitly that they do not apply these measures, suggesting that their evaluation of investment performance may rely on other metrics or qualitative assessments.

Conversely, other funders provided specific figures. One funder indicated a minimum MoC of 5:1 and an IRR of 15%, reflecting a more structured approach to measuring returns. Another funder reported a MoC of 3x and an impressive IRR of 78%, indicating a strong focus on maximizing returns on investment.

Overall, the responses highlight a lack of consensus on the importance of MoC and IRR in the litigation funding space, with some funders favouring traditional performance metrics while others opt for different evaluation methods.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The outcomes of litigation funding arrangements reveal a complex landscape characterized by varying levels of success and benefits for both plaintiffs and funders.

One funder pointed out that there is currently no public information available regarding the outcomes of funded collective redress claims, indicating that none of these cases have been decided yet. Another funder elaborated on the benefits for plaintiffs, noting that external funding enables access to the courts and legal representation that they might not have been able to afford otherwise. For funders, the primary aim is to achieve a return on their investment, with gains calculated based on the terms outlined in the funding agreements.

A different funder shared insights into the tangible benefits of litigation finance, stating that funding not only covers litigation and arbitration costs but can also inject capital into the daily activities of businesses involved in claims. This perspective emphasizes the role of litigation funding in facilitating broader access to justice and supporting the financial health of businesses.

However, another funder indicated that, as of now, no funded cases in Portugal have reached a conclusion, with the first cases having commenced in 2020. This suggests that the litigation funding market in Portugal is still in its early stages.

One funder noted that there were challenges and uncertainties inherent in litigation funding outcomes, due to confidentiality obligations. They described three distinct groups of funded cases: (*i*) successful outcomes: cases where the funder receives the contractually agreed return because the proceedings were successful, resulting in payment from the opposing party; (*ii*) suboptimal returns: cases where the funder receives less than expected due to lower-than-anticipated awards resulting from the litigation; and unsuccessful cases: Instances where the funder loses its entire investment due to unsuccessful proceedings or inability to enforce the award.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

The disclosure of funding agreements to the court varies among funders, reflecting different levels of transparency and legal requirements.

One funder confirmed that in collective redress cases, funding agreements are fully disclosed to the court, supporting transparency and ensuring all parties are aware of the funding arrangements. Another funder noted that plaintiffs receiving funding are required to disclose all terms of their funding agreements to promote transparency and fairness throughout the legal proceedings.

Additionally, a different funder stated that they recommend lawyers to disclose at least the existence of the litigation funding agreement, emphasizing a commitment to maintaining some level of transparency without detailing all terms.

In consumer cases, one funder highlighted that funding agreements have been voluntarily disclosed in full by claimant consumer associations, and due to the transposition of the Representative Actions Directive, there are legal requirements for partial disclosure in consumer opt-out representative actions. However, in business-to-business (B2B) disputes, these agreements are typically not disclosed and are not legally required to be.

In contrast, another funder pointed out that there are currently no disclosure rules regarding funding agreements in state court proceedings, leading to less transparency in how funding arrangements are handled within the legal system.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

In response to whether litigation funders exercise any form of control over legal proceedings, all funders interviewed indicated that they do not exert control in any significant manner.

Specifically, one funder stated unequivocally that there is no control over the legal proceedings. Similarly, all other funders echoed this sentiment, affirming that they do not exercise control over aspects such as the choice of lawyer, consent for settlement, consent for appeal, consent for expert evidence, or agreement on strategy.

However, one funder clarified that while they do not interfere with the choice of counsel, they do refrain from providing funding if they are not convinced of the quality of the lawyers involved. They mentioned that, should the budget include costs for an appeal, they would not terminate the litigation funding agreement (LFA) following a negative first-instance decision if there was a reasonable chance of success for the appeal. This funder also noted that the requirement for expert evidence was discussed prior to entering into the LFA and included in the budget, indicating no further interference once funding is secured.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

The prevailing sentiment among interviewees is that the relationship between litigation funders and plaintiff's lawyers is largely characterized as a financial one. Many funders view their role as strictly providing financial backing for the cases rather than being involved in the legal strategy or management of the cases. This financial focus indicates a professional and transactional nature to the relationship.

While the relationship is primarily financial, there is an expectation for regular communication between funders and lawyers. Funders generally prefer to receive updates on case developments every one to two months. This expectation emphasizes the importance of transparency and ongoing communication in maintaining a cordial relationship.

Funders highlighted the importance of receiving non-confidential information regarding case progress from lawyers. This information may also include updates on expenses associated with the case. Such sharing fosters a collaborative environment where funders can stay informed about the status of the litigation without intruding on the legal process.

It was noted that while funders do not typically have direct contracts with lawyers, legal representatives are required to sign the litigation funding agreement (LFA). This step acknowledges the contractual obligations of the funded party and reinforces the funder's role in the process. Funders expressed a willingness to engage in discussions with lawyers, indicating a cooperative spirit in the working relationship.

Trust plays a crucial role in the relationship between funders and the plaintifs' lawyers. Funders often develop relationships of trust with case-leading lawyers during the Due Diligence phase of funding. This foundation of trust can facilitate smoother interactions and enhance collaboration throughout the litigation process.

Some funders described their role as passive, meaning they do not interfere with legal strategy or decision-making but rather support the lawyers and their clients. This passive involvement suggests a respectful acknowledgment of the lawyers' expertise and independence in managing the case.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

When it comes to the possibility of withdrawing funding during the litigation process, all funders interviewed indicated that it is indeed possible to do so under certain circumstances.

One funder stated that withdrawal of funding can occur in cases of a breach of the terms of the agreement by the funded party. Specific reasons for withdrawal include material adverse changes such as shifts in legislation or the discovery of unfavourable evidence.

Another funder explained that the potential for withdrawing support during the litigation process is governed by the specific terms outlined in the litigation funding agreement. This suggests that the conditions for withdrawal are clearly delineated and agreed upon beforehand.

A third funder added that withdrawal could happen in cases of legal malpractice or breach of the litigation funding agreement, emphasizing the importance of adherence to the agreed terms.

Another funder noted that the ability to withdraw funding depends on the specific agreement in place. Typically, claimants expect that funders will continue providing financial support unless exceptional circumstances arise or unforeseen developments occur. A common clause included in funding agreements allows funders to cease their obligation to pay if the claimant seriously violates their obligations under the agreement in a non-remediable manner.

Finally, one funder clarified that they could terminate the litigation funding agreement if the funded party has committed a material and irremediable breach or fails to remedy a remediable breach within a specified notice period. Furthermore, termination is also possible if it becomes likely that the proceeds from the litigation will be insufficient to reimburse the full amount of the investment. It is important to note that any termination of the agreement results in the complete loss of the funder's investment, indicating that termination is considered a last resort and is only pursued when there is no reasonable prospect of recovering the investment.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

According to the insights gathered from the funders interviewed, all participants confirmed that they have safeguards in place to prevent conflicts of interest.

Each funder emphasized their commitment to maintaining ethical standards and avoiding situations that could compromise their integrity.

One funder specified that they implement a standardized conflict-checking procedure designed to identify and mitigate potential conflicts. This procedure ensures that they do not fund cases against parties that have previously approached them regarding the same matter, nor do they fund cases against parties involved in other matters where they may have received confidential information.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

Most funders indicated that their agreements do cover the issue of liability regarding adverse costs. Specifically, a significant number opted for a model of limited liability. This means that the financial responsibility of the funders for adverse costs is capped at a certain level, which provides a degree of protection for both the funders and the plaintiffs.

Conversely, a couple of interviewees stated that their funding agreements do not include provisions for liability concerning costs in the event of an unsuccessful outcome. This highlights a divergence

in practices within the industry, suggesting that some funders may take a more cautious approach than others when it comes to assuming potential liabilities associated with adverse costs.

Additionally, one funder elaborated on their approach to limited liability by specifying that they agree on a specific amount for each instance, which is designed to cover realistic adverse costs. This structured agreement not only clarifies the extent of their liability but also serves to protect the interests of all parties involved.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

The interviews revealed varying perspectives on the inclusion of After the Event (ATE) insurance in litigation cost agreements.

One funder confirmed that their agreements typically include a requirement for ATE insurance, indicating a standard practice within their operations.

In contrast, several other funders stated that ATE insurance is not commonly included in their litigation cost agreements. They emphasized that their funding arrangements do not typically encompass such insurance provisions.

Another funder provided a nuanced view, noting that the necessity for ATE insurance depends on the specifics of each individual case. They mentioned that in some instances, they organize ATE insurance through their in-house solution, incorporating the associated premium into the overall budget. In other cases, the potential adverse costs are included in the case budget in full, suggesting a flexible approach based on the particular circumstances of the case.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

The information gathered regarding the availability of publicly accessible funding agreements reveals a mix of responses among the interviewed funders.

One funder noted that in the context of collective redress, funding agreements are public and can be accessed upon request to the court, indicating transparency in their processes.

Another funder confirmed the existence of such agreements but did not provide a copy, highlighting that while the agreements are available, access may be limited or require specific requests.

In contrast, one funder indicated that they are not authorized to share any examples of funding agreements, suggesting a lack of public access to their specific contracts.

However, another funder pointed out that the Ius Omnibus consumer association has filed copies of its funding agreements in all consumer opt-out representative actions before the Portuguese courts. These agreements can be obtained from the courts through a simple request, and the funded cases are identified on the Ius Omnibus website, reflecting a commitment to transparency in consumer-related funding.

Lastly, one funder did not provide a response regarding the availability of funding agreements.

4. Stakeholder views on TPLF in your jurisdiction

The insights gathered from the stakeholder interviews regarding the measures in the draft directive annexed to the EP resolution on litigation funding reveal a complex landscape of opinions and recommendations aimed at addressing current practices in Member States.

One of the key trends identified in the responses is a significant divergence in the perceived effectiveness of the measures. Several stakeholders expressed skepticism regarding the overall utility of these measures. For instance, one expert evaluated the majority of the proposed measures as either "not at all effective" or "rather not effective," indicating a lack of confidence in their ability to bring about meaningful change. Specifically, this expert categorized seven out of fourteen measures as ineffective and four as rather ineffective. Only the measures aimed at enhancing transparency and mitigating conflicts of interest were viewed positively, being classified as "very effective." This highlights a clear sentiment that while there is recognition of the importance of transparency, many proposed measures may fail to effectively address the concerns raised within the litigation funding framework.

In contrast, another stakeholder had a more favorable outlook, qualifying most of the measures as "rather effective" and four as "very effective." This stakeholder particularly noted the importance of certain articles in the resolution, such as those related to transparency and conflict avoidance, suggesting that these aspects could serve as crucial components for improving the overall regulatory landscape. The acknowledgment that transparency measures can positively influence the relationship between funders, legal practitioners, and clients reflects a growing consensus on the need for clarity and openness in funding agreements.

However, the interviews also highlighted specific concerns regarding certain aspects of the proposed measures. Notably, the provisions relating to fiduciary duties and the content of third-party funding agreements were marked as "not at all effective" by one expert, indicating significant skepticism about their potential impact. This critique suggests that without clear guidelines and definitions, these provisions might not achieve the intended objectives of safeguarding the interests of all parties involved in litigation funding.

Moreover, the perspectives of stakeholders were further enriched by external viewpoints, particularly from organizations like the International Legal Finance Association (ILFA). This association submitted a letter expressing its members' concerns regarding the Voss Report, suggesting that there are broader industry apprehensions about the implications of the proposed measures. The involvement of industry organizations underscores the importance of considering the practical realities of litigation funding when formulating regulatory frameworks.

In conclusion, the insights gathered from the interviews underscore a complex interplay of opinions surrounding the measures in the draft directive annexed to the EP resolution. While there is a notable emphasis on the need for increased transparency and the avoidance of conflicts of interest, the effectiveness of the measures remains contested among stakeholders. Addressing the highlighted concerns regarding fiduciary duties and the specifics of funding agreements will be critical for refining the proposed measures. Moving forward, it is essential for policymakers to engage with stakeholders to ensure that the final measures effectively balance the interests of funders, legal practitioners, and litigants while promoting a fair and transparent litigation funding landscape in the Member States.

Glossary of abbreviations and acronyms

EOA: Portuguese Bar Association

LAV: Portuguese Arbitration Law

TCRS: Competition, Regulation, and Supervision Court

TPLF: Third-Party Litigation Funding

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Ius Omnibus v. Apple App Store (Tribunal da Concorrência, Regulação e Supervisão) [*on going*]

Ius Omnibus v. Google Play Store (Tribunal da Concorrência, Regulação e Supervisão) [*on going*]

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Romania

Dr Catalin-Gabriel Stanescu, University of Southern Denmark

Executive Summary

- TPLF is legally admissible in Romania but lacks specific regulations in the Civil Procedure Code. Its permissibility relies on contractual freedom, provided it does not conflict with ethical or legal provisions.
- Law 414/2023 allows TPLF in consumer representative actions under the Sponsorship Law (Law 32/1994), but some of the doctrine believes this prohibits funders from claiming a share of the winnings.
- TPLF is rarely used and primarily in international arbitration cases. Funders typically operate from outside Romania.
- There are no available statistics on TPLF usage in Romania.
- TPLF raises concerns about lawyers' independence and the influence of funders on litigation strategies.
- Law 414/2023 and the Sponsorship Law regulate TPLF for consumer representative actions, emphasising conflict-of-interest avoidance and transparency.
- Equating TPLF with sponsorship, as per the transposition of the Representative Actions Directive, creates doctrinal tension, as some suggest sponsorship laws prohibit profit-driven activities that are central to TPLF.
- Law 414/2023 provides for mandatory disclosure of funding agreements and prohibition of detrimental funder influence on consumer interests.
- Funders must not control beneficiaries' activities. Beneficiaries must disclose funding arrangements and ensure compliance with transparency requirements.
- Courts oversee compliance under Law 414/2023, ensuring funders do not unduly influence litigation outcomes.
- Courts can determine qualified entities to reject or modify terms of funding agreements to resolve conflicts of interest.
- Under the Sponsorship law, tax incentives for sponsors may be removed if they attempt to direct beneficiaries' actions.
- Law 414/2023 does not explicitly address adverse costs. Cost-sharing provisions depend on the terms of the funding agreement.
- No specific TPLF-focused legislation is planned.
- Romanian law partially aligns with EU measures on transparency, disclosure, and review of third-party funding agreements but lacks authorisation systems, capital adequacy, and sanctions provisions.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

No. Currently, there are no official provisions within the Civil Procedure Code or other normative acts.[787] Thus, third-party funding is generally deemed permitted, either according to the principle that in civil law, everything that is not explicitly banned is allowed,[788] or under the principle of contractual freedom[789] (as long as it does not infringe good morals or mandatory provisions of Law 51/1994 on the lawyer profession,[790] the Statute of the Lawyer Profession[791] or the Lawyers' Ethics Code.[792]

However, as of 18 December 2023, Romania has transposed the provisions of Directive 2020/1828 on representative actions for the protection of the collective interests of consumers into national law via Law 414/2023 (Representative Actions Law).[793] Art 10 of Law 414/2023 provides that a representative action for obtaining reparatory measures can be financed by a third party under the provisions of Law 32/1994 on sponsorship (Sponsorship Law)[794], provided there is no conflict of interest. Under the terms of Art 1 (1) of Law no. 32/1994, sponsorship is "the legal act by which two people agree on the transfer of the right of ownership over some material goods or financial means, for the support of non-profit activities (literally non-lucrative activities) carried out by one of the parties, referred to as the beneficiary of the sponsorship." According to Art 4(1), "sponsorship applies to activities carried out in areas of public interest, such as cultural, artistic, educational, scientific, humanitarian, sports, medical, social, environmental protection, and heritage

[787] Maria Dumitru-Nica, 'Third Party Litigation Funding between Business Opportunity and Facilitating Access to Justice' [2022], European Journal of Law and Public Administration, Vol 9, Issue 1, 104, 109, <https://doi.org/10.18662/eljpa/9.1/175>, accessed 16 December 2024; Alexandru Șerpe, 'Finantarea litigiilor de catre terti-o perspectiva asupra profesiei de avocat (*Juridice,* 3 July 2023) <https://www.juridice.ro/693013/finantarea-litigiilor-de-catre-terti-o-perspectiva-asupra-profesiei-de-avocat.html> accessed 16 December 2024.

[788] Tamara Ungureanu 'Finanțarea litigiilor de comerț _internațional prin procedeul „Third party litigation funding' [2015] Revista Moldovenească de Drept Internațional și Relații Internaționale, 1, 125, 133; Cosmin Vasile and Alina Tugearu, 'Litigation 2025: Romania' (*Chambers Global Practice Guides,* 3 December 2024) <https://practiceguides.chambers.com/practice-guides/litigation-2025/romania> accessed 16 December 2024; Zamfirescu Racoti Vasile & Partners, 'Q&A: conducting litigation in Romania' (*Lexology,* 21 July 2023) <https://www.lexology.com/library/detail.aspx?g=b7d638f9-7bef-4609-a6d5-c1d1b8be48d7#:~:text=Litigation%20funding%20by%20a%20third,is%20not%20interdicted%20is%20permitted> accessed 16 December 2024.

[789] Yarina Laufer, 'Finanțarea de către terți a litigiilor. Impactul tendințelor europene asupra profesiei de avocat în România' (*Juridice,* 30 June 2023) <https://www.juridice.ro/692634/finantarea-de-catre-terti-a-litigiilor-impactul-tendintelor-europene-asupra-profesiei-de-avocat-in-romania.html> accessed 16 December 2024.

[790] Law 51/1995 for the organization and exercise of the lawyer profession, republished in the Official Gazette of Romania, Part I, no 440/24.06.2018.

[791] The Statute of the Lawyer Profession of 03.12.2011, published in the Official Gazette of Romania, Part I, no 898/01.12.2011.

[792] Annex to Decision no. 268/17.06.2017 of the Council of the National Union of Romanian Bar Associations.

[793] Law 414/2023 on representative actions for the protection of consumers' collective interests, published in the Official Gazette of Romania, Part I, no 1158/20.12.2023.

[794] Law 32/1994 on sponsorship, published in the Official Gazette of Romania, Part I, no 129/25.05.1994.

conservation." While the sponsor can be a foreign or Romanian natural or legal person, the beneficiary can only be a legal entity that carries out non-profit (non-lucrative) activities.

Because of these elements, it is considered that sponsorships directly interest non-profit organizations as potential beneficiaries. Thus, some consider sponsorship as incompatible with claiming a winning commission or a share of the beneficiary's winnings, which are essential elements of the TPLF.[795] From this perspective, the provisions of Law 414/2023 (corroborated with those of Law 32/1994) could be understood as a limitation of TPLF vis-à-vis representative actions for consumers. However, the wording of the Romanian legislator can be interpreted as an indicative rather than an exhaustive list. Consequently, in the absence of an explicit prohibition and as long as a legal action can be classified within a field of public interest (e.g., the protection of fundamental human rights, combating abuses, or promoting access to justice), there is no legal obstacle to TPLF in consumer actions.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

While not very common, TPLF is used in Romania, mainly in complex international arbitration cases. In a 2024 interview, a partner of a Romanian law firm disclosed that his law firm had three pending major arbitration cases where the clients' financing came from foreign third-party investors.[796]

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

No. From the available public information, the operating funders are from outside Romania.[797] There is no data about their number.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

N/A

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is some doctrinal discussion on TPLF in Romania, however I would not qualify it as "significant". Most of the doctrine is informative: concerning the origin, role and mechanism of TPLF.

Tamara Unguranu's article[798] explores the development of TPLF as an emerging practice, particularly in international commercial disputes, and its limited presence in Romania. It highlights that while TPLF is generally permissible under Romanian law, it is unregulated and rarely used,

[795] Laufer.
[796] Eugen Sârbu, 'Finantarea costurilor arbitrale de catre terti investitori – o inovatie in piata din Romania. Interviu cu Av. Drd. Eugen Sarbu', (*Universul Juridic,* 29 May 2024) <https://www.universuljuridic.ro/finantarea-costurilor-arbitrale-de-catre-terti-investitori-o-inovatie-in-piata-din-romania-interviu-cu-av-drd-eugen-sarbu/> accessed 16 December 2024.
[797] Ibid.
[798] Ungureanu.

primarily in high-stakes commercial arbitration. The article draws distinctions between TPLF and other funding mechanisms, such as contingency fees, discussing TPLF's unique features: financing from an independent third party, conditional recovery based on case success, and the absence of funder control over litigation. Challenges include the lack of specific regulations and potential conflicts with Romanian legal traditions, such as prohibitions on contingency fee arrangements. Despite these obstacles, the author believes that TPLF offers significant advantages, including reducing financial risks for litigants and enabling access to justice, especially in costly international disputes. The article concludes that TPLF remains in its infancy in Romania but has the potential to grow if supported by more precise legal frameworks.

The article by Maria Dumitru-Nica[799] examines TPLF as a growing mechanism balancing business opportunities and improved access to justice. The article highlights regulatory developments, including the European Parliament's 2022 resolution recommending minimum transparency, fairness, and proportionality standards in TPLF agreements. The article restates that, in Romania, TPLF remains unregulated but is legally permissible under general contractual principles. The author underscores the need for clear frameworks to balance the benefits of TPLF with safeguards to protect litigants' rights, maintain professional independence, and prevent abuses. As TPLF evolves, it is expected to remain a significant topic in legal and policy discussions.

The article by Alexandru Șerpe[800] explores the concept of TPLF as a growing yet largely unregulated phenomenon in European legal systems. Despite its potential benefits, such as enabling litigants to pursue claims they might otherwise abandon due to financial constraints, the author shows that TPLF introduces significant ethical and procedural challenges. Lawyers face new pressures from funders who may influence litigation strategies or settlements, raising concerns about the independence of legal professionals and the fairness of judicial outcomes. The article highlights the European Parliament's efforts to analyse a possible regulatory frameworks for TPLF, focusing on transparency, fairness, and safeguarding litigants' rights. While some arbitration contexts already require disclosure of funders, broader regulation is necessary to address issues like conflicts of interest and power imbalances between funders and litigants. The author underscores the potential for TPLF to evolve into a distinct legal specialisation while also cautioning against its risks, particularly when profit motives overshadow the litigants' best interests. Ultimately, the piece calls for balanced regulation to harness the benefits of TPLF without compromising the integrity of legal systems or the legal profession's independence.

The article by Yarina Laufer[801] examines the rise of TPLF in Europe and its potential impact on the legal profession in Romania. The article highlights efforts by the European Union to regulate TPLF through the 2020 Directive on Representative Actions for Consumer Protection, which introduces minimum safeguards to address potential conflicts of interest and ensure fairness. In Romania, the lack of specific legislation has left TPLF agreements to operate under the principle of contractual freedom, potentially exposing lawyers to conflicts with professional ethics and independence. The author argues for a careful regulatory approach that balances the benefits of TPLF in improving access to justice with the need to protect legal principles and professional integrity. Her worry is that as TPLF grows, Romanian lawyers may face increasing challenges while navigating the evolving landscape.

[799] Dumitru-Nica.
[800] Șerpe.
[801] Laufer.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The last three articles raise concerns about the potential for TPLF to compromise lawyers' independence. The article by Laufer[802] discusses how funders, especially in active financing models, may (seek to) exert significant control over litigation strategies, potentially undermining the client-lawyer relationship and lawyers' professional autonomy. Similarly, Dumitru-Nica[803] highlights the danger of funders influencing case-related decisions.

At the same time, the equation of TPLF with sponsorship in Romanian law, as highlighted in Laufer's article,[804] represents a specific doctrinal issue that raises essential questions about the legal characterisation and regulation of TPLF in Romania. This conceptual alignment creates challenges, both in theory and practice, as it fails to capture the distinct nature of TPLF agreements.

[802] ibid.
[803] Dumitru-Nica 106.
[804] Laufer.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

Besides the general contract law rules contained in the Civil Code, TPLF is legally admissible in Romania under Law No. 414/2023, which allows third-party funding for consumer representative actions provided no conflict of interest exists.[805] The funding must comply with the Sponsorship Law,[806] which imposes additional conditions on financing litigation.

The Sponsorship Law provides a framework under which third-party funding could align with sponsorship agreements that support activities "without a lucrative purpose"[807] and requires a written contract detailing the funding's objectives, value, and duration, as well as the rights and obligations of the parties.[808] This reinforces the admissibility of TPLF but might suggest that it must avoid profit motives (as shown above).[809] Nevertheless, the law specifies that parties retain the right to conclude conditional agreements if these do not direct or affect the beneficiary's activity.[810]

In my reading, the Sponsorship Law's provisions do not hinder TPLF in consumer-related representative actions but incentivise it. Sponsorship comes with benefits, such as tax deductions,[811] albeit with obligations, such as mandatory disclosures.[812] These legal incentives may be lost if the sponsor seeks to direct the beneficiary's activity.[813]

2.2 Regulatory oversight of funders/funding industry

While TPLF funders are not directly regulated as a distinct category, oversight is partially covered by courts, which have the competency to evaluate the observance of the law by either the representative entities or third-party funders.[814]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There are no specific capital adequacy or operational requirements tailored to TPLF funders. The Sponsorship Law's principles of non-lucrative activity may conflict with TPLF's commercial nature, creating potential ambiguity.[815]

[805] Art 10(1) of Law 414/2023.
[806] Ibid.
[807] Art 1(1) of Law 32/1994.
[808] Art 1(2) of Law 32/1994.
[809] Laufer.
[810] Art 10(2) of Law 32/1994.
[811] Art 8(1) and 9(1) of Law 32/1994. Similar disclosures are provided in Art 10(5) of Law 414/2023.
[812] Art 5(2) of Law 32/1994.
[813] Art 10(1) of Law 32/1994.
[814] 10(4) of Law 414.2023.
[815] Laufer.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

The Sponsorship Law attempts to deter sponsors from influencing the activities of beneficiaries,[816] which might limit funders' ability to control litigation strategy. However, this prohibition might not align with typical TPLF practices, where funders often have a vested interest in litigation outcomes.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Law 414/2023 mandates disclosure of funding sources and independence from undue influence to avoid conflicts of interest. The law requires that consumer interests are always considered and cannot be negatively affected by third-party funding. Specifically, the law bans any decision a) concerning settlements influenced by a funder in a manner that would be detrimental to the collective interests of consumers or b) introducing a representative action against a respondent that is a competitor of the financier or against a respondent that the financier is dependent on.[817] Courts have the authority to evaluate compliance with these requirements during representative actions .[818]

Both the Law on Representative Actions and the Sponsorship Law mandate transparency in the funding agreement.[819] The Sponsorship Law also attempts to discourage any arrangements that might indirectly influence the activity's purpose by removing the tax incentives.[820] Under Law 414/2023, if the courts find grounds to believe that there is a conflict of interest, they can order the qualified consumer entities to reject or modify the terms of the funding. They can even disqualify the qualified entity from representing consumers and dismiss the action.[821]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

According to Law 414/2023, funding by third parties that have an economic interest in the introduction or in the outcome of the representative action does not affect the protection of

[816] Art 10(1) of Law 32/1994.
[817] Art 10(3) of Law 414.2023.
[818] Art 10(4) and (6) of Law 414/2023.
[819] Art 10(5) of Law 414/2023 Art 5(2) of Law 32/1994.
[820] Art 10(2) of Law 32/1994.
[821] Art 10(6) of Law 414/2023. In the Statement of Reasons, the National Authority for Consumer Protection stated that "Qualified entities must be fully transparent to the courts regarding the source of financing their activity in general and regarding the source of funds which supports a specific action in representation to obtain remedial measures. This transparency is necessary to allow courts to assess whether funding by a third party fulfils the conditions provided for in this law if there could be a conflict of interest between the third party financier and the qualified entity that presents a risk of abuse of procedure, and if financing by a third party that has an interest economic in input or output the action in representation to obtain the remedies would remove the action from representation of the protection of collective interests of consumers." See National Authority for Consumer Protection, Statement of reasons, at: https://anpc.ro/galerie/file/proiecte_acte/2022/180422.pdf, accessed 18.12.2024.

collective consumer rights. Nonetheless, the action cannot be introduced against a respondent who is a competitor of the financier or a respondent on which the financier depends.[822]

Beneficiaries must disclose the funding arrangement to the court to assess potential conflicts of interest, ensuring transparency and fairness.[823]

2.7 Obligations of funders towards beneficiaries and vice-versa

Law 414/2023 provides that TPLF is allowed only in the absence of a conflict of interest and ensures that the qualified entity's decision vis-à-vis a representative action, including a settlement, is not influenced by a third party in a manner that would negatively impact the collective interests of consumers.[824] The wording does not seem to exclude all influence, only that which may impact the beneficiary's interests.

The Sponsorship Law also provides for a non-interference principle, seeking to ensure that funders do not control the funded activity under the threat of losing their tax incentives.[825] In my opinion, this might be one of the reasons why the Romanian legislator linked the two laws. However, the linkage creates a doctrinal tension with TPLF's typical practice of funders influencing litigation strategy, potentially limiting their contractual role in Romania (at least concerning consumer representative actions).

2.8 Distribution of awards and bearing adverse costs in lost cases

Law no. 414/2023 does not specify funders' obligations to bear adverse costs. According to the legal provisions, the qualified entities should ensure sufficient funds for the envisioned procedures and are not obliged to pay judicial fees.[826] This would leave qualified entities liable solely for other procedural costs and the opposing party's legal costs, provided their funding agreement does not state otherwise.

Outside the framework of Law no 414/2023, the financial arrangements must comply with general contractual law, which may include cost-sharing provisions depending on the parties' agreement.

2.9 Planned legislation

There is no planned TPLF-specific legislation at the moment. The current regulatory approach relies on adapting existing sponsorship and consumer protection laws, and it is safe to assume it would not have been considered but for the transposition of the Representative Actions Directive into national law.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

[822] Art 10(2) and (3)(b) of Law 414/2023.
[823] Art 10(4) and (5) of Law 414/2023.
[824] Art 10(3)(a) of Law 414/2023.
[825] Art 8, 9 and 10 (1) of Law 32/1994.
[826] Art 20 (1) and (2) of Law 414/2023.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	N/A
Capital adequacy (Art.6)	N/A
Fiduciary duty (Art.7)	N/A
Powers of supervisory authorities (Art.8)	N/A
Investigations and complaints (Art.9)	N/A
Coordination between supervisory authorities (Art.10)	N/A
Content of third-party funding agreements (Art.12)	N/A
Transparency requirements and avoidance of conflicts of interest (Art.13)	Yes
Invalid agreements and clauses (Art.14)	N/A
Termination of third-party funding agreements (Art.15)	N/A
Disclosure of the third-party funding agreement (Art.16)	Yes
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Yes
Responsibility for adverse costs (Art.18)	N/A
Sanctions (Art.19)	Partially

3. Practical operation of TPLF in your jurisdiction

N/A

4. Stakeholder views on TPLF in your jurisdiction

N/A

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Slovakia

Daniel Vencovský and Dr Liljana Cvetanoska, RPA

Executive Summary

- Slovakia lacks specific legislation on Third-Party Litigation Funding (TPLF). However, the 2023 Class Action Act includes provisions that allow third parties to cover litigation costs in collective action cases.
- TPLF is not commonly used in Slovakia, with only one known (Czech based) funder, LitFin, which primarily operates outside the country.
- There are no official statistics or specific academic studies on TPLF in Slovakia, and the subject is rarely part of any political or doctrinal debates.
- The 2023 Class Action Act sets out conditions for third parties funding class actions, including protections to avoid a negative influence by funders on the interests of consumers.
- Funders are required to disclose their funding sources and organisational structures, but there are no specific regulations on capital adequacy or economic activity related to TPLF.
- The law does not contain detailed procedural safeguards or rules regarding conflicts of interest for funders in civil litigation beyond basic transparency requirements for plaintiffs.
- Successful claimants in class actions may receive up to 20% of the recovered amount, or up to €100,000 for consumer-related cases. The court decides the exact amount based on the case particulars.
- Slovakia's legal framework lacks many of the measures found in the draft directive annexed to the European Parliament resolution on TPLF, such as authorisation systems, capital adequacy requirements, and transparency obligations.
- TPLF is rarely used in Slovakia, with an estimated 10 cases per year, primarily funded by non-Slovak entities like LitFin.
- Minimum claims are typically valued between €1-4 million, with an average claim value of around €2.5 million.
- The ratio between investment by the funder and the claim value is generally 1:5, although specific investment figures are case-dependent.
- Funders often play an active role in legal proceedings, influencing the choice of lawyer, settlement decisions, and legal strategy.
- Litigation funders have measures in place to avoid conflicts of interest, and funding agreements usually include provisions on liability for costs in the event of a loss.
- Funders work closely with plaintiffs' lawyers, regularly participating in decision-making throughout the case.

- Stakeholders were not familiar with the European Parliament resolution on TPLF but expressed concerns that excessive regulation could discourage investments and complicate litigation processes. They emphasised the importance of maintaining flexibility for funders.
- TPLF remains underdeveloped in Slovakia, with few cases and limited regulatory oversight. Any future EU-level measures should consider the significant variations in how TPLF is used across member states.
- It is important to avoid overregulating TPLF, which could deter funders and increase litigation costs. Nonetheless, basic safeguards, such as protections against coercion and transparency requirements, should be implemented to ensure a fair process for plaintiffs.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no existing law specifically dedicated to TPLF in Slovakia. However, on July 25, 2023, the Act on Actions for the Protection of the Collective Interests of Consumers (the Class Action Act) came into force.[827] It aims to ensure consumer access to justice while also providing adequate safeguards for traders against abusive litigation.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

NA

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There is one known operating funder in the country: LitFin[828], but they are based in the Czech Republic and their focus is largely on other countries, such as France, Germany etc.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

Considering that this is an underdeveloped legal area there do not seem to be any publicly available statistics on the matter.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

There is very little discussion on TPLF in Slovakia. There are a few overviews regarding the status of TPLF in the country published on the webpages of some international law firms that work in this

[827] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2023/261/20230725.html
[828] LitFin Capital (www.litfin.cz)

area, but scientifically the matter is under researched. For example, Bird and Bird[829] have provided some background information on TPLF[830] but no academic studies focused on this matter in Slovakia are available.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

Aside from a few newspaper articles[831] and reports of law firms[832] that have mainly focused on discussing the 2023 Class Action Act, there is no widespread discussion on this topic.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

The 2023 Class Action Act prescribes the conditions under which a class action is permissible and regulates who can be considered as the authorised person. According to Article 18: "The costs of proceedings for the issuance of a corrective measure may be paid by a third party. In this context, the authorised person must not be influenced by a third party in a way that would harm the collective interests of consumers affected by the given action, and the action must not be filed against a defendant who is a competitor of the third party or against a defendant on whom the third party is dependent." The Class Action Act prescribes that the authorised person must not be influenced by a third party in a way that would harm the collective interests of consumers affected by the given action, and that the action must not be filed against a defendant who is a competitor of the third party or against a defendant on whom the third party is dependent.

2.2 Regulatory oversight of funders/funding industry

The authorised person must meet the criteria listed in the Law and must provide information about its funding sources, its organisational, management and membership structure, its legal purpose and its activities on their website.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

The domestic law does not provide any specific conditions for TPLF.

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829 https://www.twobirds.com/en/trending-topics/consumer-class-actions/current-collective-action-landscape-map/slovakia

830 https://wood.cz/insight/wood-company-umozni-investovat-do-financovani-soudnich-sporu-z-portfolia-spolecno/

831 https://www.schoenherr.eu/content/greenwashing-class-action-risk-in-light-of-upcoming-slovak-laws

832 https://www.dentons.com/en/insights/articles/2023/august/9/-/media/b71b1d51eb424989bb93b20ed0691534.ashx

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

As discussed above, according to the 2023 Class Action Act, the authorised person must provide information on the measures taken by them to prevent the influence of persons who have an economic interest in filing a lawsuit, to protect the collective interests of consumers, as well as measures to prevent a conflict of interests between the applicant's interest, the interest of his financing providers and the interests of consumers. This would demonstrate the fulfilment of the condition according to the Class Action Act, including agreements on credit or similar performance that correspond economically to the credit which the applicant concluded, including all annexes and additions, and obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute. However, there are several other laws that can indirectly impact TPLF in the country.

The Collective Investment Act (Act No. 203/2011[833]) regulates investment activities, including those that may be related to TPLF. The Act sets standards to protect investors and ensure fund operations.

The Securities and Investment Services Act (Act No. 566/2001[834]) also can affect TPLF, as it regulates the marketing and selling of investment products, including high-risks ones, such as TPLF.

The Anti-Money Laundering Act (Act No. 297/2008[835]) is also relevant to TPKF as it focuses on the origin of funds and ensures that all funds, including TPLF ones do not come from illicit sources. This allows for increased transparency and prevent money laundering.

The Foreign Direct Investment Screening Act (Act No. 497/2022[836]) is indirectly linked to TPLF because it screens foreign investments, which could impact foreign-funded litigation.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

There are no specific rules included in the Class Action Act on obligations of funders towards other parties in the dispute, but there are obligations for plaintiffs to represent the interests of the groups in a class action, as described above.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

The Law on Class Actions (Act No. 26/2023 Coll.) does not specifically regulate third-party litigation funding and does not explicitly outline obligations of funders within the context of class actions. However, the general obligations related to courts, public administration, and adverse parties as prescribed in general civil procedure laws and principles, such as the Civil Procedure Code (Act No. 160/2015 Coll.) should apply.

[833] https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2011/203/20240701
[834] https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2001/566/20240601
[835] https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2008/297/20240320
[836] https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2022/497/20230329

2.7 Obligations of funders towards beneficiaries and vice-versa

This is not regulated.

2.8 Distribution of awards and bearing adverse costs in lost cases

If the authorised person is successful in proceedings for a corrective measure with a determinable value, they receive a reward proportional to their success, up to 20% of the recovered amount, which the entitled person satisfies from the corrective measure's value, with the court specifying the percentage. If the value cannot be determined, the authorised person is entitled to a reward of up to 100,000 euros. For successful proceedings on abstract control in consumer matters, the reward is up to 10,000 euros. The court determines the reward for these cases based on circumstances and complexity, considering the damage to consumers, trader's benefit, plaintiff's actions, proceeding length, and number of affected consumers. If multiple entitled persons are involved, the court apportions the reward based on individual contributions, ensuring the total does not exceed the amount for a single proceeding. Legal representation costs for the entitled person are recognized by the court only if there are special considerations.

2.9 Planned legislation

No information on additional legislation affecting TPLF directly is available.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Please note that even though there is regulation on some of the issues below for class actions, there is no regulation for individual cases, hence the answers below.

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not in place
Capital adequacy (Art.6)	Not in place
Fiduciary duty (Art.7)	Not in place
Powers of supervisory authorities (Art.8)	Not in place
Investigations and complaints (Art.9)	Not in place
Coordination between supervisory authorities (Art.10)	Not in place
Content of third-party funding agreements (Art.12)	Not in place
Transparency requirements and avoidance of conflicts of interest (Art.13)	Not in place

Invalid agreements and clauses (Art.14)	Not in place
Termination of third-party funding agreements (Art.15)	Not in place
Disclosure of the third-party funding agreement (Art.16)	Not in place
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Not in place
Responsibility for adverse costs (Art.18)	Not in place
Sanctions (Art.19)	Not in place

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

According to the interviewees, there are very few cases in the country. Interviewees pointed to only one funder who is located outside of Slovakia, in the Czech Republic, but they usually fund cases in different jurisdictions. An interviewee provided an estimate of 10 cases funded by TPLF in Slovakia per year.

b. Minimum claim value in absolute terms (in million Euro)

There is no specific regulation on the minimum claim value. For LitFin, who also operate in Slovakia even though they are based outside of it, the minimum claim is 4 million euros for individual cases, according to their website. However, they assess cases on individual basis and the claim may vary[837]. In addition, an interviewee commented that most cases in Slovakia have a minimum clam between 1-2 million Euros.

c. Typical claim value in absolute terms (in million Euro)

According to an interviewee, this value was approximately a couple of millions, but for individual cases they estimated 2.5million Euros or more on average. Depending on the cases, this could be less, but not less than 100 000 Euros.,

d. Typical ratio between investment by the funder and claim value

According to an interviewee, the typical ratio is 1:5, but no other information on Slovakia specifically was available. They broke down the costs as follows: 5% court costs, and 5-15%, legal costs, suggesting that the ratio depends on the costs involved.

[837] https://litfin.capital/single-case-funding/

e. Typical size of the investment by the litigation funder (in million Euro)

An estimated number was not provided since, according to interviewees, this depended on several factors, including expert costs and length of the case.

f. Origin of funding provided by the litigation funder

Slovakian companies and Austrian businesses were given as general examples of funders. According to an interviewee, funders have networks of investors and private equity investors are invited to invest into TPLF.

g. Share of compensation awarded typically demanded by litigation funders

The average according to interviewees is 50%, but it can vary. This depends on the liability for outer-party costs for representation, because if the claim is lost the counter party's lawyer costs need to be paid. If the litigation funder is to assume this liability too, then the injured party does not have any liability at all, and then the litigation funders are asking for the majority of the stakes, i.e. 50% or more.

h. Other conditions of the litigation funding agreement

Contractual penalties may apply if the settlement is made outside of court negotiations, without an approval from the litigator funder, and there are penalties for withdrawal from a case which are set out in the agreements.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

This is assessed on an individual basis and depends on the credit of the defendant, the scalability – as in, the chance tha other injured parties that may join and the benefits from expanding the claim. Also, according to an interviewee, at least 2 legal opinions from law firms are gathered before making decisions to fund a case.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

No information on MoC was provided. Regarding IRR, what is considered is: how quickly the investment will be repaid (calculated in percentages or years) to assess the effectiveness of an investment, but it is at least 12%, and usually over 15%.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

According to an interviewee, they had won a shareholder dispute, the gain was triple in value as it was traded on the stock exchange for the price of the share in that particular case. The beneficiary for the funder was a small investment boutique, and the beneficiaries received more than 10 million of Slovak crowns (this case was before 2009 and the Euro was still not used as a currency in the country).

L. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

There is no requirement to do so as per Slovak legislation. However, a reason has to be given in the request to become adjuncts party to a process, so a disclosure can be made at that point.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Yes] If yes, please indicate what type of control:

X Choice of lawyer

X Consent for settlement

X Consent for appeal

X Consent for expert evidence

X Agreement on strategy

X Other: other parties joining to become a claimant, strict control of public media disclosure, control power regarding which witnesses will be called, and what proof and evidence should be used.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

According to an interviewee, regular meetings are held, they are involved in court actions and out of court settlements, i.e. a funder is present and is one of the decision makers.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes, and this depends on the contract, and is related to the recovery of payments made by the funder.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Yes, there is general legal obligation against conflict of interests as they would be liable for damage that was caused to the claimant/ defendant but there is also contractual declaration and they should preserve conflict of interest and disclose to claimants if anything changes.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

X Limited liability- In Slovakia it is limited regarding legal fees for the counter party, as these is a decree on how to calculate legal fees for judgements for the losing party who is responsible for the legal representation tariff. Primarily, the claimant themselves are liable. There is a recourse that can be applied but the defendant will go after the assets of the claimants.

- Conditional liability
- No liability

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No information was provided.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Not publicly available.

4. Stakeholder views on TPLF in your jurisdiction

None of the stakeholders were closely familiar with the EP resolution and were unable to comment on it.

Table of legislation

Civil Procedure Code (Act No. 160/2015 Coll.) (Slovakia) https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/160/ accessed 1 October 2024.

Slov-Lex Act No. 261/2023 Coll. on Legal Regulations in Slovakia [2023] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2023/261/20230725.html accessed 1 October 2024.

Slovak Republic, Act No. 203/2011 Coll. on Collective Investment https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2011/203/20230801 accessed 23 September 2024.

Slovak Republic, Act No. 297/2008 Coll. on Protection Against the Legalisation of Proceeds from Crime and on Protection Against Terrorist Financing (Anti-Money Laundering Act) https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/297/20240101 accessed 23 September 2024.

Slovak Republic, Act No. 566/2001 Coll. on Securities and Investment Services https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/566/20240101 accessed 23 September 2024.

Slovak Republic, Act No. 497/2022 Coll. on the Screening of Foreign Direct Investments https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/497/20230301 accessed 23 September 2024.

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Slovenia

Matija Curic, RPA

Executive Summary

- Slovenia regulated TPLF primarily through the Collective Actions Act (2017), amended in December 2023 to align with the Directive on representative actions (EU) 2020/1828 (RAD).
- TPLF in Slovenia is not limited to consumer rights; it includes claims involving competition law, financial markets, labour disputes, environmental damage, and anti-discrimination. However, all current TPLF cases have been financed by attorneys, and no independent TPLF funders are operating in Slovenia.
- There is limited doctrinal debate on TPLF due to its minimal practical application, with most discussions focused on attorney contingency fees and recent amendments addressing funder transparency, potential conflicts of interest, and partial exemptions for trade secret disclosures.
- There is no specific regulatory body overseeing TPLF in Slovenia. The court is responsible for assessing funding agreements and ensuring they are reasonable and do not compromise plaintiffs' independence.
- The Slovenian Attorneys Act addresses conflicts of interest, with safeguards requiring attorneys to prioritize their clients' interests and prohibiting conflicting business activities. Procedural Safeguards: Article 59 of the Collective Actions Act mandates transparency in funding agreements and prohibits funders from influencing plaintiffs' procedural decisions. Funders must have sufficient capital and cannot fund actions against competitors.
- Courts assess funding agreements for fairness and may require plaintiffs to provide security for adverse costs, protecting defendants from speculative litigation.
- Stakeholders see the European Parliament's Resolution as a positive step but recognize the need for stronger regulation of funders, particularly regarding conflicts of interest and financial oversight.
- The report suggests establishing regulatory oversight, addressing conflicts of interest (particularly involving attorneys as funders), imposing capital adequacy requirements, and standardizing transparency rules across the EU.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Slovenia was the first EU member state which regulated TPLF by adopting special legislation in collective proceedings. TPLF in Slovenia is regulated through the Collective Actions Act[838], originally enacted in September 2017[839] and amended in December 2023[840]. The latest amendments to the Collective Actions Act have completed the transposition of the Directive on representative actions (EU) 2020/1828 (RAD)[841].

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPLF regulation in Slovenia is not only limited to protection of collective interests of consumers. Collective actions according to the Collective Actions Act can be filed[842] for

- consumers' claims against companies for violations of consumer rights;
- claims arising from violations of provisions on the prohibition of restrictive practices referred to in the Prevention of Restriction of Competition Act[843]
- claims related to violations of the rules on trading in a regulated market and to the prohibited behaviour of market abuse under the Act governing the market in financial instruments
- workers' claims enforced by independent actions in individual labour disputes, as defined by the Act governing procedures before labour courts;
- claims related to liability for damage due to causing an environmental accident
- collective injunctions under anti-discrimination law.

Since the enactment of the Collective Actions act in 2017 there has been 21 cases (2019 1, 2021 1, 2022 15, 2023 4)[844] that are considered to be TPLF cases according to Slovenian legislation on TPLF. 15 cases initiated in 2022 cover the same type of infringement of consumer rights by 13 different banks, and 4 cases in 2023 cover the same type of infringement by 4 telecom operators.

However, what must be stressed here is that all the cases which, according to the Slovenian legislation, are considered as TPLF cases have been financed by claimants' attorneys i.e. law firms.

Considering that for the purpose of this study "the term '*Third Party Litigation Funder' indicates any entity that is not a party to a dispute, or which is a lawyer or insurer of such a party, which bears the*

[838] Collective Actions Act (Zakon o kolektivnih tožbah (ZKolT-A), Uradni list RS, št. 55/17 in 133/23)
[839] Collective Actions Act (Zakon o kolektivnih tožbah (ZKolT-A), Uradni list RS, št. 55/17)
[840] Act amending the Collective Actions Act (Zakon o spremembah in dopolnitvah Zakona o kolektivnih tožbah (ZKolT-A), Uradni list RS, št. 133/23)
[841] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC
[842] Article 2 (1, 2) of the Collective Actions Act
[843] Official Gazette of the Republic of Slovenia [Uradni list RS], No 130/22
[844] Slovenian Register of collective actions, kolektivne tožbe - sodni postopki (sodisce.si)

costs of the dispute in exchange for a share of the financial recovery, only if the case is won", it can be pointed out that there have never been and there are currently no third-party litigation funders operating in Slovenia.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are currently no operating TPLF funders and there have never been any TPLF funders operating in Slovenia except law firms which are not considered TPLF funders in the context of this study, although they are considered TPLF funders according to the Slovenian legislation on TPLF.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no reliable statistics available (no existing TPLF cases other than those funded by lawyers representing a group of claimants in a collective legal action).

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Some doctrinal discussions on TPLF in Slovenia are presented in a scholarly article from April 2024 titled 'Novelties of the financing of a collective action by a third party according to the amendment to the Collective Actions Act'[845], covering the following themes:

- A new definition of third-party litigation funding (TPLF)
- Risks of the new exception to TPLF disclosure requirements
- Equalisation of conditions and safeguards for all funders
- Elimination of the controversial "*sui generis*" attorney financing model
- Reasonableness of special fee agreements for lawyers
- Protection of lawyer's fees
- Clearer safeguards against abusive litigation
- Clarification of court jurisdiction in approving collective actions
- Conditional protection of funders' premiums
- Calculation of funders' premiums in opt-out systems
- Regulatory challenges and future legal considerations (*de lege ferenda*)

[845] Vlahek Ana, Djinović Marko, Novosti financiranja kolektivne tožbe s strani tretje osebe po noveli ZKolT-A, Pravna praksa, št. 16, 2024, str. 20. (A Vlahek, M Djinovic, Novelties of the financing of a collective action by a third party according to the amendment to the Collective Actions Act, Pravna praksa, 18 April 2024)

Additionally, while not based on a particular scholarly article or other publicised source, doctrinal discussions have allegedly[846] been focusing on the contingency fee arrangements for lawyers in collective actions and not on regular TPLF mostly because there is no TPLF practice in Slovenia.

The existing discussion is a more of a theoretical one and focuses on the provisions of Article 59 of the Slovenian Collective Actions Act, which is the core article regulating TPLF in Slovenia for collective actions. The discussion focuses mainly on the requirements for the funders, including the question of whether the funding agreement in addition to the source of funds should be disclosed to the court or not.

Also, there was no definition of TPLF in the Slovenian Collective Actions Act before 2023 (the latest amendments to the Collective Actions Act) which led to some doctrinal discussions on this. This resulted in the adoption of the definition of TPLF now provided for in Article 3 (18)[847] of the Collective Actions Act.

Another point of doctrinal discussion concerned the exemption of the requirement to disclose the funding agreement to the court, allowing for some of the provisions of the funding agreement, e.g. trade secrets, to be concealed upon obtaining the court's approval. The 2023 amendments to the Collective Actions Act contain provision allowing the court to conceal the part of the funding agreement that contains trade secrets, if this is not relevant to the assessment of the remaining conditions included in the Article 59 of the Collective Actions Act.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

See previous point.

There has not been any significant political debate on TPLF[848] mostly due to the lack of existing practical operations of TPLF funders, and because the attorneys showed no interest in the debate outside the subject of contingency fee arrangements. As for the potential plaintiffs, Consumer Association of Slovenia was leaning towards public funding arguing that public funding would be more appropriate than commercial TPLF. However, consumer associations have started activating contingency fee arrangements with attorneys to fund their legal actions.

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

[846] Source for the observations on the doctrinal discussions on TPLF in Slovenia is interview with Ana Vlahek, Associate Professor of Civil and Commercial Law & Associate Professor of European Law at University of Ljubljana, Faculty of Law. The interview was held on 11th April 2024.

[847] Article 3(18): third-party funding of collective actions shall mean that a third party provides funding to the plaintiff for part or all of the costs of proceedings in exchange for an agreed premium in the event the claim is successful, which is usually determined as a share of the amount awarded by the court or a share of the amount agreed in the settlement reached in the proceedings.

[848] Source for the observations on the political discussions on TPLF in Slovenia is interview with Ana Vlahek, Associate Professor of Civil and Commercial Law & Associate Professor of European Law at University of Ljubljana, Faculty of Law. The interview was held on 11th April 2024.

Legal admissibility and conditions of using TPLF in civil litigation had already been regulated in Slovenia to some degree since 2017 (the original Collective Actions Act), before the RAD came into effect and were drafted on the bases of the Commission's Recommendation on collective redress from 2013. With 2023 amendments to the Collective Actions Act requirements on legal admissibility and conditions of using TPLF are fully in line with the requirements of the RAD.

2.2 Regulatory oversight of funders/funding industry

There is no regulatory oversight in place i.e. there is no agency or other type of institution in place who would verify and confirm suitability of a specific or potential TPL funder. According to the Collective Actions Act[849] it is the court who assesses the agreement and the funding arrangement and the reasonableness of the fee. It is an *ad hoc* type of assessment in each specific case.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There are no specific requirements in the legislation in terms of conditions for carrying out economic activity of TPLF specifically.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Procedural autonomy of parties in civil procedures is regulated in the Slovenian Civil Procedure Act[850], preventing potential abusive interference of third-party litigation funders and guaranteeing free disposition of the claims in civil proceedings. According to Article 3 of the Civil Procedure Act, litigation parties may freely dispose of the claims put forward by them in proceedings; they may waive their claims, admit the opposing party's claims and conclude a settlement, and the court shall not admit dispositions by parties which are contrary to ius cogens and those which are contrary to the rules of morality.

Considering that in Slovenia it is the attorneys i.e. law firms that practically (and, so far, exclusively) operate as third-party litigation funders, provisions of the Slovenian Attorneys Act[851] on conflict of interest and abusive practices are additionally relevant in the context of non TPLF legal framework.

The Slovenian Attorneys Act contains several provisions addressing conflict of interest and abusive practices, particularly within the context of an attorney's professional duties.

Conflict of Interest:

Article 5: Attorneys are explicitly required to refuse representation if they have previously represented the opposing party in the same case. This includes situations where an attorney from the same law office has represented the opposing party or where the attorney has worked as a

[849] Article 28, 59 of the Collective Actions Act

[850] The Civil Procedure Act – Zakon o pravdnem postopku (ZPP) (Official Gazette of the Republic of Slovenia (Uradni list RS), No. 26/99 of 15 April 1999)

[851] The Attorneys Act - Zakon o odvetništvu (Official Gazette of the Republic of Slovenia (Uradni list RS), št. 18/93 z dne 9. 4. 1993

judge, prosecutor, or official involved in the same case. This provision aims to prevent conflicts of interest, ensuring impartiality and integrity in legal representation.

Article 11: Attorneys must act in the best interest of their clients, ensuring they represent them conscientiously, fairly, and diligently. They are also required to follow the principles of legal ethics, which inherently includes avoiding conflicts of interest.

Article 12: While attorneys may cancel their mandate at any time, they must continue representing the client for up to a month if necessary to prevent harm to the client. This article protects clients from any potential harm that could arise from abrupt withdrawals and addresses situations where conflicts may emerge after representation has begun.

Abusive Practices:

Article 21: This article lists activities that are incompatible with the legal profession, including engaging in other business activities that damage the profession's reputation and independence. It specifically forbids any activity that might compromise the attorney's integrity, thus preventing abuse of the profession for personal or financial gain.

Article 59: Attorneys are held accountable for violations of their duties. The act mandates that they must exercise their profession conscientiously and are liable for any misconduct. It also extends this responsibility to candidate attorneys and trainee attorneys.

Article 61: Disciplinary measures for attorneys, including fines, warnings, and the suspension of the right to practice, are detailed here. Severe breaches of professional duties, particularly those that undermine trust in the profession, can result in these sanctions, thus discouraging any abusive practices.

These articles collectively ensure that Slovenian attorneys maintain high ethical standards, avoid conflicts of interest, and refrain from abusive practices. The act establishes a clear framework for disciplining misconduct, reinforcing the integrity of the legal profession.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Procedural safeguards are contained in the Collective Actions Act: primarily in Article 59 (Third-party funding of collective actions) with some additional provisions in Articles 3 (18) (TPLF Definition), Article 58 (Value of a matter in dispute).

Core TPLF requirements contained in Article 59 are:

Obligation for the plaintiff to publicly disclose and notify to the court the source of funding it will use to finance the court proceedings;

Rules on avoidance of conflict of interest between the third party, the plaintiff and its team;

Prohibition for the third party to fund a collective action against a defendant that is its competitor, and requirements by which it is controlled;

- Adequacy of funds of the TPL funder who must have sufficient funds to fulfil the financial obligations towards the plaintiff that initiated the proceedings for the collective action and adequacy of security to pay the costs of the opposing party in the event that the collective action does not succeed;
- Rules on the reasonableness of the agreed premium;

- Rules that the third party that funds a collective action must not decisively influence the plaintiff's procedural decisions, including the decisions on settlement, if these decisions are not to the benefit of the collective interests of the group members to which the collective action applies;
- Rules on the premium for funding a collective action, which is defined as a share of the amount to be awarded by the court or a share of the amount agreed on in the settlement reached in the proceedings, and if the opt-out system was applied, the share of the awarded amount to be calculated from the amount to be paid to the group members that have actually enforced the payment, which may not be lower than 30% of the amount to which the third party would have been entitled if the full compensation[852] was paid to the injured parties.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Based on the Slovenian Collective Actions Act, the obligations of funders and beneficiaries in the context of TPLF toward courts, public administration, and adverse parties of a dispute are outlined in various provisions as it follows.

1. Funders' Obligations:

Article 3/1(18) defines third-party litigation funding (TPLF) as an arrangement where a third party finances part or all of the legal costs in exchange for a share of any successful outcome (usually part of the court award or settlement). Funders are required to ensure that their financial involvement is transparent and disclosed to the court to avoid conflicts of interest and ensure fairness.

Article 5: This article requires the court to assess the representativeness of the plaintiff (qualified entity). This includes ensuring that the plaintiff is independent and not unduly influenced by external parties with economic interests, such as funders. Funders must therefore avoid exerting improper control over the proceedings or influencing the plaintiff in ways that could harm the interests of the group members.

Article 59: This article mandates transparency in funding arrangements, including the disclosure of the third-party funding agreements to the court. This allows the court to assess the fairness of the terms, including the premium (the portion of the award the funder will receive). It also obliges funders to cover adverse costs in case of an unsuccessful claim, as the court may require the plaintiff to post security for costs, which the funder typically provides.

2. Beneficiaries' Obligations:

Article 61: It must be ensured that agreements made between the beneficiaries of third-party funding and their attorneys are reasonable and transparent. The court is tasked with ensuring that these agreements, especially regarding contingent fees or the division of any awarded compensation, are appropriate and fair.

Chapter V (Articles 57-63), particularly Articles 59 and 61, emphasises that the agreements between beneficiaries (plaintiffs) and third-party funders must not compromise the integrity of the collective action process. The plaintiff must ensure that their primary duty remains to protect the interests of

[852] Referred to in Article 40 of the Collective Actions Act (Compensation assessment when individual assessment is not possible)

the group members and not the funder. The court monitors this to prevent any abuse of the litigation process by parties for economic interests.

3. Obligations Towards Adverse Parties:

Article 28: When approving a collective redress action, the court considers the overall fairness of the case, including how funding arrangements impact the plaintiff's independence and the equitable treatment of the adverse party. Adverse parties are protected from speculative litigation by the requirement that funders and plaintiffs disclose their financial backing, and by the court's ability to require security for costs from the plaintiff (backed by the funder).

Article 29: Courts can require plaintiffs (and by extension, their funders) to provide security for costs, in order to cover the adverse party's expenses if the claim is unsuccessful. This protects the defendant from excessive costs arising from unsuccessful litigation supported by external funding.

In summary, under the Slovenian Collective Actions Act, funders and beneficiaries must act transparently, especially regarding financial arrangements with the court, public administration, and adverse parties. Funders must avoid exerting undue influence on plaintiffs, and they bear potential responsibility for adverse costs. Beneficiaries, particularly qualified entities, must maintain their independence and ensure their primary duty remains to the group members, not to the third-party funder.

2.7 Obligations of funders towards beneficiaries and vice-versa

The Slovenian Collective Actions Act outlines the obligations of funders towards beneficiaries and vice versa within the context of TPLF. In short, the funders are obligated to disclose their involvement, act transparently, and avoid influencing the litigation unduly. Beneficiaries must ensure transparency in agreements with funders and maintain their independence. The court monitors both parties to ensure the arrangement is fair and in the best interest of the group members.

1. Funders' Obligations Towards Beneficiaries

Article 3/1(18) defines third-party litigation funding (TPLF) as an arrangement where a third-party finances part or all of the costs in exchange for a share of the compensation awarded or a settlement. Funders have an obligation to ensure transparency in the financial arrangement and to disclose their involvement to the court.

Article 5 obligates the funder to respect the representativeness and independence of the plaintiff (qualified entity). Funders must not exert undue influence over the plaintiff or their legal strategy, as the court ensures that the plaintiff remains independent and acts in the best interests of the group members.

Article 59 requires transparency in the funding agreements. Funders must ensure that the financial terms, including premiums and potential coverage of adverse costs, are reasonable and clearly articulated. This is important for when the court assesses the funding arrangements to ensure they are not detrimental to the beneficiaries' interests.

2. Beneficiaries' Obligations Towards Funders

Article 61 addresses the responsibility of beneficiaries (qualified entities) to ensure that any agreements with attorneys, including third-party funders, are reasonable.

Article 4 stipulates that the plaintiff (qualified entity) is obligated to disclose its funding sources, including third-party funders, to maintain transparency. This ensures that beneficiaries do not engage in hidden or undisclosed funding arrangements that could compromise the litigation's fairness.

Article 28(5) requires the plaintiff to negotiate agreements that are fair and ensure that the cost-sharing with third-party funders does not unduly burden the group members. Beneficiaries must be diligent in ensuring that funders' financial expectations (such as the share of compensation) are reasonable and approved by the court.

2.8 Distribution of awards and bearing adverse costs in lost cases

In Slovenian practice**,** attorneys participate in collective action proceedings in two distinct ways:

1. Attorneys/law firms represent claimants based on classic contingency fee agreements, with premiums limited to 15%.

2. Predominantly, attorneys/law firms assume the role of third-party litigation funders *stricto sensu*. This entails:

- Covering all costs of the proceedings upfront, including court fees, expert fees, evidence-taking costs, legal representation expenses, etc.
- Bearing the responsibility for any adverse costs should the claimant be unsuccessful.
- Receiving a percentage of the proceeds of the proceedings (award or settlement) in successful cases.

In terms of the regulatory framework, the Slovenian Collective Actions Act establishes a framework that allows TPLF, with courts ensuring that such funding arrangements are reasonable, transparent, and do not undermine the independence of the plaintiff. If the case is lost, adverse costs may be borne by the third-party funder, depending on the arrangement, and the court may require the plaintiff to provide security to cover potential costs for the defendant.

– Distribution of Awards:

Article 3/1(18) defines third-party funding for collective actions. It notes that a third party may fund part or all of the costs in exchange for a premium if the action is successful, which is typically a share of the award. This structure allows external entities to financially support litigation in return for a portion of the awarded compensation.

Article 5 highlights the court's responsibility to assess the representativeness of the plaintiff (as a qualified entity) and ensure that it is not influenced by third parties with economic interests, thus preventing misuse of litigation for financial gain rather than for the genuine interests of the injured parties.

Article 22 mentions the distribution of compensation (aggregate or individual) and the role of evidence in proving entitlement to payment. TPLF can affect how compensation is divided, as third-party funders usually claim a share before the remainder is distributed to the group members.

Chapter V (Articles 57-63) provides additional rules regarding costs and funding in collective actions:

Article 59 outlines the conditions for third-party litigation funding, which must be disclosed. The court ensures that the funder's involvement is appropriate, and that the plaintiff's representativeness and independence are not compromised.

Article 61 further ensures that agreements with attorneys, especially regarding contingency fees or third-party funding, are reasonable and transparent, which aligns with the court's powers to review cost agreements in funded cases.

- Bearing Adverse Costs in Lost Cases:

Article 59 (in conjunction with Article 61) requires transparency in third-party funding arrangements. Importantly, if the claim fails, the costs may need to be borne by the third-party funder as part of the funding agreement.

The court may request the plaintiff to pay a security for costs (Article 29/3), which would protect the defendant from financial harm in the case of an unsuccessful claim. This provision also serves as a safeguard against speculative litigation financed by third parties.

Article 28(5) empowers the court to assess the reasonableness of the cost and funding arrangements. This includes assessing the premium which the funder would receive if the claim succeeds and ensuring that the arrangement does not unduly burden the group or promote abusive litigation practices.

2.9 Planned legislation

N/A

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not regulated
Capital adequacy (Art.6)	Not regulated
Fiduciary duty (Art.7)	Not regulated
Powers of supervisory authorities (Art.8)	Not regulated
Investigations and complaints (Art.9)	Not regulated
Coordination between supervisory authorities (Art.10)	Not regulated
Content of third-party funding agreements (Art.12)	Not regulated
Transparency requirements and avoidance of conflicts of interest (Art.13)	Partially regulated (Article 59 of the Collective Actions Act regulates disclosure of funding agreements and avoidance of conflicts of interest)
Invalid agreements and clauses (Art.14)	Article 14/1 not regulated Article 14/2 partially regulated

	Article 14/3 not regulated Article 14/4 partially regulated (no specified cap, only reasonableness criterion) Article 14/5 not regulated Article 14/6 not regulated Article 14/7 not regulated
Termination of third-party funding agreements (Art.15)	Not regulated
Disclosure of the third-party funding agreement (Art.16)	Yes, partially regulated Article 16/2 not compatible because court always have to make the assessment *ex offo* and not based on the request of a party to the proceedings. Thus Slovenian regime is even stricter than the proposed measure.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Partially regulated, see above point
Responsibility for adverse costs (Art.18)	Not regulated
Sanctions (Art.19)	Not regulated

3. Practical operation of TPLF in your jurisdiction

N/A (There are currently no operating TPLF funders and there have never been any TPLF funders operating in Slovenia, except attorneys/law firms which are not considered TPLF funders in the context of this study)

4. Stakeholder views on TPLF in your jurisdiction

- *Existing TPLF Regulation in Slovenia:*

Slovenia already regulates TPLF under its Collective Actions Act, primarily inspired by the European Commission's 2013 recommendations. However, this regulation only applied to collective actions and not general civil litigation, which created some limitations in its practical application.

Amendments made in 2024 aimed at improving the Slovenian TPLF framework. These included defining third-party litigation funding, addressing some imperfections from previous regulations, and allowing greater clarity around the funding agreements used in collective actions.

- *Provisions Addressed in the European Parliament Resolution:*

The EP's recommendations for a draft directive on TPLF calls for a more comprehensive regulation, particularly regarding transparency and oversight, which Slovenia does not currently have in its

entirety. The Slovenian system lacks regulatory oversight of funders and an adequate institutional framework, with the court being the primary body responsible for assessing the reasonableness of funding agreements on a case-by-case basis. This approach could be burdensome if the EU directive requires setting up a more formalized oversight regime and additional institutional capacity.

The stakeholders note that Slovenia would need to introduce new mechanisms, such as an agency or institution responsible for overseeing TPLF practices, to comply with the directive. This would include checking the capital adequacy of funders and ensuring that they operate within regulated frameworks, which do not currently exist in Slovenia.

- *Key Areas of Concern in the Slovenian Context:*

In Slovenia, lawyers often act as third-party funders, which is atypical compared to other EU jurisdictions. While the European Commission's definition of TPLF typically excludes lawyers and insurers, the Slovenian system allows for lawyers to finance cases, making them effectively third-party funders in collective actions.

Contingency fees and attorneys acting as funders are already accepted practices in Slovenia. Stakeholders point out that there was no substantial debate over whether contingency fees should be allowed, as Slovenia has always permitted them.

One interviewee's primary concern is the potential conflict of interest when lawyers act as funders. He points out that lawyers acting as investors may prioritize their financial interests over the clients' best interests. This could lead to decisions like settling a case early to secure a return on investment rather than pursuing the most favourable outcome for the plaintiffs. He also highlights that Slovenian lawyers act as both investors and insurers, which is not their core business. This situation raises concerns that lawyers might pressure clients into decisions that benefit the lawyers' financial interests rather than the collective interests of the plaintiffs.

The 2024 amendments to the Collective Actions Act in Slovenia introduced transparency measures, requiring funding agreements to be disclosed to the court and ensuring that they are fair and reasonable.

- *Implementation of the EP's recommendations for a draft directive on TPLF:*

The stakeholders highlight that the implementation of the EP's recommendations for a draft directive on TPLF would require significant changes in Slovenia's TPLF framework. Many of the measures, such as the regulation of third-party funding agreements, oversight, and prevention of conflicts of interest, align with Slovenia's existing provisions but would need further strengthening.

Challenges include the need for a more robust regulatory framework to oversee funders beyond just judicial review, which would involve creating an institutional structure to manage these responsibilities. Slovenia would likely need to adapt its systems to ensure compliance with the directive's requirements, such as preventing funders from influencing legal decisions unless it benefits the collective.

- *The Way Forward:*

One stakeholder suggests that the position on lawyers acting as third-party funders should be reconsidered. He argues that if the EU does not explicitly exclude lawyers from TPLF, other jurisdictions could experience similar issues, particularly in countries without strong attorney ethics rules. In jurisdictions like Slovenia, where such rules are lacking, this creates a potential loophole.

Stakeholders suggest that while Slovenia's system has some good practices, there are still inefficiencies. The amendments made in 2024 were steps in the right direction, but further reforms would be necessary to fully align with the EP's recommendations for regulating TPLF.

Greater transparency and regulation of funding agreements, particularly regarding conflicts of interest and funders' financial involvement, are crucial to improving the TPLF system in Slovenia and other Member States.

In summary, stakeholders view the EP's recommendations for regulating TPLF as an opportunity to enhance TPLF practices, though it would require significant changes to Slovenia's current framework, including better regulatory oversight and institutional support for managing funders.

Table of legislation

Collective Actions Act (Zakon o kolektivnih tožbah), Official Gazette of the Republic of Slovenia, No. 55/2017, amended in December 2023.

Directive on representative actions (EU) 2020/1828, [2020] OJ L 409.

Prevention of Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence), Official Gazette of the Republic of Slovenia, No. 36/2008.

Act governing the market in financial instruments (Zakon o trgu finančnih instrumentov), Official Gazette of the Republic of Slovenia, No. 108/2010.

Act governing procedures before labour courts (Zakon o delovnih in socialnih sodiščih), Official Gazette of the Republic of Slovenia, No. 2/2004.

Slovenian Civil Procedure Act (Zakon o pravdnem postopku), Official Gazette of the Republic of Slovenia, No. 73/2007.

Slovenian Attorneys Act (Zakon o odvetništvu), Official Gazette of the Republic of Slovenia, No. 94/2007.

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Spain

Prof Fernando Gascón Inchausti and Prof Guillermo Schumann, Complutense University of Madrid

Executive Summary

- There is no specific law or regulation governing third-party litigation funding in Spain. The litigation funding agreement is regarded as an atypical contract which must be considered valid and is sometimes assimilated to the so-called 'contract for joint accounts' (*contrato de cuentas en participación,*) or the so-called 'parciary loans' (*préstamos parciarios*).
- Currently, the only legal proposal that incorporates some regulation on TPLF is the Draft Law to implement Directive (EU) 2020/1828 on representative actions. The Draft Law does not contain an exhaustive or complete regulation of TPLF, and is limited to the specific scope of collective actions in consumer matters, envisaging a minimum regulation and several safeguards to avoid abuse of proceedings. Certain proposals of the Draft Law correspond to the content of some articles of the recommendations for a draft model directive contained in the 2022 European Parliament's resolution.

  [Update, December 2024] As of December 2024 the Draft Law to implement the 2020 Directive has been excluded from parliamentary discussion for political reasons. The Draft Law was a part of a wider package on procedural reforms: in order to find the necessary support to other reforms – linked to EU Next Generation funds that would otherwise get lost – the political parties sustaining the government demanded to exclude the sections regarding collective actions from the scope of the legislation to be approved. As a result, at the moment, the RAD has not been transposed into Spanish law and there is no Draft law currently being discussed in the Parliament. Some consumer associations have reported the situation to the EU Commission, in order to trigger a sanctioning procedure against Spain that would add pressure.
- There is a significant academic discussion on TPLF in Spain. A large part of the papers that have been published in Spain focus on the analysis of the European Parliament Resolution of 13 September 2022. It can therefore be said that the European Parliament Resolution is known and has generated academic discussion in Spain.
- There is a consolidated and growing market for the funding of litigation and arbitration proceedings in Spain. National and international funds of different sizes are already operating in Spain. The first funded cases before courts are still ongoing, and no final decisions have been reached so far.
- There are no statistics or public data measuring the presence of TPLF in the Spanish legal order. So far, third-party litigation funding remains undocumented.
- With regards to the funding of court litigation, it has been common practise to finance legal proceedings related to IP rights as well as creditors' claims in insolvency proceedings.

- Due to the economic characteristics of Spain, the average amount of litigation funded in Spain is lower than in other jurisdictions. This allows smaller funders to operate, and larger ones to enter the Spanish market without taking a large risk.
- Typically, funders require a 60-70% chance of success. Most litigation funding agreements contain (i) 'material adverse change' clauses, (ii) 'return of investment' clauses or Multiple-on-Capital (MoC) structures, (iii) mechanisms to share the amount obtained in the lawsuit — i.e. the pledging of the future claim that might be recognised in the judgment—, (iv) choice of lawyer clauses, (v) duty to inform clauses and (vi) liability for adverse costs — usually reinsured by an "After the Event (ATE) insurance".
- Funding agreements are not normally required by the court nor voluntarily disclosed in the proceedings.
- TPLF seems to be having positive effects. These include the professionalization of legal services and the improvement of access to justice.
- Stakeholders consider that a minimum EU regulation is desirable. They also predict that the approval of the new Law on Collective Actions Law will boost the funding of collective proceedings in consumer matters and of the TPLF market as a whole.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no specific law or regulation governing third-party litigation funding in Spain. The litigation funding agreement is regarded as an atypical contract which must be considered valid as it develops within the freedom of contract and the autonomy of the will of the individuals (Art. 1255 of the Spanish Civil Code).[853] Since the litigation funding agreement is not, in-and-of itself, contrary to any law, morality or public policy in Spain, its validity and effectiveness must be considered as the general rule.

An important part of the literature considers that the contract for the funding of litigation by third parties can be assimilated to the so-called 'contract for joint accounts' (*contrato de cuentas en participación*, Arts. 239 et seq. of the Spanish Commercial Code), which is a type of commercial contract present in the original version of the Commercial Code, i.e., enacted in 1885. According to this type of contract, 'traders may take an interest in each other's operations, contributing to them with such part of the capital as they may agree, and sharing in their success or failure in such proportion as they may determine'.

[853] Article 1255 of the Spanish Civil Code: *Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público*. ['Contracting parties may establish such covenants, clauses and conditions as they see fit, provided that they are not contrary to the law, morality or public policy'].

The possibility of assimilating the funding contract to the so-called 'parciary loans' (*préstamos parciarios*) has also been pointed out, which are loans in which the lender provides an amount of money that the borrower must return along with the profits obtained from the investment.[854]

For a contract to be valid and effective under Spanish law, it is not necessary for it to be expressly regulated in any law; we have already said that the litigation funding contract is, for the time being, an atypical contract. However, in Spanish law it is still important to be able to attribute a legal nature to contracts, even if they are atypical, for several reasons.

In general, it is considered that the identification of an institution similar to the litigation funding contract would make it possible to apply, by analogy, a regulation that governs the relations between the parties to the contract - the funder and the funded - and third parties such as the lawyer, the defendant or the parties' experts. As there is no express regulation, it may be necessary to resolve the interpretative difficulties presented by these contracts and, for this, understanding their legal nature is important, especially in a system with a civil law tradition, as is the case in Spain.

Furthermore, and in more specific terms, identifying the legal nature of the contract is necessary to determine the accounting and tax rules applicable to the funder and the funded party. [855] In particular, in the Spanish tax system there is a limit on the deductibility of financial expenses, meaning that identifying the nature of the monetary contribution made by the third party funder in the litigation funding contract can have important economic consequences from a tax point of view. This limit on the deductibility of financial expenses is undoubtedly of concern and directly affects the TPLF market in Spain.

On the other hand, it should be noted that few court decisions have expressly ruled on the validity of TPLF, or on its impact on the proceedings. One of the few has been Order no. 80/2020 of 24 June of the Provincial Court of Vitoria[856] which held as follows: "An applicant for access may contract the support of a litigation fund. There is nothing to oppose this from the perspective of article 1.255 of the Civil Code, or from that of articles 239 and following of the Commercial Code. 'Third Party Funding', or financing by a third party, in the absence of specific regulation in Spanish law, and even more so in the proceedings in which we are involved, must be considered lawful".[857]

The assignment of claims is also considered a form of TPLF, according to Article 3 h) of the European Parliament Resolution with recommendations to the Commission on responsible funding of private litigation. In Spanish law, the assignment of claims is a common and permissible figure. However, case law has imposed a limit when it involves a future claim against a public administration, such as in the case of claims for liability against the State (an area, in turn, in which it may make sense to resort to third-party funding). Specifically, the Judgment of the Supreme Court (Administrative Chamber, 8th Section) no. 53/2020 of 22 January[858] has established that the claim arising from the liability of the Administration can only be assigned once it has been finally recognised by the Administration itself or, if not, by a final judgment. Thus, it is impossible to assign the claim before

[854] J. ALFARO ÁGUILA-REAL, J., *Las cuentas en participación* (2017). Available at: https://almacendederecho.org/las-cuentas-participacion

[855] A. SÁNCHEZ SÁNCHEZ, "Tributación de los contratos de financiación de litigios", Revista Quincena Fiscal (2019) núm. 47.

[856] ECLI:ES:APVI:2020:481A

[857] *Un solicitante de acceso puede contratar el respaldo de un Fondo de litigación. Nada se opone a ello desde la perspectiva del artículo 1.255 del Código Civil, o desde la de los artículos 239 y siguientes del Código de Comercio La "Third Party Funding", o financiación a cargo de un tercero, a falta de regulación específica en el Derecho español, y más aún en el procedimiento en que nos movemos, debemos considerarla lícita*.

[858] ECLI:ES:TS:2020:124

it has been recognised to its original owner: according to this case law, the assignee could not be the one to initiate the corresponding administrative or judicial proceedings to recognise the claim and seek compliance and/or enforcement. This effectively excludes this special form of TPLF with respect to public administrations.

Currently, the only proposed law that incorporates some regulation on the TPLF is to be found in the Draft Law implementing Directive (EU) 2020/1828 of the European Parliament and the Council of 25 November 2020 on representative actions. However, it is not a bill solely dedicated to this issue, as the Government decided to include it in a broader package of procedural reforms called the the '*Proyecto de Ley Orgánica de medidas en materia de eficiencia del Servicio Público de Justicia y de acciones colectivas para la protección y defensa de los derechos e intereses de los consumidores y usuarios'*, which was presented on 22 March 2024 and is still in the parliamentary procedure.[859]

The Draft Law does not contain an exhaustive or complete regulation of TPLF[860], and is limited to the specific scope of collective actions in consumer matters, envisaging a minimum regulation and several safeguards to avoid abuse of proceedings. The Draft Law deals with the regulation of TPLF in those aspects in which it is required by the Directive and does so by regulating the new special procedure for collective actions, which is to be included in the Spanish Code of Civil Procedure. In doing so, in any case, it implicitly accepts the validity of TPLF in the Spanish legal system.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

There is a consolidated and growing market for the funding of litigation and arbitration proceedings in Spain.

Arbitration was one of the first niches of third-party litigation funding. As is well known, the Spanish State has been sued in a large number of investment arbitrations as a result of the cutback in the benefits associated with investments in renewable energy. It has been common for the plaintiff (foreign) investors to resort to external funding for these arbitrations. It has also been common for investment arbitration against other states or foreign state-owned companies to be funded.

With regards to the funding of court litigation in the strict sense of the term, it has been common to finance legal proceedings related to industrial property - patent, industrial design or trademark infringement proceedings - as well as creditors' claims in insolvency proceedings.

However, probably the most important in practice is the funding of proceedings in which damages actions are brought for antitrust infringements. As a result of the transposition of Directive 2014/104/EU on certain rules governing actions for antitrust damages, Spain is one of the EU jurisdictions in which private enforcement of competition law has been most widely received and consolidated. This has clearly been a differentiating element that has put Spain on the map and in the spotlight of the litigation funding market. Currently, issues such as the truck cartel, the car cartel or the milk cartel are attracting attention and market funding in the country.

It is important to note that, as a consequence of the country's macro- and microeconomic characteristics, the average amount of litigation funded in Spain is lower than in other jurisdictions.

[859] https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-16-1.PDF

[860] On the Draft Law, see F. GASCÓN INCHAUSTI, «The Implementation of the Collective Redress Directive into the Spanish Procedural System: Key Elements of the Draft Act on Representative Actions», *Zeitschrift für Zivilprozess International* (2022) Vol. 27, pp. 3-24.

On the one hand, this is allowing smaller funders to act and, on the other hand, larger funders are using these processes to 'test' the Spanish market without putting much risk in it.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Withs regards to market participants, it has been identified that national and international funds of different sizes operate in Spain.

The following funds have been identified as operating in Spain (the list is not exhaustive): Ramco, Burford, Omnibridgeway, Harbour, Therium, Fortress, Sachenga and Qanlex.

The imminent transposition of Directive (EU) 2020/1828 on representative actions will mean a consolidation and possibly also a strengthening of the TPLF in Spain.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no statistics or public data measuring the presence or incidences of TPLF in the Spanish legal system. So far, third-party litigation funding has remained in the shadows.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Despite being a new and still unknown practise, there is a significant academic production on TPLF.

The literature is practically unanimous in its opinion that the third-party funding contract is valid and should be considered an atypical contract that falls within the contractual freedom of the parties (art. 1255 CC). [861] It is also usual that, in an attempt to define the funding agreement and identify its nature, a differentiation is made between the agreement and other figures and institutions, such as the contingency fee or the assignment of receivables — assignment model — (Art. 1526 et seq. CC). [862]

A large part of the doctrinal works that have been published in Spain focuses on the analysis of the European Parliament Resolution of 13 September 2022, with recommendations to the Commission on the responsible private financing of litigation.[863] It can therefore be said that the European

[861] L. BORRERO ZORITA, "Fondos de litigación (litigation funds): una primera aproximación", *Revista Lex Mercatoria* (2019) Vol. 11

[862] D. AGULLÓ AGULLÓ, "Los contratos de financiación de litigios por terceros (third-party funding) en España", *Revista de Derecho Civil*, vol. IX, núm. 1, pp. 192-202; G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 275-280; L. BORRERO ZORITA, "Fondos de litigación (litigation funds): una primera aproximación", *Revista Lex Mercatoria* (2019) Vol. 11; S. VICENTE MAZZUZ, "Extensión y límites al deber de divulgación en materia de financiación por terceros en el arbitraje", *Diario LA LEY* (2023) núm. 10320,.

[863] M. AGUILERA MORALES, "Hacia un marco normativo europeo sobre la financiación de litigios" in MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro* (Atelier, 2022), pp. 587-596; J. C. FERNÁNDEZ ROZAS, "El mercado emergente sobre la financiación privada de litigios responsable en la Unión Europea: un cauce para facilitar el acceso a la justicia a los ciudadanos y las empresas privadas", *La Ley Unión Europea* (2022), núm. 108; S. VICENTE MAZZUZ, "Extensión y límites al deber de divulgación en materia de financiación por terceros en el arbitraje", *Diario LA LEY* (2023) núm. 10320; S. CENTENO, J. TARJUELO, "¿Hacia una directiva que regule la financiación de litigios?: la resolución del Parlamento Europeo de 13 de septiembre de 2022", *Diario la Ley* (2022)

Parliament Resolution is well known and has generated an important academic discussion in Spain. In this regard, the regulation of the content of the funding agreement (Art. 12 of the draft Directive annexed to the EP resolution) and the control of the funding agreement that can be carried out by the court (Art. 17 of the draft Directive) have received special attention by Spanish scholars.[864]

Due to the importance they have had in Spain, it is also recurrent to find references to the funding of arbitration proceedings by third parties.[865] It is usual to draw attention to the incorporation in many rules of national arbitration institutions of the obligation to disclose the existence of the third party funding.

It is also common to read in doctrinal studies the idea that third-party funding of litigation enhances access to justice and the effectiveness of the judicial protection of the rights of litigants. [866] However, there is also a risk that many small claims may not be funded because of the low profitability they may have.[867]

In general, it is felt that funders will only support well-founded actions where there is a high likelihood of success - around 60%-70% chance of success. This is considered to give strength and seriousness to the funded claim and also to have a deterrent effect on the defendant. [868]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The main concerns identified in the literature focus on the conflict of interest that may arise during the proceedings between the funder and the parties - especially with regards to the possibility of reaching an out-of-court settlement.[869] The risk of the third party unilaterally terminating the funding midway through the proceedings or incorporating completely arbitrary contract

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núm. 10148; G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288; D. AGULLÓ AGULLÓ, "Los contratos de financiación de litigios por terceros (third-party funding) en España", *Revista de Derecho Civil*, vol. IX, núm. 1, pp. 184-187.

[864] M. AGUILERA MORALES, "Hacia un marco normativo europeo sobre la financiación de litigios" in MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro* (Atelier, 2022), pp. 587-596; G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288; D. AGULLÓ AGULLÓ, "Los contratos de financiación de litigios por terceros (third-party funding) en España", *Revista de Derecho Civil*, vol. IX, núm. 1, pp. 184-187.

[865] S. VICENTE MAZZUZ, "Extensión y límites al deber de divulgación en materia de financiación por terceros en el arbitraje", *Diario LA LEY* (2023) núm. 10320,; D. AGULLÓ AGULLÓ, "Los contratos de financiación de litigios por terceros (third-party funding) en España", Revista de Derecho Civil, vol. IX, núm. 1, pp. 207-211.

[866] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), p. 282.

[867] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023).

[868] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), p. 283; J. C. FERNÁNDEZ ROZAS, "El mercado emergente sobre la financiación privada de litigios responsable en la Unión Europea: un cauce para facilitar el acceso a la justicia a los ciudadanos y las empresas privadas", *La Ley Unión Europea* (2022), núm. 108.

[869] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288.

termination clauses is a recurring concern. There are also concerns about the funder's undue control over the procedural strategy and the work of the lawyer during the proceedings. [870]

There is a recurring concern about the possibility of the funder incorporating an unfair or excessive rate of return that virtually deprives the litigant of their right to compensation[871].

It is also frequently pointed out that it is important for the funder to bear the potential costs of the funded party in the event that the claim is dismissed, in order to avoid the risk of a type of 'hit and run' scenario.[872]

This discussion is also echoed in seminars, congresses and conferences. In many cases, the debate is very much divided between lawyers from different law firms who are in favour or against the promotion of funding. [873]

In contrast, there is still no open political discussion on the issue of third-party funding of litigation - beyond the Draft Law on class actions that has started its parliamentary procedure (see above). In the public sphere, TPLF is still peripheral, seen as something distant and more typical of other jurisdictions.

2. Relevant legislation applicable to TPLF in Spain

2.1 Legal admissibility and conditions of using TPLF in civil litigation

At present there is no law or regulation expressly governing TPLF in Spain. TPLF is legally admissible in Spain under the general rules of freedom of contract and parties' autonomy, unless a specific funding agreement is contrary to any law, morality or public policy (Art. 1255 of the Spanish Civil Code).

[870] M. AGUILERA MORALES, "Hacia un marco normativo europeo sobre la financiación de litigios" in MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro* (Atelier, 2022), p. 590; J. C. FERNÁNDEZ ROZAS, "El mercado emergente sobre la financiación privada de litigios responsable en la Unión Europea: un cauce para facilitar el acceso a la justicia a los ciudadanos y las empresas privadas", *La Ley Unión Europea* (2022), núm. 108; G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 286-288..

[871] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), pp. 271-304; AGUILERA MORALES, M., "Hacia un marco normativo europeo sobre la financiación de litigios" en MARTÍN PASTOR, J., et al. (dirs.), *El Derecho procesal: entre la academia y el foro*, Atelier, Barcelona, 2022, p. 597.

[872] G. ORMAZABAL SÁNCHEZ, "La financiación de litigios por terceros (TPF). Clarificación de conceptos y algunas claves para su regulación" in HERRERO PEREZAGUA, J. F. et al. (dirs.), *La justicia tenía un precio* (Atelier, 2023), p. 297.g

[873] See, for instance, the discussion that took place at the 2024 edition of the *Madrid Competition Litigation Seminar* [https://www.mclseminar.org/event/f97f2494-e111-4aa7-8eca-109d4686db6c/websitePage:84135b65-f871-461c-a10e-b49fd2b25f0a?environment=production-eu&i=UaK41neogke3dYkiCRS2Ow&locale=es-ES].

2.2 Regulatory oversight of funders/funding industry

There is no regulatory oversight, supervision or control of funders or of the funding industry in Spain: no public authority is entrusted with these functions.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There is no specific legal framework applicable to funders. If a funder is incorporated as an LLP, the general provisions will apply.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

If the funded party is a consumer, general protective provisions would apply: unfair contract terms (due to their content or to their potential lack of transparency) included in the funding agreement would, therefore, be void and null. This protection, however, would not apply if the claimant/funded party would be a consumer association bringing a collective claim in the interest of a group of consumers. The usually low number of consumers' individual claims does not seem to match the size of cases in which funders are usually interested in.

Insofar as assignment of claims is considered a form of TPLF, it follows the general provisions of the Spanish Civil Code (Articles 1526 to 1536). Regulation of the assignment of claims under Spanish law does differ, in its essence, to the civil law tradition. The only provision with potential impact in the field of TPLF is that or Article 1535 of the Civil Code, envisaging the assignment of a contentious claim, i.e. a claim which, at the moment where the assignment takes place, is already being discussed or enforced in court. In that case, the debtor is entitled to extinguish the claim if they reimburse to the assignee the amount paid (plus costs and interests) within a 9-day deadline.

Funders may be investment funds. If they are incorporated as such in Spain, they will have to comply with the general requirements, established in a specific Act on collective investment schemes (*Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva*). These provisions are primarily concerned with structuring the internal workings of funds and protecting investors in their dealings with fund managers. Supervision is entrusted to the Spanish stock market regulator, the *Comisión Nacional del Mercado de Valores*. There are no specific provisions for cases in which the funds' investments are focused on the litigation market.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

No specific procedural provisions address this issue. General procedural rules apply to proceedings where one of the parties relies on TPLF. A general rule prohibiting abuse of proceedings (Article 247 of the Spanish Code of Civil Procedure) could be used in case there would be a conflict of interest between the funder and the adverse party of the beneficiary (such a situation has never been described as occurring in practice).

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Since TPLF is not regulated as such, funding agreements only create obligations between their parties (i.e., the funder and the beneficiaries). The agreement does not entitle courts, public administration and/or adverse parties to claim anything from the funder.

2.7 Obligations of funders towards beneficiaries and vice-versa

They will follow the provisions of the funding agreement (Article 1255 of the Spanish Civil Code).

2.8 Distribution of awards and bearing adverse costs in lost cases

They will follow the provisions of the funding agreement (Article 1255 of the Spanish Civil Code). Reimbursement of costs will have to be claimed by the successful party from the party that lost the case but benefitted from TPLF. The successful party is not entitled to claim the costs directly from the funder.

2.9 Planned legislation

The only legislative proposal that currently exists on TPLF is the aforementioned Draft Organic Law that encompasses, among other procedural provisions, a new regulation on collective actions for the protection of the rights and interests of consumers and users transposing into Spanish law Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions.[874] This part of the proposed legal package will be called hereinafter, for the sake of expediency, the 'Draft Law'. The analysis of the regulation will therefore focus on the proposed text and its current passage through Parliament.

The Draft Law proposes to include a new title in the last book of the Spanish Code of Civil Procedure, which would fully regulate the special process for the bringing of collective actions.[875] The moments and the way in which TPLF is addressed in the proposed text will now be analysed.

a) The first relevant moment is the initial one, i.e. the statement of claim. According to the (proposed) new Article 844.1.f) LEC, the claim in which a collective action is brought, must include, among other information, "[a] full statement of the sources of funding used to support the collective action. This statement shall include, where appropriate, the existence of funding by a third party, which must be duly identified". The intention is therefore to incorporate a duty of transparency as to the existence of the funding, which must be disclosed by the plaintiff, without the defendant or the court having to ask about it.

b) The second relevant moment is the so-called certification hearing of the collective action. This is an oral hearing in which, in an adversarial manner, it must be discussed whether the plaintiff's claim meets the requirements of commonality and homogeneity sufficient to be processed as a collective

[874] The evolution of the parliamentary development can be traced at: https://www.congreso.es/es/proyectos-de-ley?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostrarDetalle&_iniciativas_legislatura=XV&_iniciativas_id=121%2F000016

[875] On the structure of the Draft, see GASCÓN INCHAUSTI, F., «The Implementation of the Collective Redress Directive into the Spanish Procedural System: Key Elements of the Draft Act on Representative Actions», *Zeitschrift für Zivilprozess International (ZZP Int)*, Vol. 27, 2022 (published in 2023), pp. 3-24.

action. This is the essential core of the certification hearing. If the action is funded, the court must also examine the viability of the funding to decide whether it is admissible. Therefore, in the order to certify the collective action "the court shall, where appropriate, rule on the financing of the proceedings by a third party" (new proposed Art. 850.1 LEC).

For the assessment and admission of the viability of the funding, the court may request the qualified plaintiff entity "to provide the funding contract, for the purpose of verifying the consequences that its terms would have on the consumers and users affected by the collective action" (new proposed Article 850.5 LEC). The production and the adversarial examination of the contract will take place at a hearing before the judge, in the presence of all the parties and the funder (new proposed Article 850.5 LEC).

The Draft Law expressly establishes that the court must reject the funding of the collective action if it understands that there is "a conflict of interests or when the funding by third parties has an economic interest in the exercise or the result of said action that deviates the collective action from the protection and defence of the rights and interests of consumers and users" (new proposed art. 850.1 LEC). The proposed text considers that there will be a conflict of interest situation "when the defendant is a competitor of the funder or a businessman or professional on whom the funder depends"; or if the court "notices that the decisions of the plaintiff entity, including those relating to redress agreements, are influenced by a third party who is funding the proceedings, in a way that may be detrimental to the collective interests of the consumers and users affected" (new proposed Art. 850.2 LEC).

In the event that the court identifies that there is a conflict of interest, it must require the plaintiff to "waive or modify the disputed funding within a period of time specified by the court" before denying the funding. After this period has elapsed, if "the plaintiff entity does not justify having proceeded with the required waiver or modification, the court shall dismiss the proceedings or exclude the affected entity from the proceedings, in the event that another qualified entity entitled to exercise the collective action for damages that is not affected by the conflict of interests is involved" (new proposed Art. 850.3 LEC).

c) The conflict of interest may materialise or become apparent after the certification of the action, or during the course of the proceedings. In that case, the court may also make such requests for documents and amendments to the agreements as it deems necessary in order to decide whether the funded proceedings may continue (new proposed Art. 850.4 LEC).

In short, the Draft Law imposes on the plaintiff to disclose that its collective action is being funded and, in addition, the courts are given an active role in controlling the funding by third parties. This is specified in the obligation of transparency imposed on the parties and in the regulation of the duties to produce documents, which can be enforced against the parties to the proceedings and the funders themselves.

d) In the Draft Law, there is also a reference to the funder in the approval of the collective settlements that may be reached. According to the proposed new Article 865.2 LEC, the judge must assess, among other matters, "the amount of the sums to be paid to the third party who has funded the process or the remuneration to be paid to those who have assumed the representation and defence of the plaintiff entity".

e) When dealing with the enforcement of the judgment or the redress agreement, the Draft Law contemplates that when distributing the sums to which the defendant was sentenced, "the portion, if any, corresponding to the third party who has funded the proceedings" must be reserved (new proposed article 878 LEC). It is thus implicitly admitted that the funders obtain the return on their

investment from the amount to which the opposing party is sentenced - in accordance with the percentage or the conditions that must have been previously validated by the court.

f) Finally, and on a different level, the same Draft Law also establishes the requirement that consumer associations wishing to apply for authorisation and registration as a qualified entity must disclose whether they are funded by third parties. It is not a TPLF situation as such, since the rule envisages the funding of all kinds of activities developed by the consumer association, but it shows legal concern on avoiding conflicts of interest (new proposed art. 56 of the general law on the defence of consumers and users).

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not Applicable
Capital adequacy (Art.6)	Not Applicable
Fiduciary duty (Art.7)	Not Applicable
Powers of supervisory authorities (Art.8)	Not Applicable
Investigations and complaints (Art.9)	Not Applicable
Coordination between supervisory authorities (Art.10)	Not Applicable
Content of third-party funding agreements (Art.12)	Not Applicable
Transparency requirements and avoidance of conflicts of interest (Art.13)	Not Applicable
Invalid agreements and clauses (Art.14)	Not Applicable
Termination of third-party funding agreements (Art.15)	Not Applicable
Disclosure of the third-party funding agreement (Art.16)	Not Applicable
Review of third-party funding agreements by courts or administrative authorities (Art.17)	Not Applicable
Responsibility for adverse costs (Art.18)	Not Applicable
Sanctions (Art.19)	Not Applicable

The purpose of the Draft Law on collective actions has not been to comply with Parliament's Resolution, as no mandate for the Member States has yet been derived from it. However, on some points, the Spanish pre-legislator does seem to have been aware of its content, as certain proposals

correspond to the content of the recommendations for a draft model directive contained in the European Parliament's resolution. These include the following:

The proposed new Article 844.1.f) LEC, examined above, is in line with Article 16 of the draft directive included in the European Parliament's Recommendation, in regard to the disclosure of third-party funding agreements. Although the proposed provision does not require the disclosure of the funding contract with the statement of claim, it does require the disclosure of the collective action's funding from the outset.

In addition, the possibility is envisaged in the Draft Law for the judge to request the funding agreement from the funded party in order to check its content (proposed new Art. 850.5 LEC, in connection with Art. 16.2 of the draft directive).

With regard to the reviewing of the funding agreement, the judge is empowered to require the plaintiff to waive the disputed funding or to modify it (new proposed Art. 850.3 and 5 LEC). This provision would also mean incorporating into Spanish law the review of funding agreements by the courts, recommended by the Parliament (Art. 17 of the draft directive). In particular, the possibility for the judge to issue binding orders or instructions to a litigation funder (Art. 17.a of the draft directive); to assess the conformity of each third-party funding agreement with the minimum content and transparency requirements (Art. 17.b) and c) of the draft directive); or to assess the reasonableness and proportionality of the return to the funder (Art. 17.d) of the draft directive).

In short, although in a limited scope and also with a reduced scope, the Draft Law on collective actions addresses and incorporates the judicial control of the funding agreement as one of the key elements of collective proceedings.

3. Practical operation of TPLF in Spain

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

The main areas of funded proceedings are (i) damages actions for competition law infringements, (ii) industrial property actions - in particular patent infringement actions - and (iii) actions related to insolvency proceedings. New products are beginning to appear on the market, for example in tax matters - recovery of tax losses - or in the monetisation of judicially recognised claims.

The financing of arbitration proceedings has long been consolidated in the country, especially with regard to investment arbitration against the State and/or foreign companies - especially in renewable energy and in matters associated with insolvency proceedings.

Progressive funding of consumer litigation is also beginning to be detected. For the time being, almost all of them focus on financial and banking products and competition law, albeit from the consumers' perspective – purchase of products, subscription of services from cartelised companies or abuses of dominant positions. In any case, legal practitioners hope that the approval of the Collective Actions Law Bill will boost the funding of collective proceedings in consumer matters. This is generating some controversy between the business sector, which fears that the TPLF will allow abusive or fraudulent actions to be brought, and the consumer defence sector, which aspires to have funding to activate claims that, at present, they are unable to promote due to a lack of resources.

In terms of the characteristics of the funded proceedings, it is observed that antitrust damages litigation is mostly follow-on proceedings, which are backed by prior public enforcement. The funding market considers such litigation to be a very safe product and therefore very attractive, given the high probability that the claim will be upheld. It is also common for funded lawsuits to be of a high value. Even if they are follow-on proceedings, it is necessary to provide complex expert opinions to prove the amount of the damage claimed. The cost of these expert opinions is often very high and, together with legal defence costs, determine the need for funding to push the process forward.

A good example is provided by the milk cartel claims. This is a sophisticated case that requires a very complex counterfactual report, with rooms of data, which create a lot of costs. A normal company would often not be able to defend this case on its own.

On the other hand, it is common to fund not only individual litigation, but also packages of litigation, i.e. a set of related cases - for example, in antitrust damages litigation against cartelised companies.

For funding to be possible, funders make sure that they have a good case. One or two external due diligences are usually requested to assess the viability of the case. Normally a 60-70% chance of success is required. Only in exceptional circumstances can this percentage be lowered.

The number of court cases financed in the last 3 years ranges between 10 and 15. These are few cases, although of significant amount in a modest and clearly expanding market such as the Spanish one. In general, the operators interviewed show a lack of knowledge about the absolute numbers and all responded on the basis of calculations or estimates, which demonstrates the opacity of the market to its own participants.

The number of arbitrations funded in Spain appears to be somewhat higher and could range between 15 and 25 in the last three years.

An exponential increase can be expected in the future, as significant developments are detected in the sector's entities.

b. Minimum claim value in absolute terms (in million Euro)

The minimum value of claims ranges between €10-14 million, whether a single case or a bundle of homogeneous litigation is funded.

Operators insist that the value of claims in Spain tends to be small. This has an effect on the market configuration. On the one hand, some large funds can start to enter the Spanish market without taking much risk. On the other hand, smaller funds are allowed to appear and start operating in Spain.

c. Typical claim value in absolute terms (in million Euro)

The most repeated answer to the typical amount of funded litigation is that it ranges between EUR 50 million and EUR 99 million. It should be noted, once again, that this amount refers to a specific litigation or to a package or bundle of litigation.

d. Typical ratio between investment by the funder and claim value

The ratio between investment and litigation amount is usually between 1:5 and 1:10.

e. Typical size of the investment by the litigation funder (in million Euro)

The responses on this point were not homogeneous, although in all cases they were in the lower range, either between 2 and 4 million Euros or between 5 and 9 million Euros.

f. Origin of funding provided by the litigation funder

In most cases the funding originates from private or institutional investors.

It is striking that many funds initially operated as family offices. Their initial assets are usually owned by professionals - lawyers or businessmen - who cease their main activity and invest part of their assets in the funds.

g. Share of compensation awarded typically demanded by litigation funders

The most repeated response is that the percentage return is usually around 30%, specifically between 20-30%. It is considered that more than 35-40% would be unaffordable for the market and somewhat disproportionate.

Of course, it is emphasised that these percentages depend on the characteristics of the case and the estimated duration of the judicial process - i.e. the payback time. In large insolvency cases or investment claims against foreign states or public companies, the percentage can even rise to 60%-70%.

h. Other conditions of the litigation funding agreement

In all cases, the inclusion of a 'material adverse change' clauses was reported, which would allow the funding to be withdrawn or changed as a result of relevant changes in case law or national law affecting the ongoing case.

In some cases, a priority order for the collection of amounts is established in the funding agreement. Based on this, it is established who will collect first among the different actors: the funder, the party, the lawyer, the experts, etc.

In most cases, mechanisms are established to share the amount obtained in the lawsuit. The most common system is the transfer of the money to an escrow account, which is then distributed by an independent third party in accordance with the agreement. Other legal forms are also used, such as the pledging of the action - i.e. the pledging of the future claim that might be recognised in the judgment.

In terms of economic conditions, "return of investment" clauses or multiples (MoC) are common, whereby the percentage of return to the fund increases each year.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Normally a 60-70% chance of success is required. Only in exceptional circumstances can this percentage be lowered.

In cases where there is no clear precedent, it has been considered appropriate to base the decision on one or two positive assessments by reputable lawyers in the forum.

Of course, a good case is required. One or two external due diligences are always requested to assess the viability of the case. Sometimes, in order to avoid a conflict of interest, an attempt is made to ensure that the lawyer who issues the due diligence is different from the one who will be chosen to take on the legal management of the case.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

The reference to multiples (MoC) was unanimous in all funding agreements.

In some cases, an Annualised Internal Rate of Return (IRR) of between 20%-25% is reported in the agreements.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

Most cases are still pending: none of the interviewees reported any funded case that has already ended in a final judgement. The TPLF market is only just developing in Spain, so there are no concrete results - at least as far as court cases are concerned - yet.

In general, the development of the proceedings is considered to be favourable. All operators are optimistic. It is considered that win-win dynamics are being created between the experts, the lawyers, the funder and the party, and that this benefits the development of the sector.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

No. As far as we have been able to ascertain, only on one occasion has the funding agreement been disclosed to the court and the parties, in a claim associated with insolvency proceedings, where maximum transparency was sought to prevent possible challenges from dissatisfied creditors. The funder admits that it was unhappy with the effect the disclosure had on the proceedings, as the content of the agreement was leaked to the press and the procedural debate focused too much on the funding.

In insolvency matters involving an insolvency administrator, disclosing the financing and obtaining the judge's approval or homologation of the contract is considered to provide legal certainty. It is considered that this prior approval by the court will prevent a change of mind later in the enforcement phase that would prevent the fund from recovering its investment.

In a few isolated antitrust damages cases, the issue of funding has arisen and access to the funding contract has been sought by way of discovery measures. Funding was considered to influence the economic impact that the enforcement of the measures had on the parties and thus their proportionality as a criterion for the judge to adopt them. In any case, the funding agreement as such was never disclosed.

In the context of arbitration, the existence of funding is almost always disclosed, because it is required by most of the regulations of the Spanish arbitration institutions. However, the content of the agreements are not exhibited – only the existence of the funding is disclosed.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

- *Consent for settlement*

X Consent for appeal

- *Consent for expert evidence*
- *Agreement on strategy*
- *Other*

There is a duty of continuous information between the lawyers and the fund. This takes the form of regular reporting on the progress of the proceedings - on a monthly, quarterly or half-yearly basis - as well as on each important procedural milestone.

Although there is no explicit direct control, the periodic reports serve to monitor and audit the conduct of the process.

In any case, funders attribute almost absolute independence to the legal management. Lawyers are considered to be the experts in the field and in the forum and are therefore the decision-makers.

The choice of lead counsel is one of the most important issues for the fund. In fact, sometimes the specific lawyer who will handle the case is specified (ad hominem) and it is agreed that a change of lawyer will be a cause for termination of the agreement.

The only situation in which it is identified that there may be a conflict of interest between the fund and the party is when the possibility of a settlement is raised. At the moment this is not something problematic in Spain and it is assumed that any such issue can be resolved reasonably.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

It is generally considered to be a relationship of trust in which all actors have a common interest: that the case is conducted as smoothly as possible, and that it is won.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes. The inclusion of 'material adverse change' clauses is generally reported, which allow the funding to be withdrawn or changed as a result of relevant changes in case law or national law affecting the ongoing case.

In addition, if the case is lost at the first and second instance, the fund may sometimes not continue with the funding of the litigation. There are other similar clauses that operate as 'exit windows' - for example, as mentioned above, when the lead counsel ceases or changes.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Yes, the normal conflict of interest controls of a company or a law firm are generally applied.

In most cases, funds are subject to codes of conduct of national and international litigation fund associations. In such cases, these checks are required to be passed.

Conflict of interest checks are particularly important in the arbitration world. It is possible for an arbitral award to be overturned on the grounds that there was a conflict of interest with the arbitrator and that he or she was therefore not independent.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

Yes, liability for an adverse costs award is almost always included, i.e. the funder assumes reimbursement of costs to the opposing party in the event that the case is lost. This is one of the elements that is of most interest to the client of the funding, as not only does the client not have the assets to fund the litigation itself, but they also do not have the assets to bear a hypothetical costs award. The risk assumed by the fund in relation to costs is usually covered by a contract with an insurance company.

In a few cases, related to industrial property infringement actions, it is reported that the client prefers not to have this risk covered by the funding agreement, as this increases the price of the funding (it is assumed that the client negotiates this directly with an insurance company, if applicable).

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Yes, almost always. As has just been said, the coverage and insurance of possible awards of costs is a security for the client and one of the major attractions for litigation funding.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No, not at all. Litigation funders consider that their contracts have economic value and should not be disclosed to potential competitors or to potential defendants.

4. Stakeholder views on TPLF in Spain

In all cases, positive effects of the existence of TPLF are identified. On the one hand, the TPLF is considered to improve access to justice. On the other hand, more specifically, it is noted that it contributes to the professionalisation of legal services: better funding makes it possible to hire better lawyers, with more complete teams, something that has a direct influence on a better defence of the parties. This increase in quality and professionalism is also identified with regard to experts.

There is a unanimous view that the growth of the TPLF market will be exponential in Spain. It is considered that the future law on collective actions will be a clear stimulating for the system.

Almost all operators consider that some form of regulation is necessary and, furthermore, prefer that this regulation be at European level. It is considered that this avoids pointless national discussions, and that the regulation will be more acceptable to all operators if it originates in the EU.

In almost all cases it is considered that the regulation should focus on the financial adequacy of the fund and on a minimum regulation of the agreement - concentrating only on a few prohibitions. Market participants are reluctant to regulate in great detail. In particular, it is considered that a cap on fund returns could be totally counterproductive for the market. In that case, funds would cease to operate directly in Spain, but would continue to do so from other jurisdictions, such as the UK or the US. On the other hand, it is considered that regulation should be adapted to the type of litigation: B2B is not the same as consumer collective litigation.

It is considered that only solid and viable cases are financed in Spain. Some operators are concerned that frivolous claims could start to be funded, as may be happening in Portugal in consumer matters. However, it seems that funders do not share this view: they are not interested in funding cases with no prospect of success or no relevant economic value.

It can be seen how the market is gradually developing, and how new products are appearing beyond the financing of specific litigation (e.g. in tax matters). In general, the TPLF market is presented as a solution for companies wishing to obtain liquidity and externalise certain accounting risks.

There is not much appetite in the Spanish market for the assignment of receivables to an ad hoc vehicle, which takes care of the legal claim. This technique is not common in Spain (unlike in other countries) and there is a fear that the courts will not be receptive, especially when it comes to accepting the vehicle's standing to sue.

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Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva (Collective Investment Schemes Act).[877]

Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil (Spanish Civil Code).[878]

Real Decreto de 22 de agosto de 1885 por el que se publica el Código de Comercio (Spanish Commercial Code).[879]

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[876] Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2000-323
[877] Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-20331&p=20230318&tn=6
[878] Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763
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Sweden

Dr Eva Storskrubb, Uppsala University

Executive Summary

- There is a TPLF market in Sweden. Both local and international funders fund cases in Sweden in a variety of civil and commercial fields of law, including both arbitration and litigation.
- However, one cannot say that there is a "regular" use of TPLF in Sweden – it is still rare that a case is funded by TPLF.
- There is limited regulation of TPLF in Sweden. It is clearly stated in a legislative bill of the Government that TPLF is permitted in Sweden. Further, TPLF is generally perceived as a matter of party autonomy and freedom of contract.
- So far in Sweden TPLF appears to occur in cases where both the funder and the funded party are commercial actors. The main doctrinal discussion on practical issues related to TPLF, such as conflict of interest, takes place in the context of arbitration.
- There appears to be a common answer in the doctrine, and so far also in the limited case law, on most issues that have been raised and discussed related TPLF and litigation costs. However, specifically on the issue of a potential secondary liability for adverse costs, i.e. whether a funder in limited circumstances could have such a liability, further clarification in case law could be useful.
- The main legislative provisions that deal directly with TPLF are provisions that implement Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. However, even in that specific context, the Swedish legislators have chosen minimum regulation and emphasized freedom of contract.
- Due to the Code of Conduct of the Swedish Bar Association, TPLF funding by attorneys is only possible in limited circumstances. However, other actors on the legal market are free to provide contingency-fee funding.
- There can be regulatory oversight of local TPLF actors by the Swedish Financial Market Regulator including potential sanctions for non-compliance. Sor far, it appears as if their operations can fall within the scope of the Currency Exchange and Other Financial Services Act, which entails a limited form of supervision.
- Stakeholders have mainly observed positive effects of TPLF on the Swedish market. TPLF is seen as providing access to justice for commercial parties that could otherwise not fund litigation/arbitration. The only limited debate on TPLF has concerned funding of mass cases.
- Stakeholders consider that it is too early for any regulation since no abuse is perceived as prevalent on the Swedish market. Many stakeholders also consider that self-regulation would be a first relevant means of regulation.

- The local funders express a clear concern that the extensive regulation called for by the European Parliament will significantly stifle a market that is slowly evolving in Sweden.
- Particularly in light of the Swedish focus on freedom of contract, any regulatory proposals that could impact on individual funding agreements seem far-reaching and unnecessary.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no general legislation on TPLF in Sweden.

- However, as set out below, the Swedish legislation implementing Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers[880] ("RAD") includes limited provisions on TPLF, which allows the use of TPLF. This legislation is only applicable to certain consumer claims.
- In addition, the Swedish Group Proceedings Act ("GPA")[881] includes limited provisions on the funding of litigation by the claimant's attorney by means of conditional fees, which are set out below.

There is no further legislation that is planned.

As further explained below, TPLF in Sweden is mainly seen as a matter of contract, and there is far reaching party autonomy in contract law.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

TPF is not "regularly" relied upon in Sweden. It is a relatively new phenomenon, and funders only fund a limited number of cases. The perception is that funding is still a rare phenomenon. Based on the information collected, the local funders fund both litigation and arbitration cases whereas the international actors fund arbitrations (and potentially ancillary litigation).

One of the local funders, Kapatens, has also funded cases that can be characterised as mass claims. However, so far, there are no claims concerning consumer rights. The mass claims that are public and funded mainly concern dividend rights of preference shareholders. A very specific case concerns the potential right to restitution for damages from the Swedish State for corporations that have paid VAT on postal services allegedly in breach of EU-law.[882]

[880] [2020] OJ L409/1.

[881] The Group Proceedings Act (Swe: Lag (2002: 599) om grupprättegång) can be found here in Swedish,: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-2002599-om-grupprattegang_sfs-2002-599/. An unofficial translation is also available in English but this does not include potential subsequent amendments, see: https://www.government.se/government-policy/judicial-system/group-proceedings-act/.

[882] https://kapatens.com/en/open-group-claims/.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

Yes, there are two local funders operating in Sweden: Kapatens[883] and Litigium Capital[884]. Because Sweden is also well-known for international commercial arbitration (as well as investment arbitration) under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), well-known international funders that are based abroad have also funded arbitrations seated in Sweden and shown an interest in the Swedish market.

Nivalion, Burford and Deminor are among the international funders perceived to have an interest in or presence on the Swedish market. In addition, some local actors specifically refer to Therium as potentially relevant for Sweden since they established a presence in Norway and showed an early interest in the Nordics in general.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

No statistics available.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

The most significant doctrinal discussion of an academic nature has been in the doctoral dissertation of Henrik Bellander[885] (lecturer at Uppsala University) on litigation costs and, later, in a book chapter by the same author.[886] However, his work focuses broadly on litigation costs and TPLF is not the main focus of his work. In addition, the phenomenon of TPLF has been raised by Peter Westberg (professor emeritus at Lund University)[887] in his textbook on civil procedure, and by Sebastian Wejedal in his doctoral dissertation[888] on the right to counsel and the allocation of counsel fees before Swedish courts. However, in general I would say that academically the area is still very much under-researched in a Swedish context.

- The most principled doctrinal discussion on TPLF by Bellander situates the phenomenon in a broader historical context and in the evolution of the procedural landscape in Scandinavia.[889] He reflects in parallel on both conditional-feel agreements and TPLF, and notes that their emergence is not based on a conscious strategy of the legislator, but rather as a side effect of other trends. Such trends being reduced litigation funding from traditional sources, both public (legal aid) and private (litigation insurance) sources, as well as an increased focus on settlement and alternative dispute resolution. This has, over time, led to civil litigation and its costs being viewed more in the light of an individual economic risk (of the claimant), rather than as the effects these costs have on society or the collective role of civil procedure as impacting on the

[883] https://kapatens.com/en/about-us/.
[884] https://litigiumcapital.com/en/about-us/.
[885] H. Bellander, *Rättegångskostnader* (Iustus, 2017), pp. 250-251, 265-268
[886] In particular, H. Bellander, "Från statlig rättsskipning till privat riskhantering – Mot en ökad användning a tredjemansfinansiering och riskavtal …eller för" in A. Wallerman Ghavanini and S. Wejedal (eds), *Access to justice i Skandinavien* (Santérus, 2022), pp. 189-210.
[887] P. Westberg, *Civilrättsskipning I* (3rd ed) (Norsteds Juridik, 2021) pp.212-214.
[888] S. Wejedal, *Rätten till biträde – Om biträdeskostnaders hantering vid svenska domstolar* (Juridiska institutionens skriftserie, Göteborg, 2017) pp. 98-105.
[889] Bellander.

behaviour of citizens.[890]He posits that an increase of conditional-fee arrangements and TPLF increases the risk management perspective on civil litigation. In addition, the focus on the conflict resolution function of civil litigation as well as the substantive assessment of the dispute and its merits can be seen to be shifted further from the court and the parties, towards their attorneys and funders.[891]

There are a few publications focused more directly on TPLF written by practitioners (attorneys and former attorneys some of whom currently work for funders). The main publication in this context is the monograph on TPLF, *Tvistefinansiering*, co-authored by Johan Skog and Carl Persson.[892] In addition, there have been a limited number of shorter articles and contributions in various journals,[893]some also in English.[894] Many of these contributions focus on TPLF in the context of arbitration seated in Sweden.

- The main issues that have been discussed in these publications are: recovery of litigation costs, liability for adverse costs, security for costs and issues regarding conflicts of interest and disclosure.

Finally, it should be noted that there is a more historic discussion in Sweden on what can be called claims vehicles, assignment of claims, and the old concept of a procedural/debt collection commissioner.[895] Further, there has also been an earlier discussion on use of conditional-fees by attorneys (i.e. by members of the Bar Association), in general and also in the context of the enactment of the GPA.[896] Even though these discussions are not directly focussed on the newer phenomenon of TPLF, they can be relevant as being related to or analogous on specific issues that are of importance in the context of TPLF.

The main issues

(a) Recovery of litigation costs

[890] Ibid. pp. 206-208.
[891] Ibid. pp. 209-210.
[892] J. Skog and C. Persson, *Tvistefinansiering* (Norsteds Juridik, 2022). For a review of the book see: C. Falkman, "Litteratur: Johan Skog och Carl Persson, Tvistefinansiering, Norstedts Juridik, upplaga 1:1m 248 s", *Svensk Juristtidning* 2023, pp. 216-221.
[893] See, C. Söderlund, "Tredjepartsfinansiering av skiljeförfaranden", *Juridisk Tidskrift* Nr. 4 2015/16, pp. 959-964; P. Mühlenbock, "Tvisteinvestering – Särskilt om vissa kostnadsfrågor", *Juridisk Publikation* 1/2016, pp. 113-143; and R. Josefsson and J. Neway Herrman, Extern finansiering av tvister och riskavtal – en möjlighet att stärka Sverige som säte för internationella skiljeförfaranden", *Ny Juridik* 1:2018, pp. 85-94.
[894] J. Sidklev and C. Persson, "Sweden" in L. Perrin (ed), *Third Party Litigation Funding Law Review* (1st ed) (Law Business research, 2017) pp. , 145-153; J. Sidklev and C. Persson, "Sweden" in L. Perrin (ed), *Third Party Litigation Funding Law Review* (3rd ed) (Law Business research, 2019) pp. 190-198; B. Gustafsson, "Article 38 of the SCC Rules; An Analysis of Security for Costs in TPF Arbitration", *Stockholm Yearbook of Arbitration* (2019), pp. 137-154; A. Foerster and J. Skog, "Cost Issues in Arbitrations Involving Third Party Funding: The Swedish Example", *German Arbitration Journal* (2020), pp. 149-155; and J. Skog and C. Persson, "Beyond the Myth of the Bermuda Triangle: A Swedish Perspective on Conflicts of Interest in the Context of Third-Party Funding in International Arbitration", *Stockholm Yearbook of Arbitration* (2023), pp. 131-161.
[895] See e.g. L. Sundqvist and G. Löwander, "Pursuing Claims in Under-Capitalized Claims Vehicles – A Swedish Perspective", *Europarättslig Tidskrift* (2014) pp, 691-706; L. Edlund, "Rätt part? – Om processöverlåtelser, felskrivningar och inkassomandatarier" in *Festskrift till Torkel Gregow* (Norsteds Juridik, 2010), pp. 63-76, and S.Lindskog, "Om fattig mans rätt till rättegång – Några synpunkter med anledning av NJA 2006 s. 420", in *Festskrift till Lars Heuman* (Jure Förlag, 2008) pp. 327-343.
[896] Bellander p. 226-237

- An issue which has been discussed by commentators is whether recoverable *actual* litigations costs have been incurred by the successful litigating party, if a third party has paid for the cost of counsel. The main means of external funding in civil cases in Sweden is public legal aid and private litigation insurance. With respect to legal aid, it is made clear in the statute that the counterparty is liable for adverse cost and in case of loss.[897] In relation to litigation, insurance courts have in practice followed the same ethos, i.e. that the counterparty is liable for adverse costs regardless of whether the winning party has litigation insurance cover.[898] Thus, it has been held that the duty of the losing party to cover adverse costs is primary with respect to legal aid and litigation insurance. In other words, the obligation of the losing party to cover such cost is not dependent on whether the successful party was funded.[899]
- For TPLF, the issue has arisen in court cases ancillary to arbitration, e.g. a challenge of an arbitral award or an application for interim relief following an arbitral award.[900] In these cases the funded party has been successful on the merits and the counterparty, liable for adverse costs, has argued that no actual costs have been incurred due to the underlying funding. The issue has not yet been dealt with by the Supreme Court. However, the lower courts, both district and appeal courts, have so far held that the underlying funding does not impact on the issue and ordered the counterparty to pay the costs.[901] In one of the cases that has been discussed in the doctrine, the district court in question held that it is not unusual that a third party pays or guarantees the costs of a litigation, for example legal aid or litigation insurance, and there must be a presumption that the adverse cost liability of the counterparty is primary and that any cover from an external party is subsidiary. However, the court also held that there had not been any evidence to refute that presumption.[902] It has been discussed in the literature whether there is an underlying requirement that the funding arrangement is commercial, i.e. that the funder will be reimbursed and that the winning party in that respect incurs the cost.[903]
- A further issue which has been discussed by commentators is whether the sum payable to the funder by the funded party under a litigation funding agreement ("LFA"), which can be called the investment-premium, can constitute recoverable adverse litigation costs. With

[897] Legal Aid Act (Swe: Rättshjälpslag (1996:1619)), Section 30. The cost is to be paid to the State that has provided legal aid as well as to successful party that may have carried part of the cost
[898] Bellander p. 266.
[899] Ibid.
[900] Skog and Persson 170-175.
[901] Ibid. 170-173 and the cases mentioned therein. One of the cases mentioned, at 172 footnote 13, has been decided by Svea hovrätt and costs have been ordered against the non-funded party, case ÖÄ 13682-21.
[902] Stockholm tingsrätt, T 15045-09.
[903] See Mühlenbock pp. 131-134, and Foerster and Skog pp. 152-154.

reference to the wording of the Section 18:8[904]of the Code of Judicial Procedure ("CJP")[905] most commentators agree that the premium cannot be included in adverse costs.[906]

(b) Liability for adverse costs

- The discussion on liability for adverse costs is dealt with below, *Section 2.3*.

(c) Security for costs in arbitration

- Please see below, *Section 2.3*, regarding security for costs in court litigation in Sweden.
- Regarding security for costs in the context of arbitration seated in Sweden, it has been discussed in the doctrine whether the existence of TPLF for a party in the arbitration should have any impact. The commentors seem to agree, with reference to international development and sources, that the existence of TPLF is not in itself a ground for granting security for costs, but TPLF and particular terms of a LFA can be relevant facts in the assessment of relevant circumstances, such as a party's alleged impunity or inability to cover adverse cost.[907]
- For institutional arbitration in Sweden, under the auspices of the SCC, its rules include since 2017 provisions on security for costs, which can be awarded in exceptional circumstances.[908] However, a practice note of the SCC that reviews the decisions on security for costs in arbitrations from 2017 to 2022 does not evidence that TPLF has been a central factor in any case.[909]

(d) Conflicts of interest and disclosure

- The discussion on conflict of interest and disclosure is dealt with below, *Section 2.5*.

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

There has been no debate so far at a political level.

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[904] According to Section 18:8 litigation costs shall "…cover the costs of preparation for trial and presentation of the action including fees for representation and counsel, to the extent that the costs were reasonably incurred to safeguard the party's interest."

[905] The Code of Judicial Procedure (Swe: Rättegångsbalk (1942:740)) can be found here in Swedish: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/rattegangsbalk-1942740_sfs-1942-740/. An unofficial translation is also available in English but this does not include potential subsequent amendments, see: https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf.

[906] See Mühlenbock p. 134, Bellander p. 269, and Skog and Persson p. 175-176. Compare, Foerster and Skog, p. 153, who argue that in international arbitration seated in Sweden under the SCC institutional rules, a broader definition of recoverable costs may be applied that could in very rare cases be held to encompass the premium.

[907] Söderlund pp. 962-963, Foerster and Skog pp. 154-155 and Gustafsson pp. 147-150.

[908] Rule 38. According to Rule 38(2), in determining whether to order security for costs, the arbitral tribunal shall have regard to: (i) the prospects of success of the claims, counterclaims and defences; (ii) the claimant's or counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award; (iii) whether it is appropriate in all the circumstances of the case to order one party to provide security; and (iv) any other relevant circumstances.

[909] See: https://sccarbitrationinstitute.se/sites/default/files/2024-04/practice-note-security-for-costs.pdf.

There is a doctrinal discussion mainly among legal practitioners on certain practical legal issues related to TPLF particularly in the context of arbitration (see *Section 1.5*).

Limited debate regarding TPLF and mass claims

There has also been a limited and short debate regarding TPLF and mass claims. Briefly presented below are some of the arguments presented by the two sides in the debate. Please read the original sources for a full understanding of their positions.

- One short debate article has been published in the magazine of the Swedish Bar Association, by two attorneys that have represented defendant parties in the funded mass claims cases pending in Swedish courts regarding shareholder rights.[910] This debate article can be characterised as a critique against TPLF in mass claims. Amongst others, the authors are critical against funders identifying potential legal wrongs and then finding relevant claimants via advertising or social media, which they call aggressive methods. Thus, the authors compare TFPL to so called "ambulance chasing" and allege that a funder can become the "interested party" rather than a mere provider of financing. The authors suggest that some kind of guidelines, e.g. a code of conduct, for funders would be useful. Finally, the authors raise the context of return on investment for the funders being of contingency-fee nature, i.e. a percentage of the potential win, which is forbidden for members of the Bar Association in Sweden. They suggest that the remuneration should potentially be capped and that requirements should be put on the funder's ability to bear the costs of the litigation.
- Representatives of the funders of the relevant mass claims cases, Kapatens, have responded to the debate article in their own article, published on the legal online daily news site, Dagens Juridik[911]. In their article, they refute that funders are ambulance chasing. Notably, they refute that funders would be exploiting the distress and vulnerable situation of the claimants. They note that claimants in mass claim often have so called "rational apathy" towards bringing a claim. Further, they argue that the role of funders in approaching such claimants in a commercial context is from a broad perspective in the interest of both the individuals as well as society at large. They argue that professional funders only invest in well-grounded claims and refer to the official report of the Inquiry that preceded the Swedish implementation of the RAD-Directive, which does not predict an increase in unwarranted claims. They note that the report therefore proposed an explicit acceptance of TPLF for consumer claims in Sweden when implementing the RAD. On the issue of renumeration, they argue that from a litigant's perspective a variation in models for litigation cost can be positive and provide different incentives. In the funding-model, the litigant is relieved of both cost and risk, in exchange for a share of the outcome.

It should be emphasised that this is a very limited debate amongst actors that both have an interest in the matter at hand.[912] It should also be noted that this limited debate concerns mass claims and would not appear to be directed against funding of individual claims, e.g. in commercial arbitration.

[910] S. Brocker and O. Flygt, "Ambulance chasing, class actions and third party funding – en hälsosam cocktail?", *Advokaten* 7/2022.

[911] J. Skog and G. Leijonhufvud, "En grundkurs i tvistefinansiering – debatt", *Dagens Juridik* 28.10.2022.

[912] The enactment of the Group Proceedings Act garnered widespread debate in Sweden, see e.g. P. H. Lindblom, "Group litigation in Scandinavia", *ERA Forum* (2009) 12. From an outside perspective, the positions seem to partly mirror the positions and concerns represented in that debate.

Overall, other commentators have noted that it rather seems as if there has been a shift in the perception of practitioners towards TPLF, from fairly negative to more positive over the past years.[913] (See further below comments of practitioners interviewed for this report, *Section 4*).

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

There are no rules on the admissibility of and conditions for using TPLF in civil litigation (including arbitration), in general in Sweden. The starting point is therefore that TPLF is allowed, which has also been explicitly confirmed by the legislator.[914]

However, there are limited rules that apply to particular types of cases:

- RAD: In the Swedish Implementing Act for the RAD ("RAD-Act",[915] there are specific but short provisions on the use TPLF in consumer collective actions for redress that fall under the scope of RAD:
    - If TPLF is used for funding a group action, the qualified entity may set, as condition for the consumers joining the action, that a share of the consumer's proceeds in the case shall be paid to the funder. This specific condition set for the funding shall be communicated to the consumers in the notification on initiation of proceedings that is mandated in group actions, Section 23 RAD-Act.
    - A funder is not allowed to unduly influence the procedural decisions of the qualified entity in a manner that would be detrimental to the collective interests of the consumers, according to Section 24 RAD-Act. The funder shall not be a competitor to the defendant, or a party on which the funder is dependant, according to Section 24 RAD-Act.
    - If there is reason to suspect that the funding arrangement is in breach of Section 24 RAD-Act, the court may order the qualified entity to provide information on the funding. The qualified entity will lose its standing in the case if the funding is found to be in breach of the mentioned provision and the qualified entity does not undertake changes mandated by the court. However, that standing will not be lost if the court deems that it is appropriate to proceed with the action, considering the interests of the group members and the defendant, according to Section 25 RAD-Act.

[913] Sidklev and Persson 2019 p. 198.

[914] Prop. 2022/23:136, p. 95, available here in Swedish: https://www.regeringen.se/rattsliga-dokument/proposition/2023/07/prop.-202223136. See also SOU 2022:42, p. 170 and 187.

[915] Lag (2023:730) om grupptalan till skydd för konsumenters kollektiva intressen, available here in Swedish: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-2023730-om-grupptalan-till-skydd-for_sfs-2023-730/.

- It may be useful here to provide some additional information from the Inquiry,[916] that preceded the RAD-Act. Specifically, the report[917] of the Inquiry:
    - The report of the Inquiry confirms that TPLF is unregulated in Sweden and must as a starting point be seen as permitted for all types of civil and commercial cases.
    - In addition, the report confirms that as a starting point no limitations exist in the contractual freedom of parties to an LFA.
    - Therefore, there is nothing in Swedish law that hinders a provision in the LFA that the group members contribute to the funding by relinquishing part of their substantive proceeds upon winning to the funder.
    - The fact that such an explicit provision was proposed in the report to the RAD-Act is not intended to change the contractual freedom that exists, rather it aims to facilitate and clarify the entry into such a contract between the parties and the information that needs to be provided to the consumers that choose to opt-in to an action.
    - The issue of whether a limit should be put on the share of proceeds paid to the TPLF funder was discussed in the report, and explicitly refuted. The report notes that as a starting point contractual freedom prevails and there is no need to further protect the group members. Particularly because the qualified entity is required to act in the interest of the group members and under the GPA, the claimant side will be represented by counsel who is an attorney/member of the Bar Association.
    - Further, according to the report, the risk that TPLF would lead to an increase in unfounded litigation, should not be exaggerated. It is noted that there is a considerable risk for the funder to fund a group action (with no return in case of loss). Therefore, commercial actors that provide funding will carefully assess the merits of a potential action.
    - Finally, the rules in the RAD and RAD-Act on conflicts of interest will provide sufficient protection against any form of negative impact from the TPLF funder. Otherwise, the premise should be that the qualified entity can make the decisions that it considers best for the group members and that the proposed rules as a whole provide sufficient protection for consumers. However, the report concludes by noting that TPLF should be carefully monitored in the group-action setting.
- GPA: The GPA applies to all types of civil claims, i.e. including but not limited to consumer claims. To be admissible as a group claim under the GPA, certain prerequisites in Section 8

[916] Before the Swedish government prepares a legislative proposal, it can order an Inquiry to report on issues relevant to the potential future legislation. A rapporteur, secretary and experts are assigned by the relevant department of government to prepare the report or assist the with the Inquiry. The Inquiry is independent and prepares an official report for the government with specific proposals. The report can provide useful information on the relevant legal issues underlying a subsequent legislative proposal by the government.

In the case of implementation of RAD, an Inquiry was conducted and its official report is SOU 2022:42, *Skydd för konsumenters kollektiva intressen – genomförande av EU:s grupptalandirektiv*, available here: https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2022/07/SOU-202242/. A brief summary is also provided in English in the report, pp. 21-26.

[917] SOU 2022:42 pp. 187-189.

GPA must be fulfilled. If a case is admitted as a group claim, certain special rules apply to funding and costs, specifically with respect to funding by the attorney:

- The attorney representing the claimant party may conclude a risk-agreement regarding his/her fees. However, the risk-agreement must be approved by the court, according to Section 38 GPA.
- A risk agreement may only be approved if it is reasonable having regard to the nature of the dispute. The agreement must indicate how the fees will deviate from normal fees. The agreement may *not* be approved if the fees are based *solely* on the value of the subject of dispute, according to Section 39 GPA.
    - Thus, a contingency fee type of arrangement, where the fee of the attorney is based on a share of the value in dispute, is not allowed. Rather, an arrangement that could be called conditional fees is envisaged, e.g. a higher hourly rate upon success.[918]
    - Therefore, the possible lawyer-funding under the GPA does not appear to fulfil the definition of TPLF in this project/report.
- Section 41: When considering which litigation costs are indemnifiable as adverse-costs, regard shall not be taken to such additional costs that have arisen owing to a risk agreement. Thus, in case of a win, the additional cost of the risk agreement must be carried by the claimant itself. However, each group member is liable to cover his/her share of this cost, though not more that he/she won in the proceedings, Section 34 GPA.

2.2 Regulatory oversight of funders/funding industry

There is no specific regulatory oversight of funders or the TPLF industry in Sweden.

However, under the Currency Exchange and Other Financial Services Act ("OFFA")[919], so called other financial services are considered financial institutions that must register their operations with the Swedish Financial Market Regulator (Swe: Finansinspektionen) (FI).

- FI only conducts supervision of compliance with anti-money laundering regulations of such institutions. FI also conducts an ownership and management assessment in conjunction with the registration application (and annually thereafter). Changes in management or ownership should be reported to FI.[920]
- In the context of breach of anti-money laundering rules, FI may order the institution to correct its breach or, if a systematic breach takes place, order the cessation of operation of the institution, according to OFFA Section 13. There are also rules on personal and corporate sanctions against the entity and its board members and CEO, according to OFFA Sections 14-23.

[918] Lindblom p. 16.
[919] The Currency Exchange and Other Financial Services Act (Swe: Lag (1996:1006) om valutaväxling och annan finansiell verksamhet) available here: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-19961006-om-valutavaxling-och-annan_sfs-1996-1006/.
[920] See: https://www.fi.se/en/payments/apply-for-authorisation/currency-traders-or-other-financial-operations/.

One of the local funders has confirmed in the context of its interview for this project that it is registered with FI under OFFA.

To the extent that the operations of a funder would be considered to fulfil the prerequisites for other regulated action on the financial market, other rules and regulation may apply to them.[921] However, there is so far no information that TPLF funders on the Swedish market would be under any other form of financial market regulation.[922]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

There are no general rules in the CJP regarding financial adequacy of litigating parties, including those that are externally funded. In addition, the only rules regarding security for costs concern foreign parties, thus significantly excluding certain EEA entities and other persons based on the international commitments of Sweden.[923]

- The Swedish Supreme Court has confirmed that as a general principle any party that has a civil claim has a right to access to court. In addition, any limitation to that access must be enacted in law and must customarily be interpreted restrictively. The Swedish Supreme Court specifically refers to Article 6.1 ECHR and to case law of the ECtHR.[924] This is a case where a foreign party had assigned its claim to a person resident in Sweden and thereby in practice avoided a duty to provide security for costs. The Supreme Cout found that there was no duty to provide security in such a situation. However, the Supreme Court also made a number of further statements that are useful for this report.
- The Supreme Court namely goes on to confirm that there is no general requirement in Swedish law that a claimant party is able to cover adverse costs. Referring to its own prior case law, the Supreme Court further notes that the legislator has not enacted any specific rules for corporate entities in liquidation. In addition, without specific legislative support, no such requirement can be put on a bankruptcy estate which lacks funds.[925]
- Furthermore, the Supreme Court notes that no requirement of being able to cover adverse costs is present for a party that acts in its own name on behalf of another party, under a so-called procedural (or debt-collection) commission arrangement. However, in cases of procedural commission, the original claim holder is liable for adverse costs if the commissioner cannot cover the costs, and a separate claim must be brought against the original claim holder to enforce that liability. [926]
- In another case, the Supreme Court has dealt with the issue of assignment of claims to a limited liability company that is a claims vehicle/SPV, i.e. a company that has as its sole

[921] See the website of FI: https://www.fi.se/en/ for information financial market regulation in Sweden.
[922] See further analysis regarding the potential legal classification of TPLF in Skog and Persson pp. 133-144.
[923] Act on the Obligation of Foreign Claimants to Provide Security for Litigation Costs (Swe: Lag (1980:340) om skyldighet för utländsk kärande att ställa säkerhet för rättegångskostnader).
[924] NJA 2016 s. 587, para 9.
[925] Ibid. para 10. See cases NJA 2000 s. 144 and NJA 2006 s. 420. For an analysis of the older case law see Sundqvist and Löwander. See also Lindskog. See further Bellander p. 373, as well as Sidklev and Perssson (2019) pp. 197-198, regarding the responsibility of the bankruptcy estate, its trustee and the bankruptcy creditors.
[926] NJA 2016 s. 587, para 11.

purpose the pursuing of a claim.[927] The shareholders of a company are, according to the main rule, not responsible for the debts of the company, but there are limited exceptions in legislation and case law for piercing the corporate veil.[928] The question before the Supreme Court was whether the shareholders of an SPV could be held for liable adverse costs. The Supreme Court held that the shareholder could be held liable because, since the sole purpose of the SVP was the litigation, the capital in the SPV only covered own litigation costs not adverse costs, and there was no evidence to suggest that the company had a plan to cover adverse costs. Thus, the Supreme Court concluded that the SVP was solely a front for the owners to pursue the litigation without any economic risk of adverse costs, i.e. to evade the rules regarding litigation costs in the CJP and to disrupt the cost risk balance that these rules are intended to create.[929]

The relevance of the above-mentioned case law for TPLF funders has been discussed quite extensively in the doctrine.[930] In particular, whether a funder can be held liable for adverse costs even if this has not been agreed in the LFA.

- If a funder uses a model with the formal transfer of claims to a SVP, the case law entails that the owners of the SPV may under specific circumstances also be held liable for adverse costs. However, so far, most cases funded on the Swedish market would appear not to be based on such an assignment model and do not involve a SPV.
- The majority of the commentators agree that it is difficult to apply the case law directly or by analogy to TPLF funders in the case of *direct* funding. Mühlenbock argues that the "real interested party", i.e. the funder, should in certain circumstances be held liable.[931] In addition, Bellander, in a broader analysis based also on case law on tort liability, raises the possibility that funders could under certain circumstances be held liable under general principles of corporate or tort law in cases of "undue behaviour".[932]
- However, a further precedent that specifically deals with and elaborates upon the potential liability for adverse costs specifically for TPLF funders is needed to address the issue. At present there is no clear and direct support in case law for such liability.

Under the GPA, a requirement that the claimant has *financial capacity* to bring the action is one of the formal criteria for a case to be able to proceed as a group action, according to GPA Section 8(5). Thus, there is a financial adequacy requirement on (i) an individual or (ii) an organization that brings a group action and is the formal claimant in the action (the group members that opt-in to the action are not formally parties to the action).

- Thus, it is the claimant that has to have financial capacity. However, whether or not the claimant has external funding, including TPLF, can be one of the factors that the court considers in its assessment.[933]

[927] NJA 2014 s. 877.
[928] Ibid. para 6-8.
[929] Ibid. para 12-14.
[930] See Mühlenbock pp.136-142, Foerster and Skog pp.153-155, Sidklev and Persson (2019) pp. 197-198, Skog and Persson pp. 176-181 and Bellander pp. 373-378.
[931] Mühlenbock pp.136-142.
[932] Bellander pp. 373-378.
[933] Ibid. pp. 253-254. See also P. H. Lindblom , *Grupptalan i Sverige* (Norstedts Juridik 2009) pp. 450-459.

- It is unclear to what extent the court in its assessment of financial capacity must consider not only costs to *bring* an action, i.e. to cover ones own costs, but also to cover adverse costs.[934]

- Should the claimant ultimately win the case, but the counterparty not be able to cover adverse costs (i.e. the claimant's cost), each group members is liable to cover his/her share of this cost, though not more that he/she won in the proceedings, according to Section 34 GPA.
- Should the claimant ultimately lose, and not be able to cover adverse costs, the group members have no general statutory obligation to step-in.
- There are no rules with regard a TFLP funder and adverse cost. Therefore, there is at present no legislative obligation or clear case law in supporting that the funder should have an obligation to step in and cover adverse costs. However, the discussion above for general civil litigation under the CJP rules is also relevant for group actions, and there may potentially in the future be clarification in the case law.

Under the RAD-Act, there are rules requiring the *solvency* of a qualified entity, Section 4 RAD-Act. In addition, a qualified entity must make public how it is funded, according to Section 4 RAD-Act. It is unclear what the word funding precisely means in this context, whether the funding of the day-to-day operations of the entity also includes information on how cases are funded. However, it is notable that the threshold to be accepted as a qualified entity appears fairly low, merely to be solvent, and this does not appear to relate to any specific litigation.

- In a specific litigation, the action will fall under the GPA, but the qualified entity is exempt from the requirement of financial adequacy, according to GPA 8(5), see analysis immediately above.
- Regarding liability for adverse costs, there is no specific rule in the RAD-Act to cover this issue. Therefore, see above analysis regarding the GPA.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

Since there are limited legislative provisions specifically on TPLF in Sweden, all legal frameworks that are relevant to TPLF can be held to be "non-TPLF" frameworks.

- As elaborated above and below, *procedural laws* that can be relevant for TPLF includes the CJP, the GPA and the RAD-Act.
- As elaborated above, *regulatory laws* regarding *financial markets* can be relevant for TPLF.
- As elaborated below, *professional regulation* of the Bar Association is relevant with respect to the limits of lawyer funding in Sweden.

[934] Ibid. Lindblom argues that adverse costs should not be taken into account or perhaps only in cases of "abuse", Bellander notes that in practice there may have been instances where it has been at least mentioned as a relevant factor.

- As elaborated below, *self-regulation* or *soft-law standards* in the in the field of *arbitration* and institutional arbitration can be relevant for TPLF.

As noted above, under Swedish law TPLF is allowed as a main rule and TPLF is mainly perceived to be a matter of contract. The main rules relevant to a specific TPLF relationship between a funder and the funded party will be *contract law*, as their relationship is considered a contractual one regulated in the specific LFA.

- The provisions of the LFA will govern the relationship between the parties. General contract law principles and rules will apply to the interpretation and application of that contract.
- So far funding on the Swedish market TPLF appears to occur in civil and commercial cases between commercial actors. In commercial contractual relationships between parties of equal strength, the main rule is naturally that contractual provisions are binding and that freedom of contract is respected.
    - However, as an ultimate and rarely used exception under Section 36 of the Contracts Act[935], a court is empowered to modify or set aside contracts or individual contractual terms to avoid unreasonable contract effects.[936]

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

The question is broadly formulated, and the issues differ depending on which specific actors are in focus or the type of procedure (court litigation or arbitration).

Members of the Bar Association and other counsel

Members of the Swedish Bar Association, i.e. attorneys, have fiduciary duties to their clients and are bound by rules of the Bar Association, including the Code of Conduct, breach of which can lead to disciplinary sanctions.[937] The Code of Conduct includes provisions on a duty to avoid conflict of interest.[938]

- Funders often engage external counsel to perform case assessments, i.e. are themselves clients of attorneys.
    - Commentators have discussed how to interpret the rules in the Code of Conduct in various related scenarios. For example, a situation where an attorney has an assignment for a funder to perform a case assessment and in parallel has a client seeking funding in an unrelated dispute. In another example, the attorney has an assignment for a funder to perform a case assessment and after completing the assignment considers whether or not he/she can represent either party in the same dispute. Despite certain differences in the interpretation of the rules, the

[935] The Contracts Act (Swe: Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område).
[936] T. Håstad, "Modification Due to Unreasonableness in Nordic Commercial Contract Law (Sweden)" *European Review of Private Law* (2020) pp. 577–584.
[937] For an English version of the Code of Conduct see: https://www.advokatsamfundet.com/globalassets/advokatsamfundet_eng/code-of-professional-conduct-swedish-bar-association-2024.pdf
[938] Code of Conduct, e.g. Rule 3.2.

commentators agree that there may arise a conflict of interest in such cases that ultimately may entail that attorney must decline an assignment.[939]

- However, when an attorney represents a funded party that has entered into a LFA, the commentators note that, on the Swedish market, no ancillary agreement is entered into between the funder and the attorney in order to avoid conflict of interest for the attorney. Thus, the commentators note that it is the funded party itself that often has a duty of information to the funder and will instruct its attorney to provide information to the funder accordingly.[940]

Another issue that is dealt with in the Code of Conduct of the Bar Association is contingency-fee arrangements:

- As already noted above, contingency-fees, i.e. a fee arrangement where the counsel representing a party is entitled to a share of the outcome in dispute, is specifically dealt with in legislation concerning group actions, in the GPA, *Section 2.1*.
- However, the professional rules of the Code Conduct apply to all mandates of an attorney, and prohibit contingency-fees, expect for in exceptional cases.[941] According to the Bar Association's own commentary on the Code of Conduct, specific reasons for allowing such an agreement are for example when an attorney acts is in a collective action or is engaged in a cross-border mandate, or when a client without such an agreement finds it difficult to get access to justice.[942]
- According to the Code of Conduct, *other* risk agreements, e.g. conditional-fee arrangements, which entail that that the attorney takes another type of financial risk in the outcome of a case, must not result in the attorney's interest in the matter becoming disproportional or otherwise having an adverse effect on his/her completion of the mandate.[943]
- It is stated in the commentary to the Code of Conduct that risk agreements have traditionally been deemed inappropriate because they may violate the main rule that fees should be reasonable and because they disrupt the principle that an attorney should not have a direct financial interest in a client's case. In all circumstances, the rule prohibits a fee agreement where the attorney takes such a financial risk in the outcome of a matter that he/she may find it beneficial to act or omit to act in a manner that would jeopardize the best interest of the client.[944]
- The rules in the Code of Conduct, as well as the practice of the Bar Association's Disciplinary Committee, show that contingency-fees will only be allowed in exception cases. Other

[939] Skog and Persson pp. 141-143, see also Falkman pp. 219-221.
[940] Skog and Persson p. 144.
[941] Code of Conduct, Rule 4.2.1.
[942] Commentary, pp. 34-35. The Code of Conduct with Commentary is available here in English: https://www.advokatsamfundet.com/globalassets/advokatsamfundet_eng/code-of-professional-conduct-swedish-bar-association-2024.pdf.
[943] Code of Conduct, Rule 4.2.2.
[944] Commentary p. 35.

types of risk-agreements can be allowed in limited cases.[945] Therefore, TPLF lawyer-funding by members of Bar Association will not occur or develop into a practice.

It should be noted though that in Sweden it is not mandatory to have legal counsel: a party may choose to have no counsel and be a so-called litigant-in-person at any court level in a civil case.[946] In addition, counsel that represents a party in court does not have to be an attorney (i.e. does not have to be a member of the Swedish Bar Association), but has to be considered suitable to be a representative in the eyes of the court.[947]

- There is, thus, no Bar Association monopoly in Sweden and only lawyers that work for law firms registered with the Bar Association and the only lawyers that can become members of the Bar Association, i.e. attorneys, and hold the professional title. A member of the Bar that moves to another legal occupation and works for another type of employer, must relinquish his/her professional title.
- All other lawyers, e.g. lawyers working in-house in corporations, lawyers working for accountancy firms or lawyers working for law firms not registered with the Bar Association, can thus also represent parties in court as counsel. However, these other lawyers are not bound by the Code of Conduct of the Bar Association, or any other form of professional regulation.
- Such other lawyers are free to enter fees arrangements of a contingency type, i.e. have freedom of contract, as long as this arrangement is not in breach of consumer rules on unfair contract terms or of general principes of contract law, see *Section 2.4*.
- Therefore, TPLF lawyer-funding can occur in Sweden. However, there is no public information available regarding whether and to what extent it occurs.
- One known example of such alternative fee arrangements are the complaints companies that in Sweden counsel and assist claimants in civil proceedings regarding compensation for flight delay and flight cancellation. (These cases would constitute micro-claims in the terminology of this project.)

Transparency and disclosure

In court litigation in Sweden there are no rules regarding transparency/disclosure of potential funding of the parties to the action.

- In the context of the RAD-Act and the GPA some provisions entail, or can potentially entail, that a funding arrangement or the identity of the funder is known or becomes public, see *Section 2.1* above. However, the scope of these provisions is limited to consumer cases and group actions.
- In *general,* civil litigation is outside the scope of the above-mentioned rules. It is not uncommon that third parties, e.g. insurance companies or trade unions, are involved in a case "behind" the litigating party. Such actors can provide strategic advice to a party or fund a party. There are no rules that require disclosure or transparency of such involvement or of funding by means of TPLF.

[945] See: https://www.advokatsamfundet.se/disciplinnamnden/. For an analysis of the practice see e.g. Skog and Persoon pp. 157-161 and Falkman. See further Bellander.
[946] CJP, Section 12:1.
[947] CJP, Section 12:2.

In arbitration seated in Sweden, there are couple of sources that can contribute to the disclosure of the identity of the funder for the purpose of avoiding conflict of interest.

- Disclosure in arbitration is important to avoid one of the members of the arbitral tribunal from having a conflict of interest, which can constitute grounds for an annulment of an arbitral award.
- Under the IBA Guidelines on Conflicts of Interest in International Arbitration, a commercial TPLF-funder will be equated with the party itself for conflict-of-interest purposes, and a party has a duty of disclosure of such circumstances.[948] These Guidelines are not binding on the parties in a specific arbitration (unless they specifically agree so). However, they can be held to reflect best practice in international arbitration, and they can be used as a source to reflect such practice. The Swedish Supreme Court has, concerning conflicts of interest, referred to the IBA Guidelines as one potentially relevant source of support for what constitutes a conflict of interest.[949]
- In institutional arbitration seated in Sweden under the auspices of the SCC, the SCC Policy on disclosure of third parties with an interest in the outcome in dispute will be relevant.[950] According the Policy each party is encouraged to disclose the identity of any third party with a significant interest in the outcome of the dispute, including TPLF funders.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

There are no general obligations of funders and beneficiaries towards courts, public administration and adverse parties.

The funded party as a litigant can as any other litigant be sanctioned with a fine under certain circumstance for bringing, appealing or delaying an action, Sections 9:1-3 CJP. In addition, a litigating party may under certain circumstances bear a personal liability for litigation costs due to procedural inaction of carelessness, Section 18:6 CJP.

2.7 Obligations of funders towards beneficiaries and vice-versa

The obligation of funders towards the funded party and vice-versa is not regulated in legislation, aside from what is set out above in the RAD-Act and the GPA. As noted above, the rights and obligations of the funder and the funded party are seen as a matter of contract, and customarily set out in the LFA.

2.8 Distribution of awards and bearing adverse costs in lost cases

The distribution of awards is not regulated in legislation, but in the LFA. As noted below, LFAs customarily include a waterfall clause, giving priority to the funder.

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[948] Standard 6(b) and 7(a). The latest version of the Guidelines is available here: https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024.
[949] NJA 2007 s. 841.
[950] See: https://sccarbitrationinstitute.se/sites/default/files/2023-05/scc_policy_disclosure_third_parties_2023.pdf.

Regarding adverse costs, see analysis above under *Section 2.3*. In Sweden the discussion on third party secondary liability for adverse costs has been connected to the issue of the capital adequacy. As concluded above, there is no case law that confirms such a liability in general for TPLF funders, albeit there is case law that is relevant if a SPV-model is used.

2.9 Planned legislation

There is no planned legislation in Sweden.

2.10 Please assess the degree of compatibility of TPLF regulation in your Member State with the measures proposed in the EP resolution

Measure (Art.)	*Compatibility with the TPLF regulation in your Member State*
Authorisation system (Art. 4) and conditions for authorization (Art. 5)	Not a specific authorization system. Only general reporting and limited supervision system under OFFA (see *Section 2.2*).
Capital adequacy (Art.6)	No requirement of capital adequacy of a potential funder. Limited requirements on litigating parties for collective actions (see *Section 2.3* above.)
Fiduciary duty (Art.7)	No.
Powers of supervisory authorities (Art.8)	Only limited supervisory powers of FI under OFFA (see *Section 2.2*).
Investigations and complaints (Art.9)	No.
Coordination between supervisory authorities (Art.10)	Coordination possible under OFFA (see *Section 2.2*), with other Member State authorities or ECB if mandated under EU Law.
Content of third-party funding agreements (Art.12)	No. In Sweden this is considered a matter of contractual freedom.
Transparency requirements and avoidance of conflicts of interest (Art.13)	No. (i) Except in consumer cases see RAD-Act, *Section 2.1* above. (ii) See also self-regulation in arbitration, *Section 2.5* above.

Invalid agreements and clauses (Art.14)	No. See though general rules of contract law, *Section 2.4*.
Termination of third-party funding agreements (Art.15)	No. In Sweden this is considered a matter of contractual freedom. (Note though general rules and principles of contract law, *Section 2.4*.)
Disclosure of the third-party funding agreement (Art.16)	No with respect to court litigation. However, an exception for lawyer funding under the GPA, and potentially for consumer cases under the RAD-Act see *Section 2.1* above. Note also the status in arbitration, where it is common that the identity of the funder is disclosed, *Section 2.5* above.
Review of third-party funding agreements by courts or administrative authorities (Art.17)	No. Limited exceptions in group actions and consumer cases under GPA and RAD-Act (see *Sections 2.1* and *2.3* above).
Responsibility for adverse costs (Art.18)	No. See analysis above, *Section 2.3*.
Sanctions (Art.19)	Sanctions possible under OFFA (see *Section 2.2*)

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Regarding the average number of cases funded, the information provided in the interviews leads to an estimate of 20-30 cases being funded per year, as well as an estimate of 25-50% cases being arbitration cases. (Notably some cases might also be ancillary to arbitration, e.g. challenge or enforcement cases.)

Based on the interviews, no typical cases stand out. Funding seems to have been provided in a broad spectrum of cases. Most interviewees note that cases have been of a civil and commercial nature. In addition, financial services, business/enterprise, intellectual property, insolvency and competition/antitrust were selected to denote the cases.

Some further examples of cases were provided that included: shareholder rights, redemption of minority shareholders, post M&A, construction, termination of agency, termination of commercial lease, auditor liability, negligent financial advice, patent infringement and bankruptcy.

b. Minimum claim value in absolute terms (in million Euro)

It should be noted that some of the interviewees did not provide an answer. Some also noted on a general level that the values could be different levels for local funders and international funders funding international arbitrations in Sweden.*

Minimum claim value is between 1 and 4 million.

c. Typical claim value in absolute terms (in million Euro)

See above general comment 3(b).*

Typical claim value is between 5-14 million.

d. Typical ratio between investment by the funder and claim value

Typical ratio is 1:10 (sometimes up to 1:15).

e. Typical size of the investment by the litigation funder (in million Euro)

See above general comment 3(b).*

Typical size of the investment is <1 million.

f. Origin of funding provided by the litigation funder

No specific information available, a general perception is that Swedish family offices are local investors.

g. Share of compensation awarded typically demanded by litigation funders

Typically, the share is between 20-30%.

Most interviewees noted that the share is often not a fixed percentage, but rather based on a variable scale (often called "multiple").

Many interviewees noted that the share can progressively depend on factors such as time and other particular risk factors. In particular, the size of the investment, the legal risk and risk related to the counterparty were mentioned as factors that can have an impact on the share.

h. Other conditions of the litigation funding agreement

A solvent counterparty and representation by a top-tier lawyer have been mentioned as important.

Also mentioned by several interviewees is that the funded party will often have a broad duty of information in the LFA, i.e. keeping the funder informed of case developments. (Sometimes this entails that the funded party will via a PoA give the funder access to the case file on the SCC digital platform.) Some interviewees stressed that this is the duty solely of the funded party and does not involve its attorney.

It has also been noted by interviewees that there is often a so-called waterfall clause.

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Yes, funders have an acceptable threshold for probability of success, but it is not always explicit.

Based on the interviews, it is always over 50%, but more likely between 60-70%.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Very limited answers, therefore no general information.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The answers to this question varied and were in general not very specific. Notably, in some cases the dispute was settled with no clear win-loss information. However, some interviewees noted the number of "wins" in funded cases, ranging from 67% to 88%.

Limited information on effective gains showing 2-30% for funders.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

Interviewees have answered both yes and no to this question, which provides a mixed picture. Notably, it is unclear if interviewees have answered from a litigation or arbitration perspective (or both). It is also unclear if interviewees have focused on disclosure of the identity of the funder or disclosure of the terms of the LFA.

However, some clarification has been provided in the open answers. In particular, in the context of arbitration most interviewees note that disclosure of the identity of the funder is common (which is also the recommendation in SCC arbitrations, see above *Section 2.5*. However, generally no further disclosure of the terms of the LFA, unless the issue has arisen in the context of the issue of security for costs. In such a scenario, multiple interviewees have confirmed that certain redacted terms have been disclosed.

Some interviewees also mention court litigation and the fact that there is in general no duty of disclosure. However, sometimes voluntary disclosure is strategically relevant.

(None on the interviewees mentioned consumer disputes under the RAD-Act, in this context for which there are rules that may lead to disclosure, or the GPA, see above under *Section 2.1*).

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

X Choice of lawyer

X Consent for settlement

X Consent for appeal

☐ Consent for expert evidence

☐ Agreement on strategy

☐ Other

Many of the interviewees stressed that there is very limited and specific control based on the LFA. The main rule seems to be that the funder remains passive.

In relation to choice of lawyer, many interviewees noted that the issue is rather one of indirect control, because the factor that a top-tier lawyer or law-firm is engaged for the claimant impacts the funding decision (see above *Section 3.h*).

In relation to settlement, the terms of the LFA may vary. Nevertheless, many interviewees noted that there is often a duty of information of the funded party and that, below a certain threshold, the funder may require the right to consent to settlement.

Outside the terms of formal control, some interviewees noted that strategic input might voluntarily be sought from funders.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

There is no formal/contractual relationship between the funder and the lawyers of the funded party. This is an important point that many of the interviewees, both funders and attorneys, wished to emphasize.

It is notable that both the interviewees and other sources confirm that, in the Swedish funding market, funders would not require and counsel would not accept that any contractual relationship is established between the two.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes, most of the interviewees confirmed that a LFA will customarily include a right to withdraw under very limited circumstances. Most interviewees referred to a material breach of the LFA or a fundamental change in the circumstances as grounds for possible withdrawal.

One funder noted that of course the main rule is that funding is provided until the end of the case, which is a contractual commitment. However, in limited circumstances a contractual right of termination is necessary, e.g. when it emerges that the funded party no longer owns the claim or when the counterparty in the litigation becomes bankrupt. (If such circumstances arise the funder is in practice not able to recover its investment.)

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Some of the interviewees confirmed that this is the case. One counsel who had been involved in seeking funding on behalf of a client noted that funding was denied for reasons of conflict of interest.

One of the funders confirmed a detailed system for avoiding conflicts of interest and noted that this applies as self-regulation to members of the European Litigation Funders Association (ELFA).

Anther funder was critical of the term and the unspecified nature of "conflict of interest", and noted that if you see funders as investors, they arguably do not have conflicts of interest of their own, but rather a normal contractual duty of loyalty to the funded party.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

Most interviewees confirmed that adverse costs are covered, but that the liability is limited, i.e. capped to a certain amount.

However, some of the interviewees noted that adverse costs are always discussed when entering into an LFA but that ultimately such cover is a matter of negotiation. In particular, the funders noted that to cover adverse costs increases the price of the funding and some funded parties do not want such costs to be covered.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

No, most interviewees confirmed that such a requirement does not feature in LFAs.

However, some interviewees mentioned that ATE solutions might be discussed with the funder and that also the funders can enter into ATE solutions.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

No, funding agreements are not in general public and LFAs are customarily negotiated on an individual basis.

However, one of the funders was prepared to share a template agreement in the context of this project.

In addition, a funder on the Swedish market that funds mass claims provides the terms of the assignment of claims on its webpage for each open action.[951]

[951] See e.g. https://esign.simplesign.io/online/382819/Kapatens

4. Stakeholder views on TPLF in your jurisdiction

In general, the non-funder stakeholders who were interviewed did not have specific or detailed views on the EP resolution. However, the majority of the non-funder stakeholders had observed positive effects of TPLF on the Swedish market, mainly as a means of providing better access to justice for commercial parties that could not fund litigation/arbitration. It should also be noted that many stakeholders noted that for corporate/commercial entities, i.e. the type of entities that funding in Sweden is focused on, no other methods of providing external financial litigation support are available. Further, the alternative methods mentioned in the questionnaire, e.g. public funding (legal aid), philanthropic funding or ADR/ODR/ombudsmen, are not methods that are available to such parties in Sweden, and it is not foreseen that this will change.

Only one actor had observed negative effects of TPLF in addition to observing positive effects. The specific nature of the negative observations related to the market having been "immature" and parties and funders perhaps not always having had realistic expectations. This comment solely concerns the early developments of the local Swedish market.

Many non-funder stakeholders responded that it is too early for any regulation, that no abuse is prevalent on the Swedish market, and that if any regulation is to be developed, it should first be self-regulation by the relevant actors (soft law/market guidelines). Some of the interviewees noted in this context that the issue or conflicts of interest of arbitral tribunals has been addressed in a practical manner by action taken by the arbitration institutes (i.e. by self-regulation).

Some of the non-funder stakeholders specifically noted that the commercial funding market in Sweden is one where the actors, included the funded parties, are perceived as sophisticated commercial actors, which makes the need for regulation limited.

One of the stakeholders, the SCC, noted that it is important that the arbitration market is understood and dealt with based on its own special commercial features. The funders also echo this sentiment that commercial cases need not be dealt with in the same manner as consumer cases, for which the RAD (and local Swedish RAD-Act) now has rules on TPLF.

The funders provided much more detailed views on the EP resolution, which cannot all be mentioned in detail in this summary. However, before mentioning some specific issues, the overarching perspective of the funders should be noted. First, the funders question whether there is any need for regulation in a business-to-business context. The funders find that a lot of the issues mentioned and the measures in draft directive annexed to the EP resolution are simply not relevant, very invasive in a business-to-business context, and leave no room for normal commercial negotiation. As an example, consider the issue of TPLF cover for adverse costs. In the context of the Swedish market, the funded parties are mostly commercial actors that have access to own legal counsel. As noted above (*Section 3.q*) some funded parties do not need cover for adverse costs and this is a factor that is negotiated and impacts on the price of funding. If such a risk is imposed on funders, as provided for in the draft directive annexed to the EP resolution, this will in practice entail that less cases are funded.

Secondly, the funders noted that many of the measures in the draft directive annexed to the EP resolution would have a negative impact on the availability and cost of funding, i.e. on the development of a funding market. The funders even go as far as noting that the market could be considerably stifled or closed down. In addition to the measure on adverse cost risk, the measure on a capital adequacy requirement, the measure which would prohibit a waterfall-clause, and the measure designed to invalidate clauses that provide beneficiaries below 60%, are among the provisions that could according to funders significantly negatively impact the market. Furthermore,

one of the local funders raises a concern not only about the funding market in Sweden, but also about the commercial arbitration market in the EU. If funding under the draft directive annexed to the EP resolution or any future regulation is considered too limited, some parties may prefer to move the seat of arbitration outside the EU.

Thirdly, the funders consider that the authors of the EP resolution appear to neither understand the market nor grasp market realities for funders. Funders note that they should be understood to be investment companies, best compared to private-equity companies. A rule that would prohibit a waterfall-clause would, according to funders, make funding impossible in the majority of cases. Because, in practice, it is not commercially viable for an investor to invest in a dispute without such a clause. Another example given by funders is the measure prohibiting termination of the LFA. According to funders, it is a considerable failure for a funder to have to terminate a LFA, but under certain limited circumstances this must be possible due to the funder's responsibility to protect the investment of its investors, e.g. if the counterparty becomes insolvent (see above *Section 3.0*). Finally, it should be noted that one of the local funders notes that if any regulation is to be imposed it should rather be an authorization and monitoring system, not a system that invasively impacts on the terms of every single commercial investment contract.

Abbreviations

CJP	The Code of Judicial Procedure (Swe: Rättegångsbalk (1942:740)
EEA	The European Economic Area
FI	The Swedish Financial Market Regulator (Swe: Finansinspektionen)
GPA	The Group Proceedings Act (Swe: Lag (2002: 599) om grupprättegång)
LFA	Litigation funding agreement
OFFA	The Currency Exchange and Other Financial Services Act (Swe: Lag (1996:1006) om valutaväxling och annan finansiell verksamhet)
RAD	Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers [2020] OJ L409/1
RAD-Act	The Swedish Implementing Act for the RAD (Swe: Lag (2023:730) om grupptalan till skydd för konsumenters kollektiva intressen)
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce

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The United Kingdom

Rhonson Salim, BIICL/Aston University

Executive Summary

- TPLF is a feature of litigation and arbitration in UK. TPLF is accepted by the courts in single-party and class actions cases. Collective action cases before the Competition Appeals Tribunal have been largely advanced with the support of TPLF.
- There is no existing legislation on TPLF specifically. The current regulation of TPLF is achieved via a combination of self-regulation and judicial oversight in cases. There is ongoing discussion whether regulatory reform is required. In R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors [2023] UKSC 28 ('PACCAR'), the Supreme Court held that litigation funding agreements which gave a funder a percentage of any damages recovered are "claims management services" and were covered by requirements of the regulations applicable to damage based agreements.
- In the regulatory debate, issues such as: caps on funder's fees, disclosure, adverse costs, conflicts of interest, under compensation of claimants have been raised by various stakeholders.
- TPLF agreements (LFAs) are not per se champertous.
- There is varying court practice as to the acceptable amount of the return to the funder.
- Adverse costs coverage is a typical feature of LFAs. The general costs rule in is 'loser pays'. ATE insurance is frequently used address costs concerns.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

In England[952], there is no specific legislation on TPLF.

In *R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28 ('PACCAR'), the Supreme Court held that litigation funding agreements (LFAs) which gave a funder a percentage of any damages recovered are "claims management services" and were covered by requirements of the DBA[953] Regulations 2013 (Regulations). The relevant sections of the Regulations stipulate several requirements for DBAs, including the circumstances for payment of the representative's fees and costs, and the reasons for setting the payment amount. Additionally, a key element of the Regulations is the limitation of the recoverable fees allowed under DBAs. The application of the Regulations to LFAs made many LFAs unenforceable, forcing funders to renegotiate their agreements with the funded party.

Post-PACCAR, the funder's success fee in most re-negotiated LFAs is calculated on a multiple-of-costs basis. In March 2024, the Conservative government proposed[954] a retroactive amendment to section 58AA of the *Courts and Legal Services Act 1990*. This amendment sought to exclude LFAs from the requirements of the Regulations. The Litigation Funding Bill was not included in the "wash-up" period before the UK Parliament was dissolved ahead of the general election on 4th July 2024. The Labour government has indicated that it will wait for the review on TPLF currently being undertaken by the Civil Justice Council (CJC) to conclude before taking action.[955]

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Yes. It is relied upon in collective competition claims as well as in the use of the GLO and Representative Action procedures (CPR r. 19.21-19.26 and CPR r.19.8 respectively). TPLF is also used in arbitrations, insolvency disputes, IP and family law disputes.

[952] The scope of this report is limited to the jurisdictional limits of England and Wales. The law and legislation stated in this report is current up to 1st September 2024.

[953] Damages-Based Agreements

[954] Via the *Litigation Funding Agreements (Enforceability) Bill*

[955] Lord Ponsonby, Written Answer to Parliamentary Question (1 August 2024), '… The Government is keen to ensure access to justice in large-scale and expensive cases, whilst also setting up adequate safeguards to protect claimants from unfair terms. The Civil Justice Council is considering these questions and others in its review of third-party litigation funding, and hopes to report in summer 2025. The Government will take a more comprehensive view of any legislation to address issues in the round once that review is concluded.' Available at: https://questionsstatements.parliament.uk/written-questions/detail/2024-07-29/hl449.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The June 2022 edition of Litigation Funding Magazine listed 19 funders, of whom 10[956] are members of the Association of Litigation Funders ('ALF'). However, the currently listed funder members of ALF is as follows:

- *Asertis Ltd*: Asertis will consider investments of £500,000 and above, with a minimum claim size of £4 million.
- *Augusta Ventures LLP*: 265 Augusta was established in 2013 and has offices in London, Sydney and Toronto. It has provided over £585 million of capital to fund consumer and commercial disputes in a range of jurisdictions.
- *Benchwalk Advisors*
- *Balance Legal Capital*: Balance provides funding for both litigation and arbitration as well as class actions. Its minimum claim value is £10 million.
- *Burford Capital*: Burford has approximately US$5.1 billion committed to the legal market. It was founded in 2009 and its shares are traded on the London Stock Exchange and New York Stock Exchange.
- *Calunius Capital LLP*: Calunius operates through an investment fund structure, with Calunius Capital LLP providing investment management services to the Calunius funds based in Guernsey. Calunius ceased investing in new cases in 2018.
- *Deminor Litigation Funding*
- *Erso Capital*
- *Harbour Litigation Funding Ltd*: Harbour generally requires a minimum claim value of £10 million.[957]
- *Innsworth Advisors Ltd (formerly known as Bentham Europe)*: Innsworth funds shareholder litigation and anti-trust claims on behalf of large groups of claimants, as well as commercial litigation and arbitration claims in excess of US$100 million.
- *Omni Bridgeway*: Omni is a combination of multiple businesses including IMF Bentham which acquired Omni Bridgeway in November 2019.
- *Orchard Global Capital Group*
- *Redress Solutions Plc*: Founded in 2009, Redress is a privately-owned company based in London. Redress will fund single or group action commercial claims with a minimum claim value of US$1 million.
- *Therium Capital Management Ltd*: Therium has funded claims valued at over US$36 billion. There does not seem to be a minimum case value for funding by the funder. However, in individual cases, Therium will normally invest £15 million or more.[958]

[956] The authors of Class Action in England and Wales (2nd Edition) noted that there are three funder members of ALF that are not listed in the Litigation Funding Magazine.
[957] See https://www.harbourlitigationfunding.com/working-with-us/what-we-look-for/ . Particularly question 3.
[958] Class Actions in England and Wales 2nd Edition (Sweet and Maxwell 2022), para. 8-806

- *Vannin Capital PCCC*
- *Woodsford Litigation Funding Ltd*: Linked to Woodsford Consulting, a business consultancy which acts as the family office of a wealthy European family. The minimum claim value is £4 million.
- *Winward Litigation* Finance

At present, the ALF has 6 'associate members'.[959]

Other funders listed in the Magazine include: *Acasta Europe Ltd; Apex Litigation Finance Ltd; Claims Funding Europe Ltd; Commercial Litigation Funding Ltd; Managed Legal Solutions Ltd; Manolete Partners Plc; Quanta Capital Holdings Ltd* and *Temple Funding Ltd*.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

In 2020, the value of claims and cash held by the top UK litigation funders was approximately £2 billion, a doubling of the amount from the past three years.[960] In 2023, estimates of the market range from £1.5 billion to £4.5 billion.[961] Overall, a growth trend can be observed with predictions of growth at a compound annual growth rate of 8.7 per cent– from £2.2 billion in 2023 to £3.7 billion by 2028.[962] However, actualised growth rate will depend on the socio-economic and legal environment that funders operate in. A funder has expressed the view that raising finance against the current environment is more challenging compared to previous years as the increase in interest rates means that investors are able to achieve target levels of return on their capital in alternative, lower risk investments.[963]

Furthermore, a distinction needs to be drawn between the size of the market versus the amount capital effectively deployed. One view is that the amounts effectively deployed is a fraction of the sums estimated of market size.[964]

In the period of 2019 - 2024[965], TPLF has supported 34 cases before the Competition Appeals Tribunal (CAT), 13 claims before the High Court (10 GLO and 3 Representative Action), 15 claims before the High Court and specialist tribunals (non GLO cases, e.g. family law, insolvency, tax), 5 arbitral appeal cases before the HC.[966]

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[959] See: Membership Directory | Association of Litigation Funders

[960] The Lawyer, "UK litigation funding market hits £2bn milestone", 27 April 2021.

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[962] Strategy & UK Legal Services Market Report 2022, PwC UK, https://www.pwc.co.uk/industries/assets/uk-legal-services-market-report-2022.pdf.

[963] N 10

[964] Ibid citing PWC, https://omnibridgeway.com/docs/default-source/insights/regulation/class-action-centre/litigation-funding---final-pwc-report---march-2020.pdf?sfvrsn=6f7cc6ec_7; Grand View Research, https://www.grandviewresearch.com/press-release/legal-services-market; Research & Markets, https://www.researchandmarkets.com/reports/5234755/global-litigation-investment-funding-market.

[965] Up to 1st September 2024

[966] See Appendix B of *A Review Of Litigation Funding In England And Wales A Legal Literature And Empirical Study* by Professor Rachel Mulheron, A Report for submission to the Legal Services Board, 28TH March 20204. The Report will be referenced hereinafter as 'LSB Report.' See also:

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

Yes.

Litigants agreeing to LFAs without adequate information and advice

A concern arises that a funded party may hold a position of vulnerability vis a vis the funder and will not enter into TPLF arrangements on a properly informed and advised basis. This can be acute in the collective actions space before the Competition Appeals Tribunal (CAT). In such cases, a class representative or proposed class representative (PCR) may not have a strong inventive to survey the funding market or obtain independent legal advice on the funding package offered by a particular funder. Indeed, data from the Class Representatives Network Survey indicates that "by the time PCRs are involved in making decisions about litigation funding, the solicitors have already completed enquiries with regards to funding arrangements and have selected the arrangement which they believe to be most suitable."[967]

As the CJC has acknowledged, this potential concern may be addressed via a combination of measures: effective regulation, class certification procedures by courts or the CAT in collective actions when the suitability of proposed class representatives is being considered, or through the current Code of Conduct of the Association of Litigation Funders of England & Wales (ALF), which requires its funder members to ensure that they take reasonable steps to ensure access to independent legal advice concerning their proposed TPLF arrangements for those who are considering entering into them.[968]

Under compensation of claimants

Some stakeholders have raised that the use of TPLF, while it may promote access to justice, also results in the under-compensation of funded claimants as the funder's profit is taken from any award of damages.[969]

Recoverability of funder fee from defendant

A funder's fee is covered by the claimant. This position contrasts with the position in arbitration where the funder's fee is recoverable from the defendant in English seated arbitrations[970]. The

https://www.catribunal.org.uk/cases?query=&case_type%5B128%5D=128&case_type%5B223%5D=223&start_year=&end_year= and

[967] R. Gupta, Selecting Litigation Funders and Negotiating Funding Agreements, A report by the Class Representatives Network, pg. 9-11. The report can be accessed here: < https://classrepresentativesnetwork.org/research-and-reports/ > There were 14 responses to the survey, reflecting around a quarter of collective proceedings brought under s.47B Competition Act 2015.

[968] CJC, Review of Litigation Funding Interim Report and Consultation interim report, accessed here: < https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf> pg. 13

[969] Fair Civil Justice, Establishing Fairness in Litigation Funding A British Roadmap to Protect Consumers, SMEs and Other

Parties in Funded Legal Actions, June 2024, accessed here: < https://faircivilj ustice.org/wp-content/uploads/2024/12/1452C_TPLF_4_RGB_Pages.pdf>

[970] See Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd[2016] EWHC 2361 (Comm) where the arbitrator held that he was entitled to use his discretion to order recovery of the litigation funding costs as these were 'other costs' for the purpose of s 59(1)(c) of the Arbitration Act 1996. See also *Tenke Fungurume Mining SA v*

discussion is whether the position in arbitration should be reflected in litigation, and the funder's success fee should be a recoverable cost from the unsuccessful defendant. The discussion in other studies is that the funder's fee should be recoverable, but subject to the discretion of the courts.[971] It is suggested that this entitlement to recover the funder's fee from the defendant will also assist in preventing the adoption of attrition strategies[972] by defendant litigants.

Management of conflict of interests between funded party and funder.

In the competition space, interview data is that the tribunal operates on a working assumption the PCR is in control of the litigation. Some stakeholders have voiced concerns of whether the funder de facto executes a degree of control over the funded party's decision making in the litigation.[973]

Whether Multiples are subject to DBA regulations.

Since the Supreme Court's July 2023 ruling in PACCAR, a funding arrangement where the fee is calculated by reference to a share of damages is classed as a damages-based agreement. As outlined above, DBAs must comply with the Regulations to be enforceable, and are not permitted in opt-out collective proceedings before the CAT. Since PACCAR, funders have largely swapped to a funding model based solely on a multiple of the sum invested, in a bid to avoid their LFAs being classed as a DBA. Given this pivot, the question has arisen as to whether funding that is based on a multiple should still be regarded as being calculated by reference to a share of damages, thus falling under the auspices of the Regulations.

The Court of Appeal has indicated that it will consider the issue by July 2025.[974] Defendant parties in the proceedings argue that because the funders' fee cannot be more than the full amount of the damages, there is a link between the multiple and a share of damages, thus falling under the scope of the DBA Regulations.

Endorsement of TPLF in the courts and in law reform spaces

Litigation funding has received positive endorsement from the English courts. Case law has taken the view that TPLF, provided by a stranger entity in return for a proportion of the proceeds of the funded litigation, did not fall foul of the rules on champerty and maintenance and were enforceable.[975]

A link between TPLF and access to justice has also been drawn. In *Gulf Azov Shipping Co. Ltd. v Idisi*[976], the Court of Appeal took the view that "[p]ublic policy now recognises that it is desirable, in order to facilitate *access to justice*, that third parties should provide assistance designed to ensure

Katanga Contracting Services SAS [2021] EWHC 3301 (Comm). In Tenke, no improper conduct by either party was present. Central to the court's decision was whether the costs were reasonable.

[971] LSB Report pg. 122

[972] See for example, the approach taken by the Post Office in the Alan Bates and Others v Post Office Limited [2019] EWHC 3408 (QB) litigation. The funded party has commented on the deployment of the attrition strategy here: Our Post Office victory is being twisted by those who don't want to see its like again | Alan Bates | The Guardian

[973] Fair Civil Justice, n18, page 14.

[974] Alex Neill v Sony Interactive Entertainment; Apple Inc. & Apple Distribution International Ltd v Kent; Commercial and Interregional Card Claims II Ltd v Visa Inc & ors; Commercial and Interregional Card Claims I Ltd v Mastercard; and Gutmann v Apple Inc & ors.

[975] See House of Lords in Giles v Thompson [1994] 1 A.C. 142; London & Regional (St George's Court) Ltd v MOD [2008] EWHC 526 (TCC) [103] (Coulson J) (citations omitted), and citing from the summary in: Mansell v Robinson [2007] EWHC 101 (QB) (Underhill J).

[976] [2001] EWCA Civ 21

that those who are involved in litigation have the benefit of legal representation."[977] A similar view has also been given in the *Mastercard* litigation. The Court of Appeal (considered with approval in the Supreme Court) took the view that "the power to bring collective proceedings … was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding".[978]

On the other hand, some have questioned this link to access to justice and have expressed wider concerns on TPLF, calling for regulation. [979] The assertions by this campaign have been heavily critiqued, including by funded parties (claimants) themselves.[980]

In law reform, the Civil Justice Council (CJC) first looked favourably at TPLF describing it in 2005 as a 'last resort means of providing access to justice'[981] and then revised this view (in 2007) to state, that '[p]roperly regulated third party funding should be recognised as an acceptable option for mainstream litigation' .[982] In 2024, the CJC renewed its focus on TPLF, directing a new review on TPLF on the following aspects:

- As to whether and how and, if required, by whom, TPLF should be regulated.
- As to whether and, if so, to what extent a funder's return on any TPLF agreement should be subject to a cap;
- How TPF should be best deployed relative to other sources of funding, including but not limited to; legal expenses insurance, and crowd funding;
- As to the role that rules of court, and the court itself, may play in controlling the conduct of litigation supported by TPLF, or similar funding arrangements, including: whether and, if so, what provision needs to be made for the protection of claimants whose litigant is funded via TPF; and, the interaction between pre-action and post-commencement funding of disputes;
- The relationship between TPLF and litigation costs;
- Duties concerning the provision of TPLF, including potential conflicts of interest between funders, legal representatives and funded litigants;
- As to whether funding encourages specific litigation behaviour such as collective action.[983]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

[977] See also Sir Rupert Jackson in Review of Civil Litigation Costs: Final Report (Dec 2009), ch 11, para 1.2, that 'the institution of third party funding was beneficial in that it promoted access to justice.'
[978] Merricks v Mastercard Incorporated & Anor [2019] EWCA Civ 674 (16 April 2019), para. 60
[979] See 1452C_TPLF_4_RGB_Pages.pdf (faircivilljustice.org) . It is this expert's view that some of the concerns expressed in this paper are inadequately supported by evidence in practice.
[980] https://www.theguardian.com/uk-news/article/2024/may/10/alan-bates-calls-for-protection-of-legal-funding-that-helped-bring-horizon-scandal-to-court . See also: Our Post Office victory is being twisted by those who don't want to see its like again | Alan Bates | The Guardian
[981] Improved Access to Justice: Funding Options and Proportionate Costs (2005) 49, and recommendation 13.
[982] The Funding of Litigation: Alternative Funding Structures: A Series of Recommendations to the Lord Chancellor (Jun 2007) 53, and recommendation 3.
[983] See https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/ . The Terms of Reference can be found here: Terms of Reference for CJC Review of Litigation Funding. (judiciary.uk)

Yes. In addition to the points covered in the previous section:

Relationship between recovery of funding costs and low damages

One issue is the question as to how recoveries of funding costs are re-negotiated where the final damages in the claim are too low. This is of concern in instances where the individual damages recovered by a funded party/class member at the end of litigation would be completely exhausted by the funding costs. The CJC is currently looking into the extent to which funders currently exercise any flexibility in their contractual entitlements (e.g. 'haircuts' in the recovery of their fees) where there are lowered than claimed damages recoveries. There is some limited evidence of funders taking 'haircuts' in their recoveries.[984]

Imposition of caps on funders' success fees

Imposition of caps on funder returns has generated debate, with one funder commenting that the idea of a cap "would be a preposterously dumb idea [which] would make the UK extremely unattractive to capital providers - and you have to think long and hard [about that].'[985] One of the reasons for this view is that monies spent on legal costs and disbursements incurred in a claim are elements making up the success fee that the funder receives and can be a large proportion of it. The total costs and disbursements can vary and may be dependent on factors outside of the funder's and/or funded party's control. This can be, for example, delays in the litigation process or costs needed to be incurred due to the use of attrition strategies by defendants.[986] A fixed cap (if inclusive of these costs), may result in the claim being unviable from the start. Some stakeholders have argued that "the control of funder returns is better achieved by the courts applying suitable procedural rules to the specifics of the cases in question, rather than the blunt tool of caps."[987]

Operation of non-party costs orders

Interview feedback from a funder entity is that the ability of the courts to issue non-party cost orders, whereby the funder is made jointly and severally liable for a successful defendant's costs stalks the operation of TPLF. Such a risk filters into a funder's decision making on whether to fund a claim and on the calculations on recoverability. In *Arkin v Borchard Lines Ltd and others*[988], a professional funder who financed part of the costs of litigation was held liable for the other side's costs, to the same extent as it had funded the costs of the losing litigant. However, recent case law[989] has shown that the courts are not wedded to this limit, creating an uncertain risk exposure for funders. Indeed, the courts have taken the view that the imposition of a non-party costs order under section 51 of the SCA 1981 is a matter of discretion, to be exercised based on what is **just** in the circumstances of each case. This means that on an application for a non-party costs order against a commercial funder, the court retains a broad discretion to decide the extent to which the

[984] See Therium's approach to their recovery in the Bates litigation as mentioned in n 29

[985] Law Society Gazette, 'CEO of top litigation funder warns against 'unthoughtful' industry reforms'. https://www.lawgazette.co.uk/news/ceo-of-top-litigation-funder-warns-against-unthoughtful-industry-reforms/5119789.article <accessed 25/5/24>

[986] See the approach taken by lawyers in the Post Office litigation here: https://www.lawgazette.co.uk/news/post-office-live-solicitor-accused-of-being-the-epitome-of-arrogance/5120026.article

[987] See Stewarts, Stewarts' Response To Civil Justice Council's Review Of Litigation Funding Consultation, accessed here: https://www.stewartslaw.com/news/stewarts-responds-to-civil-justice-council-review-of-litigation-funding/

[988] [2005] EWCA Civ 655. See also Excalibur Ventures LLC v Texas Keystone Inc and others [2014] EWHC 3436 (Comm)discussed further below

[989] See cases of Bailey and others v Glaxosmithkline UK Ltd [2017] EWHC 3195 (QB), Davey v Money and others [2019] EWHC 997 (Ch) Sharp and others v Blank and others [2020] EWHC 1870 (Ch) and Chapelgate Credit Opportunity Master Fund Ltd v Money and others [2020] EWCA Civ 246

funder should be liable for adverse costs. This exposure for funders feeds into the viability of funding, as the pricing of funding increases to reflect this risk.[990]

Consequences of PACCAR

Given the pivot to multiples due to the PACCAR decision, there is a high risk that the funded party becomes " more vulnerable to recovering nothing at all under the multiple method if the claim value turns out to be relatively low compared with the costs incurred to pursue it".[991] The additional consequence of PACCAR is that cases are not fully being pursued to the merits as litigation is curtailed as success fees are calculated on multiples. Law firms have commented in other studies that*:*

"if the costs of the litigation increase (and we have found that often to be attributable to unnecessary steps being taken by defendants), and the client is on a multiple-of-costs success fee with its funder, then it gets to a 'tipping point' where, even if the client succeeds (via settlement or judgment), there may not be enough left of the financial recovery sum to actually fix the cladding. This leads to dilemmas such as: whether to settle earlier than we would like; and whether the clients can afford to pay any of the disbursements themselves, to reduce the effect of the multiple."[992]

Funder's views*[993]* on the use of multiples are that the basis:

(a) increases the vulnerability of the funded party to attrition strategies deployed by defendants. [994]

(b) increases funder competition for the strongest cases. This results in strong, but less meritorious, cases being not funded;

(c) reduced/no recoverability of success fee as this fee cannot be met out of the financial benefit recovered, thus fewer cases become fundable, *[995]*

(d) reduced recoverability of success fee decreases funder appetite to support claims.

Multiples commonly used in the industry have increased from the previous norm of c. 3x up to c. 14x in the current funding environment. [996]

Capital Adequacy requirements.

Some funders have taken the view that such requirements "would make it harder for smaller new entrants to enter the market. …. You do have a history of larger players being willing to step in and buy out claims if somebody doesn't have the capital to finance [them]. I don't know that the risk of failure is any higher for a small funder than it is for a large funder. ….'*[997]* However, other entities[998]

[990] Tets Ishikawa, Third party litigation funding and the Arkin risk. In pricing, the "Loss given default" element of the pricing calculation increases.

[991] Rachel Rothwell, 'Time to end the post-PACCAR chaos' (LSG, 8 Dec 2023), available at: https://www.lawgazette.co.uk/commentary-and-opinion/time-to-end-the-post-paccar-chaos/5118125.article). See also LSB report, pg. 100

[992] See empirical feedback 'a Law firms' take on it' , LSB Report, pg. 100

[993] LSB Report and those expressed by funders at panels of the 2024 Brown Rudnick conference, 14 March 2024.

[994] "Under the multiple-of-costs approach, funded clients are very vulnerable to defendant's antics which push up the costs incurred by the funded client – so not only may the client obtain less in their own pockets, but the market effect is that the cost of funding to the client has gone up since Paccar." Comment by funder at Brown Rudnick Conference, 14th March 2024, quoted in LSB Report. See also Alan Bates, n29

[995] See Funder #2613's comments in LSB report, pg. 101

[996] See LSB Report.

[997] See funder feedback in LSB Report, pg. 58

[998] See Fair Civil Justice, n18

view a capital adequacy requirement as a measure to address the risk that a funded party becomes fully liable for a case. The collapse and administration of Affiniti Finance Limited[999], a litigation funder providing financing to law firms and parties directly for financial mis-selling and a range of consumer disputes, has been referenced by some stakeholders in support of arguments for a capital adequacy requirement.[1000]

2. Relevant legislation applicable to TPLF in your jurisdiction

Application of rules of champerty and maintenance.

Historically, arrangements whereby an unconnected third party funded litigation in return for a share of the proceeds would be unenforceable because of the operation of the rules on Champerty and Maintenance. These rules are related, but separate doctrines and are based on the public policy ground that the involvement of interested third parties might "sully the purity of justice".

Mulheron[1001] has defined Maintenance and Champerty as:

Maintenance

"[is] directed against those who, for improper motive, often described as wanton or officious intermeddling, become involved with disputes of others in which the maintainer has no interest whatsoever, and where the assistance he or she renders to the other parties is without justification or excuse[1002]. [It involves] improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.[1003] The maintainer improperly encourages others either to bring actions, or to make defences which they have no right to make."[1004]

Champerty

"[is] maintenance to which there must be added the notion of a division of the spoils.[1005] It is an egregious or aggravated form of maintenance, in which there is the added element that the maintainer stipulates for a share of the proceeds.[1006] [It is] a particularly obnoxious form of maintenance which exists when the maintainer seeks to make a profit out of another person's action."[1007]

The Criminal Law Act 1967 removed the criminal and tortious liability attached to these rules. However, s.14(2) retained some application of the rules in that the statutory abolition does not affect any rule of that law in which a contract is to be treated as contrary to **public policy** or otherwise illegal.

[999] https://www.lawgazette.co.uk/news/major-litigation-funder-goes-into-administration/5110468.article
[1000] See n 37
[1001] Rachel Mulheron, The Modern Doctrines of Champerty and Maintenance, (OUP 2023), pg.3-4
[1002] British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006 (CA) 1015 (Fletcher Moulton LJ)
[1003] *Re Trepca Mines (No 2)* [1963] 1 Ch 199 (CA) 219 (Lord Denning MR).
[1004] Findon v Parker (1843) 11 M&W 675, 682 (Lord Abinger)
[1005] Giles v Thompson [1994] 1 AC 142 (HL) 161
[1006] Wild v Simpson [1919] 2 KB 544 (CA) 562
[1007] Trendtex Trading v Credit Suisse ('Trendtex') [1980] 1 QB 629 (CA) 654 (Lord Denning MR)

As outlined above, the courts take the view that funding agreements, as a matter of principle, does not foul of the rules on champerty and maintenance, and were enforceable.[1008] Whether a funding agreement (e.g. LFA) in practice falls foul of the champerty and maintenance rules will depend upon "a case-by-case basis [and] whether the [LFA] would undermine the purity of justice or corrupt public justice".[1009] The trend in the caselaw is that a funding arrangement must evidence impropriety to amount to Maintenance or Champerty. As briefly discussed below, this could be "wanton or officious" meddling, disproportionate control or profit, or a trend demonstrating corruption of justice (e.g. a motivation to inflate damages).

The ALF's 2018 Code of Conduct[1010] which applies to funders who are part of this association, contains some anti-champerty factors.[1011] The court looks at all aspects of an LFA and compliance with the anti-champerty factors contained in the Code of Conduct does not necessarily lead to the conclusion that an LFA is not champertous. Some of the key factors in the Code are: **independent advice, an absence of conflicts of interest**, and **no improper control**. As to independent advice, the funder must ensure that the litigant "received independent advice on the terms of the LFA" (per clause 9.1) and such advice must be received "prior to the execution" of the LFA. Data in other studies shows that, as a practice, non-ALF members adhere to this Code of Conduct requirement as well. [1012]

This obligation is deemed satisfied '… if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute.'[1013] There is variation of practice in who provides the advice and who pays for this advice.[1014] The independent advice should be provided to the funded party by experienced and reputable advisers, enabling the funded party to make informed decisions, and as a "check and balance" upon the control exercised by the funder.[1015]

With regards to conflicts of interest, the Code provides that funder must not take any steps that would cause, or be likely to cause, the funded party's solicitor or barrister "to act in breach of their professional duties" (clause 9.2). This clause seeks to protect the funded party's legal representative from being placed in position of choosing between the wishes of the funder and the interests of the funded party. However, Mulheron has argued that English courts have shown themselves to be unwilling to overplay the potential for conflict.[1016]

Funders must ensure that it will not "seek to influence the [funded party' legal counsel] to cede control or conduct of the dispute to the Funder" (clause 9.3). The LFA must also state whether (and, if so, how) the funder may input into the claimant's decisions in relation to settlements (clause 11.1). In some LFAs, clauses reinforcing that it is the claimant and/or his lawyer that has independent

[1008] See Giles in n24.
[1009] Rees v Gateley Wareing (a firm) [2014] EWCA Civ 1351
[1010] Available here: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf
[1011] Other relevant champertous rules (but which are not in the Code) include that the third party must not "improperly stir up litigation and strife" or engage in "wanton or officious intermeddling" in another's claim.
[1012] LSB Report pg. 128
[1013] Code of Conduct 2018, Clause 9.1
[1014] LSB Report pg. 126. In relation to GLOs, feedback in the LSB Report shows that the obligation for the advice rests primarily with the lawyers representing each claimant.
[1015] R. (Factortame) Ltd. v Secretary of State for Transport (No. 8) [2002] EWCA Civ 932, cited in LSB Report, pg. 137
[1016] Rachel Mulheron, England's unique approach to the self regulation of third party funding: a critical analysis of recent developments (2014) 73(3) CLJ 570, 582-583. Mulheron cites Giles v Thomspon [1994] 1 AC 142., per Lord Mustil

control proceedings have been favourably viewed as indicators of a funded party's independence.[1017] Further assurance has been derived from the presence of dispute resolution clauses for any disputes between the funder and the funded party to be referred to an independent KC. [1018] Similar to conflicts of interest, Mulheron has argued that the courts are also unwilling to overstate this concern of influence/control by a funder.[1019] Indeed, the courts have held that a funder's selection of the lawyer to advance the claim is insufficient by itself to conclude that the funder inappropriately took control. [1020] Neither does the obligation on the funded party to acquire the consent of the funder to any settlement or compromise create that wrongful control.[1021] Caselaw also shows that the courts will view LFA contractual provisions whereby "control" of the proceedings was stated to remain with the funded party and its lawyers, but that the funder had a right "to be informed of the progress of the proceedings", and where the funded party agreed to conduct the litigation "in accordance with the reasonable advice of its lawyers" as not interfering with the independence of the funded party.[1022]

The avoidance of a high share of the proceeds may be relevant to a determination that an LFA is, or is not, champertous. However, it is not readily apparent as where the boundary for "too high" a success fee lies. In *Factortame (No. 8)*[1023], the court took the view that the greater the share of the spoils that the funder contracts to receive, "the greater the temptation to stray from the path of rectitude".[1024] Ranges of recovery in the caselaw are variable and percentages of between 8%, 25%, 55%[1025], 75% (or less)[1026] of the proceeds can be seen. In the latter case, the return was described as a "handsome share of the proceeds" but was not found to be jeopardise the proper administration of justice.[1027]

Additionally, Mulheron argues that the funder's willingness and ability to meet potential liabilities (including adverse costs) or to pay that party's ATE premium under the LFA may count as a factor that the agreement is not champertous. [1028]

Furthermore, in the competition sector, the CAT takes a proactive scrutiny role in the review of funding arrangements, particularly at the CPO stage. The CAT recognises the potential for conflicts of interest, taking the view that : "the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders."[1029]

[1017] See Gutmann v Apple, Case Number: 1468/7/7/22, Clause 10 and 16 of the Gutmann LFA.
[1018] Ibid
[1019] N65
[1020] Giles v Thomspon [1994] 1 AC 142.
[1021] See Arkin v Borchard Lines Ltd [2005] 2 Lloyd's Rep 187
[1022] Re Valetta Trust (25th November 2011). Available here: https://www.harbourlitigationfunding.com/wp-content/uploads/2015/08/the_valetta_trust_25_nov_11.pdf
[1023] N64
[1024] Ibid, para. 85
[1025] Ibid
[1026] See for example Golden Eye (International) Ltd v Telefonica UK Ltd [2012] EWHC 723 (Ch)
[1027] Ibid, para. 99
[1028] N64, pg. 585
[1029] Gormsen v Meta Platforms Inc and others [2024] CAT 11, para. 35

Insolvency

Funders are able to take assignments of another's cause of action in two scenarios- insolvency and in enforcement. In insolvency cases, a liquidator, administrator or trustee-in-bankruptcy of a company has statutory powers[1030] empowering them to sell causes of action in order to recoup money for the company's creditors and other parties. In such cases, a funder may purchase those causes of action from the liquidator etc.[1031] A judgment in the funded client's favour can validly be the 'thing' assigned because it represents 'the fruits of the litigation'[1032]

Family cases

TPLF is utilised in family disputes, particularly in proceedings relating to the division of property upon separation. The High Court has taken the view that family litigation funded by an adherent to the ALF's Code of Conduct would not present significant risk of corrupting justice.[1033] Assignment has been used in these types of proceedings. In *Akhmedova*[1034], the wife assigned all her rights to the funder. However, under the assignment, she retained full control over the litigation unless she defaulted in making a payment to the funder. The funder was consulted on decisions in the litigation and retained a right to consent on any settlement. The court did not view this arrangement as falling foul of the rules on champerty and maintenance.

A funder's support of family proceedings by way of litigation loan, which is not repayable from assets recovered has also received approval by the Court of Appeal.[1035] Furthermore, in this arrangement, a funder's interests can be taken into consideration in approving a consent order between the parties and funders are afforded a degree of 'right of audience' when decisions on such orders are being made.[1036] Funders are not granted party status, but are able to intervene in the proceedings, particularly where the funder alleges that the debt was incurred solely to enable to funded party to litigate, and that party is now taking steps to conclude a settlement that can/will defeat its ability to recover its loan.[1037] In this context, funders are afforded a very narrow avenue of participation in the proceedings- participation in any finding of fact hearing. The funder is not afforded the benefit of full disclosure, nor the right for it to file questionnaires, or to cross-examine the parties, or to make submissions as to the appropriate settlement for the applicant.[1038]

2.1 Legal admissibility and conditions of using TPLF in civil litigation

[1030] Per: Insolvency Act 1986, s 167(1) (vesting power in the liquidator 'to sell any of the company's property by public auction or private contract'), and s 436 (defining the 'property' which can be sold to include a 'cause of action'). Sch 4 to the Act deals with power of a liquidator in a winding up, and Sch 5 deals with powers of a trustee in bankruptcy. Administrators have the power to assign a company's claim under para 60 of Sch B1 to the Insolvency Act 1986.
[1031] See Manolete Partners plc, of its funding model, available at: https://manolete-partners.com/how-we-work/the-manolete-method. Cases funded via this method are also noted in Appendix B4 of LSB Report.
[1032] Glegg v Bromley [1912] 3 KB 474 (CA). An order of Mr Justice Robin Knowles (dated 30 Jul 2018) in the matter of: Harbour Fund III LP v Kazakhstan Kagazy plc (Matter CL-2018-000446) in which Harbour was given permission to 'take over sole conduct of all negotiations and proceedings in connection with [the judgment obtained against the defendant]'
[1033] Akhmedova v Akhmedov [2020] EWHC 1526 (Fam) at [45].
[1034] Ibid
[1035] Simon v Simon [2023] EWCA Civ 1048
[1036] Ibid
[1037] [2023] EWCA Civ 1048, [106]
[1038] [2023] EWCA Civ 1048, [107].

See rules on champerty and the doctrinal discussion above

2.2 Regulatory oversight of funders/funding industry

There is no consolidated and uniform approach to the oversight of TPLF in England and Wales. Oversight of TPLF is based on a fragmented approach incorporating the combination of:

- self-regulation which is provided by oversight by the Association of Litigation Funders (ALF). The ALF's Code of Conduct[1039], Rules and Articles of Association[1040], and the Complaints Procedure[1041] govern ALF members,
- Judicial scrutiny of funding agreements

Some litigation funders[1042] are regulated by the Financial Conduct Authority. However, this regulatory oversight is imposed insofar as they offer investment services on behalf of investors who contribute to their capital funds. It is not due to the funders' litigation funding activities directly. As funders are not viewed as providing insurance services or products, the oversight by the Financial Conduct Authority or by the Prudential Regulation Authority is not required as would be the case with insurance entities.

In addition to membership of the ALF, several funders are also members of ILFA.[1043] Whilst ILFA is not a self-regulatory or a regulatory body. It is a representative body, which seeks to promote TPLF. Its members commit to best practice principles[1044]. These are:

Clarity – ILFA members should provide services to users in a clear and forthright manner. The terms, expectations and contractual arrangements associated with the financing should be set forth unambiguously and comprehensively. The process of obtaining financing should be transparent.

Respecting duties to the courts – ILFA members should not interfere with the performance of lawyers' duties to the courts and to their clients and respect the proper administration of justice.

Avoid conflicts of interest – ILFA members will maintain effective systems to detect and manage potential conflicts of interest, including conflicts that could affect the enforcement of an award or judgment.

Preserve confidentiality and legal privilege – ILFA members will only receive confidential or privileged information pursuant to an approach which is expected to be respected in the relevant jurisdiction(s) and take all necessary steps to preserve confidentiality and legal privilege in information which they receive.

Capital adequacy - ILFA members should not make investment commitments without having adequate capital available or reasonably projected to be available to meet those commitments.

[1039] See note 29

[1040] Available here: https://associationoflitigationfunders.com/wp-content/uploads/2023/10/ALF-Rules-finalJanuary2023.pdf and https://associationoflitigationfunders.com/wp-content/uploads/2015/02/ALF-Articles-of-Association-final-July-2014.pdf

[1041] Available here: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf

[1042] Balance Legal Capital, Burford Capital, and Harbour Litigation Funding, Inssworh

[1043] These include Therium, Burford, Omni Bridgeway, Winward, Harbour Litigation Funding, Woodsford, Orchard Global

[1044] The principles are available here: https://www.ilfa.com/#best-practice.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements

Given the preeminent role of self-regulation outlined above, supervision in relation to the financing of funders falls within the remit of the ALF as it concerns its members and as contained in the 2018 Code of Conduct for ALF members and reinforced by the ALF Rules of Association. The Code of Conduct imposes two capital adequacy minimum thresholds for each ALF member. Each member is required to 'maintain access to a minimum of £5 million of capital or such other amount as stipulated by the ALF'[1045] and to 'maintain the capacity to cover aggregate financial liabilities under all of its LFAs for a minimum period of 36 months'.[1046] Supplementary obligations in relation to capital adequacy are also imposed on members in the Code. These include obligations on auditing,[1047] continuous disclosure and notification [1048] , access to adequate financial resources to meet the obligations agreed[1049]and maintenance of capacity to pay all debts when they became due and payable.[1050]

An ALF funder also accepts responsibility to the ALF for its entities' non-compliance with the Code including the entity/subsidiary's fulfilment of the capital adequacy requirements.[1051]

Rule 3.15 of the Rules of Association supplement clause 9.4 of the Code of Conduct and is instructive on what is considered in assessing compliance with the capital adequacy requirements as well as the frequency of assessment. Members are required to be 'conservative' as to what is counted as Capital and 'pessimistic' about the timing and level of any expected returns under existing Litigation Funding Agreements.[1052]The maintenance of the capital adequacy is also a continuous obligation.[1053]

Questions have also been raised by the courts concerning the efficacy of the capital adequacy terms of the Code of Conduct and a litigant's reliance on it, by itself, to establish confidence that a funder will cover adverse costs. In *Rowe v Ingenious Holdings Plc,* Nugee J was not. "confident that its [funder's] membership of the ALF, and the obvious pressure which that puts on it to comply with the ALF rules, is sufficient to give one enough confidence that if it were facing a large liability for costs at the end of the day, that the money would be forthcoming.'[1054]

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

In general, the obligation to check the provenance of funds used in litigation is with law firms. Pursuant to the Money Laundering, etc, Regulations 2017 (AML), law firms in England are required

[1045] See clause 9.4.2 of the 2018 Code.
[1046] See clause cl 9.4.1.2.
[1047] See clause 9.4.4
[1048] See clause9.4.3
[1049] See clause 9.4
[1050] See clause 9.4.1.1
[1051] Clause 4. Under the Code, the is required to *maintain access* to the minimum capital threshold (clause 9.4.2)
[1052] Rule 3.15.5
[1053] Rule 3.15.6
[1054] Rowe v Ingenious Holdings Plc (2020), para. 106

to conduct AML checks upon persons from whom they receive money.[1055] This includes funds received from funders. Interview data with law firms indicates that law firms are cognisant of this. In some cases, an enhanced due diligence on the provenance of funds is applied where firms are representing clients with ESG obligations.[1056] At present, specific guidance from the Solicitors' Regulation Authority (SRA) to law firms on law firms' AML responsibilities with respect to funders is absent.

ATE insurers are also the subject of AML requirements in circumstances where a litigation funder has contracted to pay the premium in respect of any ATE policy taken out to cover the risk of an adverse costs order imposed on the funded party. The chair of ALF has, in other studies, confirmed that there has not been any evidence of any funding from illegal or terrorist activities since self-regulation commenced of TPLF in 2011.[1057]

Where a funder is authorized by the Financial Conduct Authority in respect of their investment activities, they are required to create and apply AML procedures in line with the FCA Handbook.[1058] This necessitates that those funders have procedures in place regarding AML, which often includes using an external party to carry out AML checks on sources of capital in the funds which those funders manage.[1059]

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

'Safeguards' for the funded client have been established in case law (see above). As also discussed above, some of these are also covered by the 2018 Code. Please see below and in the doctrinal discussion above for further explanation.

Costs

In the competition space, the CAT has proven alert to costs in TPLF, taking the view that scrutiny at the certification (CPO) stage necessarily involves the Tribunal 'assessing' the reasonableness of the funding costs taking into account all of the circumstances of the case and the available evidence and experience of the Tribunal as to reasonableness.[1060] The CAT examines the nature and adequacy of the funding arrangements, both in terms of meeting the applicants' own costs and their potential liability for the costs of other parties.[1061] Additionally, section 47C of the Competition Act 1998 (CA) introduced provisions concerning the tribunal's discretion on costs in collective proceedings. In *Merricks v Mastercard Incorporated*[1062], the tribunal held that the words 'costs, fees or disbursements' under section 47C did not carry a special meaning or were to be treated as terms of art governed by case law governing the recovery of litigation costs. The tribunal was of the view that

[1055] Regs 8 and 12
[1056] Date from Interview with claimant law firm.
[1057] Pg. 76 of LSB Report.
[1058] FCA Handbook (Release 34, Mar 2024), Ch 3, 'Money laundering and terrorist financing', available at: https://www.handbook.fca.org.uk/handbook/FCG/3/2.pdf
[1059] LSB Report pg.79
[1060] See Gutman v First MTR South Western Trains Ltd & [2024] CAT 32 at [65]; McLaren v MOL (Europe Africa) Limited
[2024] CAT 47 at [56]; Gutmann v Apple Inc. and others [2024] CAT 18
[1061] See for example, In UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and others and DAF Trucks NV and others and Road Haulage Association Limited v MAN SE and others and Daimler AG [2019] CAT 26
[1062] [2017] CAT 16

if a third party (e.g. a funder) agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings.

Disclosure

Generally, Paragraphs 6.3-6.5 of the SRA Solicitors' Code of Conduct address confidentiality and disclosure. The application of these provisions means thar a solicitor must keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents (paragraph 6.3). Tensions with these obligations may arise where a prospective funder wishes to view documentary evidence in order to assess the strength of the claim, particularly in the context of a claimant's application for TPLF. Most funders agree to standard confidentiality agreements or NDAs prior to receiving substantial information. A common interest agreement is also used in practice. In these agreements, the funder agrees that all documents provided by the litigant's solicitor are being disclosed on the basis that they will be held in complete confidence, will not be disclosed to third parties and that a limited waiver of privilege by the litigant applies. A key element in such agreements is that the parties articulate a clear intention to have a common interest in the litigation and as such, common interest privilege will apply.

In relation to disclosure between parties in the litigation, key insights can be derived from the competition proceedings. In these proceedings, the CAT scrutinises a PCR's funding arrangements as part of its assessment of the PCR's CPO application. The CAT Rules 2015 and associated Guide to Proceedings require the CAT to consider the PCR's financial resources and their ability to pay the Proposed Defendant's recoverable costs, if ordered to do so. The CAT has ruled that, other than instances where privilege applies, it is in its discretion to determine whether a document should be treated as confidential, balancing issues of relevance with interests of confidentiality, as identified by the party making the request. As corroborated by the interview data in section 3 below, the CAT has adopted the starting presumption that the terms of LFAs should be transparent and members of the class should be able to scrutinise it.[1063] In collective proceedings under section 47B of the Competition Act 1998, the CAT held that it retained a discretion to refuse disclosure of materials of "strategic sensitivity" .[1064] In *Kent*, the CAT concluded that the amount of the ATE premia and the Solicitors Excess Provision should both remain redacted on the basis that to not do so would confer an unfair tactical advantage on Apple. A similar approach was taken in *Elizabeth Coll v Alphabet Inc and others* [2022] CAT 6.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

Please see disclosure and non-costs orders outlined above.

2.7 Obligations of funders towards beneficiaries and vice-versa

Funders will typically pay the own-side legal fees which the funded client's law firm charges in order to advance the claim. Funders will also pay for the own-side disbursements incurred. These own-

[1063] Gormsen v Meta , n78 at para. 37
[1064] Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd [2021] CAT 37

side costs are the 'bread and butter' of what the LFA will cover.[1065] A funder must also inform the funded client, prior to the execution of the LFA, whether the LFA is being entered into by the funder itself or by one of its subsidiaries or entities.[1066]

2.8 Distribution of awards and bearing adverse costs in lost cases

It remains unclear whether a litigation funder can take part of any of financial benefit that a successful claimant acquires under a CPR r.19.8 claim. As the LSB Report has found: "There is no clear legal authority which would entitle a funder to take a share of that pot, absent the contractual authorisation of each and every class member."[1067]

Under the group litigation order (GLO) regime, each class member must affirmatively signal their wish to the sue the defendant(s), and their individual actions are grouped together as a form of case-managed collective litigation.[1068] As an opt-in procedure, an LFA will need to be entered into between the funder and each member of the class.

In the competition sphere, the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of the proceedings. "This means the Tribunal can, at the end of proceedings, revisit whether it is prepared to endorse the payment of the agreed sums to the Funder. At this stage it may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings and can, if necessary, require further evidence to be presented in relation to the appropriateness of the Funder's fee."[1069]

In *Gutmann*, the CAT took the view that a PCR must be subject to the supervision of the tribunal, including the PCR's decision of what arrangements are appropriate for the funding of the litigation."[1070] The CAT also took the view that in relation to **settlements**, the tribunal has the power to order payment of a funder's fee out of **unclaimed damages**.[1071] The CAT took the view that s. 47C is silent as to whether damages may be paid by the class representative to the funder if a collective proceedings claim is successful.[1072] The tribunal was of the view that there was no impediment to it ordering that a proportion of damages should cover costs which have been paid by the funder in the event there are insufficient unclaimed damages to meet any shortfall. [1073]

In reaching this determination, the CAT noted that in general it should be slow to interfere too heavily with individual funding negotiations. The CAT positively noted the safeguards in the *Gutmann* funding arrangement, such as that class representative has independent control over the conduct of proceedings, and an independent dispute mechanism can address disagreement between him and the litigation funder. The CAT also noted that it will retain a supervisory role and that it can revisit any endorsement of fees at the end of the proceedings. The CAT has taken the

[1065] Nick Rowles-Davies, Third Party Litigation Funding (OUP, 2014) 33.
[1066] Clause 5.2
[1067] LSB report, page 20
[1068] ibid
[1069] Para. 12 of Gutmann v Apple [2024] CAT 18
[1070] See para. 22
[1071] Gutmann, para. 30
[1072] The CAT noted it has the power to order costs under Rule 104 of the Competition Appeal Tribunal Rules 2015, and while this power does not likely extend to ordering payment of fees to litigation funders, Rule 93 and section 47C(6) Competition Act give it the power to order payment from unclaimed damages.
[1073] Gutmann, para. 35

stance that whilst the terms of the funding arrangement allow for a variety of potential circumstances, it does not set up any presumptions that will impact CAT discretion.

In *Le Patourel*, Green LJ (giving the judgment of the court), observed[1074] " ...the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under r 98 of the CAT Rules. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means."

However, the picture where settlements are reached is very nuanced. In *Maritime Car Carriers*[1075] The CAT was of the view that the PCR could not use the damages element of a settlement reached with one defendant to pay its litigation funder prior to distribution to class members or the conclusion of the proceedings against the other non-settling defendants.

Costs, adverse costs, security for costs and non-party costs orders

Funders are not mandated by ALF Code of Conduct or caselaw to cover adverse costs orders or security for costs orders which may be ordered against a funded party. Equally, funders are not mandated to pay a funded party's ATE premium. Indeed, funders have contractual freedom as to which potential financial liabilities they will fund, in return for the success fee set.[1076] However, ALF funder members need to be clear to the funded party as to which liabilities they cover in the LFA. The funder must state in their LFA whether, and to what extent, the funder is liable to the funded client to pay:

- adverse costs to which the funded client may be exposed in the event that the claim fails,
- any ATE premium taken out in order to purchase insurance against those adverse costs,
- any security for costs ordered, or
- any other financial liability to which the funded client may become subject[1077]

There is varying funder practice as to whether, and to what extent, they will cover adverse costs, security for costs, ATE premia, or other financial liabilities which the funded client may incur. There is no standard customary practice across the industry. Some funders cover the risk of adverse costs themselves, whereas other funders make it a condition of their funding that an ATE policy must be taken out by the PCR in order to cover adverse costs and other costs awards that may be awarded against the funded client. Anti-avoidance endorsement[1078] in ATE insurance policies are commonly used as well.[1079] The endorsements provide extra reassurance to funders as to the ATE insurer's ability to meet any security for costs orders. The premium of this endorsement is usually paid for by the funder. Funders tend to prefer such endorsements as they typically cost an upfront premium of between 10-20% of the capital amount that full security of costs would require. These

[1074] [2022] EWCA Civ 593, at para.99
[1075] [2024] CAT 47
[1076] Nick Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014), 121 and App 1
[1077] Clause 10 of the Code of Conduct
[1078] Clauses inserted into the insurance policy that to the effect that insurers will not seek to avoid the policy.
[1079] ATE policies supported by Deeds of Indemnities are also used as an alternative.

endorsements thus reduce the need for the funder to prove access to large pools of capital to cover costs. [1080]

That said, as shown in section 3 below, it is common for defendants to challenge the grant of certification on the basis that the limits of the ATE policy does not give the representative adequate security for costs or provide the defendant with 'sufficient protection'.[1081] Thus ATE insurance coverage (or ATE 'wrap') has gained an increasing level of importance in the discussion of adverse costs coverage, the availability and viability of TPLF and the costs of litigation generally.

CPR r46 and section 51 of the Senior Courts Act 1981 grant the courts an inherent power to make a non-party costs order against a funder. However, challenges arise where non-party costs orders are sought by a defendant against a funder's subsidiary. This may be a concern where capital liquidity of the subsidiary is a concern. However, as discussed above, the ALF Code of Conduct mandates that funders accept responsibility for these entities' non-compliance with the provisions of the Code.[1082] Additionally, the interview data shows that funders are cognisant that they can be made jointly liable in the non-party costs order, enabling the defendant to pursue the funder in the first instance rather than the subsidiary entity, which may be insolvent.

2.9 Planned legislation

See section 1 above.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

In the case of the funder interviewed, c100 cases in total (both litigation and arbitration cases) were undertaken per year, with approximately 30% being arbitration cases. However, one interviewee has commented that there is "massive variation between funders, over time (e.g. depending on where they are at in the life cycle of their fund) and their relationship with the litigant or law firm."

In the period from 2019-2024, 27 cases in CAT, 13 representative claims before the High Court, (10 GLO and 3 Representative Action), 15 before HC and specialist tribunals), 5 arbitral appeal cases before the High Court.[1083]

In England and Wales, TPLF is form of 'non-correlated financial asset'. Given this classification, funders apply a stringent screening criterion to funding applications which are 'pitched' to them. Stakeholder data is that the acceptance rates of pitched cases varies between 3% and 5% of funding opportunities pitched. This is also corroborated in other studies.[1084]

[1080] Nick Ellor, 'Security for costs and ATE insurance: threats and co-operation' (Legal Futures, 9 Dec 2022).LSB report pg. 88
[1081] See for example the Merrick v Mastercard ligation.
[1082] See clause 4
[1083] See Appendix B of the LSB Report.
[1084] See LSB Report.

The funder, defendant law firm and judiciary stakeholders commented that most funded cases are high value and large-scale litigation, often including group or class actions. The average funding commitment is circa £4m but can be as high as £30m or more. Claims are often for £100m+. As evidenced in the data in the preceding paragraphs, the defendant law firm also highlighted an increased funder focus on collective actions in the CAT.

The funder interviewed commented that underwriting criteria is used to determine whether to fund a case. These criteria included an assessment of the legal merits, quantum, budget and economics of the case as well as enforceability of any judgment or award and risks associated with the case generally.[1085] ESG criteria were also used in some investments (whether cases drive SDGs for instance).

b. Minimum claim value in absolute terms (in million Euro)

Ranges of between 5-9 to 10-14 were given by most stakeholders, though a range of 40-50 was stated by defendant law firm stakeholder.

c. Typical claim value in absolute terms (in million Euro)

Stakeholder responses range from 50-99, 100-299 and 300 or more (specifically in competition cases)

d. Typical ratio between investment by the funder and claim value

1:10 – 1:20

For claimant focused respondents, it was acknowledged that the 1:10/1:15 was a ' rule of thumb', which has been historically used. However, this is not an industry hard and fast rule and higher ratios have been seen, particularly in competition cases (confirmed by the judiciary stakeholder). The rationales for this range of ratios seems to be: a) the objective to achieve the most in recoverability whilst also maintaining an alignment of interests between funder and funded party, b) the large litigation budgets inherent in the furtherance of some of the competition cases and c) funders are cognisant of their lack of control, particularly of settlements. The funder interviewee also highlighted the need to avoid creating conditions for improper incentives in the ratios chosen. The funder interviewed commented:

"… Typically funders don't want to go into cases where they think they're going to take more than half of it. Because ***you lose the alignment with the client****. If you're taking all of it, the client then is going to do something unpredictable. They'll either stop taking your calls and ignore you and you know, wash their hands of the litigation, or that they will develop a massive risk appetite and try to go to trial to get a better number. …. So as a funder, when you go into the case, you're trying to work out what you need from it and make sure that there's enough in the case that alignments are maintained."*

"Funders typically have worked on the base of a sort of Capital plus 3x type return,

[1085] For further elaboration of the criteria deployed by some funders in the assessments of applications for funding, please see Woodsford, A Practical Guide to Litigation Funding < https://woodsford.com/wp-content/uploads/2021/01/Woodford-White-Paper-A-Practical-Guide-Lit-Fund-NLogo.pdf>

e. Typical size of the investment by the litigation funder (in million Euro)

Some variation is seen from stakeholder responses - between 2-4 and 5-9. Though one stakeholder has commented that the common range is more like 3-25m Euro. As confirmed by the judiciary stakeholder, the typical size of the investment can be considerably larger. As mentioned above, factors such as the litigation budget and the value of the claims feed into this size of investment.

The funder stakeholder commented that investors are, in the present economic climate, more reluctant to commit funding to large cases given the possible delay in the payout timescales. The defendant focused stakeholder has commented that whilst the size of the investment depends on the nature of the claim, they have observed that the litigation budgets which are being filed in collective actions in the CAT by PCRs are increasingly providing for significant sums.

f. Origin of funding provided by the litigation funder

The origins of funding provided by a litigation funder varies. Interview data shows a mixed picture with sources ranging from corporate investors, family offices, large asset managers, sovereign wealth funds & pension funds. The source and size of funder's liquidity may also be influenced by the economic environment such as Central Bank interest rates. The funder interviewee commented that some funders invest from their balance sheet (and some of the players are listed entities). These funders often combine this with funds managed by the funder. Other funders use a pure fund management model. Terms/restrictions placed by investor(s) providing funds to the funder can exist. However, some funders retain a large discretion where they own the funds or where the investors take a 'hands off' approach, leaving the selection of the investments to the funder. That said, mandate restrictions are possible in some cases- e.g. a funder is to avoid mass tort claims or to avoid claims against entities associated with the investor(s) of the funder.

The judiciary stakeholder commented that courts do not get visibility of the origins of the funds behind the fuds deployed under an LFA, unless this is raised by a party to the proceedings as a matter of concern. The courts' focus instead has been on visibility of the numbers of assets and projected returns in a fund in order to determine the defendant's ability to get recourse. However, it was acknowledged that greater scrutiny of the origins of the funding may eventually transpire in competition claims where those claims come to a conclusion after a merits hearing and distribution is considered in more depth.

g. Share of compensation awarded typically demanded by litigation funders

Post PACCAR, many LFAs have now been renegotiated on the basis of a multiples of the funder's investment and interview data confirm the use of staggered but increasing multiples (see j below) in LFAs.

Prior to PACCAR, the share varied between 20-40%. Though the LSB Report indicated a range of between 10-50% (based on data from 3 funders). [1086] In the LSB Report, none of the respondent

[1086] LSB Report, page 107

funders to that study had charged more than 50% of the financial benefit recovered (or for any part of it on a sliding scale) during the 5-year period since 2019.[1087]

percentages were linked to different aspects of the litigation. Factors considered included the likely duration of the case, claim value, type of case being funded, novelty of points of law, competition in the market, pricing of finance etc. There is a practice of mixing the percentage basis with that of multiples, with the funder getting whichever was higher. In other studies, a funder commented that it typically used a combination of percentage and multiple-of-costs for its success fee, 'to protect against the claimant's absolute control over settling the case'.[1088]

The interview data seems to demonstrate that some funders take a pragmatic approach to their recovery premiums, negotiating reductions to ensure recovery for claimants, especially where the eventual settlement is lower than was originally anticipated and/or the costs proved much higher than budgeted then the funders premium

Some commentators involved in English litigation funding have also advocated for a 50% cap 'to ensure that the primary beneficiary of litigation funding is justice itself, not profit'.[1089] However, funders in other studies have expressed the view that a maximum cap should not apply, but should be determined on a case-by-case basis.[1090] The rationale for this view seems to be the diversity of factors that feed into a funder's decision making process and which can affect pricing. "For funders, pricing is affected by both the risk / reward on that case but also their assumptions about risk across a portfolio as well as their costs of providing funding more generally (funder overhead / management fees etc and their cost of capital). Funders need to make up for capital on lost cases from the winning cases and what may look like a high return on an individual case may be reasonable when considering risk and losses across a portfolio and the need to deliver net returns to investors. Caps are unlikely to take this into account."[1091] As exemplified in the waterfall agreement from *Gutmann v Apple*[1092] below, a funder may typically be entitled to reimbursement of its invested capital/Drawn Down Amount as a priority in the 'waterfall distribution' of the financial recovery.[1093]

On the other hand, the defendant stakeholder was of the view that a cap on fees has merit. The underpinning rationale seems to be the need to protect class members given their position of vulnerability. In the defendant stakeholder's view, as regulation is in place in other consumer areas, consumers should get equal level protection (including via a cap on fees) where TPLF is concerned. However, that stakeholder was against a hard and fast cap for competition claims. This was

[1087] Ibid. This was based on where a percentage-of-recovery method of calculating the success fee had been used.
[1088] LSB Report, p. 106
[1089] Gabriel Olearnik, 'Navigable lights: the future of litigation funding (Partner, Head of Special Situations, LitFin Services, speech published 23 Feb 2024), available at: https://www.linkedin.com/pulse/navigable-lights-future-litigation-funding-gabriel-olearnik-vu1ef?utm_source=share&utm_medium=member_ios&utm_campaign=share_via.
[1090] LSB Report 106-107. One participant funder in that study considered that the only circumstance in which a cap would work would be if the court was permitted a discretion to order that a losing defendant should pay the costs of the funder. Otherwise, 'caps mean that a funder cannot go beyond a certain budget of capital spent, but the problem is that plans change as risk changes, and funders must price that risk prospectively, without fully knowing of those risks at the outset.' (pg. 110)
[1091] Funder feedback, LSB Report, pg. 109
[1092] [2024] CAT 18, para. 18
[1093] Other payments in priority in the waterfall will be any outstanding or deferred fees payable to the law firm; and any adverse or other costs which the ATE insurer has had to pay out during the course of the proceedings. See also the waterfall clause precedent in: Nick Rowles-Davies, Third Party Litigation Funding (OUP, 2014)

premised on defendant stakeholder's confidence in the CAT's fulfilment of its gatekeeper role and its scrutiny of costs.

h. Other conditions of the litigation funding agreement

Funding agreements can include (but not solely) provisions on information sharing, confidentiality, adverse costs, termination and dispute resolution.

Interviewee comments suggest that some of these provisions are based on a desire of a funder to monitor and protect the investment being made whilst also overlaying some protections and cheques and balances for both the funder and the funded party. Funders' rationale for some of these provisions seems to be due to the notion that "that we're providing all the costs and we have an interest in the outcome. We'll take all the downside if it [claim] goes wrong, but we're not in the driving seat. ...We're also not the client."

In relation to the use of dispute resolution clauses, the scope of these clauses seems to be funder specific. The funder interviewed stated that their fund's approach to triggering this clause is in instances of large disagreements with the funded party, not on marginal matters, its "not whether I get to overlay my view over that of the funded party. ... they [funded client] still has a very wide margin over the top."

I. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Based on the interview data, it seems that from the funder's view, it is a fact specific assessment of the circumstances of the case and would include matters discussed earlier- duration, legal merits etc. The law firm interviewee commenting that funders " have very rigorous and multi-faceted risk assessment processes that exceed the levels applied by most law firms at the early stages of a claim." The defendant law firm stakeholder did not know whether litigation funders have an acceptable threshold for probability of success / acceptable level of risk.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

These are highly variable on a case-by-case basis. Stakeholders' views are consistent between each other - in high value complex commercial disputes with good prospects, the typical range of MoC (net) seems to be in the range of 2-3.5x, though multiples of 0.5-4x, 1-14x and 2.5-5x have been given in other studies.[1094] In some cases, the MoC is frequently staged to increase with time and "can start lower or end higher especially for cases with good prospects of early settlement or, conversely, high risks of trial, appeals or enforcement issues extending the duration" (law firm interviewee comment). This is corroborated in the stages seen in the multiples table in the LFA from *Gutmann v Apple T*he LFA contained the following staged approach to multiples of capital:

[1094] LSB Report, pg.113-114

"The **Funder's Return** will be calculated as follows:

If the Court approves the payment to the Class Representative of costs, fees and disbursements other than from Stakeholder Proceeds, the Funder's Return shall be calculated in accordance with Table 1 (**Funder's Return 1**) and the Priorities Waterfall 1 in Schedule 3 shall apply.

Table 1:

If the date of Recovery is:	**Funder's Return is:**
Stage 1: From the date of the Relationship Agreement up until (i) the issuance of the proceedings or (ii) expiry of 6 months (whichever is sooner)	2.05x Committed Capital
Stage 2: From the end of Stage 1 until (i) the first case management conference or (ii) expiry of 6 months (whichever is sooner)	2.55x Committed Capital
Stage 3: From the end of Stage 2 until (i) award of CPO; or (iii) expiry of 6 months (whichever is sooner)	3.05x Committed Capital
Stage 4: From the end of Stage 3 until expiry of 6 months	3.55x Committed Capital
Stage 5: From the end of Stage 4 onwards	3.8x Committed Capital

If the Court does not approve the payment to the Class Representative of costs, fees and disbursements other than from the Stakeholder Proceeds, then the **Funder's Return** shall be calculated in accordance with Table 2 (**Funder's Return 2**) and the Priorities Waterfall 2 in Schedule 3 shall apply.

Table 2:

If the date of Recovery is:	Funder's Return is:
Stage 1: From the date of the Relationship Agreement up until (i) the issuance of the proceedings or (ii) expiry of 6 months (whichever is sooner)	2.15x Committed Capital
Stage 2: From the end of Stage 1 until (i) the first case management conference or (ii) expiry of 6 months (whichever is sooner)	2.65x Committed Capital
Stage 3: From the end of Stage 2 until (i) award of CPO; or (iii) expiry of 6 months (whichever is sooner)	3.15x Committed Capital
Stage 4: From the end of Stage 3 until expiry of 6 months	3.65x Committed Capital
Stage 5: From the end of Stage 4 onwards	3.9x Committed Capital

For Funder's Return 1 and Funder's Return 2, for each £100,000 of Additional Funding that the Funder agrees to provide, the Funder's Return will increase at each stage by 0.03x

From the interview data, the funder interviewed would target IRRs to investors of above 20% IRR and MOCs of 2x in order to justify the risk and illiquidity of litigation funding investments.

One view[1095] is that the higher multiples (e.g. 3x to 4x (and higher) plus time-based staging) in competition opt-out claims, are deployed due to the additional risks to the funders (e.g. achieving certification, length of the proceedings, whether the funders return will be delayed to and contingent on the residual undistributed fund etc).

As demonstrated in the Post Office group litigation, the percentage-of-recovery formula could work out to be more advantageous to the funded party/class than the multiples approach. In the LSB Report, the view was expressed that the "multiple approach particularly suits high-risk cases where the amount recovered may be much less than the amount claimed – for such cases, the success fee 'is tied to the spend', and hence, the amount of spend is the same, whether the risky claim (on the merits) turned out well or not; whereas the percentage method is often more suited to less risky claims, because the claim value may turn out to be high, closer to the amount claimed – and in that

[1095] Claimant law firm interviewee

case, the success 'is tied to the recovery'. As one funder put it, 'the multiple approach protects better against the downside of a low recovery in a risky case because it is tied to the spend'[1096]

In practice, the base in which the multiple is calculated can either be the amount of capital committed to the funded case at the outset or the costs incurred in the funding of the case. It has been noted in literature that "a funder may use a formula whereby the multiple is an aggregate of both the committed capital and the costs incurred (say, the funder's return may be stipulated as 'the aggregate of 0.5x the committed capital and 2.5x the drawn capital'). Such flexibility may be useful to tailor the funder's return-of-investment to the risk profile of the case (say, the anticipated length of the proceedings), and the way (and the timings at which) that the funding will be drawn down."[1097]

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

Outcomes vary. There have been successes, partial successes and total losses

Please see above discussion of ranges shown in the caselaw.

It is worth noting that a funder's success fee includes coverage of disbursements and legal costs, leading to the result that, in some cases, the funder's profit can end up being much lower than the actual success fee. As stated in other studies, "cases which may appear successful on their face can be 'disasters' for funders, because the success fee is 'consumed' by costs. There may be no profit made at all. This may particularly occur if:

- the claim value is significantly less than what was envisaged (according to one funder, its statistics show that, 'on average, the amount of financial benefit recovered in our funded cases was only 30% of the original claim value projected by the law firm,
- the case had a much longer duration than anticipated.
- there are changes to the substantive law underpinning the case that requires further legal opinion, expert evidence, or revisiting of factual evidence; or
- there is a procedural hiccup (such as the Paccar saga) which necessitates interlocutory hearings about preliminary issues which were not anticipated when the success fee was contractually negotiated."[1098]

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

With the exception of the procedures in the CAT for certifying opt-out class actions, and in the context of security for costs, the terms of funding agreements are not usually disclosed to courts. The judiciary stakeholder shared that the courts are attuned to the need for transparency in proceedings, particularly in collective claims before the CAT.[1099] In the CAT, the interview data indicates that the generally accepted practise is that the LFA in its entirety is disclosed to the

[1096] LSB Report, pg. 112
[1097] LSB Report, pg. 113
[1098] LSB, pg. 98
[1099] Corroborated by the CATs approach in Gormsen., n 78

tribunal and parties. Interview comments were that a growing trend is for a similar level of disclosure of priorities agreements.

Confidentiality rings are commonly used for LFAs. However, the extent of disclosure seems to be on a case-by-case basis. Interviewees comments are that, in some cases, redactions have been sought for elements which may be considered to be strategically sensitive. These include, inter alia, a funder's basis of return (whether multiple or percentage), matters that may give an insight into claimant side's assessment of the merits and risk (e.g. variable ATE premia), and information on any compartmentalisation of funding – for e.g. allocated funding for specific stages of litigation (e.g. amount of funding provided for certification proceeding only). What seems to be the case is that most of the exceptions are created because of different funder practices to disclosure – some funders are open to disclosure of something which they are not required to, whereas some funders have a real sensitivity about the same element and insist on non-disclosure.

From a defendant stakeholder perspective, disclosure is seen as important tool to enable the defendant to test information provided by the PCR during the CPO hearing. Interview data was that termination and ATE provisions are some of the LFA provisions that are usually sought to be disclosed by defendants. In relation to ATE provisions, the defendant stakeholder's main concern was whether, and to what extent, the ATE coverage covers adverse costs. In relation to termination provisions, their concern was not with the right to terminate per se but the effect and process of termination. Of concerns were the funder's liability for any adverse costs incurred prior to termination, the defendant being left unaware of any cessation of funding, and the defendant being left with no recourse. The defendant stakeholder was of the view that the approach taken by the CAT and courts is **currently '**balanced' .

Please see further comments on disclosure above.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *Choice of lawyer*
- *Consent for settlement*
- *Consent for appeal*
- *Consent for expert evidence*
- *Agreement on strategy*
- *Other [Text]*

This responses to this question were mixed with differences apparent between the interviewees. All question options were selected by the claimant law firm stakeholder. The basis of their view was that "you can't get away from the fact that it is through the terms of the agreement and the sheer fact that the claimants are relying on the funder for the money- there are ways in which the funders' kind of exert influence, a type of control'. A broad understanding of control was adopted in order to reflect, in their view, the more nuanced and subtle instances of control. A similar perspective was shared by the defendant law firm stakeholder who highlighted that funders can influence strategic decisions.

Interview data seems to show that certain funders have developed a reputation in the market for being interventionist/ 'very pushy'. In the claimant law firm's view, the majority of reputable funders

are appropriately cautious to avoid exerting undue influence on the substantive and procedural decisions. However, on rare occasions, boundaries have been crossed where pressure has been exerted on claimants in relation to settlement.

Other examples of influence/control given by stakeholders included acquisition of funder agreement on change of strategy (e.g. to pursue an unexpected/ urgent interim procedure after disclosure of evidence where such type of proceeding was not anticipated when the LFA was agreed at the beginning of the claim), change of legal team.

However, it was also recognised that some LFA clauses (e.g. consent to change the legal team) are not unreasonable per se, and the way some clauses were implemented in practise has been reasonable. The judiciary stakeholder commented that courts are also attuned to the risk of funder control and do keep a watchful eye for this. This seems is further evidenced by caselaw where courts have requested undertakings from the class representative as to their control over the proceedings.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

The funder interviewee recognises the absence of a contractual relationship between the funder and the law firm. In practice, the claimant law firm stakeholder was of the view that normally the relationship is co-operative but can become strained in the event of unanticipated events and related budget coverage (which are not at all uncommon in complex and high value disputes). As mentioned in the preceeding question, certain funders in the market are known to be more "hands on" than others and this can influence the type of relationship between the funder and the claimant's lawyers.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes.

Section 11.2 of the 2018 Code of Conduct stipulates the grounds in which ALF funders can terminate. This includes:

> the Funder or Funder's Subsidiary or Associated Entity:
>
> > 11.2.1 reasonably ceases **to be satisfied about the merits of the dispute**;
> >
> > 11.2.2 reasonably believes that the dispute is **no longer commercially viable**; or
> >
> > 11.2.3 reasonably believes that there has been **a material breach of the LFA** by the Funded Party.

Whilst the grounds are known, the instances in which these grounds are triggered seems to be nuanced and fact specific. In interview, the funder stakeholder elaborated that 11.2.2. may be considered by funders due to legal and/or commercial factors that arise after funding has been agreed. Termination may be considered in instances such as whether it is going to cost too much money to get the litigation to the end, that the defendant(s) has/have become insolvent during the proceedings, or that it subsequently transpires that an expert report is no longer credible after disclosure or that key witnesses cannot be located.

In case of termination, the provisions on the length of notice in LFAs can vary and there is a desire for greater transparency on notices from law firm stakeholders. From the interview data, the time

frame of 15 business days prior written notice was raised as a practice by some funders. However, in principle, the time frame is not consistent between funders and a concern is that, in some instances, LFAs will specify a very short time frame when the funded party has no fault and the funded party ought to be afforded some reasonable notice period to try and negotiate the best possible exit they can.

However, interviewee data is that, at least in proceedings before the CAT, the notice period of termination and the funding agreement is not determinative of what happens to the action before the tribunal. The tribunal is empowered to grant the representative additional time to seek alternative funding when their current funder has terminated the funding agreement.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Yes, funders undertake conflict checks before funding. Use of NDAs to check conflicts of interests between funders and potential parties in the litigation is an avenue. Additionally, solicitors have a professional obligation to their client (not the funder) to avoid acting whether there is a conflict of interest. Therefore, it's a solicitor's job to ensure that the terms of an LFA are carefully scrutinised to protect their client (if acting for the funded party).

Additionally, the ALF Code of Conduct requires that funders do not to take any steps that cause or are likely to cause the funded party's solicitor to act in breach of their professional duties – one of these duties is to avoid conflicts of interest (subject to certain exceptions).

The judiciary stakeholder commented that a PCR in collective proceedings before the CAT is expected to be proactive in the management of their relationship between the funder and themselves, and to seek tribunal guidance should a conflict of interest issue arises.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

Yes, the practice as to the acceptance of liability varies according to the funder. In some cases, the funder may require the claimant to take out ATE insurance to provide these costs. The funder may or may not cover the premia.

In cases where the LFA contains specific provisions on adverse costs, funders will usually stipulate the scope of this coverage. Items such as defendant's cost, fees and disbursements, as well as the cost of any other party action are sometimes covered. Applicable VAT that the class representative or the funder is properly liable to pay the defendant by agreement or order is also an item of coverage.

Interviewee data demonstrates that the CAT proactively looks for ATE policies as part of the CPO proceeding and it ensures that these are endorsed to enable defendant to directly recover from it.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Yes.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Yes.

4. Stakeholder views on TPLF in your jurisdiction

Positive and Negative effects of TPLF

All stakeholders flagged positive and negative effects of TPLF in England, with the majority of interviewees taking the view that TPLF has filled an essential funding gap in facilitating access to justice. Other themes of commonality include filtering and professionalism between the stakeholders. However, there seems to be some doubt by the funder stakeholder as to the existence (and level) of the deterrence effect of TPLF on companies that serve consumer markets (due to the increased likelihood of mass claims).

On the value of TPLF, the claimant law firm view was that TPLF:-

- Provides equality of representation notably in "David v Goliath" claims;
- Enables some corporate or institutional claimants to pursue claims without exposing themselves to litigation costs risks. For some corporates this may be important as they need to apply their limited resources to forward looking development of their business rather than litigation to attempt to recover past losses. For some institutional claimants, notably pension funds, there may be scheme rules or protocols that prevent them from exposing the pension fund to litigation costs.
- Creates a deterrence effect which can also apply between corporates, to discourage bad corporate behaviour (e.g. in relation to patent/copywrite infringements, or price fixing).

A common negative shared by both funder and claimant law firm stakeholders is the reduction of compensation to claimants. However, the law firm stakeholder took a pragmatic approach to the reduction of compensation to claimants. In particular, the firm was of the view that the courts play a role in opt-out and representative actions (where the claimants will not usually have been involved in negotiating the TPLF terms) to ensure that the scale of TPF deductions from compensation strikes an appropriate balance of risk/reward to the funders and fairness to the claimants. The reduction in compensation was seen as an inevitable consequence of the nature of TPLF. "A funder cannot be expected to provide funding without adequate recompense. Non-recourse litigation funding is risky and so inherently expensive and it is was acknowledged that the funders are savvy financial institutions who are aiming to make a profit for their investors/shareholders. In the law firm's view, the best protections against this becoming excessive is for funded litigants to seek specialist legal advice before entering into LFA."

A particular concern for the defendant stakeholder was the funding of frivolous claims with the aim of reaching an extorted settlement, or other forms of abuse. In their view, the theories of harm being

deployed in some competition cases are uncertain and there are doubts as to what the level of damage is in those cases. However, other stakeholders have taken the view that the combined operation of a specialist regime such as the CAT (where the tribunal has a gatekeeper function), coupled with the procedural option of the defendant to make strike out applications does provide protection against the risk of frivolous claims.

The duration of proceedings was raised as a concern by the judiciary stakeholder, with the observation being that there is room for claimants/representative to be more proactive in furthering the case expeditiously through the litigation process and thereby reduce costs.

On Regulation

Overall, the notion of regulation was viewed positively (to varying extents) by both the claimant and defendant law firm stakeholders. The claimant law firm stakeholder was of the view that light touch regulation/control measures would be appropriate but **should not** include caps as they are likely to restrict access to justice. In this stakeholder's view," Any regulation would need to distinguish between the very differing levels of protection appropriate for consumers and corporates." Key issues identified by this stakeholder were:-

a. Transparency over the identity of the funder and their main investors/UBOs

b. Financial due diligence / capital adequacy

c. Variation and termination rights/consequences to ensure they do not unduly infringe access to justice

d. Incentivise ADR and reduce the adverse impact of defendants to funded claims intentionally driving up the claimants funding costs (eg by refusing to mediate, accept reasonable offers to settle or other aggressive litigation conduct) by giving the courts power to order the defendants to pay some of the additional costs of funding in limited circumstances.

In this stakeholder's view, aspects of potential regulation would best be incorporated in court rules, as is already in place under the CAT Rules. Additionally, this stakeholder was of the view that regulation of lawyers at a national level also plays an important role and to some extent, can be used to reduce the scope of regulation. In this stakeholder's view, lawyers should be required to advise their clients on the full range of funding/retainer options that might be in the client's best interests for the claim in question. They should also inform their client about their right to take independent legal advice on the proposed funding and/or retainer. However, they did not favour compulsory independent legal advice as that adds costs and delay.

The defendant stakeholder viewed regulation as an inevitable occurrence given the size of the industry and the rate of change since Lord Justice Jackson's review. In this stakeholder's view, cases are now being brought by claimants who are represented by funders who are not part of ALF and who are not subjected to code of conduct requirements (e.g. capital adequacy), thus regulation is needed in this area. Regulatory rules on capital adequacy and on a fiduciary duty being imposed between funder and class were also viewed positively by this stakeholder. The latter being viewed as a reasonably important consumer protection element.

Despite this appetite for regulation amongst some 2 interviewees, the funder stakeholder questioned the need for regulation given a) the existing gatekeeper role being exercised by the courts and b) "there is no evidence of problems due to any lack of regulation in the UK. The ALF

Code is influential in shaping funding models, even amongst funders that are not members of the ALF, and there have been no valid complaints made to the ALF nor public scandals associated with funding. The Courts also have powers to intervene in the event of any abusive conduct and clients are all represented by lawyers who provide a check and balance on funders."

On Extrajudicial Processes:

Nether the funder or claimant law firm viewed these processes as effective. In the latter's view, the experience if that these processes are not well resourced to address complex, high value disputes. The defendant stakeholder held a more neutral view. Whilst it recognised that competing demands means redress via a regulator would be appropriate, their experience of some alternative processes, such as ombuds, is that they can be suboptimal. In particular, questions relating to whether the defendant's view/concerns are properly heard/ not properly adjudicated in these processes arise. This was seen in processes where the determining test of a dispute is of a vague norm/standard and not specified legal tests.

The judiciary stakeholder recognised that there may be some merit in utilising extrajudicial processes, particularly when the question to be answered is a straightforward quantum of damages and when there has been a regulatory decision on liability. However, it was recognised that some cases (e.g. in overcharge cases), an extra-judicial process may not be the most efficient given the technical expertise required to resolve the claim. Indeed, an adversarial process was seen as benefit in these cases, as different expert conclusions can be extensively tested. This stakeholder also saw merit in having a class representative be a public entity, that is adequately funded, rather than a private one. However, it was recognised that the current trend of high litigation budgets in collective claims may mean that a public entity, who is poorly funded, is unlikely to be able to act as a representative.

Legislation

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Switzerland

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Executive Summary

- There is no existing specific legislation on TPLF in Switzerland.
- TPLF is generally permitted. The sector is very diverse and several funders (of different size and impact) operate across various areas of the law.
- The Swiss Federal Supreme Court ruled that TPLF is allowed if a funder acts independently of the claimant lawyer. The Court confirmed the lawyer's professional duty to inform claimants about the possibility of litigation funding if the circumstances require it. The court also set out a framework regarding conflict of interests.
- No major issues in practice have been reported from Switzerland.
- From 2025, the Swiss Code of Civil Procedure (CPC) will include a duty to inform the public as to the possibilities of legal aid and TPLF.
- No suggestion of a comprehensive regulation has been made by stakeholders, with the exception of rules on capital adequacy requirements.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

As of 2024, there is no existing legislation on TPLF in Switzerland. No act of self-regulation was reported,[1100] and no general model agreement exists, either.[1101] However, TPLF has been the subject of limited instances of case law. In 2004, the Swiss Federal Supreme Court held that TPLF is fundamentally allowed as long as the funder acts independently of the claimant lawyer.[1102] The ruling was confirmed in 2015, when the Court also held that it is the lawyer's professional duty to inform claimants about the possibility of litigation funding if the circumstances require it.[1103]

In 2025, the Swiss Code of Civil Procedure (CPC) will be amended to include a duty for the Federal Council (FC) to inform the public as to the possibilities of legal aid and TPLF.[1104] The introduction of collective redress mechanisms in Swiss civil procedure is currently under discussion before the Swiss Parliament, and no draft has been finalized to this date.

In the context of arbitration, Art. 6(4) of the Swiss Rules of International Arbitration allows TPLF if authorized by the tribunal. The wording of the rule is reported to be deliberately vague[1105], so it is not excluded that funding may occur covertly and without the need for the tribunal's permission.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Authors report around 50 cases per year in total in Switzerland, mostly in the fields of civil liability, intellectual property, inheritance, contract and corporate law.[1106] Empirically, an average share in earnings of about 30% was observed.[1107]

[1100] See Schellenberg Wittmer, 2022.
[1101] See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 193.
[1102] See BGE 131 I 223, where a prospective provision to be added in the Zürich cantonal law on the lawyer profession (*Anwaltsgesetz*), essentially forbidding the financing of proceedings of any nature as well as the brokering of financing agreements, was struck down as unconstitutional. General Swiss private law provisions as well as the Federal Act on the Free Movement of Lawyers (FMLA) were ruled to be applicable to TPLF, and were considered to provide an adequate regulatory framework. A full-on prohibition of the practice was thus deemed disproportionate.
[1103] See BG, 2C_814/2014, where the Court was faced with a lawyer who was involved with a TPL funder and facilitated a funding agreement between said funder and one of his own clients. The lawyer also omitted to disclose the funding agreement, even though his client had benefitted from legal aid. According to the Court, this violated Art. 12(a) and (c) FMLA.
[1104] See Art. 400(2bis) CPC (status as of January 1st, 2025).
[1105] See Steiner and Junginger, Litigation Funding in Switzerland, 2018, https://www.globalarbitrationnews.com/2018/01/30/litigation-funding-in-switzerland/, last accessed on August 21st, 2024.
[1106] See Schellenberg Wittmer, 2022, and Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021,p. 190.
[1107] See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 190, and Schumacher, Fachhandbuch Zivilprozessrecht, 2020, p. 51. The latter also reports that it is not infrequent to have staggered earning shares in claims with a very high litigious value.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

The following funders are reported to operate in Switzerland.[1108]

- JuraPlus AG
- Nivalion AG
- Profina Prozessfinanzierung GmbH
- Swiss Legal Finance SA
- Liti Capital SA
- Liti-Link AG
- Omni Bridgeway (not established in Switzerland, but reported to have funded Swiss cases).
- Vannin Capital (not established in Switzerland, but reported to have funded Swiss cases).
- Burford Capital Ltd
- Allianz ProzessFinanzGmbH, one of the first funders to enter the Swiss market after the 2004 decision by the Swiss Federal Supreme Court[1109], is no longer active.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no statistics regarding TPLF in Switzerland.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

1.5.1 General situation of TPLF in Switzerland

Reliance on TPLF in Switzerland is considered to be rather limited – which the Federal Council regretted, in the fields of consumer protection and investor claims.[1110]

The following reasons were evoked:

- Limited knowledge of the mechanism; lawyers wishing to avoid indirect control by a third party and a potential additional source of liability; cultural resistance towards systems that prone the sharing of proceedings' earnings; a general sense of insecurity, due to a lack of specific regulation; sparse offer[1111]; existing alternatives to litigation, which can be more efficient from a financial point of view; initial cost barrier, in that the contact with a funder

[1108] See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 189, and Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, AJP 2018, p. 460, note 26.
[1109] See BGE 131 I 223. See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 189.
[1110] See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick, HAVE 2013, p. 245.
[1111] Although it has risen since 2017. See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 189.

generally requires a lawyer, which could dissuade prospective litigants; general scepticism towards companies that are relatively new.[1112]

The funders active in Switzerland mostly focus on the funding of civil cases. Most are reported to be individual – not belonging to a clustered company. They are sufficiently capitalized to operate continuously and in the long-run and tend to examine prospective cases steadily.[1113]

A four-party configuration, imaginable in the context of bundled or collective claims, made up of an original claimant, an association to whom the claims are assigned, a separate litigation funder, and a legal representative is possible in theory, but hardly ever witnessed.[1114]

1.5.2 TPLF and the "loser pays" principle

If the funded party is successful in its claim, the question arises whether the funding agreement should impact the loser pays principle, which guides cost allocation in Swiss civil procedure.[1115] A parallel has been drawn with justice protection insurance: in case of victory, the succumbing counterparty is generally still condemned to reimburse the successful beneficiary because the choice to enter an insurance contract should benefit the policyholder, and not third parties.[1116] Similarly, it was argued that the loser pays principle should apply even when the successful claimant was backed by a third party funder. While the beneficiary of a funding agreement will not have had to pay hefty deposit sums, they still pay for the funding services via a reduction of their earnings. Denying them the reimbursement of costs by the counterparty would further and unfairly reduce their earnings.[1117]

The Swiss Code of Civil Procedure allows a situational attribution of costs based on equity, notably in case of a severe difference in the economic power of opposing parties.[1118] TPLF is not seen as a factor creating an economic imbalance; similar to justice protection insurance practice[1119], funding only generates means within the context of the proceedings, and enriches one party compared to the other.[1120]

It was also discussed whether a successful funded party could claim damages from the counterparty for the financial *lucrum cessans* suffered due to the funder's share of the proceedings' earnings. But

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[1112] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 50-52.

[1113] See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandsaufnahme und Ausblick, HAVE 2013, p. 236.

[1114] See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 202, 203 and 211. The author postulates that the rare occurrence of such a configuration may be due to the risk of conflicting interests. He takes an opposite stance, in that he considers that the simultaneous existence of parties with control and accountability over one another could lead to a balance of power.

[1115] Art. 106(1) and (2) CPC.

[1116] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 82-83.

[1117] *Ibid*., p. 84-85. In this regard, arbitral tribunals seem to likewise abide by the loser pays principle even in case of TPLF.

[1118] Art. 107(1)(f) CPC.

[1119] Indeed, even if a party benefits from justice protection insurance, the equitable attribution of costs is generally inapplicable. See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 85. The author does imply that TPLF differs from insurance, in that it is an opportunity that generally only exists for one party and not both, which may foster the disparity between parties.

[1120] *Ibid*., p. 86. The author also remarked that, because of its wide formulation, the doctrine pleads for a restrictive interpretation of Art. 107(1)(f) CPC. Applying it to TPLF cases merely because the funding option only exists for the party with better chances of success would be unadvisable.

no clear legal ground to demand that the counterparty cover such expenses exists under Swiss law[1121] and it would be problematic if such claim were possible.[1122] If a party had the means to conduct the proceedings on its own but deliberately chose to shift the risk to a TPL funder, the party – not the counterparty – should bear the cost of such risk. Similar considerations apply for justice protection insurance policies – the counterparty can't be condemned to pay the insurance premiums – as well as for interests for loans taken to finance proceedings.

1.5.3 Content of a typical funding agreement

1.5.3.1. Veto powers

The conclusion of a funding agreement follows a thorough examination by the funder.[1123] TPLF agreements in Switzerland tend to stipulate specific rights for the funder, such as veto powers for several acts (e.g. introduction of a claim, acceptance or rejection of settlements, extension or reduction of the procedural scope, the inclusion of third parties, changing of the attorney, etc).

The funder may refuse to cover specific costs associated with acts breaching the agreement or decide to terminate the funding agreement.[1124] Other unilateral rights of the funder to terminate the agreement are generally stipulated for the period between procedural instances as well as in case of events that significantly impact the chances of success.[1125]

On the beneficiary's side, unilateral withdrawal is generally limited to "important reasons" – which doesn't encompass improvements of the beneficiary's economic situation, nor recent access to legal aid.[1126]

Regarding settlements, funding agreements tend to provide that if the beneficiary goes on litigating – while the funder favoured a settlement – the beneficiary does so at his or her own risk. Clauses provide that the funder will need to be paid as though the settlement had been accepted: this generally includes their cut of the would-be settlement money, and the reimbursement of all incurred costs.[1127]

TPLF contracts generally include a series of contractual obligations of the beneficiary, i.e. the duty to inform the funder of relevant facts regarding the claim.[1128]

Whether funding agreements automatically carry over to enforcement proceedings varies from funder to funder.[1129]

[1121] *Ibid.*, p. 88-89.
[1122] *Ibid.*, p. 87.
[1123] *Ibid.*, p. 101.
[1124] *Ibid.*, p. 93 and 99-101.
[1125] *Ibid.*, p. 99. The idea is to allow the funder to withdraw if the chances of success worsen significantly, e.g., if the beneficiary loses at first instance.
[1126] *Ibid.*, p. 101.
[1127] *Ibid.*, p. 100. The author also reports that the opposite situation – where the litigant wants to accept a settlement but the funder wishes to go to trial – can likewise be addressed via a clause stipulating that the dispute has to go on but the beneficiary will be paid what he would have received from the rejected settlement. At the time of the contribution (2015) the model contract of Profina Prozessfinanzierung GmbH was reported to contain such a clause.
[1128] Said obligation could be legally excluded in cases where a conflict of interests between funder and beneficiary arises, if the transmission of information would be detrimental to the beneficiary, *Ibid.*, p. 212.
[1129] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, note 6. The author reports that the model contracts of JuraPlus AG stipulated a conditional carry over, whereas Profina Prozessfinanzierung GmbH's model contracts were silent on the matter.

1.5.3.2. Securities

Often, contracts include securities by the beneficiary. Assignments of the claim at hand are not permitted as a security, as they would endanger the prospective claimant's legitimacy to act (no *gewillkürte Prozessstandschaft*). [1130] If the beneficiary brings a claim previously assigned to a funder, it can be considered as non-complying with procedural requirements or even as meritless. [1131] There is no unanimity regarding the admissibility of assignments after proceedings are pending. [1132] They affect the active legitimation. [1133]

A way to structure securities is by *pledging* the main claim to the funder, as this does not compromise the active legitimation and can be done regardless of pendency[1134], although the security reach offered by pledges is more limited than assignments. [1135]

1.5.4 Disclosure of funding agreements

There is no general duty to disclose the existence of a funding agreement in civil litigation[1136], but such duty may arise if the funded party was benefitting from legal aid upon conclusion of the funding agreement. [1137]

While funding agreements generally include confidentiality clauses, the disclosure of an agreement could be beneficial to the funded party – e.g., because it demonstrates its ability to sustain the proceedings and the soundness of its claim, thus bolstering its negotiating power. In such cases, it is argued that voluntary disclosure by the funded party should be admissible. [1138]

In the context of arbitration proceedings with a seat in Switzerland [1139] there is no legal duty to disclose a funding agreement. [1140] It has, however, been criticised that IBA Guidelines provide insufficient protection against conflicts of interests in the context of TPLF and that the existence of a funding agreement and the identity of the funder should be disclosed at the beginning of arbitral proceedings. [1141]

[1130] Whereby a claimant would enter a trial for a claim that they no longer hold, as it was assigned to the funder.
[1131] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 7-8; and Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 219-220.
[1132] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 221-222 and note 1355.
[1133] By virtue of Art. 83(1) CPC.
[1134] *Ibid*., p. 223.
[1135] *Ibid*, p. 223-225. However, another author notes that a pledged claim provides the funder with some external powers, opposable to courts, including the power to approve – or veto – the filing or dropping of a suit or the conclusion of a settled agreement concerning the pledged claim. See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 7-8.
[1136] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 7.
[1137] See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 195; and Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 81-82. Up to now, such a duty has only been evoked in the context of disciplinary proceedings against a lawyer who omitted to disclose a funding agreement while his client was benefitting from legal aid. See BG, 2C_814/214.
[1138] See Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 196; and Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 98.
[1139] See Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 54-55.
[1140] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 173.
[1141] See Zaugg, Implications of Third Party Funding on the integrity of arbitral proceedings Is there need for action in Switzerland?, in *Von A wie Arbitration über T wie Transport bis Z wie Zivilprozess*, Stämpfli 2018, p. 263. However, the author considers it unnecessary to reveal the terms of the agreement, with respect to the security for costs orders debate (see *infra*, 1.6.2).

1.5.5 Impact on the lawyer profession

1.5.5.1 Information duties

It has also been discussed if the conclusion of a funding agreement impacts or extends a lawyer's mandate and which additional duties arise, in particular in the pre-agreement phase.[1142]

Lawyers should counsel their clients in detail regarding the existing funding offers in Switzerland and abroad and assist in the negotiation of the agreement and in the communication with the funder, and probe into the latter's stability, solvability and potential for conflicts of interest.[1143] Client and lawyer should also determine who has to provide the funder with relevant data, and negotiations should include a non-disclosure agreement that extends to the pre-agreement phase.[1144]

When entering the funding agreement, it should be extended to legal operations in progress at the time of its conclusion. Also, legal professionals should disclose possible grounds of conflicts of interest in light of the involvement of the funder. The agreement needs to be clear on key points such as unilateral rights of withdrawal and the moment of payment of the funder's share – which, ideally, should happen only once the decision is definitive.[1145]

It has been noted that lawyers are in a less favourable position than funders, as they are forbidden to stipulate contingency fee agreements and *pactum de quota litis* in their mandate contracts.[1146]

1.5.5.2 Ties between funders and lawyers/ Conflict of interests

Lawyer's activities in a funding company would be in open violation of Articles 12(b), (c) and (e) of the Federal Act on the Free Movement of Lawyers (FMLA). Lawyers cannot sit on the board of directors of a company that is active in the TPLF business and represent a party funded by said company – regardless of the client's awareness or consent. Lawyers who undertake party representation cannot be employed by funders without violating Art. 8 FMLA.[1147]

With regards to financial participation of a lawyer to a funding company: In case of low-value participations, Articles 12(b) and (c) can be considered respected if the results of the case have no bearing (neither positive nor negative) on the lawyer's participation in the funding company. It has also been pointed out that a lawyer's ownership of shares in a funder that is publicly quoted on the stock market should not amount to a conflict of interests.[1148]

It has been suggested to introduce a duty for funders to disclose ties to lawyers with their board members, employees, consultants or shareholders/members or a broader regulation that addresses conflicts of interests within funding companies. [1149]

1.5.6 Social and practical implications of TPLF

[1142] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 260 ff.
[1143] *Ibid.*, p. 260-263.
[1144] *Ibid.*, p. 262-263.
[1145] *Ibid.*, p. 264.
[1146] See Lauer, Das Anwaltshonorar, ZPR 2023, p. 74, note 410.
[1147] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 182-195.
[1148] See Wyler, Auswirkungen von Prozessfinanzierungen auf die Tätigkeit des Anwaltes, Anwaltsrevue 2020, p. 33.
[1149] SCHUMACHER (2015, p. 195-207) always considers Ibid., p. 195-207 and 305.

The question of financing became more relevant after the introduction of a federal Code of Civil Procedure, due to generally high costs for civil litigation and more extensive deposit requirements.[1150] TPLF is considered helpful for the middle class, who is often cut out of legal aid,[1151] for legal persons with low solvability[1152] and for companies that do not wish to suffer the financial impact of proceedings for strategic or bookkeeping-related reasons.[1153]

The existence of TPLF options does not seem to have voided procedural costs of their social function (financing of proceedings, avoiding baseless claims, encouraging settlements).

Baseless claims did not rise after the 2004 Decision of the Federal Tribunal, likely due to the fact that the economic risk is not eliminated by TPLF but merely shifted to a third party that cares about its profitability.[1154]

TPLF does not contribute to procedural inequality of arms in Switzerland, where justice protection insurance is common and allows a prospective counterparty to insure themselves against legal costs.[1155]

Nonetheless, the lack of regulation of TPLF in Switzerland has been criticised as inviting socially unaware hedge funds to the Swiss market.[1156]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

1.6.1 Legal nature of the funding agreement

The nature of a TPLF agreement remains very controversial.[1157] The nature of funding agreements can have a bearing on the practice of TPLF, if individual questions were not negotiated.[1158]

TPLF typically differs from *Forderungsinkasso* and *Factoring*[1159] – where the third party takes a primary role in the proceedings.[1160]

[1150] See Schumacher and Nater, Anwaltsrubrik/La page de l'avocat: Prozessfinanzierung und anwaltliche Aufklärungspflichten, SJZ 2016, p. 45; and Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick, HAVE 2013, p. 235 and 243. For the deposit requirements, see in particular Articles 98 and 59(2)(f) CPC.

[1151] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 47.

[1152] Except for a specific case where the whole active of the person is litigious, and all of the members and stakeholders, including creditors, don't have the means to finance the process. See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 80.

[1153] *Ibid.*, p. 181.

[1154] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 56.

[1155] *Ibid.*, p. 63-65.

[1156] Also, in some fields with limited interest to private funders – such as collective consumer protection in low-value claims – the creation of public or mixed funds has been judged more beneficial than the services provided by private funders. See Stadler, Kollektiver Rechtsschutz - Chancen und Risiken, ZHR 2018, p. 652.

[1157] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 164.

[1158] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 14.

[1159] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 45-46.

[1160] Reportedly, Liti-Link AG's business model is structured around bringing assigned claims in its own name; see Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession,

While funding agreements can be qualified as simple society contracts destined to create a "tacit society" (*stille Gesellschaft*), others consider them to be unnamed mixed contracts,[1161] with elements of loan, society and guarantee contracts, but without a prevalent component.[1162]

Key differences between TPLF agreements and named contracts are the following: if money for proceedings is obtained via a standard loan agreement, the lender will not have any influence on the conduct of the proceedings, and the financial risk of loss will be carried by the borrowing party.[1163] Unlike consumer credit contracts, there is no risk of excessive indebtment in the context of TPLF[1164] and protective norms, conditions and authorizations required by the Consumer Credit Act do not apply.[1165] Funding agreements are also not akin to purchases of claims in default of an assignment or transfer of the claim,[1166] or to betting or gaming contracts, since the contractual parties are not opposed in their winning and losing relations.[1167] Contrary to insurance contracts, a TPLF contract lacks the payment of premiums, and is negotiated after a dispute has arisen[1168], i.e. TPLF contracts are not subject to the Insurance Contract Act.[1169] Funding agreements are also not mandates, as the beneficiary primarily follows its own interest – not the funders – and the funder does not have an extensive right to instruct the beneficiary.[1170] There is no unilateral right to terminate the contract, unless agreed upon.[1171] Funding agreement share some similarities with "partiary" (*partiarisch*) loans, although a key difference is the purpose of TPLF to not only finance a venture, but also to shift its financial risk.[1172] Funding agreements also resemble guarantee contracts in their "security" function (*Sicherungsfunktion*).[1173]

If considered mixed contracts reuniting elements of the categories above,[1174] the funder may, due to the guarantee component of TPLF agreements, be freed from its obligation to cover the costs of the proceedings in case of abusive behaviours by the beneficiary that negatively affect the chances of success of the claim,.[1175] The "partiary" loan component should include an implicit duty to preserve the "commercial secrets" of the borrowing party, even when confidentiality clauses are missing from the TPLF agreement.[1176]

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objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 181, note 886; and Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, AJP 2018, p. 460, note 26.

[1161] *Ibid.*, p. 165; see also Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick, HAVE 2013, p. 238.

[1162] See Can, Der teure Prozess, ius.full 2021, p. 190-191; Amstutz and Morin, Einleitung vor Art. 184 ff., in BSK OR I, Seventh Edition, Helbing Lichtenhahn 2020, para 23.

[1163] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 30.

[1164] *Ibid.*, p. 115.

[1165] *Ibid.*, p. 157.

[1166] *Ibid.*, p. 105.

[1167] *Ibid.*, p. 108.

[1168] *Ibid.*, p. 33-35 and 124. The author goes on saying that there's a difference concerning the legal areas where insurance and TPLF contracts are recurrent, and points out that and insurance can be stipulated even for small claims and non-monetary claims. Finally, the author notes that justice protection insurance contracts generally include maximums, meaning that the risk is not entirely shifted, but only highly limited.

[1169] Ibid., p. 157.

[1170] Ibid., p. 136-138.

[1171] Which exists for mandate contracts by virtue of Art. 404 of the Swiss Code of Obligations (CO).

[1172] *Ibid.*, p. 108-114.

[1173] *Ibid.*, p. 128.

[1174] *Ibid.*, p. 132.

[1175] *Ibid.*, p. 159.

[1176] *Ibid.*, p. 161. The author does say that the extent of the notion of commercial secrets is not unambiguous.

1.6.2 Securities for costs orders in arbitration

An arbitration agreement can generally not be extended to a funder, who remains a third party. The funder can't be directly condemned to the payment of costs in the award itself, nor ordered to pay security deposits during the proceedings.[1177] Still, this would not hinder an arbitrator from taking into account a – disclosed – funding agreement in its decision on securities for adverse costs. A demand for security deposits can avoid "hit and run scenarios" – where the funder would profit from potential gains but escape losses which risk remaining uncovered.[1178] A funding agreement should not, however, be a reason *per se* for an order to make a security deposit[1179] because the beneficiary's economic situation is not worsened by the agreement. Security deposits should only be ordered if the general conditions for such order[1180] are fulfilled and the TPLF agreement does not irrevocably extend to the legal costs of the counterparty.[1181]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

In the absence of specific federal provisions, the admissibility of TPLF was determined by the Swiss Federal Supreme Court in BGE 131 I 223. The Court was confronted with a provision from the canton of Zürich that was to be added in the cantonal law on the profession of lawyers (*Anwaltsgesetz*).[1182] The draft allowed for neither the financing of proceedings of any nature nor the brokering of financing agreements. It was challenged by a foreign company active in the field of litigation funding, who alleged that the draft violated both the derogatory power of federal law[1183] and the fundamental right to economic freedom.[1184]

The Supreme Court held that while the FMLA exhaustively regulates the professional duties of lawyers and forbids financing of proceedings by lawyers, the cantonal provision was not directed at lawyers only, as it prohibited the practice of TPLF regardless of the identity and profession of the funder. The cantonal provision was not in violation of the federal act, since the FMLA did not exhaustively regulate litigation funding.[1185]

[1177] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 180.
[1178] *Ibid*., p. 185.
[1179] Nor for an inversion of the burden of proof in this regard, *ibid*., p. 190-192.
[1180] A possible right of the counterparty to reimbursement of its legal costs; the endangerment of said right; and the worsening of that endangerment.
[1181] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 193-196; and, Bachmann, The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland, ASA Bulletin 4/2020, p. 860.
[1182] Switzerland is a federalistic country, meaning that cantons have their own set of laws, who supplement and complete federal laws. In particular, the cantonal law on the lawyer profession regulates the acquisition of the bar licence in Canton Zürich, the practice of the profession within the canton, and concrete aspects regarding disciplinary supervision of the lawyers. It supplements the FMLA.
[1183] Art. 49 BV.
[1184] Art. 27 BV.
[1185] BGE 131 I 223, point 3. The FMLA does forbid lawyers from financing proceedings, so to the extent that cantonal provision was reaffirming this prohibition, it was simply moot.

With regards to the restriction of the right to economic freedom, the cantonal provision did address a public interest[1186] – the independence of lawyers – but it was considered disproportionate, based on the following arguments:[1187]

- The attribution of rights to the third party (e.g. the right to be informed of the status of the proceedings, and to approve or veto settlements), was held to be no obstacle to the independence of lawyers, as it is a prerogative of the holder of any claim.[1188] A party can validly authorize its lawyer to communicate confidential information to the funder.[1189] The fact that, unlike lawyers, third parties would not be subject to criminal law provisions concerning confidentiality, is not relevant. The same could be said of civil liability insurers which participate in proceedings, and any party is free to communicate its secrets to third parties, bound only by a contractual duty of confidentiality.[1190]
- While the triangular relationship created by TPLF could potentially result in a conflict of interests for a lawyer, it is disproportionate to fully exclude the practice. The lawyer can operate to avoid such situations, under the existing threat of disciplinary measures of Art. 17 FMLA. Some riskier configurations– such as the employment of the lawyer by a funder – are either already forbidden by the FMLA or allowed in the context of justice protection insurance – such as lawyers sitting in the board of directors of insurers. There is no need for a further/explicit interdiction of TPLF. Existing laws are sufficient and more refined than a full-on prohibition.[1191]

2.2 Regulatory oversight of funders/funding industry

There is no overseeing authority dedicated to third party funders, and litigation funding does not automatically entail the supervision of the Swiss financial market supervising authority (FINMA).[1192] There is no specific authorization requirement for the funding industry in Switzerland. Instead, the existence of authorization and surveillance imperatives is rather dependent on the funder's corporate structure and business model.

As per Art. 3 of the Financial Market Supervision Act (FINMASA), supervision is mandated for "persons and entities that under the financial market acts[1193] require to be licensed, recognised, or registered by the Financial Market Supervisory Authority" as well as "collective capital investments

[1186] One of the requirements for a restriction of a fundamental right not to be deemed unconstitutional, as provided by Art. 36(2) BV.
[1187] BGE 131 I 223, point 4.
[1188] Within the limit of Art. 27 of the Swiss Civil Code (CC), which protects physical persons against excessive engagements and restrictions, BGE 131 I 223, point 4.5.5.
[1189] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 174-175. This will not be considered a general waiver of attorney-client privilege.
[1190] BGE 131 I 223, point 4.5.6. Conversely, according to scholars, a funder never counts as a lawyer's auxiliary – a collaborator to whom lawyers can transfer information even without an authorization by their clients – even if there is some sort of support that the funder provides to the lawyer. See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 209-210.
[1191] BGE 131 I 223, point 4.6.
[1192] See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandsaufnahme und Ausblick, HAVE 2013, p. 237-238.
[1193] Listed in Art. 1 FINMASA. The list includes: the Mortgage Bond Act (SR 211.423.4), the Federal Act on Contracts of Insurance (SR 221.229.1) and the Insurance Supervision Act (SR 961.01), the Financial Services Act (FinSA), the Financial Institutions Act (FinIA), the Banking Act (SR 952.0), the Financial Market Infrastructure Act (FinMIA), the Collective Investment Schemes Act (CISA), and the Anti-Money Laundering Act (AMLA).

under the Collective Investment Schemes Act of 23 June 2006 that have been or must be licensed or approved".

Funders are not subject to the financial market acts[1194] but, depending on their corporative form and their way of acquiring capital, they may be considered "asset managers of collective investment schemes", who are subject to FINMA supervision by virtue of Art. 13 of the Collective Investment Scheme Act (CISA).[1195]

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements.

There is no legislation specifically directed at the funding industry in Switzerland and no compliance framework is applicable transversally to all funders with regards to capital adequacy requirements or internal governance and procedures ensuring the respect of the funders' fiduciary duties. This is criticised and some ask for specific legislation introducing some form of requirements.[1196] On the other hand it also seems that litigation practice would rather only approve legislation based on capital adequacy.

Notwithstanding, funding companies will *a minima* be subject to the provisions of the CO – or the CISA – that apply to their corporate structure, as detailed below.[1197]

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

2.4.1 Minimum capital provisions

Depending on the corporative form taken by the funding company, a minimum capital is required upon foundation:

- If the company takes the form of a Limited Liability Company (LLC), then its nominal capital must be of at least 20'000.- CHF, paid in full.[1198]
- In case of a company limited by shares (Ltd), the share capital must amount to a minimum of 100'000.- CHF. Of it, shareholders must pay up at least at least 20% of the share capital, but not less than 50'000.- CHF. A reduction of capital below 100'000.- CHF is not admissible.[1199]

[1194] See Wegmüller, Prozessfinanzierung in der Schweiz: Bestandsaufnahme und Ausblick, HAVE 2013, p. 237-238. The FinMIA (2015), the FinIA and the FinSA (2018) were introduced in the meantime

[1195] See Nivalion AG, At a glance: regulation of litigation funding in Switzerland, Lexology 2023.

[1196] Notably Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 305.

[1197] See *infra*, 2.4.1

[1198] As per Articles 773, 782(2) and 793 CO.

[1199] See Articles 621, 632, and 653j ff. CO.

- If the funding company were to take the form of a bank[1200], it would have to have a minimum capital of 10'000'000.- CHF, paid in full.[1201]
- If the funder acts as an asset managers of collective investment schemes in the form of a SICAV[1202], then the capital would be ontologically variable, but the company should hold assets worth at least 5'000'000.- CHF.[1203]

2.4.2 Financial market regulation

Some acts regulating financial markets have no bearing on TPLF. The regulation of insurance companies contains provisions that would be incompatible with TPLF: Art. 170 of the Ordinance on the Surveillance of Private Insurers (OS) forbids justice protection insurers to be promised a share of the earnings of the proceedings. TPLF companies therefore can't take the form of insurers in Switzerland.[1204]

Other financial regulation acts find application only under precise circumstances:

- If the funding company assumes a particular corporate form – such as a bank[1205], in which case the Banking Act (SR 952.0) would apply[1206], or a SICAV, to which the CISA would be applicable[1207]; or
- If the funder acts as an intermediary who manages funds accrued from open-ended collective investment schemes and injects them into judicial proceedings – in which case it should be subject to the Financial Institutions Act (FinIA), the Anti-Money Laundering Act (AMLA), the CISA, as well as the FINMASA.[1208]

[1200] Some authors seem to hint at the possibility – see Steiner and Junginger, Litigation Funding in Switzerland, 2018, https://www.globalarbitrationnews.com/2018/01/30/litigation-funding-in-switzerland/, last accessed on August 21st, 2024. However, if compared to the reality of the Swiss TPLF industry, this would be peculiar. A typical funding company would not classify as a bank *per se*, as their business model does not include the commercial acceptance of funds deposited from the public – see Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick, HAVE 2013, p. 237-238. The configuration proposed by Steiner and Junginger would seem to be attainable only if a bank, in and of itself, started to offer TPLF as an additional service.

[1201] Art. 15 of the Banking Ordinance (SR 952.02).

[1202] An uncommon scenario, as described briefly *infra*, 2.4.2.

[1203] As per Art. 36(2) CISA *cum* Articles 35 and 53 of the Collective Investment Schemes Ordinance (SR 951.311).

[1204] See Subilia, Commentaire romand Loi sur le contrat d'assurance – Art. 170 OS, Helbing Lichtenhahn 2022, p. 1301-1302.
For more content on the difference between funders and insurers, see notably Wegmüller, Prozessfinanzierung in der Schweiz: Bestandesaufnahme und Ausblick, HAVE 2013, p. 237-238.

[1205] See note 128.

[1206] As a consequence, the FINMASA would too. See notably Art. 1(4) of the Banking Act, and Art. 1(1)(d) of the FINMASA.

[1207] According to Articles 2(1)(a) and 32 ff. CISA. The FINMASA would also be applicable, by virtue of Art. 2(2)(b) and 2(2)(b[bis]) FINMASA, Articles 13 and 15 CISA, and Art. 32 FinIA.

[1208] By virtue of Art. 32 FinIA, Art. 2(1)(a) and 2(2)(b) AMLA, Articles 2(1)(a) and 8 CISA, and Art. 2(2)(b) and 2(2)(b[bis]) FINMASA. Regarding the applicability of the AMLA, see also Steiner and Junginger, Litigation Funding in Switzerland, 2018, https://www.globalarbitrationnews.com/2018/01/30/litigation-funding-in-switzerland/, last accessed on August 21st, 2024.
Contra such applicability, see Wegmüller, Prozessfinanzierung in der Schweiz: Bestandsaufnahme und Ausblick, HAVE 2013, p. 237-238, who held that funders are not subject to the AMLA or to the CISA – as they do not act as finance intermediaries who administer or keep assets of third parties nor operate as collective investment schemes. Again, as stated in note 121, it is possible that the author was merely basing his assessment on the typical business model assumed by funders, without taking into account other possibilities that are seldom encountered in practice.

Nevertheless, the possible applicability of the CISA to TPLF companies, which was evoked by a funder[1209], should be read in light of Art. 2(2)(d) CISA: a provision that excludes "operating companies which are engaged in business activities" from the scope of the act. As of today, the Swiss TPLF industry is composed solely by "operating companies engaged in business activities", in the form of LLCs and Ltds. The application of CISA is unlikely since, firstly, the funder would likely have to significantly stray from the business models and legal structures that are typically observed across the TPLF sector. Secondly, being subject to the CISA would multiply the onuses on funding companies, adding authorization and surveillance requirements[1210] as well as a prohibition for foreign fund management companies[1211] to open branches in Switzerland.[1212]

2.4.3 Accounting provisions

LLCs and Ltds are subject to the duty to keep accounts and file financial reports as provided by Art. 957(1)(2) CO.[1213] In general, Swiss companies are not bound by financial reporting standards such as the IFRS, the Swiss GAAP or the US GAAP, and can generally decide to comply to such standards on a voluntary basis. LLCs and Ltds must abide by one recognized financial reporting standard only if company members who represent at least 20 per cent of the basic capital demand it or, in the case of Ltds, it is listed on the SIX Swiss Exchange market.[1214]

2.4.4 Substantial private law provisions

Several basic legal principles and general provisions can be relevant to the activity of litigation funders.

2.4.4.1 Principle of good faith

In BG 1C_16/2017, the Swiss Federal Supreme court was confronted with a case that was atypical in the context of TPLF, as proceedings may have been prompted by the funding party and not the beneficiary. During administrative proceedings against the issuance of a clearance permit to a neighbouring company, an administrated party omitted to inform the court that a third party had covered all of the legal costs incurred for the proceedings at hand. The cantonal court considered that, given the financial situation of the party, his lack of awareness of the financial consequences of his action, and his incapacity to describe how issuing the clearance permit would negatively impact him, the action constituted an abuse of a right: it appeared that the party was a strawman actor for the interests of a third, undisclosed party who had financed the proceedings – possibly a competitor of the company which requested the permit.

The Swiss Supreme Court affirmed that the cantonal court had not violated the party's procedural guarantees, nor had it decided arbitrarily. The personal interest of the party was deemed as minimal, a mere vehicle for the interests of a third party that would not have a right to the action[1215];

[1209] See Nivalion AG, At a glance: regulation of litigation funding in Switzerland, Lexology 2023.
[1210] See for example Articles 13, 15, 26, 27, and 74 CISA; Articles 1(4), 3 ff., and 23 of the Banking Act; Articles 5(1), 15, 37, and 39 FinIA; Articles 12(a) and 18 AMLA.
[1211] As defined by Art. 32 FinIA.
[1212] As per Art. 52(2) FinIA.
[1213] This should occur in an annual report containing the balance sheet, the profit and loss account and some required notes , Art. 958(2) CO.
[1214] See Art. 962 CO. Fo an analysis of the duties that would arise in case a funder was subject to the IFRS, see Junginger, Prozessfinanzierung zur Kapitalanlage – Die Bewertung und Bilanzierung von Prozessrisiken, Law & Management Praxis 2018, p. 46 ff.
[1215] As the alleged third party was not a neighbour of the company that had requested the clearance permit.

thus, the claim was considered manifestly "estranged from its purpose" (*zweckentfremdet*), and in clear violation of Art. 2(2) CC.[1216]

2.4.4.2 Provisions related to foundations

In case HG170257, the Zürich commercial court was confronted with a foundation acting as a claimant on behalf of consumers in a relatively high-valued proceedings. The court examined whether this was compatible with the foundation's scope. Art. 80 CC provides that "A foundation is established by the endowment of assets for a particular purpose." In light of its low capital (50k.-), the judges considered that the scope set by the founders was not, for the foundation, to be a vector for the claims of consumers.

The claim was financed by a TPLF agreement, which was allowed to deviate exposure to the economic risks of the proceedings from the foundation to the funder. This circumstance was noted by the judges, but they considered that it did not have bearing on the determination of the foundation's scope, and thus on its ability to act on behalf of others. Recourse to a litigation funder does not allow to extend or ignore the limits of a foundation's scope.

2.4.4.3 Provisions concerning the validity of a contract

In its landmark ruling BGE 131 I 223, the Swiss Federal Supreme Court noted that Art. 27 CC ("no person may renounce legal capacity or the capacity to act") limits the attribution of rights concerning a claim to third parties.

According to doctrine, the stipulation of unilateral termination rights in favour of a funder does not amount to an excessive restriction under Art. 27 CC as the termination of the agreement does not *per se* prevent the claimant from continuing to bring his/her claim.[1217] Art. 27 CC could be relevant in a case where the funder knows that the beneficiary would be unable to proceed without the funding agreement, and where the funder withdraws as soon as it appears that the winning chances are lower than expected; or in a case of personal injury where the funder pushes for the acceptance of a settlement below the claimant's expectations.

Another provision that could affect the validity of a funding agreement is Art. 21(1) CO: "Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the person suffering damage may declare within one year that he will not honour the contract and demand restitution of any performance already made." The "strained circumstances" criterion can be relevant in the context of TPLF, but "inexperience" would be difficult to plead, if the beneficiary was represented by a lawyer at the time of the negotiation of the funding agreement.

2.4.4.5 Rules on the assignment of claims

Articles 164 ff CO regulate the assignment of claims. As mentioned above[1218], the assignment of a claim is not a viable means of security. If the beneficiary of funding had already brought the claim, only they and their representative can actively participate in the proceedings. Any participation rights included in a TPLF agreement merely affect the *internal* relations of the parties and won't

[1216] Art. 2(2) CC states that "the manifest abuse of a right is not protected by law."

[1217] See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 204-205.

[1218] See *supra*, 1.5.3.1.

allow the funder to act in the name of the beneficiary in court.[1219] If a claim is assigned to the funder during the proceedings, then there will be a problem of active legitimation.[1220]

2.4.4.7 Other private law rules and principles

If the funding agreement were to be characterized as a simple society contract[1221], then the contractual relation would be subject to Articles 530 ff CO and by virtue of Art. 536 CO, "[n]o partner may carry out transactions for his own benefit which thwart or obstruct the purpose of the partnership". Furthermore, as per Art. 544(3) CO, the funder would be jointly and severally liable for procedural costs ordered in a decision or award.

If there is significant imbalance between the contractual performances because of an objectively unforeseeable event that occurred after the conclusion of the contract, a judge could adapt the contract according to the *clausula rebus sic stantibus* principle.[1222] The question was raised whether an early settlement proposal from the counterparty could be construed as a sign that the calculation of the evaluated risk of failure was too pessimistic, and whether the funding agreement should be adapted to reduce the funder's share in the earnings of the proceedings. The application of the *clausula rebus sic stantibus* principle should in any case be very restrictive. In the context of TPLF, many events occurring during the proceeding will have an impact on the initial risk assessment. As such, most funding agreements already have clauses addressing the variation of the expected odds of success. Even when they do not, a certain variation should be expected, meaning that the criterion of foreseeability will not be fulfilled. Thus, application of the *clausula rebus sic stantibus* is seldom – if ever – appropriate.[1223]

2.4.5 Provisions of procedural nature

2.4.5.1 Cost and referral mechanisms in the federal Codes of Procedure

In Articles 95-116, the Swiss Code of Civil Procedure (CPC) contains general provisions as to the attribution of the costs of the proceedings. In particular, the "loser pays" rule in Art. 111(2) CPC. Art. 95(3) CPC describes the notion of "party costs" rule. It is argued that this notion does not extend to the costs of recurring to the services of a TPLF company. The funder's cut in the earnings of the proceedings should not be included in the determination of "party costs" that are to be covered by the counterparty.[1224]

Art. 108 CPC presents an exception to the "loser pays" rule, as it allows to charge unnecessary procedural costs to the *person* who caused them. The official English translation of the CPC wrongfully speaks of "party" – not person. Instead, all the official versions of Art. 108 CPC implicitly extend to persons that do not have a role in the proceedings, meaning that a court may condemn a third party to cover the costs caused by the latter.[1225] It can be imagined that this could apply to a funder, if they acted in such a way as to cause unnecessary procedural costs.

[1219] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 7.
[1220] See *supra*, note 36.
[1221] Which is not a consensual stance in the Swiss doctrine; see *supra*, 1.6.1.
[1222] See Winiger, Commentaire romand Code des obligations I – Art. 18, Helbing Lichtenhahn 2021, p. 197-202.
[1223] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 239.
[1224] See Steiner and Junginger, Litigation Funding in Switzerland, 2018, https://www.globalarbitrationnews.com/2018/01/30/litigation-funding-in-switzerland/, last accessed on August 21st, 2024
[1225] See for example Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 179-180.

In criminal procedures, Art. 126(3) of the Swiss Code of Criminal Procedure states that "[i]f a full assessment of the civil claim would cause unreasonable expense and inconvenience, the [criminal] court may make a decision in principle on the civil claim and refer it for civil proceedings." According to one author, this provision is a source of interesting investing opportunities for TPLF companies. Indeed, a case upon which a criminal court has ruled on principle – before referring it to a civil court to rule on remaining questions such as the extent of damages – presents a safe(r) investment opportunity for funders, as they already have a clear indication of how the civil trial will end.[1226]

2.4.5.2 Provisions as to legal aid in civil procedure

Articles 117-123 CPC regulate legal aid, which is only awarded to persons whose financial means are insufficient to partake in the proceedings *and* whose case does not seem devoid of any chances of success.[1227] Legal aid exempts the payment of court costs and can provide a party with a free representative, if necessary. However, if the beneficiary of legal aid loses their case, legal aid will not exempt them from having to cover adverse costs.[1228] Furthermore, legal aid must be paid back as soon as the beneficiary can do so, which can happen in instalments. TPLF presents an advantage over legal aid, since a funding agreement can extend to adverse costs and since the beneficiary does not generally have an obligation to repay the funder's contribution, beyond the share of earnings that was stipulated as compensation.[1229]

One of the advantages of TPLF over legal aid is also that the latter is limited to litigation, whereas third-party funding can extend to other dispute resolution mechanisms, such as arbitration and mediation. TPLF can solve the financing issue for several jurisdictions at once, whereas legal aid has to be requested before each jurisdiction. Also, legal aid requires exposing one's lack of liquidity to the court, whereas TPLF will usually remain confidential. On the other hand, the "chances of success" criterion for legal aid is only evaluated once, and not questioned at every ulterior event that affects said chances, whereas TPLF agreements generally allow a funder to abandon the case mid-journey. Finally, TPLF can entail secondary costs for the prospective beneficiary that are higher than those associated with the assessment of whether legal aid can be awarded. [1230]

As to the subsidiarity of legal aid in the context of TPLF:

- Legal aid is subsidiary only to concluded funding agreements, and only to the extent of their reach:
    - Funding agreements that cover future costs cause a party to lose its right to legal aid, because it will be considered that the party has sufficient means, with regards to Art. 117(a).[1231]

[1226] See Mausbach, Das Adhäsionsverfahren auch im medizinstrafrechtlichen Licht, Stämpfli 2023, p. 638.
[1227] As per Art. 29(3) BV and Art. 117 CPC.
[1228] See Art. 118 CPC.
[1229] See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 185-186.
[1230] See Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 40 ff.
[1231] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 67-69; and Wuffli and Fuhrer, Handbuch unentgeltliche Rechtspflege im Zivilprozess, In Praxi 2019, p. 78.
See also Von Büren, Kommentar zum Gesetz über die Verwaltungsrechtspflege im Kanton Bern – Art. 111, Stämpfli 2020, p. 1460-1461; and Stähelin, Rechtsverfolgungskosten und unentgeltliche Rechtspflege im Lichte der Rechtsgleichheit, ZStöR 2017, p. 40.

- If the funding agreement also covers prior expenses for which legal aid had been awarded, the beneficiary will be required to repay legal aid *ex tunc*.[1232]

- Conversely, a judge can't deny legal aid merely on the grounds of a hypothetical TPLF contract which the party could seek and conclude. Even if the party has a concrete offer by a funder for the funding of the proceedings at hand, legal aid can't be considered subsidiary and refused. Only the conclusion of an agreement creates a credit towards the funder, thus entailing the loss of the right to legal aid. As a consequence, a party does not need to actually look into TPLF – and provide proof of rejections – in order to obtain legal aid, which preserves the effectivity of the constitutional right to legal aid provided by Art. 29(3) of the Swiss Federal Constitution (BV).[1233]

2.4.5.3 The Federal Act on Proceedings for Debts and Bankruptcy (SchKG)

In in case RT180059, the Zürich High Court was confronted with an injunction to pay, brought against a funding company. The beneficiary of a funding agreement had lost on the merits and had been ordered to pay adverse costs for over 100'000.- CHF. Deeming that the funding agreement extended to adverse costs, the beneficiary requested an injunction to pay against the funding company. The latter brought timely opposition against the injunction. The beneficiary sought to provisionally remove the opposition (*provisorische Rechtsöffnung*) as per Art. 82 SchKG, which requires an instrument – either authenticated or signed by the debtor – acknowledging the debt at hand. The beneficiary presented the financial agreement signed by the financer, where it was stipulated that the financer would reimburse to the beneficiary's representative any adverse cost that the beneficiary would have to cover. The Court considered this a valid title for the removal of the opposition. The fact that the sum would need to be delivered to the lawyer did not tarnish the active legitimation of the beneficiary, as the contract only specified who should receive performance, not who had a right to claim performance – a so called "imperfect stipulation for others" (*stipulation pour autrui imparfaite*). The holder of the claim was solely the beneficiary, as per the funding agreement in light of Art. 112(1) CO.

Art. 256 SchKG allows selling individual claims in the mass to third parties, but this provision can only apply subsidiarily, if the claim was not assigned to individual creditors by virtue of Art. 260 SchKG. Under the latter provision, a creditor belonging to a bankruptcy mass can require that the mass assign him or her a claim which the mass would not pursue due to lack of funds. It must be specified that only claims that the bankruptcy mass refused to bring as a collective can be assigned under Art. 260 SchKG.[1234]

Art. 260 SchKG is interesting for the assignee as he or she will be paid first from the earnings of the suit or its settlement. Often, if settlements are reached, they tend to be in the sole interest of the acting creditor. Overall, once the claim is assigned, the mass has little hope – if at all – to receive a pay-off. It is therefore discussed how TPLF would provide the bankruptcy mass with a more favourable alternative to Art. 260 SchKG. Bankruptcy administrators and liquidators could explore

[1232] See case LA110040-O8, where the court argued that the obligation to repay stems from the rules on civil liability that apply due to the retroactive loss of the right to legal aid. An author instead suggested that the obligation should originate from a *mutatis mutandis* application of Art. 123(1) CPC. See See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 69. See also *infra,* 2.4.6.3.

[1233] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 73 ff; Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, AJP 2018, p. 467; Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 55; and Wuffli and Fuhrer, Handbuch unentgeltliche Rechtspflege im Zivilprozess, In Praxi 2019, p. 78.

[1234] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 15.

whether filing a suit with external funding could be more beneficial to the community of creditors than assigning the claim to one of them.[1235]

Also, a bankruptcy mass is allowed to recur to the services of a funder via a funding agreement, which maintains a contractual nature. This is particularly sensible when the mass does not have the liquidity to file proceedings. However, given the delicate situation of the bankruptcy mass, the funder's unilateral rights to resolve the agreement should be negotiated with particular care. Moreover, the administration should be careful about the funder's solvability (even more so than the prospective defendant's). Whether it should be considered as asking the funder for securities[1236] is another question. If the funder appears to solvable, there is no need to request securities at all costs. Administrators should consider to stagger the funder's share of the earnings (e.g., 10% of the first 100k.-, 30% above that) and ask funders to waive their unilateral right of termination for cases of settlement proposals or events lowering the claim's chances of success.[1237] If the funder were to terminate the TPLF agreement during the proceedings, assignment of the claim to a creditor under 260 SchKG should be considered. If a funder pushed to accept a settlement, the mass administration would generally have to concede – not necessarily *de iure*, but rather because it would be in a bind, *de facto*. If, at that point, an individual creditor wished to go on at their own risk under 260 SchKG, then they would be able to do so, but would have to pay a security deposit in the amount of the proposed settlement sum. The funder would then take its cut from the deposit, and the rest would be awarded to the mass. If no individual creditor invoked Art. 260 SchKG, then the administration would simply have to accept the settlement.[1238]

TPLF can also be interesting for an individual creditor wishing to bring a suit under Art. 260 SchKG, particularly in the context of bank bankruptcies, where single creditors can rarely afford to act under Art. 260 SchKG.[1239]

2.4.6 Regulation of the profession of lawyers

2.4.6.1 Independence and conflicts of interests

Art. 8(1)(d) FMLA prohibits a lawyer to be employed by persons who are not entered on a cantonal roll. Being employed by companies that offer TPLF would overtly violate the independence required by this article, which the Swiss Federal Supreme Court confirmed *in obiter* in BG, 2C_814/2014, point 4.3.1.

In the aforementioned case, the Court was confronted with a lawyer who was also a member of the board of directors of a TPLF company. The lawyer proceeded to oversee the negotiation and conclusion of a funding agreement between said company and one of his own clients. According to the Court, such behaviour is in violation of Art. 12(c) FMLA, which states that lawyers "[…] shall avoid any conflict between the interests of their clients and persons with whom they have a business or personal relationship". The representative created a concrete situation of conflict of interest. In the negotiatory stage of the agreement, where interests of the funder and the prospective beneficiary

[1235] See Berger, Furter and Studer, Bei der Prozessfinanzierung, ZZZ 2023, p. 166. See also Bersheda, Civil Liability of Company Directors and Creditor Protection in the vicinity of Insolvency – Comparative analysis based on the Swiss and English legal system, AISUF 2007, p. 211; and Hunkeler, Prozessieren ohne Kostenrisiken – Ein Bundesgerichtsurteil eröffnet neue Möglichkeiten, Recht im Spiegel der NZZ 2005, p. 25.

[1236] See Hunkeler and Wohl, Kommerzielle Prozessfinanzierung zu Gunsten von Insolvenzmassen?, BlSchK 2015, p. 48 and 50-53.

[1237] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 16-17.

[1238] *Ibid*., p. 16.

[1239] *Ibid*., p. 56-58 and 60-61.

are particularly divergent, the need for independence is heightened. Also, while the beneficiary's and the financer's interests can be considered aligned during the proceedings, this is not true at the stage of distribution of the earnings obtained through the proceedings – when both parties want to maximise their own share.[1240] The funding agreement included a provision regarding money that the lawyer had loaned to the client, further solidifying the conflict of interest.

Contractual, corporative, or economic ties to a funder could also undermine the lawyer's independence required by Art. 12(b) FMLA[1241]; in the absence of said ties, there is low risk for violation of Art. 12(b) and (c) FMLA, even if the funding agreement were to allow the funder to instruct the lawyer on some points.[1242]

However, the mere fact that a lawyer's rates would be higher given a funding agreement rather than under the legal aid system does not generate a conflict of interests.[1243]

2.4.6.2 The prohibition of contingency fees

TPLF does not infringe the monopoly of attorneys, which only extends to representation of parties before courts, as per Art. 2(1) FMLA. Funders fill a niche that lawyers are not allowed to provide. Art. 12(e) FMLA forbids *pactum de quota litis* agreements whereby the lawyer's honorary would be wholly conditional on the outcome of the proceedings.[1244] This entails that a lawyer cannot finance the proceedings of their clients. The funding should emanate from third parties that are unconnected to the proceedings.[1245]

It was even argued that the prohibition of contingency fees for lawyers may have fostered the development of TPLF, but that the latter is not a perfect substitute[1246] as TPLF is not a viable solution for declaratory suits, injunctions, and non-monetary claims.[1247]

Art. 12(e) FMLA only extends to lawyers and not to funders, as decided by the Swiss Federal Supreme Court in BGE 131 I 223. The Court considered that it would be disproportionate to prohibit

[1240] In a similar case, the Aargau administrative court had considered that a lawyer in such a position was not violating its professional duties. See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 22.

[1241] See Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 54.

[1242] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 177-178.

[1243] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 180-181.

[1244] *Pactum de palmario* agreements, whereby a component of the lawyer's honorary depends on the outcome of the proceedings, are admissible in principle, but the percentage of the compensation that hinges upon the success at trial needs to be contained. See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 170.

[1245] See BG, 2C_814/2014, point 4.3.1. See also Villa, Le financement de contentieux par des tiers («third party funding»), Anwaltsrevue 2014, p. 208.

[1246] See Domej, Finanzierung von Verbands- und Gruppenklagen, in *Das Zivilrecht und seine Durchsetzung – Festschrift für Professor Thomas Sutter-Somm*, Schulthess 2016, p. 72.

[1247] *Ibidem*. See also Stadler, Kollektiver Rechtsschutz - Chancen und Risiken, ZHR 2018, p. 651.
Conversely, some authors consider that TPLF can also find application for non-monetary claims, as long as the claimant has an economic interest at stake to which the funder can participate in case of victory. See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 178-179; and Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 5.

every practice which could give rise to an abstract conflict of interest, which was also reminded in BG, 4A_240/2016.[1248]

2.4.6.3 Due diligence with regards to legal aid

After the conclusion of a financing agreement, the conditions for legal aid are likely no longer fulfilled. A lawyer should immediately inform the court of this change of circumstances, since waiting until trial violates Art. 12(a) FMLA (lawyers "shall practise their profession diligently and conscientiously"). The Swiss Federal Supreme Court decided in BG, 2C_814/2014 that the TPLF agreement needn't be disclosed, just the cessation of the required conditions for legal aid.

In case LA110040-O8, points 8.3 and 8.4, the non-disclosure of a funding agreement whilst legal aid was being received led to the *ex post* and retroactive loss to legal aid going back to the moment of conclusion of the funding agreement. The fact that the funder had unilaterally terminated the agreement prematurely was not considered a reason to reintroduce a right to legal aid. Indeed, the judge considered that the termination was in breach of contract, so the money to fund further proceedings could "simply" be obtained by suing the funder by relying on the arbitration clause within the agreement.[1249]

One author argued that in case LA110040-O8, the loss and repayment legal aid should have gone back to the very beginning of the proceedings, given that under the supervening funding agreement, the funder had paid a lump sum "for all open and future legal costs". Conversely, in configurations where the funder only takes up legal costs that arise after the agreement is concluded, then the right should be lost only *pro futuro* from the point of the conclusion going forward, the author argued.[1250] Whether the obligation to repay stems from the rules on civil liability due to the retroactive loss of the right to legal aid[1251] or from a *mutatis mutandis* application of Art. 123(1) CPC[1252] is a question that has not yet found a definitive answer.

The author stated that different notice should have been paid to the (irregular) unilateral termination of the agreement by the funder. He ruled that a party devoid of means was told that it could recover necessary funds by leading – costly – arbitral proceedings against a multinational company. As such, he suggested that two cumulative conditions should be met in order not to reinstate legal aid when a funding agreement is terminated[1253]:

- The loss of financing must have been caused by the beneficiary's behaviour in a way that it would be abusive to now allow him to be paid by the state, e.g., the beneficiary was in breach of contract;

[1248] E.g., Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 171.

[1249] The fact that the arbitration seat was in Zürich, that applicable law was Swiss law, and that there were assets in Switzerland – which could ensure that the beneficiary would be paid – played a role in the court's decision that recovery of the funding would be attainable.

[1250] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 68-69.

[1251] In LA110040-O8, points 8.3 and 8.4 the court opted for this argumentation by mentioning the damage suffered by the canton that had unduly paid for legal aid. It could also have been imaginable to apply the rules on unjust enrichment of Articles 61-67 CO.

[1252] Which is what the author argued; see Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 69.

[1253] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 70-72.

- Any rights of the beneficiary against the funder must be "effective", to justify not reinstating legal aid. Litigious rights should not be considered effective.

In cases such as LA110040-O8, the author recommended to allow legal aid on the condition that the beneficiary sues the funder to obtain payment of what is owed – legal aid should then also be allowed for such proceedings. Once the beneficiary is paid, he will have to repay all legal aid by virtue of Art. 123(1) CPC.[1254]

Regarding "complementary" TPLF – in parallel to legal aid – the author considered it non-problematic if it does not extend to elements covered by legal aid. For example, a funding agreement that only covers potential adverse costs should not impede the issuance of legal aid. However, the situation is more delicate if the agreement has an impact on the benefits provided by legal aid, e.g., if it adds a supplement to the lawyer's compensation. The author held that such a configuration would be against the lawyer's duty of due diligence, because when a lawyer is paid through the legal aid mechanism, it has a relation with the State and cannot accept further payment from the client.[1255]

2.4.6.4 Respect of confidentiality

One scholar was of the idea that sensitive information should not be transferred by a lawyer to the funder, and only shown in the law firm locales. The author pointed out that funders are not bound by professional secrecy norms, only by confidentiality clauses in the agreement. Such clauses do not constitute attorney-client privilege before courts, so a funder would have to testify against a beneficiary even if a confidentiality clause had been stipulated. The author opined that it would be advisable to legally extend the funder's duty to preserve confidentiality and include a right not to testify for funders and justice protection insurers.[1256]

2.4.6.5 Liability of the lawyer for damages suffered by the funder

Several authors pointed out that there is no contractual ground for the lawyer's liability for damages suffered by the funder in case of alleged malpractice; the lawyer is only contractually bound to the client.[1257]

Tortious liability would be the only legal ground for a funder's malpractice suit against a lawyer,[1258] but it would be difficult to fulfil the illegality condition required by Art. 41(1) CO, given that the damage that a funder could allege would be purely economic. Liability for such a damage requires "behavioural illegality" (*Verhaltensunrecht*, *illiceité de comportement*) under Swiss law, which amounts to two cumulative conditions[1259]:

1. The funder would need to prove that a specific provision of Swiss law was violated, eg. the professional duties set out by Articles 12 and 13 FMLA. However, it must be noted that in

[1254] *Ibidem*.
[1255] *Ibid.*, p. 78-80.
[1256] *Ibid.*, p. 210-212.
[1257] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 14, who salutes this, because lawyers would otherwise be torn between two sets of interests, if they risked litigation from unsatisfied funders and not just from their clients. See also Wyler, Auswirkungen von Prozessfinanzierungen auf die Tätigkeit des Anwaltes, Anwaltsrevue 2020, p. 35.
[1258] See Wyler, Auswirkungen von Prozessfinanzierungen auf die Tätigkeit des Anwaltes, Anwaltsrevue 2020, p. 35.
[1259] See Werro and Perritaz, Commentaire romand Code des obligations I – Art. 41, p. 435-437.

the context of malpractice claims against lawyers, the Swiss Federal Supreme Court set a high evidentiary standard as to the proof of the violation of a professional duty. [1260]

2. The funder must prove that the aim of said provisions was the preservation of the funder's financial integrity. Given how TPLF has not been the subject of legislation in Switzerland, and that the FMLA dates back to a time when the admissibility of TPLF had not yet been declared, it would be brazen to argue that Articles 12 and 13 FMLA could have the goal to protect the financial interests of the funder.

All in all, the difficulties pertaining to each condition mean that it is very unlikely that a lawyer will be tortiously liable for damages suffered by the funder.

It was also discussed whether the lawyer's liability could stem from "Trust-based liability" (*Vertrauenshaftung*, *Responsabilité fondée sur la confiance*), a case law-based ground for liability under Swiss law akin to precontractual liability, albeit more general. To apply, this ground of liability requires a trust or expectations "deserving protection".[1261] This condition would not be fulfilled between funders and lawyers. If a lawyer were to reassure the funder in a particular and explicit way, given the funder's professional expertise, they would generally not be in need of protection.[1262]

Overall, it appears that the lawyer cannot directly be held liable for damages suffered by the funder due to alleged malpractice. Nonetheless, the beneficiary may very well be liable for said damages by virtue of Art. 97 CO *cum* Art. 101 CO – liability for wrongful performance of obligations stemming from the agreement, which extends to the acts of associates. If the beneficiary is held liable and condemned to cover the funder's damages, then the beneficiary will have suffered a damage for which the lawyer can be held liable by virtue of Art. 97 CO.[1263]

2.4.6.6 Professional duty to inform a client of the possibility of TPLF

According to the Swiss Federal Supreme Court, the duties of a lawyer include the need to inform the client of the possibilities of obtaining third-party financing, and to counsel and represent the client in the negotiation and conclusion of a financing agreement.[1264]

The following criteria are used to assess whether a duty to inform exists in a given case[1265]:

- The client has insufficient means to carry out the proceedings but doesn't qualify for legal aid;
- The proceedings relate to private law, and are monetary and litigious in nature;
- The litigious value is of at least 250k.- CHF[1266];

[1260] See Wyler, Auswirkungen von Prozessfinanzierungen auf die Tätigkeit des Anwaltes, Anwaltsrevue 2020, p. 35-36.
[1261] See Morin, Commentaire romand Code des obligations I – Art. 1, p. 44-46.
[1262] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 284-285 and 311-312.
[1263] See Can, Der teure Prozess, ius.full 2021, p. 194-195.
[1264] See BG, 2C_814/2014, point 4.3.1.
[1265] See Schumacher and Nater, Anwaltsrubrik/La page de l'avocat: Prozessfinanzierung und anwaltliche Aufklärungspflichten, SJZ 2016, p. 45 ff; and Wyler, Auswirkungen von Prozessfinanzierungen auf die Tätigkeit des Anwaltes, Anwaltsrevue 2020, p. 35.
[1266] Many contributions noted 250k-300k- as the general minimum value cases that funders will accept, but data is not always coherent. One author reported that the minimum value tends to be between 500'000.- and 1'000'000.- CHF; see Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, note 10.

- The client seems particularly risk-averse as to the costs of the proceedings[1267];
- The likelihood of success is compatible with the habitual expectations of funders.
- The client's assets are not sufficiently liquid, or the client wishes to use its liquid assets for other endeavours.

On the contrary, the duty to inform was excluded in other instances, such as: if the client benefits from legal protection insurance policy; if the client is already knowledgeable about the practice of TPLF in Switzerland; if the mandate is one that no TPLF company would want, e.g., because the client's interests are not expressible in economic terms, because the litigious value is below market thresholds, or because the case has low chances of success.[1268]

When the duty to inform does exist, provided information should be abstract and explain the concept of TPLF and the main advantages and disadvantages of the practice.[1269]

Nevertheless, it should be noted that there is no obvious sanction for cases where the duty to inform is violated.

2.4.7 Provisions of criminal law

In its ruling BGE 131 I 223, the Swiss Federal Supreme Court mentioned Art. 157 of the Swiss Criminal Code as one of the existing provisions which would provide a framework to the TPLF industry. The provision punishes profiteering, and reads as follows:

1.. Any person who for his own or another's financial gain or the promise of such gain, exploits the position of need, the dependence, the weakness of mind or character, the inexperience, or the foolishness of another person to obtain a payment or service which is clearly disproportionate to the consideration given in return,

any person who acquires a debt originating from an act of profiteering and sells or enforces the same,

shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

2. If the offender acts for commercial gain, a custodial sentence of from six months to ten years shall be imposed.

No case of profiteering concerning TPLF has yet been reported in Switzerland.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs

Recent contributions have reported that Nivalion AG funds cases worth 7'000'000.- CHF and up, whereas Profina Prozessfinanzierung GmbH kept the minimum value at 250'000.- CHF. See respectively Berger, Furter and Studer, Bei der Prozessfinanzierung, ZZZ 2023, p. 166; and Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 190, respectively.
In case of bundled claims, one author notes that the altogether sum of the values of all claims is determinant. See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 15.

[1267] One author underlines that for risk-averse clients, the duty can exist even when legal aid would be available; see Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 51. Indeed, as noted *supra*, 2.4.5.2, legal aid does not extend to adverse costs owed to a winning counterparty and it must be repaid.

[1268] See Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 45; see also Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 254.

[1269] See Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 46.

Under Swiss law, there is no general obligation to disclose a TPLF agreement.[1270] As mentioned above[1271], if the beneficiary of the funding agreement is also a recipient of legal aid, then their representative risks violating Art. 12(a) FMLA if the loss of right to legal aid is not communicated to the court. However, as stated by the Swiss Federal Supreme Court, the lawyer can do so without mentioning the existence of the agreement, meaning that even in this configuration of facts, there is no duty of full disclosure. [1272]

Regarding conflicts of interests, the provisions that exist largely concern the lawyers, and have been summarized above.[1273]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

If requested by the defendant, a claimant can be ordered to pay securities for adverse costs under the conditions set by Art. 99 CPC.[1274] If due, the payment is a procedural requirement under Art. 59 CPC. Formally, this duty concerns the claimant alone: even if it is made aware of a funding agreement, the court to which the funded claim was brought cannot order the TPLF company to pay the securities on the ground of a provision of the CPC. Only the beneficiary can claim such payment from the funder.[1275]

Furthermore, there seems to be an agreement as to the fact that, even when the TPLF agreement contains a stipulation for the covering of adverse costs, it only constitutes an obligation of the funder toward the beneficiary, and cannot give rise to direct claims by the counterparty against the funder – unless the beneficiary assigns his or her claim to the counterparty under Articles 164 ff. CO.[1276] Such an assignment can be pre-emptively excluded in the agreement as per Art. 164(1) CO.

2.7 Obligations of funders towards beneficiaries and vice-versa

There are no specific provisions on the obligations of funders towards beneficiaries.

Obligations of contractual origin that are usually contained in TPLF agreements include the following[1277]:

- The beneficiary has a duty to provide the funder with the details of the funded claim; to inform the funder of relevant news and important events related to or affecting the

[1270] See Villa, Le financement de contentieux par des tiers («third party funding»), Anwaltsrevue 2014, p. 210; and Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 7.
[1271] See *supra*, 2.4.6.3.
[1272] See for example case BG, 2C_814/2014.
[1273] See *supra*, 2.4.6.1.
[1274] Alternatively: lack of residence or registered office in Switzerland; apparent insolvability; unpaid debt for previous procedural fees; considerable risk that adverse costs will not be paid in case of defeat. In proceedings listed in Art. 99(3) CPC, such as divorce proceedings, securities need not be provided.
[1275] See Nivalion AG, Litigation Funding 2021, Lexology 2020, point 19.
[1276] See Nivalion AG, Litigation Funding 2021, Lexology 2020, point 18; Schmid, 5 Jahre ZPO aus Sicht der Praxis – Wünsche für die nächsten fünf Jahre, Schulthess 2016, p. 27; and Steiner and Junginger, Litigation Funding in Switzerland, 2018, https://www.globalarbitrationnews.com/2018/01/30/litigation-funding-in-switzerland/, last accessed on August 21st, 2024.
[1277] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 4 and 8. These obligations are not specific to funding agreements concluded for the Swiss litigation market.

proceedings[1278]; to conduct the proceedings in a cost-effective way; to waive attorney-client privilege in favour of the funder; to include the funder in decisions that have bearing on costs and prospective earnings; to pay the agreed upon cut of the earnings[1279] to the funder.

- The funder has to pay for the proceedings and make the required deposits.

The beneficiary's duty to conduct proceedings efficiently also results from the general duty to preserve fiduciary interests. If the funding agreement does constitute a simple society, then the *diligentia quam im suis principle* provided in Art. 538(1) CO will apply.[1280]

Consequences to a beneficiary's breach of contract include the non-payment of costs associated with acts in breach, or unilateral termination rights – with *ex nunc* or *ex tunc* effects. Sometimes, the funder is also given the right to approve of the beneficiary's choice of the lawyer.[1281]

Besides unilateral termination, it is also discussed whether a funder could hold a beneficiary liable of having misrepresented its claim's risk profile. *Culpa in contrahendo* could be applicable to misrepresentation during the negotiation stage if the funder suffered damages or, if a funding agreement was concluded, liability for wrongful performance (Articles 97 ff CO).[1282]

Aside from obligations, the funder can *de facto* exert influence on the beneficiary, in particular if unilateral termination rights have been stipulated. This is particularly visible if the funder wishes to withdraw because of loss in the first instance, of settlement propositions, of counter-claims raised by the counterparty, or of *nova* that negatively affected the chances of success.[1283]

2.8 Distribution of awards and bearing adverse costs in lost cases

There is no legislation that would specifically apply to TPLF. However, in civil proceedings, a judge can order the claimant to pay securities for the costs encountered by the defendant, if some conditions are met.[1284] In particular, such an order can be issued if "there seems to be a considerable risk that the compensation will not be paid".[1285] If, as it occurs in the majority of cases, the funding

[1278] See also Schoch and Heidbrink, Der Prozessfinanzierer übernimmt das Risiko - Ein kostengünstiges Instrument kann in Zivilprozessen helfen, das Recht durchzusetzen, Recht im Spiegel der NZZ 2019, p. 11.
[1279] The cut is generally within a range of 20 to 40%. In BGE 131 I 223, the Swiss Federal Supreme Court mentioned that one author considered a cut of 50% to be immoral, thus in violation of Art. 20 CO. However, the Court neither confirmed nor opposed this stance. See Nivalion AG, At a glance: regulation of litigation funding in Switzerland, Lexology 2023
[1280] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 8.
[1281] *Ibid*, p. 4 and 8. See also Can, Der teure Prozess, ius.full 2021, p. 191-192.
[1282] See Can, Der teure Prozess, ius.full 2021, p. 191-192. Furthermore, the author notes that Articles 24 and 28 CO would allow the unilateral and *ex tunc* voidance of the contract, and it would also be possible to claim damages as per Art. 31(3) CO *cum* Art. 41 CO.
[1283] See Meier, Prozessfinanzierung, insbesondere prozessuale und konkursrechtliche Fragen, ZZZ 2019, p. 9-11. According to the author, it would be beneficial if the termination right were waived on a case by case basis – if not all in every instance. For example, the author evokes that in cases where the personal/human component is strong (personal injury claims), it would be unfair to force a claimant to go on because of a proposed settlement that is less substantial than expected earnings.
[1284] As provided by Art. 99 CPC, the defendant must require it, and a situation must exist that makes the recovery of such costs doubtful – e.g., a claimant not residing in Switzerland, or apparently insolvent. Orders can't be issued in the context of divorce proceedings, proceedings related to the Federal Act on Data Protection (RS 235.1), or non-monetary simplified proceedings. The latter are listed in Art. 243(2) CPC.
[1285] Art. 99(1)(d) CPC.

agreement remains undisclosed, then it cannot mitigate the aforementioned risk nor influence a decision on securities. When a funding agreement is disclosed, and the agreement explicitly extends to the funding of adverse costs, a security for costs order may be issued based on the above ground.[1286]

In the context of arbitration, it was reported that a funding agreement can wholly exclude the funder's coverage of adverse costs in case of loss at trial.[1287] It was argued that in such cases, ordering the beneficiary to secure adverse costs seems adequate, particularly if the beneficiary's financial situation appears doubtful. In general, however, the mere conclusion of a funding agreement should not entail an order for securities of adverse costs.[1288]

2.9 Planned legislation

2.9.1 Unsuccessful attempts

In its first project for the Financial Services Act (FinSA), the Federal Council wanted to introduce funds which would support claims with not unreasonable chances of success, brought by claimants of limited means. Unlike legal aid, the funding would have extended to adverse costs. In case of victory, the fund would have a direct claim against the losing counterparty, limited to the extent of the funding. There would be no additional share to be paid to the fund, in excess of the money that was lent. The legislative project fell through due to strong opposition during the consultation stage, in particular from the finance sector.[1289]

Another failed piece of legislation that concerned TPLF was related to Art. 97 CPC. The article currently states that "The court shall advise a party without legal representation on the costs to be expected and on legal aid". This duty was to be expanded: the court would have to inform all parties as to legal aid and the existence of TPLF.[1290] The Federal Council considered that the low recourse to TPLF in Switzerland was at least partly due to a lack of awareness as to the existence of this possibility. Already in 2013, the Federal Council had expressed the wish for the establishment of a flourishing TPLF market in Switzerland, which arguably lacked in efficacy.[1291]

Similar opinions had been expressed during the consultation process: while some stakeholders approved of the proposed amendments to Art. 97 CPC[1292], the majority of cantons and organizations did not. The most significant arguments adduced against the were the following[1293]:

[1286] See Nivalion AG, Litigation Funding 2021, Lexology 2020, point 20; and Peter, Der ZPO-Revisionsentwurf zum kollektiven Rechtsschutz, AJP 2022, p. 586-587. The latter argues that the only configuration in which the funding agreement could effectively mitigate the risk in Art. 99(1)(d) CPC, and thus avoid a security for costs order, is if the counterparty were to have a direct claim against the funder for said costs.

[1287] See Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 195.

[1288] See Bachmann, The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland, ASA Bulletin 4/2020, p. 860; and Zweifel, Prozesskostensicherheit im Schiedsverfahren, SGRW 2021, p. 191-196.

[1289] See Schumacher, Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren, ZStV 2015, p. 47.

[1290] See SC, Rapport explicatif relatif à la modification du code de procédure civile, March 2nd, 2018, p. 48-49; and Wuffli and Fuhrer, Handbuch unentgeltliche Rechtspflege im Zivilprozess, In Praxi 2019, p. 271-273.

[1291] See FC, Exercice collectif des droits en Suisse: état des lieux et perspectives, 2013, JAAC 2013, p. 148 and 155.

[1292] In particular some organizations, syndicates, and one funder. See FC, Révision du code de procédure civile – Synthèse des résultats de la procédure de consultation, p. 28.

[1293] See FC, Révision du code de procédure civile – Remarques par article, p. 119 ff.

- The duty to inform about private TPLF should not fall on courts;
- Information would reach parties at too late a stage[1294];
- The consequences of an omission on the side of the judge were not clear;
- There may be a risk of State liability arising from the advertisement of funding activities;
- The draft promoted an undue influence of the public sector on the private market, in particular in a field that was constitutive of a quasi-monopoly, because of the low number of funders active in Switzerland;
- By advertising TPLF, more money would be invested in claims, and the judicial peace (*Rechtsfrieden*) would be compromised;
- Parties counselled by lawyers would have no need for this kind of information, since it is already their lawyers' professional duty to inform them[1295], and judges should not intervene to counsel parties that are already being counselled by a lawyer;
- Suggesting funding options to both parties is not above posing impartiality concerns since, in reality, the claimant is the one most often benefitting from TPLF.

Other participants to the consultation process proposed some improvements, such as making it a *Kann-Vorschrift*[1296] or adding that courts should check that financing would only come from third parties unrelated to the dispute and in a neutral position as to the parties and the facts.[1297]

However, Art. 97 CPC was not altered, and was cut from the review of the CPC altogether.[1298] Reportedly, the parliament agreed that judges should not advertise privately financed instruments and that, considering the minimum values in the TPLF industry, interested parties would already have a lawyer to inform them of this possibility.[1299]

2.9.2 Legislation to enter into force

In response to the striking down of the amendment to Art. 97 CPC, a new draft of Art. 400 CPC was proposed, whose entry into force is scheduled for January 1st, 2025. It adds an *a linea* 2bis stating that "[t]he Federal Council shall provide the public with information on legal costs and the possibilities of legal aid and litigation funding." The duty of information was shifted from the judiciary to the executive, solving most of the issues that had been raised and that are listed above.[1300] The Federal

[1294] This view was seemingly shared even by stakeholders that were favourable to the project, such as the funder Nivalion AG, who proposed to extend the duty to inform to conciliation authorities; see FC, Révision du code de procédure civile – Remarques par article, p. 121.
Outside the consultation process, one scholar voiced a similar opinion: to be useful, information on TPLF should reach parties before they reach court. If information on private services were to be given at all – which is not necessarily true – it should happen either before conciliation authorities or on court websites. Parties that reach court have already wagered that they can afford the proceedings, or they would not have gone that far. See Schumacher, Richterliche Pflicht zum Hinweis auf private Prozessfinanzierung?, AJP 2018, p 467; and Schumacher, Anwaltliches Erfolgshonorar, FHB Zivilprozessrecht 2020, p. 56.
[1295] As per BG, 2C_814/2014.
[1296] The judge would provide the information only if he or she considered it appropriate for the parties at hand; see FC, Révision du code de procédure civile – Remarques par article, p. 125.
[1297] See FC, Révision du code de procédure civile – Remarques générales, p. 42.
[1298] See FC, Message relatif à la modification du code de procédure civile suisse, February 26th, 2020, p. 2624.
[1299] See Heisch, Abtretungsmodelle im Zivilprozess – Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung, ZStV 2022, p. 183-184.
[1300] See *supra*, 2.9.1.

Council hopes to facilitate access to funding for parties that are unable to obtain legal aid under Art. 117 CPC.[1301]

2.9.3 Work in progress

The review of the CPC to enter into force in 2025 was meant to include the addition of collective redress mechanisms. Due to political disagreements, the introduction of collective claims and settlements has been severed from the rest of the review and postponed, as it will need to undergo further debates before a possible approval.[1302]

A regulatory impact assessment (*Regulierungsfolgenabschätzung*, RFA) of the current project on collective redress[1303] mentions that if the project is approved, TPLF companies will gain traction in the Swiss legal system due to their very important role for the funding of representative actions – although some resistance is palpable from the corporate sector, with companies fearing a rise in liability claims.[1304]

Both in the RFA and in pre-existing contributions, the risk that TPLF would foster abusive claims was described as minimal, because the financial risk is not avoided altogether but shifted to a third party who still seeks profitability. As such, funding agreements are only concluded if the prospective claim withstands a thorough vetting process regarding the chances of success. If said chances are deemed to be limited or doubtful, the claim will not be funded, because it won't be profitable for the funder itself.[1305]

3. Practical operation of TPLF

From a practical perspective, the Swiss market for TPLF is quite diverse with funders covering different types of proceedings and funders of different size and with different experience.

Operators:

- JuraPlus AG
- Nivalion AG
- Profina Prozessfinanzierung GmbH
- Omni Bridgeway
- Swiss Legal Finance SA
- Liti Capital SA
- Vannin Capital
- Liti-Link AG

[1301] FC, Message relatif à la modification du code de procédure civile Suisse, February 26th, 2020, p. 2632 and 2683.
[1302] *Ibid.*, p. 2721 ff. See also Lantham, The Third Party Litigation Funding Law Review, Fifth edition, 2021, p. 199.
[1303] Which plans to introduce representative actions through organizations, and collective settlement mechanisms. See Ecoplan and Domej, RFA zu Verbandsklage und kollektivem Vergleich, June 23rd, 2023, p. 14.
[1304] See Ecoplan and Domej, RFA zu Verbandsklage und kollektivem Vergleich, June 23rd, 2023, p. 14 and 67-68.
[1305] See Ecoplan, Zusatzabklärungen zur RFA zu Verbandsklage und kollektivem Vergleich, February 2nd, 2024, p. 42. See also Müller, Kollektiver Rechtsschutz in der Schweiz – Braucht es ein Gruppenvergleichsverfahren?, HAVE 2019, note 289.

- Burford Capital Ltd

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Types of cases typically funded depend on the funder. Frequently funded cases include Civil Law, Commercial law, Consumer Protection, Antitrust, Data protection and Insolvency.

On average, larger funders reportedly would fund 6-7 cases per year. Some of these cases are arbitration cases where funders derisk the award creditor from enforcement and set aside risks.

b. Minimum claim value in absolute terms (in million Euro) and c. Typical claim value in absolute terms (in million Euro)

Funders utilise portfolio TPLF, but it is not as prevalent in Switzerland. Larger funders would typically fund cases with a minimum claim value of around 30 Mio CHF. In arbitration cases the value would be ca 70 - 75 Mio CHF on average.

d. Typical ratio between investment by the funder and claim value

The typical ratio between the investment by the funder and the claim value would be around 1:10 as a general rule.

e. Typical size of the investment by the litigation funder (in million Euro)

The typical size of the investment by litigation funders depends again on the funder and the funded cases. For financing of larger cases investments cover ca. 5-7,5 Mio CHF.

f. Origin of funding provided by the litigation funder

N/A

g. Share of compensation awarded typically demanded by litigation funders

The share of compensation typically demanded by litigation funders is generally bespoke, usually based on multiples or a combination of multiples and percentages. A percentage of just under 30% was mentioned by a litigation funder.

As to the outcomes of funded cases, and if success is determined by getting the investment plus a return back, then the overwhelming majority of cases has a positive outcome due to careful due diligence. One funder mentioned a success rate of 95% .

h. Other conditions of the litigation funding agreement

N/A

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

N/A

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

N/A

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

In the arbitration context (e.g. in arbitrations under the ICC rules) the fact that a case is funded needs to be disclosed. Arbitration rules increasingly acknowledge the existence of and the requirement for transparency regarding TPLF. Only a few leading institutions do not explicitly address TPLF in their rules, amongst them is currently the Swiss Rules.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control

It was reported by litigation funders that they do not exercise any direct control over the legal proceedings. Funders would discuss a potential settlement but do not take any strategic decisions; the lead in this debate is the lawyer, together with the counterparty. Settlement risks are addressed by the funder in the initial negotiations and in the commercial terms and are priced in, but there is generally no express veto right provided for, or any other possibility of influencing procedural decisions. Funders can be involved in discussions on strategy, but without exercising any influence on the decision-making process itself.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

Litigation funders and plaintiff lawyers will have regular calls, together with clients, but there is usually no separate communication outside the discussion as a team. Law firms and funders might establish institutional relationships due to frequent cooperation.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Funding could be withdrawn if contractual obligations are not met. This depends on the contract terms.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

As to conflict of interest, litigation funders have generally the same safeguards in place as e.g. law firms and would investigate if there are conflict of interests at the outset, similarly to the checks that would be done with an arbitral tribunal in this respect.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")?

Funding agreements can cover adverse costs as a budget line item.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Litigation cost agreements often include the requirement for After the Event (ATE) insurance.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

N/A

4. Stakeholder views on TPLF

It was reported that litigation funding practice considers the current legal situation in Switzerland as sufficiently clear, due to the above-mentioned landmark decisions of the Federal Tribunal and the rules in the CPC on the obligation to advise clients on funding.

As to any new or additional regulation, it was mentioned that a regulation of capital adequacy requirements would be helpful, firstly from a user perspective to achieve transparency about the origins of funds and secondly for the funding market as such to provide a framework for less experienced funders. It has also been mentioned that, from a Swiss perspective, the introduction of pricing caps as is the case in some jurisdictions is not a viable option.

Any other option of litigation finance was considered less efficient to ensure access to justice for large cases. Legal aid would not be sufficient and specific public funds are unavailable. For mass cases there is no access to justice without funds. ADR can generally be effective to seek redress, but mediation tends not to deliver a binding final result. It was noted that there is new market segment of TPLF in mediation as well.

In Swiss practice, the following positive effects of TPLF have been observed in practice: Better access to court procedures for parties that could not fund litigation otherwise (in particular, insolvency related cases would not have been pursued without funding in Switzerland); deterrence effect on companies that serve consumer markets due to the increased likelihood of mass claims related to e.g. the use of unfair practices or marketing of unsafe products and services; a filtering effect, as cases with a low chance of success will not be funded; professionalisation and expertise for complex cases provided by the funder.

Negative effects have not been reported as being a major issue in practice. Conflict of interests can be avoided through transparency; The funding of frivolous claims is not in the interest of funders and any concerns in this respect could be solved with rules on capital adequacy. The mentioned issues could only be problematic in the context of funders without experience who don't do due diligence.

There are no indications that the use of TPLF in Switzerland has led to economic impacts (e. g. on costs of litigation, increasing costs of legal insurance etc).

As to further regulation of TPLF, it was mentioned that a regulation of capital adequacy rules should be considered.

Abbreviations and acronyms

*AG Company Limited by Shares (*Aktiengesellschaft*)*

AISUF Arbeiten aus dem Iuristischen Seminar der Universität Freiburg

AJP Aktuelle Juristische Praxis

AMLA Anti-Money Laundering Act of October 10th, 1997 (SR 955.0)

ASA Swiss Arbitration Association

*BG Swiss Federal Supreme Court (*Bundesgericht*)*

*BGE Ruling of the Swiss Federal Supreme Court (*Bundesgerichtsentscheid*)*

BlSchK Blätter für Schuldbetreibung und Konkurs

BV Federal Constitution of the Swiss Confederation of April 19th, 1999 (SR 101)

CC Swiss Civil Code of December 10th, 1907 (SR 210)

CISA Collective Investment Scheme Act of June 23rd, 2006 (SR 951.31)

CL Collection lausannoise

CPC Swiss Civil Procedure Code of December 19th, 2008 (SR 272)

CO Swiss Code of Obligations of March 30th, 1911 (SR 220)

FHB Fachhandbuch

FinIA Financial Institutions Act of June 15th, 2018 (SR 954.1)

FINMASA Financial Market Supervision Act of June 22nd, 2007 (SR 956.1)

FinMIA Financial Market Infrastructure Act of June 19th, 2015 (SR 958.1)

FinSA Financial Services Act

FMLA Federal Act on the Free Movement of Lawyers of June 23rd, 2000 (SR 935.61)

GAAP Generally Accepted Accounting Principles

*GmbH Limited Liability Company (*Gesellschaft mit beschränkter Haftung*)*

HAVE Haftung und Versicherung

IFRS International Financial Reporting Standards

ius.full Forum für juristische Bildung

JAAC Jurisprudence des autorités administratives de la Confédération

LLC Limited Liability Company

Ltd Company Limited by Shares

NZZ Neue Zürcher Zeitung

OS Ordinance on the Surveillance of Private Insurers of November 9th, 2005 (SR 961.011)

p. page

*RFA Regulatory impact assessment (*Regulierungsfolgenabschätzung*)*

*SA Company Limited by Shares (*société anonyme*)*

SC Swiss Confederation

SchKG Federal Act on Proceedings for Debts and Bankruptcy of April 11th, 1889 (SR 281.1)

SGRW St. Galler Schriften zur Rechtswissenschaft

*SICAV Investment company with variable capital (*société d'investissement à capital variable*)*

SJZ Schweizerische Juristen-Zeitung

*SR Classified Compilation (*Systematische Rechtssammlung*)*

TPLF Third party litigation funding

UCA Unfair Competition Act of December 19th, 1986 (SR 241)

US United States

ZHR Zeitschrift für das gesamte Handels- und Wirtschaftsrecht

ZPR Schriften zum Schweizerischen Zivilprozessrecht

ZStöR Zürcher Studien zum öffentlichen Recht

ZStV Zürcher Studien zum Verfahrensrecht

ZZZ Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht

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Relevant legislation

AMLA	Anti-Money Laundering Act of October 10th, 1997 (SR 955.0)
BV	BV Federal Constitution of the Swiss Confederation of April 19th, 1999 (SR 101)
CC	Swiss Civil Code of December 10th, 1907 (SR 210)
CISA	Collective Investment Scheme Act of June 23rd, 2006 (SR 951.31)
CPC	Swiss Civil Procedure Code of December 19th, 2008 (SR 272)
CO	Swiss Code of Obligations of March 30th, 1911 (SR 220)
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FinMIA	Financial Market Infrastructure Act of June 19th, 2015 (SR 958.1)
FinSA	Financial Services Act of June 15th, 2018 (SR 950.1)
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SchKG	Federal Act on Proceedings for Debts and Bankruptcy of April 11th, 1889 (SR 281.1)
UCA	Unfair Competition Act of December 19th, 1986 (SR 241)

Canada

Prof Camille Cameron KC, Schulich School of Law

Executive Summary

- Third Party Litigation Funding (TPLF) is increasingly a feature of litigation and arbitration in Canada.
- TPLF is accepted by Canadian courts in single-party and class actions cases.
- TPLF agreements (LFAs) are not per se champertous, but a small number have been found by courts to be champertous due primarily to the amount of the return to the funder.
- There is a significant amount of court jurisprudence in Canada regarding TPLF, much of it in a class actions context. That jurisprudence has also shaped the development of TPLF outside the class actions context.
- There is no direct regulation of TPLF in Canada.
- An indemnity for adverse costs is a typical feature of LFAs. The general costs rule in Canada is 'loser pays'. Some provinces have an exception to this rule for class action litigation.
- Canadian lawyers are permitted to charge contingency fees. These are a common feature in many TPLF cases. Court jurisprudence regarding contingency fee agreements (CFAs) has influenced approaches taken by courts in cases in which they are called on to approve LFAs.
- Pre-approval of LFAs by courts is required in class actions and insolvency cases. Some plaintiffs and litigants choose to apply for pre-approval of LFAs in private (non-class action) commercial cases.
- There are mixed views about whether pre-approval of LFAs is required in private commercial litigation. The dominant but not the only view, based on recent court jurisprudence and our interviews, is that pre-approval is not required in such cases.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

There is no existing legislation that directly addresses TPLF, nor are we aware of any planned legislation. Most of the guidance has come from the development of the common law on a case-by-case basis.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

The use of TPLF has increased significantly in the past decade.[1306] The subject matter of TPLF cases is broad and varies across litigation funders and lawyers. It includes but is not limited to price-fixing, patent infringement, insolvency, anti-competitive practices, violations of labour and employment rights, consumer protection, personal injury, equality and non-discrimination, data protection, securities fraud, business and human rights, insolvency, and product liability. A striking feature of TPLF in Canada is that many of the case funded are class actions. As TPLF has developed, however, the number of private commercial (non-class action) cases has increased.[1307]

See the summary in Appendix B for details of a broad sample of cases (court, subject matter, funder).

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

As of 2024, at least 12 funders have been active in the Canadian market. Some of these funders have a Canadian base; most are based elsewhere but have funded or are currently funding one or more Canadian cases.

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There is no single source that offers statistics on TPLF cases. Much of the information regarding the operation of TPLF comes from court decisions in class actions.[1308] Canadian Courts have a supervisory role in class actions. This role includes protecting class members, recognising the risk that the interests of prospective class members may not necessarily be aligned with those of the

Camille Cameron KC, Professor, and David Eno, JD'26 (Schulich School of Law, Dalhousie University, Nova Scotia, Canada)

[1306] For general overviews of the growth and development of TPLF in Canada, see the collected papers from a 2013 symposium on TPLF, (2014) 55 Canadian Business Law Journal 1 (*Symposium 2013*); Litigation Funding Roundtable: The Canadian Perspective (2016), Bentham IMF (*2016 Roundtable*): https://www.bennettjones.com/Publications-Section/Speaking-Engagements/Litigation-Funding-Roundtable-The-Canadian-Perspective; OmniBridgeway, *Case Summaries:* https://omnibridgeway.com/insights/regulation-and-case-law/legal-landscape-canada/case-summaries/ 1

[1307] *Omni Bridgeway Case Summaries*

[1308] Many of those class action cases have been decided by courts in the province of Ontario under the provisions of that province's *Class Proceedings Act 1992* (*Ontario CPA*).

representative Plaintiffs, class Counsel, or third-party funders.[1309] It follows that any LFA ***in a class action (and in insolvency cases)*** must be approved by the Court.[1310]

As TPLF has developed, however, there have also been a few court decisions regarding the operation of TPLF outside these two contexts.[1311] The number of private commercial cases has increased in the past decade, but these are for the most part not reported because, as matters currently stand, court approval of funding agreements in these cases is not required.[1312] The Federal Court of Canada has stated that the application for pre-approval of a LFA in a private commercial case is "strictly a matter of contract between subject and subject and properly within the jurisdiction of the courts of the provinces." [1313] In such cases, the funder and the plaintiff might nonetheless decide to apply to a court of a province to seek the comfort of court pre-approval of the LFA.

In addition to court decisions as a source of information about TPLF, there is also a significant amount of detail available in various business media sources and on the websites of litigation funders. Apart from these sources and court decisions, there is no system-wide collection or analysis of statistics regarding TPLF.

1.5 Is there significant doctrinal discussion on TPLF?

The primary source of discussion and debate regarding the operation of TPLF in Canada has been court decisions in which courts have been called on to approve litigation funding arrangements. There is some but not a great deal of discussion in academic journals regarding TPLF. The dominant themes in this literature include how best to regulate TPLF; its contributions to enhancing access to justice; ethical issues that can arise in funded cases, especially regarding control of litigation and termination of a LFA, and whether approval or disclosure of litigation funding agreements outside the class action context is or should be required.[1314]

1.6 Are there specific issues that have caused debate at a doctrinal or a political level?

This is addressed in *1.5*, above. There has not been discussion of or lobbying for regulation to the extent heard in some other jurisdictions. This might be due in part to the stage of growth of TPLF in Canada when compared with other jurisdictions. Another reason is that many of the Canadian cases in which TPLF has been used are class actions, the result being that court approval of the TPLF arrangements has been required. This has given courts the role of shaping and defining the contours of TPLF and its role in civil litigation.[1315] While most of the court decisions have been made in class

[1309] *Difederico and Casey v. Amazo.Com Inc, 2021 FC 311 (Difederico v. Amazon)* [29-30]
[1310] The first ***reported*** case in which a Canadian court approved a LFA was *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, a class action in which the class alleged that the defendant misrepresented its risk management practices in its public disclosure documents.
[1311] *Seedlings v. Pfizer,* 2017 FC 826
[1312] ibid
[1313] ibid [28]
[1314] *Symposium 2013*; Ranjan K. Agarwal and Doug Fenton, 'Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context' (2017) 59 Canadian Business Law Journal 65 (*Agarwal and Fenton, Beyond Access to Justice*); Poonam Puri, 'Profitable Justice: Aligning Third Party Financing of Litigation with the Normative Functions of the Canadian Justice System' (2014) 55 Canadian Business Law Journal 34 (*Puri, Profitable Justice*)
[1315] *Defederico v. Amazon*

actions, that jurisprudence has had and continues to have an influence on shaping TPLF outside the class actions context.[1316]

2. Relevant legislation applicable to TPLF in Canada

2.1 Legal admissibility and conditions of using TPLF in civil litigation

Maintenance and Champerty

It is still possible in Canada for court approval of a LFA to be rejected on the grounds of champerty, but this is rare.[1317] Beginning with consideration of Conditional Fee Agreements between lawyers and clients (CFAs), Canadian courts have been reshaping the rules regarding CFAs over time to "accommodate changing circumstances and the current requirements for the proper administration of justice."[1318] Chief among the factors courts have considered in this CFA context are the costs of litigation and the importance of access to justice. Courts have relied on and used this same reasoning in the TPLF context.

In *McIntyre v. Ontario,* a wrongful death suit, the Ontario Court of Appeal considered a claim by the Attorney General of Ontario that the CFA entered into between the plaintiff and her lawyers was void for champerty.[1319] The Court stated that "there is a strong case to be made that the continuation of a per se prohibition against contingency fee agreements actually tends to defeat the fundamental purpose underlying the law of champerty – the protection of the administration of justice and, in particular, the protection of vulnerable litigants."[1320] Informing the Court's view were concerns about access to justice and the costs of litigation.[1321] While these comments were made in the context of court approval of a CFA, they have been relied on since then in cases regarding the approval of LFAs.[1322] In *Difederico*, for example, the Federal Court of Canada reviewed the analysis and conclusions in *McIntyre* and stated that courts should take a similar approach in considering whether a LFA is champertous.[1323]

In cases in which courts have found that a LFA is champertous, the main concern has been that the return for the funder is unreasonable.[1324] In *Schenk v. Valeant*, the Court was "very sensitive" to the access to justice issues raised by the Plaintiff, who was a person of modest means with no ability to finance the complex patent litigation without the support of a litigation funder. [1325] The Court rejected the LFA as champertous, however, because it provided for an open-ended return to the

[1316] Rachel Meland, 'How Class Actions Have Shaped Litigation Financing Law in Canada' (2019) Canadian Class Action Review 467 (*Meland, CCAR*)
[1317] In *Schenk v Valeant Pharmaceuticals*, 2015 ONSC 3215 the court evaluated a LFA and found it to be champertous, but allowed the parties involved to amend the agreement, resulting in its ultimate approval.
[1318] *McIntyre Estate v. Ontario,* (2002) 61 O.R.(3d) 257 (*McIntyre*)
[1319] ibid
[1320] *McIntyre* [72]; *Difederico v. Amazon* [49]
[1321] *McIntyre*, ibid [55]
[1322] *Houle v. St Jude Medical Inc*, 2018 ONSC 6352 (*Houle v. St Jude 2*) [43]*; Ingarra and others v. Dye & Durham Ltd and others*, 2024 FC 152 (*Ingarra*) [55]; *Difederico v. Amazon* [48-52]
[1323] *Difederico v. Amazon,*ibid [52] `
[1324] *Ingarra*; *Schenk*; *Breckon and Sills v. Cermaq Canada Ltd and others* 2024 FC225 [106-120]
[1325] *Schenk v. Valeant*, (n12)

funder, who might have received more than 50 percent, perhaps even all, of any recovery.[1326] The order was made on a without prejudice basis to allow for the parties to negotiate a more favourable agreement or for the Plaintiff to find another funder.[1327] The parties returned to Court with an amended LFA which the Court approved.[1328]

2.2 Regulatory oversight of funders/funding industry

There is no body charged with direct oversight of litigation funders or the litigation funding industry. Some of the litigation funders operating in Canada are members of the Association of Litigation Funders UK and subject to that association's Code of Conduct. One of our interview participants stated that there is some evidence that the ALF Code has an influence on the conduct of funders that are not signatories to the Code.[1329]

2.3 Legal frameworks applicable to funders as determining the conditions for carrying out economic activity, e.g., capital adequacy requirements

There exist no capital adequacy requirements or anything akin to that in Canada specifically for TPLF. As stated in *2.2*, some of the funders active in Canada are members of the Association of Litigation Funders (ALF) UK. The ALF UK Code of Conduct mandates that members have at least 5M pounds capital or such other amount as stipulated by the association, and also imposes other requirements regarding overall financial liquidity, financial auditing, and reporting.[1330]

2.4 Non-TPLF frameworks which apply to TPLF

We have discussed maintenance and champerty above in *2.1*. Other relevant frameworks include:

Contract Law – Contract law principles, such as unconscionability and undue influence, might invalidate an agreement for reasons other than maintenance & champerty.

Insurance Law – Funders might come within principles of insurance law and regulation if they offer an insurance product, for example, some form of after the event insurance.

Insolvency - The *Companies Creditors Arrangement Act* (*CCAA*)[1331] allows both recourse and non-recourse financing options. Recourse funding takes the form of debtor-in-possession (DIP) financing.[1332] TPLF can also be approved as interim financing when the judge in the case determines that it is fair and reasonable and in line with the objectives of the *CCAA*. In the *Bluberi* case[1333], the Supreme Court of Canada approved TPLF as interim financing under s 11.2 of the *CCAA*. It noted

[1326] ibid [14-19]
[1327] ibid [19].
[1328] See OmniBridgeway, Maintenance and Champerty in Canada, at: https://omnibridgeway.com/insights/regulation-and-case-law/legal-landscape-canada/case-summaries
[1329] Participant interview; ALF UK Code : https://associationoflitigationfunders.com/wpcontent/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf
[1330] ibid [s.9]
[1331] *RSC 1985, c. C-36 (CCAA)*
[1332] See for a brief explanation of DIP financing in a Canadian context: https://ca.practicallaw.thomsonreuters.com/w-025-1386?transitionType=Default&contextData=(sc.Default)
[1333] *9354-9186 Québec Inc. v Callidus Capital Corp*, 2020 SCC 10 (*Bluberi*)

that while this funding differs from other, more common forms of interim financing, "where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage." [1334] TPLF accomplishes the purpose of interim financing by allowing the debtor to realize on the value of its assets. In *Bluberi*, the single asset was a potential litigation claim of more than $200 million in damages against a creditor, Callidus.

Assignment of a claim - Third party litigation funding takes the form of passive investment with the litigation funder remaining at arm's length during the proceedings. However, in some cases, parties have ceded significant amounts of control of litigation proceedings in a bid to arrange financing. This is done through assigning causes of action. These funding arrangements are permitted in certain limited circumstances, but courts remain wary as champerty & maintenance laws apply. In *7779615 Canada Inc. v British Columbia Hydro and Power Authority,*[1335] *(BC Hydro),* Reconcept GmbH, a German investment firm, advanced a loan to the plaintiff for a wind farm project. That loan was not repaid, which gave Reconcept control of the shares of the plaintiff according to the terms of the loan agreement, making Reconcept the sole shareholder. Reconcept then entered into a litigation funding agreement with the plaintiff and others against BC Hydro that entitled Reconcept to control the litigation. BC Hydro applied to strike out the claim, arguing that assigning one's claim to be handled and litigated by a third-party violated the rules of maintenance and champerty. The court ruled that an assignment of a cause of action in tort is possible where a plaintiff has an obvious and commercial interest in litigation that pre-dates the litigation agreement. The court found that the funder had a genuine and pre-existing interest in the litigation and, accordingly, held that the assignment was not tainted by maintenance or champerty. In that capacity, it was entitled to direct litigation even without the litigation funding agreements.

2.5 Procedural safeguards

In class actions, all the procedural safeguards available to litigants before courts apply. In *Difederico v. Amazon*, a 2021 Federal Court of Canada case[1336], the Court reviewed previous case law and concluded that the overarching test for approval of a LFA is whether it is in the interests of justice to do so.[1337] Building on previous jurisprudence, they identified various factors that should be considered by courts in making this determination. One of these factors is that the "basic procedural and evidentiary requirements have been met".[1338] These include: the Plaintiffs have obtained independent legal advice; there has been prompt disclosure of the LFA and any retainer agreement; there has been a prompt request for court approval of the LFA, with notice to other parties, and a

[1334] *Bluberi*, ibid [96]

[1335] 2023 BCSC 2094

[1336] *Difederico v. Amazon* [32]. The Court stated that as of 2021, it was aware of only one other case in which the Federal Court of Canada had been called on to consider a LFA in a class action. Amazon was later successful in having the class action stayed by the Federal Court in favour of arbitration (*Difederico v. Amazon* (2022) FC 1256). Leave to appeal that decision to the Supreme Court of Canada was dismissed on 16 May 2024

[1337] *Ibid* [35]. *Difederico v. Amazon* was followed in *Pass Herald Ltd v. Google LLC and others* 2024 FC 305 (*Pass Herald v. Google*)

[1338] *Defederico v. Amazon*, ibid [38-40]

copy (with permissible redactions) of the LFA has been provided; and the Court has been given sufficient information regarding the "relevant background circumstances" of the LFA.[1339]

There are different views across Canadian jurisdictions regarding whether defendants have a right to be heard in applications for court approval of LFAs in class actions. In some provinces, applications for approval of LFAs in class actions must be on notice and a copy of the LFA ("subject to appropriate redactions"), has to be provided to the Defendant. In other provinces, the applications can be made *ex parte* (without notice to Defendants). Defendants might therefore argue that this removes a procedural safeguard for them.

Court approval is not required in private commercial claims. In those cases, the contract is the direct source of safeguards.

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties

and

2.7 Obligations of funders towards beneficiaries, and vice versa

These obligations are interrelated.

The primary source of obligations for funders and beneficiaries is the LFA. Funders have an obligation to negotiate an agreement that is neither champertous nor unconscionable and that ensures, among other things, that control of the litigation rests squarely with the beneficiaries. Those funders who are parties to the ALF Code of Conduct must also ensure that their conduct complies in all respects with that Code. If the case is one in which court approval is sought, either because it is a class action or an insolvency case, or it is a private commercial case in which the funder and the plaintiff have chosen to apply for approval of the agreement at the outset of the litigation, then both the funder and the beneficiary are bound by all of the rules that apply to parties on such applications.

The LFA also creates obligations for beneficiaries. A corollary of their right to control the litigation is that they will do so conscientiously. This includes, for example, giving proper and timely instructions during the litigation as required and giving appropriate consideration to reasonable settlement offers.

While questions *2.6* and *2.7* do not ask about lawyer's obligations, those obligation are relevant in a LFA arrangement and are interconnected with the obligations of funders and beneficiaries. Lawyers owe duties to their clients regarding candour, conflicts of interest, and confidentiality, as set out in the relevant ethical codes of conduct, statutes and regulations.[1340] Lawyers are responsible to ensure that the provisions of a LFA and the way a case is conducted (especially regarding control of the litigation) do not run afoul of those obligations.

In their consideration of LFAs on applications for approval, courts look to the terms of the LFA to determine whether the LFA interferes with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding. For example, in *Houle v. St Jude Medical 1*, the

[1339] *Difederico v. Amazon*, ibid [38]; *Houle v. St Jude Medical,* 2017 ONSC 5129 (*Houle v. St Jude 1*) [74]
[1340] See for example the Federation of Law Societies, Model Code of Professional Conduct.

court concluded that some of the clauses in the LFA regarding litigation management and the funder's right to terminate the agreement interfered with the lawyer and client relationship and the autonomy of the representative plaintiffs.[1341] The court gave conditional approval, subject to the Plaintiffs submitting an amended LFA that incorporated the required changes.[1342] In *Difederico v. Amazon*, the Court relied on clauses in the LFA:

- affirming the duties of class counsel to act independently and in the interests of the representative plaintiffs and class members, and to act in a manner consistent with their professional duties;
- making the duties of the plaintiffs' lawyers to the funder subject to professional duties of the lawyers;
- giving the Representative Plaintiffs "the sole and exclusive right to direct the conduct of the Claim and the Proceedings, including the sole and exclusive right to settle the proceedings";
- requiring non-interference by the funder, and
- requiring court approval before the funder could suspend or terminate the LFA agreement.[1343]

Confidentiality - A LFA must have terms stating the funder is bound by the deemed undertaking rule and is also bound not to disclose any confidential or privileged information.[1344] The deemed undertaking rule imposes an obligation not to use information or documents that litigants are required to produce in a civil proceeding for any purpose other than in that proceeding.[1345] This is an undertaking to the court, and anyone bound by it must apply to the court to be relieved of the undertaking. In *Gebien v. Apotex Inc*[1346], an opioids class action, the Defendants raised concerns about deficiencies in the proposed LFA regarding the deemed undertaking and the confidentiality of the documents they would be required to disclose during the course of the litigation. The Court noted that the defendants proposed changes to the LFA that would address their privacy and confidentiality concerns, "probably because they have no right to veto and because they are third party beneficiaries of the litigation funding agreement insofar as adverse costs awards are concerned."[1347] The matter was adjourned to give the Plaintiffs time to address the defendant's concerns. A revised LFA was subsequently approved by the Court.

2.8 Distribution of awards and bearing adverse costs

Distribution of Awards

Third party funders generally seek a share of the recovery in the 30-35% range.[1348] Funding may also be provided as a fee calculated as a multiple of the amount the funder invests. Some funding

[1341] *Houle v. St Jude Medical Inc*
[1342] This decision was upheld on appeal: see *Houle v. St Jude Medical Inc* 2018 ONSC 6352 (*Houle v. St Jude 2*)
[1343] *Defederico v. Amazon*
[1344] *Houle v. St Jude 1, supra* note 35 [30], [37], [65]; *Difederico v. Amazon, supra* note 4 [89-92]; *Seedlings v. Pfizer, supra* note 7 [32-33]
[1345] Practical Law Canada Corporate & Commercial Litigation, "Litigation Funding Overview" (19 June 2024) online: (PL) Thompson Reuters Canada, available at: https://perma.cc/TUL5-9PP3
[1346] *Gebien v. Apotex Inc* 2023 ONSC 4651
[1347] ibid [91]
[1348] Participant interviews

agreements calculate the funder's fee by reference to the greater of a multiple of the funder's investment and a percentage of the successful outcome.

The LFA will usually set out the priority of payments, including any interest and costs ordered, following an award in the claimant's favour or a settlement of the claim. LFAs often provide for payment of proceeds in the following order:

- The funder is reimbursed for its investment/ expenses.
- The funder is paid its return.
- Lawyers receive their agreed fee.
- The balance is paid to the claimant.

In the province of Ontario, litigants can apply to the *Class Proceedings Fund (CPF)* for financial support to assist with the litigation. If support is given, then the *CPF* is entitled to a 10% levy on the award or settlement. That levy is uncapped.[1349] Some Canadian courts have used the *CPF* 10% levy as a benchmark to evaluate the fairness of returns to funders in other class actions that do not have *CPF* funding. Similarly, class action lawyers in Canada also use the CPF 10% levy as a guide for return to funders, especially in cases in which they are looking primarily for protection against an adverse costs order.

The *CPF* provides financial support to approved class action plaintiffs for disbursements during the proceedings (but not legal fees), and it indemnifies plaintiffs for adverse costs that may be awarded against them. Factors considered on applications for funding include:

- strength of the case
- scope of public interests involved
- plaintiff's fund-raising efforts
- likelihood of certification as a class proceeding
- availability of funds at the time of application; and
- other relevant case-specific factors

If a case receives *CPF* funding, a levy in favour of the *CPF* is payable after the case is either settled or adjudicated in favour of the class. The levy is composed of repayment of the disbursement funding provided by the Fund and 10 % of the award or settlement.

> **Example:** On a settlement amount of $10,000,000: deduct counsel fees ($2,000,000), funded disbursements ($200,000) and administrative costs of $50,000. The remaining amount subject to the levy will be $7,775,000. The levy will be $775,000.

The fact that a funder in a non-*CPF* funded class action will receive less than the 10% levy applicable in a class action that ***is*** *CPF*-funded, is a factor courts will consider in favour of approving a LFA.[1350] The Ontario *CPF* Fund has been an influential factor in the development of TPLF in Canada.[1351]

[1349] The *CPF* was established in 1992 with initial funding from a $500,000 grant from The Law Foundation of Ontario. The information in this section about the *CPF* is taken from the Law Foundation of Ontario website: https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/

[1350] *Defederico v. Amazon*; Participant interview

[1351] Participant interviews

There is a similar fund in the province of Quebec. The Fonds d'aide aux actions collectives (*FAAC*)) was created in 1978. Application must be made to the fund by the class representative. Funding assistance can include legal fees, expert fees, the costs of notice and other expenses necessary for bringing the action. The *FAAC* can recover its funding amount and a percentage of the award or settlement amount.

See **Appendix C** for several examples of sharing formulae as described in reported court cases.

Adverse costs

Canada is a 'loser pays' jurisdiction. A standard feature of LFAs is that the funder will indemnify the funded party for any adverse costs order.

The costs rules for class actions vary across Canadian jurisdictions. Some provinces' class proceedings regimes – British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan – have a 'no costs' rule for certification, the common issues, trial, and appeals. The Federal Court of Canada has a similar rule for class actions.[1352]

2.9 Planned legislation

There is no planned legislation as far as we are aware.

3. Practical operation of TPLF in your jurisdiction

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

Most of the funders operating in Canada fund both litigation and arbitration cases, although the majority of cases funded are litigation cases. The subject matter is very broad: see above, *1.2*. See also **Appendix B** for additional case details.

b. Minimum claim value in absolute terms (in million CAD)

This varies across funders. The minimum claim values given by those interviewed ranged from 2-4 to 10-14.

c. Typical claim value in absolute terms (in million CAD)

The variation across funders and cases is such that it is not possible to identify a typical claim value. One funder stated that claims are often for 10million plus and are up to 12billion. Another offered a

[1352] For additional information on the way costs are determined across jurisdictions, see U.S. Guide to Class Actions in Canada, Osler Hoskin Harcourt, 2018, available at: https://www.osler.com/osler/media/Osler/reports/litigation/US-Guide-to-Class-Actions-in-Canada.pdf

range from 2-4 million to 100-299 million. A third gave a typical claim value in the 20-29 million range. A large international funder stated that most of the cases they fund are "high value and large-scale litigation, often including group or class actions."[1353]

d. Typical ratio between investment by the funder and claim value

This also varies by funder. One funder identified a 1:10 ratio but noted that it can vary considerably across their range of cases. Another funder identified 1:20 ratio as typical for their business.[1354]

e. Typical size of the investment by the litigation funder (in million CAD)

This varies across funders and cases, from less than 1 to 14, with some cases going higher (for example, to 20 million or more).

f. Origin of funding provided by the litigation funder

Funders use different sources of capital. Some invest from their balance sheet. Other funders use a pure fund management model. Capital is sourced typically from institutional investors and family offices, including multi-strategy funds, large asset managers and sovereign wealth funds.[1355] One of the most active funders in Canada, Omni Bridgeway, is a publicly listed company, and some details of their funding sources can be found in their Annual Statements.[1356]

g. Share of compensation awarded typically demanded by litigation funders

The approximate range is from 10% to 33%. Funders typically use a sliding scale of multiple of invested capital and/or percentage of recovery. One funder gave a range of 10% to 30% and added that 30 % would apply "after several years in".[1357] That same funder stated that they have reduced their entitlement in two cases so that the claimant could get a better recovery. In *Schenk v. Valeant* (not a class action) the Court found that it would be reasonable to allow a funder a recovery of approximately 50 percent in some circumstances.[1358] "This case would, to my mind, fit within that category, since it involves a plaintiff of modest means seeking to pursue significant litigation against corporate defendants involving complicated subject matter and very significant damages being claimed." However, the Court did not approve the LFA as presented because the terms provided for an open-ended exposure to the plaintiff "that could result in Redress retaining the lion's share of any proceeds."[1359] An amended LFA was later submitted and approved by the court.

h. Other conditions of the litigation funding agreement

[1353] Participant interviews
[1354] Participant interviews
[1355] Participant interview
[1356] See: https://omnibridgeway.com/InvestorPresentations/omni-bridgeway-annual-report-2023/
[1357] Participant interview
[1358] *Schenk v. Valeant* [17]
[1359] ibid

N/A

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

Interviews revealed the following factors:

- legal merits
- quantum
- budget and economics
- experience of lawyers
- enforceability of any judgment or award
- overall commercial and other risks
- importance of funder's reputation
- ESG criteria
- whether case drives UN Sustainable Development Goals
- social value can play a role

Legal merit is central to the risk analysis, but so are other issues. One funder stated that a case can be a strong case on the merits but still rejected depending on other factors. "We look at the various ways in which a case could go sideways. Who the players are matters." Pricing will depend on the risk profile. This will influence how the return will be calculated, for example, whether it will be a percentage of the award or a multiple of the invested capital.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

Litigation funders treat this information as confidential. One funder stated that "as a guide, we would target IRRs to investors of above 20% IRR and MOCs of 2x in order to justify the risk and illiquidity of litigation funding investments." Another identified an annualized IRR of 30%.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

This was described by one interview participant as follows: "Litigation funding investments are high risk and outcomes vary, from good successes to total losses and every variation in between."[1360] Other information offered by interview participants identified various gains. Obvious gains include providing access to justice for a meritorious claim that would not have proceeded but for the TPLF and, if successful, a financial gain for the litigants, their lawyers and the funder.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

[1360] Participant interview

In the class action and insolvency contexts, where the funding will affect the interests of absent interested parties, the agreement must be disclosed to the court. In some but not all provinces, the motion for approval must be made on notice to the other party.[1361] In *Hayes v The City of Saint John et al*[1362], the plaintiff sought approval of a litigation funding agreement for a class action. The motion was initially filed on an *ex parte* (without notice) basis, but the Court ordered that it proceed with notice to the defendants.[1363] The plaintiffs were, however, not required to give the defendants copies of the LFA. The defendant made a submission on the principles the court should apply when deciding whether to approve an LFA. The court relied upon the criteria outlined in previous cases, found that those criteria were satisfied, and approved the LFA.[1364]

In cases where funding is disclosed and approved, courts have consistently protected the commercial details and allowed the defendants to view only a redacted version of the funding agreement. This was the case in *Schenk v. Valeant* and in *Hayes v. The City of Saint John*.[1365]

Courts in the province of Quebec appear to be taking a different approach to pre-approval of litigation funding agreements in class actions. In *E.L. v. Attorney General of Québec*, the Superior Court of Québec refused to pre-approve a LFA submitted by the plaintiff.[1366] The Court held that the LFA could only be approved at the conclusion of the litigation, at which time the court would be able to assess the reasonableness of the LFA against the result achieved. The Court "invited the plaintiff to submit a narrower pre-approval request, limited specifically to known or foreseeable court-ordered costs and expert fees."[1367]

In private commercial litigation, there is no requirement to disclose the LFA to the court or to the opposing party. In *Seedlings v Pfizer*, the Federal Court stated that 'the manner in which [a plaintiff] chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant'.[1368] However, some parties in these cases opt to apply for approval to have the up-front assurance of the validity of the LFA.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings?

Maintenance and champerty – This is discussed above in *2.1*, primarily in the context of unreasonable returns to funders. Another situation in which a LFA can be found champertous is if the agreement gives too much control of the litigation to the funder.

Choice of lawyer – Choice of counsel is a matter for the client. As one funder explained it, notwithstanding the economic incentives in the agreement, funders are not in control, and this is a

[1361] Woodsford, "Litigation Funding 2022" published by Lexology: Getting the deal through in Law Business Research Ltd 2021:
http://woodsford.com/wp-content/uploads/2022/01/LexGTDT-Litigation-Funding-2022-full-book-PDF-.pdf
[1362] *Hayes v City of Saint John et al.*, 2016 NBQB 125 (*Hayes v. City of Saint John*)
[1363] Ibid [2]
[1364] Ibid [4] (The court referred to *Bayens v. Kinross* and *Dugal v. Manulife*)
[1365] *Schenk v. Valeant*; *Hayes v. City of Saint John*
[1366] *E.L. v. Attorney General of Québec (2024) QCCS 1386* (available in French only)
[1367] See, for a case summary, Joséane Chrétien (Mcmillan), July 2024, link here: Superior Court of Quebec Expresses Serious Reservations About Pre-Approving Private Funding of Class Actions, and available at: https://mcmillan.ca/insights/publications/superior-court-of-quebec-expresses-serious-reservations-about-pre-approving-private-funding-of-class-actions/
[1368] *Seedlings v Pfizer*

significant risk.[1369] Funders are usually dealing with the matter through counsel, which means that a key component of evaluating risk and the likelihood of success on the merits is knowing who the lawyers are.[1370] The relationship between the funder and the lawyer is a business relationship. The level of a funder's involvement can sometimes be just a monthly call. In other cases, lawyers want more contact, including some strategy conversations. Sometimes the lawyer might want to "triangulate" by including the client in meetings with a funder, depending on the client's approach. While funders are not contractually in control, they do have some indirect control as it is their money and there is a desire on the part of lawyers to preserve good relationships with funders. Funders offer opinions but the litigants and their lawyers have the final say. [1371]

Consent for settlement – Litigation Funders have no veto over settlement. Settlement is a matter for the client in consultation with their lawyer. However, funders typically have a right to be informed of settlement negotiations and may offer their input on the merits of the proposed settlement, for example, "that looks like a reasonable settlement offer". There are usually safeguards in the LFA to protect the funder against a litigant making a commercially unreasonable decision.[1372]

Case strategy – This will vary depending on circumstances. Some lawyers will invite more input from funders than others on matters regarding strategy.

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

This varies, with the degree of communication during the case depending on the funder and the lawyers (and the clients). It is a business relationship. Some lawyers are comfortable with communication limited to regularly scheduled updates. Others prefer more frequent communication, and some might bring their clients into those conversations in circumstances where they think this would assist in moving the case forward constructively.

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

Yes, withdrawal of funding is possible in limited circumstances. Termination rights are negotiated in each funding agreement. Courts have approved LFAs with terms that give the funder the right to terminate funding with court approval where there has been a breach of the agreement, the lawyers withdraw as counsel, or the funder reasonably considers that the proceedings are no longer commercially viable.[1373] In *Schenk v Valeant* (not a class action) the Ontario Superior Court found that a clause in a LFA giving a funder the right to terminate an agreement where it reasonably ceased to be satisfied about the merits or commercial viability of the case did not restrict the plaintiff's ability to remain in control of the litigation.[1374] The Quebec Superior Court reached the same conclusion in *Bluberi*.[1375]

[1369] Participant interview
[1370] Participant Interview
[1371] Participant interviews
[1372] Participant interviews
[1373] Woodsford, "Litigation Funding 2022" (*Woodsford Litigation Funding 2022*) published by Lexology: Getting the deal through in Law Business Research Ltd 2021. This information was confirmed in our participant interviews. http://woodsford.com/wp-content/uploads/2022/01/LexGTDT-Litigation-Funding-2022-full-book-PDF-.pdf
[1374] *Schenk v. Valeant*
[1375] *Bluberi*

The UK ALF Code of Conduct permits termination rights in some circumstances (mutual consent, material adverse change and breach of contract by the claimant).[1376]

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

Yes. The extent varies. One funder, for example, references the organization's best practices and criteria for selection of cases. Screening cases according to these criteria ensure that any possible conflicts of interest are identified before an agreement is made.

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

The matter of adverse costs is covered in funding agreements. Practice varies – some funding arrangements provide for payment by the funder of any adverse costs order, while other attach some conditions or limits.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Some TPLF arrangements include provision of ATE insurance. The use of ATE insurance is expanding, but the market for these products is not yet as developed as it is in some other jurisdictions, such as the UK and Australia.[1377] In cases in which court approval of TPLF agreements is required, ATE insurance is not a pre-condition for approval. Other products, such as before-the-event insurance and legal expense insurance are also used by some litigants. In *Defederico v. Amazon*, Therium (the funder) "agreed to fund legal expense insurance sufficient to meet any additional risk that the representative plaintiffs or class counsel may identify. Therium is also entitled to obtain such insurance against any similar risk that it might identify"[1378].

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

Yes.

[1376] ALF Code; Participant Interview
[1377] Woodsford Litigation Funding 2022, *supra* note 64 http://woodsford.com/wp-content/uploads/2022/01/LexGTDT-Litigation-Funding-2022-full-book-PDF-.pdf
[1378] *Defederico v. Amazon*, supra note 4 [94]

4. Stakeholder views on TPLF in your jurisdiction

We interpret stakeholders for the purpose of this question to include litigants, lawyers, funders, and academic and other commentators.

- TPLF provides access to justice for deserving claims that might not otherwise be litigated.
- Considering the high level of risk involved, funders accept a very small proportion of requests for funding.
- While it is not easy to measure, cases brought forward with the assistance of TPLF can contribute to deterring wrongdoing. Courts have used the deterrence value of claims as a factor in approving TPLF in class actions.
- A negative aspect of TPLF is that it results in less of a return for plaintiffs. A corollary is that TPLF can improve access to justice for some deserving cases that would not otherwise proceed.
- There are features of Canada's civil litigation system that make it less attractive to some funders than other jurisdictions in which those funders operate, primarily related to duration of cases.
- There are not many calls for regulation of TPLF in Canada. To the extent that there have been such calls, the following themes have emerged.
    - The role of courts - The role that courts have played and continue to play is seen by many stakeholders as effective and sufficient 'regulation' of TPLF, at least in the class actions context. There are some voices that see this as inefficient from a regulatory perspective and that propose a principles-based legislative framework, combined with some judicial oversight where disputes arise, at least for private commercial cases.[1379]
    - Court approval of LFAs – Court approval is required for class actions. There is a strong recent view from the Federal Court of Canada that court approval is not required in private commercial cases.
    - Disclosure of LFAs to courts and adverse parties – There are mixed views. Some stakeholders are of the view that LFAs ought to be disclosed to adverse parties in all cases, subject to permissible redactions for confidential information. The reasons offered for this view include that disclosure would promote efficient settlement negotiations, as parties would have "full knowledge of the other's capacity to maintain the litigation."[1380] We also heard the view that the only matter on which defendants have a legitimate interest is provision in the LFA for any adverse costs award against the plaintiff.
    - The role of lawyers – All stakeholders accept that control of the litigation and the choice of lawyers is the exclusive domain of the plaintiff. Funders also emphasised that the identity of the lawyers is a key factor in assessing risk and determining whether to fund a case. One funder observed that in a few cases, a three-way conversation (funder, lawyer, client) revealed that lawyers had not done a sufficiently thorough job of explaining the funding arrangements to their client. Lawyers should ensure that the client understands the overall funding model, including lawyers' entitlements, and that the proposed model is fit for their client.

[1379] Puri, *Profitable Justice*
[1380] Ibid [53]; Participant interview

- Funders - Funders acknowledge that LFAs should be advanced in the interests of promoting greater access to justice. However, it cannot be ignored that these agreements are investments, and that funders are accountable to their investors. Some funders would appreciate an extension of their rights allowing for greater control in litigation to better manage these investments and the risks, while still ensuring that rules regarding maintenance and champerty, unconscionability and undue influence are fully respected.

APPENDIX B – List of TPLF Cases

CASE	YEAR	JURISDICTION	SUBJECT MATTER	TYPE	FUNDER
Metzler v Gildan Activewear	2009	Ontario	Should a litigation funding agreement be approved in a Class Action?	Class Action	Claims Funding International (CFI)
Dugal v Manulife Financial Corporation	2011	Ontario	Do litigation funding agreements offend the law of champerty and maintenance?	Class Action	CFI
Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation	2012	Ontario	Action involving allegations of Sino Forest committing fraud by claiming to own forestry assets it did not own.	Class Action	CFI
Schenk v Valeant	2015	Ontario	Single plaintiff of modest means wished to pursue contract claim against well-funded defendant.	Commercial Litigation	Redress
Bayens v Kinross Gold Corporation	2013	Ontario	Motion for the approval of a litigation funding agreement	Class Action – securities/	Harbour

				misrepresentation	
Drynan v Bausch Health Companies	2020	Ontario	Action arises from an allegedly misleading marketing campaign and related misrepresentations made by the defendants to promote and sell their COLD-FX® brand of products	Class Action	Harbour
JB & M Walker	2019	Ontario	Action against franchiser for alleged misappropriation of advertising funds	Class Action	Galactic TH Litigation
David v Loblaw	2018	Ontario	Unlawful price fixing	Class Action	Bentham IMF- now Omni Bridgeway
Houle v St. Jude Medical Inc.	2018	Ontario	What constitutes a final order	Class Action	Omni Bridgeway (formerly Bentham IMF)
Bluberi	2020	Quebec	When a debtor company, subject to protection under the CCAA has no assets except a litigation claim, who should decide whether to pursue the claim or accept a settlement - the debtor or the creditors?	Insolvency	Omni Bridgeway
Ingarra	2024	Federal Court	The plaintiffs sought an order certifying this	Class Action	Motion denied

			action as a class proceeding and appointing them as representative plaintiffs.		
Seedlings	2017	Federal Court	Should LFA be subject to court approval outside the class action context?	Private Commercial	Omni-Bridgeway
Hayes v City of SJ	2016	New Brunswick	Is the city vicariously liable for the assault committed by a member of its police force during working hours?	Class Action	Redacted
BC Hydro	2023	Federal Court	Action for patent infringement against BC Hydro	Commercial Litigation	Reconcept (German Based Firm)
Crystallex	2012	Ontario	Stems from allegations that the Bolivarian Republic of Venezuela ("Venezuela") unlawfully expropriated certain mining rights and investments belonging to a Canadian company, Plaintiff Crystallex International Corporation ("Crystallex").	Insolvency	Tenor (New York Based Firm)
Fehr	2012	Ontario	Plaintiffs sought orders that a motion for approval of a third-party funding agreement be heard: (a) without notice, (b) in a	Class Action	Bridgepoint Global Litigation Services

			hearing closed to the public, and (c) that the third-party funding agreement be sealed		
Difederico v Amazon	2021	Federal Court	The plaintiffs sought to certify a class action alleging Amazon's agreements with third-party sellers establish indictable criminal offences for conspiring, agreeing, or arranging certain anti-competitive conduct	Class Action	Therium
Davies v Clarington (Municipality)	2023	Ontario	Should non-party lenders with no involvement in directing litigation be liable to pay an adverse costs award that a plaintiff will not pay?	Class Action	Multiple Funders including: Bridgepoint Global Litigation Services, Yorkfund Investment Inc, Seahold Investments Inc, Lexfund Inc.
Berg v Canadian Hockey Association	2016	Ontario	Motion for approval of a third party LFA	Class Action	Bridgepoint Global Litigation
Mariott v General Motors of Canada Company	2018	Ontario	Action for alleged violations of Canada's automobile emission standards	Class Action	CFI

Stanway v Wyeth	2014	British Columbia	The parties in this certified class proceeding seek an approval order of a settlement agreement, as well as ancillary orders, under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]	Class Action	Bridgepoint Global Litigation
Breckon v Cermaq	2024	Federal Court	Unlawful price fixing	Class Action	Unknown
Pass Herald	2024	Federal Court	Motion seeking approval of an amended LFA and a confidentiality order in relation to the confidential version of that agreement.	Class Action	Omni Bridgeway
Wasylyk v Lyft Inc	2023	Ontario	Motion by plaintiff for approval of an LFA	Class Action	Omni Bridgeway
Flying E Ranche Ltd. V Canada (Attorney General)	2020	Ontario	Plaintiffs sue for alleged negligence in failing to prevent imported United Kingdom ("UK") cattle from "Mad Cow Disease," into Canada.	Class Action	Harbour Litigation Funding
Eaton v Teva Canada Ltd	2021	Federal Court	Unlawful price fixing	Class Action	Parabellum Partners
Heller v Uber	2021	Ontario	Alleged breach of employment contracts	Class Action	Augusta Ventures Ltd
Barron v Ford Motor Co	2023	Ontario	Claims for negligence,	Class Action	Woodsford

			breach of warranty, and unjust enrichment		
Lochan v Binance Holdings Ltd	2023	Ontario	Motion for an order to approve an LFA	Class Action – cryptocurrency contracts – damages/recissio n	Parabellum Partners
Gebien v. Apotex Inc	2023	Ontario SCJ	Motion for an order to approve LFA	Class Action - Opioids	Omni Bridgeway
E.L. v. Attorney General of Quebec	2024	Quebec Superior Court	Motion for an order to approve LFA	Class Action- Institutional Abuse	Omni Bridgeway

APPENDIX C - Samples of sharing formulae as described in reported court cases

Pass Herald v Google LLC (2024) FC 305

To fund this class action, the plaintiff entered into a LFA with Omni Bridgeway (Fund 5) Canada Investments Ltd. ("OBC") and Class Counsel, Sotos LLP ("Class Counsel"). Among other things, the LFA provides for several million dollars in funding for various types of disbursements. Those disbursements include highly specialized economic analysis, including in relation to tens of billions of transactions between publishers and advertisers.

The terms include that Omni Bridgeway would be entitled to 3% of the claim proceeds plus a multiplier of the funds it advanced under the agreement (the "OBC Return"). That multiplier increases from a minimum of two times the total amount of such advanced funds (the "Amount Funded"), if the claim proceeds are received at any time within one year of the date of the LFA, to a maximum of six times that amount if those proceeds are received on or after the sixth anniversary of that date. The OBC Return is in addition to a reimbursement of the Amount Funded, and is capped at $100 million, which represents 12.5% of the total amount claimed by the plaintiff in this proceeding.

Pursuant to Article 3.3 of the Amended LFA, any claim proceeds are required to be distributed in the following order of priority:

i. Reimbursement of the Amount Funded;

ii. Payment of $12.5 million to the Class Members and/or Pass Herald;

iii. Reimbursement of any "project costs" incurred by OBC (subject to a cap of $75,000), and payment of a fee relating to Court-ordered costs;

iv. Payment of any expenses incurred in connection with the implementation and administration of a final resolution of the proceedings;

v. Payment, on a *pro rata* and *pari passu* basis, of:

   a. a Class Counsel fee of 30% of the claim proceeds (subject to the Court's approval); and

   b. the OBC Return; and

vi. Payment of the remainder to Class Members.

Ingarra v Dye & Durham 2024 FC 123

Pursuant to the LFA, any potential proceeds from the proposed class proceeding will be distributed as follows. First, the Funder will receive a full return of its capital outlay. Second, the Funder will receive its profit share subject to the cap of $16 million. Third, Exton (a Broker who assisted in securing a funder) will receive its brokerage fees, subject to the cap of $1 million. Fourth, counsel for the Plaintiffs will receive their counsel fees based on the flat rate of 25% of total proceeds, as outlined in their retainer agreement and subject to the Court's approval. Finally, any residual proceeds will be distributed amongst the class members.

The 10% benchmark used in the Ontario CPF and used by the Federal Court in *Difederico* to examine the reasonableness of the return under the LFA applied in this case. As a result, the agreement was deemed to be champertous as it allowed for the funder to receive an extremely unfair return depending on the amount of the settlement.

***Schenk v Valeant* (2015) ONSC 3215**

This case offers a contrast to the sharing formula used in the class actions context. In this private commercial dispute, the court stated that a litigation funder could receive up to 50% of the award in a successful case, depending on degree of risk and complexity. In this case, the 10% cap in class actions funded by the Ontario CPF that has served as guidance for courts in evaluating the reasonableness and fairness of a return, did not apply.

The court dismissed the application for approval because the recovery claimed by the funder was too high. The parties returned to Court with an amended LFA which the Court approved.

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Prof Maya Steinitz, Boston University

Executive Summary

- Commercial third-party litigation funding ("TPLF") is not centrally regulated in the United States. It is subject to the overlapping jurisdiction of state and federal courts, state and federal legislatures, regulatory agencies, and bar associations. Legislation, regulation, and oversight of TPLF is being undertaken at each of those levels – much of it centered around the questions of when and whether TPLF should be disclosed; how to mitigate conflicts of interest created by TPLF (including the potential for claimants to lose control over their case to funders); and the identification of any foreign individuals, entities, or countries that may be providing the funding. At least 12 state legislatures and the U.S. Congress have passed or considered TPLF legislation. Many federal and state courts have issued standing orders regarding litigation finance. In TPLF cases, courts have used their inherent powers to investigate potential abuse of process and to determine whether those appearing before the court are the real parties in interest.
- TPLF is used in most types of civil litigation, perhaps most commonly in contract disputes, intellectual property, class and mass actions, and mass tort claims. There are many third-party litigation funders in the U.S., including specialized litigation funders as well as other institutional (and occasionally individual) investors. There are no countrywide disclosure or reporting requirements for TPLF; to the contrary, most deals are confidential and only become known if a dispute arises. Because of that, there is no comprehensive, reliable dataset regarding TPLF.
- Several areas of law bear on the permissibility of TPLF generally and on the legality of any particular agreement. One is champerty, a common-law doctrine (at times codified by statute) forbidding a stranger to a lawsuit from funding or 'officiously intermeddling' in another's lawsuit for a profit. Because champerty is a matter of state, not federal, law, the particulars vary considerably from state to state. Some have abolished the doctrine; others still enforce it. Still others have modified it in ways that permit many forms of TPLF and that regard regulation by other doctrines as a better approach. Because TPLF is created by contract, contract doctrines apply (also with considerable variation across states). Especially important in this context are the doctrines of unconscionability and public policy. Since TPLF implicates important principles underpinning the civil justice system, it is possible that a given agreement could be void for violating public policy, or be found to be unconscionable in other ways. Further, the rules of professional responsibility for attorneys (the rules of legal ethics) also impose duties on the lawyers and law firms representing the claimant in matters involving TPLF.
- Responses to the stakeholder surveys and interviews confirm that there are multiple types of TPLF in the United States and that no comprehensive data exists about questions such as the number of cases funded; the returns obtained by funders versus recovery remaining in the hands of plaintiffs; and if funding increases meritorious litigation (access to justice) or non-meritorious litigation and if so, by how much.

Methodological Note

This National Report answers questions presented by the lead researchers of the European Commission study on "Mapping Third Party Litigation Funding in the European Union," The British Institute of International and Comparative Law (BIICL) working in collaboration with Civic Consulting, the Asser Institute and Risk & Policy Analysts (RPA).

It is one of 31 National Reports. For the purposes of Parts 3 (Practical Operation of TPLF) and 4 (Stakeholders Views on TPLF) of the reports, the National Experts have been instructed to each conduct four or five interviews with some combination of "[i]ndividual interviewees represent[ing] different categories of stakeholders to ensure a broad view on the situation: businesses, []; litigation funders []; organisations that (potentially) benefit from TPLF, []; lawyers/law firms []; judiciary[]; [and] academics researching TPLF." The National Experts used questionnaires developed by BIICL and RPA, followed by semi-structured, qualitative individual interviews.

In addition to the National Expert Reports, the lead researchers conducted broad stakeholders' consultation including interviews based on the same questionnaire used by the National Experts and conducted a survey of thousands of stakeholders.

For a full description of the methodology see the Research Methodology section of this study.

1. Introduction

1.1 Is there existing or planned legislation on TPLF in your jurisdiction?

Yes, there is significant legislative activity at both the federal and state level, as well as increasing oversight by courts and bar associations. The bodies developing the litigation finance regulatory regime in the United States include:

Legislators:

- The United States Congress;
- At least 12 state legislatures.

Courts, through:

- Standing orders in particular courtrooms;
- Jurisdiction-wide standing orders[1381];
- State Supreme Courts regulating the practice of law.

Bar Associations:

- Bar associations using the authority delegated to them by state supreme courts to enforce the standards of professional responsibility of attorneys.

Federal agencies:

- The Securities and Exchange Commission;
- The Department of Justice.

1.2 If existing, is TPLF regularly relied upon? In what type of cases?

Third-party litigation funding is used in nearly every kind of case heard in courts or arbitral forums in the United States. While there is information as to the types of cases in which funders invest,[1382] there is no systemic data since there are no reporting obligations. Data is privately held by funders and law firms, and most disputes surrounding litigation funding are arbitrated in confidential arbitration rather than in public courts. Third-party funding arrangements are nearly always

[1381] A 'standing order' is a directive issued by a court or a judge which establishes a rule or a procedure to be followed in cases within that court's jurisdiction or in cases pending before said judge. Otherwise stated, it is an instruction by the court or the judge that remains in effect until it is amended or revoked. Standing orders are characterized by their general application, in contrast with an order that applies only to an individual case, they usually address a procedural issue, and they can be issued without the formal procedure necessary to promulgate a local rule (and as such, do not require public comments). Standing orders are a mechanism that enables efficiently providing a consistent manner of addressing recuring procedural issues.

[1382] Many litigation funders advertise the types of cases they invest in and those that are publicly traded include information in their corporate disclosures to investors. *See, e.g.*, Burford Capital, Annual Report 101 (2023); Omni Bridgeway, Annual Report (2022); Cases We Fund, Tribeca Lawsuit Loans, https://tribecalawsuitloans.com/cases-we-fund/ (Last visited May 29, 2024); Case Portfolio, Lex Shares, https://www.lexshares.com/cases (Last visited May 29, 2024); In addition, funders and lawyers describe investment areas in conferences and press interviews and when litigation of funding agreements end up in court they also provide a glimpse.

confidential and are typically only disclosed when a dispute arises between the funder and the funded party. Therefore, there is no empirical data. What can be said is that there are types of disputes where litigation finance is commonplace. These include, but are not limited to:

- Contract disputes;
- Intellectual property;
- Securities;
- Antitrust;
- Class actions and multidistrict litigation including mass torts (non-contractual obligations) and consumer cases.
- Whistleblower claims;
- Torts;
- civil rights;
- International arbitration, including both private commercial claims and investor-state disputes.

Defense-side litigation finance is rare due to difficulties such as the ability to price the risk and assess the benefits. Even so, rare instances of defense-side litigation finance have been reported.

1.3 Are there operating funders in your jurisdiction? If so, how many are operating in your jurisdiction?

There are many third-party litigation funders operating in the United States. However, as with other aspects of the industry in the U.S., there is no transparency in the market. It is therefore impossible to say how many there are. Furthermore, it is important to note that in addition to specialized litigation finance firms, some of which advertise their services, there are many other investors who include a small volume of litigation finance investment in a greater portfolio of unrelated assets and/or invest indirectly. Such entities include private equity firms and hedge funds, insurance companies, family offices, and wealthy individuals.

Recently, the Securities and Exchange Commission promulgated new rules requiring private equity funds to confidentially report on the percentage of their capital earmarked for litigation finance.[1383]

1.4 Are there any reliable statistics regarding TPLF in your jurisdiction?

There are no available statistics and funding arrangements are private and usually confidential.

1.5 Is there significant doctrinal discussion on TPLF in your jurisdiction? If yes, summarise the main points (with reference to sources).

[1383] 88 Fed. Reg. 38146 (June 12, 2023) (to be codified at 17 C.F.R. pts. 275, 279). ("We also are adopting [] amendments to update the strategy categories that advisers can select to reflect our understanding of hedge fund strategies better and to improve data quality and comparability[.] [] [W]e are including more granular categories for credit strategies, such as litigation finance…").

Litigation funding has generated academic debates, regulatory efforts, litigation, and press in recent years.

There are a number of doctrinal debates touching on litigation finance. The discussion below will summarize the main points of the debates without claiming to be a comprehensive survey. Given that, as discussed above, the sites of the emerging regulation of litigation finance include the courts and legislatures of the 50 states, the U.S. Congress, federal courts, and even some federal regulatory agencies, such a survey is well beyond the scope of the present report. The following paragraphs, however, will attempt to capture the most common issues that receive the most attention.

The main doctrinal debates touching on litigation finance include:

- **Maintenance and Champerty**. Both maintenance and champerty (maintenance for a profit) are common-law doctrines carried over to the U.S. from England. In some states they are codified in statute. Some states do not have maintenance and/or champerty prohibitions. As the United States Supreme Court explained, "[p]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[1384] A champertor "intermeddl[es] in a suit of a stranger or [is] one not having any privity or concern in the subject matter, or standing in no relation of duty to the suitor."[1385] The American Bar Association ("ABA") explained that even in states which allow it, "champerty is generally permissible only as long as the supplier is not… 'intermeddling' with the conduct of the litigation (e.g. determining trial strategy or controlling settlement)."[1386] The status and application of the doctrine of champerty is a matter for state courts; hence there is a spectrum of approaches:
    - Many states forbid champerty outright.[1387]
    - At least one state (California) never had a champerty prohibition and some states—such as Massachusetts,[1388] Ohio,[1389] and Minnesota[1390]—have recently done away with the doctrine in favor of doctrines that are regarded as more finely-calibrated such as unconscionability, general principles of equity, and public policy (discussed below).
    - Still others, like New York[1391] and Delaware,[1392] maintain the prohibition on champerty while interpreting it in a way that makes litigation finance generally permissible but still constrained within certain boundaries.
    - Some states, including Kentucky and Pennsylvania, have doubled down on the prohibition.[1393]
- **Contract and equity doctrines**, including:

[1384] *In re Primus*, 436 U.S. 412, 424 n.15, 98 S. Ct. 1893, 1900 n.15, 56 L. Ed. 2d 417, 429 n.15 (1978).
[1385] 14 Am.Jur. 2d Champerty, Maintenance, and Barratry § 1.
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- **Unconscionability**. The contract doctrine of unconscionability is broad, giving courts the leeway to negate all or part of a litigation finance contract for a variety of reasons. These might include unconscionably low or even negative remaining recovery for the plaintiffs and denying plaintiff control if his or her claim. While the doctrine of unconscionability applies in any contract dispute in any state, it has taken on particular importance in states that have explicitly abolished champerty. For instance, when abolishing champerty, the Minnesota Supreme Court noted that "district courts may still scrutinize litigation financing agreements to determine whether equity allows their enforcement. Parties [] retain the common law defense of unconscionability [...] Courts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation...".[1394] However, it is important to note that many courts in the U.S. are generally reluctant to find contracts unconscionable in light of the principle of freedom of contract.
- **Public policy**. Courts may void contractual provisions which contravene public policy. In the litigation finance context, the relevant public policies at stake are the same ones that underpin the doctrine of champerty. These include:
  - Limiting the amount of litigation in courts and a preference for private dispute resolution.
  - Preventing the prolonging of litigation.
  - Protecting parties' autonomy and control over their cases.
  - Preventing speculation in lawsuits and extortion of defendants.
  - Encouraging settlements.
- **Usury**. Usury forbids excessive interest rates on loans.[1395] For usury to apply, a funder must have recourse. Therefore, until recently litigation financiers generally structured their arrangement as non-recourse financing, not loans. More recently, however, some funders include loans in their litigation finance offerings which means usury is once again a consideration in litigation funding.
  - Courts may find predatory arrangements to be impermissible or otherwise limit them even if they are not usurious. Examples are the *3M Combat Arms Earplug Prods. Liab. Litig.*,[1396] in which the judge imposed a court approval requirement to prevent predatory TPLF terms, and *In re World Trade Ctr. Disaster Site Litig.*, in which the judge declined to allow passing

[1394] https://law.justia.com/cases/minnesota/supreme-court/2020/a18-1906.html

[1395] Every U.S. state has a usury law which could apply to litigation financing. *See* Susan L. Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DePaul Bus. & Com. L.J. 85 (2002). Usury can give rise to forfeiture of the loan or civil and criminal penalties, with up to 5 years in prison in some states. *See* Allowable Fees on Commercial Loans, 0090 SURVEYS 82.

[1396] Judge M. Casey Rogers ordered counselors in the litigation to disclose any third-party funding obtained by any claimant, to file information about the loan with the Court-appointed Settlement Administrator, and to cease agreement to any further third-party funding contracts without approval of the court by motion. See Case Management Order No. 61, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885, 2023 2023 WL 8609280 (N.D. Fla. Aug. 29, 2023) ("[I]t is important that CAE Claimants are not exploited by predatory lending practices . . . .").

on litigation funding fees incurred by the lawyers on to the clients finding they were excessive.[1397]

- **Ethics and Professional responsibility standards** (discussed in more detail in the section regarding Article 7, below). Bar associations have clarified litigation funding must not run afoul of legal ethics requirements,[1398] such as:
    - lawyer's duty to avoid conflicts of interest;
    - lawyers' fiduciary duties, including the duty of loyalty and of zeal towards their clients in cases where funding is involved i.e., lawyers' obligation to prioritize their clients interest and to follow their clients' directives, not those of funders;
    - lawyers' duty to exercise independent professional judgment (i.e., free of funders' interference);
    - Maintaining attorney-client privilege and protecting the confidentiality of 'work product';
- **Securities regulation**. Some scholars are of the view that some litigation funding agreements constitute 'securities' as the term is defined in securities law. In such cases, various securities regulations apply.[1399]

1.6 Are there specific issues that have caused debate at a doctrinal or political level? If yes, summarise the main points (with reference to sources).

The main debates at the political level in the U.S. regarding third-party litigation funding relate to the systemic effects of litigation funding including whether it gives rise to non-meritorious litigation; the effects that litigation funding has on defendants' rights and whether consequently, inter alia, funding agreements should be disclosed; the ethical implications of litigation funding and the conflicts of interest created by litigation funding; the concern that plaintiffs will lose control over their cases; and the possible participation of foreign investors, especially hostile foreign governments, investing to advance illegitimate goals.[1400]

As mentioned above, several states and the U.S. Congress have passed, have considered, or are considering legislation regarding disclosure. The main positions are:

[1397] Judge Hellerstein demanded justification of some attorney's fees and declined to allow $6.1 million to be passed to plaintiffs, reasoning that the rates were excessive and contrary to public policy. *See* Twersky, Hellerstein & Henderson, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 Cornell L. Rev. 127 (2012-2013).

[1398] *See, e.g.*, ABA Comm'n on Ethics 20/20; Report on the Ethical Implications of Third-Party Litigation Funding, N.Y. State Bar Ass'n (Apr. 16, 2013) quoting in agreement Formal Opinion 2011-2: Third Party Litigation Financing, http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02.

[1399] See Robert F. Weber, The Securities Law Disclosure Conundrum for Publicly Traded Litigation Finance Companies, 56 U. Mich. J. L. Reform 699, 723 (2023), for a discussion of litigation funding as a securitized asset.

[1400] *See* Jodi Esposito, "Coalition of State AGs Urge DOJ to Protect U.S. Courts from Foreign Interests - ILR," ILR, January 10, 2023, https://instituteforlegalreform.com/blog/coalition-of-state-ags-urges-doj-to-protect-us-courts-from-foreign-interests/; *see also* Disclosure Rule, "Lawyers for Civil Justice," Lawyers for Civil Justice, 2014, https://www.lfcj.com/tplf-disclosure-rule-sought-by-leading-companies-lcj; *see also* Congressman James Comer, Letter to Chief Justice John Roberts on Third-Party Litigation Funding, July 12, 2024, https://oversight.house.gov/wp-content/uploads/2024/07/TPLF-Letter-07122499.pdf. To require the full disclosure of third-party funding, *see* Advisory Committee on Civil Rules, Rules Suggestion 24-CV-V (proposed amendments, October 2, 2024).

- Requiring full disclosure of all funding arrangements, as Wisconsin,[1401] Montana,[1402] and West Virginia[1403] have recently decided to require.
- Requiring disclosure in certain types of cases.
    - This was the approach adopted by Senator Grassley in his proposal to mandate the disclosure of funding arrangements in class actions and multidistrict litigation.
    - It is also the law in Indiana, which requires funded plaintiffs to disclose the existence (but not the terms) of a litigation finance agreement only where the "plaintiff enters into a commercial litigation financing agreement that is directly or indirectly financed by a foreign person…"[1404]
- No rules compelling full or partial disclosure, except as ordered by individual courts in the unique circumstances of specific cases.
- The above approaches relate to the question of whether there's a need for litigation funding-specific disclosure legislation. Either way, however, funding arrangements are subject to the general rules of discovery, meaning the opposing party can seek the court's permission to compel the funded party to disclose while the funded party can oppose disclosure, as is true of any other document or thing. As background to this more general point, it is important to understand that in the U.S. parties can generally ask to discover anything that is reasonably calculated to lead to admissible evidence (subject to some narrow exceptions such as information and things that are subject to attorney-client privilege and as long as the overall scope of discovery is proportional to the size of the case).[1405] As part of that process, parties can seek discovery of litigation funding agreements or other documents and things regarding litigation funding - e.g., disclosure of relationships between lawyers and funders, communications between lawyers and funders or funders and their investors, etc. Specific rules on the discovery of litigation funding, where they exist, provide parties and judges guidance on when discovery is required as a matter of course without a party specifically asking for it as part of the general discovery process that characterizes, to a unique extent, American civil litigation.

More recently, political discussions have begun to address the question of whether foreign adversaries might seek to influence the U.S. by investing in lawsuits designed to produce specific policy or financial outcomes or might otherwise misuse civil litigation in American courts.[1406] Concerns center around sovereign wealth funds from countries like China, but also include wealthy individuals and institutional investors who might seek to use the courts to undermine U.S. interests. The principal approach being considered in this regard is prohibiting the participation in litigation

[1401] *See Wis. Stat. § 804.01(2)(bg) (2017).*
[1402] *See* Mont. Code Ann. § 31-4-108 (2023).
[1403] *See* W. Va. Code § 46A-6N-6 (2024).
[1404] Civil Proceeding Advance Payment Contracts and Commercial Litigation Act, H.B. 1160 §5(b).
[1405] For a discussion of the breadth of American civil discovery and a comparison to other common-law countries and to civil-law countries, see Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid,* 76 Tex. L. Rev. 1665, 1675 (1998).
[1406] *See generally* Denamiel, Schleich & Reinsch, *Is Third Party Litigation Financing a National Security Problem?,* Center for Strategic and International Studies (Feb. 23, 2024), https://www.csis.org/analysis/third-party-litigation-financing-national-security-problem; A New Threat: The National Security Risk of Third Party Litigation Funding 9, U.S. Chamber of Com. Inst. for Legal Reform (Nov. 2022) [hereinafter A New Threat] https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf.

finance (directly or indirectly) of individuals or entities from countries designated as adversaries to the U.S..[1407]

2. Relevant legislation applicable to TPLF in your jurisdiction

2.1 Legal admissibility and conditions of using TPLF in civil litigation

While litigation finance legislation has traditionally been focused on consumer finance (excluded from the current report) interest from lawmakers, courts, and regulators in commercial funding is growing on both the federal and state level. Legislators have addressed issues such as the circumstances under which parties should be compelled to disclose litigation finance arrangements (in whole or in part), capping returns, control of litigation, and legal ethics and the regulation of the participation of foreign investors – especially foreign governments – in financing cases in the United States.

Regulation of litigation funding is, generally speaking, within the purview of the states. First and foremost, many of the questions that arise in the litigation finance context are questions of contract interpretation – for instance, whether a certain litigation funding contract or provision is void as champertous, unconscionable, or as contrary to public policy. Those are contract law issues which are interpreted by the courts on a state-by-state basis. However, at least some states are considering – and some have passed – laws governing commercial litigation finance. State courts are also involved in regulating litigation finance. Individual judges may, and some have, issued standing orders for all cases in their courtroom, or in a specific case, relating to the use of litigation finance in a given case or generally before that court. Also, states' supreme courts have the power to regulate the legal profession; they typically delegate to state bar associations the power to interpret and enforce the professional responsibility standards promulgated by state supreme courts – many of which are relevant to litigation finance.

Not all activity is taking place at the state level, however. **Congress and some federal regulators are also paying attention to litigation finance.** The Department of Justice is interested in whether entities in the U.S. who accept funds from foreign investors, such as sovereign wealth funds, may be violating their statutory obligation to register as foreign agents. Recently, a judge in federal court investigated the use of shell companies to shield interested parties from liability in patent litigation, noting that at least one original patent holder was a foreign government.[1408]

The question of whether and to what extent litigation finance arrangements should be disclosed provides a useful example of the multiple sites and levels at which regulation of litigation finance in the U.S. is developing.

[1407] The United States maintains an official list of adversaries under 15 C.F.R § 7.4 (2021). The current list includes China, Cuba, Iran, North Korea, Russia, and the Maduro Regime of Venezuela.

[1408] *See* Nimtz Techs. LLC v. Cnet Media, Inc., Civ. No. 21-1247-CFC, 2022 WL 17338396, at *3. (D. Del. Nov. 30, 2022). The judge believed the parties had failed to disclose the real parties in interest. *See* Nimtz Techs. LLC v. Cnet Media, Inc., Civ. No. 21-1247-CFC, 2023 WL 8187441 (D. Del. Nov. 27, 2023).

- Several state legislatures have debated disclosure measures, and some have passed them.[1409]
- Many federal and state courts have issued standing orders regarding litigation finance.[1410]
- State and federal courts have ordered disclosure in specific cases.[1411]
- Most state courts' standards of professional responsibility include requirements that attorneys serve as officers of the court and also act in the best interests of the client. While most litigation funding contracts include an arbitration clause, which means that claims of breach of these obligations are not visible to the public, some cases where clients have alleged that their attorneys acted in a funder's best interest as opposed to their own have made their way to the court.[1412]

Some examples of recent legislative, regulatory, and judicial oversight activity include:

[1409] At least ten states have proposed legislation related to the disclosure of third-party litigation financing. For a tracker of state legislation as of February, 2024, see *State Lawmakers Wade Into Third-Party Litigation Funding*, LEXISNEXIS (Feb. 20, 2024), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-wade-into-third-party-litigation-funding. Most recently, Indiana and West Virginia enacted legislation in March, 2024. For a summary of those bills, see *Indiana and West Virginia Close to Enacting Strong Protections Against Litigation Funding Industry*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, https://instituteforlegalreform.com/blog/indiana-and-west-virginia-close-to-enacting-strong-protections-against-litigation-funding-industry/, (last modified Mar., 27 (2024).

[1410] For an extensive list of such standing orders and other efforts to regulate litigation finance, see Shook Hardy & Bacon, *Third-Party Litigation Funding: State and Federal Disclosure Rules & Case Law* (May 11, 2022). To take an illustrative example, the Northern District of California has adopted a standing order that all parties must submit a "Certification of Conflicts and Interested Entities or Persons": which details "any persons, associations of persons, firms, partnerships, corporations [...] other than the parties themselves, known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." N.D. Cal. Civil L.R. 3-15.

[1411] *See* In re Nat'l Prescription Opiate Litig., 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018); In re Zantac (Ranitidine) Prods. Liab. Litig., 2020 WL 1669444, at *5-6 (S.D. Fla. April 3, 2020).

[1412] Consider the following three cases. One, is Vinh Binh v. King, 2022 WL 130879 (S.D. Tex. 2022) (NO. 4:21-CV-02234) (alleging breach of fiduciary duty, negligence, and fraud for colluding with third-party financier. The case was compelled into arbitration so no information is available as to any findings regarding the allegations). Second, is Sysco Corporation v. Glaz LLC, 1:23-cv-01451, (N.D. Ill. Mar. 8, 2023). The following description is taken from Sysco's allegations contained in court filing in the Amended Petition to Vacate Arbitration Award, N. D. Ill., Case: 1:23-cv-01451 Document # 18 (03/20/23). (The author of this report served as an expert witness produced by Sysco in that case.) Sysco was about to settle litigations funded by Burford when Burford initiated arbitration to enjoin the settlements. In the course of arbitration and subsequent litigation, Sysco, according to its allegations, learned that its counsel had, without Sysco's knowledge, told Burford he thought the settlement price was too low and that he suggested initiating arbitration against Sysco. Sysco alleged that the extent of its counsel's relationship with Burford, which spanned several cases, was never disclosed and that, consequently, it never had the chance to waive any potential conflicts. As a result, Sysco terminated the law firm. No further action was taken, however, since Sysco and Burford ultimately settled their dispute. The law firm and the attorney involved deny any breaches of professional responsibility and Sysco's allegations in that respect have not been decided by a bar association or court. *See also,* Alison Frankel, "Sysco Sues Litigation Funder Burford, blasts Boise Schiller over $140 Million Soured Deal, (March 9, 2023), https://www.reuters.com/legal/legalindustry/sysco-sues-litigation-funder-burford-blasts-boies-schiller-over-140-million-2023-03-09/. Third, GmbH v. Burford German Funding LLC et al, No. 1:2023cv01481 - Document 50 (D. Del. 2024) (alleging the litigation funder hid its relationship with a law firm it tapped to lead trucking industry antitrust cases). As of this writing the case is still pending and the allegations have not yet been adjudicated. *See*, Emily R. Siegel, Burford German Affiliate Sued Over Ties to Hausfeld Law Firm, Bloomberg Law (July 1, 2024).

At the federal level:

- The United States House of Representatives' Committee on Oversight and Accountability held a hearing on "Unsuitable Litigation: Oversight of Third-Party Litigation Funding," and the House of Representatives Judiciary Committee a held hearing on "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities." The following bills have been introduced in recent years: the Protecting Our Courts from Foreign Manipulation Act of 2023 and the Litigation Transparency Act of 2024.[1413] Earlier bills include the Litigation Funding Transparency Act of 2019 and the Litigation Funding Transparency Act of 2021.[1414]
- Senior members of Congress tasked the Government Accountability Office ("GAO", which provides Congress with independent, nonpartisan research and analysis) with research into third party funding. The result was a December 2022 report which "describes (1) characteristics of and trends in the commercial and consumer markets, (2) data gaps in the markets, and policy options to address them, (3) potential advantages and disadvantages of third-party litigation financing for users and investors, and (4) its regulation and disclosure."[1415]
- The Securities and Exchange Commission and the Commodity Futures Trading Commission adopted joint rules "designed to enhance the Financial Stability Oversight Council's ("FSOC's") ability to monitor systemic risk as well as bolster the SEC's regulatory oversight of private fund advisers and investor protection efforts. The rules require investment funds to disclose (confidentially) the percentage of their investment in litigation finance.[1416] In doing so, the Commission noted that "[w]e also are adopting [] amendments to update the strategy categories that advisers can select to reflect our understanding of hedge fund strategies better []. For example, we are including [] more granular categories for credit strategies, such as litigation finance…"[1417]
- The Department of Justice is currently considering whether U.S.-based funders receiving investments from foreign sources, such as sovereign wealth funds, are in violation of their obligation to register as foreign agents.[1418]
- Some federal judges are taking an active role is supervising potential TPLF-related abuses as in *3M Combat Arms Earplug Products Liability Litigation* and *Nimtz Techs. LLC v. Cnet Media, Inc*. discussed above (and below).[1419] These cases illustrate that the courts' inherent authority to supervise TPLF is very broad.

[1413] Protecting Our Courts from Foreign Manipulation Act of 2023, 118th Cong., S. 2805 (2023); Litigation Transparency Act of 2024, 118th Cong., H.R. 9922 (2024).

[1414] Litigation Funding Transparency Act of 2019, 116th Cong., S.471 (2019); Litigation Funding Transparency Act of 2021, 117th Cong., H.R.2025 (2021).

[1415] U.S. Gov't Accountability Off., GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (2022).

[1416] 17 C.F.R. §§ 275, 279 (2024).

[1417] https://www.sec.gov/files/rules/final/2024/ia-6546.pdf, p. 76

[1418] For a summary of the Department of Justice's statements regarding potential new rules, see Covington & Burling, *DOJ Officials Signal New Trends in Enforcement and Interpretation of the Foreign Agents Registration Act* (Dec. 7, 2023), https://www.cov.com/en/news-and-insights/insights/2023/12/doj-officials-signal-new-trends-in-enforcement-and-interpretation-of-the-foreign-agents-registration-act.

[1419] supra note 28. As Judge Connolly noted in Nimitz, "It cannot be seriously disputed that I had the inherent authority to order the production of these records and to invite the parties to submit names of potential amici to

At the state level:

- **Wisconsin** was an early entrant; in 2017 it passed a law requiring that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[1420]
- **Arizona created, in 2021,** a first-of-its-kind comprehensive regulation of nonlawyer investment in law firms, a type of litigation funding provided directly to law firms, which take the form of owning equity in the firm, via investment in portfolios, or otherwise (see below). The regime is part of the Arizona Code of Judicial Administration, promulgated and enforced by the Arizona Supreme Court.[1421]
- **Utah** - Utah's Supreme Court in 2020 authorized the creation of a pilot program, a 'regulatory sandbox' where entities desiring to provide legal services could apply to conduct business outside the traditional constraints of the lawyer-owned law firms.[1422] Among the models that could be authorized in Utah are "entit[ies] that include[] nonlawyers who have an interest, including profit sharing [...] in the entity." Although the state's Web site lists the identity and basic data about the entities that have been approved, it is not possible to discern from the available information whether commercial litigation funding is involved.[1423] Notably, in September of 2024, Utah tightened its requirements adding a Utah 'nexus' meaning that in order to be eligible, an entities must demonstrate that it will have a substantial impact on underserved Utah consumers of legal services.[1424]
- **Montana**: the newly-enacted Litigation Financing Transparency and Consumer Protection Act requires all litigation finance entities to register with the state and caps their portion of any litigation proceeds at 25%.[1425]
- **Indiana** passed a law banning any litigation finance undertaken directly or indirectly by "foreign countries of concern"; explicitly prohibiting litigation financiers from exercising any control over the conduct of the litigation, including, explicitly, settlements; and allowing discovery of litigation finance agreements.[1426]

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assist me in addressing the matters I have raised. [] The Supreme Court has expressly held that a federal court's inherent powers include [] the power to conduct an independent investigation in order to determine whether [the court] has been the victim of fraud." (internal quotation marks and citations omitted). https://fingfx.thomsonreuters.com/gfx/legaldocs/lgpdkwzxzvo/frankel-nimitzfundingdisclosure--connollyorder11.30.22.pdf p. 76].

[1420] *Supra* note 1401.

[1421] Ariz. Code of Jud. Admin., pt. 7, ch. 2, § 7-209 (Ariz. 2022).

[1422] Sandbox Resources, Utah Office of Legal Services Innovation, https://utahinnovationoffice.org/sandbox-resources/ (last visited May 24, 2024).

[1423] Authorized Entities, Utah Office of Legal Services Innovation, https://utahinnovationoffice.org/authorized-entities/ (last visited May 24, 2024).

[1424] https://utahinnovationoffice.org/info-for-interested-applicants/.

[1425] S.B. 269, 68th Leg. (Mont. 2023). Although the word "consumer" appears in the title of Montana's law, it explicitly applies to both natural persons and entities entering into an agreement for the "financing, funding, advancing, or loaning of money to pay for fees, costs, expenses, or any other sums arising from or in any manner related to a civil action, administrative proceeding, claim, or cause of action...".

[1426] H.B. 1160, 123d Gen. Assemb., 2d Reg. Sess. (Ind. 2024). Indiana's law refers explicitly to *commercial* litigation finance.

- **West Virginia** has passed a law imposing strict requirements on litigation finance. It prohibits litigation financiers from referring financed parties to law firms; assigning or securitizing agreements entered into with natural persons; offering or providing legal advice; or receiving any right to "direct or make any decisions with respect to the conduct of the consumer's legal claim or any settlement or resolution."[1427]

It is important to note that the foregoing discussion includes legal reforms which allow nonlawyers to invest in law firms, because such reforms are a form of litigation finance regulation. This is because in the United States, industry practice is shifting from funding single cases via agreements with individual claimants to funding portfolios of cases through agreements with law firms. Although single-case funding still happens and is expected to continue, portfolio funding has become funders' preference. The legal difference is important when considering the permissibility of portfolio funding, but economically there is little distinction between portfolio funding and investing in a law firm given that plaintiff law firms' principal assets are their contingent rights to proceeds in the cases they litigate.[1428] The European Parliament has recognized this in the resolution under consideration, noting that "that there is an increasing trend of litigation funders agreeing to finance law firms across a series of future cases (portfolio funding)."[1429]

Arizona is the only state that permits nonlawyers investment in law firms, which it did through a comprehensive regulation issued by the Arizona Supreme Court in its capacity as the ultimate governing body of the legal profession in the state.[1430] The Court's regulation defines law firm finance broadly, and in a way that encompasses portfolio funding:

> "Economic interest" means (1) a share of a corporation's stock, a capital or profits interest in a partnership or limited liability company, or a similar ownership interest in any other form of entity, or (2) a right to receive payments for providing to or on behalf of the entity management services, property, or the use of property (including software and other intangible personal property) that is based, in whole or in part, on the firm's gross revenue or profits or any portion thereof. Notwithstanding the foregoing, "economic interest" does not mean employment-based compensation pursuant to a plan qualified under the Internal Revenue Code of 1986, as hereafter may be amended, or any successor rule, or discretionary bonuses paid to employees.[1431]

Other states are declining to follow Arizona's lead. Namely, they are deciding not to allow nonlawyers to invest in law firms. Since Arizona lifted its restriction, in 2021, several states have affirmatively flatly rejected similar liberalizing reforms, including California, New Mexico,

[1427] S.B. 850, 2024 Reg. Sess. (W.Va. 2024). Although the bill uses the language of *consumer* litigation finance, it is written to encompass both consumer and commercial modes – an earlier version of the bill restricted the definition of "consumer" to "natural persons," but the adopted version struck the word "natural" in the definitions section and amended later provisions to refer specifically to "consumer[s] who [are] natural person[s]."

[1428] For a fuller discussion of this point, see Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 Wm. & Mary L. Rev. 939 (2022).

[1429] European Parliament, Resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation, paragraph 8 (2020/2130(INL)).

[1430] *See* Ariz. Sup. Ct. Admin. Ord. No. 2020-173 § A (2020) [hereinafter Order 173], https:// www.azcourts.gov/Portals/22/admorder/Orders 2 /2020-173F.pdf.

[1431] See supra 1401.

Massachusetts, Illinois, Georgia, and Florida.[1432] The New York State Bar Association, which has a consistently negative attitude toward nonlawyer ownership of law firms, issued an Ethics Opinion in 2021 which allowed for a very narrow exception for New York lawyers practicing elsewhere, but otherwise left the prohibition intact.[1433] The New York State Bar Association also joined the Illinois State Bar Association in supporting the American Bar Association ("ABA") resolution which affirmed the rule against nonlawyer ownership.[1434]

Although it is not the direct subject of this report, it is worth noting that several states have laws regarding *consumer* litigation finance as distinct from *commercial* litigation finance. This distinction is generally achieved by text in the statute restricting its application to litigation finance provided to consumers, where "consumer" is defined as "a natural person." These include Nevada,[1435] Vermont,[1436] Tennessee,[1437] Utah,[1438] Oklahoma,[1439] Nebraska,[1440] Missouri, [1441] Maine,[1442] Illinois,[1443], Arkansas, [1444] Ohio,[1445] and Georgia (providing that "[c]ontracts of maintenance or champerty" are ones which "contravene[] public policy generally…"[1446]

2.2 Regulatory oversight of funders/funding industry (any analogous principles to Art. 4 and Art. 8 in the Annex to the EP Resolution?)

There are no licensing requirements in the U.S. analogous to those found in Article 4. However, bearing in mind the distributed nature of regulatory authority described in the Introduction, above, different bodies in different jurisdictions may exercise some degree of oversight. In the event a litigation financier securitizes a claim or set of claims, those securities would be monitored by the Securities and Exchange Commission. Federal judges may choose to investigate matters such as whether the use of litigation finance agreements constitutes an abuse of process in their own courtroom, as Judge Connolly did in the *Nimitz* patent litigation, or whether pricing may be abusive, as Judge Rogers did in the *3M Combat Arms Earplug Products Liability Litigation*.[1447]

So while **there is no single, overarching regulator** with powers over all litigation financiers throughout the U.S., as discussed in the Introduction, **there are a number of players at the level of**

[1432] *See* Michael Abdan, *Changing of the Tide: Law Firm Fee-Sharing and Ownership With Nonlawyers*, The Trial Lawyer's Journal (2024), https://www.triallawyersjournal.com/articles/changing-of-the-tide-law-firm-fee-sharing-and-ownership-with-nonlawyers/.

[1433] Committee on Professional Ethics, Opinion 1234, New York State Bar Association (Dec. 7, 2021).

[1434] *See* Lucian T. Pera, *Ethics, Lawyering, and Regulation in A Time of Great Change: Field Notes from the (r)evolution,* 74 S.C. L. Rev. 801, 810 (2023).

[1435] Nev. Rev. Stat. Ann. § 604C.

[1436] Vt. Stat. Ann. tit. 8, § 2251- 2260.

[1437] Tenn. Code Ann. § 47-16.

[1438] See supra note [xx].

[1439] Okla. Stat. tit. 14A, § 3-801 - 3-817.

[1440] Neb. Rev. Stat. Ann § 25-3301 - 25-3309.

[1441] Mo. Rev. Stat. § 436.550 - 436.572.

[1442] Me. Rev. Stat. tit. 9-A, § 12-101 - 12-107.

[1443] 815 Ill. Comp. Stat. Ann. 121/1 - 121/910.

[1444] AR Code § 4-57-109.

[1445] OH Rev. Code § 1349.55.

[1446] Ga. Code Ann. § 13-8-2.

[1447] *See* Nimtz Techs. LLC v. Cnet Media, Inc., Civ. No. 21-1247-CFC (D. Del. Sept. 13, 2022); *see also In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885, 2023 2023 WL 8609280 (N.D. Fla. Aug. 29, 2023) .

individual courts, states, and the federal government which are increasingly using their power to set and enforce standards for litigation finance.

Since there is no single regulator there is also no single complaints mechanism like the one described in Article 8. That does not, however, mean that funded parties, funded counsel, opposing parties or counsel, or others who may have a dispute with a funder are left without recourse.

The distributed regulatory structure described in this report relies in large part on private enforcement. (This is true of many parts of the economy in the United States where so-called private enforcement of the law[1448] is preferred over public enforcement). More specifically, it relies on funded parties, and at time decedents, to bring a lawsuit against funders to redress any abuses. In addition to lawsuits against funders, funded parties have the option of bringing complaints with state bar associations in the event that their counsel violated the standards of professional responsibility. For instance, it is the professional responsibility of attorneys to adhere to the client's directions (which ensures client control over the conduct of the claim); to ensure that confidentiality is maintained; to ensure that the introduction of a funder does not create conflicts of interests between the lawyer and the client, etc. Where an attorney violates those rules, their client can file a complaint with the state bar for violations of the rules of professional conduct or bring a lawsuit in the courts for causes of action such as malpractice or breach of fiduciary duties.

Judges can also refer cases of possible litigation finance abuse to relevant authorities such as bar associations. In the *Nimitz* litigation (discussed below) the presiding judge, suspecting fraud and abuse of process, referred those involved to investigation and possible discipline by the relevant bar associations and the Department of Justice.

In Arizona, the most comprehensive regulation of law firm finance (and therefore litigation finance) to date, the Supreme Court mandates a robust complaints procedure. This illustrates that states do have both the legal authority to regulate litigation finance and the ability to do so.

Similarly to Article 8(2), opposing parties (usually defendants) can bring a motion to the court in the funded case to challenge any aspect of the funding agreement if it affects their rights. For instance, the founders of the dating app Tinder sued Match.com, the company which bought Tinder. In the course of the litigation, the litigation finance agreement entered into by the plaintiffs became the focus of a subsidiary dispute initiated by the defendants, and satellite litigation ensued over the question of whether payments made under the agreement amounted to improper payments to witnesses. In another example, where a funder substituted itself, using a subsidiary, with the original plaintiffs, defendants argued that such substitution denies them their ability to obtain discovery and renders the availability to sanction the entity, which is likely not capitalized, for any litigation abuse effectively unavailable. [1449]

Arizona's comprehensive regulation of law firm finance establishes a licensing and oversight scheme with powers in the regulator -- the Arizona Supreme Court -- that closely mirror those laid out in Article 8(3). These include:

- Making decisions on licensing of Alternative Business Structures (ABS), taking into account such factors as:

[1448] *See* John C. Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 (1986).

[1449] *See, respectively*, In the Matter of Rad v. IAC, New York State Unified Court System: NYSCEFS (July 27, 2021); In re Pork Antitrust Litig., No. 18-CV-1776 (JRT/JFD), 2024 WL 511890, at *12 (D. Minn. Feb. 9, 2024). The author of this Report served as an expert witness in both of these matters.

- Protecting the public interest.
- Promoting access to justice.
- Encouraging a strong legal profession.
- Promoting adherence to professional principles.

- Enforcing the Code of Conduct for ABSs which includes principles which create fiduciary duties for nonlawyer investors by requiring ABSs to "maintain effective governance structures, arrangements, systems, and controls to ensure: [...] [that m]anagers, economic interest holders, decision-makers, employees, or anyone employed, associated with, or engaged do not cause or substantially contribute to a breach of the ethical rules of [the Arizona Rules of Professional Conduct] or this section."[1450]
- Disciplining violations by ABSs or their members through the same "supreme court rules governing complaints, investigations, and disciplinary proceedings against Arizona licensed attorneys..."[1451] with a range of sanctions including revoking or suspending the ABS's license.

2.3 Legal framework applicable to funders as determining the conditions for carrying out economic activity of TPLF- e.g. capital adequacy requirements (any analogous principles to Art. 6 and Art.7 in the Annex to the EP Resolution?)

Whether a litigation financier pays its debts in a timely fashion is subject to general contract law. Failure to pay when any debt under any contract becomes due and payable would be a breach of contract giving rise to a cause of action in a court of law.

Third-party litigation funders are not subject to any obligations to fund all stages of the proceedings they have committed to beyond any contractual obligations they have entered into which, in turn, would be governed by general contract law.

There is no general capital adequacy requirement, nor any body with the power to verify capital adequacy, except when the funder might be subject to such requirement independently of whether it is engaging in litigation funding. For example, insurance companies, which are increasingly engaging in litigation funding, are subject to capital adequacy requirements under insurance law.

Other than in Arizona (see above), there are not yet fiduciary duties on funders in the United States. Rather, the working assumption so far has been that the ethical regulation of lawyers, including their fiduciary duties, serves as indirect regulation of funders because lawyers are obliged to act as gatekeepers who will not get involved in a funding agreement that does not comport with their professional responsibilities, including their fiduciary duties. Lawyers are subject to a range of fiduciary duties and ethical obligations to their client, many of which are relevant to litigation finance. These include duties of:

- **Loyalty and zeal.**[1452] "A lawyer should pursue a matter on behalf of a client [], and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

[1450] *Supra* note 41, at K(1)(e)(2).
[1451] *Supra* note 1421, at H(1).
[1452] Model Rules of Pro. Conduct r. 1.3 cmt. (Am. Bar Ass'n 2020) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); New York Rules of Pro. Conduct, Preamble: A Lawyer's Responsibilities (N.Y. Bar Ass'n 2021) ("The touchstone of the client-lawyer

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[1453]

- **To refrain from conflicts of interest.**[1454] Attorneys must refrain from conflicts of interest. An example of a potential conflict of interest would be for lawyers who are nominated by a funder to multiple cases to advance a funder's interest to the detriment of its client's interests, in order to enhance the value of other lawsuits that the funder is invested in. The *ABA's Best Practices* caution that a "lawyer should beware of conflicts of interest [for example, consider] how many times has the lawyer used the particular funder? What is the relationship between the lawyer and the funder?"[1455] This particular conflict is known in the scholarship as the problem of 'repeat play' between funders and lawyers/law firms: conflicts may be "exacerbated by the fact that most litigation funders are repeat players, creating a perpetual cycle of investment and litigation decisions that are designed to maximize funders' return on investment rather than advance the best interests of the law firm's clients. In short, the closer the relationship between funders and law firms becomes, funders' interests will probably exert more pull than those of the clients."[1456]
- **To maintain confidentiality.**[1457] An oft-cited concern about the involvement of litigation funders is that sharing information with them would violate a lawyer's duty of confidentiality, waive the attorney-client privilege, or eliminate the attorney work product protection. In addition, funder control over the litigation, in particular, may compromise lawyers' duty of confidentiality. The *ABA's Best Practices*, therefore, recommend that lawyers "only supply the funder with public documents and access to the public file… and offer no opinion about the underlying claims…"[1458] It is also best practice for funding agreements to "state that no advice as to the underlying claims has been or will be provided to the funder and no one at the law firm or client has any authority to offer such advice; and the lawyer should obtain acknowledgement from the funder that no opinions have been offered and none were sought on the underlying lawsuit, and none will be required by the funder during the case."[1459]
- **To exercise independent professional judgment.**[1460] A lawyer has the duty to exercise independent judgment and render candid advice. This duty is closely related to the duty of

relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.").

[1453] American Bar Association, Comment to Model Rule 1.3.

[1454] Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 2020).

[1455] Best Practices For Third-Party Litigation Funding 17 (Am. Bar. Ass'n 2020).

[1456] Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation on Investors' ESG Demands*, 34 Geo. J. Legal Ethics 1383, 1398–99 (2021) (internal quotation marks omitted).

[1457] *See* Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 2020).

[1458] *See supra* note 1398, at 18.

[1459] *See supra* note 1398, 13–14.

[1460] *See* N.Y. Rules of Pro. Conduct Rule 1.7(a) (N.Y. State Bar Ass'n 2022) ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties"); *id.* at Rule 1.8(f) ("A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless… there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship."); *id.* at Rule 5.4(c) ("lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

loyalty because a lawyer's ability to exercise independent judgment might be impaired if he or she represents clients with adverse interests.[1461] In the context of litigation funding, a careful lawyer will assure that the litigation funding agreement accurately reflects that the client retains control of the litigation and that the attorney "retains and protects his or her ability to exercise independent professional judgment."[1462]

Another important duty in this regard, the **duty to act in the best interests of the client**, is addressed in the response regarding Article 14(3), below.[1463]

One major exception to the general rule that litigation financiers do not have fiduciary duties is Arizona, where the Supreme Court's regulatory framework imposes lawyers' fiduciary duties directly on nonlawyer investors in law firms. Specifically, the Arizona regulation makes "authorized persons" (which includes investors with "economic interest in the ABS equal to or more than 10 percent of all economic interests in the ABS)[1464] "individually responsible for compliance by the ABS with [the Court's] code of conduct" which incorporates by reference the state's professional responsibility standards.[1465]

Because of the experimental and therefore amorphous structure of Utah's 'regulatory sandbox,' it does not explicitly impose fiduciary duties on participants in the sandbox. Rather, Utah closely monitors the activities of licensed entities and specifically seeks to identify and mitigate harms to consumers of legal services, defined as:

- Consumer achieves an inaccurate or inappropriate legal result.
- Consumer fails to exercise legal rights through ignorance or bad advice.
- Consumer purchases an unnecessary or inappropriate legal service.

Increasingly, insurance companies are entering into the litigation funding space and, generally speaking, insurance companies are subject to fiduciary duties including the duty to fund (but these generally pertain to insurance for defendants not funding for plaintiffs). Insurance regulation is subject to state law which means there are 50 different regimes covering insurance companies in the U.S.. It is therefore hard to generalize other than to note that state laws generally impose fiduciary obligations on insurance companies. It is possible that with time, as insurance companies become competitors of litigation financiers, they will demand that similar duties be imposed on the latter.

2.4 Non TPLF legal framework which applies to TPLF. Please assess the effect of non TPLF specific legislation which affects TPLF practice (e.g. legislation on abusive clauses, transparency, avoidance of conflict of interest etc).

In addition to the various aspects of the legal framework that apply to TPLF, which are already discussed above, a few additional concepts apply to TPLF.

[1461] *See, e.g.*, Applied Energetics, Inc. v. Gusrae Kaplan Nusbaum PLLC, No. 21CV382 (DF), 2022 WL 956119, at *13 (S.D.N.Y. Mar. 30, 2022) (finding that lawyers' independent judgment might have been impaired when they represented a client with adverse interests to those of a former client).

[1462] *Supra* note 1386, at 11 n. 5.

[1463] Model Rules of Pro. Conduct r. 1.3 cmt. (Am. Bar Ass'n 2020) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[1464] *See supra* note 1421, at 1.

[1465] *Supra* note 1421, at 26.

Real party in interest: Under the Federal Rules of Civil Procedure, a lawsuit "must be prosecuted in the name of the real party in interest."[1466] This rule protects the due process rights of opposing parties by providing them with the identities of their adversaries so they can confront them as part of the adversarial process. It also protects the public's interest in knowing the facts at issue in court proceedings, a core tenet of the rule of law.[1467] And it allows the court to identify any conflicts of interest the judge might have. Thus, if a funder is found to be the real party in interest, they become a party to the litigation they are funding. This has various implications such as subjecting them to more discovery than non-parties are subject to; subjecting them to potential court sanctions; and subjecting them to potential adverse cost rulings, where applicable (which is relatively unusual in the American system). On a couple occasions in recent years, courts have made a finding that a funder is the real party in interest and on one occasion a funder claimed that it should be regarded as the party rather than the original plaintiffs.[1468]

Abuse of process is a doctrine generally available to courts in the U.S., and judges can issue orders designed to curb abuse of process *sua suponte*. A well-known recent case in Delaware (a very important district for commercial litigation since many corporations are formed under its laws and many contracts select Delaware law as governing law) combines both abuse of process and real parties in interest. In short summary, the plaintiff in a series of intellectual property cases were suspected of abuse of process in part by hiding real parties in interest namely, the funders.

Judge Connolly of the U.S. District Court issued an order directing, among other things, disclosure of litigation finance agreements. In an extensive memorandum explaining the basis for the order and the investigation he had launched into the parties' conduct, he explained that "[The Court] issued the Memorandum Order[1469] *sua suponte* [...] because the testimony of witnesses and representations of counsel at a hearing [the Court] held [...] had give[n] rise to concerns [about] the accuracy of statements in filings [] with the Court and whether the real parties in interest are before the Court"; specifically because of "concerns about whether Plaintiff has complied with the Court's standing order regarding third-party litigation funding"; and, finally, "concerns about the abuse of our courts and the lack of transparency as to who the real parties before the Court are, about who is making decisions in these types of litigation."[1470]

Ultimately, Judge Connolly referred the attorneys of record for the plaintiffs to their respective bars for discipline, and also sent his findings to the Department of Justice for further investigation based on his conclusion that "(1) counsel of record for the LLC plaintiffs violated numerous rules of professional conduct by actions they took and failed to take; [] and (3) real parties in interest in the patents in these cases, including a foreign government, were not disclosed to the Patent and Trade Mark Office, defendants, or the Court."[1471] This case also illustrates the inherent power of judges to investigate potential abuses in their courts, including abuses relating to litigation finance.

[1466] Fed. R. Civ. P. 17(a)(1).

[1467] Guerrilla Girls, Inc. v. Kaz, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (adversaries' and public's interest in knowing the real party in interest).

[1468] Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693–94 (Fla. Dist. Ct. App. 2009) (individual and corporation funding litigation were "parties" and could be held liable to pay attorney's fees and costs even though they were not named in the pleadings, because they entered into an agreement pursuant to which they paid litigation costs, approved counsel, had veto power over the filing and manner of prosecution of the lawsuit, had the final say over any settlement agreements, and were entitled to 18.33% of any amount awarded to the shareholders); Nimtz Techs. LLC v. Cnet Media, Inc., Civ. No. 21-1247-CFC (D. Del. Sept. 13, 2022) (funders were the real party in interest).

[1469] *See* Nimtz Techs. LLC v. Cnet Media, Inc., Civ. No. 21-1247-CFC (D. Del. Sept. 13, 2022).

[1470] *See* Nimtz 2022 WL 17338396, *supra* note 1408.

[1471] *See* Nimtz 2022 WL 8187441, *supra* note 1408.

2.5 Procedural safeguards (or lack thereof) on (potential) conflicts of interest, transparency, disclosure and costs (any analogous principles to Art. 13, Art. 14 and Art. 16 in the Annex to the EP Resolution?)

Article 13(1)

There is no analog to this in the U.S. The general philosophy is that market discipline, e.g., via reputation, addresses or creates incentives for funders to be good actors.

Article 13(2)(b)

One of the central conflicts of interest in litigation finance is the potential for conflict between the economic interest of the litigation financier as an investor and the desires of the claimholder. When these are at odds, policy in U.S. jurisdictions requires that control over choices about how to conduct the litigation – including and especially when or whether to settle and for how much – remain with the claimholder. For a discussion of how the law in the U.S. gives effect to that policy, see the section regarding Article 14(2), below.

Some judges have instituted standing orders that require lawyers to certify that the funding agreement does not create conflicts.

Furthermore, **some of the state laws passed or recently under consideration explicitly prohibit certain kinds of conflicts.** For instance, West Virginia's law prohibits litigation financiers from referring funded parties to a specific law firm or attorney or accepting any commissions or referral fees from law firms or attorneys.[1472]

In the context of class and mass actions (collective redress), courts in the U.S. take a very active role in supervising any aspect of the litigation that may negatively affect plaintiffs who are not well-positioned to assert their rights. In such instances plaintiffs are often absent – or even unknown and/or unknowable – and/or have financial stakes that are too small for them to be effective supervisors of their lawyers. Judges pay particular attention to potential conflicts of interest in such cases. For example, the Northern District of Ohio, Eastern Division, has ordered that in all multidistrict litigation cases, counsel for a funded party must provide the court with:

> two sworn affirmations— one from counsel and one from the lender—that the [third-party] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.[1473]

In Florida, a U.S. District Court in a multidistrict litigation required counsel to disclose whether the case was financed and, if so, to answer several questions including the following:

> Does the litigation funder have any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or

[1472] *See supra* note 1403, at 2.
[1473] *See* In re Nat'l Prescription Opiate Litig., 2018 WL 2127807 (N.D. Ohio May 7, 2018).

> briefs, or any input into the decision to accept a settlement offer? Does the financing (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent judgment, (4) give to the lender any control over litigation strategy or settlement decisions (as to either the common benefit work done by counsel or work for individual retained clients), or (5) affect party control of settlement?[1474]

As discussed previously, **Arizona's extension of fiduciary duties to all 'economic interest holders' in law firm investing imposes a fiduciary duty to avoid conflicts of interest on funders**.

Article 14(1)

While there is no general licensing requirement for commercial litigation financiers in the U.S., some jurisdictions do require it. For instance, the Arizona regulation, already discussed, requires both registration and commitment of all economic interest holders to fiduciary duties and standards of professional responsibility. Utah requires entities who wish to take advantage of its 'regulatory sandbox' to register and submit to intensive oversight. Montana requires all litigation financiers to register with the state.

Article 14(2)

Ensuring that claimholders retain control over their claim – and especially over decisions about when and whether to settle – is one of the core public policies underlying legislative approaches to litigation finance and judicial interpretations of the limits of the practice.

West Virginia's law, for instance, states simply that "[a] litigation financier shall not […]

- "Attempt to obtain in the litigation for which the litigation financing transaction exists a waiver of any remedy, including, but not limited to, compensatory, statutory, or punitive damages to which the consumer might otherwise be entitled;"[1475]
- "Attempt to effect in the litigation for which the litigation financing transaction exists mandatory arbitration or otherwise effect waiver of a consumer's right to a trial by jury;"[1476]
- "Offer or provide legal advice to the consumer regarding the litigation financing or the underlying dispute;"[1477] or,
- "Receive any right to direct or make any decisions with respect to the conduct of the consumer's legal claim or any settlement or resolution. The right to make such decisions shall remain solely with the consumer and his or her attorney."[1478]

Montana has similar language, making it unlawful for litigation financiers to:

[1474] *See* In re Zantac (Ranitidine) Prods. Liab. Litig., 2020 WL 1669444 (S.D. Fla. April 3, 2020).
[1475] *See supra* note 1403, at § 46A-6N-4(a)(6).
[1476] *See supra* note 1403, at § 46A-6N-4(a)(7).
[1477] *See supra* note 1403, at § 46A-6N-4(a)(8).
[1478] *See supra* note 1403, at § 46A-6N-4(a)(11).

- "refer or require any consumer to hire or engage any person providing any goods or rendering any services to the consumer;"[1479]
- "attempt to secure a remedy or obtain a waiver of any remedy, including but not limited to compensatory, statutory, or punitive damages, that the consumer may or may not be entitled to pursue or recover otherwise;"[1480]
- "offer or provide legal advice to the consumer;" or,[1481]
- "demand, request, receive, or exercise any right to influence, affect, or otherwise make any decision in the handling, conduct, administration, litigation, settlement, or resolution of any civil action, administrative proceeding, claim, or cause of action in which the litigation financer has provided litigation financing. All rights remain solely with the consumer and the consumer's legal representative."[1482]

Montana's law goes even further, providing that "A person who provides any goods or renders any services to the consumer may not have a financial interest in litigation financing and may not receive any commissions, referral fees, rebates, or other forms of consideration from any litigation financer or the litigation financer's employees, owners, or affiliates."[1483]

Similarly, **Indiana** law provides that "[a] commercial litigation financier may not make any decision, have any influence, or direct the plaintiff or the plaintiff's attorney with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding, or make any decision with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding. The right to make these decisions remains solely with the plaintiff and the plaintiff's attorney in the civil proceeding."[1484]

In states that retain the doctrine of champerty, the more control that a funder exerts or purports to exert over the conduct of the claim, the more likely courts are to regard the agreement as champertous.[1485]

As the American Bar Association observed, in states which allow it, "champerty is generally permissible as long as the supplier is not… 'intermeddling' with the conduct of the litigation (e.g., determining trial strategy or controlling settlement)."[1486]

For example, in a recent case the Superior Court of Delaware held that a litigation finance agreement was not champertous under Delaware law because the funder was not "controlling or forcing [the plaintiff] to pursue litigation, or is controlling the litigation for the purpose of continuing a frivolous or unwanted lawsuit."[1487] Where champerty is prohibited, champertous agreements are void.[1488]

[1479] *See supra* note 1402, at § 31-4-104(1)(f).
[1480] *See supra* note 1402, at § 31-4-104(1)(h).
[1481] *See supra* note 1402, at § 31-4-104(1)(i).
[1482] *See supra* note 1402, at § 31-4-104(1)(l).
[1483] *See supra* note 1402, at § 31-4-104(2).
[1484] *Supra* note 1426, at 4.
[1485] This and the foregoing paragraphs are reproduced and adapted, with minor changes only, from my forthcoming article M. Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy And Funders' Intermeddling*, Cornell Law Review (forthcoming 2025).
[1486] *Supra* note 1398.
[1487] *See supra* note 1392.
[1488] 14 C.J.S. Champerty and Maintenance § 17 (1991); 14 Am. Jur. 2d *Champerty and Maintenance, Etc.* § 7 (2020).

States that have abolished champerty, in order to allow funding as an access to justice mechanism, nonetheless retain the strong public policy against funders acquiring or assuming control over the conduct of a claim. For example, in *Maslowski v. Prospect Funding*,[1489] the Minnesota Supreme Court abolished the common law doctrine of champerty but noted that "[o]ur abolition of champerty as a defense does not mean that all such agreements are enforceable as written"[1490] and that "[p]arties like Maslowski retain the common law defense of **unconscionability**."[1491] The court went on to "note that district courts may still scrutinize litigation financing agreements to determine whether **equity** allows their enforcement" and specifically directed "[c]ourts and attorneys [to] likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation similar to the "intermeddling" that we described in our early champerty precedent."[1492] The court concluded by emphasizing that "it is difficult to conceive of any stipulation more against public policy than a contract term requiring the litigation financier's permission to settle the underlying litigation[]."[1493]

The South Carolina Supreme Court abolished champerty, but noted that "[o]ur abolition of champerty as a defense does not mean that all such agreements are enforceable as written"[1494] and that ""[a] financier becomes an officious intermeddler when he or she offers unwanted advice or otherwise attempts to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit."[1495]

A U.S. Court of Appeals upheld a U.S. District Court finding that a litigation finance agreement was champertous under the laws of Kentucky because "the terms of the Agreements effectively give [the Funder] substantial control over the litigation [...] [impose] conditions [which] raise quite reasonable concerns about whether a plaintiff can truly operate independently in a litigation [...] [and] that agreements like this may interfere with or discourage settlement."[1496]

Claimants' control over their own cause of action is also protected by the professional standards that require attorneys to advance her client's interests *as understood by the client*. In practical terms, since few cases can proceed without counsel, rules of professional responsibility which would cause counsel to withdraw or otherwise be unable to continue a representation operates as a *de facto* limitation on what litigation funders can do. Litigation finance agreements which by their terms or in their operation give litigation financiers control over the conduct of a litigation – and especially over settlement – is just such a matter.

In New York, for instance, "[t]he touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system...".[1497] Specifically, in any given case the client has the right to accept or reject a settlement proposal[1498] and a lawyer must abide by a client's decisions concerning the objectives of representation, including and

[1489] Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 238 (Minn. 2020).
[1490] *Id.* (internal quotation marks omitted) (quoting in agreement Osprey, Inc. v. Cabana Limited Partnership, 340 S.C. 367, 532 S.E.2d 269 (S.C. 2000)).
[1491] *Id.*
[1492] *Id.*
[1493] *Id.* (internal quotation marks omitted).
[1494] Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 532 S.E.2d 269, 278 (S.C. 2000).
[1495] *Id.* at 383.
[1496] Boling v. Prospect Funding Holdings LLC, 771 Fed. Appx. 562 at 580 (6th Cir.).
[1497] N.Y. Rules of Pro. Conduct, Preamble para. 2 (N.Y. State Bar Ass'n 2021).
[1498] *Id.* at Rule 1.17 cmt. 7.

especially a client's decision whether to settle a matter.[1499] If a funding agreement compromises the attorney's independent judgment on this, or any other, point the lawyer must withdraw.

Every state has similar rules for attorneys. The decision as to whether and under what terms to settle a case is protected to the same degree other fundamental legal decisions—such as a client's decision to write a new will or a decision whether to plead guilty to a crime—are protected.[1500] This is because litigation "concerns a client's affairs and is intended to advance the client's lawful objectives as the client defines them… Some decisions are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions…"[1501] And the decision about whether to settle is specifically reserved to the client "because a settlement definitively disposes of client rights."[1502]

Additional rules of professional responsibility which touch on the issue of control are discussed in the answer regarding Article 7, above.

Article 14(3)

In the collective redress context, some judges are stepping in to ensure enough of the recovery goes to the plaintiffs. A recent high profile example is the *3M Combat Arms Earplug Products Liability Litigation*, discussed above.

An earlier example was the decision in the *World Trade Center Disaster Site Litigation* not to allow lawyers to roll over some or all of the cost of their financing on to their clients, also discussed above.

Furthermore, as discussed above, in the class action context judges supervise the fairness of settlements with an understanding that given the features of class actions this is an area open for abuse.[1503]

Article 14(4)

While there are presently no nationwide minimum client recoveries or return caps, judges and legislatures have taken steps to ensure that funders do not receive outsized portions of recoveries at the expense of plaintiffs. Legislatively, Montana caps recovery at 25% of the total claim proceeds.[1504] Florida's proposed law would cap a financier's share of the proceeds at 50%.[1505]

[1499] *Id.* at Rule 1.2(a-b).

[1500] The Restatement (Third) of the Law Governing Lawyers § 22 (Am. L. Inst. 2000).

[1501] *Id.*

[1502] *Id.*

[1503] Rule 23(e) of the Federal Rules of Civil Procedure provides that class "claims […] may be settled […] only with the court's approval […] only after a hearing and only after finding that [the settlement] is fair, reasonable, and adequate and after considering whether: A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate […]; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e). Several states have similar provisions. For examples, see Massachusetts, Mass. R. Civ. P. 23(c), New York, N.Y. C.P.L.R. 908 (McKinney 2009), and California, Cal. R. Ct. 3.769.

[1504] *See supra* note 1402, at § 31-4-104(1)(d) ("A litigation financer may not […] receive or recover any payment that exceeds 25% of the amount of any judgment, award, settlement, verdict, or other form of monetary relief obtained in the civil action, administrative proceeding, claim, or cause of action that is the subject of the litigation contract").

[1505] Florida proposal 69.109 ("A litigation financier may not […] [c]ontract for or receive, whether directly or indirectly, a larger share of the proceeds of a civil action, administrative proceeding, claim, or other legal proceeding financed by a litigation financing agreement than the share of the proceeds collectively recovered by the plaintiffs

As discussed above, some judges in the class and mass action context have taken an interest in ensuring that plaintiffs are not harmed by the terms of litigation funding agreements. The broader context here is that judges tend to scrutinize whether settlement amounts, attorneys' percentage of the recovery, and other costs are fair for the plaintiffs in class and mass actions. Traditionally, the focus here has been on the amount of the recovery that goes to the attorneys, since until the rise of litigation finance only attorneys would be in line to receive any part of plaintiffs' recovery. Now, however, we can expect judges to extend that scrutiny to include the fairness of the percentage of the recovery claimed by litigation financiers.

Laws forbidding usury may also be relevant in this context. These vary state by state, but generally cap interest rates. Many consumer litigation finance laws, for instance, provide a maximum amount of annual compound interest a consumer may be charged. Third-party funders have historically structured their financing as non-recourse funding in order to render usury laws inapplicable (because non-recourse funding does not qualify as a loan and so the rate of return on the investment is not interest). But to the extent that third-party funders are now on occasion providing recourse loans, those are subject to usury limitations on the maximum allowable interest rate.

Article 14(5)

Generally, the U.S. follows the so-called 'American rule' on litigation costs. This means that each party pays their own litigation costs, in contrast with the European 'loser pay' rule. That makes this Article largely inapplicable. However, there are instances where a loser can be forced to pay court costs and the other side's attorneys' fees. In general, these include, e.g., civil rights cases with statutory fee shifts and instances where costs and fees are shifted as a sanction. Some legislatures have acted to ensure that, where appropriate, funders be held responsible for such fees and costs for example Montana's law provides that litigation financiers are "jointly and severally liable for any award or order imposing or assessing costs or monetary sanctions against a consumer arising from or relating to any civil action, administrative proceeding, claim, or cause of action for which the litigation financer is providing litigation financing."[1506] Florida's proposal goes further, requiring funders to "indemnify the plaintiffs [...] against any adverse costs, attorney fees, damages, or sanctions..."[1507] And in at least one instance a court has imposed such costs on a funder. [1508]

2.6 Obligations of funders and beneficiaries towards courts, public administration and adverse parties of a dispute

There is no common set of laws or regulations imposing uniform obligations on funders towards courts, public administration, or adverse parties.

to any such action, claim, or proceeding after the payment of any attorney fees and costs owed in connection to such action, claim, or proceeding").

[1506] *See supra* note 1441.

[1507] *See supra* note 1505.

[1508] *See, e.g.*, Abu-Ghazaleh, *supra* note 88.

2.7 Obligations of funders towards beneficiaries and vice-versa

There is no common set of laws or regulations imposing uniform obligations on funders and beneficiaries towards one another, beyond the obligations each contracted for, which are governed by contract law.[1509]

2.8 Distribution of awards and bearing adverse costs in lost cases (any analogous principle to Art. 18 in the Annex to the EP Resolution?)

Since U.S. courts follow the 'American Rule' namely, each party pays its own costs and do not shift costs to the losing party (discussed in more detail in the answer regarding Art. 14(5) of the Annex to the EP resolution, above), orders for adverse costs are rare. There is therefore no state entity or state obligation similar to the one set forth in Art. 18.

2.9 Planned legislation

At the federal level, lawmakers have in recent years introduced legislation which would require the disclosure of the participation of litigation finance in class and mass actions, the disclosure of the existence and identity of any foreign entity invested in a lawsuit, and disclosure of funding generally.[1510] It is also reasonable to expect that with a new Republican administration in control of both houses of Congress starting 2025, that legislation regarding litigation funding—whether pertaining to disclosure or addressing other forms of regulation as well—will be introduced again and will pass.[1511]

Florida's comprehensive proposed Litigation Investment Safeguards and Transparency Act – stalled in committee at the time of this writing[1512] would:

- Allow courts to take the existence of a litigation financing agreement into account in class and mass actions when evaluating the adequacy of counsel and class representatives.
- Prohibit litigation financiers from directing or making decisions with regard to the underlying claim, including choice of counsel, litigation strategy, and settlement.
- Limit financiers' recovery to 50% of the proceeds of the claim.
- Prohibit assigning or securitizing any litigation finance agreement.
- Require disclosure of any litigation finance agreement to the court or other tribunal and opposing parties – and also the direct or indirect participation in the investment by foreign individuals or entities.
- Require litigation financiers to indemnify funded parties against adverse costs, including attorneys' fees.

[1509] *See* Maya Steinitz, The Litigation Finance Contract, 54 Wm. & Mary J. 455 (2012); *see also* Maya Steinitz & Abigail Field, A Model Litigation Finance Contract, 99 Iowa L. Rev. 711 (2014).

[1510] Litigation Funding Transparency Act, S. 840, 117th Cong. (2021); Protecting Our Courts From Foreign Manipulation Act, S. 2805, 118th Cong. (2023); See Litigation Transparency Act of 2024, 118th Cong., H.R. 9922 (2024).

[1511] Jon Compisi, "GOP Trifecta in Washington Could Put Litigation Finance Industry Under Pressure," Law.com (Nov. 14, 2024).

[1512] H.B. 1179, Reg. Sess. (Fl. 2024).

Several states have considered or are considering bills similar to the one passed in Montana. These include Iowa, Kansas, and Nevada.[1513]

Iowa is also considering a separate bill which prohibits litigation finance altogether.[1514]

Louisiana Is considering a bill requiring disclosure of all litigation funding where foreign entities or individuals are investors, and placing limits on the use of foreign funds in litigation finance.[1515]

In addition to its regulation of law firm finance, **Arizona** is considering a bill that explicitly prohibits litigation financiers from directing or making decisions regarding the underlying litigation and from receiving more than half of the claim proceeds; and directing courts in class and mass actions to consider the existence of funding agreements and potential conflicts of interest when evaluating the suitability of class representatives and class counsel.[1516]

3. Practical operation of TPLF in your jurisdiction

Per the methodology set out by the lead researchers, the author of this report conducted surveys and interviews with a partner at a law firm representing predominantly plaintiffs; a partner at a law firm representing predominantly defendants; a partner at a firm representing predominantly litigation funding firms; two executives at a litigation funding firm (responding to a single survey and participating in a single interview); and a senior executive of a litigation finance advisory firm. To protect respondents' anonymity, responses that could reveal respondents' identity are not included.[1517]

a. Types of cases typically funded / Average number of cases funded by TPLF per year in your jurisdiction in the last 3 years (indicate how many are arbitration cases)

The advisory firm executive estimated an average of 300 to 400 cases annually excluding portfolios. The defense attorney answered that while he does not know how many cases are funded annually, counting mass tort cases individually, the number would be in the tens of thousands, if not more. Other respondents did not know the average numbers of funded cases annually in the U.S. in the past three years.

As to types of cases, the funder answered that there is a wide range of types of cases that are funded and it is not possible to generalize about 'typically' funded cases. Funders' counsel identified as types of cases commercial disputes, trade secrets, intellectual property, mass torts, and antitrust. Plaintiffs' counsel identified as types of cases commercial/breach of contract cases, intellectual property cases, qui-tam, and investment treaty arbitration. The defense counsel identified consumer and personal injury mass torts.

[1513] See S.F. 338, Gen. Assemb. 90 (Iowa 2023); H.B. 2694, Sess. of 2022 (Kan. 2022); S.B. 179, 82d Sess. (Nev. 2023).
[1514] S. Study B. 3150, Gen. Assemb. 90 (Iowa 2023).
[1515] S.B. 355, 2024 Reg. Sess. (La. 2024).
[1516] H.B. 2638, 56th Leg., 2d Reg. Sess. (Ariz. 2024).
[1517] It is worth noting that publicly traded litigation finance companies must file disclosures with securities regulators. Such disclosures shed light on some of the questions discussed in this section (however, analysing such disclosures is beyond the scope of this report and the author's expertise).

b. Minimum claim value in absolute terms (in million Dollars[1518])

Advisory firm executive and plaintiffs' counsel both placed the minimum claim value at the 10-14 million dollar range. The Defense counsel did not know the answer to the question.

The funder did not provide an answer to this question. The funder responded more generally to the questions in this part of the survey that, given the broad range of funding options, it is not possible to provide information about a 'typical' case and that they do not compile industry-wide information.

c. Typical claim value in absolute terms (in million Dollars)

The funders' counsel and plaintiffs' counsel identified the typical claim value as being in the 100 – 299 million dollar range. The Advisory firm executive placed the number as ranging from 20 million to more than 300 million dollars. Defense counsel did not know the typical claim value.

d. Typical ratio between investment by the funder and claim value

The advisory firm's executive and plaintiffs' counsel placed the ratio at 1:10. The funder's counsel identified them as a ratio of more than 1:20. The defense counsel did not know.

e. Typical size of the investment by the litigation funder (in million Dollars)

The advisory firm's executive placed the number at the 2 – 9 million range. The plaintiffs' counsel placed the number at 5 – 9 million range but added that they are increasingly in the 15-29 million range as well as in excess of 50 million and that it is hard to generalize. The funder's counsel also answered that it's hard to generalize because cases, and the costs of litigating them, vary based on the type of case.

f. Origin of funding provided by the litigation funder

The plaintiffs' counsel answered that funding originates from limited partners, investors, and institutional investors. The defense counsel answered that his understanding is that investment comes from institutional and individual investors including foreign investors.

The other respondents did not respond to this question.

g. Share of compensation awarded typically demanded by litigation funders

The advisory firm's executive placed the typical funder's compensation at the 20% – 40% range. The plaintiffs' counsel placed it at 30%. The funders' counsel responded that there's no typical return but rather that return depends on various factors such as funded amount, timing or resolution. The defense counsel did not know what funder's typical share of the compensation is. The funder answered that "agreements are bespoke, varying by litigation type, geography, duration, risk, etc. Moreover, our return is rarely, if ever, structured as a simple percentage of proceeds" and further

[1518] Survey respondents surveyed for this U.S.-focused reports were asked to address as the dollar amounts rather than Euro amounts.

elaborated that "[c]ommercial legal finance providers take on significant financial risks. Funding is provided to counterparties on a non-recourse basis - the funder's return is dependent on a successful outcome; they are not entitled to anything in the event of an unsuccessful outcome. In a competitive, commercial environment, there are strong legal and commercial incentives for funders to ensure that claimants receive the majority of any proceeds. When entering into a funding agreement, a counterparty may choose not to enter into the agreement if it considers the contract or the terms offered to be unreasonable."

h. Other conditions of the litigation funding agreement

The funder and funder's counsel did not provide a response. The defense counsel answered they did not know what other conditions are common in funding agreements. The advisory firm's executive answered that the agreements usually contain provisions of no control and no interference in the attorney-client relationship. The plaintiffs' counsel answered that royalties and monetization provisions are common. They also noted that the agreements often state they are non-recourse but "there are all these land mines and these contracts that easily convert from non-recourse to recourse."

i. Existence of an acceptable threshold for probability of success / acceptable level of risk and factors taken into account to establish it

None of the respondents provided information about an identifiable threshold of probability of success or specific risk factors assessed.

j. Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR)

None of the respondents provided (anonymizable) response.

k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?

The defense counsel answered that frequently consumer class actions and mass tort personal injury cases are settled for large amounts. Other respondents did not provide anonymizable information.

l. Are funding agreements disclosed to the court? Please specify the extent of disclosure.

The funder and defense counsel described the state of the law on disclosure as generally not requiring disclosure, with some exceptions where specific court rules or a court order do require disclosure. The defense counsel added that some federal courts have local rules requiring TPLF disclosure, that at least a few individual federal judges have disclosure requirements for matters over which they are presiding, and that several states have enacted statutes to require disclosure in their state courts, and such rules are under consideration elsewhere. The advisory firm's executive and the plaintiffs' counsel described the state of the law as requiring disclosure of litigation funding agreements with the extent of the disclosure depending on the jurisdiction. The plaintiffs' counsel added that there's a distinction between disclosure of the existence of funding versus the funding agreement itself which does not necessarily need to be disclosed or may be disclosed *in camera*, not publicly.

m. When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? [Y/N] If yes, please indicate what type of control:

- *Choice of lawyer*
- *Consent for settlement*
- *Consent for appeal*
- *Consent for expert evidence*
- *Agreement on strategy*
- Other

The funder, the funders' counsel, and the advisory firm's executive responded "no" to this question.

Plaintiffs' counsel responded "yes" - that funders exercise control over choice of lawyers, consent to appeal, and other matters such as requiring implicit agreement on strategy and implicit consent with respect to settlement. They further stated that "we've observed anecdotal instances in which control or influence has been asserted on each of the instances noted [referencing the questions drop-down menu of options - MS]. The key is to focus on the notion of influence. The funding contracts may not give funders legally binding authority to direct a litigation matter, but counsel's reliance on the funder for revenue (and in some instances the ability of the funder to terminate the flow of funding) gives the funder enormous leverage over counsel's decision-making, particularly with respect to the timing and amount of any settlements." The Plaintiffs' counsel also said that "there are clauses that are in there as levers that whether or not they're enforceable or not remains to be seen. I would think that they probably aren't, but by the nature of certain clauses, reps, warranties, and covenants that are in these agreements, it creates an indirect effect, indirect control right and that's the problem and so very rarely these days they've gotten sophisticated on the face you will not see any mention of control or interference but there's an indirect aspect that no one likes to talk about."

n. How would you describe the relationship of the litigation funder with the plaintiff's lawyers?

The funder answered that "[t]his varies on a case by case basis, depending on the type of investment, the parties involved, and the specific circumstances of the underlying litigation. Lawyers have strict professional, legal and ethical obligations governing their practice and duties to their clients. Users of commercial legal finance generally are sophisticated actors involved in high-stakes business-related disputes." The advisory firm's executive answered that plaintiffs' lawyers provide updates on the case to funders and sometimes serve as escrow agent for recovery proceeds. The defense counsel answered that their understanding is that plaintiffs' lawyers feel obliged to follow the directions offered by the funder, but funders vary in the extent to which they attempt to intervene. The plaintiffs' counsel answered that "[u]sually, the relationship is very collaborative - - until, it's not."

o. When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? If yes, for what reasons?

All respondents answered that there are situations in which funding can be withdrawn. The funder stated that if "the underlying claim becomes commercially unviable, typically due to negative developments in caselaw, or in the case of a contractual breach by a counterparty," funding can be withdrawn. The funders' counsel answered that if the funding recipient breaches various provisions of the funding agreement or makes misrepresentations about the case funding may be withdrawn. The advisory firm's executive cited material adverse change in litigation and default by counterparty as reasons for withdrawal. Plaintiffs' counsel cited breach of contract or material adverse change as reasons for withdrawal of funding. They also noted that the funder may still be eligible for returns on the ultimate recovery if the case has not been fully abandoned/dismissed even if they withdrew funding. The defense counsel stated generally that they were aware of cases in which funding had been terminated.

p. According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest?

The plaintiffs' counsel and defense counsel did not know the answer and the funder's counsel did not respond to this question. The advisory firm's executive responded that funders typically run some form of conflicts check, but do not have the same conflict considerations as law firms and the funder similarly stated that "[w]e are not a law firm, so we don't have conflicts of interest in the legal ethics sense. But we have a business conflicts checking process and a committee that oversees that process."

q. According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? If yes, is it:

- *Limited liability*
- *Conditional liability*
- *No liability*

Respondents agreed this is irrelevant in the United States. The Plaintiffs' counsel added, however, that for the exceptional cases in the United States where adverse costs may be an issue, they sometimes negotiate some type of indemnity or insurance agreement that will exist alongside the litigation funding agreement.

r. According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?

Respondents did not know, did not respond, or agreed that this is irrelevant in the United States.

s. Are there any examples of a funding agreement used by litigations funders publicly available? If yes, could you please provide a copy.

None of the respondents provided sample agreements. Some noted that the agreements are, or are described as, bespoke and/or variable and/or proprietary and some noted generally that there are publicly available examples but did not provide those.

4. Stakeholder views on TPLF in your jurisdiction

When asked whether they observed positive or negative effects of TPLF:

The funder responded they have observed positive effects. The selected the following effects from a drop-down menu: better access to justice, deterrence to corporations due to the likelihood of mass claims, filtering (screening) of weak cases, professionalization and expertise enhancement in complex cases by the funder, infrastructure and tools provided by funders. They also added the benefit of availability of capital to businesses and law firms who would otherwise be unable to monetize legal assets. The funder observed no negative effects from TPLF and observed that any other tools, such as legal aid or insurance, that could provide access to justice would be complementary to, not a replacement for, TPLF. Funders' counsel similarly noted they observed only positive effects of improved access to justice, case screening and enhanced expertise. They, too, observed no negative effects. The Advisory firm's executive noted only positive effects of improved access, deterrence, and screening of weak claims.

The defense attorney observed only negative effects of TPLF, including the following effects from a drop-down menu: conflicts of interest, undue influence by the funders, funding of frivolous claims with the aim of reaching an extorted settlement or other forms of abuse, reduced compensation for the claimant, and extension of the duration of proceedings. They observed no positive effects. And were of the view that in the U.S., given the availability of contingency fees and the absence of a loser-pay rule, there is no need for TPLF in order to facilitate access to justice. Further, defense counsel observed that increasingly in mass tort proceedings plaintiffs' counsel feel a need to get approval from the funder whether it is contractually required or not. They also observed: "I've also been in several situations now where clearly the attorney who has the cases is in financial difficulty and the funder clearly is putting pressure on the attorney to get a deal" and that on several occasions it has been the "litigation funder that is there negotiating their settlement for them [the plaintiffs-MS] with no ethical obligations, nothing. I mean, the attorney will do what's necessary to execute papers and whatnot and I, you know, it's a little unclear what the defendant is supposed to do in that circumstance, but you know you ask questions about whether the attorney will explain the agreement to the parties and so on, so at least they do everything you can to make sure that ethical requirements are fulfilled but it's troubling that you now have a non-attorney in the middle of this."

The plaintiffs' lawyer observed both positive and negative effects. The positive effects they identified are increased access to courts and deterrence and the negative they identified are the conflicts of interest and undue influence.

When asked whether further regulation of TPLF is needed in the U.S.:

The funder responded that the answer is no, "To date, there has been no valid argument put forth in favor of regulation of litigation funding. Indeed, the very absence of evidence of serious concerns or problems to be addressed should lead policymakers to the conclusion that overly broad or restrictive regulation is unnecessary and would only compromise the viability of the market. A "one size fits all" approach would ignore the different contexts in which funding can assist in access to justice and the different risk or other factors which justify a diverse range of solutions for claimants. Moreover, commercial legal finance providers are regulated like any other financial service such as services offered by banks, investment firms, and private investors." They added that "funders are bound by voluntary professional codes of conduct, such as that promulgated by the International Legal Finance Association (ILFA)… which requires members to uphold the highest standards of best practices, and the Association of Litigation Funders of England and Wales ("ALF"), an independent organization charged by the UK Ministry of Justice with self-regulation of litigation funding in

England and Wales that has a Code of Conduct setting forth standards by which all members must abide. In addition, funders must comply with rules governing courts and other tribunals and rules of professional responsibility governing the practice of law." The advisory firm's executive also saw no need for additional regulation.

The funder also noted that a lot of funding takes forms that are different than the form of funding the survey assumes. For example, TPLF includes law firm investment, portfolio investment, monetizing of claims, litigation investment in companies, licensing programs that are adjacent to litigation whereas many of the survey questions assume case funding. This makes answering questions about value, returns, and so forth difficult. Additionally, there may be players who are engaged in some form of litigation funding but are not considered part of the traditional funding industry and may not be captured by the study. For these reasons, the funder cautions about drawing conclusions about the entire litigation funding industry from a study that appears to focus on only parts of the industry- "that is capturing one leg of the elephant." The funder also pointed out that both private and publicly traded TPLF companies are subject to many forms of regulation that should be taken into account such as anti-money laundering regulation, the USA Patriot Act, the Bank Secrecy Act, and regulation aimed at similarly preventing other forms of financial crimes.

The funders' counsel also saw no need for additional regulation but added that "sensible regulation is not in and of itself bad. The issue is that the proposed regulations in various states and federally aim to eliminate the business and the benefits that it provides. In fact, some of the proposals go further than regulations in other, larger industries."

The defense attorney was of the view that more regulation of TPLF is needed in the U.S. including "full disclosure of TPLF (including agreements) in all civil cases. Prohibiting funder control and influence over litigation (perhaps by permitting funders access only to public information about the cases they fund) is also important. Funders proclaim that they are 'silent partners' in their funded matters, so there should be no problem imposing such a requirement."

The plaintiffs' attorney commented that "there's attorney ethics rules and I think where legislation could be helpful is if there were corollary to the funders because right now the funders are sort of free" from any form of regulation.

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4 RESULTS OF THE STAKEHOLDER CONSULTATION

4.1 INTRODUCTION AND CHARACTERISTICS OF STAKEHOLDERS CONSULTED

This section presents the results of the stakeholder consultation for this study.[1519] The consultation consisted of stakeholder interviews at national level that informed the national reports (see Section 3), and a general EU stakeholder survey. In total, 84 national interviews were documented in an e-questionnaire. In addition, 147 stakeholder organisations and individuals completed the (largely identical) EU stakeholder survey, the invitation to which was widely distributed across relevant stakeholders across the EU. Overall, this amounted to 231 contributions, which covered all EU countries, as well as several third countries.[1520] The consultation was accompanied by an EU level interview process, which ran in parallel to the EU stakeholder survey, and focused on selected key stakeholders that elaborated on their survey contribution.[1521]

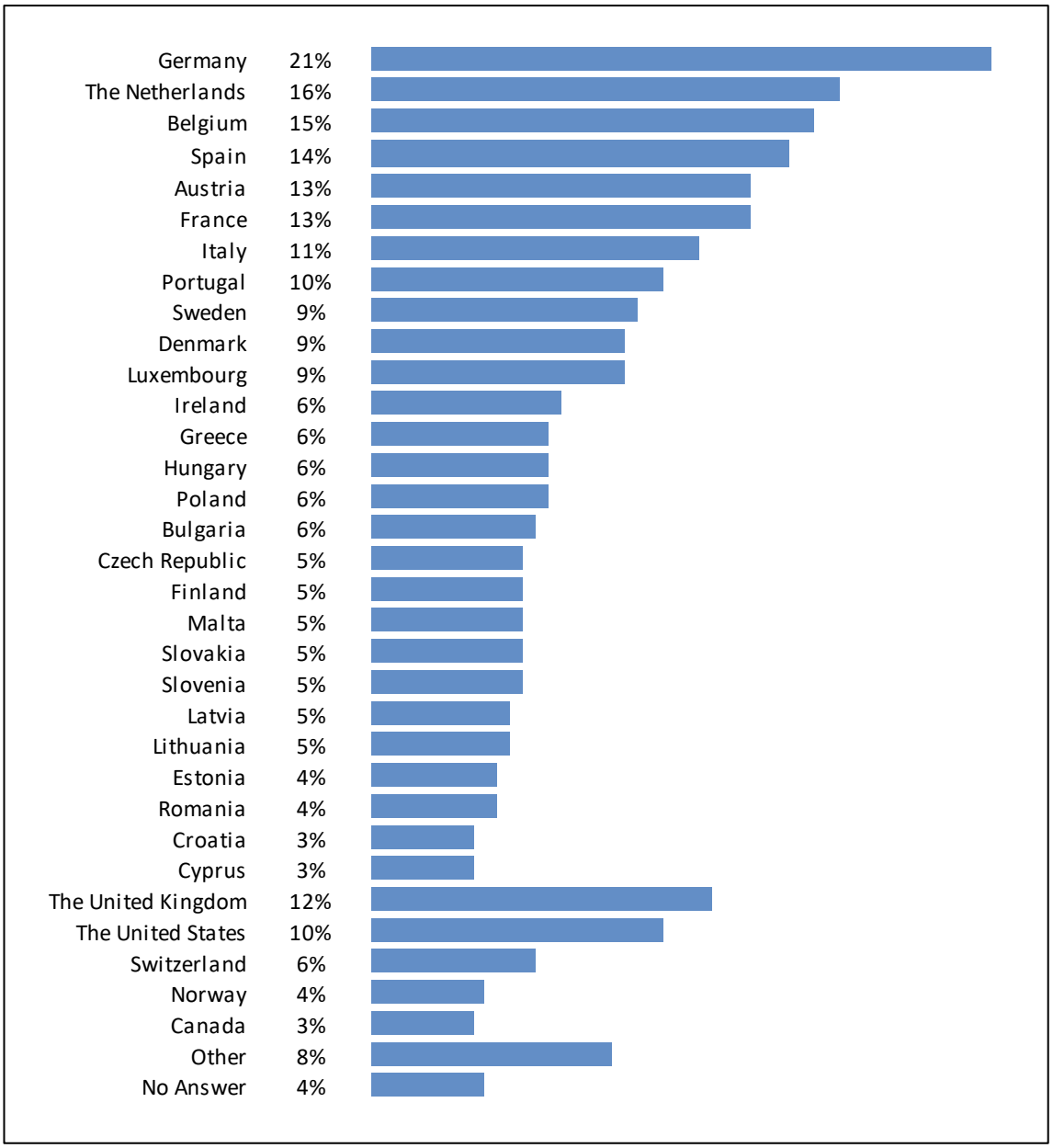
The detailed distribution of respondents by country is provided in the following figure. Note that the question referred to the main country/ies of operation of the respondents – in some cases several countries were indicated. Most frequently listed countries are Germany, the Netherlands, Belgium, Spain, Austria, France, Italy and Portugal.

[1519] Within the consultation, some stakeholders are quoted and refer in their responses to a "proposal by the EP" which refers to the draft directive annexed to the European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2023_125_R_0002

[1520] Listed third countries were UK, CH, US, NO, CAN. Respondents that indicated 'other' referred often to operations in multiple countries or globally.

[1521] The complementary interviews covered EU business and consumer stakeholders, litigation funders, as well as clients and defendants of cases in which TPLF was used. Where relevant, background information from these interviews is considered in this section.

Figure 1: Main country(ies) of operation of respondents (multiple answers possible)

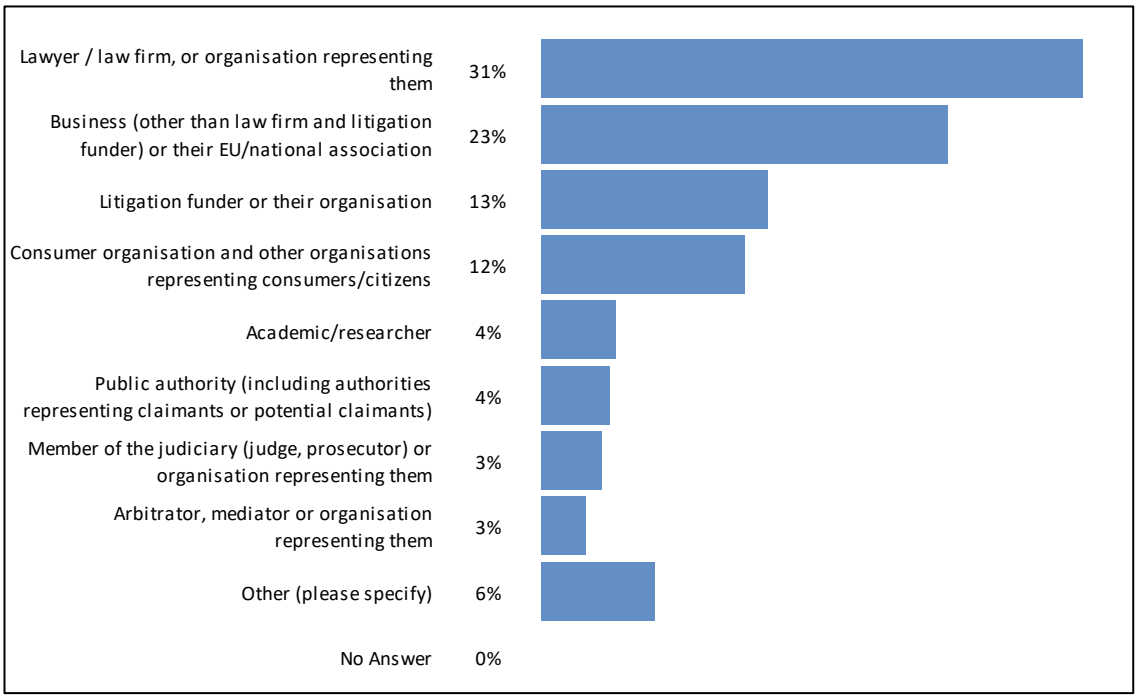


N=231

All stakeholder groups are covered by the consultation. The detailed breakdown is provided in the following figure. It shows that largest stakeholder groups represented are: lawyers/law firms, or organisation representing them (31% of respondents), businesses (other than law firm and litigation funder) or their EU/national associations (23%); litigation funders or their organisations (13%) and consumer organisations and other organisations representing consumers or citizens in collective actions (12%). All other stakeholder groups – public authorities (including authorities representing claimants or potential claimants); members of the judiciary (judge, prosecutor) or organisation

representing them; arbitrators, mediators or organisations representing them; academics/researchers; other – accounted for the remaining 20%.

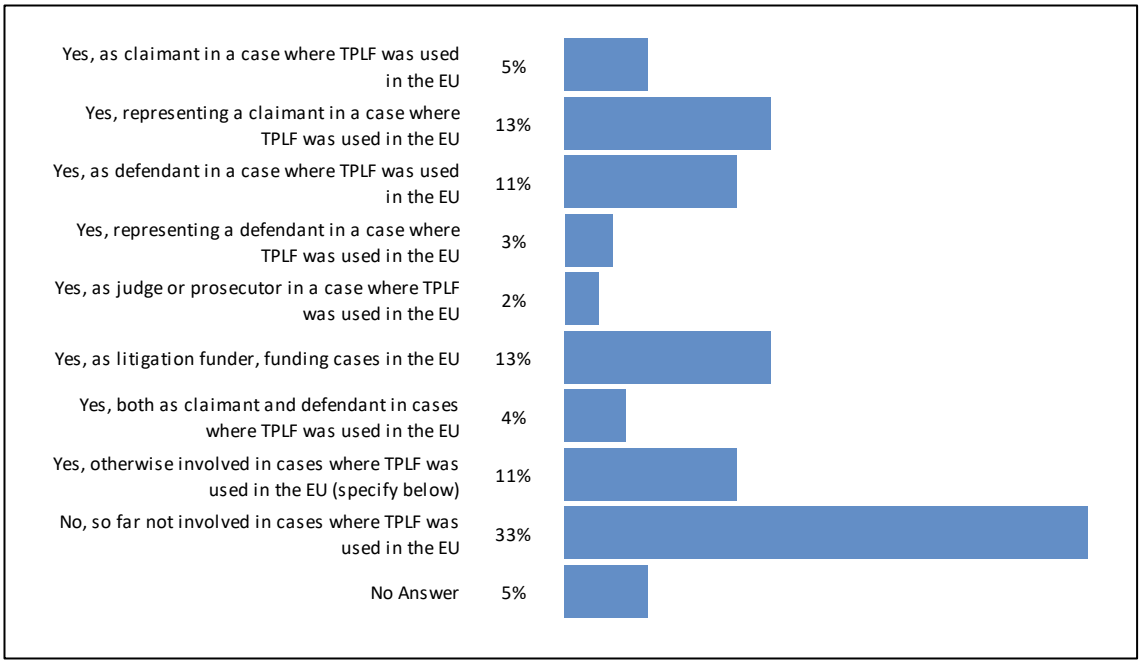
Figure 2: Type of stakeholders



N=231

As the following figure shows, more than 60% of respondents have been involved (directly or indirectly through their members) in a case where TPLF was used in the EU, in varied roles.

Figure 3: Have you or your members been involved in a case where TPLF was used in the EU?



N=231

In a subsequent question, a majority of respondents indicated that their experience with TPLF relates to litigation cases (32%), or to both litigation and arbitration cases (20%). Only 6% indicated their experience relates to arbitration cases (only).

4.2 USE OF TPLF IN THE EU AND PRACTICES OF LITIGATION FUNDERS

For this consultation, a litigation funder (or 'Third Party Litigation Funder', 'Third Party Funder', 'Litigation Financier', 'Litigation Fund' or 'Funder') was defined as "any entity that is not a party to a dispute, or which is a lawyer or insurer of such a party, which bears the costs of the dispute in exchange for a share of the financial recovery, only if the case is won." This broad definition already hints to the great variety of litigation funders active in EU MS. They differ in size, approaches, number of funded cases, areas of law they are active in, sources of funding, amount of funding provided and conditions of funding. Often, the underlying assumption is that litigation funders are used by claimants, but litigation funding may also available for defendants ('defence financing').[1522] This variety makes general conclusions regarding practices of litigation funders difficult, and it also implies that the results of this consultation are not necessarily a complete picture of litigation funding in the EU, but rather provide a summary of those practices that were observed by the

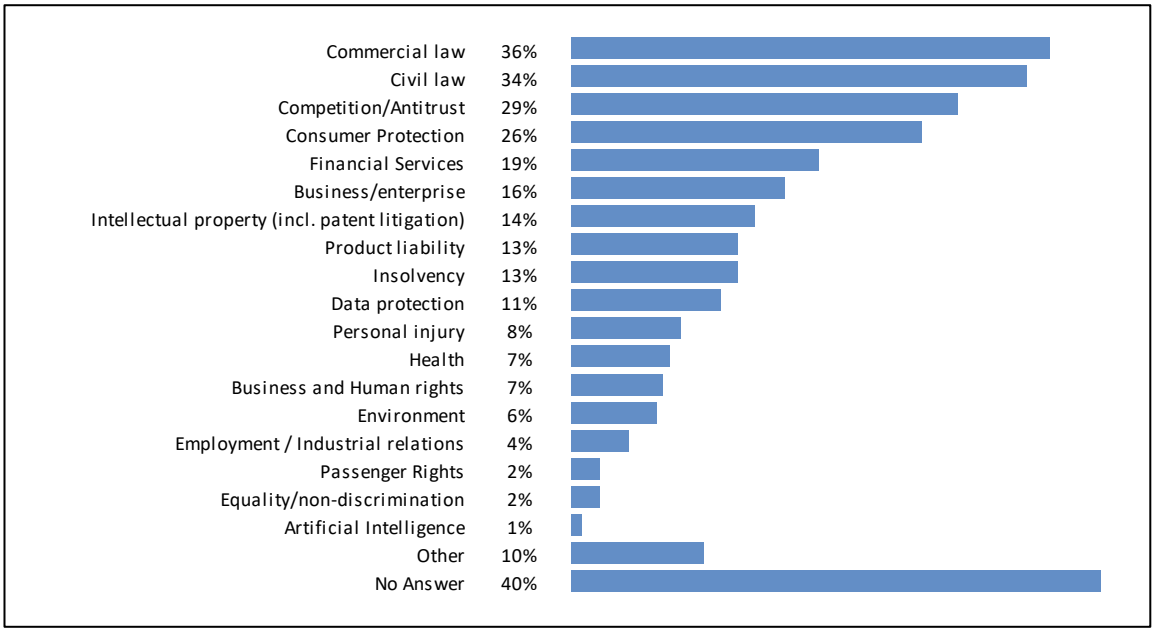
[1522] See, for example https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/07/07/a-primer-on-defense-side-litigation-finance, https://www.burfordcapital.com/what-we-do/case-studies/case-study-financing-the-defense/

participating litigation funders and other stakeholders.[1523] In the following sub-sections, we present key results of the consultation regarding the use of TPLF in the EU and practices of litigation funders. Where possible, we provide details regarding the differences observed, and outline areas where assessments of different stakeholder groups showed a remarkable degree of consistency.

Areas of law in which TPLF is used and number of funders/funded cases in the EU

In terms of the areas of law in which respondents had been involved in cases where TPLF had been used in the EU, commercial law, civil law, competition/antitrust and consumer protection law were most frequently mentioned (see figure below).

Figure 4: Please select the areas in which you or your members have been involved in case(s) where TPLF was used in the EU (multiple answers possible)



N=231

The results illustrate that TPLF is used in various areas of law, and all areas listed in the questionnaire were indicated by multiple respondents (the lowest ranked item, artificial intelligence, was indicated by two respondents). In addition, a wide range of 'Other' areas of law were indicated by respondents. These are: enforcement of judgments and awards; securities litigation (investor loss cases, capital markets disclosures, insider trading); directors and officers (D&O) liability; price manipulation; cases in which sovereign countries expropriated projects being developed by natural gas exploration & production companies, protection of foreign investment (ISDS arbitration); tax and energy; inheritance law cases; construction; online casinos, gaming, sport bets; constitutional

[1523] The wide variety of practices within the TPLF market may result in definitional challenges. For example, some stakeholders view investments by hedge funds into Special Purpose Vehicles (SPVs) created specifically for litigation as a form of litigation funding. In these cases, investors in the SPV may not directly receive a share of the financial recovery from litigation but instead profit based on the overall financial performance of the SPV (which may or may not include other sources of revenue), further complicating its classification within traditional TPLF models.

law; road traffic law. In our complementary interviews, the importance of TPLF for enforcement of judgments and awards was often highlighted, as well as cases that involve securities litigation, intellectual property/patent litigation, antitrust consumer and business claims for damages, and the use of TPLF in arbitration cases, including in the ISDS (Investor–state dispute settlement) framework.

Close to 60% of respondents are aware of litigation funders operating in their jurisdiction. A large number of stakeholders (often business stakeholders having a critical view of TPLF) provided comprehensive lists of litigation funders, providing the names of in total close to 300 entities

involved in litigation funding that they reported to be active in the EU.[1524] Several stakeholders also referred to existing research on litigation funding and provided links to existing lists of funders.[1525]

[1524] The list of entities involved in litigation funding reported by stakeholders to be active in the EU is as follows: 1624 LLC, AC – Prozessfinanzierer GmbH, Acacia Research, Acivo Prozessfinanzierung , Actiofund, Advofin Prozessfinanzierung AG, AEQUIFIN GmbH und Co. KGaA, Afectados por las Petroleras Dos s.a.r.l. (Lux), Afectados por las Petroleras SRL II (Lux), AiPi Solutions, Airhelp, Aktiengesellschaft für Umsatzfinanzierung S.A., Anjay Venture Partners, Annecto, Antin Infrastructure Partners, Arag, Arigna Technology Ltd., Arista Capital , Armida UG, Ashurst , Atlantic IP Services Limited (Magnetar Capital), Augusta Ventures, Axia Funders, B&K Prozessfinanzierung GmbH, Badura Resources B.V., Baker Street Funding, BALMORAL WOOD, Baltic Litigation Fund, Bardin Hill Investment Partners (formerly known as Halcyon Capital Management), BE CAUSE SICAF S.p.A., Bedrock IP Co., Bellavista Capital GmbH, Bench Walk Advisors, Bench Walk Guernsey PCC, Bentham, BGPL Funding I Limited, Blue Nebula GmbH, BlueIron, BMS Procesfinanciering, BPGL Funding I Limited , BR IP Ventures LP (Brickell Key Asset Management), Bradeum AG, Brevet Capital, Brickell Key Investments, Bryson & Mason, Burford Capital, Burford German Funding LLC, Cabraser, Calunius Capital, Capaz Procesfinanciering, Casinohelp, Casinoklage, Casino-Verlust, CDC (Cartel Damages Claims) Consulting SRL, Centerbridge Partners, CF Taupe Ltd , CF Tipan Van LF Ltd, CFI, CFLA, Chargeback24 GmbH, Citizens' Voice, Claimbnb, Claims Funding Europe, ClaimShare, Clyde & Co, Cobin Claims, COBIN claims (COnsumers-Business-INvestor) , COMPEL s.r.o., Connected Capital GmbH, ConsumentenClaim, Consumer Justice Legal Fund Trust (managed by Colony Trust Company LLC), Consumer Justice Network BV, Consumer Privacy Litigation Funding LP, Contingency Capital, Corpocon Legal BV, CPC Consulting PM Cloud Services SRL, Creditale GmbH, D.E. Shaw Group, DAS, Davidson Kempner European Partners LLP, DE Shaw & Co, Dea Dia PF I GmbH, Debeo GmbH, Delta Capital Partners, Deminor Litigtion Funding, DLA Piper (through its independent funding company Aldersgate Funding Limited), Dominion Harbor, dP die Prozessfinanzierer GmbH, Droogteschade Nederland CV (managed by Redbreast Associates NV), DRRT, Druga fundacija d.o.o., Dynamic IP Deals LLC (doing business as DynaIP), East-West Debt, Easy Claims (Goodall Capital k.s.), EasyClaims Deutschland GmbH, Eaton Hall Funding LLC (a Delaware based fund) , Elco Investor Services LLC, Elliott Management, Emission Claim Trust BV, Empyrean Capital partners, Equilib Netherlands BV, Erso Capital, Erste Allgemeine Schadenshilfe, Eskariam, Euromex, Evest, ExActor Forderungsmanagement GmbH, fairesLeben ABC GmbH, Fideal , FIG LLC (doing business as Fortress Investment Services), financialright claims GmbH, Financiering Essure Claims CV (managed by Redbreast Associates NV), FINE Legal GmbH, Fisker, flightright, Foris AG, Fortress Investment Group, FourWorld Capital, France Brevets , Fulbrook, G&E SPG Funding LLC, gamble-verluste.at (TS Prozessfinanzierungs GmbH), Gamesright GmbH, Gesellschaft für Freiheitsrechte, Getright 24 GmbH, GLS Capital, Grant & Eisenhofer , Greg Coleman Law, Hagens Berman , Harbour Litigation Funding, Hausfeld, HDI, Hereford Litigation, HFS, Hilco Capital, HPG Prozessfinanzierung, ICEBERG IP Group, Ignitis, IMF Bentham Capital, Inkaso d.o.o. , Innsworth Capital Limited, International Securities Association & Foundations Management Company, Inverlitis Legal Fund, IP Bridge, ISAF, Iubel, Ius Omnibus, IVO Capital Partners, Jufina Prozessfinanzierung (Juno Finanz AG), JuraPlus AG, Jurfin GmbH, Juris, Just Legal Finance BV, Justice4all , Justice4All, Kapatens Partners AB, Kennedy Lewis Investment Management LLC, Kerberos Capital Management, Klein-Unternehmen und Privatanlegern, la Française AM, Law Capital, Law Finance Group, LCM, Legal Claims Holding AG, LegalHelp (Verein für Gerechten Verbraucherschutz Österreich), LEGALIST Prozessfinanzierungs GmbH, Legial AG, Legial AG, Legis Capital BV, LEVANTIX Rechtsdienstleistungen GmbH, Lexcapital , Lexdroit Internationa, Lexfinance, LexShares, LibraClaims (Libra Srl), Lieff, Lieff Cabraser Heimann & Bernstein, Liesker, Liesker Legal, Liesker Legal (seems also to give legal advice and process management services) and Liesker Procesfinanciering BV (parent company active in litigation funding, Liesker Legal and Liesker Procesfinanciering BV , Lion Point Master Fund, Lionfish, LitFin, Litifund BV, Litigation Capital Management, Litigation Funding Nederland, Litigation Lending Services, Litigation Partners (CH), Litigium, Litigium Capital, Liti-Link AG, LIT-US Chisum, Longford Capital Management , Luminate, LVA24 Prozessfinanzierung GmbH, M&S Prozessfinanzierung, Magnetar Capital, Marsh Funding, Meinprozess, meinprozess.com (R.M. Prozessfinanzierung GmbH), Milberg, Mirai Ventures, Money back, MS Prozessfinanz, myRight Verbraucherrechte GmbH, Neo Wireless, Nera Capital, Network System Technologies, Nivalion AG, Northwall Capital, Novelty Capital Partners I LLC, Oak Hill Advisors L.P. (subsidiary of T. Rowe Price), Obligatio GmbH, Obligatio GmbH, Office Value Fund NV, Omni Bridgeway, Option3 Cyber Investments LLC (suspected to be a TPLF), Orchard Global, Orrow Prozessfinanzierung, Padronus (Prozessfinanzallianz GmbH), Palmira Wireless, Parabellum Capital, PatForce, Pegasus Legal Capital LLC, Pelufi, Pemberton, Penker Prozessfinanzierung KG, PLA Litigation Funding, Plaza Group/Square Two Capital, Ploum & Liesker Procesfinanciering, Pogust Goodhead Polaric Partner GmbH, Pretium Capital, Privileg, Profile Investment, Profin

Many of the litigation funders active in the EU (which include large funders such as Burford, Deminor, Nivalion and OmniBridgeway, see previous footnote) are present and operate simultaneously in several Member States. In interviews, funders pointed to the fact that litigation funding has a long tradition in some EU Member States, most notably Germany and the Netherlands. Also Belgium, France, Austria, Spain, Portugal, Denmark, Sweden and Italy were mentioned as countries in which litigation funders are active (see below, and country reports for more details). Respondents critical of litigation funding often referred to *"the lack of transparency around litigation funding"*, and *"the absence of an official registry for funders at European or national levels"*. Therefore, it was stated, for example, that *"it is not feasible to accurately depict the number of funders operating in Europe."*

Similarly, data on the number of cases funded by litigation funders in EU Member States is scarce. This was confirmed by the results of the survey, in which many stakeholders indicated that often the fact that a case is funded by a litigation funder is not known. A national bar association pointed out that they do *"not have any data or figures on the average number of cases funded by TPLF, nor are there any known market studies that take a closer look at the number of litigation-financed legal disputes and provide figures. The background to this is probably that there is no obligation to disclose TPLF in [our country]. In other words, both the court and the opposing party remain unaware of whether the legal dispute is litigation-financed. The litigation funder also ensures the confidentiality of the funded party as part of the litigation funding agreement. As a rule, it is agreed here that the financed party may not discuss either the litigation financing as such or the content of the underlying litigation funding agreement without the written consent of the funder."*

While in the Netherlands there is a register of collective claims containing all collective actions initiated since 1 January 2020 (see also country report NL), as several stakeholders pointed out, this is clearly an exception.[1526] Still, a considerable number of stakeholders provided estimates for their respective jurisdiction, often qualifying them as *'guesstimate'* based on their legal practice or other information available to them. Others also pointed out the difficulties in providing such estimates, e.g. how to count several claims (possibly even funded by different funders) in relation to the same event. The respondents that provided estimates regarding cases in a specific EU country are listed in the following table. The largest number of estimates were provided for the Netherlands, Germany and Belgium. In the Netherlands, respondents frequently estimated the average number of TPL

Claims GmbH, ProFina, PROFIT Procesfinanciering, Prozess-Finanz.at, PurpleVine IP, Qanlex, R.M. Prozessfinanzierung GmbH, Ramco Litigation Funding, Randolph Square, Redbreast Associates N.V. , Redress Solutions, Reunion Ventures BV, Right to Consumer Justice BV, RightNow Prozessfinanzierung (Legal Claims Holding AG/RightNow GmbH), Robin Hood Claims Prozessfinanzierungs GmbH, Rockmond Litigation Funding, RoundShield, S2 Ventures, Sauvegarder Investment Management LLC, Signal Capital Partners ,Signal Capital Partners, SLB Verwaltungsgesellschaft mbH, Slingshot Capital, Solvantis AG, Solvantis AG, Soryn IP Group LLC, Spreefels, Starboard Value, Stonward Litigation Finance, Synchronicity IP GmbH , Systema Capita, Taupe Ltd, Techumseh Alternatives, Tenadio, Tenor Capital , Therium Capital Management, Therium Litigation Finance Atlas P IC, Third Point, Tilia Finance LP (part of Orchard Global Capital Group) , Titan Beta GmbH , TKL Forensische Dienstleistungen GmbH, Tom Orrow Prozessfinanzierung GmbH, TransAtlantis, TRGP Capital, TS Prozessfinanzierungs GmbH, Ultima Ratio, Unilegion, Valar Finanzgruppe GmbH, Validity, Vannin Capital , Vector Capital, Viaright, Windward, Woodsford Group Limited, Xclaim / VerbraucherFux, Yieldstreet, Youleegal GmbH. The listed entities are mostly litigation funders, but also include some insurers, law firms, claim aggregators and other organisations involved in litigation funding. While the list has been edited to account for typos and duplications, the scope of activities and the geographical coverage of the listed entities have not been independently verified.

[1525] These included: https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2022-370.pdf; https://chambers.com/legal-rankings/litigation-funding-europe-wide-58:2816:80:1;

[1526] https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen

funded cases per year to be around 80. Higher estimates were reported from Germany and Austria, with some respondents reporting estimates in the thousands. This reflects answers from the gaming industry, which reported a similarly high number of cases brought against them from both countries (see below).

Table 1: Number of TPL funded cases reported for specific EU countries

Country	Type of stakeholder	Average number of cases funded by TPLF per year in the last 3 years (estimates)	Of which arbitration cases (estimates)	Types of cases typically funded/comments
NL	Lawyer / law firms, or organisation representing them	+/- 80	n.a.	Class actions pursuant to article 3:305a DCC (old) and under the Dutch Act on the settlement of Mass Damage in Collective Action (WAMCA). Class actions based on assigned claims or bellwether proceedings.
		+/- 80	n.a.	Collective actions under the old Article 3:305a of the Dutch Civil Code (DCC) and the Dutch Act on the Settlement of Mass Damage in Collective Action (WAMCA). Collective actions based on assigned claims or test cases.
		10	n.a.	GDPR, securities, commercial, class actions in all these areas of law.
		+/- 80	n.a.	Class actions pursuant to art. 3:305a DCC (old) and under the Dutch Act on the settlement of Mass Damage in Collective Action (WAMCA). Class actions based on assigned claims or bellwether proceedings.
		50	n.a.	Class actions
		15-20	n.a.	Mostly on behalf of consumers
		At least hundreds	n.a.	The common denominator in these claims for damages, is where the aggregated interest can be expressed in a significant monetary value.
		Dozens	n.a.	Generally, these include follow-on cases from competition and/or cartel violations. We also see shareholder/securities, data breach/privacy, product liability, environmental and personal injury claims. Typically claims with scattered damages and enough injured parties make the claimed damages an interesting enough investment for litigation funders.
		Estimated 40 to 50 cases	n.a.	Mass claims (Dutch 3:305a claims) and cases that use the assignment-model
	Consumer organisations and other organisations representing consumers or citizens in collective actions	200	20	Varies per funder. Every funder has a different claim focus, minimum value etc.
		15 à 20	n.a.	Litigation funders typically focus on cases with a higher likelihood of success. This often includes cases that involve high claims amounts, and harm to a large number of consumers, thereby having a broad impact on enforcing consumer rights. The types of claims brought by consumer organizations that receive funding can vary by funder.
DE	Lawyer / law firms, or organisation representing them	125	15	Damages claims
		Around 5 000	200	Mass and class actions with high amounts in dispute, particularly claims for damages from a large number of affected parties due to damages resulting from the same event ("Streuschäden"), especially cartel damages claims
	Litigation funder or their organisation	1500	n.a.	Consumer lost Money in Bad Capital Market products
	Business (other than law firm and litigation funder) or	4 known cases in Germany in 2023/24	0	Patent litigation

	their EU/national association			
BE	Lawyer / law firms, or organisation representing them	15	n.a.	Enforcement cases / class action type matters
		250	n.a.	Road traffic law
		5 to 10	3	Recovery – class actions
	Consumer organisation and other organisations representing consumers or citizens in collective actions	0	0	
SE	Lawyer / law firms, or organisation representing them	It is impossible to answer because there is no public information.		My perception is that most cases that are funded in Sweden are commercial arbitration cases, and potentially ancillary litigation such as challenge cases related to arbitration awards. My perception is also that the number of funded cases is still low. However, there have apparently also been the first litigation cases funded in Sweden, that is cases where knowledge of the funding has become publicly known in the legal market. Fields of competition law, intellectual property and insolvency have … been of particular interest.
		It is very difficult to make any kind of estimate.		In the field of commercial arbitration seated in Sweden my guess would be between 10 and 20 cases per year (notably many large commercial arbitrations are pending longer than a year. However, I take the question to mean new cases that receive funding.) Any commercial dispute of a certain value can be relevant for funding. One type case can be insolvency cases where the bankruptcy trustee seeks funding to enable disputes on behalf of the bankruptcy estate.
		My guess would be 20-30 cases per year	My guess is 50% arbitration	Big bankruptcy cases and commercial arbitrations seated in Sweden (on a broad spectrum of commercial issues).
DK	Business (other than law firm and litigation funder) or their EU/national association	Approx. 650 cases	n.a.	Commercial disputes
	Lawyer / law firms, or organisation representing them	3	1	Insolvency and commercial cases
		5	3	Securities litigation Arbitration cases
PT	Consumer organisation and other organisations representing consumers or citizens in collective actions	17	0	Private enforcement, competition law, GDPR, consumer law.
	Lawyer / law firm, or organisation representing them	10	3	Consumer opt-out representative actions, large B2B disputes, mass B2B claims
SI	Arbitrator, mediator or organisation representing them	Total of 21 cases since April 2018	n.a.	Consumer protection – mass claims in banking, IT & telecoms sector and other regulated sectors
	Academic/researcher	Total 21 since April 2018	0	All types of cases, so for collective actions for the protection of the interests of the consumers. 15 cases in 2022 cover the same type of

				infringement by 13 different banks, 4 cases in 2023 cover the same type of infringement by 4 telecom operators
AT	Lawyer / law firm, or organisation representing them	> 5 000	n.a.	Gaming / sport betting losses; investor losses; compensation for flight delays or denied boarding; financing of court proceedings by insolvency administrators in the event of insufficient assets; claims against car manufacturers ("diesel-claims")
ES	Lawyer / law firm, or organisation representing them	30	n.a.	Competition cases (follow-on cases), investment treaty arbitrations, insolvency and enforcement proceedings against public companies or foreign States.
SK	Business (other than law firm and litigation funder) or their EU/national association	Up to 1 000	n.a.	Consumer Protection Cases, Damage Compensation
PL	Arbitrator, mediator or organisation representing them	20 or more	20 or more	Commercial arbitration and investment arbitration

n.a. = no answer/unknown. Note: Each row corresponds with the answer of one respondent. Included are only stakeholders who specifically provided data for the country in question. Slightly edited for readability.

A second important source concerning the number of TPL funded cases are litigation funders themselves. A total of 23 litigation funders provided details regarding their EU operations, as provided in the following table. Typical figures provided are in the range of less than 10 to more than 100 cases per year, in total close to 700 cases for the 23 funders (including enforcement cases), of which less than 100 arbitration cases. Some funders pointed out that the figures provided concern ongoing cases in a given year, which typically have a duration of more than one year, other focused their estimate on new cases per year. As the understanding of respondents that provided estimates may have been different in this respect, the total figure has to be interpreted with care.

Table 2: Number of own cases reported by litigation funders

Litigation funder #	**Main country(ies) of operation of litigation funders**	**Average number of cases involved in as funder per year in the last 3 years in EU Member States**	**Of which arbitration cases**	**Examples of cases funded in the EU**
1	AT, BE, DK, FR, DE, IT, LU, NL, PT, ES, SE, UK, CH, NO, CAN, US	83	10	Arbitration and litigation cases, including enforcement of claims
2	FR, IT, NL, UK, CAN, US	8	1	Various competition claims; *Dieselgate* claims.
3	AT, DE, CH	100 (ca. 30 new cases per year)	5-10	Medical malpractice (birth damages); Professional malpractice claims against law firms (wrongful advice); Patent infringement claims.
4	DE, NL, UK, US	ca. 100	ca. 30	Anti-trust and securities-related class actions / group litigation, high value single claimant litigation.
5	PT, ES	60	20	
6	ES, UK, Other	5	3	Discovery Go (of Texas) vs Slovakia. Pyrenees Energy Spain SA vs Spain.
7	n.a.	3-5 big cases per year including hundreds or	0	Follow-on litigation after competition authorities' decisions or court decisions

		thousands of individual claims		
8	ES	15	n.a	Truck cartel
9	US	3 (by case group, e.g., cartel)	a)	Follow-on competition claims Note: a) We have not funded EU-seated commercial arbitrations. However, we have funded investor-state disputes.
10	AT, DE, NL, ES, UK, US	10		Group Redress claims for Anti -Trust, Cartel, Employment, Consumer finance
11	BE, NL	27	1	
12	DE	160	0	Lawsuits by insolvency administrators
13	BE, DK, FR, DE, IT, LU, NL, PT, ES, SE, UK, CH, US, Other	20 in 2021, 30 in 2022, and 40 in 2023.	Currently 9 arbitration cases	Several of cases in our portfolio are collective actions, sometimes with high numbers of claims each.
14	DK, FI, SE	5	2	Negligent financial advice; Post-M&A dispute concerning valuation; Shareholder dispute concerning valuation; Construction (right to payment due to delays and increased costs); Auditor liability; Leased premises (obstacles and damages related to the use thereof); Patent infringement; Redemption of shares under minority shareholder's rights; Unlawful termination of commercial lease; Termination of agency contract.
15	FR, NL, ES, UK, US	3 per year	2 in total 1 per year average	Collective action related to GDPR; Antitrust claims
16	AT, BE, BG, HR, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI, ES, SE, CH, NO, US	n.a.	Roughly 50%	We commit approx. EUR 75 - 100 million annually in litigation and arbitration proceedings with a minimum dispute value of EUR 7.5 million. The number of new cases financed each year varies due to different case budgets requirements
17	DK, SE	Approx. 20 ongoing cases as per today	25%	
18	ES	15	2	Antitrust damages actions ("milk cartel"); Patent infringement actions; Tax recovery actions
19	Pan European	25-30 in total for the past 3 years,	5% arbitration, other firms focusing on arbitration more than us	
20	AT, BE, FR, DE, EL, IT, LU, NL, PT, ES, CH	4	1	ICC Arbitration filed by Spanish tech-company against Vietnamese shareholder
21	IT, CH	5	0	Antitrust/ Damages from financial institutions
22	LT	1	1	Investment arbitration case
23	PT, ES	(20 000)[a)]	(0.5%)	The number is not representative because it includes many antitrust legal proceedings . For example, 5 000 cases may have been financed for the dairy cartel […]. It is very important to differentiate the industry niches: complex litigation, consumer actions, class actions and scalable actions.

n.a. = no answer. Note: Included are only litigation funders who specifically provided data. Slightly edited for readability. a) Estimate in brackets, as the respondent seems to have added up the number of individual claimants linked to a specific antitrust proceeding.

Funding practices by litigation funders

We then asked for specific details of the funding practices of litigation funders in the respondents' jurisdictions. These questions were addressed to stakeholders other than funders but also reflected in similarly worded questions to litigation funders themselves. Litigation funders were asked regarding typical funding practices of litigation funders active in the EU and also regarding their own operations in the EU. As the questions are worded similarly, the results have been combined in the following overview tables.

The minimum value of a claim funded by TPLF is between less than 1 million Euro and 14 million Euro, according to more than 70% of respondents who provided an assessment (see next table, marked in bold is the most frequently mentioned category).

Table 3: Minimum claim value in absolute terms (in million Euro) – number of respondents that indicated a specific value

Minimum claim value	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
<1	**15**	**6**	5
1-1.9	11	0	2
2-4	8	3	**6**
5-9	4	1	1
10-14	12	**6**	4
15-19	0	0	0
20-29	3	2	2
30-39	2	0	0
40-50	1	0	0
More	10	0	1

N= 66 (stakeholders other than funders), 18 (litigation funders, typical values), 21 (litigation funders, own operations). The remaining stakeholders did not have an opinion. Figures in bold indicate the most frequently mentioned category. Rows highlighted in blue indicate that 70% or more of the assessments fall into these categories.

Stakeholders were then asked to assess the typical claim value in absolute terms. Results are provided in the following table.

Table 4: Typical claim value in absolute terms (in million Euro) – number of respondents that indicated a specific value

Typical claim value	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
<1	7	2	2
1-1.9	2	0	0
2-4	3	1	1
5-9	**9**	2	2
10-14	2	2	2
15-19	1	0	1
20-29	3	2	2
30-39	3	0	1
40-49	1	**4**	0
50-99	6	2	**6**
100-299	8	2	3
300 or more	**9**	0	0

N= 54 (stakeholders other than funders), 17 (litigation funders, typical values), 20 (litigation funders, own operations). The remaining stakeholders did not have an opinion. Figures in bold indicate the most frequently mentioned category. Rows highlighted in blue indicate that 70% or more of the assessments fall into these categories.

70% of respondents who provided an assessment said the typical value of a claim funded by TPLF was between 5 million Euro and close to 300 million Euro. But as the last column in the table above shows, there were also 3 litigation funders that reported considerably lower typical values of funded claims. Two funders indicated a typical value of less than 1 million Euro, and one of 2 to 4 million Euro, reflecting the diversity of litigation funding practices for different types of claims and areas of law.

For example, in TPL funded cases against the gaming industry the typical claim value was estimated to be under 1 million Euro, with a high number of TPL funded cases, as indicated by a stakeholder from the gaming industry, who wrote: *"Since neither the funders nor the plaintiff lawyers voluntarily reveal their involvement in the cases brought against [major companies in the sector], it is difficult to estimate the exact participation. While [we see] TPLF-funded claims in several jurisdictions, Germany and Austria currently stand out as the jurisdictions where the number of claims are most significant, with an estimated 500 - 1 000 cases per year in each of Austria and Germany. We suspect this is likely an underestimation since in some cases we are unaware of whether there is any relationship between the plaintiff lawyer (and his client) and a specific funder. However, we assume that the vast majority of cases is funded by TPLF."* The same respondent estimated that major companies in the sector were faced with 2500-3000 cases per year each. On the other hand of the spectrum, antitrust claims for

damages are often multi-million-Euro cases, with some cases that bundle or combine the claims of multiple affected parties reaching several hundred million Euro or more. It is notable that many litigation funders that participated in the consultation tended to provide higher estimates for typical claim values, with the most frequently mentioned ranges being 40-49 million Euro and 50-99 million Euro (typical/own practices, indicated in bold in the table above). A possible reason for the notable differences in assessments could be that among the respondents to the survey, smaller or very specialised litigation funders (e.g. those involved in gambling or betting related litigation) are possibly less represented.

In contrast, there was a great degree of consistency concerning the typical ratio between investment by the funder and claim value. This ratio is most frequently considered to be 1:10 (see next table), with more than 70% of respondents who provided an assessment indicating that the ratio was between 1:5 and 1:15.

Table 5*: Typical ratio between investment by the funder and claim value* – number of respondents that indicated a specific ratio

Typical ratio	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
1:2	4	0	0
1:5	6	2	2
1:10	**15**	**14**	**11**
1:15	5	1	3
1:20	4	1	1
More than 1:20	7	1	2

N= 41 (stakeholders other than funders), 19 (litigation funders, typical values), 19 (litigation funders, own operations). The remaining stakeholders did not have an opinion. Figures in bold indicate the most frequently mentioned category. Rows highlighted in blue indicate that 70% or more of the assessments fall into these categories.

When asked about typical size of the investment by the litigation funder, most respondents provided estimates between less than 1 million Euro and 5-9 million Euro (see below).

Table 6: Typical size of the investment by the litigation funder (in million Euro) – number of respondents that indicated a specific investment size

Typical size of the investment	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
<1	10	5	5
1-1.9	5	2	2
2-4	**19**	2	**7**
5-9	5	**6**	5
10-14	5	1	0
15-19	0	0	0
20-29	1	0	0
30-39	0	0	0
40-50	1	0	0
More	0	0	0

N= 46 (stakeholders other than funders), 16 (litigation funders, typical values), 10 (litigation funders, own operations). The remaining stakeholders did not have an opinion. Figures in bold indicate the most frequently mentioned category. Rows highlighted in blue indicate that 70% or more of the assessments fall into these categories.

One of the interviewed litigation funders elaborated how they determined the maximum investment in a case. Its representative stated that "*a funder will not fund a case where the actual outcome it expects, after discounting for a number of real risks, is lower than 10 times the estimation of the budget, corrected for some unforeseen budget increases.*" He elaborated that in a simplified illustration of the approach the 'prudently estimated claim outcome' (i.e. the most likely court award) would be multiplied by the enforcement risk (i.e. the probability to actually recover the court award), to calculate the maximum funding. For example, a claim with a face value of 100 million Euro might be reasonably expected to reach an outcome of 30% (i.e. a court award of 30 million Euro). But if the enforcement risk is considered to be 70% (i.e. the risk of default of the defendant is considered to be 30%), the prudent estimate of the claim outcome would be 21 million Euro (i.e. 70% of 30 million Euro). Based on the above mentioned '1-in 10 rule', this would imply that a funder would invest not more than 2.1 million Euro. The funder underlined that this was a simplified calculation, and other factors that contribute to risk might also be considered.[1527] He finally pointed out that the "*reason for this '1-in-10 rule' is that if the budget – including increases – [was] higher than*

[1527] Another litigation funder indicated that „a complex risk assessment and pricing mechanism, [takes] into account (among others): chances/probabilities of success, legal budget, (realistic) claim value, expected duration of the litigation, likelihood of appeal, risk of having to provide security for costs, adverse party costs (in case of a loss), potential procedural hurdles, enforcement, and others." For an additional description, see also https://www.burfordcapital.com/insights-news-events/insights-research/pricing-risk-structuring-agreements-and-the-cost-of-legal-finance-capital/

10% of the prudently estimated claim outcome, the client [might] in some versions of a "win" receive less than 50% of [the claim outcome]" and that this would "*create misalignment*".

In the perspective of a litigation funder, there are several approaches to reduce risks, as elaborated by the responding/interviewed stakeholders: The first is to strictly select cases for funding. A general accepted figure, which was referred to by both litigation funders and other stakeholders is that 95% of cases (or more) are rejected for funding after an initial screening, "*because the risk is judged as too high, or because the case ends up being funded by a competitor*" (as one litigation funder put it). The second approach to reduce risk is to combine multiple claims in a portfolio. Based on exploratory interviews, we had defined for the stakeholder survey the term 'Portfolio Litigation Funding (PLF)' as referring "to the (professional practice of) funding of dispute costs for a number of disputes arranged together in a portfolio. A portfolio arrangement can be structured in many ways, but there are two major types of arrangements: (1) finance structured around a law firm, or department within a law firm, where the claim holders may be various clients of the firm; or (2) finance structured around a corporate claim holder or other entity, which is likely to be involved in multiple legal disputes over a relatively short period of time. Structuring finance around multiple claims under either model usually involves some form of cross-collateralization, meaning that the funder's return is dependent upon the overall net financial performance of the portfolio as opposed to the outcome of each particular claim." In the consultation, we asked litigation funders whether or not they utilised portfolio TPLF. Funders were nearly evenly split, with 43% indicating 'yes', 47% indicating 'no' and the remaining 10% not providing an answer.

The share of compensation awarded typically demanded by litigation funders is most frequently reported to be in the range of 20% to 30% (see next table). A litigation funder that had indicated a similar percentage stated that in collective redress cases "*with higher potential resolution sums, the percentage above certain threshold resolution amounts tend to decrease materially to balance and avoid excessive remuneration in the event of really high awarded amounts*". In contrast, business stakeholders that were critical of TPLF often pointed out that according to their information "*compensation shares can be much higher in some cases*". One large company targeted by TPL funded claims indicated that "*some funding agreements may contain complicated, layered repayment structures wherein any proceeds are first used to repay the funder's principal investment across the entire campaign before the plaintiff receives a share.*" This practice was confirmed by a litigation funder who described the structure of their pricings as consisting of a multiple of the budget tied to duration (see below for a discussion of multiples) combined with the 'waterfall provision' which was described as a "*rule of distribution of the awarded and enforced claim: the funder first receives reimbursement of its outlay/investment, then the funder receives the success fee as stipulated and calculated according to the [litigation funding agreement], the remainder goes to the funded party*".

Table 7: Share of compensation awarded typically demanded by litigation funders – number of respondents that indicated a specific percentage

	Stakeholders other than funders (practices by funders in own jurisdiction)	**Litigation funders (typical)**	**Litigation funders (own)**
10%	0	0	0

20%	17	5	**7**
30%	**36**	**8**	6
40%	9	0	1
50%	3	2	1
60%	0	0	0
70% or more	2	1	0

N= 67 (stakeholders other than funders), 16 (litigation funders, typical values), 15 (litigation funders, own operations).). The remaining stakeholders did not have an opinion. Figures in bold indicate the most frequently mentioned category. Rows highlighted in blue indicate that 70% or more of the assessments fall into these categories.

Some stakeholder were of the opinion that the *"percentage based remuneration is now outdated for this industry: the remuneration structure is far more sophisticated"*, as pointed out by a litigation funder. Another respondent highlighted that the *"share of compensation may vary a lot, and it can for example change during the duration of the funding. […] It is often not a static percentage"* (Lawyer/law firm). This was confirmed by a litigation funder who elaborated: *"The share of compensation will vary and typically taper off the higher the claim value gets. Sometimes funders would agree on a step mechanism, with percentage tapering off in steps. Sometimes, funders would agree on a multiple of invested money, e.g. 3x investment. Depending on the case, this can be capped as well."*

Often, litigation funding agreements choose a multiple of the funded costs as compensation of the funder, or *"in some cases, a 'higher of' a multiple [of funded costs] or percentage [of compensation awarded] is agreed with the client"* (as elaborated by a litigation funder). Another funder explained the rationale of the "*'higher of' rule, i.e. a combination of (1) a multiple of the funding amount committed/deployed and (2) a percentage of the proceeds recovered by the client. This is because funding can trigger an early settlement, and this usually leads to the percentage applying rather than the multiple. This remunerates the commitment of capital from the start of the litigation. It counterbalances the risk of having a recovery in several years (which lowers the return on investment for the funder). […] In most B2B cases, the funder's share in the proceeds (multiple and percentage) will not be a fixed number or percentage, but is subject to one or more of those elements, e.g. time passed since initiating the case (the multiple/percentage increases over time), or total recovery achieved (the percentage can be lower in case of a significant recovery)."*

Several stakeholders also pointed out that, depending on the litigation funding agreement, multiples of funded costs could be calculated on the basis of either committed costs or actual costs incurred by the funder. In an interview a funder pointed out that costs in their practice always referred to external costs (e.g. for lawyers, experts etc.), and did not include internal costs/overheads of the funder.

In the questionnaire, we also asked respondents to elaborate on their information regarding the origin of funding provided by the litigation funder. There was general agreement across most other stakeholder groups that related information was scarce, that funding practices were 'opaque', that various sources of funding were used and that the origin of funding was likely to vary between litigation funders.

Some business stakeholders (other than law firms/litigation funders) therefore suggested that it was impossible to provide an answer: *"Due to a lack of transparency and the opaque nature of many*

of the funds, we are unable to respond to this question accurately." Other business stakeholders (that were often opposed to TPLF) frequently highlighted the potential for illicit funding and motives. For example, an EU business association stated that *"Identifying the source of funding supplied by litigation funders in the EU can be challenging due to the industry's perceived lack of transparency. While the sector lacks a legal frame, making it difficult to distinguish between rogue players and honest litigators, emerging evidence highlights various motives for investing in litigation funds, such as illicit access to trade secrets, laundering proceeds from illegal activities, interfering with the judicial process, attempts to weaken competitors, or possibly advancing foreign influence with geopolitical implications."* Another EU business organisation stated: *"The origin of the funding seems to point to the U.S., Australia, Singapore, China, Russia, the Cayman Islands, Monaco, the UK, and its offshore islands, like Jersey and Guernsey. Due to the opaque nature of many of the funds, it is difficult to identify concretely their origin or place of establishment, but there is a concern from a few press articles that some litigation funders might have ties with foreign sovereign wealth funds and state-owned enterprises originating in various parts of the world, including the Middle East, Asia, and Russia".* Several stakeholders referred to media reports that highlighted specific cases supporting their views.[1528]

In contrast, law firms often described the origin of funding in more neutral terms as follows:

- *"Depends on the nature of the funder (e.g. professional litigation funder vs US law firm with own funds investing in litigation funding in NL)."* (Dutch law firm)
- *"Most litigation funders active in the Netherlands source their capital from professional investors/sovereign wealth funds/endowments/(re)insurers and event-driven investors."* (Dutch law firm)
- *"Many of the funders can be compared to private equity or venture capital. Litigation funding can be seen as a special branch of such a market. Thus, my understanding is that the funding would come from the same types of sources, without having any specific information on the investors*." (Swedish law firm)
- *"Private investors (in some cases even including former lawyers)."* (Spanish law firm)
- *"[A]t least with the funders I work with: Investment funds that see litigation funding as one out of various investment opportunities."* (Austrian law firm)
- *"Third party investors wanting to invest in an alternative class of investment totally unrelated to economic cycles."* (French law firm)

The information responding litigation funders provided regarding their own practices was often quite limited and/or generic (e.g. referring to 'private capital', 'investor money', 'professional investors'). One litigation funder stated with reference to market practices that the origin of funding was *"highly dependent on the funder's model. Generally, there are two type of capital sources; the majority of funders manage capital on behalf of others including hedge funds, asset managers/LPs* [Limited Partners] *(and increasingly, family offices, UHNWs* [Ultra-high-net-worth individuals] *and SWFs*[Sovereign wealth funds]*). Less common are principal funders … whose capital source is their own (and therefore often comes with additional flexibility)."* Another litigation funder explained that their *"structure works as a regulated alternative investment fund, under the … Securities and Markets*

[1528] E.g. a reference to Bloomberg Law that reported on 28 March 2024 that a Russian investment firm A1 has financed lawsuits around the world, see https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits

authority. Our litigation funding vehicles are regulated funds that are able to raise capital with qualified investors and professional investors in order to invest that capital in the funded cases." And a third litigation funder again emphasised the diversity of practices : "*There is not always information available about the origin of the funds managed by a litigation funder, except if it is listed on the stock market. The sources can be different from funder to funder. Some are fully privately held, some are funded by parent (insurance) companies, others are PE* [Private Equity] *backed. A small number are listed on a stock exchanges. There are also more traditional asset managers with a multi-strategy approach, one of those strategies being litigation funding."*

We then asked respondents whether according to their information, litigation funder have an acceptable threshold for probability of success / acceptable level of risk. Stakeholders other than funders and litigation funders largely agreed that funders had an acceptable threshold for probability of success / acceptable level of risk (see table below).

Table 8: According to your information, do litigation funders have an acceptable threshold for probability of success / acceptable level of risk? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	**Litigation funders (typical)**	**Litigation funders (own)**
Yes	**57**	n.a.	**16**
No	15	n.a.	6

N= 72 (stakeholders other than funders), 22 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

One of the litigation funders that provided details in this respect indicated that a "*probability of success percentage above 65% is most often cited as a minimum threshold. However, it is very much an art and less a science. Different lawyers advising the client, or second opinion counsel will have different and often quite personal approaches and levels of comfort advising a percentage. Some may be very conservative and never give a percentage above 60%. Others may have dug into the case such that they have become convinced of their own arguments and are overly optimistic. It is really a task of the Investment Manager and the Investment Committee to weigh the different risk factors in their totality."*

Other provisions of funding agreements and their disclosure to courts

Several litigation funders provided descriptions of other typical conditions in Litigation Funding Agreements (LFAs). An example was a funder who stated that *"the litigation funding agreement always is totally non-recourse funding, no guarantees are required by the funded party. […] The obligations of the funded party are straightforward:*

- *Inform the funder of all developments in the case;*
- *Inform the funder of all settlement proposals;*

- *Consult with the funder in the event of a change of counsel and/or change of strategy;*
- *Ensure that the cash flows and the designated bank account for disbursements and recoveries remain identified and known to all parties.*

Any breach of the above obligations may lead to the freezing of all future disbursements pending the resolution of the issue, and in the most adverse cases to the termination of the funding agreement and the return of capital paid plus a penalty in worst cases."

Another litigation funder also described the mutual obligations (falling on both funder and client) as follows: *"Mutual clauses include:*

- *Generally acting in good faith not jeopardizing the claim/litigation;*
- *Settlement subject to mutual consent (not to be unreasonably withheld);*
- *Dispute resolution and applicable law clause.*

If the Funder withholds future funding in the event of adverse developments that makes the case no longer commercially viable, funding provided up to that point will typically not be reimbursed to the Funder and will lead to a loss for the Funder and the client is at liberty to henceforth self fund or seek alternative funding."

Finally, a third funder emphasised: *"We impost strict limits on our ability to control the case or direct the lawyers. This is a consequence of the champerty / maintenance restrictions in the UK and US where we began our business. We have just carried it over to our EU cases because we think it's the more ethical way of funding cases."*

While these are three examples provided by participating litigation funders, it is unclear how representative they are for the practices in the market, and while some litigation funding agreements have been published or are otherwise available in the public domain, there is no empirical basis available for drawing more general conclusions. As one organisation of businesses put it: *"More transparency of contracts would be helpful to answer the questions."* Several stakeholders that are not litigation funders or their clients also shared their insights into the provisions of funding agreements, as observed by them. A stakeholder from the gaming industry wrote in a detailed statement: *"Litigation funding agreements generally mandate that plaintiffs consult with the funder before waiving claims, withdrawing, appealing, or settling. If plaintiffs proceed against the funder's recommendation, they must compensate the funder to maintain its financial position. This has led to situations where settlement offers, even those beneficial to the plaintiff, are rejected in favour of the funder's interests, often to secure higher cost reimbursements. In some instances, claims are withdrawn to avoid potential negative impacts on the funder's model, particularly when courts consider preliminary rulings or expert opinions that could unfavourably affect the funder. This practice leaves plaintiffs without recovery, though funders may offer compensation to uphold their "risk-free" litigation funding model. […] The TPLF can terminate contracts immediately if prospects of success decline post-agreement, and they retain the right to transfer contracts without plaintiffs' explicit consent. Some agreements stipulate a minimum loss amount incurred by the plaintiff with an online gambling operator, typically EUR 1,000. These examples highlight common provisions but may not apply to every TPLF."*

Concerning the question of whether litigation funders exercise any form of control over the legal proceedings, stakeholders other than funders that had an opinion overwhelmingly answered with 'Yes', whereas a majority of litigation funders found a 'No' as appropriate answer (see below). But

even so, a significant number of litigation funders agreed they exercised some form of control over the legal proceedings.

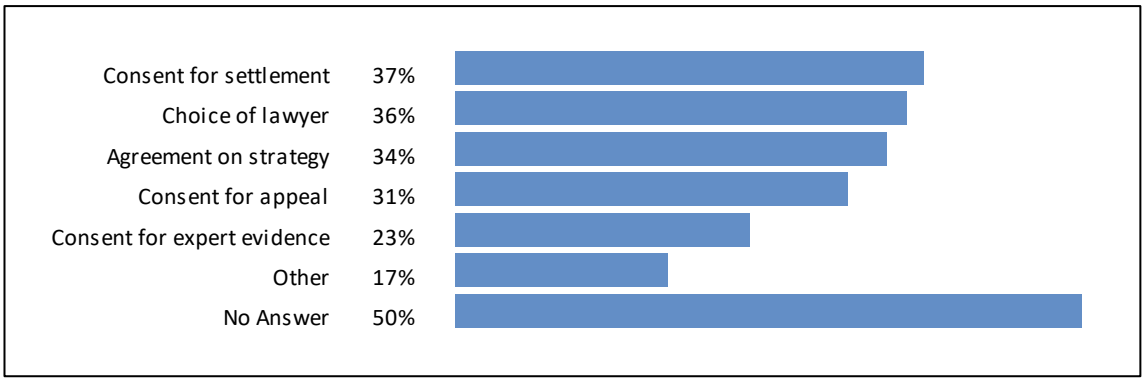
Table 9: When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
Yes	**99**	n.a.	9
No	21	n.a.	**13**

N= 120 (stakeholders other than funders), 22 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

Stakeholder were then asked to indicate what type of control over the legal proceedings litigation funders had. The results are presented below, with top ranked forms of control being 'consent for settlement', 'choice of lawyer' and 'agreement on strategy'.

Figure 5: If yes, please indicate what type of control (over the legal proceedings) (multiple answers possible)



N=231

While therefore there is an agreement among a broad group of stakeholders that funders exercise some form of control, the degree of this control appears to vary:

- A judge from England and Wales elaborated: *"It depends on the terms of the agreement, which could require any of these [types of control]. Generally Funder expertise is likely to be drawn on whether they technically exercise control or not, because they are experienced in litigating in these very large cases in specialist fields."*
- A law firm from Austria conceded: *"Sure, they exercise some form of control, but they also bear 100% of the financial burden, so there is nothing wrong with that, especially as the interest is 100% aligned with the funded party."*

- A respondent from a French law firm elaborated in more detail: "*TPLF often exercise a certain degree of control over the legal proceedings, but …it cannot take the supervision of the proceeding since it is not a party. In a nutshell, the control of the TPLF can be summarized as follows: (i) due diligence to assess the merits and potential outcomes of the case, (ii) approving/challenging a procedural strategy with the financed party and its counsel, (iii) be on a regular basis informed of the legal expenses incurred to ensure the budget is respected to and that funds are being used efficiently, (iv) be informed of any substantial information/fact that could affect the procedural strategy established (for instance, change of the lawyer, proposal to settle, etc). Generally speaking the TPLF approves the strategy set up by the parties and finance on such basis, meaning that the agreement could be affected should the party decide to modify this aspect.*"
- Finally, a Dutch lawyer referred to the specific situation where the claimant was an entity set up by the funder: "*Given a lack of regulation, funders will do what they can in their own interest. Especially in cases where funders themselves are the ones setting up the claim foundations.*"

Similar arrangements were reported from the field of patent litigation, where several business stakeholders suggested that shell companies were set up by litigation funders to bring relevant claims, based on IP purchased from third parties, thereby controlling the overall litigation process (see also below, section on negative effects of TPLF).

The consultation results regarding this question illustrate again that the situation seems to depend on the specific funder and case in question, and other stakeholders reported that their litigation funding agreements considerably limited the control of the funder:

- For example, an intermediary that brings together claimants and funders indicated that "*We have structured our agreements with funders in a way that they cannot exercise control over the proceedings, with the exception of consent for appeal in case the case has been lost in the previous instance (i.e. the funder needs to provide additional funds for a case with deteriorating prospects).*"
- A litigation funder elaborated its perspective as follows: "*We take control only in respect of our investment. Hence if we decide not to finance an appeal for lack of merits, then this will not prohibit the claimant to go ahead at his own cost and risk. If we believe we should settle and claimant would like to continue, claimant can continue but needs to financially put us in a position as if we had settled. However, in 25 years we have not had a single case where views on settling/not settling differed. We do not take influence on the strategy of the cases in our portfolio, however the individual strategy is an aspect we consider when assessing the merits of the case prior to agreeing to fund it (hence we do not fund cases if we believe the legal strategy is wrong - and in this respect, we are always aligned with the plaintiff´s interests).*"
- And another litigation funder pointed out that "*It is not possible to answer this question [of control] with a simple "yes" or "no". Where [we are] a "passive" funder (which is the case in most types of commercial disputes being funded), [we do] not have the right nor the ability to instruct the client's lawyers, nor to impose directives, choices, etc. to the client. However, in some circumstances that are defined in the funding agreement, the client may need [our] consent before taking certain decisions (e.g. accepting a settlement offer). We need some consent rights when our own financial interests are directly affected. We do not provide legal advice nor do we run or take over the case and/or the strategy of the litigation. When it comes to appeals or other legal remedies, rather than making the decision subject to [our] consent*

(which would limit the client's options), our funding agreements usually provide us with the possibility to terminate our funding."

In line with this statement there was a broad agreement among different stakeholder groups, including litigation funders, that is it possible for the litigation funder to withdraw funding during the litigation process (see following table).

Table 10: When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	**Litigation funders (typical)**	**Litigation funders (own)**
Yes	**78**	n.a.	**23**
No	13	n.a.	2

N= 91 (stakeholders other than funders), 25 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

Of those respondents that had an opinion, a majority of both stakeholders other than funders and litigation funders considered that there are safeguards in place to avoid conflicts of interest (see next table).

Table 11: According to your information, do litigation funders have any safeguards in place to avoid conflicts of interest? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	**Litigation funders (typical)**	**Litigation funders (own)**
Yes	**43**	n.a.	**25**
No	31	n.a.	0

N= 74 (stakeholders other than funders), 25 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

All litigation funders that provided an answer in this respect considered this to be the case. Accompanying explanations included:

- *"For each case presented to us, we run an internal conflicts check to ensure that no conflicts exist with our previously funded or analyzed cases and the people and entities involved. The*

same conflict check is run for every arbitral tribunal member, we now use Jusmundi's technology to ensure that."

- *"[We apply a] standardized conflict-check-procedure. This check avoids in particular that we fund a case against a party who has previously approached us in the same matter, and that we fund a case against a party that we fund in another matter (provided that we have received any confidential information on that party that could be used in the second proceedings).The conflict-check is generally very strict to avoid any reputational issues for [us]."*

One of the litigation funders provided a whole set of safeguards that were reportedly in place:

1. "*Clear Contractual Agreements: Agreements between funders, plaintiffs, and attorneys include explicit terms that define the roles and boundaries for each party. These contracts specify that funders should not have control over the legal strategy, decisions about whether to settle or proceed to trial, or the choice of legal counsel.*
2. *Disclosure Requirements: Disclosure of funding arrangements to the court and all involved parties.*
3. *Due Diligence Processes: Extensive due diligence before committing to finance a case. This includes evaluating potential conflicts of interest among the parties involved.*
4. *Independent Decision-Making: The plaintiffs legal team operates independently of … us.*
5. *Compliance with Legal and Ethical Standards[.]*
6. *Regular Monitoring and Auditing: Regular monitoring and auditing of the funding process and legal case progress. "*

However, several other stakeholders considered the possibility of conflicts of interest to be a major negative effect of TPLF (see below).

Regarding the question whether the funding agreement typically covers the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs"), most stakeholders other than funders and litigation funders considered the answer to be Yes (see next table).

Table 12: According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome ("adverse costs")? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	**Litigation funders (typical)**	**Litigation funders (own)**
Yes	**67**	n.a.	**22**
No	21	n.a.	4

N= 88 (stakeholders other than funders), 26 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

In a follow-up question, most respondents that had an opinion indicated that this was a "limited" or "conditional" liability. Several litigation funders explained their practices as follows:

- *"It depends what we negotiate with the claimant: sometimes the claimant wants the funder to assume liability for adverse costs; sometimes the claimant wants to purchase insurance (paid for by the funder) for adverse costs; sometimes (albeit infrequently) the claimant wants to assume the risk of adverse costs. Each different route has an impact on the price we will charge."*
- *"We do not typically assume liability for adverse costs risks to significant levels, although we do indemnify for adverse costs in EU jurisdictions where the exposure is limited. In other scenarios, we require the claimant to take out third party ATE insurance to cover their adverse costs risk."*
- *"We agree on a specific amount per instance which is designed to cover the full amount of realistic adverse costs. If the funded party does not want to include adverse costs coverage in the budget (note that such coverage increases the funding costs, ie, the potential success fee of the funder), we oblige the funded party in the LFA to stand in for those costs. However, it is important to note that for reputational reasons, [we] refrain from funding a case if the party interested in funding does not have sufficient solvency (this is an element we check carefully in our Due Diligence) and is not willing to include adverse cost coverage in the case budget."*

The issue of liability for adverse costs seems to depend to a considerable degree on the jurisdiction and the amount of adverse costs that can be awarded if a case is lost. A law firm from the Netherlands described their practices as follows: *"The funder will be required to pay all adverse costs. In the Netherlands, such adverse costs awards are relatively minor and based on flat rates. This is standard in a litigation funding agreement. Most agreements dictate that adverse costs insurance is funded as well to cover this risk."* In other jurisdictions these costs may be higher, and a company targeted by claimants that are funded by litigation funders reported: *"Based on limited public information regarding TPLF agreements, at least one TPLF funding agreement specified which costs were reimbursable by the TPLF and capped those costs. This agreement excluded attorney fees, costs and damages awarded against the plaintiff and its counsel as reimbursable costs."* A German law firm described market practices as follows, and highlighted potential problems of coverage of adverse costs where the claimant is an entity specifically set up for the claim: *"The funder's financial commitments in litigation funding agreements are often not disclosed and vary. However, we are aware of cases where financial commitments do not cover all adverse costs.*

- *Costs of the defendants could be covered, but not the costs of third party interveners.*
- *Financial commitments are sometimes capped at a certain maximum amount, which is below the expected total adverse costs.*
- *The financial commitment is also limited because the litigation funder can terminate the litigation funding agreement (see above).*
- *In cases of claim vehicles as claimants, there is also the factual problem of whether the claim vehicle (which often has no assets of its own) could enforce a payment claim against the litigation funder at all."*

As mentioned above, the issue of liability is linked to the question whether or not litigation cost agreements usually include the requirement for After the Event (ATE) insurance. Most stakeholders other than funders and most litigation funder that had an opinion in this respect considered this not to be the case (see table below).

Table 13: According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
Yes	19	n.a.	6
No	**34**	n.a.	**14**

N= 53 (stakeholders other than funders), 20 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

The consultation results again highlight the diversity of market practices, and from the responses to the consultation can be concluded that while not always required, the use of ATE insurance is an option that is preferred in some cases. For example, an intermediary that brings together claimants and funders emphasised that their "*agreements with our funders include a budget for an ATE insurance which covers adverse cost in the event of an unsuccessful outcome.*"

We finally explored the degree to which funding agreements are disclosed to the court. Respondents were split in their answers, with roughly two thirds of stakeholders other than funders and close to half of litigation funders that had an opinion indicating 'No', and the remaining one third of stakeholders other than funders and a slight majority of litigation funders that had an opinion indicating 'Yes'.

Table 14: Are funding agreements disclosed to the court? – number of respondents per answer option

	Stakeholders other than funders (practices by funders in own jurisdiction)	Litigation funders (typical)	Litigation funders (own)
Yes	38	n.a.	**12**
No	**78**	n.a.	11

N= 116 (stakeholders other than funders), 23 (litigation funders, own operations). Remaining stakeholders had no opinion. The questionnaire did not ask litigation funders to elaborate on typical practices, therefore not applicable (n.a.). Figures in bold indicate the most frequently mentioned category.

In the comments to the answers, several respondents emphasised that funding agreements are typically not disclosed to the court,[1529] with a limited number of national exceptions in specific circumstances, typically related to collective actions (often in the context of the transposition of the Representative Actions Directive (2020/1828)), as is illustrated by the following examples:

- With respect to the situation in Portugal a participant in the consultation described: "*With the entry into force of Decree-Law n.º 114-A/2023, of 5th December, in the event of a financing agreement for the pursuit of a collective action, and in order to assess a number of issues, including the independence of the claimant and the absence of conflicts of interest, the plaintiff must provide the court with a certified copy of the agreement, in Portuguese, written in a clear, easily understandable manner, that must include the following elements: a) A financial summary listing the sources of funding used to support the collective action; b) The various costs and expenses that will be borne by the third-party funder.*"
- A Dutch law firm indicated with respect to the situation in the Netherlands: "*The main rule is that funding agreements do not have to be disclosed to the Court. Nor does this obligation follow from law or case law. However, over the past years, there are examples where the (lower/district) Court orders the claimant to disclose the funding agreement to the Court and the defendant. The court may order a party to disclose the funding agreement if the court deems it necessary for the case or inter alia standing purposes in collective actions initiated on the basis of art. 3:305a DCC (old) and the WAMCA. However, certain provisions in the agreement may be kept confidential. The extent of disclosure depends on the case and the court's orders (and possible defences of an opposing party). It is anticipated that the need for more or less transparent rules regarding funding agreements will be addressed in the parliamentary evaluation of the WAMCA …*"

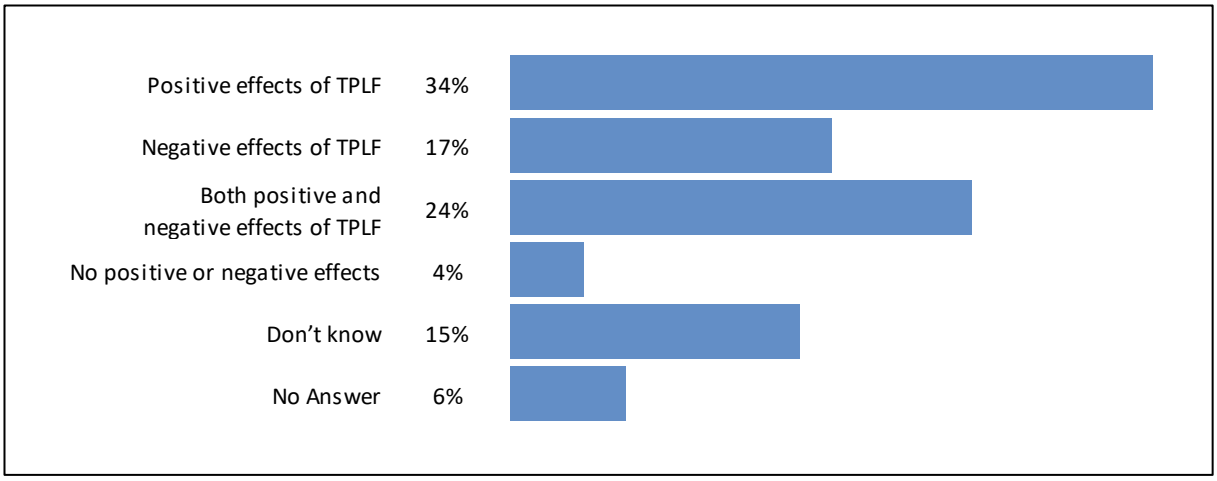
For more details on relevant national provisions in the EU Member States and the third countries covered by our research, see our legal analysis/national reports in Section 3.

4.3 STAKEHOLDER VIEWS ON THE EFFECTS OF THE CURRENT PRACTICES OF TPLF IN THE EU

The next part of the questionnaire concerned stakeholder opinions regarding the effects of the current practices of TPLF in the EU. The first question focused on the general assessment of potential positive or negative effects of the current practice of TPLF in the EU. Stakeholders mostly saw these practices as either only having positive effects (34%), or as having both positive and negative effects (24%). 17% of respondents saw only negative effects, 4% neither positive nor negative effects. The rest had no opinion or provided no answer.

[1529] Some funders indicated that in the context of arbitration, however, disclosure of funding and identity of the funder may be required. For example, the VIAC Rules of Arbitration and Mediation 2021 provide in Article 13a that "A party shall disclose the existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, or immediately upon concluding a third-party funding arrangement", see https://www.viac.eu/en/arbitration/content/vienna-rules-2021-online#Rules_of_Arbitration_Article_13

Figure 6: Have you observed positive or negative effects of the current practice of TPLF in the EU? (Total)



N=231

It is interesting to see the differences in responses by stakeholder group. The following table presents the number of respondents for each answer item by type of respondent.

Table 15: Have you observed positive or negative effects of the current practice of TPLF in the EU? (By stakeholder group) – number of respondents per answer option

	Litigation funder	Business	Consum. organis.	Lawyer/ law firm	Public authority*	Judici-ary*	Arbitrat./ mediator*	Academic/ researcher	Other	*Total*
Positive effects of TPLF	**23**	3	**15**	**30**	0	1	1	**3**	2	***78***
Negative effects of TPLF	0	**32**	0	1	1	1	0	1	3	*39*
Both positive and negative effects of TPLF	5	5	4	28	1	**3**	**4**	2	**4**	*56*
No positive or negative effects	0	0	1	3	3	1	0	1	0	*9*
Don't know	0	10	5	6	**4**	2	1	**3**	**4**	*35*
No Answer	2	4	2	4	0	0	0	0	2	*14*

N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents.
Figures in bold indicate the most frequently mentioned category.

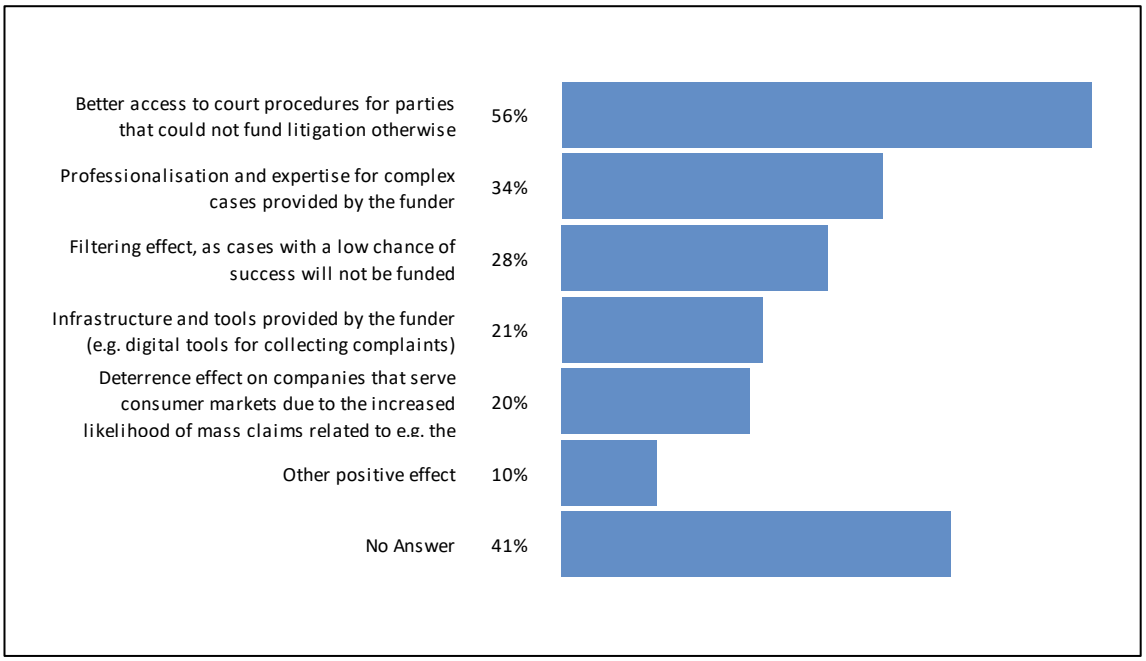
The table shows that only businesses (other than law firms/litigation funders) and their organisations had an overwhelmingly negative view of the effects of TPLF (8 in 10 respondents that had an opinion). Only a minority of the responding businesses saw positive, or a mix of positive and negative effects of TPLF. In the other stakeholder groups of litigation funders, consumer organisations, law firms/lawyers and academics/researchers, majorities of respondents that had an opinion found current practices of TPLF in the EU to have positive effects, or both positive and negative effects. The small number of public authorities that responded to the survey had divergent views, with the largest number having no opinion or seeing no effects. Members of the judiciary and arbitrators/mediators (with again each group having less than 10 respondents), as well as 'other'

respondents most frequently saw both positive and negative effects of the current practice of TPLF in the EU.

4.3.1 Observed positive effects of TPLF

In a follow-up question, respondents were asked to indicate the positive effects they had observed (negative effects were subject of a second follow-up question). The three most often observed positive effects were 'Better access to court procedures for parties that could not fund litigation otherwise', 'Professionalisation and expertise for complex cases provided by the funder' and 'Filtering effect, as cases with a low chance of success will not be funded'.

Figure 7: If positive effects indicated: Please indicate the positive effects of the current practice of TPLF in the EU you have observed



N=231

In the following subsections, we first discuss the various positive effects of the current practice of TPLF in the EU, as observed by stakeholders, before going on to discuss the observed negative effects.

Better access to court procedures

As shown in the figure above, a majority of respondents (56%) considered 'Better access to court procedures' as a positive effect of the current practice of TPLF. The fact that TPLF provides crucial financial support to individuals, small businesses and consumer groups who could not otherwise afford to litigate was often emphasised by litigation funders themselves. Consumer organisations confirmed that they often saw no other viable way to fund mass consumer claims against large companies that had breached, for example, consumer protection legislation. Some examples are provided in the following:

- *"Legal finance is an essential part of the legal system, providing financing for cases that otherwise could not be brought forward due to cost against larger, better-funded adversaries. Consequently, legal finance delivers vital access to justice for consumers and businesses. There are numerous examples of how commercial legal finance allows meritorious cases to reach the courts in Europe and deliver beneficial outcomes for citizens, consumers, and businesses."* (litigation funder)
- *"TPLF (in collective proceedings) facilitates access to justice offered to millions of consumers in the Netherlands who would otherwise be deprived of effective and efficient legal protection due to high costs. It has not proved possible for consumers to take action against large companies with financial capacity without litigation funding. There are, for instance, numerous collective settlements in the Netherlands that would have never been reached without funders facilitating the collective proceedings (e.g. Fortis, Shell, Converium etc.)."* (lawyer/law firm)
- *"We have insight only with respect to cartel damages proceedings. In this area, costs for bringing claims are usually significant (fees of specialized lawyers, economic experts; court fees that increase with the amount claimed). In particular smaller businesses may not have the means to cover these upfront costs. In such a constellation, litigation funding is key to avoid a situation where businesses are prevented from bringing their claims."* (business)
- *"Positive – ensures funding of small businesses (small business against larger ones)"* (arbitrator/mediator or related organisation)

Professionalisation and expertise etc.

Many stakeholders (in total 34% of respondents), including representatives of the legal profession considered professionalisation and expertise for complex cases as additional benefits of using a litigation funder. A related benefit (observed by 21% of respondents) was the provision of infrastructure and tools provided by the funder.

The support provided by funders included e.g. the identification of relevant case law, the development of a negotiation strategy, the involvement of external expertise, risk assessment (e.g. concerning default of defendant), and also for the enforcement of awarded damages. For example, a small business client of a litigation funder in Germany interviewed for this study reported that he found the funder's support to be very professional, particularly in analysing the opposing party's position. Following a risk assessment, the funder concluded that there was a significant risk that the opposing party would disappear from Germany in the event of a positive court decision. They therefore strongly recommended a settlement and were also involved in the negotiations (without providing legal assistance, which the funder was not allowed to do under German law). According to the interviewee, this support was essential as it strengthened his negotiating position, both in terms of resources and the fact that the funder had offices in third countries and was known to enforce claims internationally. According to the interviewee, the opposing party would not have settled without the funder's involvement. He also suggested that it was helpful to have a third party involved who brought an outside perspective ("fresh air", he said) and helped to consider all possible options.

Other stakeholders reported similar benefits:

- *"Better prepared cases, better lawyers, better experts, less bad cases, better technology, more professionalization, best experts in the cases."* (lawyer/law firm)

- *"Increased professionalism of the disputes ecosystem due to high standards required by funders which includes better prepared cases, costs control due to budget limitations, cases thought through until the end including enforcement stage (which is something not all lawyers litigating a case have on their radar – for obvious reasons)."* (litigation funder)
- *"The party provid[ing] funding usually has a network of specialists available. This has the benefit for the large group of expertise added to the claim. Lastly, the administration of cases is supported through this. TPLF provides for the opportunity to budget administration costs and tools for interacting with the class members."* (Lawyer/law firm)
- *"In my experience, the interaction with litigation funders helps to develop the case in a better way. The funder plays the devil's advocate and forces the lawyers to thinking pressing issues through once more."* (Lawyer/law firm)
- *"Funders do provide assistance in claims – such as understanding the commercial implications, providing documentation to organise groups and in tracking costs, but not so typically in providing digital tools for collecting complaints. Some funders do get involved in bookbuilding for commercial claims but less so consumer claims."* (litigation funder)
- *"[Previously the only consumer association in our country] that filed significant class actions … was forced to litigate with a very low budget, which had a negative effect on the outcome of the litigation, which in turn allowed big firms to escape from their responsibilities. I now work on a big group action financed by a funder and finally I can devote all the required efforts to the litigation. It was possible to pay a very expensive economic expert opinion. The probabilities of success are much higher."* (academic/researcher)
- *"Third Party Funding is helping restore some form of balance inside the court room. Resourceful defendants can no longer try to exhaust plaintiffs with delaying tactics. Furthermore, in B2B cases, our funding can help SMEs hire highly ranked law firms with significant expertise, experience and resources similar to the typical defendant law firms. Sometimes, the mere disclosure of the existence of a Third Party funder can help bring a defendant to the negotiations table, as the existence of a funder sends two strong signals: 1) a third party, previously not involved in the dispute, is convinced by the merits of the claim and is willing to invest in it and 2) a typical defence strategy, e.g. causing delays and multiplying obstacles, will not work."* (litigation funder)

Filtering effect

Litigation funders also pointed to the filtering effect of TPLF as benefit. They reported that they carry out rigorous risk assessments and only fund cases with a high likelihood of success, which they believe ensures that unmeritorious claims are filtered out. As a result, the vast majority of cases brought to their attention are not funded (see above). Also other stakeholders agreed (in total 28% of respondents). For example, a lawyer/law firm noted that *"In the funded cases that I have been on the opposing side, I believe that most plaintiffs would not have sued without the funding. However, due to the strict scrutiny of the Funder, the claims were all good claims."* This filtering effect was also sometimes considered a downside of TPLF, as an organisation representing lawyers noted: *"Filtering effect is considered by us as a negative effect: typically, TPLF will focus on cases with high chances of success - high risk cases are rarely funded by TPLF, although such cases could be important for development of law and rule of law."*

Deterrence effect

While 20% of stakeholders reported to have observed a deterrence effect on companies that serve consumer markets due to the increased likelihood of mass claims, others were not sure. Related comments included:

- *"Unfortunately, we have not seen much deterrence effect on companies that serve consumer markets due to the increased likelihood of mass claims related to e.g. the use of unfair practices; however, TPLF clearly put companies under scrutiny, which otherwise would have been impossible (for example, banks in mortgages cases, revolving credit cards, car cartel, among other cases)."* (litigation funder)
- *"TPLF has allowed to enforce claims that previously were not enforced, e.g. in relation to competition law infringements fined by the European and national competition authorities. This resulted in a deterrence effect regarding future infringements."* (consultancy focusing on cartel damage claims)
- *"We believe the deterring effect is yet to come as soon as successful mass claims and successful funded claims are pursued to completion."* (litigation funder)

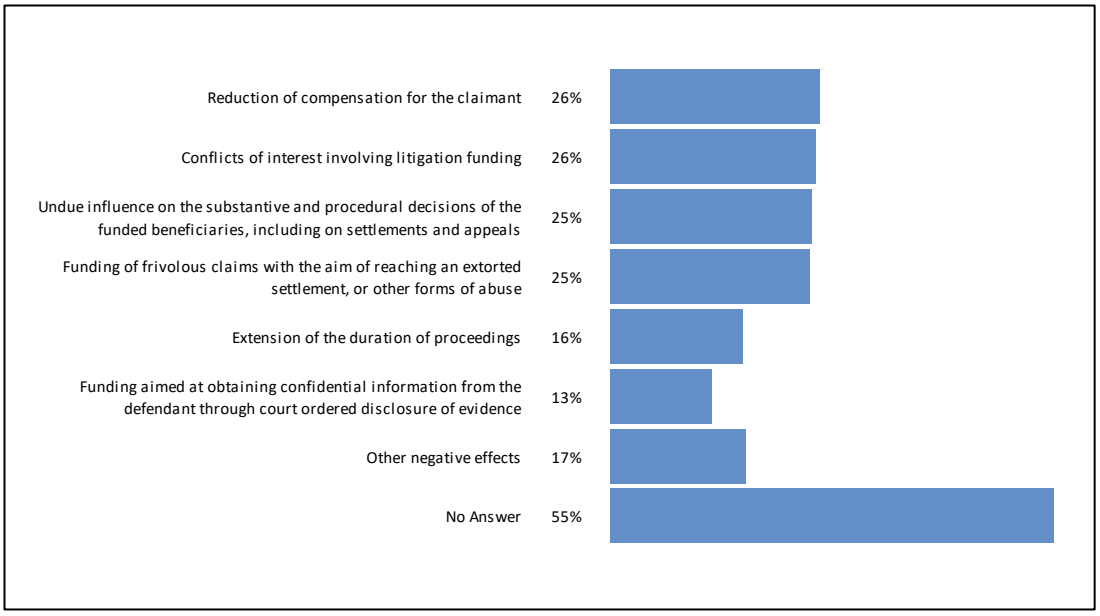
Other positive effects observed

Other positive effects highlighted by stakeholders included that TPLF restored the balance in litigation by countering resource asymmetries between plaintiffs and defendants, and that it promoted procedural economy in mass claims, benefiting judicial systems.

4.3.2 Observed negative effects of TPLF

Those respondents that observed negative effects of the current practice of TPLF in the EU specified them in a separate question. Four negative effects were most frequently indicated by the respondents (by 25% to 26% of respondents). These were 'Reduction of compensation for the claimant', 'Conflicts of interest involving litigation funding', 'Undue influence on the substantive and procedural decisions of the funded beneficiaries, including on settlements and appeals' and the 'Funding of frivolous claims with the aim of reaching an extorted settlement, or other forms of abuse' (see figure below).

Figure 8: If negative effects indicated: Please indicate the negative effects of the current practice of TPLF in the EU you have observed



N=231

Comments provided regarding negative effects often included general considerations, with reference to the experiences in other jurisdictions (most notably the US). Several business organisations and businesses provided in similar answers a disclaimer that the extent of negative effects were not (yet) know: "*There are increasing concerns regarding litigation being sponsored by parties with unclear motives. Due to the secretive nature of most funding arrangements, and the fact that settlements are reached, or judgments are not always published, the true scale of the negative effects arising from funding arrangements remains unknown. Instead, it is often necessary to rely on anecdotal evidence or press reports.*"

In the following sub-sections, we elaborate on the specific negative effects as reported by stakeholders in the consultation.

Reduction of compensation

As mentioned above, a Third Party Litigation Funder is an entity that is not a party to a dispute which bears the costs of the dispute in exchange for a share of the financial recovery, if the case is won. The compensation for the claimant is thereby reduced, which is typically accepted by anybody signing a funding agreement. A lawyer/law firm form the Netherlands elaborated: "*The only negative effect [of TPLF] is the potential impact on the compensation for the claimant. In the Netherlands, a bandwidth of 15-25% of the claim has been accepted as a proportional compensation for TPLF, although this can be different under circumstances. The possibility exists to claim this compensation from the defendant, although it is still uncertain whether courts will award these claims. This negative has to be set off against the alternative situation in which an individual claimant is not able to bring their claim at all. This is therefore a net positive*".

However, several respondents referred to anecdotal evidence from cases in the US, Australia, and the UK in which the compensation was substantially (and in their view) excessively reduced for the claimants, leaving victims with only a fraction of awarded damages. Comments on the topic of compensation included:

- *"[TPLF] causes funded parties to be under-compensated, as the funder may take their return on investment, with the result that the funded party is not fully compensated for the harm they have suffered."* (EU business association)
- *"TPLF also raises particular questions in the area of personal injury … Compensation of personal injury in France is based on the concept of full compensation of the injury, i.e., the compensation awarded must cover the totality of the loss but must not exceed it. However…, the involvement of a third party who would contribute to the funding of the proceedings in return for a percentage of the compensation would deprive claimants of part of the compensation and would in fact undermine this principle of full compensation …"* (business association)

Conflicts of interest and undue influence on the substantive and procedural decisions

The issue of conflict of interest has already been discussed in the context of a previous answer to the survey (see above). With respect to potential negative effects due to conflicts of interests, and (a related concern) undue influence on the substantive and procedural decisions, stakeholders voiced concerns about funders prioritizing their returns over the claimant's best interests when considering settlements, appeal decisions, or case strategies, which could even lead them to pursuing litigation unnecessarily or rejecting reasonable settlements. Stakeholders mentioned as examples situations in which a litigation funder reportedly funded several claims of the same nature, and in the first case, rejected a settlement offer that was considered too low in order to avoid setting a precedent, even if the client of that first case would prefer to settle. It was also suggested that law firms that were closely cooperating with a funder could have an interest in a long-term relationship with the funder and therefore prioritise the interests of the litigation funder over the interests of the client (although this would be contrary to the fiduciary duties of the legal profession). Statements about observed negative effects included, for example:

- *"Litigation funders are not subject to the ethical and conflict rules that bind lawyers and are therefore able to pressure plaintiffs to settle, continue cases for larger recovery, or modify the terms of the TPLF agreement.* " (business)
- *"Cases in which litigation funders actively influence proceedings present considerable challenges, particularly in assignment/bundling models where the claimant and the funder's contractual party is different from the claim holders (the assignors) that are directly affected by the issue. Such situations raise significant concerns about potential conflicts of interest and the possibility of funders exerting undue influence to the detriment of the assignors […] Furthermore, we observe that law firms, in cases of bundling models bolstered by funding agreements, may not diligently scrutinize the bundled claims. Instead, they might prioritize generating a high volume of cases with the primary aim of reaching settlements quickly. This approach does not align with the best interests of the assignors and can compromise the fairness and effectiveness of the judicial process."* (lawyer/law firm)
- *"The risk of influence is illustrated by the structure of litigation funding agreements, which for example contractually stipulate that the financed party is only entitled to conclude a settlement with the consent of the litigation funder. At the same time, the TPLF reserves the*

right to terminate the agreement if it recommends the acceptance of a proposed settlement but the funded party rejects it. This shows that there is not always an alignment of interests between the TPLF and the financed party – after all, the funder only has its economic interests in mind, while the person seeking legal assistance is not necessarily interested in maximizing the process revenue." (organisation representing lawyers)

- *"We have heard of cases where the litigation funder, due to the structure of the funding agreement, had undue influence on the proceeding and its outcome. From our experience however there is sufficient competition on the funders[' side], especially in case of legal cases with high chances of success, so that clients or companies like ours can choose between different funding models and can ensure that there is no such undue influence."* (intermediary that brings together claimants and funders)

Funding of frivolous claims

As with the previously listed negative effects, about a quarter of respondents reported to have observed the funding of frivolous claims. This topic was also a frequently mentioned concern of business stakeholders in the interviews we conducted, and often (but not only) focused on specific areas of litigation, such as patent litigation, shareholder litigation, product liability litigation.[1530] Business interviewees described ongoing or past cases against them that were reportedly organised by litigation funders and/or hedge funds, e.g. by setting up non-practicing entities (NPEs) or by collecting and bundling the claims of e.g. institutional investors, often allegedly purchasing patents of limited value or developing novel legal theories as justification of claims regarding large and well-resourced companies, with the explicit aim of eliciting high settlements. In this process, interviewees reported that sometimes a 'shotgun approach' was used (i.e. the funding of several, unrelated but similar claims against the same defendant), as was 'forum shopping', i.e. the use of the most suitable features of national justice systems to exert the largest possible pressure on defendants. Frequently quoted was the use of German injunction procedures in this context. Also, a major Swedish company reported regarding TPLF funded shareholder claims that pressure to settle arose due to the fact that Swedish procedural law does not allow for a dismissal of cases at an early stage. Relevant comments of stakeholders included:

- *"Litigation costs in EU jurisdictions are low compared to other jurisdictions (UK, USA) … [P]atent infringement proceedings provide opportunities, in particular for Non-Practicing Entities, to misuse the threat of injunctions to extort excessive and unfair license fees (in these cases also referred to as Patent Assertion Entities, PAE). Certain courts in Europe issue injunctions based on patents almost automatically and permit claimants to offer little security deposit to enforce an injunction on appeal resulting in a significant risk of disruption to the defendant's business activities. The combination of low cost (and thus, very low risk for plaintiff and litigation funders in case of failure) and high rewards due to the extremely high leverage of an injunction, avoids that patent litigation funders bear any real risk that could deter them from financing abusive and vexatious litigation and incentivize litigation funders to invest in all sorts of patent litigation, even litigation campaigns brought in bad faith that are*

[1530] Similar concerns were voiced by an interviewee in the context of the Investor-State Dispute Settlement (ISDS) framework. While ISDS is not a focus of this study, it is notable that TPLF is a topic in the ongoing UNCITRAL Working Group III on ISDS Reform, see https://uncitral.un.org/en/working_groups/3/investor-state. Negative effects of TPF in the area of investment arbitration are explored in, e.g.: Garcia, F.J,, The Case Against Third-Party Funding in Investment Arbitration, Investment Treaty News (ITN) Issue 2. Volume 9. july 2018 (see https://www.iisd.org/itn/)

exclusively targeted at extorting unfair and excessive license fees. […] And finally, when PAEs and TPLF funders lose their cases …, the plaintiff letterbox companies are financially not able to award attorney fees / litigation costs to the defendants." (business association)

- *"Injunctions are a significant possibility that the company must prepare for. They are less common in the United States and not easy to obtain, especially for non-practicing entities. Therefore, the plaintiffs in funded patent infringement cases filed against the company are utilizing the European judicial system to gain leverage from the threat of an injunction to optimize monetary relief in another market. The vast majority of funded patent litigations filed against the company are in Germany, which provides readily available injunctions and little monetary consequences if the case is not successful, requiring increased company resources to address potential injunctions before merits are fully addressed. TPLF-funded plaintiffs are able to exploit this mechanism to make disproportionate settlement demands even though they have little actual interest or stake in an injunction."* (A large US company that is also operating in the EU and is frequently a target of TPLF funded patent infringement cases)
- *"NPEs initiate a majority of the abusive and frivolous patent infringement suits and many NPE suits are financially backed by unnamed TPLF investors hidden through shell corporations or wealth funds that may have a real interest in the outcome of litigation. TPLF has affected critical EU technology industries, including telecommunication, automotives, and semiconductors. […] The inception of the Unified Patent Court (UPC) in Europe is escalating this issue by allowing abusers to engage in multi-jurisdictional litigation and collect significant damages from European companies that allegedly infringe on European patents."* (EU business association)
- *"Frivolous claims appear only in a small, but not insignificant number of claims. I have been involved in instances where the litigating parties were ready for compromise, but the funder refused to consent, unless they received a larger share of the spoils."* (lawyer/law firm)
- *"Funding of frivolous claims: there is a tendency of collective claims being filed in the field of data protection / privacy, where amounts of 500 -1500 Euro are being claimed on behalf of the entire population of tens of millions of Dutch internet users. Claims amount to billions of Euros. Some organisations try to push for an early financial settlement."* (lawyer/law firm)
- *"I would not say that frivolous claims are funded. I would say that speculative claims are funded and that the process of putting pressure on the defendant (or claimant) to come to settlement has led to fighting of many interlocutory disputes which would not otherwise have occurred, resulting in increased costs to both parties, & hogging of court resources."* (judge England and Wales)

Other negative effects

Other potential negative effects of TPLF mentioned by stakeholders include:

- *"Massive increase in claims and risk of over litigious society"*
- *"Legal costs might increase as well as the price of insurance premiums."*
- *"…commercialisation of legal proceedings"*
- *"Distortion of the legal market"*

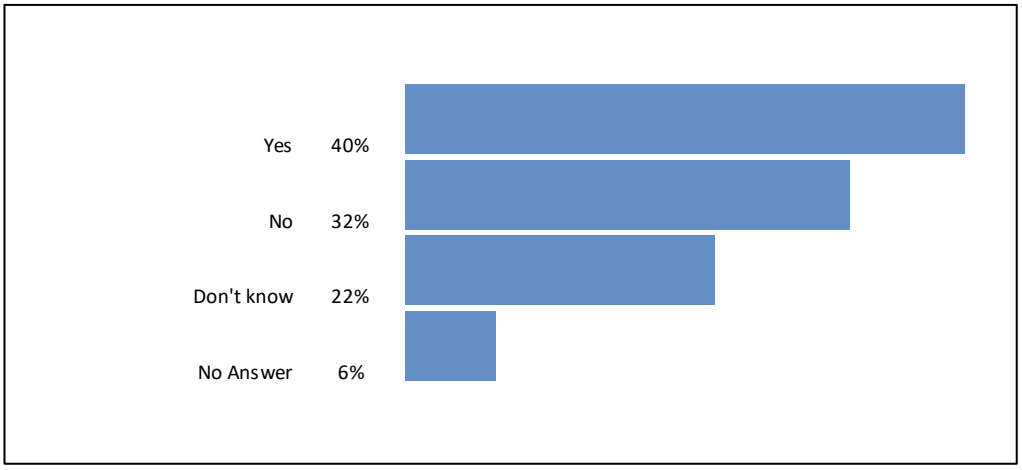
- *"… breaches of confidentiality as sensitive information about the case might need to be shared with the funder"*

4.4 STAKEHOLDER VIEWS ON ALTERNATIVES TO TPLF

4.4.1 Stakeholder views on other instruments

In the questionnaire, we also explored stakeholder views on alternatives to TPLF. When asked whether other instruments, such as legal aid, public fund, philanthropic funding, crowdfunding, or legal cost insurance, can be as effective as litigation supported by TPLF to facilitate access to justice. 40% of respondents said 'yes', while 32% said 'no' (the rest did not know/did not answer).

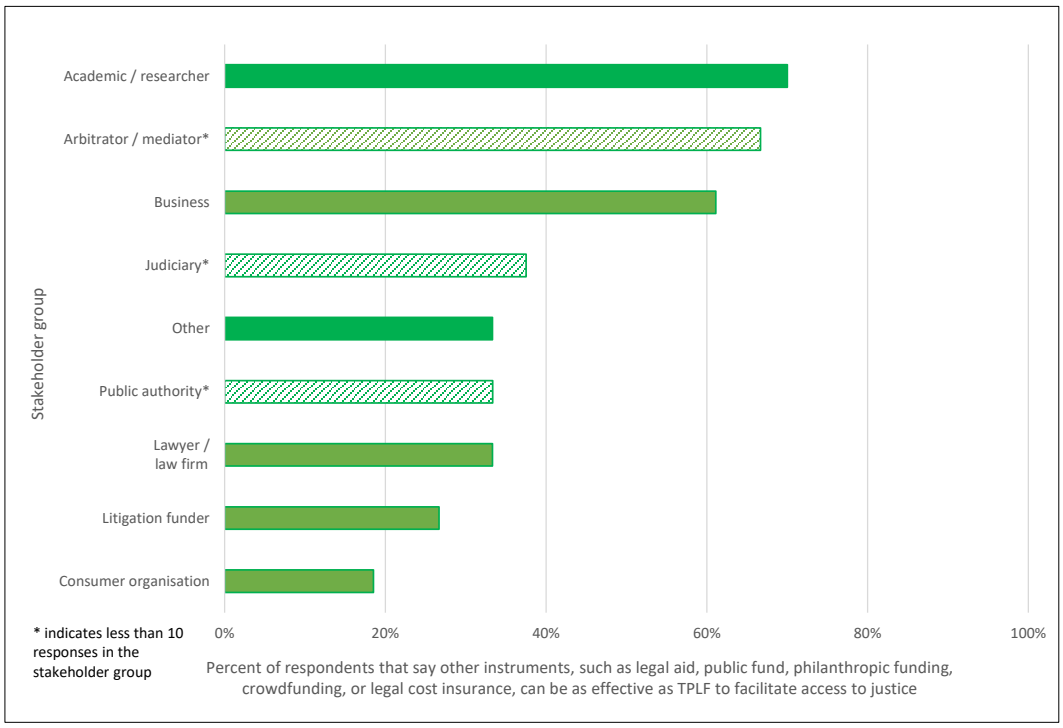
Figure 9: Would you say other instruments, such as legal aid, public fund, philanthropic funding, crowdfunding, or legal cost insurance, can be as effective as TPLF to facilitate access to justice?



N=231

Views on this varied considerably between stakeholder groups, with only the group of academics/researchers, arbitrators/mediators and businesses answering 'yes' by a large majority. All other stakeholder groups were more sceptical. This is illustrated in the figure below:

Figure 10: Would you say other instruments, such as legal aid, public fund, philanthropic funding, crowdfunding, or legal cost insurance, can be as effective as TPLF to facilitate access to justice? – Percentage YES, by stakeholder group



N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents.

Respondents who felt other instruments, such as legal aid, public fund, philanthropic funding, crowdfunding, or legal cost insurance, can be as effective as litigation supported by TPLF to facilitate access to justice argued for example that *"other forms of financial assistance or support, like legal aid or legal insurance products, have already been tested and can be also effective in providing fair access to justice"* as one EU business association put it, while not being *"driven by the profit motives as is the case with TPLF"*, as another one stated. Several respondents (mostly businesses and their associations) provided more explicit examples of instruments that worked well, in their view:

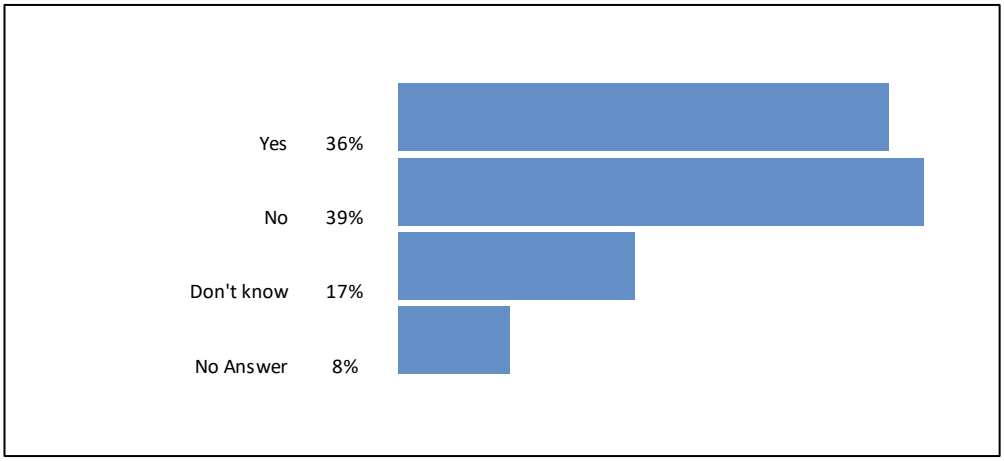
- *"Public funds, e.g. Canada, Israel. Suggest a levy on damages to contribute to the fund"*
- *"Free legal assistance is available in Spain, and other EU MS. Free legal aid is a public service that guarantees equal access to justice for those who lack the financial resources to litigate."*
- *"Contingency fee funding performs a similar function, except it requires the funder to comply with conflict of interest and other ethics rules."*
- *"Legal protection insurance can be customized with various service modules that correspond to your personal life situation. In Germany nearly 60% of all households have a legal protection insurance."*

In contrast, respondents who felt these instruments were not as effective as litigation supported by TPLF to facilitate access to justice often emphasised the limitations of the alternative instruments. For example, a litigation funder elaborated: *"Legal aid … is only granted under very limited circumstances and does not cover the adverse cost risk. Legal cost insurance … is only helpful if a policy exists and covers the specific type of dispute. Large disputes are often not covered by existing policies. Public funds do not exist and would probably be burdensome and bureaucratic to obtain and would most probably not cover adverse cost risks. Philanthropic funding seems more like a vision than reality. The same applies to altruistic crowd funding, and crowd funding against a share in the proceed is per definition TPLF."* Other stakeholders pointed out that in their areas of activity (e.g. competition law, financial services), relevant alternative instruments were typically not available and also *"do not allow to litigate at a level playing field with often financially strong and sophisticated defendants"*. And a lawyer summarised their view: *"Unfortunately no: most of those instruments are not a real alternative to TPLF".*

4.4.2 Stakeholder views on extrajudicial procedures such as ADR/ODR

Regarding the question whether extrajudicial procedures such as ADR/ODR, a public Ombudsman, a private Ombudsman or grievance systems managed by companies, can be as effective as (or more effective than) litigation supported by TPLF to seek redress, respondents were nearly evenly split: 36% of respondents said 'yes', while 39% said 'no' (the rest did not know or did not answer).

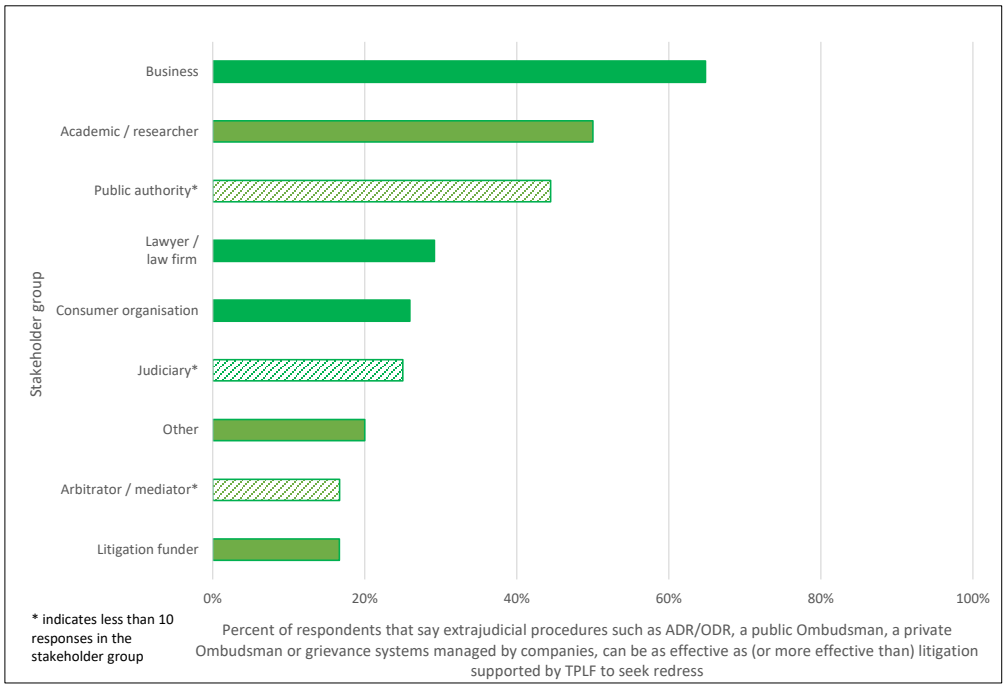
Figure 11: Would you say extrajudicial procedures such as ADR/ODR, a public Ombudsman, a private Ombudsman or grievance systems managed by companies, can be as effective as (or more effective than) litigation supported by TPLF to seek redress?



N=231

Again, views on this varied considerably between stakeholder groups, with the group of businesses, academics/researchers, and public authorities being most positive in this respect (with 40% to 60% of the respective respondent groups indicating 'yes'). In all other stakeholder groups, this share was much lower, see the following figure.

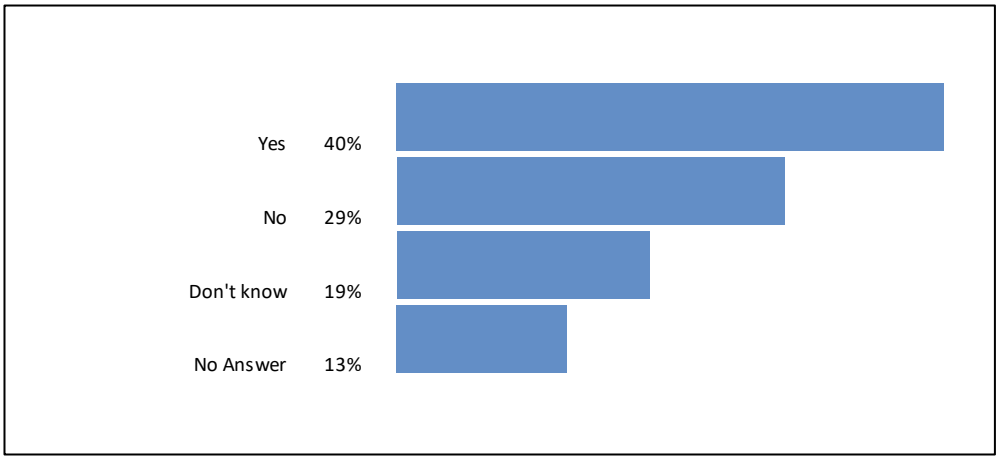
Figure 12: Would you say extrajudicial procedures such as ADR/ODR, a public Ombudsman, a private Ombudsman or grievance systems managed by companies, can be as effective as (or more effective than) litigation supported by TPLF to seek redress? – Percentage YES, by stakeholder group



N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents.

When subsequently asked whether these alternatives could result in faster and more adequate compensation for claimants, a majority of 40% answered 'yes', and 29% 'no' (the rest did not know or did not answer).

Figure 13: Would you say they could result in faster and more adequate compensation for claimants?



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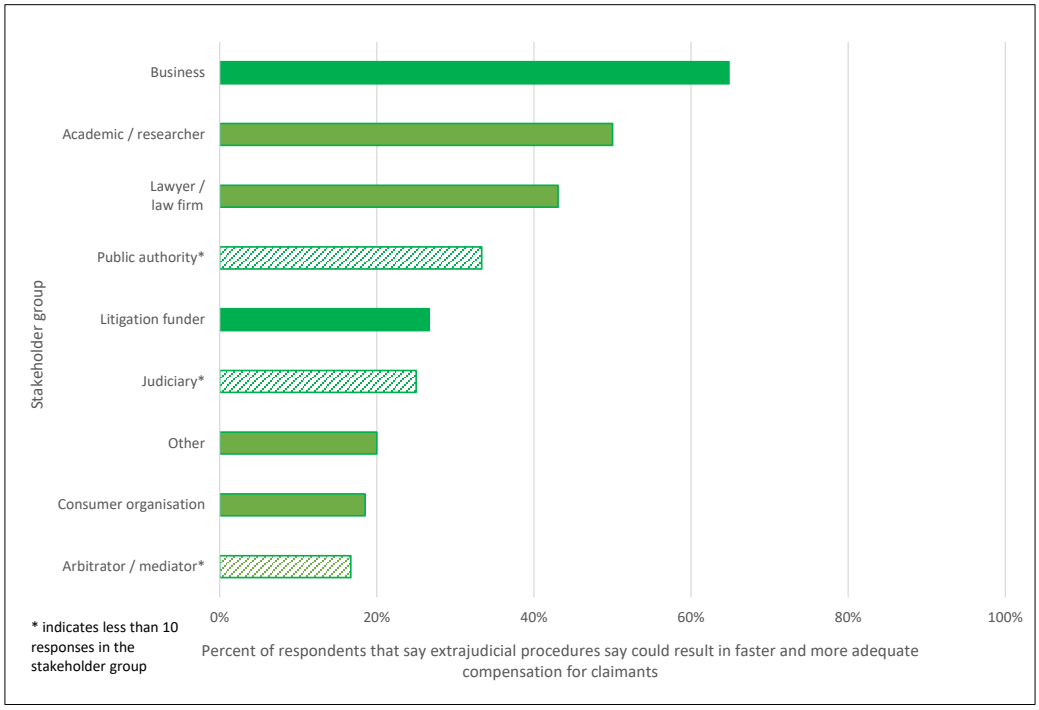
As in the previous questions, the answers varied between stakeholder groups, with businesses, academics/researchers, and lawyers/law firms being most positive in this respect (with 40% to more than 60% of the respective respondents indicating 'yes'). In all other stakeholder groups, this share was much lower, see the following figure.

Figure 14: Would you say they could result in faster and more adequate compensation for claimants? – Percentage YES, by stakeholder group



N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents.

Respondents who felt that extrajudicial procedures such as ADR/ODR, a public Ombudsman, a private Ombudsman or grievance systems managed by companies, can be as effective (and possibly even faster) as litigation supported by TPLF argued for example, that litigation as such was ineffective, and that in general negotiated solutions were preferable. Some also pointed to existing well working ADR/Ombudsman systems, e.g. in the Nordic countries. Relevant comments included:

- *"Sectoral ombudsman/ADR systems are quite prevalent in the Nordic countries, including for healthcare cases. The consensus for all the stakeholders there is that they provide faster , easier and less contentious redress to consumers and patients, while allowing regulatory agencies to better assess the issues that caused the damages in a more objective way."* (EU business association)
- *"The French Government has set up a non-judicial redress scheme for healthcare personal injury cases, which provides, if certain conditions related to gravity are met, an alternative remedy to judicial claims. This fast-track proceeding does not require legal representation and allows claimants to benefit from a free of charge expert proceeding and, if the claimant's right to indemnification is established, compensation either on public funds or pursuant to an amicable offer that must be made by the party which liability has been established."* (business association)

- *"Consumers will get reimbursement for their damages more quickly by ADR mechanisms and ombudsman proceedings than by filing a lawsuits. Usually there are no cost or only minor cost for the consumer linked to these proceedings" (*business association).
- *"Paid litigation is one of the most inefficient forms of judicial administration available; turning it into a business cannot logically reduce litigation, but [will] instead increase it; other mechanisms are and should be available to address legitimate disputes.* (other stakeholder)
- *"Litigation tends to be long and burdensome. In Germany, the average duration of litigation through 2 instances is 4-5 years. This is highly ineffective and unsatisfactory to all parties involved. ADR or special grievance systems can be much more effective, which is why we as a litigation funder offer to fund such alternative procedures as well. The challenge is that most lawyers still prefer the traditional course of litigation."* (litigation funder)
- *" ADR mechanisms offer a flexible, cost-efficient and fast settlement procedure. They tend to be designed to avoid the involvement of third parties that may have a vested financial interest in the outcome and are less confrontational for the parties than court proceedings can be. ADR schemes also help keep legal expenses at a minimum. Therefore, ADR mechanisms should be the first approach to resolving a dispute prior to permitting the initiation of court proceedings."* (EU business association)
- *"Such proceedings could facilitate access to justice at low cost for those people who really think that they have suffered damage from unlawful behaviour. What we often see now, is that claims are blown out of proportion because they are funded and the litigation funder needs a class that is sufficiently large to recover the costs. This constitutes an unhealthy incentive to inflate claims and the number of claimants."* (lawyer/law firm)
- *"It depends whether the litigation case falls within the scope of a public ADR system and of the funding and resources of such system."* (lawyer/law firm)
- *"ADR/ODR procedures are low cost, easy and quick procedures thus we believe that representative actions can be the last resort for consumers. As far as TPLF is concerned we believe that it is too complicated so as avoiding conflict of interests is concerned."* (consumer organisation)
- *"Negotiated solutions are more adequate and can resolve more adequately disputes than litigation/arbitration."* (organisation representing lawyers)
- *"All can be effective in appropriate cases, but none can completely replace the need for TPLF."* (lawyer/law firm)

In contrast, respondents who felt these extrajudicial procedures were not as effective (and/or faster) as litigation supported by TPLF often emphasised the limitations of these systems, e.g. that most ADR procedures are reliant on cooperation of defendants and existing ADR systems are typically not sufficiently resourced to deal with mass claims. In more details, respondents elaborated, e.g. as follows:

- *"Those procedures are only benefiting the interests of the companies funding them."* (consumer organisation)
- *"All alternative procedures (as well as publicity) may have positive effects, but if litigation is necessary, funding may be needed."* (lawyer/law firm)

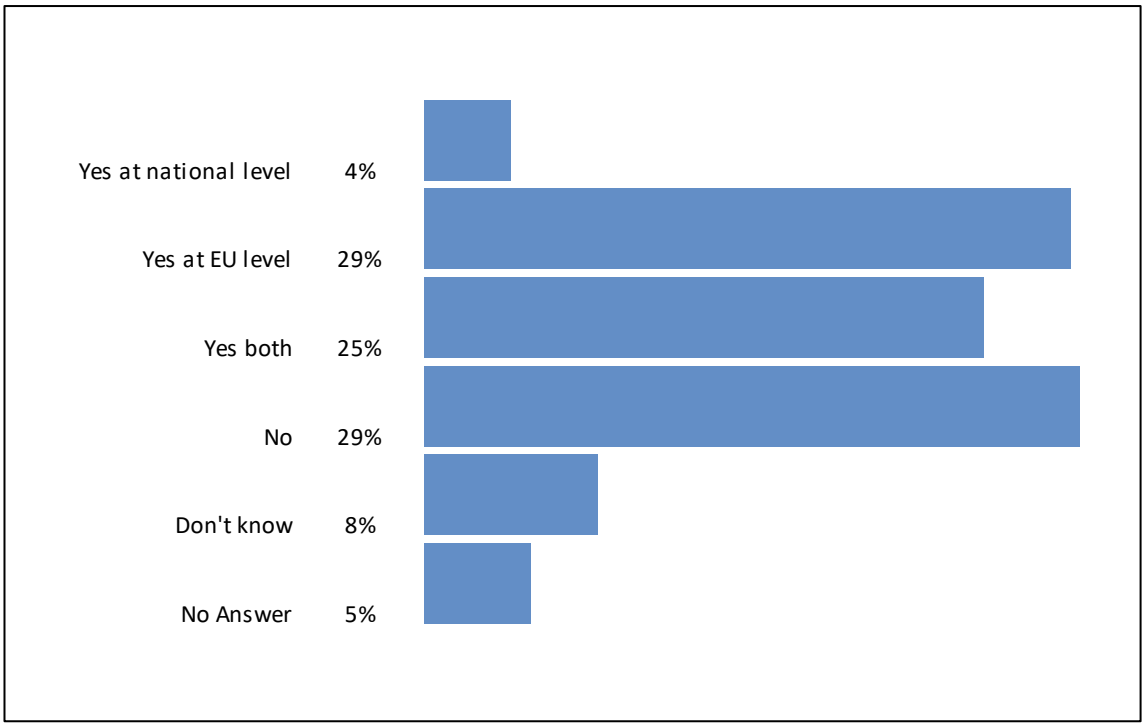
- *"The ADR/ODR system and other procedures mentioned are currently not at capacity for collective action"* (consumer organisation)
- *"These systems provide no class wide solutions and therefore allow offenders to get away with it. Moreover, these solutions lack the important legal/procedural safeguards provided for [by] EU law, such as fair trial, fair play and the possibility to appeal and/or to refer questions to the ECJ."* (lawyer/law firm)
- *"ADR/ODR might only work, potentially, if they were available as opt-out actions for consumer representatives. Otherwise they will remain a solution for a marginal number of consumers that represents a drop in the ocean of consumers aggrieved by a mass infringement. Every system in Europe which has empowered Public Ombudsmen to act to compensate consumers has been a complete failure. There isn't a single Member State that has adopted this system where this has led to the compensation of consumers in a single mass damages case."* (consumer organisation specialising in the bringing of mass claims)
- *"Extrajudicial procedures are too reliant on cooperation of defendants and still typically involve claims managers in other jurisdictions."* (litigation funder)
- *"ADR/ODR is one of the important and necessary pathways available to consumers to enforce their rights. ADR/ODR provides consumers with a simple, fast, and cost-effective route to solve their disputes and can be particularly relevant for low-value claims. At the same time, not all ADR/ODR entities have the resources and capacity to deal with collective claims, and in certain cases traditional litigation would provide consumers with the most adequate level of legal protection and enforceability. At the same time, grievance systems managed by companies can by no means be considered as equal or equivalent to consumer ADR/ODR."* (EU consumer organisation)
- *"We do not know of any large collective abuse of savers and investors where ADR or ombudsmen would have provided or even favored any redress."* (EU consumer organisation)

4.5 STAKEHOLDER VIEWS ON THE NEED FOR REGULATION AND ASSESSMENT OF POTENTIAL MEASURES

4.5.1 Need of regulation

In the final section of the questionnaire, respondents were asked whether they saw a need for regulation of TPLF at national or EU level. 29% of respondents answered 'yes, at EU level', 25% answered 'yes, both' (EU and national level), 4% answered 'yes, at national level', bringing the total share of respondents who see a need for regulation to 58%. In contrast, 29% saw no need for regulation ('no') and the rest did not know or did not answer.

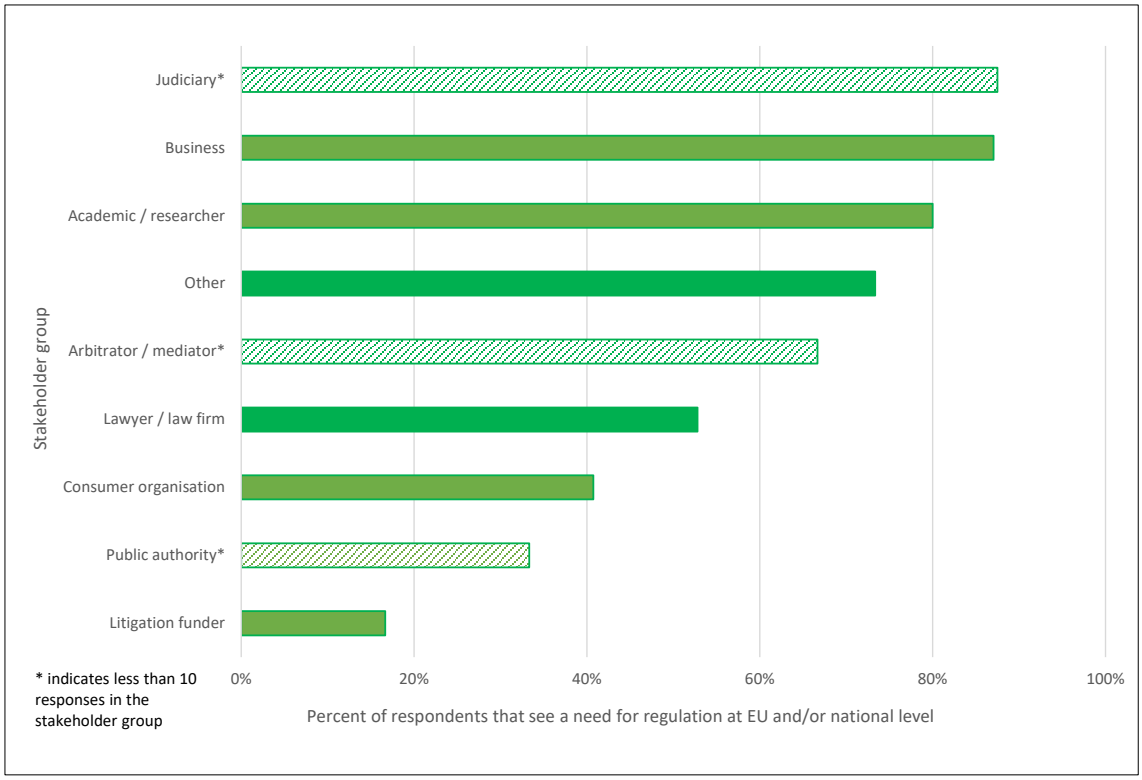
Figure 15: Do you see a need for a regulation of TPLF at national or EU level?



N=231

In the stakeholder groups judiciary, business, academics/researcher, other, and arbitrator/mediators more than two thirds of respondents saw a need for regulation either at EU or national level or both, and more than half of the responding lawyers/law firms. In contrast, in the stakeholder groups consumer organisations and litigation funders there was only a minority for any form of regulation (see following figure). A majority of public authorities said 'Don't know'.

Figure 16: Do you see a need for a regulation of TPLF at national or EU level? – Percentage YES (at EU and/or national level) by stakeholder group



N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents. The share shown refers to the sum of respondents who answered 'yes, at EU level', 'yes, both' (EU and national level), 'yes, at national level'.

Those who argued that there was a need for regulation often referred to the negative effects they believed to be associated with TPLF (see section above), and provided a summary of their arguments, a selection of which are provided in the following:

- *"There is a case for regulating TPLF on the following major justifications:*
  (1) regulating a financial service that operates in total freedom and provides services to often vulnerable parties;
  (2) regulating a service that has a role in the justice system just as lawyers;
  (3) avoiding abuses in litigation also via forum shopping and instrumentalization of access to justice for obscure objectives;
  (4) avoiding legal fragmentation in the internal market;
  (5) granting some protection against foreign interference via our judicial system." (EU business association)
- *"Due to near-automatic injunctions and lack of TPLF disclosure, TPLF regulation at the EU level is paramount to safeguard innovation and business. While national regulation is a positive step, inconsistent policy among EU Member States would create an undesirable business environment for the company and other similar businesses that operate across multiple EU Member States. EU-wide regulation would allow the company to appropriately understand the risk it faces. Moreover, a consistent TPLF policy prevents a specific Member State's court*

system from being overwhelmed due to forum shopping by TPLF-backed plaintiffs. Lastly, an EU-wide regulation would provide greater consistency with the Unified Patent Court ("UPC"), where it is predicted that TPLFs will heavily invest in the future." (A large US company that is also operating in the EU and is frequently a target of TPLF funded patent infringement cases)

- *"The low-risk-high-reward environment [...] where TPLFs can operate behind the scenes without any transparency, prevents adequate assessment by courts of potential conflicts, creates incentives to bring abusive litigation, impacts the ability of innovators to focus on their core business, and threatens Europe's position as an innovation hub [...]. The framework in the EU needs to be amended to provide for transparency into the presence of litigation funding in patent litigation. Creating such transparency will be one step towards limiting abusive and vexatious litigation campaigns against innovators in Europe."* (business association)
- *"The Medical Technology industry is particularly affected by the risk of baseless cases being funded by international funding firms forcing them into pre-trial settlements due to the observed link between Third Party Litigation Funding and class actions, which in Europe will generally take the form of representative actions under the Representative Actions Directive (RAD) once all member states have implemented it, and the fact that the Product Liability Directive is one of the substantive pieces of legislation that are included in the scope of the RAD. The Product Liability Directive provides that "innovative medical devices" are complex by nature, and in those cases it foresees the reversal of the burden of proof, putting manufacturers of innovative medical devices in great disadvantage in cases where they will be exponentially out-funded by the plaintiffs. It is important to note that over 90% of medical device manufacturers in Europe are SMEs."* (EU business association)
- *"TPLF should be carefully regulated to avoid the potential risks of these systems. Justice must prevail and the intervention of financial third parties only interested in the revenues [is] usually [contrary to the achievement] of a fair judgment."* (business other than law firm/litigation funder)
- *"Regulation of funders seems a good thing. Approval and control of third-party funders, modelled on the regulation of financial institutions, seems necessary. Terms and conditions of commercial litigation funders appear to be in need of regulation if they aim at an inadequate share of the profits and/or undue influence on the party's conduct of the case. Regulating the market, i.e. the players involved, at European level would limit financial risks and guarantee the solidity and "seriousness" of third-party funders. On the other hand, contract regulation should be left to the free negotiation of the parties involved. Regulation of the procedural aspects of third-party financing raises issues that cannot be resolved at European level."* (academic/researcher)
- *"Without regulation the current reality is that funders are so deeply involved in bringing mass damage claims (including in the legal strategy, settling decisions and the like) that, in my view, the interest of the class are no longer safeguarded. Additionally, I have observed a small but significant number of funded cases that should not have been brought, that warrant some type of minimum regulation. Specifically for class actions there is a need for court supervision over control and conflicts of interest in individual cases. Since the TPLF market is international by nature regulation should be done at the supranational level."* (lawyer/law firm)
- *"This seems like an area ideally regulated via a Directive, ensuring authorization and supervision of funders (namely to ensure transparency and compliance with money laundering*

and anti-terrorism funding provisions) and the functioning of the internal market, so that a funder registered and regulated in one Member State needn't re-register in other Member States. But Member States should be allowed to make national choices about whether to allow funding at all and to set limits, e.g. on funder remuneration of cases litigated before their courts." (lawyer/law firm)

While stakeholders (especially from the business side) were partly in favour of a comprehensive regulation of TPLF in line with the draft directive annexed to the EP resolution, others, including minorities of consumer organisations and litigation funders, were in favour of a 'balanced' or 'light touch' regulation of TPLF, which would provide basic, not too specific rules, but be careful to keep TPLF a viable option:

- *"We are in favour of regulation of TPLF at EU level, avoiding fragmentation, … in order to bring greater guarantees, some safeguards and greater transparency to the process, but without creating unnecessary barriers. Over-regulation might result in adverse effects, including fewer funders being willing to fund collective actions of consumer organisations, thereby reducing consumer access to justice. […] We are, therefore, in favour of a balanced solution that safeguards the ultimate goal of collective actions, but at the same time does not irreparably deter funders. Without accessible TPLF, many meritorious claims will remain unaddressed, denying consumers the opportunity for justice and undermining the enforcement of their rights."* (national consumer organisation)
- *"I have concluded that regulation which is prescriptive is likely to have a damaging effect on access to justice and the development of beneficial third party funding markets in those jurisdictions where funding is still in its infancy. … the optimum model is "light touch" regulation mandating minimum content in TPLF agreements, and ensuring thorough visibility and understanding of the terms by the funded party."* (reporter for the ELI Project on Third Party Funding of Litigation)
- *"Cleary certain level of regulation is desired, mostly on disclosure and conflicts of interests, but regulating a contract to the level [of] pricing and other clauses I believe it is not desirable at this point, especially because it is clear that regulators do not understand completely how funding works and the risks attached to it. It is like trying to regulate how much lawyers can charge for their services. You cannot require a funder fiduciary duties, but at the same time require no level of control over the case."* (litigation funder)
- *"Regulation that allows for all funders acting in Europe to be identified and vetted will allow our industry to be more legitimate and cast away any doubt as to: Origin of funds, purpose of the funding, conflicts of interest risk and availability of the funds."* (litigation funder)
- *"There is a good argument for some sort of gatekeeping function in the regulation of TPLF. It should not be too heavy handed because you might discourage funders from ever coming to [our country]. Basically funders should register and agree to be bound by the rules. […] Some level of court supervision of LFAs in line with the Representative Actions Directive is appropriate. There will probably be some specific requirements about LFAs and the court will have to ensure they are observed. Cap on the funder's share of the damages? This depends on whether there should be a single rule for all litigation funding. There is a strong argument for no cap where the funded party is a large commercial organisation that can look after its own interests. In representative actions the argument for a cap is much stronger."* (member of the judiciary or organisation representing them)

- *"Regulation of TPLF is required, ideally only at EU level (Regulation), but failing that at both EU and national level, or at least national level. Such regulation is required to allow TPLF and to establish best practices and standards under which TPLF can be provided transparently, adequately and proportionately, in full respect for the independence of the consumer representative and ensuring absence of conflict of interests. There should also be guidelines on adequate remuneration, while allowing room for the necessary case-by-case assessment, avoiding absolute or rigid rules that might lead to under- or over-remuneration in individual cases.* (consumer organisation specialising in the bringing of mass claims)

Stakeholders who saw no need for regulation of TPLF at EU or national level mostly argued that in their view there was no evidence of negative effects of TPLF and that over-strict regulation could deprive meritorious litigants of financial resources to access justice and enforce their rights, as illustrated by the following examples:

- "*Regulation should be aimed [at] solving problems and [be] proportional to the problems found. Many of the perceived negative effects are non-existent in the Netherlands and seem mostly invented by large [corporations], their lawyers and their lobbyists. A good example concerns the so-called danger of portfolio funding which is a non-existing phenomenon in [our country].*" (lawyer/law firm)
- *"If it is a regulation as suggested in the EP Resolution, our answer is "no". We do not believe there is an actual need to regulate the industry to such an extent. European and national consumer protection laws and general civil law rules already provide sufficient safeguards and protections against any risk of an abuse that could result from the activities of third party funders."* (litigation funder)
- *"I have never heard a credible objection to litigation funding in over 15 years' exposure to the industry and certainly never one that rises to the level of requiring regulation to resolve. [A key objection is that TPLF] promotes bad litigation because funders are just trying to get a settlement, even though the claim is bad. This is demonstrably false: funders see far more cases than they can fund - they have no need to seek out bad "shakedown" claims - any funder who funded poor claims would be out of business very quickly - i.e. the market would correct for this. […] Almost all the objections to TPLF come from large defendants and/or their lawyers. This is a sure sign that the industry is achieving. If there's a case for regulation, it is probably to provide - simply - that (a) if a case is funded, that fact should be disclosed to the court, (b) if a funder seeks to control (TBD) a claim then it will be unable to enforce its agreement beyond its capital outlay plus bank interest and (c) if a claim is funded then the default position is that adverse costs will be awarded against the claimant if unsuccessful. These measures would address almost all legitimate concerns about control and waste."* (litigation funder)
- *"Currently there are no signs of abuse. The call for legislation comes from parties / associations that want to prevent effective enforcement of claims as in the last 10 years the increase of TPLF for the first time lead to a more effective enforcement of EU law and rights enshrined in EU treaties."* (consultancy focusing on cartel claims)
- *"[We are not] against regulation per se, but it would have to be correct and fill a valid regulatory need. So far, the practice of Litigation Funding has been present in the EU since over 3 decades and without material adverse public issues, hardly any disputes between clients and Funders. Compare that to the long [queue] for the bar association's regulatory bodies handling lawyer invoice complaints. […] None of the regulatory proposals and worries have truly made a*

convincing case that these either are necessary /not superfluous because other laws already exist which regulate a certain concern, or they simply address a non-existing problem." (litigation funder)

- *"Corporate and private entities (legal and natural persons) should be free to enter into contracts as they wish. No particular downside of TPF. We do not at all accept that the premise underlying the proposal of the European Parliament is correct. It is also important to note that in the Nordic context TPLF has so far only been relevant for commercial claims and the majority of the funded claims that we are aware of are single claims (not bundled)."* (litigation funder)
- *"In a commercial context, when a funding agreement is negotiated between sophisticated commercial parties, there would appear to limited need for any regulation. The funding market has so far worked well in [our country] and competition between funders counteracts any risk of abuse. If any regulation is needed it would be better soft-law and market guidelines would be developed as a first step."* (lawyer/law firm)
- *"No, we do not see the need for any additional regulation of TPLF at either the national or EU level. At the very least, we do not see a need YET. The existing frameworks are functioning well, providing adequate oversight and ensuring that TPLF operates in a transparent and ethical manner. Over-regulation might result in adverse effects, including fewer funders being willing to fund collective actions of consumer organisations, thereby reducing consumer access to justice."* (EU consumer organisation)

There were also stakeholders that argued for other solutions, such as a public fund:

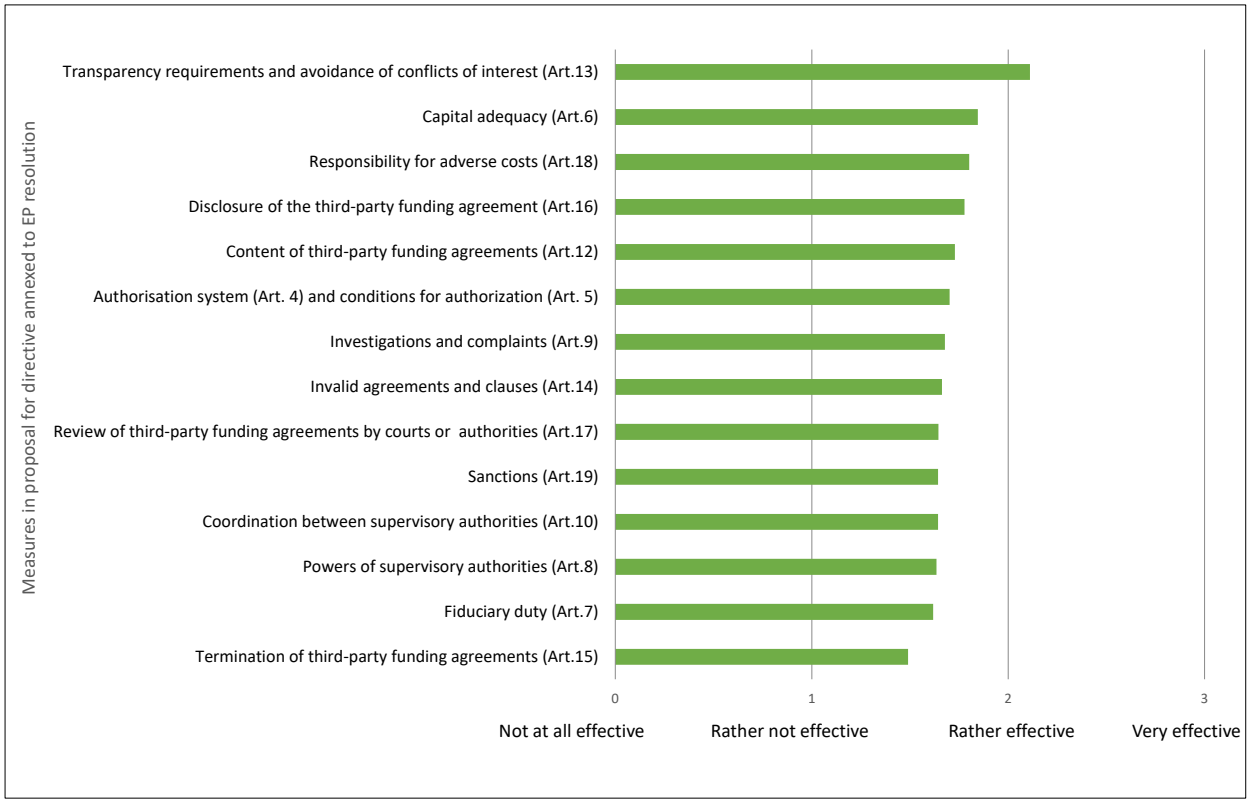
- *"The setup of procedural framework at the EU level for regulation, not only funding of collective actions by third parties, but the way collective actions are funded in general, would be of the greatest benefit. It would be most normal for the collective interest to be protected by public funds (a public fund). After all, this type of case protects not only the collective interest of the group (consumers) that suffered damage, but also the public interest by easing the work of the judicial system, significantly improving the level of consumer protection and ensuring the proper functioning of the market."* (consumer organisation)

Finally, an arbitration institute wanted to emphasise that TPLF is used in very different contexts that potentially required different solutions and suggested: *"We perceive that the funding of commercial cases in an arbitration context needs to be understood and dealt with based on its own special features. We see a risk that any potential discussion on regulation lumps all kinds of disputes together."*

4.5.2 Effectiveness of measures in the draft directive annexed to EP resolution

The final set of questions related to the effectiveness of the measures in the draft directive annexed to the EP resolution to address potential undesirable features of current TPLF practices (if any). A list of measures contained in the draft directive annexed to the EP resolution was provided and respondents were asked to indicate for each measure on a four-point Likert scale whether they considered the measure to be 'not at all effective', 'rather not effective', 'rather effective' or 'very effective'. We assigned an effectiveness score to each item, ranging from 0 for 'not at all effective' to 3 for 'very effective', and on this basis calculated a ranking of the measures in terms of effectiveness. Note that this approach does not take into account stakeholders who did not answer or who answered 'don't know'. The figure below shows the results, with 'Transparency requirements and avoidance of conflicts of interest (Art. 13)' being the most highly ranked measure, followed by 'Capital adequacy (Art. 6)' and 'Responsibility for adverse costs (Art. 18)'.

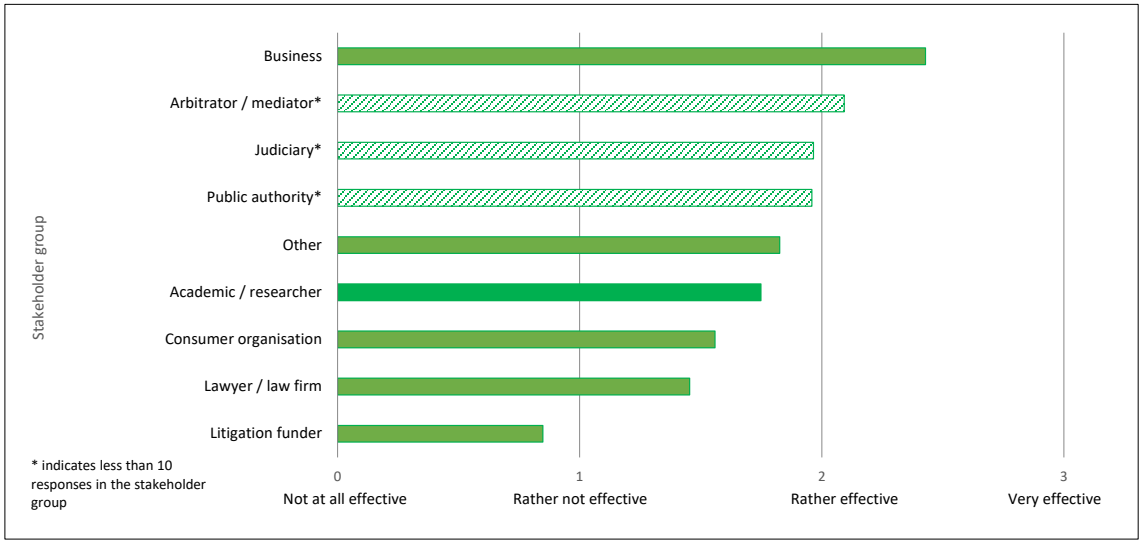
Figure 5: What is your view regarding the effectiveness of the measures in the proposal for a directive annexed to the EP resolution… (ranked by average effectiveness score)



N=231. To create the figure, we assigned an effectiveness score to each item, ranging from 0 for 'not at all effective' to 3 for 'very effective', and on this basis calculated a ranking of the measures in terms of effectiveness. Stakeholders who did not answer or who answered 'don't know' are not taken into account.

Only transparency requirements were considered on average to be 'rather effective', while all other measures were considered on average to be less effective. However, these moderate average scores for effectiveness and the relatively small differences between measures in the figure above are to some extent the result of the different views on effectiveness between stakeholder groups, with the result that conflicting scores cancel each other out. For the following figure, we have therefore calculated the average effectiveness score across all 14 measures by stakeholder group.

Figure 5: What is your view regarding the effectiveness of the measures in the proposal for a directive annexed to the EP resolution… (average effectiveness score by stakeholder group, all 14 measures)



N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents. To create the figure, we assigned an effectiveness score to each measure, ranging from 0 for 'not at all effective' to 3 for 'very effective', and on this basis calculated an average effectiveness score across all 14 measures for each stakeholder group . Stakeholders who did not answer or who answered 'don't know' are not taken into account.

The figure above shows that the differences in average effectiveness scores between stakeholder groups are much larger than the differences in scores between measures when looking at the full sample. Only businesses and their organisations and the small number of responding arbitrators/mediators consider the measures in the draft directive annexed to the EP resolution on average to be 'rather effective'. All other stakeholder groups give a lower average effectiveness rating to the measures, with litigation funders being the most negative, rating the measures on average as worse than 'rather not effective'. As this assessment is to some extent consistent with attitudes towards the need for regulation, the following presentation of comments on the effectiveness of specific measures will distinguish between stakeholders who are in favour of regulation and those who are not.

Stakeholders that considered that there was a *need for regulation* and commented on the effectiveness of measures, can be subdivided into four main groups:

1. Respondents who consider the draft directive annexed to the EP resolution largely to be effective as it stands;
2. Respondents who see the draft directive annexed to the EP resolution as starting point and propose additional measures, refinements or requirements to make potential legislation more effective;
3. Respondents who think regulation is needed but find the draft directive annexed to the EP resolution excessive;
4. Respondents who think regulation is needed but find the draft directive annexed to the EP resolution not well defined or too general.

In the following, we will separately discuss all four main groups.

As mentioned, the first group of respondents consider the draft directive annexed to the EP resolution to be largely effective as it stands. Examples of relevant comments include:

- "*We believe that all of these safeguards proposed may be very effective.*" (business association)
- "*The proposed directive appears to be a well-conceived, cohesive, and coherent regulatory framework for litigation funders. Notably, it addresses critical issues such as the concerning level of control exercised by litigation financiers and potential conflicts of interest … and the requirement for the disclosure of litigation funding agreements … With the establishment of such clear regulations there seems to be no immediate need for creation of new specialized authorities or courts.*" (lawyer/law firm)

The second group of respondents that are in favour of regulation see the draft directive annexed to the EP resolution as a starting point and suggest additional measures to make potential legislation more effective (additional measures are the subject of a separate question and are discussed in this context, see below), or suggest specific refinements, for example:

- mandatory disclosures, e.g. by providing "*defendants an avenue to request the funding agreement*";
- covering "*service providers offering litigation financing as their principal activity but also those offering such activities as an ancillary service*";
- covering the situation of intermediaries "*when the financing agreement is not concluded with the beneficial owner of the claim but with a legal service provider, such as a debt collection company, a lawyer or a qualified entity representing consumers*";
- indicating the "*concrete obligations of litigation funders towards the parties*";
- clearly separating "*the relationship between the private funder and the client from the relationship between the client and the lawyer, and to avoid any influence of the funder over the lawyer*";
- requiring that a litigation funding agreement "*should include a clause reaffirming the autonomy of the funded party in choosing its lawyer*";
- prohibiting the litigation funder from "*influencing a judicial settlement in any way, regardless of the stage at which the settlement is concluded and regardless of its conditions*".

In contrast, a considerable number of respondents who think regulation is needed found already the measures included in the draft directive annexed to the EP resolution to be excessive. This third group often argued that the proposal was too prescriptive and that it was important to avoid creating unnecessary barriers that deter funders, and make TPLF unattractive, thereby reducing access to justice. Suggestions that were provided included:

- the proposal does not consider "*the reality … that most of the funded parties are usually professionals that are able to negotiate at arm's length with the funders*";
- the proposal "*should be revised so as not to make the regime too complex and demanding*";
- "*burdens involved in establishing and funding supervisory authorities are likely to be difficult to justify*";

- *"disclosure of more than the fact of funding is highly problematical";*
- several articles of the proposal *"are completely excessive and can even be illegal under EU and national law because of controlling price and contractual conditions";*
- the proposal *"does not adequately provide mechanisms for the TPF to terminate the agreement if there is bad faith or change in circumstances (e.g. claimant withhold material information)";*
- *"control of funders should remain the prerogative of the courts, i.e. the courts should have the power to control the funding and to declare null and void a contract that has not been concluded in compliance with mandatory requirements or where the interests of the consumer are otherwise prejudiced".*

Finally, among the respondents that saw a need for regulation were a fourth group that found the proposal or aspects thereof (including definitions) to be insufficiently elaborated. These respondents pointed out, for example:

- *"The proposal appears to be based on a scenario which is from my perspective too "simplified": One funder, one claimant or a group of claimants and potentially one party in between (at max). As per our experience especially in commercially large cases with large groups of claimants there are more entities involved. It is not very clear which entities are intended to be subject to the regulation."* (intermediary that brings together claimants and funders);
- *"The aim and purpose of the draft is correct, however, most of the provisions in the draft directive are much too vague and unsubstantiated"* (lawyer/law firm or their organisations).

Stakeholders who considered that there was *no need for regulation* and commented on the effectiveness of the measures in the draft directive annexed to the EP resolution mostly argued that these measures were sub-optimal in wording, that there were no real problems with litigation funding and that the suggested measures were mostly examples of regulatory overreach. Examples of relevant comments include:

- *"Not effective. The wording is sub-optimal and/or based on assumptions or concerns that suggests these concerns are valid and needs addressing when in fact the concern has no basis in fact, is based on a misunderstanding of the practice or is simply in contravention of the aim of access to justice and the legal right to contract between professional parties."* (litigation funder)
- *"... certain minimal requirements including the terms of funding may be useful, but some of the provisions mostly seem intended to scare away litigation funders by making funding very burdensome ...* (lawyer/law firm)
- *"The legislation overreaches dramatically and in ways that will render meaningful numbers of cases simply unfundable. The instant effect would be a contraction of the market."* (litigation funder)
- *"Any regulation should ... foresee safeguards to ensure that regulation that is intended to protect the interests of claimants cannot be utilized as a tool to undermine proceedings by defendants.[...] Provisions aiming at the protection of claimants must not burden them with an additional procedural risk, as this would run counter to the objective of the regulation."* (business)

- *"Excessive regulation will make TPLF unattractive, reducing the availability of funding for collective redress cases. These cases require substantial financial resources that consumer organisations often cannot obtain any other way. Without accessible TPLF, many meritorious claims will remain unaddressed, denying consumers the opportunity for justice and undermining the enforcement of their rights."* (EU consumer organisation)
- *"I believe statutory public regulation will be very costly and do more harm than good and would serve the interests of giant corporations rather than the public interest."* (academic/researcher)
- *"Public funding is the only fair solution for both consumers and businesses. Member states should be obliged to fund such cases and not leave funding to third parties. The whole procedure proposed by EP is too complicated and we believe that because of its complexity it can be violated."* (consumer organisation)

Specific comments on particular measures in the draft directive annexed to the EP resolution included the following:

- *"the inclusion of arbitration entails significant and unnecessary consequences for commercial arbitration in the EU. It is difficult to foresee that this would work in the context of commercial arbitration, arbitrations may be moved to other jurisdictions outside the EU."*
- *"authorisation systems and processes are only as effective as those running it and the resourcing behind it. A better process would be to embed this into the court process where not only the expertise but the infrastructure already exists, along with impartiality."*
- *"capital adequacy … is a hugely complex issue, that encompasses a holistic methodology and process that needs proper consideration and construction. The lessons learnt from capital adequacy in banking (Basel) and insurance (Solvency II) are hugely valuable but the earlier versions of Basel I and Solvency I show how capital adequacy done badly can lead to issues that may impact all stakeholders and others for the worse."*
- *"disclosure of funding agreements to defendants has no benefit to protect the integrity of the litigation. That role can be undertaken by the courts or an independent administrative authority." "[The relevant provision] should be amended to ensure that any information provided to the defendant does not enable the latter to draw conclusions regarding the procedural strategy of the claimant (including, for example, information on whether an appeal is covered by the funding agreement), or regarding any other business secrets."*
- *"the concept of a fiduciary duty, like between a board member and shareholders, is also very odd in this context… Many of our clients are big commercial institutional actors with big legal teams and a much bigger budget than ours. It is also very perplexing/contradictory to give a funder a fiduciary duty and simultaneously remove all its control over the relationship and the relevant proceedings."*
- *"content of the agreement: this proposal, on reversing the so-called waterfall, and denying priority for funders shows a complete lack of understanding of the realities of the funding market. In practice such a rule would make funding impossible in the majority of cases."*
- *"prohibiting funders from taking a minimum return will mean certain cases are simply unfundable. Why would you not simply let the market sort this out?"*
- the provisions on *"invalid clauses … impinges on commercial freedom, and is also difficult to apply in practice."*

- *"courts are poorly-equipped to assess whether a return to a funder is "disproportionate" because there's so much more that does into this than merely looking at the case."*
- *"termination of agreements is a natural provision of any commercial contract and there are sometimes valid reasons for doing so - in particular where the funder may have been misled or misrepresented information.*

A subsequent question asked respondents whether they would suggest any other potential measures considered to be effective.

Respondents who felt there was a *need for regulation of TPLF* made a number of additional suggestions. Some reiterated key points of the draft directive annexed to the EP resolution but provided further reaching suggestions, e.g. regarding mandatory transparency/disclosure (as discussed before). Other proposed fully new measures. Examples of comments provided are:

- *"Mandatory disclosure of at least certain elements of a third-party funding agreement, including the name(s) of any party with a financial interest in the litigation and details about the financial interest and repayment structure, including magnitude, as well as other key terms would be beneficial …"* (business)
- *"Transparency is also needed to assess where the funders' money is originating from, in order to protect the greater public interest and safeguard EU security and stability. Consider further measures (e.g. sanctions policy or foreign direct investment policy) that address the risks posed by the financing of litigation funding by sovereign wealth funds, nefarious foreign actors, and/or as a tool to launder money or circumvent trade sanctions."* (EU business association)
- *"litigation funders should be obliged to form financial provisions for any litigation losses, especially as the litigation costs in complex proceedings can significantly exceed the amount in dispute and thus any profit from the litigation. In the event of a settlement, litigation costs can also exceed the income generated."* (business association)
- *"Propose that a funder which is found not to abide by the rules, loses its authorization to fund future claims."* (lawyer/law firm)
- *"In the context of cross-border third-party litigation funding, it is worth questioning whether funders should be required to have a qualified representative both in the jurisdiction where the proceedings are taking place and in the country of the funded party to ensure adequate protection Additionally, another issue that could arise is whether funders should be mandated to take out insurance to mitigate the risk of potential insolvency."* (member of the judiciary)
- *"From my point of view, codes of ethics of the legal profession and the control by the bar associations are also very important."* (lawyer/law firm)
- *"Accompanying law is needed to ensure that litigation funding is compatible with tax and grant law for the plaintiff. We are currently put off by the ambiguities in these areas of law."* (consumer organisation)
- *"I would be for a Regulation instead of a Directive since the market is transnational. Regulation should focus on minimum standards for funders and on taxing possible gains. Alternatively a public fund would be a better solution since this would provide real access to justice."* (lawyer/law firm)
- *"TPLF exists to take advantage of an underlying flaw in the way certain cases are litigated. Look at the types of cases that are funded, and you'll likely see areas of law where reform is*

needed. In the patent context, for example, TPLF exists because of flawed damages calculations. If you reform patent damages to reflect the plaintiff's actual suffered harm - without regard to the value of the defendant's success - you will solve your TPLF issues." (business)

- *"Litigation funders should not be able to buy claims as it's used for strategic legal industry purposes rather than in the interests of the specific customer who after selling claim has no interest and having been paid a minimum to sell it"* (business)
- *"A prohibition should be introduced for all TPLF activities in the EU other than activities by legal entities within the EU and subject to EU jurisdiction and regulatory requirements"* (several EU and non-EU business associations)
- *"I think a complete ban on TPF is the most effective measure. Access to justice can be better addressed other ways, and is really only a fig-leaf for speculative finance intruding into the justice system for private gain."* (US academic/researcher)
- *"Quebec Model (Canada), a public body with related fund for partial public financing and private co-financing selection; Out of court solutions via sectorial Ombuds Systems. Covering anti money laundering aspects in the transparency measures; The estimated remuneration and the remuneration finally charged by the law firm at the consumer's expense by way of costs and interest for late payment should be transparent to the consumer."* (EU business association)

Respondents who felt there was *no need for regulation of TPLF* often made suggestions that revolved around non- or self-regulation of TPLF and alternative reform approaches. Examples are as follows:

- *"Most effective for TPF to provide access to justice would be that no regulations are imposed."* (litigation funder)
- *"[We] advocate for an approach involving the identification of and provision of guidance on key matters in litigation funding [...] A level of self-regulation for the TPLF industry is already in existence and should continue to be encouraged."* (organisation of litigation funders)
- *"For losing defendants to pay for the funding costs. If a claimant is successful in proving that the defendant has done wrong-doing, the defendant should be responsible for paying those costs so that the claimant receives 100% of the damages."[...] "Liability for lawyers found responsible of conducting a litigation in an inappropriate matter should be made liable for costs as well."* (litigation funder)
- *"Harmonize first on the EU level legal market, legal professions and their codes of ethic."* (lawyer/law firm)
- *"Review the EU Collective redress Directive (Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers) by making it applicable to EU savers and individual investors and making it much more effective (maximum harmonization - an EU Regulation would be much better, opt out option, right for individual investor organizations to file collective claims on behalf of their members, etc."* (EU consumer organisation)
- *"Doing nothing in terms of TPLF. Instead, legal aid systems should be re-expanded across the EU, and non-profit self-funding funds such as the one in Quebec, Canada should be introduced as an alternative to TPLF in collective redress"* (academic/researcher)

5 VIEWS ON THE NEED FOR REGULATION

TPLF legislation in the EU

- In the vast majority of EU Member States, TPLF legislation exists but is mostly limited to consumer collective redress. Implementation of the RAD is still in process in France, Luxembourg, and Spain, where the draft laws contain provisions on TPLF (specifically the implementation of Article 10 RAD).
- In the context of the implementation of the RAD, Germany has severely restricted TPLF of redress actions with a 10% cap of the funder's share in the gains, and Greece has prohibited TPLF in representative actions.
- No TPLF legislation in Ireland where TPLF is currently illegal.

Legal frameworks applicable to TPLF

- The practice of TPLF operates within the general framework of national contract law and civil procedure, and rules of public policy. Consumer law, including legislation on unfair contract terms, applies if a consumer is a party to the agreement.
- All jurisdictions have existing banking and financial regulatory frameworks in place that impose specific conditions for authorisation, including capital adequacy, that could potentially apply to litigation funders, depending on their nature or structure.
- Additionally, rules of ethics, deontology, and professional conduct apply to lawyers, including obligations of confidentiality and loyalty, and duties to remain independent.

Other funding instruments are deemed to be able to provide some level of support. Some stakeholders argue in favour of the efficiency of legal cost insurance for small claims disputes, and crowdfunding for notorious disputes with a sensitive public interest. Outside of the EU, Canada gives a good example with two public funds since 1978 (Quebec) and 1990 (Ontario) that make funding available to class action litigants in return for a share of the award or settlement. On the other hand, those instruments might not always be as effective as TPLF in facilitating access to justice because they can be limited in scope and availability (legal aid, legal cost insurance, philanthropic funding), they are subject to budgetary constraints (public funds), or they rely on the ability to engage and mobilise a large number of supporters (crowdfunding).

Extrajudicial procedures are potentially effective to seek redress. However, ADR/ ODR cannot compare to TPLF as they are based on a voluntary effort to reach an agreement, and some decisions rendered within the frame of such alternative methods can be non-binding. There are also concerns as to resourcing of these procedures and whether given limited resource, they are able to cope with large volumes and/or complex disputes. Some stakeholders have raised the inequality of the procedural rules in these processes as a concern.

In light of the results and data gathered in the legal research and the consultation, three different approaches are considered thereafter, along with their rationale: **(1) No regulation, (2) Light-touch regulation, (3) Strong regulation.**

(1) No regulation

National experts and stakeholders in favour of 'no regulation' argue that there is no evidence of negative effects of TPLF and that over-strict regulation could effectively prevent any TPLF activity, and consequently deprive meritorious litigants of financial resources to access justice and enforce their rights. Additionally, as the market of litigation funding is currently limited in the EU (and non-existent in some Member States), a specific supervisory framework for the funders is deemed unnecessary.

Existing principles of contract law, civil procedural rules, consumer protection, public policy, financial and banking rules, and collective redress legislation, along with the supervision of the courts and in some Member States, supervisory authorities, are deemed sufficient to regulate TPLF activity (AT, DE, NL, IT, SE). If the funders transgress the threshold of financial supervision, the general review mechanisms can apply. If the funders impose an excessive share of compensation, the general limits and sanctions of civil law apply. It is also suggested that a "far-reaching" TPLF regulation such as the one proposed in the draft directive annexed to the EP resolutionwould be in breach of fundamental principles of freedom of contract (NL, SE).

Courts are deemed to exert a sufficient and efficient level of control (NL). Outside of the EU, courts have been and continue to be the *de facto* regulators of TPLF (CA, UK, US). In doing so, they have prioritised, among other things, access to justice, protection of the administration of justice, and the fairness and reasonableness of litigation funding agreements (LFAs). They have also demonstrated a willingness to refuse to approve a LFA in circumstances where, for example, the terms of a LFA vest too much control in the funder or where the returns to funders are too high.

TPLF is deemed to be a sector where self-regulation levels the market: 'bad players' are over time automatically banned.

Specific sectoral problems (e.g. related to patent litigation) should according to this view be addressed in legislative amendments to the relevant sectoral legislation (to avoid or reduce specific problems such as 'Patent trolls'). Issues specific to the lawyers' relationship to funders should be addressed via regulation of lawyers at a national level and/or under the CCBE (The Council of Bars and Law Societies of Europe). There were also arguments in favour of focusing on the 'root of the problem': regulating costs in civil proceedings in general (AT, UK).

(2) Light-touch regulation

A considerable number of national experts and stakeholders are in favour of a 'balanced' or 'light touch' regulation of TPLF, which would provide basic, not too specific rules, but be careful to keep TPLF a viable option. They are of the opinion that the absence of regulation creates a certain level of legal uncertainty and confusion for all stakeholders involved. Certain deontological rules are not compatible with the use of TPLF, such as the strict application of legal privilege and lawyer's obligation on confidentiality. They argue that the current system of rules is a patchwork that leads to unpredictable outcomes and higher risks for claimants, funders and defendants alike. Currently, claiming parties, funders, as well as defendants are dependent upon unpredictable developments in the caselaw.

Additionally, considering the growing development of TPLF activities in the EU, along with the current lack of transparency, reverting exclusively to the courts to exert control and supervision of funders could place an excessive burden on the judiciary.

Specific issues are identified as needing regulation:

Transparency and disclosure: of the *existence* of a litigation funding agreement, to thwart potential conflicts of interest (ES, BE, BG, DK, FR, NL, IT, PL). Opinions are more divided as to the extent of disclosure of the *content* of the agreement, as some perceive full disclosure might be used by defendants to obtain strategical advantages. Some favour reliance on supervisory authorities to review LFAs, rather than courts (see the Austrian approach in the context of collective redress: LFAs are disclosed if needed to supervisory authorities of the qualified entities). If the duty to review LFAs is attributed to courts, minimum rules with open norms should give the courts enough guidance to critically review LFAs without prescribing the details of funding agreements and/or providing defendant parties with further ammunition to, according to claimant lawyers, unnecessarily delay the proceedings (DK, NL, ES, SI).

Financial regulation: in particular capital adequacy requirements on third-party funders to ensure they have sufficient financial means (ES, DK, SI, CZ). This would help protect both claimants and defendants from speculative or undercapitalized funders. However, setting a fixed maximum percentage of remuneration is not considered to be a useful and viable solution. Setting caps could result in many disputes going unfunded, due to the lack of incentives for funders. It also does not adequately reflect the complexity of funding agreements.

Consumer protection: regulation should be proportionate and adapted to the vulnerability of consumers and the current asymmetry existing between businesses and consumers / consumer organisations. Some argue in favour of a specific preventive control system regarding the solvency and seriousness of funders when consumers are involved, and increased transparency requirements (ES, PT).

A balance must be struck when regulating, taking into account the practical issues that arose, as well as the financial reality of the TPLF market. A balanced EU-level approach

would facilitate access to justice, help monitor TPLF activities, while preventing abuse, and maintain fairness in legal proceedings.

(3) Strong regulation

Stakeholders in favour of comprehensive regulation (such as the proposal for a directive annexed to the EP resolution) often refer to the negative effects they believed to be associated with TPLF, in particular:

- Conflicts of interest and undue influence on the substantive and procedural decisions: concerns about funders prioritizing their returns over the claimant's best interests when considering settlements, appeal decisions, or case strategies, which could even lead them to pursuing litigation unnecessarily or rejecting reasonable settlements.
- Funding of frivolous claims: businesses expressed concerns, often (but not only) focused on specific areas of litigation (such as patent litigation, shareholder litigation, product liability litigation). Business interviewees described ongoing and past cases against them that were reportedly organised by litigation funders and/or hedge funds to elicit high settlements, in some cases using the most suitable features of national justice systems (such as the German injunction procedures) to exert the largest possible pressure on defendants.
- Other potential negative effects of TPLF mentioned by stakeholders include: reduction of compensation for the claimant, increase in claims and risk of over litigious society, increase of legal costs and price of insurance premiums, commercialisation of legal proceedings, distortion of the legal market, breaches of confidentiality as sensitive information about the case might need to be shared with the funder.

The current opacity and complexity of the TPLF market creates a certain level of distrust by many legal practitioners towards TPLF (ES). Regulation is perceived as a way to build confidence in litigation funders through transparency and legal certainty (BE, ES, LU, EE, PT). In this view, the TPLF market must be able to develop in a competitive manner; but given its impact, it must be subject to comprehensive regulation, imposing the necessary controls to consolidate the benefits associated with TPLF and avoid abuses to the detriment of the sound administration of justice.

On the other hand, a comprehensive regulation could effectively prevent or constrict any TPLF activity (see the example of DE where TPLF of redress actions pursuant to the RAD were severely restricted by a 10% cap on the funder's share in the gains, thereby making TPLF highly unlikely in this area). Excessively limiting the TPLF market could deprive meritorious litigants of financial resources to access justice. Additionally, comprehensive TPLF regulation will not address some of the drivers which prolong litigation and drive up legal costs and/or a reduction of compensation for claimants, but which are not funder dependent. This includes deployment of attrition strategies by defendants in litigation.

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ANNEX – MARKET INDICATORS AND DATA ON ECONOMIC IMPACTS OF THE USE OF TPLF

This annex brings together the results of the data collection regarding market indicators and economic impacts of the use of TPLF in the Member States and the selected third countries, as collected through the country research and the survey and interviews of stakeholders.[1531] To understand the economic dynamics of TPLF in EU Member States, we analysed findings regarding key indicators: **minimum claim value, ratio of investment to claim value, investment size** and **acceptable threshold for probability of success**. These indicators shed light on the operational thresholds, decision-making criteria, and financial strategies of litigation funders, including **return on investment considerations.** The following section explores these aspects, providing insights into the economic implications and practices of TPLF in Europe.

Minimum Claim Value

The minimum claim value represents a critical threshold for access to litigation funding. It is a key determinant of access to funding, representing the threshold below which funding is typically unavailable. However, funders may deviate from strict thresholds, prioritising the likelihood of a positive outcome. This suggests that decision-making often incorporates additional factors, such as case complexity and associated costs, alongside claim value.

Survey findings reveal significant variability, with minimum claim values ranging from less than €1 million to €14 million. Over 70% of respondents identified claim thresholds within this range, with €2–4 million emerging as a common category for typical practices in many jurisdictions (see detailed consultation results, main report). According to the European Class Action Report[1532] litigation funders often focus on cases with large potential recoveries due to the higher returns. This indirectly implies a preference for claims above certain monetary thresholds, though no specific minimum value is mentioned.

In terms of the variability discussed above, while some funders maintain strict thresholds (e.g., £5 million as per Asertis policy[1533]), others exhibit flexibility for clear-cut cases with high chances of success (e.g., as per LitFin's policy[1534]). This aligns with the hypothesis that substance and probability of success often outweigh claim value in funding decisions. Notably, smaller claim thresholds may enable access to justice for individual plaintiffs, whereas higher thresholds cater to collective claims or cases requiring significant financial backing. However, according to some researchers there are evident challenges of funding low-value claims which is highlighted through discussions about the costs of litigation and the role of litigation funding in aggregated actions[1535].

Interestingly, stakeholders pointed to jurisdictional nuances, such as the concentration of lower-value claims in sectors like gaming in Germany and Austria. Conversely, higher-value claims,

[1531] As this Annex is providing a summary, the section on consultation results may provide additional information, where applicable.
[1532] European Class Action Report (2023), CMS Law-Now
[1533] UK based TPL funder funding claims in select EU Member States. Litigation and Arbitration Funding - Asertis | Funding litigation, arbitration and legal actions, accessed on 29/11/2024.
[1534] Czech based TPL funder declaring on their website: "Our minimal threshold for an individual dispute is EUR 4 million, however, we are always considering the cases even below this level should they meet our investment criteria". Single Case Funding - LitFin, accessed on 29/11/2024.
[1535] S Augenhofer, A Dori, 'The proposed regulation of Third Party Litigation Funding – much ado about nothing?'

particularly in antitrust cases, dominate other sectors. This dichotomy underscores how litigation funders tailor their strategies to specific legal and economic landscapes.

Ratio of Investment to Claim Value

A defining feature of TPLF economics is the ratio between the investment made by the funder and the value of the claim. In our survey, this ratio was most frequently considered to be 1:10,[1536] with more than 70% of respondents who provided an assessment indicating that the ratio was between 1:5 and 1:15. This ratio provides insight into how funders decide the level of investment in a case relative to the potential return. It also helps assess whether funders are willing to exceed the standard ratio, particularly when additional costs arise and serves as a benchmark for funders to balance their financial exposure against expected returns.

This ratio reflects not only a financial strategy but also risk management. One of the interviewed litigation funders elaborated how they determined the maximum investment in a case. In a simplified illustration of the approach the 'prudently estimated claim outcome' (i.e. the most likely court award) would be multiplied by the enforcement risk (i.e. the probability to actually recover the court award), to calculate the maximum funding. For example, a claim with a face value of 100 million Euro might be reasonably expected to reach an outcome of 30% (i.e. a court award of 30 million Euro). But if the enforcement risk is considered to be 70% (i.e. the risk of default of the defendant is considered to be 30%), the prudent estimate of the claim outcome would be 21 million Euro (i.e. 70% of 30 million Euro). Based on a 1:10 ratio, this would imply that a funder would invest not more than 2.1 million Euro (see also detailed consulation results). This calculation ensures alignment between funders' interests and claimants' outcomes, mitigating the risk of excessive budget overruns.

According to the European Class Action Report[1537] economic viability of class actions and the size of claims are critical factors for funders. Funders focus on jurisdictions and cases with higher risks and potential returns, indirectly reflecting a preference for favourable ratios between investment and claim value.

Investment Size

Beyond the funding-to-claim ratio, understanding how funders determine the size of their investment is crucial. This decision often depends on factors such as the scale and complexity of the dispute, the parties involved, anticipated financial commitments, and the potential for settlement at various stages of the process.

The size of the investment made by funders according to the survey varies considerably, typically ranging from less than €1 million to €14 million in most cases. Smaller investments often reflect lower-value claims or early-stage funding, while larger commitments align with complex, high-stakes disputes. For instance, claims valued at €100–300 million tend to involve substantial investments to cover prolonged legal processes.

[1536] As also confirmed directly by litigation funders. E.g. Minimum investment size for Asertis is £500,000, Minimum claim value: 10x investment value: £5m - declared by UK based TPL funder who funds claims in select EU Member States. Litigation and Arbitration Funding - Asertis | Funding litigation, arbitration and legal actions, accessed on 29/11/2024. See also detailed consultation results, main report.

[1537] European Class Action Report (2023), CMS Law-Now

Surveyed funders highlighted the role of risk and complexity in determining investment size. Decisions are influenced by factors such as the likelihood of settlement, potential financial commitments, and the regulatory environment. A notable trend is the correlation between higher claim values and larger investments, albeit with strategic caps to avoid misalignment between funders' and claimants' interests.

Moreover, funders' willingness to finance smaller investments reflects their adaptability to market needs. This is particularly relevant in jurisdictions where collective claims are prevalent, enabling funders to cater to diverse claimant groups.

Acceptable threshold for probability of success

Calculating the probability of success is a crucial aspect of third-party litigation funding from the point of view of litigation funders given that they are commercial operators looking for a return on investment. Litigation funders employ a combination of legal expertise, financial analysis, and industry knowledge to assess certain factors to arrive at a probability of success. The calculation of the probability of success involves a comprehensive evaluation of various factors including legal merits, factual strength, damages quantification, litigation risks, opponent strength including financial standing, case management, settlement prospects, litigation duration etc.[1538]

Although most litigation funders do not disclose their threshold for probability of success online they will presumably have a minimum acceptable threshold for probability of success defined as their internal benchmark. As an example, AxiaFunder targets a win or settlement probability of at least 65% for cases that are funded via the platform.[1539]

Return on investment considerations: Multiple-on-Capital (MoC) and Annualised Internal Rate of Return (IRR)

Our research elicited information on the Multiple-on-Capital (MOIC) and Annualised Internal Rate of Return (IRR) typically achieved, targeted or required by funders to fund a case. Whilst Multiple-on-Capital (MOIC) measures the return on the investment made, Annualized Internal Rate of Return (IRR) also considers the length of time required to accumulate the return. This distinction is significant for TPLF since some cases can take a very long time (<10 years) before a decision is reached and a return on investment is made.[1540]

Information on the typical and minimum MOIC and IRR was provided by a number of interviewees, albeit in many cases not based on first-hand experience of the interviewee or their organisation's minimum or typical MOIC and IRR but rather on the basis of published information. It should be noted that the returns targeted may not only reflect the targets of the funders themselves but also of the investors in the TPLF provider. It should also be noted that some cases can last for long periods of time, meaning that even here the MOIC is relatively high, the IRR can be a lot lower, further highlighting that both metrics need to be considered.

[1538] https://www.burfordcapital.com/insights-news-events/insights-research/adding-value-beyond-capital-during-case-review/

[1539] https://www.axiafunder.com/our-investment-approach

[1540] For example, if a funder makes an investment of EUR 100 in year 1 and receives a pay-out of 100% at the end of the proceedings, the pay-out may be in year 10, meaning that the value of the investment would be heavily discounted. In that case, the funder's IRR may be below 10% on an annual basis (not 100% or more).

It has been reported that, between 2009 and 2023, Burford Capital, which is one of the largest litigation funders, has delivered a cumulative return on capital of 82% (interpreted as 1.8 MOIC) and an IRR of 27%.[1541] Omni Bridgeway reported a 270% rate of return (MOIC of 2.7)[1542]. A wide range of MOICs has been reported in the survey as targeted by litigation funders but often range between 2 and 5. A range of IRRs are also reported, often falling between 15 and 30%. One of the responding litigation funders summarised as follows: "Our returns are confidential but as a guide, we would target IRRs to investors of above 20% IRR and MOCs of 2x in order to justify the risk and illiquidity of litigation funding investments." And another litigation funder elaborated: "Comparable to private equity returns, IRRs in the litigation funding market target around 20% after costs, which is commensurate largely to the described risk and illiquidity. Beware in this respect for comparing gross IRR with net IRR as the operating costs of litigation funding are considerably higher than the costs of investing in other asset classes."

Economic impacts – analysis of survey responses

The stakeholder survey revealed a range of perceptions regarding the economic impacts of third-party litigation funding (TPLF). Of the 231 respondents, 21% reported that TPLF had resulted in economic effects, while 39% stated it had no impact. The remaining 40% expressed uncertainty or did not answer. These results (see table below) illustrate the varied experiences and viewpoints among stakeholder groups.

Table 16: Do you have indications that the use of TPLF in your jurisdiction has led to economic impacts (e.g. on costs of litigation, increasing costs of legal insurance etc)? (By stakeholder group)

	Litigation funder	Business	Consum. organis.	Lawyer/ law firm	Public authority*	Judici-ary*	Arbitrat./ mediator*	Academic/ researcher	Other	*Total*	*Percent*
Yes	1	**30**	1	10	0	2	0	1	3	*48*	*21%*
No	**23**	2	**13**	**39**	3	0	2	**6**	3	***91***	***39%***
Don't know	4	17	12	16	**6**	**5**	**4**	3	**5**	*72*	*31%*
No Answer	2	5	1	7	0	1	0	0	4	*20*	*9%*

N=231. Stakeholder groups marked with an asterisk (*) have fewer than 10 respondents.
Figures in bold indicate the most frequently mentioned category.

Businesses were the most likely to report economic impacts, with 30 affirmative responses highlighting concerns about increased litigation costs and heightened financial risks. Representatives of businesses indicated in our interviews that in their view TPLF would lead to a 'litigation climate' affecting the investment climate, and have an inflationary element (e.g. by affecting legal insurance premiums). An interviewee from a large Nordic company found that TPLF had already now economic impacts on their operation, as in their view TPLF was generating actors that they would otherwise not have seen in court. In terms of wider effects, a second interviewee from the same country pointed out that their country traditionally was a non-litigious society, and

[1541] Burford Capital annual and transition report (2024), available at https://investors.burfordcapital.com/financials/sec-filings/default.aspx
[1542] FY24 Full Year Results, available at https://omnibridgeway.com/investors/reports-and-presentations/results-reporting-and-investor-presentations

that TPLF was changing this. Other interviewees from two large international companies operating in Europe reported that their legal costs had already increased due to TPLF funded cases. One of them elaborated that in their view TPLF funded cases against them had economic impacts in three relevant dimensions: firstly by increasing the costs of the legal defence, secondly by creating opportunity costs as engineers and executives had to spent considerable amounts of time with litigation related activies (in this case related to patent litigation), and thirdly by increasing the expected value of the litigation case (as typically TPLF funded cases were larger than this had previously been the case).

In contrast, litigation funders predominantly reported no economic impacts, with 23 negative responses and only one affirmative. The predominant view was therefore that TPLF has no significant economic effects. This aligns with their interest in promoting TPLF as a neutral mechanism for facilitating access to justice.

Lawyers and law firms similarly leaned towards seeing no impacts, though 10 respondents in this group acknowledged specific instances of economic effects. Consumer organisations largely echoed this sentiment, with 13 indicating no discernible economic impacts.

Public authorities and members of the judiciary provided fewer responses, reflecting limited engagement with the issue. Where responses were given, these groups generally reported no economic impacts or expressed uncertainty. Academics and researchers provided mixed feedback, with some pointing to the need for further data to fully understand TPLF's economic implications.

The high rate of uncertainty among respondents (31% don't know and 9% no answer) suggests that many stakeholders lack sufficient information or have limited experience with TPLF to assess its economic effects. This uncertainty may reflect the relatively nascent state of TPLF in some jurisdictions or a lack of transparency in the funding arrangements. Divergences in responses across stakeholder groups further highlight differing priorities and levels of engagement with TPLF.

The survey results reflect a complex and fragmented landscape of stakeholder perceptions regarding the economic impacts of TPLF. While businesses highlighted economic risks, other groups, including litigation funders and consumer organisations, downplayed such effects. The considerable uncertainty expressed by many respondents underscores the need for greater clarity and information-sharing to enable a more comprehensive understanding of TPLF's role in influencing litigation costs and related economic factors.