



Responsible private funding of litigation

European added
value assessment

STUDY

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European Parliament legislative-initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union are automatically accompanied by a European added value assessment (EAVA). Such assessments are aimed at evaluating the potential impacts, and identifying the advantages, of proposals made in legislative-initiative reports.

This EAVA accompanies a resolution based on a legislative-initiative report prepared by the European Parliament's Committee on Legal Affairs (JURI), presenting recommendations to the European Commission on the responsible private funding of litigation.

The main purpose of the EAVA is to identify the possible gaps in European Union (EU) legislation. The various policy options to address this gap are then analysed and their potential costs and benefits are assessed.

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Executive summary

Background

Third-party litigation funding (TPLF) refers to an arrangement whereby a third party, who has no other connection to the litigation, finances some or all of a party's legal costs in return for a share of any proceeds of the litigation. It could be used for individual cases and for consumer collective redress and it has developed recently at a fast pace in a number of jurisdictions around the globe. The recourse to TPLF has remained limited so far in the EU, but it is expected to play a growing role in the provision of litigation services in the coming years, as climate and environmental litigation cases could increase and as the aftermath of the ongoing Covid-19 pandemic could lead to a substantial number of claims.

Why should the EU act?

TPLF could offer some benefits if the associated risks are mitigated. In particular, it may represent a tool to support private citizens and businesses in accessing justice and constitute a mechanism for transferring the risk of the uncertain outcome of the dispute to the litigation funder. At the same time, it may pose risks and entail conflicts of interests. If not properly regulated, it could lead to excessive economic costs and to the multiplication of opportunity claims, problematic claims and so called 'frivolous claims'. It could also be used for the pursuit of strategic goals by competing businesses, and the cost and time wasted in frivolous litigation in some instances could also potentially directly affect aggregate productivity and competitiveness.

Furthermore, there could be a tendency by some funders to move away from a traditional form of litigation funding to a much wider range of funding models such as complex portfolio funding. There is also a strong focus by some funders on cases with large settlements and with a low risk of losing, thus not exactly always corresponding and aligning with the interests of claimants. Finally, funders may demand excessive remuneration or may operate in a conflict of interests with the claimant in managing or settling the case. The lawyer might also be in a potential conflict of interests with clients, given that the former usually obtains their fees directly from the litigation funder.

Some of these concerns related to TPLF have been addressed, with strict reference to TPLF and consumer collective redress, by Directive 2020/1828/EU of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers. However, the regulatory approach towards representative actions varies greatly from one Member State to the other, thus not guaranteeing an identical level of protection for claimants across the EU. This might lead to distortion of competition for businesses and it may affect consumer protection and complicate access to justice. It is therefore important to ensure the necessary balance between improving claimants' access to justice and providing appropriate safeguards to avoid abusive TPLF.

Description of key findings

From an economic and competitiveness point of view, there is a need to allow institutions, businesses and citizens to have access to affordable, high quality and efficient judicial pathways. In such a perspective, a **responsible TPLF regulatory framework** should aim at lowering costs, simplifying unnecessary procedures, increasing the predictability of costs, and delivering efficient services at costs that are proportionate to the amounts in dispute.

Our analysis, building upon the study in annex, concluded that to provide fair access to justice for claimants and reasonable compensation when necessary, while allowing businesses to continue thriving and innovating, the current EU regulatory framework would need to be upgraded and updated. In particular, we explored additional effective safeguards and a number of policy options regarding the **contractual, ethical and procedural aspects of TPLF**. We distinguished between two broader regulatory approaches with various degrees of strength and depth. We then estimated

the European added value (EAV) for two alternatives, namely a moderate and a strong regulatory approach scenario using a standard benefits-costs analytical conceptual framework.

We found an **EAV of €187 million for the moderate regulatory approach scenario**. For the **strong regulatory approach scenario, we found a slightly higher EAV of €229 million**. Both alternative scenarios are therefore expected to allow for a higher level of guarantee for claimant rights while allowing adapted flexibility for private funders. This responsible funding approach would also ensure that liability costs for businesses and cost of access to justice remain reasonable. The baseline scenario is however more likely to be supported by funders (as revenues and flexibility are the highest), while the strong regulatory approach would be more favoured by businesses (as liability costs are the lowest). Claimants might be more open to the moderate scenario as it would allow a high share of litigation recovery and limit the costs, while allowing for some responsible TPLF to take place.

Given the level of uncertainty and the fact that the two numbers are relatively close, it is rather difficult to arrive at a precisely defined conclusion on the choice between the two approaches. Naturally, these estimations should be taken as evidence to nourish the necessary political discussion on the related legislative initiative. As emphasised by some, and given the relative lack of transparency in this sector, they should not be taken and interpreted in a narrow and simplistic way and should be further discussed before reaching conclusion.

In addition, one has also to consider the potential that a clear regulatory framework with adequate protections could greatly increase the legal certainty for courts, funding providers, lawyers, claimants and defendants. Resistance to funding by courts, and defendants, as well as claimants worried they will lose control of litigation, are therefore important opportunity limiting factors. Legitimate funders, and funding opportunities generally could therefore grow substantially within an appropriate regulatory framework.

Looking beyond the potential economic added value, we therefore analyse the wider repercussions of the development of TPLF in terms of a qualitative evaluation of the potential risks and impacts for various components of society. We confirm that significant changes could be affecting the justice system, while businesses, claimants and funders might be affected with varying intensity.

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List of abbreviations and acronyms

| | |
|-------------|-----------------------------------|
| ADR | Alternative dispute resolution |
| ALF | Association of litigation funders |
| B2B | Business to business |
| EAV | European added value |
| EAVA | European added value assessment |
| TPLF | Third-party litigation funding |

1. Introduction

Although third-party litigation funding (TPLF) is not recent, a renewed interest has led to a steady development of the practice in the last decade at global level.¹ In the European Union (EU), TPLF is still generally prohibited in Greece and Ireland. In Germany, the German Federal Court prohibited the use of TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act against Unfair Competition. In contrast, in Slovenia, pursuant to the new legislation on collective redress, TPLF is permitted and regulated in accordance with the principles set out in the 2013 Commission Recommendation. In the remaining Member States, there is no specific TPLF regulatory framework. As the European Commission highlights,² this general lack of rules means that 'unregulated and uncontrolled third-party financing can proliferate without legal constraints'.

In practice, TPLF refers to the provision of resources by a funder in a lawsuit in which it should in principle have no interest, assuming the costs (which can include solicitors' fees, counsels' fees and other disbursements) of the proceedings on the claimant's behalf, and collecting a share of the claimant's litigation recovery in case of success. The rationale behind the practice is linked to the fact that some claimants could potentially be at a disadvantage when pursuing a case. In particular, as funding is needed to bring well documented cases to court and as claimants are sometimes underfunded, some argue that there could be a need for third-party intervention to allow for the case to be instructed with a reasonable chance of success. This could also be relevant if claimants are confronted with businesses with access to large amounts of financial and judicial resources. TPLF might also facilitate access to justice as it proposes tools to transfer the risk of the uncertain outcome of the dispute to the litigation funder.

However, the potential negative impact of such third-party intervention is that, if not properly regulated, it could lead to excessive economic costs and to the multiplication of opportunity claims, problematic claims and 'frivolous claims'. This is even more concerning as the calculation of the funder's share of the proceeds is typically based on a percentage of the sum recovered or a multiple of the funding provided. It could also be used for the pursuit of strategic goals by competing businesses as the cost and time wasted in frivolous litigation in some instances could also potentially directly affect aggregate productivity and competitiveness. Furthermore, there could be a tendency for some funders to move away from a traditional, straightforward form of litigation funding to a much wider range of funding models,³ such as portfolio funding. There is also a focus by some exclusively on cases with large settlements and a low risk of losing, thus not exactly always corresponding and aligning with the interests of claimants. Finally, funders may demand excessive remuneration or may operate in a conflict of interests with the claimant in managing or settling the case. The lawyer might also be in a potential conflict of interests with clients, given that the former usually obtains his or her fees directly from the litigation funder.

In addition, in the current context, some stress that TPLF could be used disproportionately as a result of the current Covid-19 crisis and of the potential legal disputes that could be launched in the aftermath. In particular, negligence cases could mount in the face of the financial and physical harm caused by the Covid-19 pandemic. As is typically the case with large scale natural disasters, a great number of claimants could tend to have recourse to TPLF. In the same vein, a growing number of

¹ For a comprehensive review on developments in the EU see the study in annex. See also the [Third party litigation law review, Edition 4, January 2021](#) for a review of recent action in some markets.

² 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/2018/040 final](#), January 2018, point 2.1.6 Funding of collective actions.

³ Some types of financing are increasingly a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain some control over its investment through traditional corporate governance. Additionally, some funders now establish special purpose vehicles to receive investment funds from a variety of sources.

high profile litigations linked to climate and environmental issues could be accompanied by active TPLF. This justifies the timing of the present legislative initiative, as the ongoing development of TPLF within the EU raises some legitimate businesses concerns if related potential risks in this sector are not well addressed.

If TPLF is not adequately regulated, there is therefore a potential risk in this area for a substantial increase in cost for businesses, while a litigation service market could be overdeveloping.⁴ Moreover, as rightly pointed out by the European Commission,⁵ the important variations in the sources of litigation costs and their amounts raise obvious concerns as to the effective access to justice in cross-border disputes or in disputes involving EU citizens residing in a Member State without being nationals. The economic cost should not be ignored and the potential negative impacts for businesses and claimants of the development of such a business of litigation need to be taken into consideration for a responsible approach in this field. From a regulatory point of view, this means there is a need to ensure access to the judicial system for all legitimate claims, while making sure that 'frivolous claims' are not developing and that TPLF is not purely motivated by financial gains or employed for businesses' strategic objectives.

To shed some light on these issues and in line with the existing legislation and with the study in annex, the purpose of this paper is to assess the potential costs and benefits that would arise from the implementation of responsible private litigation funding at EU level. We start by describing the current state of play and the underlying organisation of the litigation services market. In the second section, we explain why EU action is needed, by identifying and analysing the gaps and potential policy option to improve the existing EU regulatory and legal framework. Finally, in the last section, we conduct a thorough comparative economic analysis of the EAV of the policy options identified.

⁴ It should be noted that the focus is not necessarily entirely on litigation, as there is also broad use of TPLF in other circumstances such as arbitration, and it may also be a feature in other alternative dispute resolution (ADR) mechanisms.

⁵ European Commission, Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, 2006.

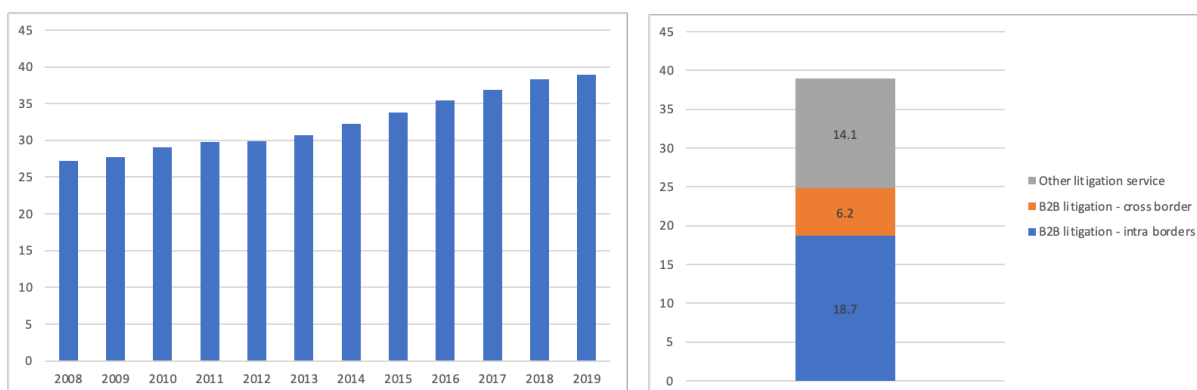
2. Description of the litigation services market

It is important to recall that various factors make it difficult to analyse the litigation service sector and the main funders operating in Europe. In particular TPLF players are often private entities under no legal obligation to disclose their operations. That being said, the study in annex offers a description of the litigation services market organisation and of its main actors. Moreover, the analysis of the funders' financial statements provide some clues as to the current state of development of the litigation services market and of expected expansion of TPLF. Building upon these results, we describe more precisely in this section the state of play in the sector and we analyse the potential prospects.

2.1. Size, importance and potential prospects for the litigation services market

The data available on the litigation services market is rather scarce at aggregate level. The study attached to this paper provides a qualitative description of the various players in this field based upon a series of interviews. More detailed information on individual funders is sometimes provided in financial reporting documents, but no comprehensive database yet exists. The difficulty of collecting data in this area is also not limited to individual businesses operating in the sector. Data on the benefits for claimants of successfully pursuing a case, on the cost of engaging in TPLF through the remuneration fee paid to lawyers and on the remuneration of the funders are not available publicly, for sometimes obvious business practice reasons. Furthermore, existing comparable data available at aggregate level on the cost for counterparties are also relatively difficult to compute, given the level of variation between countries' judicial systems and practices.

Figure 1 – Size, evolution and structure of the litigation service market in the EU-27 – € billion



Source: author's own estimation based upon Eurostat data.

To analyse the litigation services market it is therefore necessary to use the fragmented data available to proceed with a statistical quantification to derive meaningful aggregate results at EU and Member State level. Following this approach, a recent ERPS study,⁶ using fixed structural parameters⁷ estimated the size of the litigation services market at global and EU level. Using the

⁶ Evas, T., Expedited settlement of commercial disputes in the European Union, European Added Value Assessment, ERPS, European Parliament, 2018.

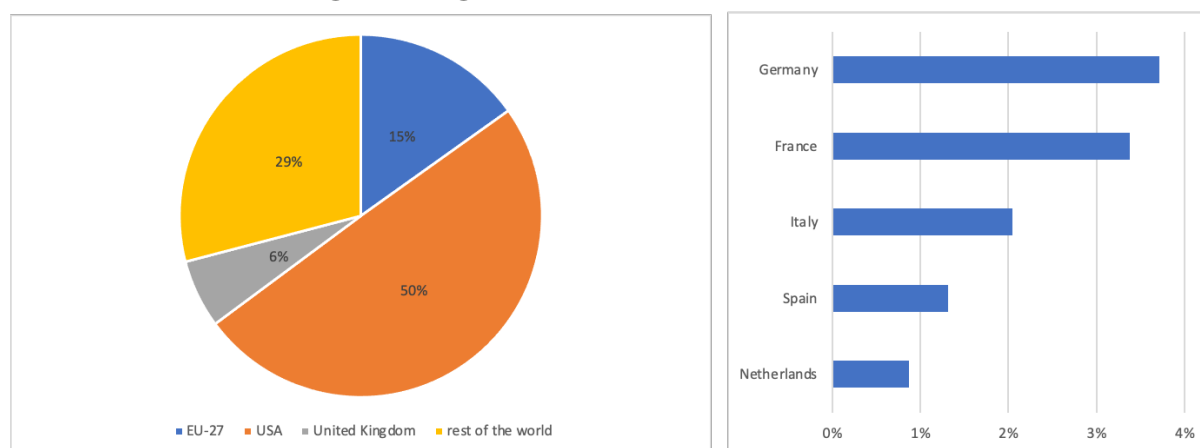
⁷ The study estimated an average value for the litigation service market as a share of the total legal service sector at 31 % for the EU27 as a whole. It also estimated the proportion of business to business litigation at 48 % of the litigation market, while the proportion of cross-border cases in B2B commercial litigation market was estimated at 33 %.

same approach, and assuming relative medium-term structural stability in this sector,⁸ we obtain an estimate of the size of the litigation service market⁹ (see Figure 1).

The results confirm some of the analysis provided in recent literature on the relatively positive financial prospects and development in the EU litigation services market. We estimate that this sector represented a worth of almost €39 billion in 2019, having seen an annual average growth rate of 3.5 % since 2008. Assuming a continuation of this past trend, the sector could increase by an additional €9 billion to reach more than €48 billion by 2025. This significant growth comes as a result of supportive business opportunities in this market. Regarding the structure of the sector in 2019, we estimated that business to business litigation (B2B) represented more than 64 % of the total market with a value of almost €25 billion in 2019. Cross border B2B litigation represented around 14 % of the total market.

Regarding the global importance of the EU litigation service sector (see Figure 2.), the region with the largest legal services market is by far the United States of America (USA), as it accounts for almost 50 % of the global market. This dominant position is mainly explained by a more aggressive litigious culture, and by the fact that international business contracts are often based on US law.¹⁰ The EU-27 and the United Kingdom (UK) display a less developed sector, with respectively 15 % and 6 % of the global market. Within the EU, Germany and France are the two largest markets with values of around €9 billion in 2019, each representing around 3 % of the total global market.

Figure 2 – Estimated global market distribution in litigation services and largest EU litigation markets, 2019 (% of the global litigation services market)



Source: author's own estimation.

While our results emphasise that litigation services have grown at a substantial pace recently, this raises the question of the importance of TPLF in this market and of its potential impact – if any. Litigation funding is currently used for a variety of claims in Europe. The most commonly funded claims are arbitration claims, claims pursued by insolvency practitioners, intellectual protection claims, investment recovery, anti-trust claims, and collective consumer claims. Funding is also commonly used to enforce judgments, especially in the context of cross-border litigation. At the Member State level, Greece and Ireland generally prohibit TPLF. In Germany, the German Federal Court prohibited the use of TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act against Unfair Competition. The measure is intended to prevent claims based on the

⁸ We assume a structural parameter of 31 % for the share of the litigation service market, see Evas, T., Expedited settlement of commercial disputes in the European Union. European Added Value Assessment, EPRS, European Parliament, 2018.

⁹ Original data on the legal sector are taken from Eurostat. The trend is estimated using a simple exponential smoothing with a neutral correction coefficient of 0.5, in line with standard statistical practice.

¹⁰ Grand View Research, [Legal Services Global Market Report 2018](#), September 2019.

unrelated motive of seeking revenue. The decision is unlikely, however, to affect the general principle established by the German Federal Court of Justice, according to which, litigation funding is admissible in civil proceedings. Indeed, the reasoning is specific to confiscation of profits by non-profit consumer associations and cannot be transferred to damages claims. In Slovenia, pursuant to the new legislation on collective redress, TPLF is permitted and regulated by Article 59, in accordance with the principles set out in the Commission Recommendation of 2013. In the remaining Member States, there is no specific TPLF regulatory framework.¹¹

Initial research,¹² using the results of survey and interviews with funders, estimated that the TPLF sector in Europe could represent around 0.8 % of the total revenue of the legal services market, thus putting its size at around €1 billion in 2019 for the EU-27.¹³ More recent works seem to confirm this order of magnitude and all estimates agree on the relatively small size of the European TPLF market, in particular when compared with the USA and Australia.¹⁴ For instance, a recent study¹⁵ estimated the US TPLF market to be around 6.6 times larger than the European market. This would mean, using our European estimate as a base, a US TPLF market of around €6.6 billion, broadly in line with other recent estimates available.¹⁶ The Australian market,¹⁷ always measured by revenue, is estimated at around €0.11 billion, while we estimate the UK market at around €0.4 billion and the potential market for the rest of the world at around €1.9 billion. This would mean a total global market of almost €10 billion, in line with recent results¹⁸ on the global size of this sector.

Given the relative gap between the size of TPLF markets in various jurisdictions, some conclude¹⁹ that substantial potential for development of the practice is still untapped and they forecast that the TPLF penetration rate could double in the next five years. This does not appear unrealistic, as in Australia for instance, the latest projections indicate a possible average growth rate of the market of close to 8 % in the coming period,²⁰ while a recent study²¹ predicts an average growth rate of more than 8.8 % at global level for 2020-2028. The same study anticipates that the US TPLF market, already the largest in value, could double by 2028, with an average annual growth rate of more than 9.2 % over the forecast period.

¹¹ 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, op. cit.

¹² Veljanovski C., [Third Party Litigation Funding in Europe](#), December 2011.

¹³ From an economic point of view, total revenue is the most common way to measure the size of an economic sector. Other indicators for the measurement of this market might naturally give different results. If one defines the market only in terms of fees paid to lawyers and other professional service providers, then the market size might be underestimated. One might therefore argue that payments to TPLF providers are not a subset of legal fees (i.e. funders do not provide services in exchange for a portion of the legal fees payable). Payments to funders are a subset of damages awards that would otherwise go to a successful claimant. Expressing TPLF as a percentage or subset of legal fees leads to the issue being underestimated, and fails to account for the transfer of wealth from consumers to funders.

¹⁴ [Third party litigation law review](#), Edition 4, January 2021.

¹⁵ [Litigation Funding in Continental Europe - Current status of the market, recent issues and trends](#), Deminor, November 2020 and [\\$2.3 Billion of Capital Deployed Over 12 Month Period Across U.S. Commercial Litigation Finance Industry](#), *Business Wire*, November 2019.

¹⁶ [Litigation funding investment market](#), Research Nester, February 2021.

¹⁷ Blackburn M., Geisker J., Luff D., Australia, *The Third Party Litigation Funding Law Review*, January 2021.

¹⁸ [Litigation Funding Investment Market: Global Demand Analysis and Opportunity Outlook 2028](#), Research Nester, December 2020.

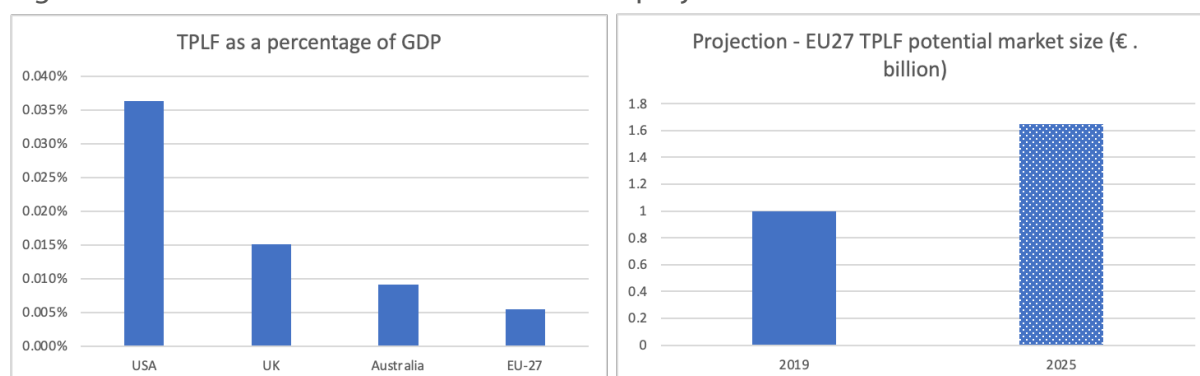
¹⁹ [Litigation Funding in Continental Europe, Current status of the market, recent issues and trends](#), Deminor, November 2020.

²⁰ Derrington S., *Litigation Funding: Access and Ethics*, October 2018.

²¹ Research Nester, 2020, op.cit.

For Europe, a number of researchers²² anticipate a large rise in litigation over damage claims following the economic downturn caused by the recent Covid-19 pandemic. The market for TPLF is also expected to grow rapidly due to the increase in the demand for funding from consumers in the context of class actions, and from small and medium-sized enterprises (SMEs) when it comes to arbitrary regulation having harmed their operations. Furthermore, the implementation of climate change policies and the need to reduce greenhouse gas emissions could see TPLF actively involved. The number of climate litigation cases is currently increasing at a fast pace in this area,²³ with some recent high profile cases. Compared with the current size of the TPLF market in the EU at around €1 billion,²⁴ this perspective of an annual rate of development of TPLF in the EU-27 in line with the global rate (i.e at 8.8 % per year on average²⁵ over the next five years) would mean the creation of an additional €0.6 billion of market revenue in TPLF.

Figure 3 – EU TPLF market size and market size projection



Note: Projection to 2025 is simply computed assuming a constant penetration rate at 4 % and a doubling of that rate at 8 %. This results in an annual growth rate based on past trends at 3.5 % on average per year, thus assuming more prudent values than the 6.5 % average annual growth rate assumed until 2023 in the projection of the growth rate for legal services.²⁶

Source: author's own estimation.

While these projections should naturally be considered with care, the level of returns on investment in TPLF has also attracted a lot of attention. In particular, a recent evaluation,²⁷ showed that litigation finance was providing investors with very large multiples (see Figure 3). The results also showed TPLF outperforming other financial market investments, with TPLF returns higher than those observed in private equity, real estate, traditional credit and hedge funds. Such high returns on investment in litigation in a time of recession and historically low interest rates are likely to continue

²² [The Future of Group Actions and Third Party Funding](#), Woodsford Litigation funding, 2020; [How COVID-19 will affect access to third-party dispute finance](#), EY, 2020; [Global Litigation Funding Investment Market prospects](#), Absolute Markets Insights, February 2020; [Why litigation finance transformed in the 2010s, and what 2030 might bring](#), Litigation finance insights, April 2020.

²³ [From a couple of cases in 2000, the number of climate litigation cases increased to more than 120 in 2019 in the US and to around 25 in the EU](#), *Financial Times*, January 2011.

²⁴ In line with the estimation and evidence available in the literature, see previous section.

²⁵ This represents an average trend growth in the sector which is ten times the forecasted average GDP growth, and this is in line with projections in the existing literature, as explained. Individual exceptional cases might give the impression of much larger expansion, but they are not recurrent. They will thus affect the trend, but an average trend growth in the sector of 8 % over five years already appears as being at the higher end of the projection margin.

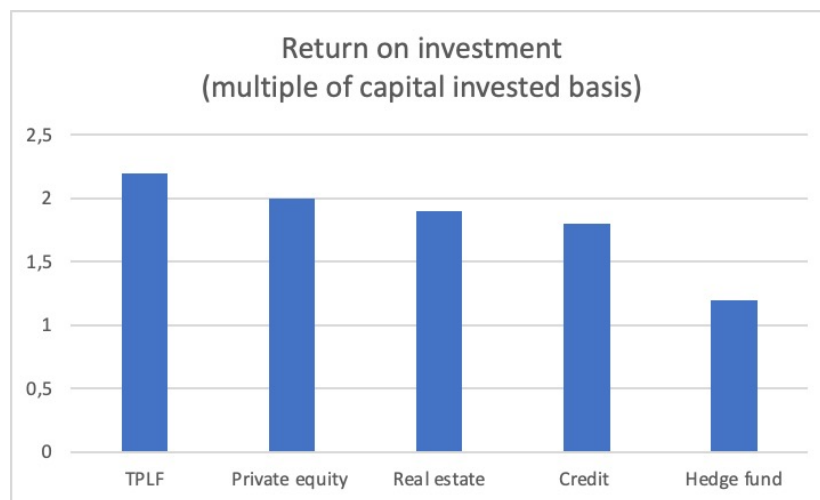
²⁶ Legal Services Market - By Types (B2B Legal Services, B2C Legal Services, Criminal Law Practices And Hybrid Commercial Legal Services), By Size, By Practice, By Region, Opportunities And Strategies – Global Forecast To 2023, The business research company, November 2019.

²⁷ [For the World's Super Rich, Litigation Funding Is the New Black](#), Bloomberg, August 2018.

to attract investors to this market. This is even truer as the promotion of TPLF is likely to increase by litigation funding businesses.

However, while high returns, rapid development and evolution in this area are welcomed by some, others point to the potential associated higher cost of litigation for businesses. Moreover, as TPLF expands in the EU, the availability of legal cases deemed of high quality i.e. with low risk, expected fast resolution and settlements large enough to compensate funders and claimants alike, will be reduced. As competition intensifies, this could significantly impact the current level of returns on investment. Important structural changes might therefore arise in this sector, with further concentration of active funders and focus on the most lucrative cases.

Figure 4 – Global returns estimates in TPLF investment



Source: [Bloomberg, 2018](#).

2.2. TPLF market organisation and main EU actors

The development of TPLF at global level mostly follows the exception granted by Australia and the UK in the 2000s on the restriction that prevented a third party from sharing in the proceeds of a judgment. The practice has also expanded significantly in the USA and Canada, where some degree of supervision, mostly judicial, already exists. In 2017, Singapore and Hong Kong moved to permit TPLF, also in a more limited way. This shift has also led to a renewed and increased interest on TPLF in some EU jurisdictions, contributing to the development of the European TPLF market.²⁸

As already explained, revenues are the economic measure of the size of participants in a given market. Smaller participants could always naturally exhibit higher returns and gain prominence. In TPLF, as data are scarce, the fund size is also commonly used as a proxy for the importance of each participant.

²⁸ J. Stroble, L. Welikson, [Third-Party Litigation Funding: A Review of Recent Industry Developments](#), *Defense counsel journal*, January 2020.

Table 1 – Description of the main private litigation funders

| | Burford | Omni Bridge- way | Harbour | Therium | Longford | Para- bellum | Augusta | Woods- ford |
|--------------------------|---------|------------------------|---------|---------|----------|-----------------|---------|----------------|
| Fund size (€ million) | €2 589 | €1 339 | €982 | €800 | €497 | €402 | €266 | €89- €268 |
| Offices | 6 | 18 | 1 | 6 | 2 | 1 | 4 | 4 |
| Team | 125+ | 160+ | 30+ | 35+ | 12 | 18 | 85 | 20+ |
| Founded | 2009 | 1986 | 2007 | 2009 | 2011 | 2012 | 2013 | 2010 |

Source: [Omni Bridgeway](#), 2020.

In Europe, the UK presents the largest market for TPLF, due perhaps to London's leading position in arbitration and finance. At present, 44 litigation funders are active in the UK, which also operates across the EU, 24 in the Netherlands, and at least 13 in Germany. France follows closely behind, with some funders also located in Austria, Spain, Portugal and Ireland (where, however, the service is prohibited by common law doctrines of maintenance and champerty). Across the EU, the most common users of TPLF are consumers in the framework of class action lawsuits and SMEs that cannot afford to press charges against larger opposition, followed by claim purchasing and monetisation, and international arbitration proceedings. Whilst the majority of well-established funders pursue large cases where settlement demands reach tens of millions of euros, new firms are emerging seeking to fund considerably smaller lawsuits of up to a million euros through crowdfunding platforms. Moreover, at global level a large TPLF market has developed linked to shareholder claims.

Figure 5 – Global presence of private litigation funders



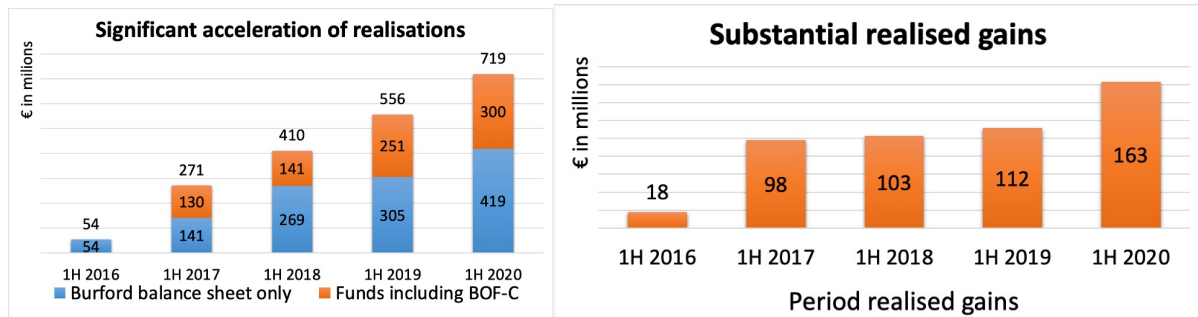
Source: [Omni Bridgeway](#), 2020.

In view of the growth in litigation finance, legal research provider Chambers and Partners established a ranking of litigation funding firms worldwide. Among these, the largest funders of litigation with operations in the EU are found to be Burford Capital, Omni Bridgeway and Therium Capital Management.

Burford Capital is the firm managing the highest number of assets in the TPLF market worldwide, with its EU office located in London. Launched in October 2009, the firm has grown to over

125 employees today with offices all over the world, and entered the UK legal finance market in 2011, with the acquisition of a leading insurance provider. Its focus lays on the provision of financing to corporate clients and law firms against the value of legal assets either on a single case or a portfolio basis. The firm presented pre-tax profits of €200 million in 2019, with an increase in the size of its portfolio to €3.5 billion. Over the past year, it has seen a rise in its return on capital from 85 % to 93 %. During 2019, the funder has made new commitments of over €1.25 billion, an important increase from the €9 million generated in 2009, testifying to the sizeable growth in the TPLF industry. In principle, Burford seeks an investment ratio of 1:10.²⁹

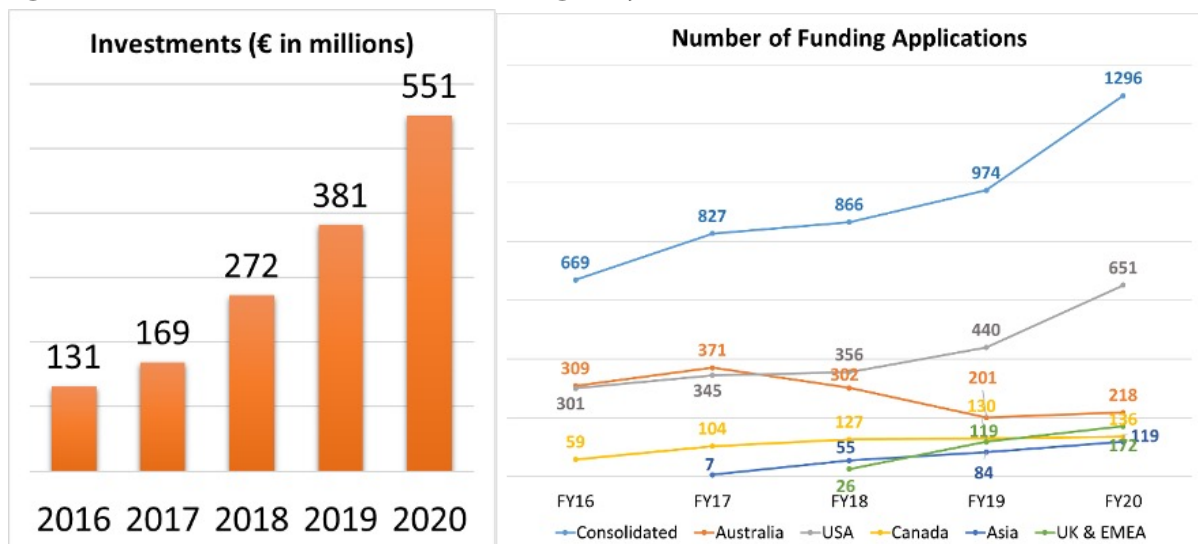
Figure 6 – Main financial data – Burford Capital



Source: [Burford Capital, 2020](#).

Omni Bridgeway Limited is one of the fastest-growing litigation funding firms globally. With over 150 experts, the company resulted from a merger between IMF Bentham and Omni Bridgeway in November 2019. Omni Bridgeway has been active in the Netherlands since 1986, focusing primarily on distressed asset recovery and restructuring, before venturing into funding banks' enforcements of non-performing loans. IMF Bentham was established in the 1990s in Australia and specialised in insolvency funding. As both firms had evolved into respected leaders in the TPLF industry by 2019, their merger created an entity with more than €1.25 billion in capital. Currently, the firm is present in the EU with offices in London, Amsterdam and Cologne, and specialises in civil and common law legal and recovery systems. In the year ending August 2020, the company reported revenues of €261 million, with net assets of €635 million, nearly four times the 2016 amount.

Figure 7 – Main financial data – Omni Bridgeway Limited

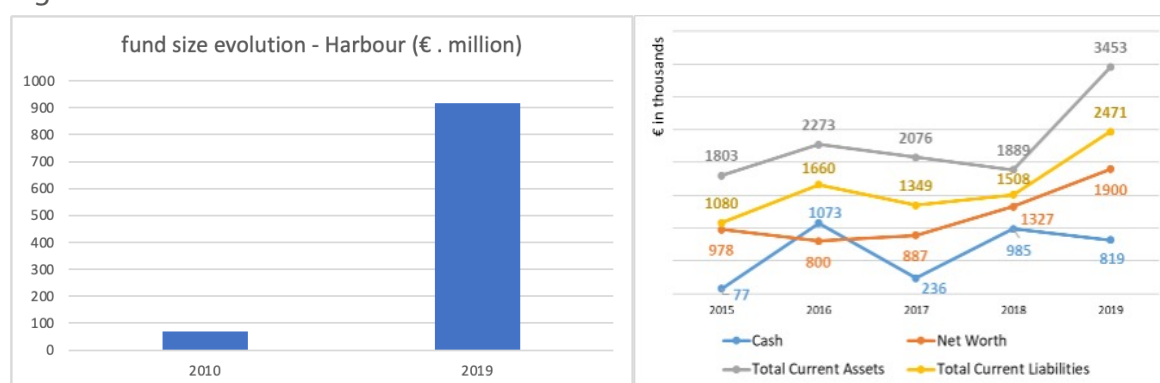


Source: [Omni Bridgeway Limited, 2020](#).

²⁹ See study in annex to this paper.

Harbour is the world's third largest private litigation funder measured by fund size, with around €920 million under management according to the latest data available. Based in London, it provides litigation funding to its clients in the USA, Europe, Canada, and Asia. Since its creation in 2007, Harbour has funded 126 cases, with a total combined claim value of around €17 billion, in both common and civil law jurisdictions, and in several arbitral forums. Harbour declares it has a substantial amount of capital immediately available of over €400 million. The firm requires a ratio of the claim value to the funding requirement of at least 10:1.³⁰ Harbour's fund size has increased sharply over the past decade of its operations, from €70 million in 2010 to €920 million in 2019. The company's balance sheet has nearly doubled in the five years from 2015 to 2019, from €1.8 million to €3.5 million, bringing Harbour's net worth to €1.9 million, almost double its 2015 value, while its cash reserves have increased more than ten-fold over the last five years. This impressive financial performance again demonstrates the recent fast growth of the TPLF service sector and the growing market importance of the funders.

Figure 8 – Main financial data – Harbour

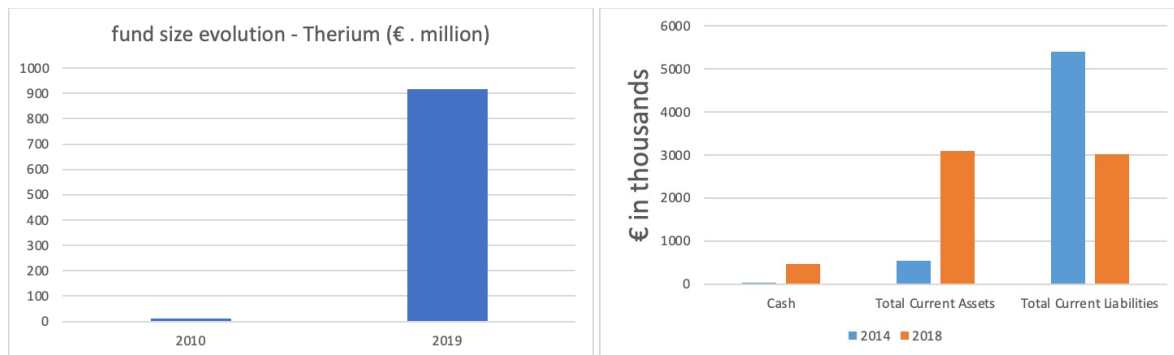


Source: author's own calculations based upon data from [companycheck](#).

Therium Capital Management, another leading funder of litigation and arbitration is present in London, Düsseldorf and Oslo in the EU, with a main office in Jersey. Its financing engagements typically surpass €20 million, and it funds some of the most sophisticated cases in the industry. The company is at the origin of integrated application of insurance tools with funding vehicles, and it initiated portfolio funding products in the UK. Over the years, it has funded claims valued at €30 billion. Through the launch of a not-for-profit funding initiative, Therium Access, with grant engagements exceeding €1 million, the firm has emphasised its objective to promote justice by funding cases which would not be financially profitable. The company's fund size has seen a remarkable increase, from €11 million in 2010 to more than €800 million in 2019, meaning that in 2019 the firm managed over 72 times the capital it managed when it first began operating. Moreover, its balance sheet also grew significantly, with assets having increased by more than 4.5 times in the 5 years between 2014 and 2018, to a value of €3 million. In the meantime, liabilities were reduced and cash at hand went from around €0.3 million in 2014 to €4.6 million in 2018.

³⁰ See [Harbour, the pioneer of litigation funding, 2007-2017](#), Harbour litigation funding, 2018.

Figure 9 – Main financial data – Therium



Source: author's own calculations based upon data from [companycheck](#).

2.3. Liability costs for businesses and costs for claimants

The other side of the coin of the development of litigation services and of the sometimes high margins observed in TPLF could be an excessive level of liability costs for businesses and for claimants. To shed some light on these relationships, we examine the evidence available in these areas.

First, regarding the cost of litigation for businesses, it must be recognised that up to date data is lacking. The most quoted source of comparable international information in this area is a 2013 study by the Institute for Legal Reform for the US Chamber of Commerce.³¹ Given the growing importance of the subject and the legislative work that has been started by the European Commission on this subject, a more proactive data collection and evidence based analysis process could have been expected. The data by the Institute for Legal Reform are based on an econometric model using panel data regression analysis. They cover nine EU countries (Ireland, where TPLF is prohibited, Belgium, Denmark, France, Germany, Italy, Spain Portugal, The Netherlands), the UK, Canada and the USA for 2008-2011. These data are naturally subject to the usual limitations attached to this type of statistical estimations. That being said, the results show a much higher cost of litigation in the USA at around 1.66 % of GDP, in Canada at 1.19 % of GDP and in the UK at 1.05 % of GDP. The cost for the EU, based upon the countries available in the sample was estimated at 0.63 % of GDP. For the USA, other sources of information³² on the issue confirm an identical order of magnitude of between 1.6 % and 2.3 % of GDP on average for the period under consideration. Updated estimates³³ in absolute terms give an absolute value of between €310 billion and €350 billion, representing respectively 1.74 % and 1.96 % of US GDP in 2019. This seems to indicate the persistence of high level of liability costs in the USA.

For the EU, no recent estimates to the same extent are available. To compute more up-to-date data, we use a bridge model that links to the revenue of the litigation service market. For that purpose, we start by plotting the liability costs against the size of the litigation service market (see Figure 10, Exhibit 1). As expected, the result of the linear regression shows a significant level of correlation between the two variables. Using the estimated equation and assuming the stability of the functional relationship, this allows us to derive some tentative estimates (see Figure 10, Exhibit 2) on the potential increase in liability costs that could be linked with the increase of the litigation service revenues from 2011 to 2019. The results are also in line with more recent data computed for

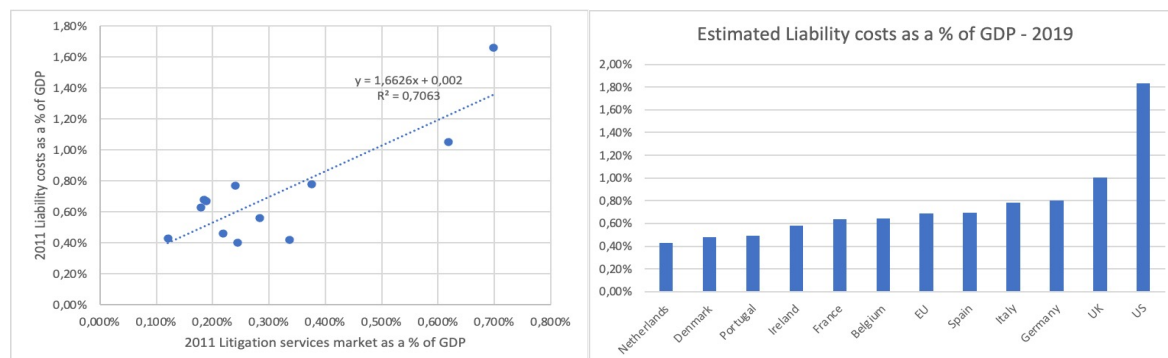
³¹ McKnight, D., Hinton, P., International Comparisons of Litigation Costs: Canada, Europe, Japan, and the United States, U.S. Chamber Institute for Legal Reform, June 2013.

³² See for instance [Economic benefits of tort reform](#), Perryman, November 2019; [U.S. Tort Cost Trends 2011 Update](#), Tower Watson.

³³ An assessment of excessive tort costs in Louisiana and potential economic benefits of reform, The Perryman Group, November 2019.

the USA. For the EU, liability costs seems to have increased slightly, from 0.63 % of GDP in 2011 to 0.69 % of GDP in 2019, still well below the values for the UK and for the USA, at respectively 1 % and 1.83 % of GDP.

Figure 10 – Estimation of updated liability costs



Source: author's own calculations based upon OECD and US Chamber of Commerce data.

Second, regarding the cost for claimants, as in TPLF the costs are paid by funders, some argue that this could lead to overrating and additional costs and as a result, a rise of costs including for non-TPLF related cases. Paradoxically, as costs rise, litigation becomes harder to afford, and the demand for third party funding could therefore grow even further. Some data are available regarding the cost for claimants. In particular, in its doing business database, the World Bank compiles data on the efficiency of resolving a commercial dispute, which could be used as a proxy for the costs faced by claimants. The data are collected for a specific type of case and the costs are recorded as a percentage of the claim value, assumed to be equivalent to 200 % of income per capita or US\$5 000, whichever is greater. Three types of costs are recorded: average attorney fees, court costs and enforcement costs. Data are available on an annual basis for all Member States except Malta, with the same methodology and comparably, since 2015.

Another source of data that is often cited in the literature refers to some previous work in 2009 by Hodges et al.. The study analysed the costs and funding of civil litigation. They concluded that the high level of lawyers' costs and the procedural architecture in some systems, produce significant challenges for delivery of access to justice at proportionate costs. The results differentiate between a number of representative cases. For the purpose of this study and as TPLF is primarily used in high-value commercial cases we look at data on the litigation costs of a hypothetical lawsuit worth €2 million with a €5 million profit or loss. Only 17 Member States are covered by the study and data might be relatively outdated.

A third source of data is a study commissioned by the European Commission Directorate-General for Justice and Consumers (DG JUST).³⁴ National reports produced for the purpose of the study contain a legal analysis for all 27 Member States on the implementation of EU consumer protection instruments into national legislation. They include information on aspects such as competent regulatory authorities, provision of legal aid, and regulation of collective redress representation. The reports also contain a snapshot of the court fees for individual claims in the different Member States in 2017. The data are provided by National Reporters, who are experts in procedural law and consumer protection law, based on information collected through investigations of the relevant national, European and international legal databases. Based on the court fees reported in the national reports, we calculate the cost of bringing an individual claim of €5 000 to the court. It is important to note that data on court fees is missing in the national reports for Cyprus, Croatia and

³⁴ European Commission, Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, 2006.

Luxembourg, while court fees for Lithuania, Romania, Slovakia and Spain are reported as null, since consumers in these countries are exempt from paying these fees.

Table 2 – Cost for claimants (€), corresponding individual case as described

| | Hodges et al. (2009) | DG JUST (2017) | World Bank (2019) |
|-------------------------|-------------------------------------|---------------------------|--|
| Austria | 243 | 299 | 1 030 |
| Belgium | 9 | 80 | 900 |
| Bulgaria | 557 | 200 | 930 |
| Croatia | | | 760 |
| Cyprus | | | 820 |
| Czech Republic | 81 | 100 | 1 690 |
| Denmark | 168 | 67 | 1 165 |
| Estonia | 187 | 750 | 865 |
| Finland | 27 | 500 | 810 |
| France | | 18.5 | 870 |
| Germany | 160 | 438 | 720 |
| Greece | 71 | 64 | 1 120 |
| Hungary | 591 | 300 | 750 |
| Ireland | 131 | 38 | 1 345 |
| Italy | | 98 | 1 380 |
| Latvia | | 435 | 1 155 |
| Lithuania | 27 | | 1 180 |
| Luxembourg | | | 485 |
| Malta | | 48 | |
| Netherlands | | 223 | 1 195 |
| Poland | 51 | 250 | 970 |
| Portugal | 3 | 102 | 860 |
| Romania | 1 | | 1 290 |
| Slovakia | | | 1 025 |
| Slovenia | | 240 | 635 |
| Spain | 133 | | 860 |
| Sweden | | 302 | 1 520 |
| United Kingdom | 2 | 207 | 2 285 |
| EU-27 | | | 973 |
| USA | | | 1 525 |
| Australia | | | 1 105 |
| | Hodges et al. (2009) and DG JUST | DG JUST and World Bank | World Bank and Hodges et al. (2009) |
| Correlation coefficient | 15 % | 10 % | 34 % |

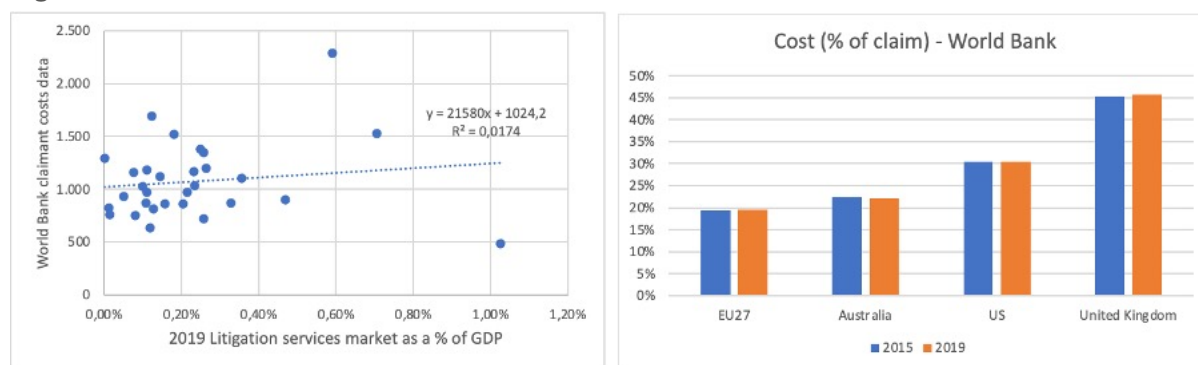
Source: author's own calculations based upon World Bank, DG JUST and Hodges et al. data.

Table 2 presents the data on the litigation costs for claimants from the sources described above. The first column contains the costs of civil litigation gathered by Hodges et al. The second column displays the court fees calculated using data from the study requested by DG JUST, European Commission. The third column presents data on the cost of enforcing contracts gathered from the World Bank doing business database. The data have been rescaled as a fraction of the claim to make them comparable. We note that there are differences with no clear observable pattern between them and very low observed levels of correlation. This could be expected, since the focus and the

methodologies used to assemble the figures are different.³⁵ Moreover, while the Hodges et al. study focuses specifically on litigation, it only provides data for 16 Member States, and its findings may be out-dated, as published over ten years ago. The World Bank data represents an approximation of the total cost of enforcing any legal contract, and the data gathered by DG JUST refers only to consumer court fees in the context of consumer protection law.

Furthermore, when we plot the data against the size of the litigation services market (see the example with World Bank data in Figure 11, Exhibit 1), we find no significant relationship. This could provide contrary preliminary evidence to the claim by some that these costs are directly related to the development of TPLF and of the litigation market. This observation is reinforced by the fact that, according to the World Bank data, despite the development of TPLF at global level and in the EU since 2015, claimant costs³⁶ have actually not grown significantly (see Figure 11, Exhibit 2). Such a conclusion would need to be confirmed by more detailed analysis of the lawyers', solicitors', counsels' and other disbursement costs for claimants. However, this information is not publicly available. A definitive conclusion cannot therefore be made at this stage. The business side of the argument seems therefore to be the main line of enquiry worth investigating through modelling, an issue that we will examine in the last section of this paper.

Figure 11 – Costs for claimants



Source: author's own calculations based upon World Bank, DG JUST and Hodges et al. data.

³⁵ The size and the definition of the representative case used for the estimation are not identical and the time periods are different, meaning that institutional development might not be taken into consideration in the same way.

³⁶ As explained, claimant costs here measures litigation cost (i.e. the cost of paying lawyers and court fees). It does not measure how successful claimants have their compensation diverted to investors, or how the involvement of funders increases the amount that needs to be recovered in order to meet the investors' minimum investment return expectations.

3. Identification of gaps and potential policy options to improve the existing EU framework

3.1. Evolution of EU legislation

At the EU level, TPLF has attracted attention in the last decade. In 2012, the European Parliament adopted its resolution 'Towards a Coherent European Approach to Collective Redress',³⁷ in which it called for any proposal in the field of collective redress to take the form of 'a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights'. The Parliament also stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States.

In 2013, the Commission issued a Communication, 'Towards a European Horizontal Framework for Collective Redress'.³⁸ Legislative initiatives for TPLF safeguards then followed, with the European Commission's Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States in 2013.³⁹ As access to collective redress differed from one Member State to another and as it was sometimes cumbersome for claimants to join forces when fighting for their rights in more complex cross-border cases, the recommendation aimed at facilitating access to justice, ending illegal practices and prohibitively expensive procedures and enabling injured parties to obtain compensation in mass harm situations. In particular, it put forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States.

Regarding funding, the recommendations stipulated:

14. The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

- (a) there is a conflict of interest between the third party and the claimant party and its members;
- (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;
- (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

- (a) to seek to influence procedural decisions of the claimant party, including on settlements;
- (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;

³⁷ [European Parliament resolution of 12 January 2012](#) on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI))

³⁸ Towards a European Horizontal Framework for Collective Redress, European Commission, June 2013.

³⁹ [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.

(c) to charge excessive interest on the funds provided

Funding of compensatory collective redress

32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

Furthermore, on funding of collective actions, the European Commission 2018 implementation report⁴⁰ explained that 'while the Recommendation does not urge the prohibition of private third party financing per se, it should be prohibited to seek to influence procedural decisions, to provide financing for action against a competitor or an affiliate and to charge excessive interest rates. Finally, specifically for cases of compensatory collective redress, it should be prohibited to make the remuneration given to or the interest charged by the fund provider dependant on the amounts recovered, unless such arrangement is regulated by a public authority'.

As a response and as a follow-up, two directives⁴¹ 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. In particular, it broadens the scope for litigation and for collective action as the rules upgrade the protection of rights by increasing the prospect for seeking collective judicial protection in cases of infringement of EU law. New rules on collective redress will allow EU consumers to come together to fight domestic and cross-border cases of unlawful practices.

In practice, the new package will allow qualified entities, designated by EU countries, to represent groups of consumers in collective cases. Collective redress will be possible in all EU countries, as at least one representative action mechanism must exist in all Member States, allowing organisations to represent citizens, with the power to seek sanctions and compensation for the harm caused. They will have to meet specific eligibility criteria. For cross-border representative action, criteria are set out in the new rules, while for domestic proceedings the criteria are set out in national law. In addition to general consumer law, collective action would be allowed in areas such as data protection, financial services, travel and tourism, energy, telecommunications, environment and health, as well as air and train passenger rights. By 2028, the European Commission should consider creating a European Ombudsman for collective redress, to deal with cross-border class actions at EU level. The issue of TPLF is addressed specifically in Article 10 of the directive:

Article 10: Funding of representative actions for redress measures

1. Member States shall ensure that, where a representative action for redress measures is funded by a third party, insofar as allowed in accordance with national law, 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.

⁴⁰ European Commission Report on the implementation of the Commission Recommendation 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), January 2018.

⁴¹ [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](#), repealing Directive 2009/22/EC and the [Directive on the better enforcement and modernisation of EU consumer protection rules](#)

2. For the purposes of paragraph 1, Member States shall in particular ensure that:

(a) the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action;

(b) the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.

3. Member States shall ensure that courts or administrative authorities in representative actions for redress measures are empowered to assess compliance with paragraphs 1 and 2 in cases where any justified doubts arise with respect to such compliance. To that end, qualified entities shall disclose to the court or administrative authority a financial overview that lists sources of funds used to support the representative action.

4. Member States shall ensure that, for the purposes of paragraphs 1 and 2, courts or administrative authorities are empowered to take appropriate measures, such as requiring the qualified entity to refuse or make changes in respect of the relevant funding and, if necessary, rejecting the legal standing of the qualified entity in a specific representative action. If the legal standing of the qualified entity is rejected in a specific representative action, that rejection shall not affect the rights of the consumers concerned by that representative action.

One point that might deserve particular attention is the fact that Directive 2020/1818 does not provide for a cap on the funder's return rate, unlike the abovementioned point 16.c of the 2013 recommendation. Such a decision appears to be aimed at fostering competition among funders. Nevertheless, it could also be argued that requiring a review of the reasonableness of the funder's return might have avoided the risk of funders being overcompensated. To analyse potential policy options, a thorough analysis of the implications of this type of remaining gap in the EU legislation is thus necessary.

3.2. Gaps and potential policy options to improve the existing EU framework

The study in annex outlines a number of regulatory gaps and challenges that the EU must overcome to improve responsible private litigation. The outcome of the research is that effective safeguards are needed to develop responsible TPLF in the EU. More specifically, the study discusses various approaches to the **contractual, ethical and procedural aspects of TPLF**. Specifically, the study highlights the main policy options at EU level – including both legislative initiatives and self-regulation – that may represent effective safeguards against the risks associated with TPLF. In this section, based upon the results of this study and on a recent comprehensive report⁴² by the Australian Parliament on recommendations to regulate TPLF, we describe the main gaps and the potential policy options to foster responsible TPLF in the EU more precisely. Table 3, below summarises the risks and potential policy options that could be envisaged to address them. Each section is then developed in detail in the following sections.

⁴² [Litigation funding and the regulation of the class action industry](#), Parliamentary Joint Committee on Corporations and Financial Services, Parliament House, Commonwealth of Australia, 2020.

Table 3 – Identified risks and potential policy options

| Risks | Policy options – moderate approach | Policy options – stronger approach |
|--|---|--|
| Over- or under-inclusive definition of TPLF activities, leading to regulatory gaps | Coordinate the adoption of clear definition and taxonomy of various form of TPLF | Requiring litigation funders to hold a financial services licence |
| Litigation funders establishing themselves in countries with more favourable legislation | Further harmonising laws regarding TPLF across EU Member States | Introduction of a requirement whereby any litigation funding agreement in the EU is governed by EU law, and the Court shall approve a litigation funding agreement |
| Claims cases funded through portfolio TPLF can bring about a large number of excessive and frivolous litigation cases, as well as opportunistic litigation, thus disturbing effective and efficient functioning of the judicial system | Encourage self-regulation by the industry to ensure responsible behaviour | Introduction of an express power for the Courts to resolve competing and multiple class actions |
| Capital inadequacy may leave the funded party without financing | Insurance coverage and/or capital adequacy requirements | Introduction of a statutory presumption requiring a litigation funder to provide security for costs |
| Lack of procedural safeguards leading to potential conflicts of interest, non-disclosure of the use of TPLF | Duty to disclose use of TPLF to the court and to the other party, together with the name of the funder – Establishment of lawyer's professional duty | <ul style="list-style-type: none"> - Requirement for a litigation funding agreement to obtain approval of the Court to be enforceable - Requirement for extensive information to be provided with the application for approval of a settlement |
| Lack of procedural safeguards leading to conflicts of interest, funder seeking to influence the procedural and outcome decisions of the claimant | Establishment of a duty for the Member States to ensure that the funder shall not seek to influence the procedural and outcomes decisions of the claimant | <ul style="list-style-type: none"> - Ability of the Court to appoint a contradictor - Specific guidance would be put in place regarding scenarios in which a conflict of interest is likely to arise - Requirement for litigation funders to disclose any potential conflicts of interest to the Court - Prohibition for solicitors, law firms and barristers from having an interest or accepting finance from a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting |
| Lack of protection of claimants in case of losses, no responsibility of funders towards the defendant for adverse costs in case the claimant loses | Providing the defendant winning the case with a direct action ⁴³ against the funder for the recovery of related costs if the funded party fails to pay | Introduction of the ability of the Court to make a costs order against a litigation funder |
| Excessive return rates | Introduction of a cap on funders' return rates, thereby balancing | Introduction of a cap on funders' return rates at 30 %, and |

⁴³ As this would require separate litigation, causing further costs, courts in the primary action should be able to award.

| | | |
|--|---|---|
| | private autonomy with the public interest of protecting the effectiveness of access to justice and address priority of payments potential issues ⁴⁴ | possibility for the Court to appoint a referee to act as a litigation funding fees assessor and address potential priority of payment issues |
| Difficult to determine how TPLF works in consumer collective redress in the Member States which have adopted an opt-out mechanism, and costs incurred are often borne by the representative plaintiff | Adoption of a 'common fund' approach, which allows the funder to claim its recovery percentage from all class members, irrespective of whether or not they signed the funding agreement | Requirement for litigation funding agreements to explicitly provide complete indemnity in favour of the representative plaintiff against an adverse costs order, as costs must be borne by funder |
| Failure to abide by standards such as: capital inadequacy, corporate standards, written TPLF agreements with clear terms, non-incitement of litigant's lawyer to act in breach of professional duties, or funder's termination of the agreement not resulting in a lack of protection for the funded party | Adoption of a voluntary ⁴⁵ European Code of Conduct for responsible litigation funders | Making these standards compulsory for all entities engaging in private litigation funding |

Source: EPRS.

3.2.1. Clarifying the scope and providing a comprehensive taxonomy of the various forms of TPLF

Defining more precisely what the terms 'third party funder' and 'third party funding' means is a prerequisite for any attempt to propose comprehensive policy options in this field. However, TPLF funders and funding currently take a variety of different forms and encompass a large number of situations. There is therefore always the risk that a uniform definition may be over- or under-inclusive. As such, clarifying the scope and providing a comprehensive taxonomy of the various forms of third-party funding accepted at EU level would allow for successful regulation for cohesion and uniformity across the EU.

A stronger policy option to create a system of accountability and to ensure that a clear legal framework can be applied to TPLF, could consist of requiring litigation funders to hold a 'financial service licence' and their regulation as investment schemes. This approach would clear any ambiguity regarding the form under which a particular TPLF agreement falls, and ensure identical treatment of all forms of third-party funding. Specifically, one gap is that funders owe no regulated duty of care towards litigants to preserve their interests. As in the insurance and financial services space, a prudential duty of care could be owed by funders to litigants. Not-for-profit litigation funders who hold charitable status and exist solely to support and protect the members of the associated charitable entity would be exempt from such a requirement.

3.2.2. Tackling 'forum shopping' by further harmonising TPLF legislation

First, the study in annex emphasises that many funders are corporations, subject to different Member State's laws and level of oversight, depending on the locations in which they have their

⁴⁴ Regarding priority of payments, funding agreements might provide a fixed agreed return (not based on a percentage), paid to funders as priority, before any other amounts are paid out. This can result in funders getting paid first, while claimants are paid second and to a potentially lesser extent.

⁴⁵ So far in this new field, the low level of adoption of the only known voluntary code by the association of litigation funders (ALF Code) should be noted. It therefore remains to be seen whether there would be sufficient adoption or adherence to a voluntary code.

registered offices. This concerns such aspects as corporate standards, capital requirements and the fiduciary duties of corporate officers and directors. In contrast, other funders such as investment funds across Europe, may be subject to EU rules that apply to capital markets. Second, the study also suggests that litigation funders are increasingly registering their offices in third countries with more favourable legislation, as they are subject to the company laws of the countries of their establishment even when investing in cases in other Member States. In the current legal and regulatory environment, Member States with more favourable laws regarding TPLF are therefore likely to attract the greater share of the industry, and policy changes in other Member States will have a limited effect.

A first, more moderate, option to tackle this situation would be to continue making progress towards further harmonising laws regarding TPLF across EU Member States. Stronger measures could consist of requiring any litigation funding agreement in the EU to be governed by EU law, with the Court approving a litigation funding agreement.

3.2.3. Reducing opportunistic, excessive, and frivolous claims

A potential benefit of TPLF is that it could facilitate access to justice for parties with legitimate claims but who may not be able to fund them. In principle, through the due diligence performed prior to the investment, only cases with substantial merit and good prospects of success are then selected for litigation funding. However, the recently increased practice of portfolio litigation⁴⁶ can result in a rise in opportunistic, excessive, and frivolous claims cases being funded through TPLF. This can bring about a large number of litigation cases, disturbing the effective and efficient functioning of the judicial system. Furthermore, portfolio litigation practices can also increase the risk of redundant litigation being carried out, where separate and concurrent class actions litigate the same legal claims, for the same or overlapping class members, against the same defendant.⁴⁷ As parties then often incur substantial additional costs and delay, this undermines the objective of the class action regime, which is for a single decision to resolve many claims that are the same or similar.

Here, the key for the regulator is to find a balanced approach to facilitate access to justice, while at the same time eliminating opportunistic, excessive, and frivolous claims. A first option could be to encourage self-regulation by the industry to ensure responsible behaviour. Another possible remedy to this issue could be the introduction of an express power for the Court to resolve competing and multiple class actions,⁴⁸ whereby it would be within the Court's discretion to allow more than one class action with respect to the same dispute to continue, or to order class closure orders.

3.2.4. Introducing insurance coverage and/or capital adequacy for funders established in the EU

Capital inadequacy represents a sizeable problem, as funders with insufficient cash in hand to fund their portfolio of investments in disputes in full may leave the funded party without financing. As highlighted in the study, such fixed capital requirements for funders have already been established by way of statute in Singapore. In the UK, fixed capital requirements have been established by way of self-regulation by the Association of Litigation Funders of England and Wales. The establishment of insurance coverage and/or capital adequacy requirements for funders established in the EU could contribute to the reduction of this risk. A stricter requirement to address this problem could be to introduce a statutory presumption requiring a litigation funder to provide security for costs.

⁴⁶ Portfolio litigation practices refer to the funding of a portfolio of disputes. Consisting of funders spreading the risks across a bundle of cases to diversify their investments, the approach has the potential to lead to cases without merit also receiving funding.

⁴⁷ This could also be linked to the lack of clarity in jurisdictional rules.

⁴⁸ This might however require an amendment to EU jurisdictional rules

3.2.5. Addressing conflicts of interest – disclosure of the use of TPLF

There is increasing concern, particularly in Member States where the use of TPLF is more widespread, regarding the absence of any duty to disclose to the court the fact that TPLF is being used, together with the name of the funder, so that the court is aware of any potential conflicts of interest and whether any awards made by the Court will actually compensate the claimants. Indeed, conflicts of interest represent an important issue in TPLF agreements, and can emerge for instance in cases where there is a pre-existing relationship between the funder and the claimant's or the defendant's lawyers, or between the claimant and the claimant's lawyer. The relationship is also sometimes between the funder and the claimant directly. In such cases, the funder can reserve the right to take decisions benefiting the funder first, sometimes leaving the claimant's interests underserved. As this is regulated by contract, the lawyer might have to accept the client's instructions, where those instructions are determined by an agreement with a funder. Finally, disclosing the use of TPLF could also address the problem of confidentiality, as commercial and potentially sensitive information concerning the claimant and the potential defendant may be provided to the potential funder in order to obtain TPLF.

A possible approach covering domestic and cross-border disputes may be to consider the disclosure of the existence of a TPLF agreement and the name of the funder. When the lawyer is party to the funding agreement, this would be complemented by a mandatory part of a lawyer's professional duty, the breach of which results in a violation of the lawyer's professional duties. In such cases, the European Parliament may promote an amendment to the Code of Conduct for European Lawyers. In cross-border disputes, a possible option could be to adopt an EU instrument aimed at introducing, in respect of individual claims, a general duty to disclose the fact that TPLF is being used, as well as the name of the funder, to the court and the other party, either at the commencement of proceedings, or if the financing agreement is concluded at a later stage, without delay as soon as the agreement is concluded.

A stricter policy option could be to introduce a requirement whereby a litigation funding agreement must be approved by the Court to be enforceable, and the Court has the power to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require. The Court could also require extensive information to be provided together with the application for approval of a class action settlement, including the amount of security costs paid, the total amount of the funding commission, and the amount of corporate tax paid in the Member State by the litigation funder in the three previous financial years.

3.2.6. Addressing conflicts of interest – influencing decisions on procedural and outcome strategies

Furthermore, as shown by the study in annex, conflicts of interest between the claimant and the funder may arise from attempts by the funder to influence decisions on procedural and outcome strategies, including settlements. Although disclosing the use of TPLF contributes to limiting the ability of the funder to influence the procedural decisions of the claimant, further actions could be taken. Managing this risk could possibly involve adopting an EU instrument on third-party funding for litigation, aimed at introducing, inter alia, a duty for the Member States to ensure that, in cases where a legal action is funded by a private third party, the funder shall not seek to influence the procedural decisions of the claimant.

A tougher regulation would be to enable the Court to appoint a contradictor in instances where there is a potential for significant conflict of interest to arise, or complex issues are likely to come to light at the settlement approval application. Furthermore, specific guidance would be put in place regarding scenarios in which a conflict of interest is likely to arise. In addition, the (representative) plaintiff's lawyers and litigation funders would be required to disclose any potential conflict of interest to the Court. Lastly, solicitors, law firms and barristers would be prohibited from having an

interest or for being financed by a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting.

3.2.7. Increasing protection of claimants in case of losses

While funders benefit financially if the claimant wins, they do have full responsibility⁴⁹ for adverse costs in case the claimant loses, and the defendant enjoys no direct action against the funder to recover procedural costs. To protect the defendant, one solution would be to provide the defendant winning the case with an option to take direct action against the funder⁵⁰ for the recovery of procedural costs if the funded party fails to pay. A stronger policy option addressing this issue would be to enable the Court to make a costs order against a litigation funder. The Court would also be able to order the costs of the work undertaken by a referee, appointed by the Court as a litigation funding fees assessor, to be paid by the litigation funder, in circumstances where the conduct of the litigation funder justifies such an order being made.

3.2.8. Limiting excessive return rates

As already pointed out, this point might deserve particular attention as Directive 2020/1818 does not provide for a cap on the funder's return rate, unlike point 16.c of the 2013 recommendation. The study in annex emphasises that the funder and the claimant enjoy freedom to contract according to the selected applicable law, although their freedom is generally limited by public policy and mandatory provisions of the applicable law. This private autonomy of the parties in determining the remuneration may, however, undermine the effectiveness of the result obtained by the claimant through successful access to justice. A litigation funder typically takes a 20-50 % share of the amount awarded in the case, or a multiple of the funding provided, and may charge excessive fees to the claimant, thus depriving him or her of a substantial part of the litigation's outcome. In this way, the success of the result obtained by the claimant through successful access to justice may be compromised, as the claimant eventually receives a considerably lower compensation than that awarded by the court. Ultimately, the claimant has to pay a substantial part of what is recovered to the funder. In light of the above, the need arises for a balance between private autonomy and the public interest of protecting the effectiveness of access to justice.

A possible remedy to the problem caused by excessively high remuneration fees would be the introduction of a cap on funders' return rates, thereby balancing private autonomy with the public interest of protecting the effectiveness of access to justice.

A stronger policy option would be to fix a cap on funders' return rates at 30% for all litigation funders across the EU. It may be necessary to ensure that a cap is expressed as a percentage of the amounts actually delivered to claimants.⁵¹ Such a cap should also take account of all the amounts funders will receive, including return of the invested amount, the fee, and any other charges or costs. Finally the cap could take account of the fact that funders often insist on being paid before anyone else, sometimes leaving little or nothing in the pot for disbursement. In addition, the Court could be given the ability, at any point in a proceeding, to appoint a professional referee to act as a litigation funding fees assessor.

⁴⁹ In some jurisdictions, there is at least some exposure. Although no longer a Member State, the UK already has some limited costs exposure for funders.

⁵⁰ As this would require separate litigation, causing yet more cost, courts in the primary action should be able to award.

⁵¹ A cap based on an initial claim amount would lead to inflation of claims. A cap based on a total possible aggregate award (but not an amount actually paid out) could disincentivise actual pay-out.

3.2.9. Clarifying opt-out mechanisms and representative plaintiff's costs in consumer collective redress

When it comes to collective redress cases, while TPLF may contribute to increasing access to justice for consumers, it may be very difficult to determine how TPLF works in consumer collective redress in the Member States which have adopted an opt-out mechanism. To this end, it would be useful to clarify how TPLF works with respect to an opt-out mechanism, for example by adopting a 'common fund' approach, which allows the funder to claim its recovery percentage from all class members, irrespective of whether or not they signed the funding agreement. To address the challenge caused by the fact that the costs incurred in the class action are often borne by the representative plaintiff, rather than among all those who share in the proceeds of a successful outcome, litigation funding agreements with respect to class actions could be required to explicitly provide complete indemnity in favour of the representative plaintiff against an adverse costs order. The court would thereby be able to reject approval of a litigation funding agreement unless it provided a complete indemnity for adverse costs.

3.2.10. Introducing a European code of conduct for responsible litigation funders

The study in annex also argues that the adoption of a European Code of Conduct for Litigation Funders could be instrumental in achieving more responsible TPLF in Europe. As mentioned in the study, this code of conduct could include safeguards such as:

- a) capital adequacy and established corporate standards;
- b) clear and unequivocal TPLF agreements drawn up in writing;
- c) defence for the funder to take any steps likely to cause the lawyer to act in breach of his/her professional duties;
- d) ensuring that the grounds for termination of the TPLF agreement by the funder must not result in a lack of protection for the funded party.

A first option for such a code of conduct could be that its implementation is left at the initiative of responsible litigation funders operating in the EU market, with the support of EU institutions. Given the limited impact that such an initiative might have, and given the current proliferation of self-regulation initiatives by different groups of funders and private entities, a more ambitious approach might be necessary. A stricter policy option could, for instance, turn the standards presented above into requirements that must be fulfilled by all entities engaging in private litigation funding, for them to be allowed to conduct their funding activities.

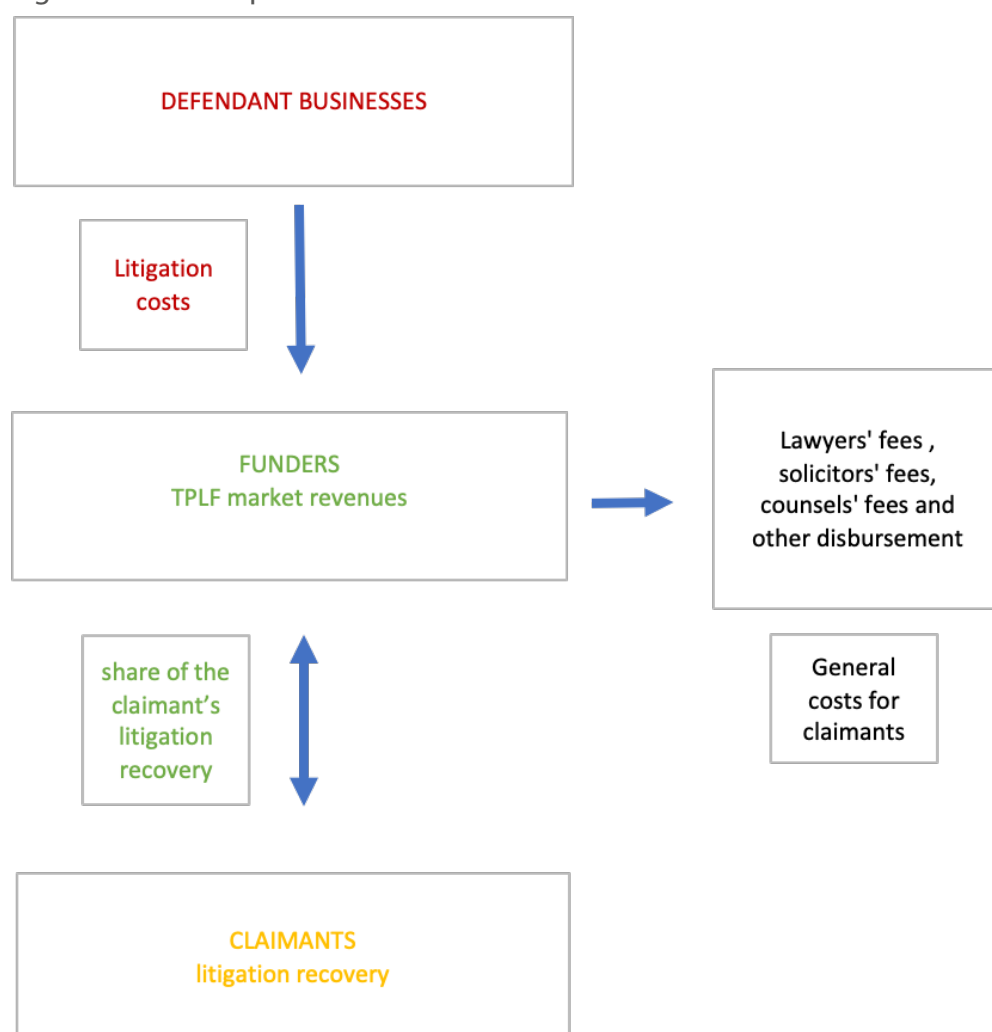
4. Analysis of the EAV of policy options identified

In this section, we start by describing the conceptual framework, the scenarios and the assumptions underpinning the evaluation of implementing the policy options previously described. We follow by presenting the results of the quantification of the EAV. Finally, we broaden the scope by conducting a systemic qualitative assessment of potential benefits and risks, while also discussing the results.

4.1. Conceptual framework and description of scenario

From an economic point of view (see Figure 12), the added value of TPLF could be analysed as benefits stemming from litigation recovery share to the claimants and revenues for the funders. The counterpart comprises costs, divided between liability costs for businesses and lawyers, solicitors, counsels and other disbursement cost for claimants, which in the case of TPLF are paid by the funders.

Figure 12 – Conceptual framework



Source: EPRS.

Based upon this conceptual framework and considering the various policy options described in the previous section, three main scenarios can be distinguished. The **baseline scenario** considers a situation where no change is made to the regulation of TPLF in the EU – a no policy change scenario. In terms of regulating TPLF, this would correspond to very low standards for harmonised criteria at EU level for third party funders. As a result, under such a situation, we assume that we would see TPLF in the EU growing in line with forecast global average growth for this sector (at 8.8 % on average over the simulation horizon). This development would incur extra liability costs for businesses, in particular as opportunistic, excessive, and frivolous litigation would continue to be funded and strategic considerations would also be in play. To estimate these liability costs, we rely upon the following bridge model estimated in Section 2 (see Figure 10):

$$\text{Liability costs}_{t+n} = 1,6626 * (\text{TPLF market revenues}_{t+n} + \text{other non-TPLF litigation market revenues}_{t+n}) + 0,002 + \mu$$

Liability costs, TPLF market revenues and non-TPLF litigation market revenues are all expressed as a % of $t+n$ GDP. μ represent the error term, n is fixed at 5 years.

Regarding the costs for claimants, given the relative stability observed in the World Bank data and given the fact that the statistical relationship in our bridge model is not significant, we simply assume that they would move in line with the recent trend of the last five years until the end of the simulation horizon (increasing by 0.1 percentage point to 19.6 %). We finally assume that litigation funders will continue to extract a 40 % share⁵² on average of the amount awarded, thus retaining a substantial part of the litigation outcome.

A **second scenario (moderate regulatory approach)** considers a situation where a substantial level of regulation of TPLF is implemented in the EU. This would correspond to introducing standards for harmonised criteria at EU level for third party funders with a view to better regulating contractual, ethical and procedural aspects of TPLF. The overall purpose would be to ensure funders engage in TPLF in a responsible way, while aiming at achieving a responsible balance between claimant rights and the need to restrain opportunistic, excessive and frivolous litigation. The options envisaged are described in details in column 2 of Table 3 above. In this scenario, we assume that TPLF in the EU would grow in line with our estimates of past average growth for this sector (at 3.5 % on average over the simulation horizon). This development would incur extra litigation costs for businesses, in line with the bridge model described above. Regarding the costs for claimants, we assume a marginally lower increase (of 0.05 % to 19.55 %). Finally, it is assumed that, given the options under consideration, litigation funders will extract a lower percentage share of the amount awarded on average, estimated at 30 %.⁵³

The **third scenario (strong regulatory approach)** considers a situation where a strong level of regulation of TPLF is implemented in the EU. This would correspond to introducing relatively strict eligibility criteria compelling funders to comply with a set of stringent requirements before being allowed to invest in litigation, with a view to ensuring strong contractual, ethical and procedural aspects of TPLF. The options envisaged are described in more detail in column 3 of Table 3 above. In this scenario, we assume that TPLF in the EU would grow at the same speed as the economy, measured by trend potential GDP (at 1.2 % on average over the simulation horizon, according to OECD long term projections).⁵⁴ This development would incur extra litigation costs for businesses, in line with the bridge model described above. Regarding the costs for claimants, we keep the same marginally lower increase (of 0.05 % to 19.55 %). Finally, it is assumed that, given the options under

⁵² Amount based upon the study in annex.

⁵³ Amount based upon the study in annex. Some would argue that this assumption alone would justify an EU regulatory model.

⁵⁴ [OECD GDP long-term forecast](#), OECD, 2018.

consideration, litigation funders will extract on average a lower percentage share of the amount awarded, estimated at 20 %.⁵⁵

Table 4 – Main assumptions

| | Increase in TPLF market revenues | Increase in litigation costs for businesses | General costs for claimants | Claimants' share of the litigation recovery |
|------------------------------|--|---|--|---|
| Baseline scenario | In line with forecasted global average growth for this sector (at 8.8 % on average over the simulation horizon) | In line with our bridge model | In line with recent trend of the last five years until the end of the simulation horizon (increasing by 0.1 % to 19.6 %) | Lower end of the spectrum at 60 % |
| Moderate regulatory approach | In line with our estimates of past average growth for this sector (at 3.5 % on average over the simulation horizon) | In line with our bridge model | lower increase (of 0.05 % to 19.55 %) | Middle value at 70 % |
| Strong regulatory approach | At the same speed as the economy measured by trend potential GDP (at 1.2 % on average over the simulation horizon according to OECD long term projections) | In line with our bridge model | lower increase (of 0.05 % to 19.55 %) | Higher end of the spectrum at 80 % |

Source: EPRS.

4.2. European added value assessment

In this section, the economic added value of the three options presented in Table 4 is analysed to compare each regulatory approach. The scenarios are based on the assumptions described in Table 4. The focus is therefore not on the development of the TPLF sector, but rather on ensuring a level of TPLF activity that would be as beneficial as possible for claimants and for the economy as a whole. The estimations provided and the outlook presented are naturally subject to uncertainty as the economic consequences of the ongoing Covid-19 pandemic will undoubtedly have profound structural implications.

In the baseline scenario, the expected development of TPLF is in line with the recent market analysis presented in section 2, which emphasises strong prospects in all segments of the market in the coming years. As a result, and as highlighted in Table 5, the size of the EU TPLF in terms of revenue would grow significantly in the next five years, by around €649 million, to reach around €1.6 billion in 2025. Moreover, TPLF would contribute to an increase in cases with potentially high settlements, as a share of this settlement constitutes the revenue paid to the funder in exchange for investment in the proceedings. This, in turn, would lead to an increase in the liability costs for businesses, as

⁵⁵ Amount based upon the study in annex. Some would argue that this assumption alone would justify an EU regulatory model.

observed in the countries with high levels of active TPLF.⁵⁶ For the baseline scenario, according to our bridge model, these costs could increase by around €1.1 billion. General costs for claimants, assumed to be 19.6 % in this scenario, would increase by €127 million, while claimants' share of the recovery, assumed to be 60 %, would reach €324 million.

In the moderate regulatory approach scenario, a development of TPLF still takes place, but at a slower pace than in the baseline scenario, due to the implementation of a harmonised and more balanced regulation at EU level in this area.⁵⁷ As a result, and as highlighted in Table 5, the size of the EU TPLF in terms of revenue would grow in the next five years, by around €287 million to reach around €1.3 billion in 2025. Moreover, TPLF would finance a lower number of claims, in particular opportunistic, excessive and frivolous claims would be significantly reduced. This, in turn, would lead to a slower increase in the overall liability cost for businesses. According to our bridge model, these costs could increase by around €477 million. General costs for claimants, assumed to be 19.55 % in this scenario would increase by €56 million, while claimants' share of the recovery, assumed to be 70 % would reach €201 million. This amount is still relatively close to the baseline that, from the claimant's point of view might be more acceptable, as most relevant claims would still be financed in a more responsible way.

In the strong regulatory approach scenario, the development of TPLF is rather limited as ambitious and more stringent harmonised regulation at EU level in this area is implemented. As a result, and as highlighted in Table 5, the size of the EU TPLF in terms of revenues would grow in the next five years by only €68 million, to reach less than €1.1 billion in 2025. Moreover, the number of claims to be financed by TPLF would be low, which would lead to a low increase in liability costs for businesses. According to our bridge model, these costs could increase by around €113 million. General costs for claimants, assumed to be 19.55 % in this scenario, would increase by €13 million, while claimants' share of the recovery, estimated at 80 %, would reach €54 million.

Using these results, an estimation of the EAV can be made. The baseline scenario serves as a reference to evaluate the EAV of the other two alternatives. In terms of the methodology used to assess the EAV, we start by recalling the economic impact for each component i.e. the liability costs for businesses, the costs for claimants, the potential benefits linked to the added value resulting from the development of TPLF and the benefits of better enforcing claimants' rights through the claimants' share of litigation recovery. We then proceed by computing the difference in the values for each component with the values for the baseline (negative signs represent costs and positive signs, benefits). The EAV is simply obtained as the sum of the relative components (see Table 5).

⁵⁶ Looking at individual countries, this development can be observed in the USA, which is known for having few restrictions regarding funders' ability to invest in litigation and arbitration, and also presents the highest liability costs as a percent of GDP – 1.83 % in 2019. The other jurisdictions where TPLF is more developed also display relatively larger liability costs according to our estimates. Our estimates gave a value of 1 % of GDP for the UK and of 0.8 % of GDP for Australia. In comparison, liability costs have remained relatively low in the EU-27, estimated at around 0.69 % in 2019, on average.

⁵⁷ Note both the UK and Australia already have versions of a moderate regulatory approach (including voluntary self-regulation), but have experienced continuous sustained levels of TPLF growth.

Table 5 – Computation and assessment of the EAV components – after five years (€ million)

| | Increase in TPLF market revenues | Increase in liability costs for businesses | General costs for claimants | Claimants' share of the litigation recovery | EAVA |
|------------------------------|----------------------------------|--|-----------------------------|---|------|
| Baseline scenario | 649 | 1079 | 127 | 324 | - |
| Moderate regulatory approach | 287 | 477 | 56 | 201 | - |
| | -362 | +601 | +71 | -123 | 187 |
| Strong regulatory approach | 68 | 113 | 13 | 54 | - |
| | -581 | +966 | +114 | -270 | 229 |

Source: EPRS.

As highlighted in the last column of Table 5,⁵⁸ we find an **EAV of €187 million for the moderate regulatory approach scenario**. This can be broken down into a benefit of €601 million in terms of lower liability costs for businesses and a benefit of €71 million in terms of lower costs for claimants, versus a cost of €362 million in terms of lost revenues for the litigation service sector through TPLF and a cost of €123 million resulting from a lower level of litigation recovery for claimants. For the **strong regulatory approach scenario, we find a slightly higher EAV of €229 million**. This breaks down into a benefit of €966 million in terms of lower liability costs for businesses and a benefit of €114 million in terms of lower costs for claimants, versus a cost of €581 million in terms of lost revenue for the litigation service sector through TPLF and a cost of €270 million resulting from a lower level of litigation recovery for claimants.

Both alternative scenarios provide for a higher level of guarantee for claimant rights while allowing some flexibility for private funders. This responsible funding approach would also ensure that liability costs for businesses and the cost of access to justice remain relatively low. Given the level of uncertainty, and given the fact that the two EAV are relatively close to one another, it is rather difficult to arrive at a clear cut conclusion on the choice between the two approaches. The baseline scenario is, however, more likely to be supported by funders (as revenues and flexibility are the highest), while the strong regulatory approach would be more favoured by businesses (as liability costs are the lowest). Claimants might possibly be more open to the moderate scenario, as it would allow a high share of litigation recovery and limit the costs, while allowing for some responsible TPLF to take place, although they might also consider the strong regulatory approach.

Naturally, these estimations should be considered as **evidence to underpin the necessary political discussion on the related legislative initiative**. As emphasised by some, and given the relative lack of transparency in this sector, these assumptions should not be interpreted in a narrow and simplistic way, and should certainly be discussed further before reaching a conclusion. Even more so, as the value of TPLF could be higher and could increase faster than even in our assumption. For instance, a sensitivity analysis assuming a doubling of the increase in TPLF market revenue, would give an EAV of €282 million for the moderate regulatory approach scenario and €383 million for the strong regulatory approach scenario.

In addition, the potential that a clear regulatory framework with adequate protections could greatly increase the legal certainty for courts, funding providers, lawyers, claimants and defendants must

⁵⁸ The results should naturally be interpreted and discussed and should not be considered in a simplistic and isolated way.

be considered. Resistance to funding by courts, and defendants, as well as claimants worried they will lose control of litigation, are therefore important opportunity limiting factors. Legitimate funders, and funding opportunities generally, could therefore grow substantially within an appropriate regulatory framework.

Furthermore, beyond the potential economic added value, the wider repercussions of the development of TPLF should also be considered, aiming at a more comprehensive assessment. Significant changes resulting from a widespread development of TPLF could, for instance, affect the functioning of the justice system, while some institutions might also be impacted. More widely, the risks and the impacts could be different for various components of society. In the next section, therefore, the analysis is expanded by complementing it with an advanced qualitative assessment.

4.3. Qualitative assessment of the potential impact on benefits and risks

Taking a more systemic approach in this section, we aim at providing a broader qualitative assessment of the development of TPLF. In particular, we evaluate the impact – in terms of potential direct benefits and of risk reduction – which the adoption of a legislative initiative on responsible TPLF would bring.

First, from a **business** perspective, an EU legislative initiative on responsible private litigation funding could improve the economic climate, encouraging more risk-taking while also securing more investment where needed. By keeping the costs of litigation from rising uncontrollably, it could make it less costly for businesses to defend themselves against opportunistic, excessive and frivolous claims. Avoiding sometimes unnecessary, costly and lengthy proceedings could allow businesses to save resources or to direct them to more productive activities. Furthermore, by reducing the incidence of opportunistic, excessive, and frivolous proceedings, the risk of disruption to business activities and strategic positioning might be reduced. As defendants, businesses could also be protected against the negative influence resulting from potential conflicts of interest between the claimant's litigation funders and other parties. In cases where the lawsuit is won by the defendant, the legislative framework could ensure the ability of the business to recover the procedural costs from the claimant's funder, further protecting it from excessive costs. By limiting the amount of opportunistic, excessive, and frivolous cases put before the Court, and subsequently increasing legal certainty and business confidence, the risk of reputational damage for businesses caused by some lawsuits could also be reduced. Lastly, businesses may also play the role of claimants if they have been harmed by other entities, such as suppliers or government bodies. In this case, they could benefit from the reduced risks, resulting from the EU legislative initiative that apply to claimants.

Claimants could also benefit from an EU legislative initiative on responsible private litigation funding. Requiring proof of capital adequacy or insurance coverage for the funder could guarantee that claimants funded through TPLF would not suddenly be left without financing for their claim when a funder experiences financial difficulty. Furthermore, capping the funder's return rate at a certain level could ensure that the compensation received by the claimants effectively indemnifies them against the damage they faced and funders cannot therefore take money from awards, leaving claimants with little or nothing. The representative plaintiff could also be protected from holding sole responsibility for the costs incurred, as the funder could claim its recovery percentage from all class members. There would be fewer incidences of a lawyer's duty to disclose potential conflicts of interest, thereby granting greater independence to the claimant over the procedural strategy he or she wishes to pursue. The responsible provision of TPLF could improve consumers' access to justice if harmed by unfair business practices, making claims possible for claimants who could otherwise not afford to seek justice. In particular collective redress could see further development, for the benefit of consumers and society, if pursued in line with a responsible litigation framework.

Moreover, attaining a higher level of consumer protection could deter businesses from engaging in harmful practices, and therefore result in lower security risks for consumers when it comes to the products they use.

Regarding the **funders**, an important benefit of the legislative initiative concerns the fact that the eligibility criteria laid out could enable a greater pool of funders to be active in the industry. As already explained however, it is not clear that funders will support this initiative, as they have traditionally resisted any form of regulation and have not yet fully subscribed to available voluntary mechanisms. Moreover, as the Member State would ensure that the funders shall not seek to influence the procedural decisions of the claimant, the risk of a conflict of interest arising is reduced. Furthermore, assuming full compliance with the requirement of responsible litigation, the legislative initiative could offer funders a greater amount of flexibility in conducting their operations, allowing them to make more independent decisions and maximise profits through their strategic choices. In particular, by introducing a code of conduct for litigation funders, funders could retain control over their operations and the rules with which they comply. Lastly, the reduced potential for conflicts of interest could improve the reputation of the TPLF sector, which could in turn benefit the company image of litigation funders and bring them more capital and revenues.

The **litigation services market** could see benefits in terms of a greater balance between claimant rights and the need to restrain opportunistic, excessive, and frivolous litigation. This could allow the litigation services market to grow, without causing harm in terms of increased costs for businesses and claimants, or lower efficiency in the judicial system, for instance through a large increase in litigation. Furthermore, a harmonisation of laws regarding TPLF across EU Member States could result in a litigation services market that is less fragmented across countries, where people in all Member States have the same ability to obtain funding for their claims.

Finally, from the perspective of the **judicial system**, without a proper legislative framework in place at EU level, some fragmentation in terms of access to the same level of justice within the EU would still occur. This would continue to overcomplicate cross-border litigation, creating distortions and additional costs. Some more specific benefits could also be expected. For instance, as the eligibility criteria could enable a greater pool of funders to be active in the market, this could increase competition between funders, and therefore improve the functioning of the justice system. Keeping rates competitive could facilitate access to justice for claimants thereby safeguarding the functioning of the judicial system. Harmonising the laws at EU level could also help to reduce inequalities in claimants' access to funding between countries, contributing to the effectiveness of the judicial system. That being said, as was included in the EU Collective Actions Directive, it is important to harmonise funding laws for those Member States that wish to permit funding, but funding is contrary to legal tradition in some Member States. Furthermore, adopting a clear definition of the various forms of TPLF could improve the transparency of the system, and ensure that TPLF activities are compliant with the appropriate directives. By limiting opportunistic, excessive, and frivolous claims that hamper the smooth running of the system, the legislative initiative would contribute to increased efficiency. Lastly, by preventing exponential litigation costs and by ensuring that a good fraction of the compensation is allotted to the claimant, the judicial system could fully fulfil its purpose of ensuring justice.

Table 6 – Qualitative assessment – EU legislative initiative on responsible private litigation

| | Potential impact on benefits | Potential impact on risks |
|----------------------------|---|---|
| Businesses | Lower transaction and litigation costs | Lower risk of financial losses due to opportunistic, excessive, and frivolous claims |
| | Lower incidence of opportunistic, excessive, and frivolous and lengthy proceedings | Lower cost and less waste of resources in unproductive activities |
| | Higher likelihood of uncovering conflicts of interest | Lower risk of the procedural strategy being influenced by the funder at the expense of the defendant business |
| | Improved mechanisms for the defendant winning the case to recover procedural costs from the funder | Lower risk of not being compensated in case the claimant loses |
| | Increased legal certainty and business confidence | Reduced risk of reputational damage |
| | More risk-taking and higher levels of investment | |
| Claimants | Lower incidence of funded claimants left without financing | Lower risk of incurring unexpected and unaffordable litigation costs |
| | Higher portion of compensation received | Lower risk of giving up a large fraction of the compensation to the funder |
| | Improved guidelines on the sharing of costs among class members | Lower risk for the representative plaintiff to pay the costs alone |
| | Higher likelihood of uncovering conflicts of interest | Lower risk of dependence on the funder's procedural strategy |
| | Improved access to justice and to collective redress | Lower risk of exclusion of low-income consumers |
| | Higher level of consumer protection | Lower security risks for consumers |
| Funders | Clearer eligibility criteria | Lower risk of failing to comply with a country's eligibility criteria |
| | Lower likelihood of influencing the procedural decisions of the claimant | Reduced risk of a conflict of interests |
| | Increased flexibility | Lower risk of being limited in their ability to run investment activities |
| | Improved reputation | Lower risk of losing control |
| Litigation services market | Greater balance between claimant rights and the need to restrain opportunistic, excessive, and frivolous litigation | Lower risk of market development at the expense of the efficiency of the judicial system |
| | Improved harmonisation of laws | Lower risk of comparatively more advantageous litigation in a given country |
| Judicial system | Greater pool of funders, more efficiency | Lower risk of anti-competitive behaviour |
| | Improved harmonisation of laws | Lower risk of unequal access to justice across Member States |

| | | |
|--|--|--|
| | Improved transparency | Lower risk of TPLF activities being assessed based on the wrong definition |
| | Lower incidence of opportunistic, excessive, and frivolous claims | Lower risk of litigation funders establishing themselves in countries with more favourable legislation |
| | Lower litigation costs and higher portion of compensation received by claimant | Lower risk of incomplete justice being served |

Source: EPRS.

5. Conclusion

Responsible TPLF regulatory framework should aim at lowering costs, simplifying unnecessary procedures, increasing the predictability of costs, and delivering efficient services at costs that are proportionate to the amounts in dispute. It has also to ensure access to the judicial system for all legitimate claims, while making sure that opportunistic, excessive, and frivolous claims do not develop and that TPLF is not purely motivated by financial gain or employed for businesses' strategic objectives. In this study, we analysed these issues in detail, with a view on identifying the possible gaps in EU legislation and on evaluating the EAV of potential policy options to address these gaps. We also conducted a thorough comparative economic analysis of the EAV of the policy options identified. We distinguished between two alternatives, namely a moderate and a strong regulatory approach scenario. The conceptual framework and the assumptions underpinning each scenario are described in details. The benefits and the costs are then quantified and the EAV for each scenario compared to the baseline are computed.

We found an **EAV of €187 million for the moderate regulatory approach scenario**. For the **strong regulatory approach scenario, we found a slightly higher EAV of €229 million**. Both alternative scenarios are therefore expected to allow for a higher level of guarantee for claimant rights while allowing adapted flexibility for private funders. This responsible funding approach would also ensure that liability costs for businesses and cost of access to justice remain reasonable. The baseline scenario is, however, more likely to be supported by funders (as revenues and flexibility are the highest), while the strong regulatory approach would be more favoured by businesses (as liability costs are the lowest). Claimants might be more open to the moderate scenario as it would allow a high share of litigation recovery and limit the costs while allowing for some responsible TPLF to take place. Given the level of uncertainty, and given the fact that the two EAV are relatively close to each other, it is rather difficult to arrive at a clear cut conclusion on the choice between the two approaches. Looking beyond the potential economic added value, we therefore analyse the wider repercussions of the development of TPLF in terms of a qualitative evaluation of the potential risks and impacts for various components of society. We confirm that significant changes could affect the justice system, while businesses, claimants and funders might be affected with varying intensity.

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State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding

Research Paper

The aim of this study is to give a comprehensive overview of private litigation funding (or third-party litigation funding – TPLF) in the European Union. The study describes the main players on the European TPLF market (i.e. funders, claimants and lawyers). It also analyses the EU legal framework, case law and best practices to identify the regulatory gaps, assess them and discuss the relevant policy options.

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Executive summary

The study examines litigation funding or third-party litigation funding (TPLF) in the European Union (EU). Litigation funding requires a funder to take on, in full or in part, the litigation costs and risks in the event of losing. If the case is won, the litigation funder will be entitled to a reimbursement and to remuneration; as it is an operation that transfers the risk of losing the dispute onto the litigation funder, if the case is lost, the funder is not reimbursed.

The study examines the EU TPLF industry (paragraph 2), discusses the contractual (paragraph 3.1), ethical (paragraph 3.2) and procedural (paragraph 3.3.) legal issues raised by TPLF, analyses its benefits and risks, and concludes by considering the different policy options at EU level (paragraph 4).

With reference to the methodology, the analysis was developed by focusing on a comparative study of the EU legal framework, case law and literature, together with quantitative (i.e. data collection) and qualitative research consisting of interviews with funders and experts in the field.

Far from being a novelty, the origin of the TPLF industry in Europe can be traced back to the 1960s in the United Kingdom (UK), where it now represents a well-established practice. The TPLF market in Europe has been developing steadily since the 2008 financial crisis. Various factors make it difficult to list precisely all players operating in Europe, as well as to determine the TPLF market size. In particular, TPLF players are often private entities under no legal obligation to disclose their operations; therefore, they tend to keep their activities private, for confidentiality and competitive reasons.

The funding agreement is a new type of contract according to which a litigation funder, which is not a party to the dispute, provides funding to a party involved for part or all of the costs of the proceedings. This funding is provided in exchange for a reimbursement of costs and for remuneration which (a) is wholly or partially dependent on the outcome of the dispute, or (b) is provided through a success fee.

Procedural safeguards are required, here, particularly with reference to the risk of a conflict of interests for the funder and with regard to the claimant's independence in managing the lawsuit.

Additionally, there are incentives for lawyers and law firms, both associated and otherwise, to collaborate with these funders; however, these legal professionals should, on the other hand, remain free to carry out their activity independently and in the claimant's sole interest. Some of these concerns have been addressed, with strict reference to TPLF and consumer collective redress, by Directive 2020/1828/EU of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC.

TPLF has some benefits: it may represent a tool to support private citizens and businesses in accessing justice and constitute a mechanism for transferring the risk of the uncertain outcome of the dispute to the litigation funder. At the same time, it may pose risks and entail conflicts of interests. For example, funders may demand excessive remuneration or may operate in a conflict of interests with the claimant in managing or settling the case. The lawyer might also be in a potential conflict of interests with clients, given that the former usually obtains his or her fees directly from the litigation funder.

In the conclusion, the study discusses various approaches to the contractual, ethical and procedural aspects of TPLF examined above. Specifically, the study highlights the main policy options at EU level – including both legislative initiatives and self-regulation – that may represent effective safeguards against these risks

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1. Introduction and state of play

1.1. Methodology and scope of the study

The study aims to provide a comprehensive overview of TPLF and the risks and benefits associated with these business models.

Indeed, there are a variety of concerns about the global phenomenon of TPLF, which tend to revolve around some fundamental research questions addressed by the study in the following paragraphs, namely:

- paragraph 1: the notion of TPLF
- paragraph 2: the TPLF industry in the EU
- paragraph 3: the main legal issues
- paragraph 4: policy options at EU level.

With respect to its methodology, the study is based on an analysis of the applicable European legal framework and case law, attempting to identify the regulatory gaps, to analyse them and to present the policy options. The study also relies on descriptive and analytical literature focusing on TPLF in the EU, as well as reports and studies that are publicly available. Other sources of empirical information include qualitative research, including, primarily, interviews based on a written questionnaire conducted with those operating in the TPLF market in the EU, with experts in the field, and with lawyers and corporate legal departments. Additional information was obtained by the research team from websites identifying sources of information on TPLF companies.

1.2. Definitions

This paragraph attempts to define some of the fundamental concepts discussed in the study and to clarify some terminology used.

'Third Party Litigation Funding (TPLF)' refers to the professional practice of an entity, which is not a party to the dispute, in funding all or part of the costs of domestic or cross-border proceedings. The funding is provided in exchange for a reimbursement of the 'investment' and for remuneration that is (a) wholly or partially dependent on the outcome of the dispute ('percentage approach') or (b) provided through a success fee ('multiple approach').

'Portfolio Litigation Funding (PLF)' refers to the professional practice of funding a portfolio of disputes for business purposes.

'Third Party Litigation Funder' (or 'Third Party Funder', 'Litigation Financier', 'Litigation Funder', 'Litigation Fund' or 'Funder') indicates any entity that is not a party to a dispute, or a lawyer or insurer of such a party, which bears the costs of the dispute in exchange for a percentage of the financial recovery, only if the case is won.

'Litigation Crowdfunding (LCF)' refers to the practice of a large group of individuals each making a small investment to provide the money needed to fund a dispute ('crowdfunding project'), sharing its costs and risks.¹

¹ Uniform requirements for the provision of crowdfunding services, for the organisation, authorisation and supervision of crowdfunding service providers, for the operation of crowdfunding platforms, as well as for transparency and marketing communications on the provision of crowdfunding services in the EU, are regulated by [Regulation 2020/1503/EU](#) of the European Parliament and of the Council of 7.10.2020 on European crowdfunding

'Before-the-event insurance (BTE)' (or 'legal expenses insurance') refers to a form of insurance – regulated, at EU level, by Council Directive 87/344/EEC of 22 June 1987 – taken out by individuals or businesses to cover the insured's liability for legal fees and costs incurred in domestic or cross-border litigation against the payment of a premium. A ceiling may be applied to the cover for the insured's own legal fees and costs and/or the insured's potential liability for the counterparty's legal fees and costs, if the claim is unsuccessful.

'After-the-event insurance (ATE)' (or 'litigation insurance') indicates a form of insurance, taken out after a legal dispute has arisen, the aim of which is to cover a litigant against any future liability for the opponent's costs, against the payment of a premium. A ceiling may be applied to the cover for the insured's potential liability for the counterparty's legal fees and costs if the claim is unsuccessful.²

'Contingency fees agreement' designates a payment arrangement concluded before the end of a judicial procedure, according to which a party's lawyer receives a share of the outcome of the dispute if the client is successful and nothing if the client loses the case.³

'Sale of claims' (or 'claim monetisation' or 'assignment of a single claim') refers to a contractual model according to which a claim is purchased outright and pursued by the purchaser in return for a price.

'Assignment of claims for collection only' refers to the practice, available in some Member States (e.g. Austria and Germany), according to which a claim is assigned by the creditor to a third person for purposes of collection in return for a fee.

'Legal aid' designates the public instrument offered by Member States to natural persons (and, in many cases, to non-profit organisations) to guarantee effective access to justice in cross-border⁴ and domestic⁵ disputes, in accordance with Article 6 (3)(c) ECHR and Article 47 Charter of Fundamental Rights of the European Union.

service providers for business, and amending Regulation 2017/1129/EU and Directive 2019/1937/EU.

² See A. Eversberg, ['Germany'](#), in S. Fries, J. Barnes, *Litigation Funding 2019*, Law Business Research Ltd, p. 37. The author notes that, in Member States where lawyers' remuneration fees to be reimbursed are calculated based on a tariff system (and are, therefore, not particularly high), ATE is seldom used 'because of the easily calculated costs of lawyers and courts pursuant to the tariff system'.

³ According to the 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 11.6.2013 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/2018/040 final](#), January 2018, (point 2.3.3), there are currently eight Member States (Bulgaria, Cyprus, Czech Republic, Germany, Greece, Portugal, Slovenia, Spain) "that allow for some form of contingency fee" [...]. In all these Member States [...] there appear to be specific provisions on the operation of such remuneration in collective redress actions.

⁴ [Directive 2002/8/EC](#) of 27.1.2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid.

⁵ For an overview of the state of the art concerning legal aid in the Member States see at https://e-justice.europa.eu/content_legal_aid-37141-en.do.

1.3. How third party funding works within the EU judicial area

TPLF is a private instrument to fund litigation (see Figure 1 below).

Figure 1: Landscape of litigation funding

A) Legal Aid (public litigation funding)

Legal aid is ONLY for natural persons (in some Member States no-profit organizations are included) with very low incomes. A very small percentage of potential claimants are eligible for legal aid.

If the legal criteria for legal aid are NOT met

PRIVATE LITIGATION FUNDING

B) Private litigation funding: a comparison of the main instruments

1. Third party litigation funding

In TPLF the funder agrees to fund litigation, bearing the costs of the civil proceedings, in return for the reimbursement of the litigation costs and for remuneration, if the funded party wins the case.

2. Contingency fees

A contingency fees arrangement is an agreement by which a party's lawyer receives a share of the outcome of the dispute if his or her client is successful.

3. Litigation Crowdfunding

This refers to the practice of a large group of individuals each making a small investment to provide the money needed to fund a dispute (the 'crowdfunding project'), sharing its costs and risks.

4. Legal expenses insurance

Legal expenses insurance is a form of insurance taken out, alternatively: (i) before a legal dispute has arisen to cover the insured's liability for legal fees and costs incurred in domestic or cross-border litigation against the payment of a premium (BTE); (ii) after a legal dispute has arisen, to cover a litigant against any future liability for the opponent's costs against the payment of a premium (ATE).

5. Sale of claim

The sale of claim is a contractual model according to which a claim is purchased outright and pursued by the purchaser in return for a price.

6. Assignment of claims for collection only

The assignment of claims for collection only is a practice, available in some Member States, according to which a claim is assigned by the creditor to a third person for purposes of collection in return for a fee.

In TPLF, the funder agrees to fund litigation, bearing the costs of the civil proceedings,⁶ and to assume contractually the risk of any adverse costs award,⁷ in return for the reimbursement of the litigation costs and for remuneration. The funder's investment is not necessarily recouped or repaid and the funder's remuneration depends on if (and when) the funded party wins the litigation. More specifically, in TPLF, the amount of the funder's remuneration depends on the following three factors:

- likelihood of success
- presumable length of the civil proceedings
- value of the claim.

⁶ The costs of civil litigation include: i) court fees; ii) lawyers' fees, which are usually higher than court fees and form the biggest part of the total costs, irrespective of whether or not jurisdictions impose tariffs for lawyers' fees. However, where no tariff applies and lawyers' fees are based upon hours worked, the final amount of lawyers' fees is unpredictable. For more details, see C. Hodges, S. Vogenauer, ['Findings of a Major Comparative Study on Litigation Funding and Costs'](#), 2010.

⁷ For more details, see paragraph 3.1.2.

The higher the litigation risk and the longer the civil proceedings, the greater the remuneration earned by the funder if the case is won.

As the remuneration depends on the claimant's recovery by winning the litigation, funders are generally more interested in funding high value claims.⁸ Legal scholars have noted that funders usually seek a ratio of between 1 to 10 in terms of the amount of money needed to finance the dispute and the value of the financed claim.⁹

A funder is more likely to agree to fund condemnation claims, rather than claims for the mere ascertainment of a legal right, which will ultimately end with the enactment of a purely declaratory judgment. In fact, if the funded party obtains a condemnatory judgment, the counterparty will pay the sum ordered by the court, and the funder will be able to retain the agreed percentage.

A funder is more likely to agree to fund a claim against a solvent defendant, offering high prospects of recovering any sum that is awarded in the final judgment.

For the funded party, usually the claimant,¹⁰ TPLF is an opportunity to improve access to justice in high value disputes and to challenge defendants greatly superior to the claimant in terms of economic power.

For the funded party, TPLF is also useful for transferring the risk of any unfavourable outcome of the judgment, which is covered in full by the funder.

Considering the cited characteristics, TPLF clearly differs from:

- BTE insurance, as there is no payment of a premium and maximum coverage for the funder;
- litigation crowdfunding, as funders are professional investors making an investment in the claim, whereas crowdfunders are usually individuals having no investment expertise and committing a small sum (often through a crowdfunding platform) to cover a small part of the costs and risks of a dispute;
- sale of claim, as the claimant's claim is not purchased by the funder;
- assignment of claims for collection only, as, in TPLF, the funder is usually not the assignee of the claim for collection purposes.¹¹

TPLF also differs from contingency fee agreements due to the fact that it is the funder – and not the claimant's lawyer – who is entitled to obtain a reimbursement and a fee. Apart from that, contingency fee agreements and TPLF agreements seem to share a common structure according to which the 'investor' that provides funds – be it a lawyer or a litigation funder – agrees with a party involved in the case (generally on the claimant's side) to be paid a fixed percentage of the recovery, if that party is successful. Nevertheless, as illustrated by Table 1 below, while lawyers are subject to professional and ethical rules, funders are currently not. Besides, while contingency fee

⁸ See Annex 1.

⁹ N. Rowles-Davies, *Third Party Litigation Funding*, Oxford University Press, 2014, p. 10; P. Fenn, N. Rickman, 'The Empirical Analysis of Litigation Funding', in M. Tuil, L. Visscher (eds.), *New Trends in Financing Civil Litigation in Europe*, Edward Elgar, 2010, pp. 175-190.

¹⁰ Funding for respondents is rare. For that reason, this aspect will not be considered for the purposes of this study.

¹¹ Conversely, German TPLF model contracts usually require the claim to be assigned to the funder ("assignee") as security. The assignment as security should be kept confidential and cannot be revealed in court. The claim is retransferred to the assignor, once the funder has no further interest or no reason to require a security. See, for example:

- paragraph 6 [Omni Bridgeway TPLF model contract](#), available in German;

- paragraph 8 [Legial TPLF model contract](#), available in German.

agreements are regulated (as well as expressly forbidden) in the EU, litigation funding is not prohibited (with the exception of Greece and Ireland) or subject to any regulatory framework with respect to individual claims.

Table 1 illustrates the main differences between BTE, contingency fees and TPLF.

Table 1: BTE, contingency fees, TPLF

| | BTE | CONTINGENCY FEES | TPLF |
|---|-----|------------------|------|
| Payment of a premium | | x | x |
| Maximum amount insured | | x | x |
| Recovery sharing (if successful) | x | | |
| Covers all costs of the proceedings (fees, disbursements, opponent's costs) | | | |
| Party's legal representative as party to the funding agreement | x | | x |
| Applicability of Directive 87/344/EEC (particularly Article 4: right to choose a lawyer freely) | | | x |
| Applicability of the Code of Conduct for European Lawyers, ¹² paragraph 3.3 (prohibition on <i>pactum de quota litis</i>) | | | x |

At EU level, the following legal instruments mention TPLF:

- Article 8.26 of the EU-Canada trade deal
- Article 3.8 of the EU-Singapore investment protection agreement
- Article 3.37 of the EU-Vietnam investment protection agreement
- 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 ('Funding', points 14-16)
- Article 10 of Directive 2020/1828/EU of 25 November 2020 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC.

At national level, Greece¹³ and Ireland¹⁴ generally prohibit TPLF.

In Germany, the German Federal Court prohibited the use of TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act against Unfair Competition ('Gesetz gegen den unlauteren Wettbewerb').¹⁵

¹² [CCBE](#) Code of Conduct for European Lawyers.

¹³ Cf. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Commission Recommendation of 11.6.2013 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/2018/040 final](#), January 2018, point 2.1.6 Funding of collective actions.

¹⁴ In Ireland, TPLF is prohibited by the Supreme Court of Ireland in *Persona Digital Telephony Ltd v Minister for Public Enterprise*, Ireland, [2017] IESC 27 at 54 (iv). According to the Supreme Court of Ireland, a TPLF agreement is champertous and, therefore, illegal.

¹⁵ Cf. German Federal Court (BGH), 13.9.2018 – I ZR 26/17, *Neue Juristische Wochenschrift (NJW)*, 2018, p. 3581 ('Prozessfinanzierer I'); German Federal Court (BGH) 9.5.2019 - I ZR 205/17, *Juristen Zeitung (JZ)*, 2019, p. 198

By contrast, in Slovenia, pursuant to the new legislation on collective redress,¹⁶ 'Law of Collective Actions (Zakon o kolektivnih tožbah—ZkolT)'¹⁷, TPLF is permitted and regulated by Article 59, in accordance with the principles set out in the Commission Recommendation of 11 June 2013.¹⁸

In the remaining Member States, as reported by the EU Commission¹⁹ and by 'The Third Party Litigation Funding Law Review'²⁰ there is no specific TPLF regulatory framework.

As highlighted by the EU Commission, this general lack of rules means that 'unregulated and uncontrolled third-party financing can proliferate without legal constraints'.²¹

('Prozessfinanzierer II'). The German Federal Court reached the conclusion that in actions for confiscation of profits, pursuant to Section 10 of the German Act against Unfair Competition, TPLF is not allowed, after noting that the only organisations able to file such a type of claim are those listed in Section 8. Such organisations must notify the Federation's competent agency of the lodging of claims and may request reimbursement from the Federation's competent agency for the costs that were incurred to bring the claim, insofar as they cannot obtain satisfaction from the debtor.

¹⁶ See J. Sladič, 'A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions?', in A. Uzelac, C. Hendrik, R. van Rhee (ed.), *Transformation of Civil Justice. Unity and Diversity*, Springer, 2018, pp. 213-227; H. Küpper, 'Kollektive Prozessformen in Slowenien', *WiRO*, 2018, pp. 97-105.

¹⁷ The English translation of Article 59 of the Slovenian Law of Collective Action is available at: US Chamber Institute for Legal Reform, [Uncharted Waters, An Analysis of Third-Party Litigation Funding in European Collective Redress](#), October 2019, p. 72; the German translation is offered by J. Sladič, 'Das slowenische Gesetz über Sammelklagen', *ZZP International*, 2017, pp. 137-186.

¹⁸ See *infra*, paragraph 3.4.

¹⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Commission Recommendation of 11.6.2013 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/2018/040 final](#), point 2.1.6 Funding of collective actions.

²⁰ L. Perrin (ed.) *Third party litigation funding law review*, Law Business Research Ltd, 2019.

In addition, with specific reference to Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg, Poland, Romania, Spain and the Netherlands, see [European Parliament Study. Collective redress in the EU](#), October 2018, p. 16.

²¹ 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/2018/040 final](#), point 2.1.6 Funding of collective actions.

2 EU litigation funding market

2.1 Emergence and development of the litigation funding industry in Europe

Far from being a novelty, the origin of the TPLF industry in Europe can be traced back to the 1960s in the UK, where it now represents a well-established practice.²² The TPLF market in Europe has been developing steadily since the 2008 financial crisis.²³ At present, as shown by Annex 1, the European market consists of several European (mainly British and German firms) and non-European (namely, US and Australian) firms.

However, various factors make it difficult to list precisely all players operating in the EU.²⁴ In particular, when TPLF players are private entities, they are under no legal obligation to disclose their operations; therefore, they tend to keep their activities private, for confidentiality and competitive reasons.²⁵

In any case, the growth of the TPLF market in the EU may be explained as follows:

- a. High returns: litigation funding is known to provide extremely high returns to funders. This is why this field has been a favourite with institutional financiers. Of late, investors such as hedge funds have also shown an interest in litigation funding. These high returns are achieved primarily due to the low investment required compared to the possible high returns. More specifically, investors often end up with multiples of the initial investment they had made. In addition, the risk involved in litigation funding is lower than that of other investment classes.
- b. Not correlated to other investments: from an investor's point of view, litigation funding is a good investment as it is not related to any business cycles. Hence, during an economic downturn when other investments drop in value, litigation funding seems to go unscathed. In fact, during an economic downturn, the number of insolvencies increases. As a result, there is more insolvency litigation, leading to more gains for funders. This is why sophisticated investors have started hedging their portfolio with the help of litigation finance.
- c. Secondary market: lastly, litigation funding is not an illiquid asset class. Since there are a number of investors who buy such assets, it is possible to liquidate the investment. This means that financier A can sell their stake in a particular case to financier B. This provides investors with relief, as they need to know that if the case goes on for too long, they can recover their funds by finding another buyer.

2.2 Funders

Our quantitative and qualitative research highlights the main players and business practices of TPLF in the EU. Annex 1 includes a list of funders active in the EU. It contains, among other things, details of the funders (corporate name, website, headquarters), the corporate structure, the most commonly funded lawsuits, the minimum funded claim value and the recovery.

²² L. Perrin, 'England and Wales, in *Third party litigation funding law review*. Law Business Research Ltd, 2019, p. 53.

²³ See [Litigation 2019: Trends - The rise and rise of third party funding](#), 22.11.2019.

²⁴ R. Strom, 'Nobody Knows Litigation Finance Size', but It's Not \$85 Billion', 11.6.2020.

²⁵ With the exception of listed funders: see Omni Bridgeway and IMF's investor presentation as of 1.1.2020, available at <https://omnibridgeway.com/docs/default-source/investors/asx-announcements/74-b-investor-presentation>.

According to Annex 1, there are at least 45 litigation funders operating in the EU.²⁶ Essentially, they are all based or have an office in Europe, inferring that they all operate on the European market. Although the majority of those funders are based in London (UK), several are located in the EU, mostly in Germany, but also in France, the Netherlands²⁷ and even in Ireland (where the service is, however, prohibited by common law doctrines of maintenance and champerty).

From the analysis of Annex 1, it firstly emerges that few leading funders²⁸ are listed and thus subject to financial market regulation in the countries of their establishment (OmniBridge on the Australian stock exchange, Burford and LCM on the UK stock exchange; Foris AG on the German stock exchange). However, the rules that funders must follow under these securities rules (UK, US, Australian rules only – none in the EU) in no way regulate per se litigation funding activities or TPLF agreements, and they certainly do not have any bearing on the parties within the litigation they fund, as securities rules have a different purpose. Thus, funding can be granted by different legal entities, such as investment funds, corporations and financial institutions,²⁹ which account for a fair share of the funding market.³⁰

Secondly, by comparing the data contained in Annex 1 with the part of the Max Planck Institute Luxembourg's Evaluation Study³¹ devoted to 'TPF via internet platforms', the EU TPLF market seems to be divided into three different segments. In the first, funding is granted to sophisticated litigants, individuals or corporations, to pay for their lawyers and costs in high value civil or commercial disputes. In the second, funding is granted in order to finance consumer collective redress in the EU.³² In the third, legal assistance and funding are provided directly to consumers via internet platforms³³ for purposes of collecting individual low value claims against a business; for example, to claim individual compensation under EU rules against airlines for delayed or cancelled flights. While the consumer individual low value claim segment is not central to this study, we note that, as highlighted by the Max Planck Institute Luxembourg's Study,³⁴ such a market segment

²⁶ It should be emphasised that the research team collected data and information from a large pool of entities (about 70) active in the EU internal market. However, from our analysis, it emerged that only 45 are litigation funders according to the TPLF definition included in the study. The remaining entities are, for example, involved in the business in the field of the sale of claims, litigation crowdfunding, etc.

²⁷ The legal framework and case law on TPLF in the Netherlands was recently discussed in the Panel III: Collectivizing & Monetizing Civil Litigation at the Conference 'Frontiers in Civil Justice held on 16-17.11.2020. For details see <https://conflictolaws.net/2020/conference-frontiers-in-civil-justice-16-17-november-2020/>.

²⁸ The Leaders League (<https://www.leadersleague.com/en/rankings/dispute-resolution-international-arbitration-and-litigation-ranking-2020-litigation-funding-france>), which provides strategic rankings for top international legal and financial companies based on an analysis of qualitative measures, with the resulting information being used by senior executives in making business decisions, has published a list of leading funders, namely: Omni Bridgeway, Therium Capital Management, Vannin Capital, Ivo Capital Partners, Nivalion, Redbreast Litigation Finance, Foris, Legial, Profile Investment and Profina.

²⁹ C. Veljanovski, 'Third-litigant litigation funding in Europe', *Journal of Law, Economics & Policy*, 2018, 8(3), pp. 405-449.

³⁰ E. Truant, '[Commercial Litigation Finance: How Big is This Thing?](#)', 26.2.2020.

³¹ Max Planck Institute Luxembourg: an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, [JUST/2014/RCON/PR/CIVI/0082](#), 2017.

³² See paragraph 4.6.

³³ According to our analysis, there are at least 9 internet platforms active in the EU, which are: Abfindungsheld (Berlin, Germany), <https://abfindungsheld.de>; Aequifin (Grünwald, Germany), <https://www.aequifin.com/>; Axiafunder (London, UK), <https://www.axiafunder.com/>; Claim it (Brussels, Belgium), <https://www.claimit.eu/>; Consumer Claim (Amsterdam, the Netherlands), <https://www.consumerclaim.nl/>; Euclaim (Arnhem, the Netherlands), <https://www.euclaim.nl/>; italiarimborso (Italy), www.italiarimborso.it; Weclaim (Dublin, Ireland), <https://www.weclaim.com/>; vuelo-retrasado.es (Amsterdam, the Netherlands), <https://www.vuelo-retrasado.es/>.

³⁴ Max Planck Institute Luxembourg: an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection

presents particular risks for individual consumers, as its legal framework is far from clear.

Thirdly, as shown by Table 2 below, it emerges that many funded litigation cases lie in the fields of competition law, capital markets law, commercial law, insolvency law and contract law.³⁵ Cases of consumer collective redress in the EU are also attracting the attention of funders.

Fourthly, our qualitative analysis has shown that funders are becoming more interested in financing: a) insolvency proceedings; b) damages actions for infringement of EU and national competition law (most often cartel cases under Art. 101 of the Treaty on the Functioning of the European Union). Private damages claims often ensue after a decision and imposition of fines by the public authority (EU Commission or a national competition authority). Private claims for damage caused by competition law infringements represent an opportunity for those who have suffered damage due to cartellists or dominant players to obtain compensation for their losses. The extent of the damage however still needs to be determined and that is usually the challenge. However, the amount of damage still needs to be determined and that is usually the challenge. This subject matter is not covered by the scope of Directive 2020/1828/EU.³⁶ In many cases, damages actions due to infringement of EU competition law have been financed by funders: i) either because the funder acts as purchaser/assignee of the claims for collection purposes, or ii) because the purchaser of the claims (in this case a professional other than the funder) relies on TPLF (see Figure 3, at paragraph 2).³⁷

Table 2: Funded litigation cases within the EU

| Areas of law of funded litigation cases | Funders operating in this area |
|---|--|
| Antitrust/competition law | <ul style="list-style-type: none"> - Acivo; - Augusta Ventures; - B&K Prozessfinanzierung; - Burford Capital; - Claims Funding Europe; - Creditale; - Deminor Luxembourg; - Foris; - Inverlitis; - Legial; - Liesker; - Redbreast; |

of consumers under EU consumer law, [JUST/2014/RCON/PR/CIVI/0082](#), 2017, p. 154-156.

³⁵ In addition to Annex 1, see, inter alia, Burford's investor presentation as of 1.11.2018 at https://www.burfordcapital.com/media/1469/burford-master-capital-markets-slides_final.pdf.

³⁶ See A. P. Mikroulea, "Collective Redress" in European Competition Law, *ZWeR*, Vol. 4, 2016, pp. 388-414; E. Sweitzer, 'Schadensersatz im Europäischen Kartellrecht', Referate im Rahmen der Vortragsreihe, Rechtsfragen der Europäischen Integration, Bonn, 25.11.2013, pp. -47.

³⁷ See J. Grothaus, G. Haas, '„Sammelklagen“ als Inkassodienstleistung – Das letzte Kapitel?', *Zeitschrift für Wirtschaftsrecht*, Vol. 41, 2020, pp. 1797-1803; A. Rogers, P. Scott, A. Sanz, M. Brown, 'Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know', *The antitrustsource*, www.antitrustsource.com, December 2016; G.M. Solas, 'Third party funding and the EU's competition law damages claims: main legal issues', *Global Competition Litigation Review*, 2019, Vol. 12(1), pp. 28-33; A. Stadler, 'Abtretungsmodelle und gewerbliche Prozessfinanzierung bei Masseschäden', *WuW* 2018, pp. 189-194; D. Valdini, 'Klagen ohne Risiko – Prozessfinanzierung und Inkassodienstleistung aus einer Hand als zulässige Rechtsdienstleistung?', *Betriebs-Berater*, 2017, pp. 1609-1613 ; Tribunal of Amsterdam, 15.5.2019; Tribunal of Helsinki, 4.7.2013; Court of Appeal of Amsterdam [4.2.2020](#).

| Areas of law of funded litigation cases | Funders operating in this area |
|---|--|
| | <ul style="list-style-type: none"> - Therium Group Holdings; - Vannin Capital; - Woodsford. |
| Banking/finance/capital markets law | <ul style="list-style-type: none"> - Augusta Ventures; - Foris; - Legial; - Ramco Litigation Funding; - Rockmond; - Therium Group Holdings. |
| Collective redress | <ul style="list-style-type: none"> - Advofin; - Augusta Ventures; - Claims Funding Europe; - Cobin Claims; - Deminor Luxembourg; - Harbour; - Liesker; - Lva24; - Ramco Litigation Funding; - Therium Group Holdings; - TOM ORROW Prozessfinanzierung (online gambling losses). |
| Commercial law | <ul style="list-style-type: none"> - Acivo (franchising); - Annecto Legal (commercial debt recovery, breach of confidentiality, shareholder disputes, franchising); - Apex Litigation Finance; - Augusta Ventures; - Balance Legal Capital; - Burford Capital; - Calunius Capital; - Claims Funding Europe (corporate misconduct and shareholder disputes); - Deminor Luxembourg; - Foris (company law, post M&A disputes, D&O liability, corporate investigations); - Inverlitis (also franchising and distribution); - Legial (distribution); - Liesker (also shareholder disputes); - Omni Bridgeaway; - Profile Investment; - Redbreast (M&A and business transactions, corporate, distribution and agency); - Redress Solutions; - Therium Group Holdings (also securities, shareholder |

| Areas of law of funded litigation cases | Funders operating in this area |
|---|---|
| | disputes, shipping international trade). |
| Consumer law | <ul style="list-style-type: none"> - Augusta Ventures; - B&K Prozessfinanzierung; - Inverlitis; - Legial; - Profin (very active on the diesel-gate matter). |
| Contract law | <ul style="list-style-type: none"> - Acivo (sales, work and labour); - Annecto Legal (breach of contract, breach of warranty, breach of confidentiality, sale and purchase agreement); - Inverlitis (also travel and hospitality); - Profina. |
| Environment and climate change | <ul style="list-style-type: none"> - Augusta Ventures. |
| Infrastructure, construction and energy | <ul style="list-style-type: none"> - Augusta Ventures; - Foris (construction); - Inverlitis (construction defects). |
| Inheritance law | <ul style="list-style-type: none"> - Acivo; - Annecto Legal (particularly regarding will disputes); - Foris; - Legial. |
| Insolvency/bankruptcy law | <ul style="list-style-type: none"> - Acivo; - Annecto Legal; - Apex Litigation Finance; - Augusta Ventures; - Balance Legal Capital; - Burford Capital; - Deminor Luxembourg; - Foris; - Legial; - Monolete Partners; - Omni Bridgeaway; - Profina; - Redbreast; - Redress Solutions; - Rockmond; - Therium Group Holdings. |
| Insurance law | <ul style="list-style-type: none"> - Acivo; - B&K Prozessfinanzierung; - Legial; - Therium Group Holdings. |
| Intellectual property/industrial | <ul style="list-style-type: none"> - Acivo; |

| Areas of law of funded litigation cases | Funders operating in this area |
|---|---|
| property rights/copyright/patents | <ul style="list-style-type: none"> - Annecto Legal (also data protection and privacy); - Augusta Ventures; - Burford Capital; - Foris; - Inverlitis; - Liesker; - Omni Bridgeaway; - Redbreast; - Therium Group Holdings; - 1624 Capital. |
| Labour law/employment law | <ul style="list-style-type: none"> - Acivo; - Annecto Legal (also pension disputes); - Omni Bridgeaway (whistleblower funding). |
| Law of obligations | <ul style="list-style-type: none"> - Acivo (also restitution law). |
| Liability (contractual and non-contractual)/professional negligence | <ul style="list-style-type: none"> - Acivo (attorney and tax accountant liability); - Annecto Legal (defective products claims, professional negligence and against banks); - Inverlitis (defective products claims, professional negligence); - Foris (professional negligence, medical malpractice); - Legial (medical malpractice); - Therium Group Holding (professional negligence). |
| Monetary credits | <ul style="list-style-type: none"> - Exactor; - Invenium; - Lexdroit. |
| Personal matters | <ul style="list-style-type: none"> - Apex Litigation Finance; - Woodsford. |
| Property law | <ul style="list-style-type: none"> - Acivo; - Annecto Legal. |
| Tax law | <ul style="list-style-type: none"> - Acivo; - Annecto Legal (VAT and HMRC penalties); - Foris; - Therium Group Holdings. |
| Tort law | <ul style="list-style-type: none"> - Acivo (traffic accidents); - Annecto Legal (fraud, defamation); - Inverlitis (accident injuries); - Redbreast (any type of breach, abuse, fraudulent or wrongful action); - Therium Group Holdings (fraud). |
| Trust | <ul style="list-style-type: none"> - Therium Group Holdings. |

Fourthly, the recovery percentages of funders, according to the information included in Annex 1, seem to range from 20 % to 50 % of the amount awarded in the case, when the percentage approach is applied. However, it is difficult to analyse such a figure, as many funders do not provide details on the recovery percentages applied (particularly when adopting the 'multiple approach').³⁸ Only the leading funders publish their percentages as part of their duties as listed companies. There is a risk that funders may apply high recovery percentages as legal scholars have highlighted that uplifts can be as much as up to 500 % of the amount invested.³⁹ Additional uplifts are possible if the case entails unforeseen costs or difficulties or takes longer than expected to run its course.⁴⁰

2.3 EU legal framework for funders

Funders active on the EU market are very varied and the related EU legal framework depends on the company form adopted.⁴¹ As anticipated, only few funders are companies based in an EU Member State and listed on the stock exchange, thus bound by the applicable EU rules. Other funders are companies engaging in complex financing operations through investment funds.⁴²

³⁸ In its article "Appealing returns" (18.8.2018 edition, at <https://www.economist.com/finance-and-economics/2018/08/18/litigation-finance-offers-investors-attractive-yields>), the Economist reports that 'Funders of a winning suit can expect to double, triple or quadruple their money'. It also reports that 30 new funding ventures have been launched within the past year and a half. Not only are new entrants broadening the litigation finance market but established funders are also expanding.

³⁹ M. Roe, 'Third Party Funding: an introduction', 2020. See, for example, the Mastercard case, a UK case in which 46 millions consumers are acting against Mastercard in a £18,5 billions competition damage collective proceedings. The UK Supreme Court has recently enabled the Mastercard collective claim: [*Mastercard Incorporated and others v Walter Hugh Merricks CBE*](#). The collective proceedings is financed by Burford Capital, which is to provide upfront costs of up to £36 millions. If the claim will be successful the funder will recover or 30% of the proceeds of the case up to £1 billion, plus 20% of the proceeds over £1 billion.

⁴⁰ Aspen Re's white paper on litigation funding available at <https://www.aspen.co/globalassets/documents/reinsurance/whitepapers/litigation-funding.pdf>.

⁴¹ In the field of European company law, the EU regulatory sources can be divided into two groups: the first one concerns minimum common obligations and the second one regards EU legal entities.

As for the first group, it is worth mentioning: i) the directive that partially codifies the European company law ([*Directive 2017/1132/EU*](#) of the European Parliament and of the Council of 14.6.2017 relating to certain aspects of company law (codification); ii) the directive on the single-member of limited liability companies ([*Directive 2009/102/EC*](#) of the European Parliament and of the Council of 16.9.2009 in the area of company law on single-member private limited liability companies); iii) the directives concerning companies' financial situation ([*Directive 2006/43/EC*](#) of the European Parliament and of the Council of 17.5.2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC and [*Directive 2013/34/EU*](#) of the European Parliament and of the Council of 26.5.2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC).

Regarding the second group, EU legal entities are: i) the European Company ([*Regulation 2001/2157/EC*](#) of 8.10.2001 on the Statute for a European company (SE); [*Directive 2001/86/EC*](#) of 8.10.2001 supplementing the Statute for a European company with regard to the involvement of employees; ii) European Economic Interest Grouping ([*Regulation 1985/2137/EC*](#) of 25.7.1985 on the European Economic Interest Grouping (EEIG)); iii) the European Cooperative Society ([*Regulation 2003/1435/EC*](#) of 22.7.2003 on the Statute for a European Cooperative Society (SCE); [*Directive 2003/72/EC*](#) of 22.7.2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees).

For the above classification and for more details on the development of the European company law, see <https://www.europarl.europa.eu/factsheets/en/sheet/35/company-law> (last access on 9/12/2020).

⁴² For example: Profile Investment (a French company expert in TPLF) "created a Luxembourg SICAV-SIF investment structure. Its funds, "LFIC1" and "LFIC2", both qualify as AIFs benefiting from the AIFM Law and the AIFMD passport. This permits the AIFM's marketing of shares of the funds to investors in any EU Member States by submitting a notification file to the CSSF which will transmit it to the competent authorities of the Member States where the AIF is intended to be marketed" in A. Grec, O. Marquais, [*Investment Management and Corporate Structuring*](#)

Essentially, the landscape is very diverse and it is not always clear whether funders use their own assets or raise capital from the public. However, the legislation applicable to funders depends on the chosen business model (or on the legal qualification of the litigation funding agreement) as there is no *ad hoc* legislation.

- a. If the funder is a listed company, as well as when claims are funded by means of operations involving financial instruments, this activity falls within the scope of European securities market legislation (that is to say: within the field of application of the Takeover Directive⁴³, Transparency Directive⁴⁴, Shareholder Rights Directive⁴⁵ Prospectus regulation⁴⁶, MiFid II Directive⁴⁷, Market Abuse Regulation⁴⁸ and Market Abuse Directive⁴⁹).
- b. If an investment fund is involved in the litigation funding market, it will be subject to the AIFM Directive⁵⁰ or the UCITS Directive.⁵¹ It is worth recalling that collective investment undertakings marketing their units or shares (as well as credit institutions and investment firms) are subject to the AML Directive.⁵²
- c. If the funder is an entity that uses its own funds, it could take any legal form⁵³, as neither the legislation of the EU nor that of the national Member States currently regulates the phenomenon.

Considerations for Third-Party Litigation Funders in Luxembourg, *ASA Bulletin*, Vol. 38(2020), Issue 2, 2020, pp. 296-413, at p. 403.

In addition, Calunius Capital presents itself on its website as “authorised and regulated as an Investment Adviser by the Financial Conduct Authority (FCA) and has been authorised and regulated as such since 2007. The Calunius Funds are authorised by the Guernsey Financial Services Commission (GFSC) as Closed Ended Investment Schemes. Investments are made through SPVs, the corporate director of which is regulated by the GFSC as an Investment Licensee” (see <http://www.calunius.com/regulatory.aspx>, last access on 18.11.2020).

⁴³ [Directive 2004/25/EC](#) of the European Parliament and of the Council of 21.4.2004 on takeover bids.

⁴⁴ [Directive 2004/109/EC](#) of the European Parliament and of the Council of 15.12.2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

⁴⁵ [Directive 2007/36/EC](#) of the European Parliament and of the Council of 11.7.2007 on the exercise of certain rights of shareholders in listed companies.

⁴⁶ [Regulation 2017/1129/EU](#) of the European Parliament and of the Council of 14.6.2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

⁴⁷ [Directive 2014/65/EU](#) of the European Parliament and of the Council of 15.5.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU; [Regulation 2014/600/EU](#) of the European Parliament and of the Council of 15.5.2014 on markets in financial instruments and amending Regulation 648/2012/EU.

⁴⁸ [Regulation 2014/596/EU](#) of the European Parliament and of the Council of 16.4.2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁴⁹ [Directive 2014/57/EU](#) of the European Parliament and of the Council of 16.4.2014 on criminal sanctions for market abuse (market abuse directive).

⁵⁰ [Directive 2011/61/EU](#) of the European Parliament and of the Council of 8.6.2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations 2009/1060/EC and 2010/1095/EU.

⁵¹ [Directive 2009/65/EC](#) of the European Parliament and of the Council of 13.7.2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

⁵² [Directive 2015/849/EU](#) of the European Parliament and of the Council of 20.5.2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation 2012/648/2012/EU of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

⁵³ For example, in Germany (*infra*, Paragraph 3.1.8) the TPLF agreement is mostly qualified as a partnership under civil law, according to which the associate invests in the activity of the associating party who is an entrepreneur but, in this case, it is the person holding the legal standing. This subject may be a natural or a legal entity. In the latter case,

2.3.1 Funders and the EU Directive on alternative investment funds

A Belgian study has tested the applicability of the 'EU Directive on alternative investment funds' (hereinafter: 'AIFM Directive')⁵⁴ to litigation funding, attempting to answer the following question: 'Is there a separate alternative investment fund between the funder and the funded party?'⁵⁵

To this end, the Belgian study mentioned before underlines that the AIFM Directive and the related ESMA guidelines⁵⁶ are not primarily addressed at entities providing TPLF. Yet, it identifies some elements of similarity between alternative investment funds and the TPLF scheme.⁵⁷

The analysis is based on Article 3 of the AIFM Directive, according to which an alternative investment fund is the entity that 'raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors'.

According to the Belgian study, the relationship between the funder and the funded party falls within the scope of Article 3 of the AIFM Directive⁵⁸, as:

- a. the capital raised is represented by the value of the lawsuit and the costs of the dispute;
- b. the capital raised comes from at least two parties: the funded party and the funding party;
- c. the investment policy concerns the litigation strategy.⁵⁹

2.4 Funders' business model

Traditionally, the business model of TPLF firms can be described as follows. Firstly, the funder collects money on the market. To this end, the funder can either raise equity or debt⁶⁰ or, alternatively, collect money from investors (endowments, pension funds, and other investor capital) and manage such investments on their behalf.⁶¹

At a later stage, the funder uses the sourced capital to fund single cases (see Table 3 below). The due diligence of the funder (see paragraph 3.1.) may serve as the second layer of the selection of litigation having a high likelihood of success, after the initial layer of the claimant's lawyer's own decision on whether or not to take the case.

Funders negotiate deals directly with clients or, in some cases, with specialist brokers,⁶² i.e.

the relationship will be established between the company and the associating party. The associate may either be a natural person or a legal person. There are no other legal requirements for the financing entity, except when it takes one of the forms provided for by partnerships or corporations. See V. Sangiovanni, 'L'associazione in partecipazione (o "società silente") nel diritto tedesco', *Le Società*, Vol. (12), 2008, pp. 1569-1575, at pp. 1571-1572.

⁵⁴ [Directive 2011/61/EU](#) of the European Parliament and of the Council of 8.6.2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations 2009/1060/EC and 2010/1095/EU.

⁵⁵ F. Lefèvre, P. Callens, G. Croisant, '[Legality of third party funding mechanisms under Belgian law](#)', *Arbitra Belgian Review of Arbitration*, Vol. 2017(1), 2017, pp. 35-65.

⁵⁶ [Guidelines on key concepts of the AIFMD](#), 2013.

⁵⁷ F. Lefèvre, P. Callens, G. Croisant, '[Legality of third party funding mechanisms under Belgian law](#)', *Arbitra Belgian Review of Arbitration*, Vol. 2017(1), 2017, pp. 35-65.

⁵⁸ *Ibid*, F. Lefèvre, P. Callens, G. Croisant, p. 64.

⁵⁹ *Ibid*, F. Lefèvre, P. Callens, G. Croisant, pp. 61-63.

⁶⁰ For example, at the end of 2019, Burford had \$545 million in outstanding bonds: see Burford's investor report at <https://www.burfordcapital.com/media/1734/fy-2019-report.pdf>.

⁶¹ <https://www.burfordcapital.com/media/1734/fy-2019-report.pdf>. Burford, the world's largest funder, declared to have \$2.9 billion in assets under management as of 31.12.2019.

⁶² According to our qualitative research, at least four litigation funding brokers active in the EU market, which are: Carbonia Investments (Madrid, Spain), <https://carboniainvestments.com>; CDC Cartel Damage Claims (Brussels,

intermediaries between funders and potential clients (see Table 3 below). If a funded case is successful, the funder recovers the costs incurred in relation to the same, plus a fee.

Table 3: Funder's business model

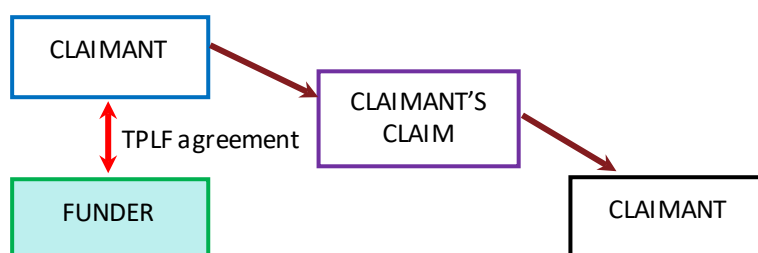
| | | |
|---|---|---|
| 1. Outline of the claim Claim outlined by the claimant or the lawyer Letter of intent (Loi). Non-disclosure agreement (NDA). | 2. Due diligence The funder verifies: <ul style="list-style-type: none"> – type and strength of the case; – amount of capital required; – likely duration; – potential damage and settlement prospects; – legal fee arrangement; – defendant's ability to satisfy a judgment. | 3. Funding offer The funder evaluates the due diligence report. The legal merits analysis concerns: applicable law, jurisdiction, additional fact-finding, statute of limitations. If approved, a litigation funding agreement is executed between the funder and the claimant. The claimant's lawyers are subject to an agreed costs budget. |
| 4. Civil litigation Generally, the case lasts 1–5 years. The funder monitors the case progress. The funder receives periodic updates from the lawyers. In certain cases, the funder also provides strategic advice on the litigation. | 5. Trial or settlement The majority of cases are settled before trial, also relying on mediation whereby a mediator assists the parties in reaching a settlement. The funder aims to settle before incurring significant legal costs. | 6. Outcome of the funding process If the claim is successful, the defendant pays the due sums to the claimant which are subsequently split with the funder, as agreed. If the claim fails, the funder pays the defendant's costs according to the terms of the agreement. |

Our analysis confirms that a funder may operate in two different ways:

- Funding of a single case (see Figure 2).
In that respect, it shall be noted that sometimes TPLF operates jointly with the assignment of claims for the purpose of collection (see Figure 3);
- Portfolio litigation funding (see Figure 4).

Figure 2 illustrates the professional practice of an entity, which is not a party to the dispute, in funding all or part of the costs of domestic or cross-border proceedings. The funding is provided in exchange for a reimbursement of the investment and for remuneration (see the Definitions of the Study).

Figure 2: Funding of a single case



Additionally, the funding of a single case may be related to the practice known as 'claim

Belgium), <https://www.carteldamageclaims.com/>; Maxima Litigation Solutions Ltd (Staffordshire, UK), <http://www.maximalip.com/>; QPL Limited (London, UK), <http://www.qpl.ltd.uk/>.

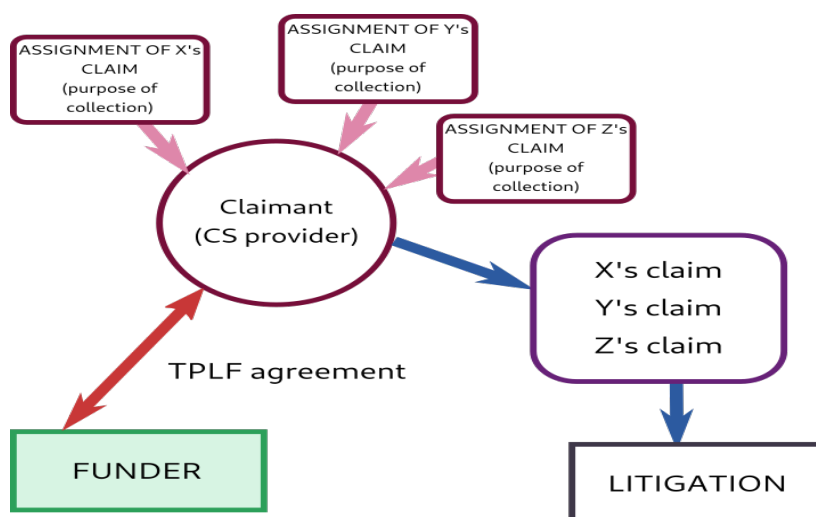
assignment for purpose of collection'.⁶³ In this case, the assignee of the damage claims (so called collection service provider, in German 'Inkassodienstleister') may enter into a litigation funding agreement with a funder (see Figure 3 below).⁶⁴ In such a case, as stressed by the German case-law, the funding agreement may create a dependency of the claimant (the collection service provider) to the funder and may entail the risk that the claimant (the collection service provider) would not act in the sole interests of the assignors.⁶⁵

⁶³ It is important to underline that such practice is allowed only in some EU Member States (eg Germany and Austria, for example). This business model is particularly common in cases of infringements of national and EU competition law provisions (Directive 2014/104/EU). In that respect, it should also be stressed that, in Germany, the activity consisting in (i) collecting third party claims or (ii) having the claims assigned for the purpose of collection for account of a third party, is qualified as "a legal service" for the purposes of the Section 2 of the German Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz*, RDG), if the debt collection is conducted as a stand-alone business (collection service). According to Section 4 of the German Act on Out of Court Legal Services, a legal service 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.

⁶⁴ However, some collection service providers - where the assignment of claims for purposes of collection is allowed - invest their own resources to finance the litigation. See at <https://www.carteldamageclaims.com/our-approach/>. In that respect see Court of Appeal of Düsseldorf, 18.2.2015, Az. VI U 3/14, which held as invalid the assignment of a claim to CDC. The main reason for declaring the assignment invalid was that it had the sole purpose of shifting the litigation costs from the damaged parties to CDC, which was considered by the court without the financial capability of bearing the possible adverse costs. Subsequently, a similar assignment of claim was held valid by the Court of Appeal of Mannheim, 24.1.2017 – 2 O 195/15. The concerns expressed by the Court of Appeal of Düsseldorf in its 2015 judgement were overstepped by CDC by means of a security of more than 2.3 mil-lion Euro. However, the claim was considered time barred (according to the principle expressed by the Higher Court of Karlsruhe on 9.11.2016, then overruled by the German Federal Court of Justice, in its 12.6.2018 judgement). In the Netherlands, the Court of Appeal of Amsterdam, 4.2.2020, considered the assignment of claims to CDC valid under Dutch law and drafted in a sufficiently clear and precise manner. The judgement stated also that the claim brought by CDC was not time barred by limitation.

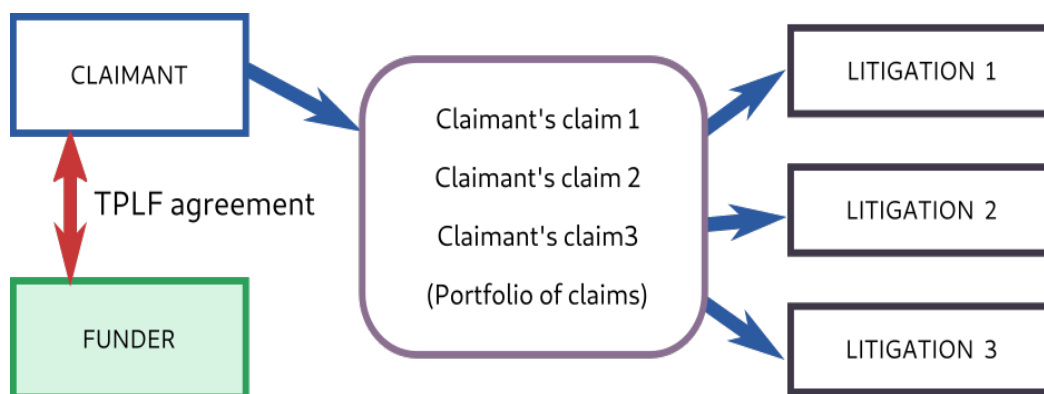
⁶⁵ More precisely, German case-law has addressed the issue of whether is consistent with Section 4 of the German Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz*, RDG) the fact that the claimant (ie. a collection service provider), while doing collection services in the interest of the as-signors enters into a TPLF agreement. The Tribunal of Munich, 7.2. 2020 – 37 O 18934/17 has stressed that a funding agreement may create a dependency of the claimant to the funder and may entail the risk that the claimant (ie. the collection service provider) would not act in the sole interests of the assignors. Conversely, the German Federal Court (BGH), 27.11.2019 – VIII ZR 285/18, *Neue Juristische Wochenschrift* (NJW), 2020, p. 208, has responded positively to this question, given that in TPLF funder and claimant pursue a joint goal (see paragraph 3.1.8).

Figure 3: Funding a single case in the event of assignment of claims for the purpose of collection



While funding a single case is still the most common approach, so-called 'portfolio funding' is becoming increasingly widespread (see 'PLF' under the Definitions, and Figure 3 below).⁶⁶ Under this model, the funder finances a bundle of claims from a specific client⁶⁷ under the same funding agreement.⁶⁸ Portfolio funding enables funders to spread the risk across the whole bundle, which, in turn, delivers superior results.⁶⁹ In addition, funders are able to finance lower value actions, which would not appeal to funders when taken on individually. Whether cases are invested in jointly (as per the above-mentioned portfolio funding practice) or individually, funders establish portfolios of different cases to pursue diversification.

Figure 4: Portfolio financing



⁶⁶ According to the Economist (18.8.2018 edition, at <https://www.economist.com/finance-and-economics/2018/08/18/litigation-finance-offers-investors-attractive-yields>) in 2017 'Burford ploughed \$726m into portfolio deals, compared with \$72m into standalone suits'.

⁶⁷ K. S. Qtiashat, A.K. Qtiashat, 'Third Party Funding in Arbitration: Questions and Justifications', *International Journal for the Semiotics of Law*, Vol. 26, 2019.

⁶⁸ For example, in 2016, Burford announced that it had granted \$45 million in funding to a 'FTSE 20 company' under a 'financing arrangement [encompassing] a portfolio of pending litigation matters': see the announcement at <https://www.burfordcapital.com/media-room/media-room-container/burford-capital-provides-45-million-in-litigation-financing-to-ftse-20-company/>.

⁶⁹ E. Truant, 'Implications of Portfolio Financings on Litigation Finance Returns', 15.1.2020.

As for more traditional forms of investments (such as those in stocks or bonds),⁷⁰ the risk of funding a case is that its proceeds may end up being lower (or higher) than expected, which makes the returns risky. The most obvious reason for diversification is to ensure that none of the funded cases (or types of cases) represents a disproportionate amount of the fund if an event occurs that – either affecting a single case (e.g. losing the case because the adjudicating body decides that it lacks merits) or a type of cases (e.g. a reform of insolvency law which negatively affects all funded insolvency cases) – alters the expected value of the investment. In order to average out the risk of various cases, funders establish funds on the basis of specific composition targets.

Both funder business models (single case and portfolio funding) give rise to concerns regarding the lack of rules on the funder's corporate standards and governance.

With respect to standards, it should be noted that there are no specific rules in the EU on the capital adequacy of funders.⁷¹

With respect to governance, only listed funders generally disclose details of their business practices (e.g. remuneration, terms of the funding agreement). However, most funders are not listed and thus are not subject to the same stringent requirements envisaged for listed companies.

Our results, at the very least, support the need for reforms designed to guarantee the capital adequacy of funders.

2.5 EU competition law and the litigation funding market

Litigation funders must comply with EU competition rules if they fall under the definition of undertakings. The concept of an 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law and must be applied and interpreted in the same way for purposes of public or private enforcement of EU competition law rules, covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed.⁷² This definition applies to activities carried out by funders as described in this study.

Article 101 TFEU prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels). There also seems to be no obstacle to the applicability, to funders, of Article 102 TFEU, which prohibits those firms holding a dominant position on a given market from abusing that position.

The key element for the application of EU competition rules (and, in particular, Article 102 TFEU) to funders is the definition of the relevant market in both its product and geographical dimensions. At this stage, a relevant litigation funding market has not yet been defined pursuant to EU competition rules.⁷³ It is reasonable to state that it cannot be excluded that, due to the peculiarities

⁷⁰ As opposed to traditional investments in capital markets, in TPLF, the amount of capital the fund will ultimately have to use in relation to a given case remains uncertain for a long time. This adds a layer of complexity to portfolio management: E. Truant, '[Implications of Portfolio Financings on Litigation Finance Returns](#)', 15.1.2020.

⁷¹ Lord Jackson, [Review of Civil Litigation Costs: Final Report](#), 2009, p. 118 observes that "There is no guarantee against the funder becoming insolvent, with all the consequences which would flow from that". For a case about a funder's insolvency within the EU see *CDC Cartel Damage Claims v HeidelbergCement AG*, *Mlex*, 2015, p. 29.

⁷² See, to that effect, Judgment in [joined Cases C-447/17 P and C-479/17 P - European Union v Gardian Europe Sàrl](#), Court of Justice of the European Union, September 2019; Judgment in [case C-307/18 - Generics \(UK\) Ltd et al. v Competition and Markets Authority](#), Court of Justice of the European Union, January 2020.

⁷³ Market definition is a tool for identifying the boundaries of competition between undertakings. The objective of defining the relevant product and geographical market is to identify the actual competitors that restrict the

of each case, the relevant litigation funding market may be segmented into different product markets (for instance, based upon the fact that some funders finance only some very specific types of litigation, targeting a distinct group of customers) or into national markets (for example, some funders located in different areas may face impediments to developing their services in competitive terms across the whole geographic market).

2.6 Tax and fiscal policy in the EU

Identifying the tax treatment of TPLF proceeds for funders is a complex task, as its outcome depends on many factors. This determination meets several layers of obstacles.

Firstly, TPLF transactions generally involve two main payments, which both raise tax issues for funders. On the one hand, the advance of cash to fund the litigation made *by the funder* (to the funded party), to the extent that it might be deemed a deductible expense, depending on all relevant circumstances. On the other hand, the repayment made *to the funder* (by the funded party) when the case is won or settled, which may be subject to income tax for the payment recipient and possibly subject to withholding taxes by the source State, where a cross-border arrangement is in place. It should also be noted that litigation funding agreements are essentially entered into on a strictly non-recourse basis, meaning that the funder recovers nothing if the claimant does not actually achieve a cash settlement or if the funded party loses the case.

Of course, the applicable tax regime depends on how litigation funding agreements (which are typically highly tailored) are structured. Determining which tax treatment applies to TPLF agreement requires an in-depth and case-by-case analysis of both the contractual arrangements and the fact. Regardless of any different qualification from a civil law perspective, for the purposes of tax law several items of income may stem from a TPLF agreement: for instance, business profits (e.g. where the funder is deemed to be carrying out business activity in performing a TPF arrangement), interest, equity-sourced income or capital gains, rather than hybrids.

In this respect, the money advanced by the funder may qualify from a tax perspective as a loan (probably interest bearing), or an equity investment (thus generally not being eligible for tax deductions). In the latter case, the asset may either be a capital asset or an asset used in the ordinary course of the investor's business: such variables involve many different tax consequences.⁷⁴

Depending on the outcome of the proceedings, the funding advanced will either be repaid (if the case is won or settled) or written off (if the case is lost). While, in the latter case, the write-off probably qualifies as a loss, whose deductibility regime is usually assessed on a case-by-case basis, whenever the case is successful (or settled) the amount received should be taxed as income. However, it may also qualify as a capital gain to the extent that the advance payment is considered a capital asset – in the same way as private equity and venture capital funds, when categorising investments as capital assets.⁷⁵

Besides, tax rules differ greatly from one country to another: for example, a litigation funding agreement, whereby some funding is granted in exchange for a portion of the case proceeds on a

commercial decisions of the undertakings concerned, such as their pricing decisions. The basic principles for defining the market are competitive constraints, demand substitution, supply substitution and potential competition.

⁷⁴ A. Morrison, R. Haight, 'The tax treatment of alternative litigation funding: some answers, but mostly questions', *Pittsburgh Tax Review*, Vol. 21, 2014, p. 6.

⁷⁵ Betting on an uncertain future: the tax consequences of large third-party litigation financing, available at https://www.fedbar.org/wp-content/uploads/2019/12/FBA-Submission_1-6-18-1-pdf.pdf.

non-recourse basis may fall within the legal scheme of the so-called *associazione in partecipazione* (partnership agreement) under Italian tax law. However, it would definitely be qualified differently elsewhere.

Furthermore, once a given arrangement is identified, its tax treatment may depend on the nature of the funder – which may be a financial institution, a corporation, or a different legal entity, or even a natural person – and the funded party.

Finally, TPLF transactions are often carried out by parties based in different jurisdictions, adding further layers of complexity. Imagine a funder tax resident in a country (say, Alfa) financing a company tax resident in a different country (say, Beta), taxation of the funder may occur on at least two levels. Firstly, the Beta government typically levies a withholding tax on the payment applied to the funder. At a later stage, the Alfa government is likely to treat the payment as revenues. Any double taxation issue arising out of a cross-border situation needs to be addressed by means of instruments envisaged by tax treaties preventing double imposition and possibly EU directives.

Additionally, it is unclear whether EU rules on Value Added Tax ('VAT') apply to the service (i.e. dispute financing) offered by the funder. On the contrary, it is clear that the lawyers established in the EU are subject to VAT with respect to their fees⁷⁶, including contingency fees where applicable.⁷⁷

In particular, it should be emphasised that the VAT regime depends on the structure of the funder (such as investment funds, corporations, financial institutions,⁷⁸ the place of establishment of European and non-European funders⁷⁹ and the legal construction of each litigation funding agreement.⁸⁰

For example, a fiscal court in Germany qualified a litigation funding agreement as the establishment of a partnership under civil law between the funder and the client.⁸¹ On this basis, the fiscal court confirmed that the agreement in question may fall under the scope of Art. 4, paragraph 8, letter g. of the Law on Turnover Tax (*Umsatzsteuergesetz, UStG*) envisaging that VAT does not apply to certain activities, such as the granting and the negotiation of credit and the management of credit by the person granting it.⁸²

The analysis has highlighted the current uncertainty in categorising litigation funding agreements and the related gains under the fiscal regimes in the EU (but also in the US).⁸³ In light of the above, some guidance by the public authorities on the taxation regimes of TPLF in the EU would be beneficial to the industry, to lawyers and to clients.

⁷⁶ With respect of VAT on lawyers' remuneration, TPLF agreements usually provides that VAT on lawyer's remuneration fees shall only be paid by the funder insofar as the claimant cannot offset payments against its own tax liability. See, for example, the paragraph 4.g [Omni Bridgeway TPLF model contract](#), available in German.

⁷⁷ See paragraph 1.2, footnote 3.

⁷⁸ See paragraph 2.2.

⁷⁹ See paragraph 2.1.

⁸⁰ See paragraph 3.1.8.

⁸¹ Fiscal Court (FG) of Baden-Württemberg 29.8.2013, 1 V 1086/13, *BeckRS* 2014, 94319.

⁸² T. Rennar, 'Steuerbefreiung von Leistungen eines Prozessfinanzierungsdienstleisters', *MwStR* 2019, 144-147.

⁸³ Similar concerns are also present in the US environment for TPLF. See the recent judgment (Judge Lauber) 28.5.2020, [David A. Novoselsky and Charmain J. Novoselsky v Commissioner](#), T.C. Memo. 2020-68.

3 Legal issues and tentative findings

3.1 Litigation funding agreement

The process that leads to the signing of a litigation agreement for a single case consists of two steps: the due diligence phase and the formation of the TPLF agreement. Both phases usually take place prior to the commencement of civil proceedings.

The due diligence phase takes place before the litigation funding agreement is signed and it is regulated by a letter of intent ('LoI'). Normally, after the claimant contacts the funder,⁸⁴ the latter asks the claimant to fill in a form, in which relevant information about the claim to be filed must be disclosed, or the funder arranges a meeting for the same purpose. The more detailed and accurate the disclosure, the more thoroughly the funder will be able to assess the value of the claim, to understand if it is well-grounded and to predict its likelihood of success. It is particularly crucial for the claimant to guarantee that it is not aware of any circumstance that may give rise to a counterclaim, which would affect the investment scenario and the funder's return prospects. According to the results of our qualitative analysis, the confidentiality of documents and information (such as commercial information concerning the claimant and the potential defendant) disclosed to the funder during the due diligence phase is usually protected by a non-disclosure contractual agreement, which is signed prior to the exchange of any sensitive information.

However, irrespective of what is agreed, any personal data related to or provided during this phase by the potential claimant (if an individual and not a legal person) are protected by the EU General Data Protection Regulation (hereinafter 'GDPR', see Table 4 below).⁸⁵

Table 4: TPLF and personal data

| Problem identified | Applicability of an existing EU rule |
|--|--|
| Confidentiality of information and data disclosed in the due diligence phase | <p>Any personal data (i.e. any information relating to the individual seeking funding) disclosed during the due diligence phase are protected by the EU General Data Protection Regulation ('GDPR').</p> <p>The GDPR does not apply to personal data concerning legal persons (Recital 14, GDPR).</p> <p>Not all information disclosed by an individual seeking funding can be qualified as 'personal data'. Only information that allows, either directly or indirectly, the person seeking funding to be identified and is capable of revealing that person's features, habits, lifestyle, personal relationships, state of health, economic situation, etc. is protected by the GDPR.</p> |

⁸⁴ In this respect, we note that the world's first online litigation funding marketplace has been created in the UK (Finlegal.io, <https://finlegal.io/>), i.e. a 'free-to-lawyer' solution that connects those needing litigation funding or ATE insurance with multiple providers.

⁸⁵ [Regulation 2016/679/EU](#) of the European Parliament and of the Council of 27.4.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. With respect to the personal data of the potential defendant, see paragraph 3.2.3.

According to our qualitative analysis, the elements that are usually examined by the funder in the due diligence phase include the following:

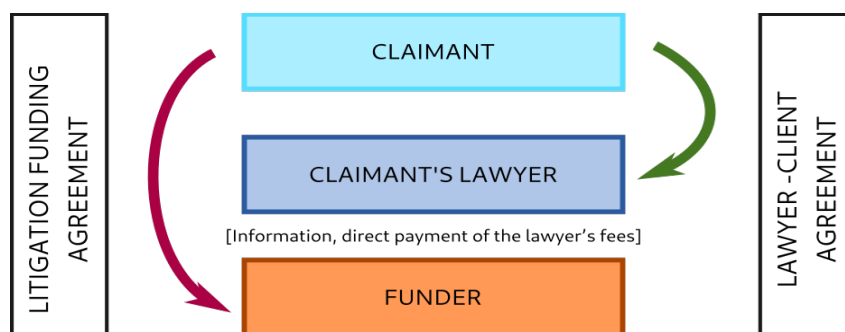
- a. Value of the claim⁸⁶. The *quantum* of the claim must be sufficient to offer the funder a certain return on the investment. For this reason, the majority of funders only finance lawsuits with a minimum claim value (see Annex 1);
- b. Length of the claim and likelihood of success (which must be very high).⁸⁷ Funders always carefully assess the strength of the claim, the available evidence and the presence of any counterclaims to calculate the likelihood of the lawsuit being successful;
- c. Accuracy of estimated costs;
- d. Defendant's solvency and prospects of recovering what is awarded by the judgment. It is important for the defendant to have the financial means to meet the claim. It is extremely frustrating, for funders, when a lawsuit ends in a successful judgment, but the opponent offers no assets for recovering what is awarded to the claimant.

At the end of the due diligence phase, the funder will decide whether or not to finance the claim. If the case is accepted, the content of the TPLF agreement is drafted between the funder and the claimant, pursuant to the principle of freedom of contract. If the claimants are consumers, they will benefit from general consumer protection against unfair terms (Directive 93/13/EEC).

3.1.1 Contracting parties

As shown by Figure 5 below, the litigation funding agreement revolves around two entities: the funder and the claimant. Conversely, the claimant's lawyer is not a contracting party to the litigation funding agreement.

Figure 5: Interactions between TPLF agreement and lawyer-client agreement



3.1.2 Funder's essential contractual obligations

Our analysis confirms that the main funder's contractual obligations are as follows:

- a. Provision of financing. The main funder's obligation is to grant the claimant the agreed financing. Funding is usually staged, depending on the progress of the case: this way, the

⁸⁶ To this end, the potential funded party must inform the potential funder of the existence of any credits claimed by the opponent from him/her, which could entitle the counterparty to the offsetting of credits.

⁸⁷ According to our qualitative analysis (interview with three leading funders), some funders finance litigation when the success chance rate is higher than 50 %, others require a success chance rate higher than 70 %, others a 'very high possibility of winning the case'.

funder can control the claimant's potential opportunism or the undertaking of excessive risk;

- b. Hold harmless. The funder undertakes to hold the claimant harmless from costs connected with the litigation (lawyers' fees, with a payment made directly by the funder,⁸⁸ lawyers' travel expenses and trial costs, including witnesses' travel expenses, security for costs). Within the EU, national courts have no jurisdiction to make a cost award against the funder, given that is not a party to the dispute. However, in entering into the TPLF agreement, the funder usually assumes the contractual obligation to hold the claimant harmless from costs to be reimbursed to the counterparty if the case is lost;
- c. Confidentiality. According to the so-called 'non-disclosure clause', which is often included in litigation funding agreements, the funder undertakes to keep confidential all information disclosed to it by the claimant.

3.1.3 Funder's essential contractual rights

Our analysis confirms that the main funder's contractual rights are as follows:

- a. Receive a share of the proceeds. If the claim is successful, the funder will receive the reimbursement of its costs and remuneration consisting of (a) a percentage depending on the outcome of the dispute, or (b) a success fee, whose amount is specified in the TPLF agreement. The percentage share of the recovery, which depends on the three factors illustrated above at paragraph 1.3. and may be very high (much higher than a commercial interest rate), is agreed between the parties, according to the principle of contractual freedom and subject to general principles of the applicable contract law.⁸⁹ With respect to collective redress, in Slovenia, the success fee shall 'not exceed the statutory interest rate in Slovenia' (Article 59.3 Slovenian Law of Collective Actions);⁹⁰
- b. Monitor the dispute. The funder has a contractual right to be informed by the claimant (by the claimant's lawyer) of the progress of the ongoing dispute. Given that all communications between the lawyer and the client are confidential (so-called lawyer-client privilege), the claimant party must waive the lawyer-client privilege in favour of the funder.⁹¹

3.1.4 Claimant's essential contractual obligations

Our analysis confirms that the claimant's main contractual obligations are as follows:

⁸⁸ See, for example:

- paragraph 4.2 [Omni Bridgeway TPLF model contract](#), available in German;
- paragraph 1 [Profina TPLF model contract](#), available in German.

⁸⁹ In that respect, note that the Court of Appeal of Munich, 31.3.2015 -15 U 2227/14, upheld that a success fee of 50 per cent is not contrary to German public policy. *Contra* A. Bruns, [Das Verbot der Quota litis und die erfolgshonorierte Prozeßfinanzierung](#), *Juristen Zeitung*, 2000, pp. 232-241. It also depends on the applicable substantive law if the share of proceeds agreed in the litigation funding agreement can be reduced if the claimant is a consumer.

⁹⁰ Interestingly, the Commercial Court of Barcelona, 2.11.2018 authorised the Spanish company in liquidation Unipost to enter into a TPLF agreement with a funder (Ramco). The Court stressed that in this case only a TPLF agreement could guarantee access to justice for the claimant. The signature of the TPLF agreement was authorised under the following conditions: a) the claimant (Unipost) should not be charged costs if the lawsuit is lost; b) the funder's remuneration fee should not exceed 30 % of the outcome of the dispute. For more details, see <https://www.lavananguardia.com/economia/20181112/452861582245/unipost-demanda-correos-abuso-competencia.html>.

⁹¹ See, for example, paragraph 3.7 [Omni Bridgeway TPLF model contract](#), available in German.

- a. Disclosure. The claimant has a duty to disclose accurately and truthfully to the funder any relevant information about the claim to be filed and allow access to the relevant documents (inspection or audit obligations);
- b. Diligent litigation management. The claimant undertakes towards the funder to pursue the claim with the due care and diligence of a prudent business professional;⁹²
- c. Report on progress. The claimant is under a duty to instruct the lawyer to inform the funder periodically of the progress of the dispute and to allow the funder (or third parties appointed by it) to inspect all relevant documents;⁹³
- d. Pay remuneration to the funder. Provided that the claimant wins the case, the latter is obliged to pay remuneration to the funder.

3.1.5 Claimant's essential rights

Our analysis confirms that the claimant's main essential rights are as follows:

- a. To be held harmless from litigation costs. The claimant has the right to claim from the funder the payment of all costs due for the dispute, including those to be reimbursed to the opponent party, if the case is lost;
- b. Confidentiality. The confidentiality of documents and information disclosed to the funder is usually guaranteed through a contractual clause.

3.1.6 Lawyer

The claimant's lawyer is not a party to the litigation funding agreement. However, as illustrated in Figure 5 above, the claimant's lawyer has the following relationship with the funder:

- a. According to our qualitative research (interviews with leading funders), the lawyer may act as broker between the claimant and the funder;
- b. the lawyer assists the claimant in the due diligence phase and in the negotiation of the litigation funding agreement;
- c. the lawyer is instructed by the claimant to report on the progress of the litigation to the funder;
- d. the lawyer receives his or her fees directly from the funder.

As will be clarified below in paragraph 3.2.3, such a relationship may place the lawyers in a very sensitive position and may lead them into a conflict of interests.

3.1.7 Applicable law and choice of forum

Most litigation funding agreements are drafted following the style of Anglo-American model contracts which regulate in detail all possible elements and contingencies that should be covered by the contract. They include: (i) the applicable law, which is regulated by the Rome I Regulation and (ii) the choice of forum with respect to disputes between the funder and the claimant arising from the litigation funding agreement (see Table 5 below).

⁹² See, for example, paragraph 3.1 [Omni Bridgeway TPLF model contract](#), available in German.

⁹³ See, for example:
- paragraph 3.7 [Omni Bridgeway TPLF model contract](#), available in German;
- paragraph 2 [Profina TPLF model contract](#), available in German.

Table 5: TPLF agreement: applicable law and choice of forum

| Issue identified | Applicability of an existing EU rule |
|---------------------------|---|
| Applicable law | Rome I Regulation ⁹⁴ , Article 3 (freedom of choice) |
| Choice of court agreement | Brussels I Recast Regulation ⁹⁵ , Article 25 (if the selected court is located in an EU Member State) 2005 Hague Choice of Court Convention (if the selected court is located in a contracting state) |

3.1.8 Qualification of the litigation funding agreement

The litigation funding agreement is a new kind of contract. If not prohibited or not regulated by the applicable law, the parties enjoy contractual freedom.

Party autonomy is one of the leading general principles on which the contract law of all Member States is based, such that the TPLF agreement can be structured in different ways, according to the peculiarity of the individual circumstances. The parties are free to choose its content and to follow one or other of the existing contract types, or even to create a mixture of them, provided that there is no (direct or indirect) infringement of mandatory provisions or public policy. In fact, our analysis reveals many different models.

However, claiming that the TPLF agreement is a new kind of contract, or a *sui generis* contract,⁹⁶ does not solve the problem of its qualification and sometimes even looking at the terms and conditions agreed by the parties is not sufficient to identify the legal regime applicable to the contract. The problem of qualification recurs, for example, when the regulation applied by the parties is found to be incomplete and a dispute arises between them on the gaps. In addition, the issue of qualification also emerges when the regulation applied by the parties makes the contract very similar to a certain type of contract known to the system, which is subject to specific rules (for example, those applicable to insurance companies and banks).

For all these reasons, it is important to identify all possible contract types that bear some similarities with the TPLF agreement. The issue at hand is much debated and Table 6 below illustrates the situation in France and Germany only.⁹⁷

⁹⁴ [Regulation 2008/593/EU](#) of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I Regulation).

⁹⁵ [Regulation 2012/1215/EU](#) of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast Regulation).

⁹⁶ See Court of Appeal of Versailles, 1.6.2006, no 05/01038.

⁹⁷ The scope of this study does not include that of offering an overview of TPLF in the 27 Member States.

Table 6: TPLF agreement: possible contract types

| Legal qualification | Pros and cons |
|--|--|
| Insurance agreement | <p>France: French legal scholars and representatives of the legal professions have concluded that, in principle, TPLF cannot be qualified as an 'insurance agreement', as the funded party does not pay any premium in return for being held harmless for the litigation costs.⁹⁸ Moreover, while, in insurance contracts, the risk is borne by the insured, in TPLF agreements the risk is borne in full by the funder.</p> <p>Germany: the Court of Appeal of Frankfurt has suggested that this is one of the possible TPLF agreement qualification options.⁹⁹ Some German scholars agree with this qualification,¹⁰⁰ while others criticise that view.¹⁰¹ However, a 1999 decision by the former German Federal Insurance Supervisory Office (BAV), now part of the German Federal Financial Supervisory Authority, stated that litigation funding does not fall under the concept of insurance and the TPLF agreement is, therefore, not subject to its control.¹⁰²</p> |
| Partnership or joint venture contract | <p>France: French legal scholars have explored the possibility of qualifying the TPLF agreement as a partnership contract. However, this opinion was rejected on the grounds that neither the funder nor the funded party are part of <i>affectio societatis</i> (i.e. they do not feel part of a 'company') and that the losses are not equally distributed between the funder and the funded party, but are unilaterally borne by the funder.¹⁰³</p> <p>Germany: the qualification of the TPLF agreement as a partnership under civil law is upheld by the majority of German case law, given that in the TPLF the parties (claimant and funder) pursue a joint goal (i.e. the success of the claim).¹⁰⁴</p> |
| Contract for the provision of services | <p>France: many French legal scholars qualify the TPLF agreement as a contract of enterprise, i.e. a contract involving the provision of immaterial services by an independent contractor.¹⁰⁵ This qualification appears to have been implicitly upheld by the French Court of Cassation,¹⁰⁶ which applied to the TPLF agreement some specific and exceptional provisions conceived for the contract of enterprise, namely the possibility for the judge to reduce the price.</p> |
| Loan agreement | <p>France: as observed by French legal scholars and representatives of the legal professions, the TPLF agreement differs from a loan as the funding is provided on a non-recourse basis and the funded party is under no obligation to return the money to the funder, even when the claim is rejected.¹⁰⁷</p> <p>Germany: the Court of Appeal of Frankfurt also suggested possibly qualifying TPLF</p> |

⁹⁸ See Le Club des Juristes, '[Financement du procès par les tiers](#)', 2014.

⁹⁹ Court of Appeal of Frankfurt, 22.8.2017, case 16 U 253/16, paragraph 25.

¹⁰⁰ J. Frische, S. Schmidt, 'Eine neue Form der Versicherung?', *Neue Juristische Wochenschrift (NJW)* 1999, p. 2998.

¹⁰¹ L. Müller-Guldemeister, C. Rollmann, 'Die Prozessfinanzierung der FORIS AG ist keine Versicherung' *Neue Juristische Wochenschrift (NJW)*, 1999, p. 3540.

¹⁰² German Federal Insurance Supervisory Office, 29.4.1999, *Veröffentlichungen des Bundesaufsichtsamtes für das Versicherungswesen (VerBAV)*, 1999, p. 167.

¹⁰³ See Le Club des Juristes, '[Financement du procès par les tiers](#)', 2014.

¹⁰⁴ See German Federal Court (BGH), 27.11.2019 – VIII ZR 285/18, *Neue Juristische Wochenschrift (NJW)*, 2020, p. 208; Court of Appeal of Munich, 31.3.2015, 15 U 2227/14, Fiscal court of Baden-Württemberg, 29.8.2013 – 1 V 1086/13; Tribunal of Cologne, 4.10.2002, *Neue Juristische Wochenschrift RR (NJW-RR)*, 2003, p. 426-427. On the other hand, its qualification as a partnership was rejected by the Tribunal of Bonn, 25.8.2006, 15 O 198/06 (paragraphs 73 ff).

¹⁰⁵ See Le Club des Juristes, '[Financement du procès par les tiers](#)', 2014.

¹⁰⁶ Cour de Cassation, Civ. I, 23.11.2011, n 10-16770, P+B.

¹⁰⁷ See Le Club des Juristes, '[Financement du procès par les tiers](#)', 2014.

| Legal qualification | Pros and cons |
|---------------------|---|
| | as a loan, as both contracts share the same financing function. ¹⁰⁸ |
| Gambling contract | France: French legal scholars and representatives of the legal professions have rejected this qualification, on the grounds that, while, in gambling, the risk is on both parties, in the TPLF agreement it is borne only by the funder. ¹⁰⁹ |

None of the suggested qualifications describes the TPLF in terms of a financial instrument laid down in the so-called MiFID II Directive and the related Regulation.¹¹⁰ In that respect, it is useful to note that, according to Article 1 of the MiFID II Directive, the directive applies to entities offering investment services or performing investment activities by establishing a branch within the EU. The Directive envisages a catalogue of financial instruments in its Section C of Annex I and defines 'investment services and activities' as any of the services and activities listed in Section A of Annex I, relating to any of the instruments listed in Section C, Annex I.

3.1.9 Termination by funder

The termination of the litigation funding agreement by the funder is subject to the contractual freedom of the parties and to the general principles of the applicable contract law.

Typically, the funder terminates the litigation funding agreement if the opponent party becomes insolvent or if it has realised that the proceedings are no longer viable, for instance, if the applicable case law is overruled. As noted by Lord Jackson, such contract termination clauses are related to events that are not under the claimant's control (i.e. not resulting from the claimant's breach of its contractual obligations) and they may, therefore, result in a lack of protection for the claimant.¹¹¹

3.2 Litigation funding and lawyers' ethics

Ethical standards and rules of professional responsibility must always be kept in mind in litigation, but particular focus must be paid to this aspect when a litigation funder is involved. In this respect, paragraph 1 of the Code of Conduct for European Lawyers clarifies the commitment a lawyer must dedicate to the claimant. When a litigation funder is financing a dispute, the ethical principles that permeate the legal profession, such as client loyalty, confidentiality, independence, claimant's freedom and interest, all come into play.

Firstly, the fact that the lawyer must always act in the best interest of his or her client (paragraph 2.7 of the Code of Conduct for European Lawyers) seems to suggest that the lawyer must inform his or her client, who does not meet the criteria to benefit from legal aid, of the possibility of using private litigation funding (TPLF included). At the same time, the lawyer should make sure that his or her client has clearly understood the meaning of TPLF and its pros and cons.¹¹²

¹⁰⁸ Court of Appeal of Frankfurt, 22.8.2017, case 16 U 253/16, paragraph 25.

¹⁰⁹ See Le Club des Juristes, '[Financement du procès par les tiers](#)', 2014.

¹¹⁰ [Directive 2014/65/EU](#) of the European Parliament and of the Council of 15.5.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU and [Regulation 2014/600/EU](#) of the European Parliament and of the Council of 15.5. 2014 on markets in financial instruments and amending Regulation 2012/648/EU.

¹¹¹ Lord Jackson, [Review of Civil Litigation Costs: Final Report](#), 2009, p. 119.

¹¹² According to the Court of Appeal of Cologne, 5.11.2018 - 5U 33/18, *Neue Juristische Wochenschrift* RR (NJW-RR), 2019, p. 759, a German lawyer is under a duty to inform his or her client of the possibility of using TPLF. However, there is no need to provide the client with information aimed at determining the most affordable funder.

The same paragraph 2.7 of the Code of Conduct for European Lawyers seems to imply that, if the client asks the lawyers to represent the case in the due diligence phase with the funder, the lawyers should consider whether or not they have the necessary experience to negotiate with a funder. If so, the lawyer must describe to the client the relevant circumstances and the related material risks. For example, if the funder seeks client confidential information, the lawyer must advise the client of the risks of disclosure.

According to paragraph 2.3 of the Code of Conduct for European Lawyers (confidentiality) the lawyer must obtain his or her client's informed consent to disclose confidential information to the funder in the due diligence phase as well as in any other further stages.

If a TPLF agreement is signed, the ethical principle of client loyalty (principle e of the Code of Conduct for European Lawyers) implies that, from that moment on, the lawyer must avoid any meeting with the funder in the absence of his or her client.¹¹³

3.2.1 Claimant's right to choose a lawyer freely

In principle, notwithstanding the TPLF agreement, the claimant remains free to choose his or her own trusted lawyer to take part in the litigation. However, our analysis reveals that the funder sometimes acts as an intermediary between the potential claimant and the lawyer.¹¹⁴ Nevertheless, when appointed, the lawyer must act independently from the funder according to paragraph 2.1 of the Code of Conduct for European Lawyers¹¹⁵ (see Table 7 below).

Table 7: Independence of the appointed lawyer

| Problem identified | Applicability of an existing EU rule |
|--|---|
| Independence of the appointed lawyer from all external pressures | Code of Conduct for European Lawyers, paragraph 2.1 |

3.2.2 Determination of procedural strategy and management of conflicts of interests

In principle, the claimant, as the holder of the right to be protected in court, remains free to choose his or her preferred procedural strategy, in agreement with the lawyer. Nonetheless, despite this circumstance in principle, some model TPLF contracts provide that the claimant must always instruct the lawyer to select the most economic strategy¹¹⁶ (which also protects the defendant against the risk of indiscriminate allegations). If that contractual clause is breached, the claimant must personally pay the extra cost. Moreover, since the funder's profit depends on the success of the dispute, the funder would be keen to instruct the claimant's lawyer to achieve this objective.

Notwithstanding the fact that both the claimant and the funder are aiming to win the case, a

¹¹³ See the resolution adopted by the Bar Association of Paris, 21.2.2017.

¹¹⁴ See, for example:

- <https://www.xn--prozessfinanz-anwlte-rzb.de/>
- <https://www.creditale.com/de/partner.html>
- <https://www.legal.de/anwaltssuche-legal-image>.

According to the decision of the German Court of Appeal of Cologne, 26.6.2020 - 6 U 37/20, such intermediation does not breach the claimant's right to choose a lawyer freely.

¹¹⁵ The [Code of Conduct for European Lawyers](#) is binding for lawyers established in the EU.

¹¹⁶ See, for example:

- paragraph 2 [Profina TPLF model contract](#), available in German;
- paragraph 3.2 [Omni Bridgeway TPLF model contract](#), available in German.

conflict of interests may arise between the two in terms of the procedural strategy to be followed.

Court settlement is one of the most sensitive issues in the relationship between the claimant, his or her lawyer and the funder, in respect of which there is a risk that the latter may attempt to restrict the claimant's freedom in determining the procedural strategy, this way 'corrupting justice'.

In fact, many TPLF model agreements require the funded party to obtain prior consent from the funder for any act of disposal of the claimed right, such as the power to enter into a settlement.¹¹⁷

A conflict of interests may arise when the funder has an economic interest in accepting the settlement offer to bring a swift end to the proceedings (so as to recover its own investment), while the claimant has an interest in rejecting the offer, as the sum proposed by the opponent is – in the claimant's opinion – not 'satisfactory'. In this respect, it should be noted that many TPLF agreements provide that the funder's remuneration and its reimbursement of the procedural costs must be the first to be paid, pursuant to so-called 'waterfall' provisions. The remainder is then paid to the funded party. Such a situation may induce the claimant to raise the stakes at the expense of the counterparty, or to continue the litigation, which might otherwise have been settled.

Let us illustrate this circumstance with an example: imagine that, during the proceedings, the counterparty offers to pay €100 to the claimant (settlement offer). Alternatively, if the proceedings are continued, the claimant could either win a sum of €200 or lose the case and receive €0. For the sake of simplicity, let us assume that the claimant has the same chance of winning or losing the case (50 % probability of winning and 50 % probability of losing). However, under the waterfall arrangement, €80 must be reimbursed to the funder. Therefore, if the offer is accepted, the claimant would receive €20 (€100 – €80), while the funder would receive €80. If the offer is refused, the expected payoff for the claimant is much higher: $0.5^{118} \times (\text{€}200 - \text{€}80)^{119} + 0.5 \times (\text{€}0)^{120} = \text{€}60$, instead of €20 if the settlement offer is accepted. The situation is completely different for the funder, whose expected payoff would be much lower if the proceedings were to be continued: $0.5 \times (\text{€}80) + 0.5 \times (\text{€}0) = \text{€}40$, instead of €80 if the settlement offer were to be accepted. Therefore, if the decision depends on the claimant exclusively, the settlement offer will not be accepted.

The existence of a conflict of interests between the claimant and the funder places the lawyer in a very sensitive position, as the latter is contractually obliged towards the claimant but his or her fees are paid by the funder. However, according to paragraph 2.7 of the Code of Conduct for European Lawyers, in the event of a conflict between the claimant and the funder with regard to the procedural strategy to be followed, the lawyer must focus on the best interests of his or her client, namely the claimant (see Table 8).

In this respect, it should also be noted that Article 10 of Directive 2020/1828/EU of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC, addresses the problem of conflicts of

¹¹⁷ See, for example:

- paragraph 5 [Profina TPLF model contract](#), available in German;
- paragraph 9.2 [Omni Bridgeway TPLF model contract](#), available in German;
- paragraph 8 [Legial TPLF model contract](#), available in German.

However, in that respect see *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), para 60. The English court held that "A funder of litigation is not forbidden from having rights of control but is forbidden from having a degree of control which would be likely to undermine or corrupt the process of justice. With respect to settlement, I observe that even if the Wife [the funded party] was required to obtain Burford Capital's consent before settling her enforcement action, that would appear to be a perfectly proper protection for Burford Capital as funder and would not tend to corrupt justice".

¹¹⁸ 0.5 represents the 50 % probability of winning (or losing) the case.

¹¹⁹ If the case is won.

¹²⁰ If the case is lost.

interests between the claimant and the funder in the field of consumer collective redress.

Table 8: PLF and conflicts of interests: risks identified

| Risks identified | Applicability of an existing EU rule |
|---|--|
| Possible conflict of interests between the claimant and the funder in respect of the procedural strategy to be followed | Code of Conduct for European Lawyers, paragraph 2.7 |
| The funder may seek to influence the procedural strategy, including decisions on settlements | – Consumer collective redress: Article 10 Directive 2020/1828/EU – Individual claims: N/A |

3.2.3 Duty to report on the stage of proceedings

One request often directed from the funder to the claimant's lawyer, according to what is agreed in the TPLF contract, is to receive regular information on the progress of the dispute, as well as to view the case file.

According to paragraph 3.1.2 of the Code of Conduct for European Lawyers, an obligation to provide information on the stage of proceedings only exists towards the claimant. Nevertheless, the lawyer-client agreement in force between the claimant and the lawyer, at the initiative of the funded party (instructed by the funder), usually includes a contractual obligation for the lawyer to report to the funder on a regular basis with regard to the stage of proceedings and allow the latter to view, upon request, the case file.¹²¹

The case file may contain the claimant's and/or the defendant's commercial information or personal data. With respect to personal data, it should be noted that:

- the claimant's lawyer is generally qualified as the controller of the funded party's personal data (if an individual) for the purposes of the General Data Protection Regulation (GDPR). Consequently, the lawyer cannot disclose to the funder the claimant's personal data without the consent of the latter. By contrast, it seems more difficult to qualify the claimant's lawyer as the controller of the defendant's data. It is unclear whether the provisions of the GDPR may be applied to protect the defendant's data. If the GDPR applies, the defendant's consent is needed to disclose the personal data to the funder;
- the funder may also be qualified as a 'controller' for the purpose of the GDPR with reference to the claimant's personal data (if an individual). Pursuant to the GDPR, the funder cannot disclose such personal data to a third person without the claimant's consent. Conversely, it is unclear whether the funder will be considered a 'controller' for the purpose of the GDPR with reference to the defendant's personal data (if an individual). If the GDPR does not rule in terms of the funder, when the funder improperly discloses the defendant's personal data (or commercial information) to third parties, the pertinent national tort law applies.

¹²¹ See, for example:
– paragraph 2 [Profina TPLF model contract](#), available in German;
– paragraph 3.7 [Omni Bridgeway TPLF model contract](#), available in German;
– paragraph 7.3 [Legial TPLF model contract](#), available in German;
– [American Bar Association Best Practices for Third Party Litigation Funding](#), 2020, p. 5 (Disclosure of client's confidential information to funder).

3.3 Procedural safeguards (individual claims)

3.3.1 Risk of vexatious litigation

As noted by Lord Jackson,¹²² in TPLF, the risk of vexatious litigation is extremely low with respect to the litigation financing of single cases, as funders tend to filter out unmeritorious individual claims and do not take on the high risk of such cases. However, portfolio financing could allow for some flawed suits to be presented in court, as funders spread the risk on a portfolio basis.

3.3.2 Is it necessary to disclose to the court that TPLF is being used by a litigant?

One very controversial issue with regard to TPLF concerns the existence of an obligation for the funded party to disclose the existence of the funding in court in order to make the court aware of potential conflicts of interests, at the same time enabling the defendant to gain a better understanding of the claimant's means.

At EU level, Article 8.26 of the EU-Canada trade deal, Article 3.8 of the EU-Singapore investment protection agreement and Article 3.37 of the EU-Vietnam investment protection agreement, in respect of third party funding being used in arbitration, envisage a duty to disclose to the other disputing party and to the arbitration tribunal the name and address of the third party funder. The information must be disclosed when submitting a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

At national level, in Member States in which TPLF is more widespread (which have been considered for the purposes of this Study), where no English or American style 'disclosure' takes place, there is no duty for the party who receives funding to disclose this fact in court and there is no basis for a court to order the disclosure of any potential third party funding agreement.¹²³

In such Member States, the decision on whether or not to disclose in court the fact that TPLF is being used lies with the claimant, as part of its procedural strategy, for instance, to seek to avoid the risk of incurring a security for cost order, where permitted by national law.¹²⁴ However, the litigation funding agreement may contain a contractual obligation for the claimant not to disclose

¹²² Lord Jackson, [Review of Civil Litigation Costs: Final Report](#): Final Report, 2009, Ministry of Justice, p. 117.

¹²³ Austria: See M. Wegmüller, J. Barnett, 'Austria', in L. Perrin (ed.) [Third party litigation funding law review](#), Law Business Research Ltd, 2019, p. 23;

France: K. Boneva-Desmich, '3 questions: Le Third-Party Funding', *La Semaine Juridique Entreprise et Affaires*, No. 35, 2016, p. 672; However, it is to be noted that, according to the Resolution of the Paris Bar Council of 21 February 2017, any French lawyer representing a funded party should encourage their clients to disclose to the tribunal the existence of TPF.

Germany: D. Sharma, 'Germany', in L. Perrin (ed.) [Third party litigation funding law review](#), Law Business Research Ltd, 2019, p. 73;

Italy: E. D'Alessandro (ed.), [Prospettive del third-party funding in Italia. Perspective on Third Party Funding in Italy](#), Ledizioni, 2019, p. 103;

Poland: Z. Kruczkowski, 'Poland', in L. Perrin (ed.) [Third party litigation funding law review](#), Law Business Research Ltd, 2019, p. 154;

Spain: A. Wesolowski, 'Spain', in L. Perrin (ed.) [Third party litigation funding law review](#), Law Business Research Ltd, 2019, p. 187;

The Netherlands: R. Philips, 'Netherlands', in L. Perrin (ed.) [Third party litigation funding law review](#), Law Business Research Ltd, 2019, p. 119.

¹²⁴ See *infra* 3.4.2.

the funder's involvement in the litigation without the funder's express written consent.¹²⁵

Although, in litigation, it is more difficult to imagine cases of a hypothetical conflict of interests with the funder than it is in arbitration, such a possibility cannot be excluded.

For example, a conflict of interests may arise:

- a. when the legal representative of the opposing party is a shareholder in the funder's company and thus has an economic interest in the case;¹²⁶ or
- b. when the funder provides financing for an action against a defendant who is a competitor of the funder or against a defendant by whom the funder is controlled ('revenge funder').¹²⁷

In respect of the example illustrated in point a) above, it should be noted that, pursuant to paragraph 3.6.1 of the Code of Conduct for European Lawyers, lawyers cannot share their fees with anyone who is not a lawyer. It implies that a lawyer cannot act as a funder. However, in the absence of any procedural duty to disclose the fact that TPLF is being used or the name of the funder, there is no way for the court to become aware of such a breach of the Code of Conduct for European Lawyers.

Bearing in mind the need to make the court aware of a potential conflict of interests, rule 245 (1) of the ELI-Unidroit 'Model European Rules of Civil Procedure'¹²⁸ encourages the introduction into domestic civil procedural rules of a general duty to disclose the fact that TPLF is being used and the name of the funder to the court and the other party upon the commencement of the proceedings (see Table 9 below). In the event of a breach of the duty to disclose, any dismissal of the claim – by way of sanction – shall not operate as an adjudication on the merits of that claim. The aim of such a provision (rule 245 (4) of the ELI-Unidroit 'Model European Rules of Civil Procedure') is to clarify that TPLF cannot affect the right of the funded party to have the case decided on its merits.

Scholars question whether the disclosure to the court should cover the mere existence of the TPLF agreement or all (or part) of its contents. In that respect, the ELI-Unidroit 'Model European Rules of Civil Procedure' opt for the disclosure of the mere existence of the TPLF agreement. The details of the litigation funding agreement should not be subject to disclosure: (i) to protect the details about the chances of success, and (ii) not to force the funded party to breach the confidentiality clause required by many funders.

However, rule 245 (4) of the ELI-Unidroit 'Model European Rules of Civil Procedure' proposes to provide the domestic courts with the discretionary power to ask 'for details of fee arrangements with a third party'. After having exercised this discretionary power, upon consulting with the parties, the court might consider the lack of fairness of such an arrangement when it makes its final decision on costs, in determining the part of the claimant's costs to be reimbursed.

Rule 245 (4) seems to attempt to protect the defendant losing the case. Thus, particularly in Member States where the lawyers' fees to be reimbursed are not calculated on a tariff system, the defendant who loses the case may be exposed to the risk of reimbursing major legal costs due to the TPLF agreement. For example, as a result of the existing TPLF agreement, the claimant may have put forward excess allegations, thus increasing both the claimant's and the defendant's

¹²⁵ See, for example, paragraph 11 [Omni Bridgeway TPLF model contract](#), available in German.

¹²⁶ Example quoted by the Swiss Federal Tribunal, 22.1.2015, 2C_814/2014.

¹²⁷ Example quoted by Article 16 of the Recommendation of the European Parliament for a proposal of directive of the European Parliament and the Council on common minimum standards of civil procedure in the EU, which constitutes an Annex of the European Parliament resolution of 4.7.2017 ([2015/2084\(INL\)](#)).

¹²⁸ [ELI – UNIDROIT Model European Rules of Civil Procedure](#), final draft, 26.5.2020.

lawyers' hourly fees and thus the defendant's and the claimant's legal costs to be reimbursed.

However, rule 245 (4) also seems unable to protect the claimant if the funder's success fee is unfair. Since the TPLF agreement appears to remain valid and effective regardless of the content of the judicial decision on the allocation of costs,¹²⁹ it is the claimant – and not the funder – that would suffer the consequences of the court cutting the claimant's costs to be reimbursed.

Table 9: TPLF and duty to disclose (individual claims)

| Problem identified | Applicability of an existing EU rule |
|--|--|
| Lack of a general duty to disclose the fact that TPLF is being used and the name of the funder | – N/A [Possible reference: rule 245 (1) ELI-Unidroit 'Model European Rules of Civil Procedure'] |

3.3.3 Recovery of costs against funders and security for costs

Within the EU, national courts have no jurisdiction to make a cost award against the funder, given that it is not a party to the dispute. According to the 'loser pays' principle, which constitutes one of the basic procedural guarantees within the Member States,¹³⁰ only the losing party of a dispute can be ordered to pay costs to the winning party.

When the funded claimant wins the case, the defendant shall pay costs. Such costs do not include the funder's remuneration fee. Otherwise, the TPLF agreement would become risk-free for the claimant: if the case is lost, the funder bears all the costs, while if the case is won, the defendant would pay costs and also the funder's remuneration fee.

When the funded claimant loses the case, the defendant can take no direct action against the funder in order to recover its procedural costs. Conversely, in England and Wales, such a possibility exists in order to protect the defendant who wins the case (see Figure 6 below).¹³¹ As highlighted by ICCA Report no 4: ICCA-Queen Mary Task Force Report on Third Party Funding 'The rationale behind these cases is clear and straightforward: a funder who benefits financially if the client wins should not be able to walk away without any responsibility for adverse costs if the client loses'.¹³²

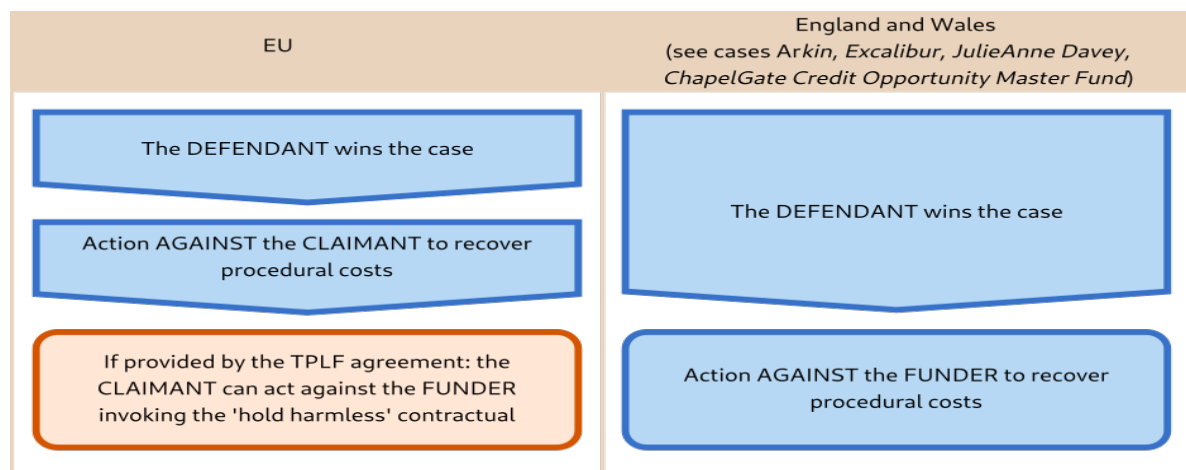
¹²⁹ In fact, in the economy of rule 245 [ELI – UNIDROIT Model European Rules of Civil Procedure](#), the funder does not become a party to the proceedings, thus having the opportunity to enjoy its day in court with regard to the validity of the TPLF agreement clauses.

¹³⁰ Max Planck Institute Luxembourg: an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law JUST/2014/RCON/PR/CIVI/0082, 2017, p. 119.

¹³¹ See *Arkin v Borchard Lines Ltd* (no 2 and 3) [2005] EWCA Civ 655, [2005] 1 WLR 3055, where the court capped the litigation funder's liability for adverse costs at the amount of funding that was provided; *Excalibur* [2016] EWCA Civ 1144; *Julie Anne Davey* [2019] EWHC 997 (Ch). However, in the recent decision *ChapelGate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246, the funder was ordered to pay the full amount of adverse costs. The Court of Appeal, on that occasion, clarified that the deciding court has discretion to determine whether to cap the litigation funder's liability for adverse costs (so-called 'Arkin cap').

¹³² [ICCA-Queen Mary Task Force Report on Third Party Funding](#), p.16.

Figure 6: Recovery of cost



In terms of a security for costs, the existence of a TPLF agreement, if disclosed to the court, may help the defendant to highlight the risk of not being reimbursed by the claimant as it required funding to bring the action. On that basis, if permitted by national procedural law (*Lex Fori*), a defendant might apply – at the beginning of the proceedings – for a security for costs against the claimant.¹³³ A security for costs could be an effective instrument to protect the defendant against the risk of not being reimbursed by the funded party. However, it should be noted that the Court of Justice of the European Union has limited the court's power to order a security for cost by stating that a Member State is not entitled to require '(...) security for costs to be furnished by a national of another Member State who has brought an action in one of its civil courts against one of its nationals where that requirement may not be imposed on its own national'.¹³⁴

3.4 Litigation funding and consumer collective redress

As class members injured by a mass tort or consumer associations¹³⁵ are often unwilling or incapable of investing the large amount of money needed to achieve a successful lawsuit, they may refrain from seeking compensation.¹³⁶ Such a dynamic hinders full access to justice and TPLF may represent a viable solution to this.

However, even in the field of collective redress, concerns have been raised with regard to TPLF. In

¹³³ A security for costs is an order requiring a party to provide a guarantee as security for the counterparty's costs in the proceedings. It must be stressed that the disclosure of the existence of a litigation funding agreement may help the defendant to highlight the risk of not being reimbursed by the claimant, but, in itself, it might not be considered by the court as a sufficient indication that the claimant is impecunious. Yet, according to the local applicable rules of civil procedure (*lex fori*), the mere existence of a TPLF agreement will be just one of several other factors taken into consideration when a court assesses a request for security.

¹³⁴ Judgment in [Case C-323/95](#) - *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GmbH*, European Court of Justice, March 1997.

¹³⁵ With reference to the high costs and procedural hurdles regarding collective redress in Europe, see the report published by the European Consumer Organisation (BEUC), [Stepping up the enforcement of consumer protection rules](#), 2020, (pp. 19-20). See, also, G.M. Solas, [Third Party Funding. Law, Economics and Policy](#), Cambridge University Press, 2019.

¹³⁶ In this respect, see the ongoing case *The Privacy Collective v Oracle Nederland B.V and Oracle Corporation*. The foundation (The Privacy Collective) has launched a collective redress action in the Netherlands in a case of infringement of the General Data Protection Regulation (GDPR). Interestingly, the collective redress action issued by The Privacy Collective is funded by a company established in Jersey.

See <https://www.dutchnews.nl/news/2020/08/consumer-privacy-group-files-privacy-breach-court-case-against-oracle-and-salesforce/>

particular, it has been noted that (i) a financial incentive to mass claims might stimulate abusive litigation;¹³⁷ moreover, (ii) the third party intervention may lead to conflicts of interests between the funder and the defendant, or may give the funder a predominant position in case management terms.¹³⁸

A further issue is represented by the fact that class members may be bound to a litigation funding agreement signed by the class representative or by the consumer association acting as claimant.

In this respect, it should be underlined that the EU documents addressing TPLF attempt to tackle issues (i) and (ii).

Specifically, point 14 of the 2013 Recommendation on consumer collective redress¹³⁹ firstly envisages a transparency rule, requiring the claimant to declare the origin of the funding used in the context of collective redress.

Moreover, point 15 provides that the court shall be allowed to stay the proceedings: a) in the case of a conflict of interests between the funder and the claimant; b) where the funder does not have the financial capacity to meet its financial commitments to the claimant; and c) where the claimant cannot bear the counterparty's costs in the event of a defeat.

In addition, point 16 of the 2013 Recommendation prescribes that Member States shall ensure that a) it will be forbidden for the funder to influence the claimant's case management decisions, also with regard to settlements; b) the funder must not invest in a lawsuit in which it has a conflict of interests; and c) the funder must not charge excessive interest on the invested funds.¹⁴⁰

Given the non-binding value of the Recommendations, such rules can only be implemented voluntarily at Member State level. In such a context, Article 59 of the Slovenian legislation on collective redress ('Law of Collective Actions') introduced and specifically regulated TPLF. The rule is very similar to points 15 and 16 of the 2013 communication.¹⁴¹ It is also worth pointing out that, in compliance with point 16.c of the 2013 Recommendation, Article 59, paragraph 3 of the Slovenian Law of Collective Actions places a cap on the funder's maximum return at the Slovenian statutory interest rate.

In order to achieve a more effective impact in creating an EU-wide collective redress mechanism, Directive 2020/1828/EU, repealing Directive 2009/22/EC has finally been enacted. The new Directive applies to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I of Directive 2020/1828/EU.

The issue of TPLF is addressed by Article 10 of Directive 2020/1828/EU. In particular, Article 10, paragraph 2 of the Directive provides that Member States shall ensure that: a) the decisions of

¹³⁷ However, in that respect, see I. Tillema (2017), 'Entrepreneurial motives in Dutch collective redress', in W.H. van Boom (ed.), *Litigation, Costs, Funding and Behaviour: Implications for the Law*, Routledge, p. 222-243. Tillema's research has shown that there is no evidence of a rise in frivolous lodging of collective damages claims.

¹³⁸ [ELI – UNIDROIT Model European Rules of Civil Procedure](#), final draft, 26.5.2020, rules 210 and 245, p. 375 and 428 ff. See also Recital 19 of the 2013 Recommendation.

¹³⁹ Commission [Recommendation of 11.6.2013](#) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹⁴⁰ See, also, point 32 of the 2013 Recommendation, providing that 'it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties'.

¹⁴¹ Report drafted by the US Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress* (p. 71). It is also worth highlighting that Article 1 of the recent Dutch Collective Damages Act (*WAMCA*), entered into force on 1.1.2020, provides safeguards in order to prevent a third party funder from having a leading influence on the claim. See the report on the Dutch *WAMCA* drafted by Linklaters LLP at <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/the-netherlands> (consulted on 16.11.2020).

qualified entities are not unduly influenced by the funder in a manner that would be detrimental to consumers' interest; and b) the action is not brought against a competitor of the funder or against a defendant on which the funder is dependent. Moreover, Article 10, paragraph 1 of Directive 2020/1828 provides that third party funding cannot divert the aim of the lawsuit from consumer protection.

Having regard to the disclosure of the relevant TPLF agreement, Article 10, paragraph 3 of Directive 2020/1828/EU requires the representatives to disclose to the court or administrative authority a financial overview listing the sources of funds used to support the action. Such a provision, however, does not clarify:

- a) when the disclosure must take place (hopefully in the early stages of the action);
- b) if the disclosure concerns only the existence of a TPLF agreement and the name of the funder;¹⁴² and
- c) if the details of the funding must only be disclosed to the court (as appears to be the case from reading recital 52: 'qualified entities should be fully transparent vis-à-vis courts or administrative authorities') or also to the counterparty. In the absence of a clear provision on this latter aspect, one model might be represented by rule 237 of the ELI-Unidroit 'Model European Rules of Civil Procedure', which provides that the Court may require disclosure to the court and 'insofar as appropriate, to the [counter] parties'.

If, after the disclosure, a conflict of interest emerges, the court or administrative authority should be empowered to take appropriate measures, such as requiring the qualified entity to refuse or change the relevant funding and, if necessary, rejecting the legal standing of the qualified entity or declaring a specific representative action for redress measures inadmissible. Such a rejection or declaration should not affect the rights of the consumers concerned by the representative action.¹⁴³

Moreover, it is worth outlining that Directive 2020/1828/EU does not provide for a cap on the funder's return rate, unlike the abovementioned point 16.c of the 2013 Recommendation. Such a decision appears to be aimed at fostering competition between funders. Nevertheless, requiring a review of the reasonableness of the funder's return might have avoided the risk of the overcompensation of funders.¹⁴⁴

¹⁴² If the entire funding agreement is disclosed, some concerns may arise with regard to any confidential information it contains, such as the procedural strategy, the litigation risk assessment, the possible limitation of the available funds. See comments to rule 237 of the [ELI – UNIDROIT Model European Rules of Civil Procedure](#). However, pursuant to recital 52 of Directive 2020/1828/EU, the information provided by the qualified entity to the court or administrative authority should enable the court or administrative authority to assess whether the third party could unduly influence the procedural decisions of the qualified entity in the context of the representative action, including decisions on settlement, in a manner that would be detrimental to the collective interests of the consumers concerned, and to assess whether the third party is providing funding for a representative action for redress measures against a defendant who is a competitor of that third party funding provider or against a defendant on whom the third party funding provider is dependent.

¹⁴³ Recital 52 of Directive 2020/1828/EU.

¹⁴⁴ The US Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress*, (pp. 82-83 and 27), citing the Canadian case *Houle v St. Jude Medical* (2017 ONSC 5129, available at <http://canlii.ca/t/h5nnm>, consulted on 16.11.2020), where the Ontario Superior Court of Justice stated that 'to approve a third party funding agreement, the court must be satisfied that: (a) the agreement must be necessary in order to provide access to justice; (b) the access to justice facilitated by the third party funding agreement must be substantively meaningful; (c) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (d) the third party funder must not be overcompensated [...]'. The latter point might be controversial, as a funded case with a high return rate might be preferable to a claim not filed due to lack of funding. However, it is crucial to avoid the risk that consumers may not obtain fair compensation to which they are entitled, as funders charge a proportion of the compensation for their services. On this point, see Max Planck Institute Luxembourg 'An evaluation study of national procedural laws

3.4.1 Opt-in and opt-out mechanisms

A key feature of an effective collective action regime is represented by the adhesion mechanism, i.e. how group members can adhere to the lawsuit. In brief, group members can join the action through an opt-in mechanism, by which they express their explicit will to be included in the class, or through an opt-out scheme, in which the judicial decision binds all class members, who may then decide to be excluded from the relevant group. In the past, EU institutions have expressed their preference for an opt-in system, which was considered a safeguard against the risk of abusive litigation.¹⁴⁵ However, a significant shift was made by Directive 2020/1828/EU, which accepts both the opt-in and the opt-out scheme, leaving the choice to the Member States.¹⁴⁶

The opt-out system, of course, has the innate feature of rendering a collective claim more powerful. However, due to the undefined number of class members, with reference to TPLF, its management may be more difficult, particularly in terms of recovering the funder's remuneration.¹⁴⁷

Indeed, through an opt-in mechanism, the class perimeter is defined and class members explicitly join the action. In such a scenario, a specific clause providing for the funder's remuneration must be signed when opting-in. It is sufficient to clearly inform the class members, when joining the claim, that they are also accepting the TPLF agreement.

On the contrary, by means of an opt-out mechanism, the class perimeter is not defined and group members who did not sign the funding agreement may benefit from the funded action as 'free-riders', receiving their compensation without paying the funder's remuneration.¹⁴⁸

No specific EU rules address this issue, which is also not regulated by Directive 2020/1828/EU (see Table 10). Consequently, a brief comparative analysis may be useful. Interesting insight can be gained from the Australian experience, where, together with an approach that facilitated a 'closed class' system, in which, notwithstanding the opt-out regime, in funded proceedings, the class is limited to members who have actually signed the relevant funding agreement, a 'common fund' approach has emerged.¹⁴⁹ This mechanism allows the funder to claim its recovery percentage from

and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' [JUST/2014/RCON/PR/CIVI/0082](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0082), 2017, p. 154.

¹⁴⁵ See, for instance, points 21-24 of the 2013 Recommendation. It is also worth underlining that point 21 of the Recommendation provides that any exception to the opt-in principle, "by law or by court order, should be duly justified by reasons of sound administration of justice". The preference for the opt-in system was also related to the principle of private autonomy in filing a lawsuit. On this point see, inter alia, C.I. Nagy, *Collective Actions in Europe*, Springer, 2019, pp. 24-30; A.P. Mikroulea, "'Collective Redress" in European Competition Law', *Zeitschrift für Wettbewerbsrecht*, Vol. 14(4), 2016, pp. 392, 406-408.

¹⁴⁶ Recitals 43 and 44 of Directive 2020/1828/EU.

¹⁴⁷ R. Gamble, 'Jostling for a larger piece of the (class) action: Litigation funders and entrepreneurial lawyers stake their claims', *Common Law World Review*, Vol 46(1), 2017, p. 6. For an example, see the Fortis Shareholders' claim: <https://www.corporatedefensedisputes.com/2018/07/dutch-court-approves-collective-settlement-of-fortis-shareholders-claims/>.

¹⁴⁸ BT. Fitzpatrick, 'Can and Should the New Third Party Litigation Financing Come to Class Actions?', *Theoretical Inquiries in Law*, Vol. 19(109), 2018, pp. 117-118.

¹⁴⁹ R. Gamble, *Jostling for a larger piece of the (class) action: Litigation funders and entrepreneurial lawyers stake their claims*, *Common Law World Review*, Vol 46(1), 2017, p. 6-8. See, also the Report released by the Australian Parliamentary Joint Committee on Corporations and Financial Services. *Litigation funding and the regulation of the class action industry*, 21.12.2020, pp. 95-125 and the Final Report released by the Australian Law Reform Commission, *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third Party Litigation Funders*, 2018, p. 99, point 4.35. It is worth highlighting that the "common fund" approach is not provided by any statutory provision. This is the reason why point 4.35 of the Report suggested adopting a legislative initiative on this topic. The same approach is suggested in the abovementioned report *Litigation funding and the regulation of the class action industry*, 21.12.2020, p. 125. The 'common fund' approach was firstly mentioned in scholarly works (see, for instance, J. Kalajdzic, P. Cashman, A. Longmoore, 'Justice for Profit: A Comparative Analysis of Australian,

all class members, irrespective of whether or not they signed the funding agreement.¹⁵⁰

Such an approach also seems to be suggested by the ELI-Unidroit 'Model European Rules of Civil Procedure': in particular, rule 238 (3) provides that the qualified claimant's costs and expenses incurred in bringing the proceedings must be paid from the common fund prior to any distribution of compensation to the group members. Given the fact that comments on this rule mention the TPLF agreement and, due to the systematic collocation after rule 237 (about TPLF), it seems reasonable that the funder's reward might be included in the expression 'costs sustained by the qualified claimant'. Such a mechanism seems appropriate and workable for collective redress mechanisms entailing a common fund, which must then be distributed among the class members. In any case, a 'closed class' system might also be applicable (both systems may be chosen by the Member States depending on their collective redress scheme).

Table 10: TPLF and consumer collective redress. Opt-in and opt-out. Problems identified

| Problems identified | Applicability of an existing EU rule |
|---|--|
| Risk of conflict of interest | Article 10 Directive 2020/1828/EU Non-binding: points 15(a), 16(a) and (b), 2013 Recommendation |
| Class members' adhesion to the TPLF agreement/funder's return fee payment if members have not signed the TPLF agreement | N/A [Possible reference: rule 238(3) ELI – Unidroit 'Model European Rules of Civil Procedure'] |

Canadian and U.S. Third Party Litigation Funding', American Journal of Comparative Law, Vol. 61(2), 2013, pp. 93-148 at pp. 107-109). Thereafter, starting with the Full Federal Court decision *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*, (2016) 245 FCR 191, such orders were granted in numerous class actions. Then, on 4.12.2019, the High Court of Australia, in *BMW Australia Ltd v Brewster & Anor* and *Wastpac Banking Corporation & Anor v Lenthall & Ors* [2019] HCA 45, stated that courts do not have the power to grant 'common fund orders' at an early stage of the proceedings. However, according to the Full Federal Court in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183, and the NSW Court of Appeal in *Brewster v BMW Australia Ltd* [2020] NSWCA 272, it seems that the court retains the power to issue 'common fund orders' at a later stage (e.g. settlement approval or judgment). For more details, see: Australian Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, 21.12.2020, pp. 95-101; <https://www.herbertsmithfreehills.com/latest-thinking/the-end-of-common-fund-orders-as-we-know-them>; <https://www.lexology.com/library/detail.aspx?q=20552911-ce83-4a67-a1c1-0c5c1102a424>; <https://corrs.com.au/insights/common-fund-orders-full-federal-court-considers-brewster> (consulted on 16.11.2020).

¹⁵⁰ *Ibid*, pp. 7-8.

4 Recommendations for responsible TPLF and the need for EU action

4.1 A regulatory 'safety net' for TPLF in the EU

This study has preliminarily analysed the growth of the funders industry within the EU, as well as the contractual, procedural and ethical aspects of TPLF. Preliminarily, the study attempted to provide a working definition of a 'third party funder' and 'third party funding'.¹⁵¹ Defining these two terms is crucial to any successful regulatory effort to achieve cohesion and uniformity at EU level.

In light of the analysis, it has emerged that TPLF involves finding a balanced approach between the need to enhance access to justice¹⁵² and the need to prevent large risks, costs for businesses and significant potential for conflicts of interests.¹⁵³ Accordingly, the study concludes by putting forward some recommendations for responsible TPLF in the EU and pinpoints the need for EU action in this respect. Indeed, in the absence of any EU regulatory framework, funders may seek the most favourable national regimes for their establishment, the law applicable to the funding agreement and the local procedural rules.

4.2 Regulating litigation funders at EU level

The study has shown that many funders are corporations subject to different EU corporate laws for the locations in which they have their registered offices,¹⁵⁴ envisaging corporate standards, capital requirements and fiduciary duties of corporate officers and directors. Additionally, other funders, such as investment funds across Europe (more specifically, only a few are listed), may be subject to EU rules that apply to capital markets.

In that respect, one policy option may consist of ruling on insurance cover and/or capital adequacy for funders established in the EU. However, it should be noted that many funders active in the EU have their registered offices in third countries. Consequently, they are subject to the company laws of the countries of their establishment.

Indeed, one of the risks of TPLF is that funders will have insufficient cash on hand to fund in full their portfolio of investments in disputes and will either withdraw from cases or run out of money during cases, leaving the funded party without financing. Requiring funders to obtain insurance policies or applying capital requirements which cover the amount of their promised contributions to litigation costs would help to limit these risks.¹⁵⁵

According to our analysis, fixed capital requirements for funders have already been established by

¹⁵¹ *Supra*, paragraph 1.2.

¹⁵² Cf. Max Planck Institute Luxembourg 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' (JUST/2014/RCON/PR/CIVI/0082), 2017, p. 153.

¹⁵³ *Supra*, paragraphs 3.2.2, 3.3.2, 3.4.

¹⁵⁴ *Supra*, paragraph 2.3.

¹⁵⁵ Certain public-owned or controlled companies (more specifically, banks and insurance companies) are subject to capital requirements in the EU because of their corporate purpose, which may be relevant to the public interest. For funders, minimum capital requirements may also be justified due to the impact of their activities and their corporate purpose on access to justice and the functioning of civil justice. This requirement may contribute to avoiding undercapitalisation problems with respect to funders.

way of statute in Singapore.¹⁵⁶ In the UK, fixed capital requirements have been established by way of self-regulation by the Association of Litigation Funders of England and Wales ('ALF'). See Table 11 below.

Table 11: Regulating TPLF: an overview

| State | Year of first regulation | Type of regulation | Content |
|-----------|--------------------------|---|--|
| Australia | 2020 | Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). | Litigation funders must hold a licence and register, as well as operate litigation financing schemes as a managed investment scheme in accordance with several legal requirements. |
| Hong Kong | 2017 | Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017 | Litigation funding in court proceedings remains forbidden (whereas it is allowed in arbitration), except in three circumstances: (i) if the funder has a legitimate common interest in the litigation; (ii) if there are access-to-justice considerations at stake; and (iii) in insolvency proceedings. Also, a mandatory code of conduct was issued by the Secretary of Justice, envisaging rules on (i) control, (ii) conflicts of interests and (iii) disclosure. The code applies to all arbitration based in Hong Kong and to all arrangements whereby funding is granted in Hong Kong. |
| Singapore | 2017 | Civil Law (Third Party Funding) Regulations 2017 | Regulation 4 of the Civil Law (Third Party Funding) of Singapore lays out the requirements to be a 'qualifying Third Party Funder' under the law. The funding of the costs of dispute resolution proceedings shall be the funder's principal business; it shall have paid-up share capital of not less than SGD 5 million; and these funds must be invested pursuant to a TPF contract to enable the funded party to meet the costs, including pre-action costs, of the proceedings. Funders which fail or cease to comply with these requirements cannot enforce their rights arising under TPF contracts, while the rights of other parties – such as the funded party – are preserved under the TPF contract. |

¹⁵⁶ Regulation 4 of the Civil Law (Third Party Funding) of Singapore lays out the requirements for being a 'qualifying Third Party Funder' under the law. The funding of costs of dispute resolution proceedings shall be the funder's principal business; it shall have paid-up share capital of not less than SGD 5 million and these funds must be invested pursuant to a TPF contract to enable the funded party to meet the costs, including pre-action costs, of the proceedings. Funders, which fail or cease to comply with these requirements, cannot enforce their rights arising under TPF contracts, while the rights of other parties - such as the funded party - are preserved under the TPF contract.

| State | Year of first regulation | Type of regulation | Content |
|----------------|--------------------------|---------------------|--|
| United Kingdom | 2011 | ALF code of conduct | Litigation funders can join the Association of Litigation Funders (ALF). For an entity to be admitted into the ALF, it must abide by a code of conduct providing for specific capital adequacy requirements (£5 million). Furthermore, under the code, funders have a duty to behave reasonably and are prevented from controlling the litigation or the settlement bargaining or from causing the funded party's lawyers to act in breach of their professional duties. |

4.2.1 Adopting a European code of conduct for responsible litigation funders

The study also argues that the adoption of a European code of conduct for litigation funders may represent an option to be considered.¹⁵⁷ A code of conduct, like the one in place in the United Kingdom¹⁵⁸, could be implemented by the own initiative of responsible litigation funders operating in the EU market¹⁵⁹ with the support of the EU institutions.

The study recommends inserting into the code of conduct the following safeguards:

- Firstly, capital adequacy and corporate standards shall be established for funders;
- Secondly, the funder shall ensure that TPLF agreements are drawn up in writing, and their terms – including the remuneration details – are clear and unequivocal;
- Thirdly, the funder shall not take any steps that would cause, or be likely to cause, the litigant's lawyer to act in breach of his or her professional duties;
- Fourthly, the grounds for termination of the TPLF agreement by the funder must not result in a lack of protection for the funded party.¹⁶⁰

However, there is a risk that this policy, which is dependent upon the own initiative of responsible litigation funders, may only have a limited impact, unless funders choosing not to participate in the adoption of such a code become marginalised in the EU litigation funding market. Additionally, the proliferation of self-regulation initiatives by different groups of funders and private players may

¹⁵⁷ R. Mulheron, 'England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments', *Cambridge Law Journal*, Vol. 73(3), 2014, pp. 570-597.

¹⁵⁸ In the United Kingdom, the Association of Litigation Funders of England and Wales (ALF), <http://associationoflitigationfunders.com/code-of-conduct>, has been established which has issued a code of conduct for their affiliates.

¹⁵⁹ According to our qualitative analysis, it has emerged that there are two ongoing initiatives. Firstly, a group of a few litigation funders operating in the EU market, which are members of the International Litigation Finance Association (ILFA, see <https://www.ilfa.com/>), are promoting the establishment of a continental European association of funders. ILFA promotes best practices among its members. Secondly, some private players are promoting the establishment of a 'European Association of Litigation Funders'. Such an association has, among its goals, the adoption of a code of conduct. Further details are available on the Association website (partially under construction): <https://europeanlitigationfunders.com/about-us>.

¹⁶⁰ *Supra*, paragraph 3.1.9.

undermine the overall impact of such an initiative.¹⁶¹

For example, the 'ALF' is a voluntary membership group for England and Wales-based funders that has adopted a code of conduct for (associated) litigation funders. According to its website and official documents, the ALF currently has about seven member funders.¹⁶² Clearly, 'ALF' has no direct means of enforcing its code of conduct and there are funders operating in the UK that are not part of this association.

Thus, the adoption of a European code of conduct for responsible litigation funders, at best, may only offer a partial solution to the risks highlighted in paragraphs 2 and 3 of this study.

4.3 Litigation funding agreement

The study has revealed that the funder and the claimant enjoy freedom to contract according to the selected applicable law. Their freedom is generally limited by public policy and by mandatory provisions of the applicable law. For example, EU consumer law includes a set of mandatory provisions to protect consumer rights and the Slovenian law on collective actions places a cap on funders' return rates.¹⁶³

Interestingly, in this respect, it should be noted that the European Parliament¹⁶⁴ has stressed that the private autonomy of the parties in determining the remuneration may prejudice the effectiveness of the result obtained by the claimant through successful access to justice. Ultimately, the claimant has to pay a substantial part of what is recovered to the funder. In light of the above, the need emerges to balance private autonomy with the public interest of protecting the effectiveness of access to justice, for example by encouraging funders to make their return rates public or by putting a cap on funders' return rates.

4.4 TPLF and lawyers' ethics

With respect to the legal profession, the study has revealed that the Code of Conduct for European Lawyers should be applied to avoid risks related to TPLF.¹⁶⁵ However, there is also an opportunity to insert a provision on TPLF, as illustrated below in paragraph 4.5.1.

4.5 Procedural safeguards (individual claims)

The study has revealed that not only claimants but also defendants shall be protected against potential risks related to TPLF. In respect of the defendant, one of the main gaps, which was pointed out in paragraph 3.3.3, consists of the fact that national courts have no jurisdiction to make a cost award against the funder, given that it is not a party to the dispute. Thus, when the funded claimant loses the case, the defendant can take no direct action against the funder in order to recover its procedural costs, if the claimant fails to pay such costs.

The study highlights the importance of ensuring that the funder is not able to walk away without

¹⁶¹ See footnote 159.

¹⁶² The list of the ALF's members is available at <http://third-party-funding.org/list-of-funders>.

¹⁶³ See paragraph 3.1.3.

¹⁶⁴ 2017 Recommendations to the Commission for a directive of the European Parliament and of the Council on common minimum standards of civil procedure in the EU (2015/2084(INL)).

¹⁶⁵ More precisely, articles 3.2, 3.6, 3.7, 4.2 of the [Code of Conduct for European Lawyers](#) may apply to the relationship between the lawyer and the claimant in cases of TPLF.

any responsibility for adverse costs if the funded party loses.

4.5.1 On the duty to disclose the fact that TPLF is being used

There is some concern, at least in Member States where the use of TPLF is more widespread, regarding the absence of any duty to disclose to the court and to the other party the fact that TPLF is being used, together with the name of the funder, so as to make the court and the defendant aware of any potential conflicts of interests. As shown by the ELI-Unidroit 'Model European Rules of Civil Procedure', a uniform initiative is required at EU level (as TPLF has a European, and not a purely national, dimension) with regard to the duty to disclose TPLF also in respect of individual claims. Such disclosure may bring potential conflicts of interests to the attention of the court, which may decide to act depending on the applicable procedural rules, at the same time enabling the defendant to gain a better understanding of the claimant's means.

- a. Domestic and cross-border disputes: a possible approach, which may cover domestic and cross-border disputes, may consist of considering the disclosure of the existence of a TPLF agreement and the name of the funder to be part of a lawyer's professional duty¹⁶⁶, the breach of which results in a violation of those duties. In such a case, the European Parliament may promote an amendment of the Code of Conduct for European Lawyers;
- b. Cross-border disputes only (Article 81(2) of the Treaty on the Functioning of the European Union): a possible option, with respect to cross-border disputes only,¹⁶⁷ could be that of adopting an EU instrument aimed, inter alia, at introducing, in respect of individual claims, a general duty to disclose the fact that TPLF is being used and the name of the funder to the court and the other party; (i) at the commencement of proceedings, or (ii) if the financing agreement is concluded at a later stage, without delay as soon as the agreement is concluded. Such an obligation shall be conceived as an expression of the parties' general duty to cooperate between them and with the court in the interest of the proper administration of justice.¹⁶⁸

An EU instrument on TPLF may also ensure that the Member States¹⁶⁹ establish a sanction for the case of any breach of the duty to disclose (in the event that the court becomes aware of the existence of a TPLF agreement in some other way). However, as explained in section 3.3.2, the sanction against the non-compliant party may not result in any dismissal of the claim being seen as an adjudication on the merits.

Finally, it should be highlighted that, in implementing such an EU instrument, the Member States would have the opportunity to also extend the safeguards provided for cross-border disputes to domestic cases.

¹⁶⁶ As in Singapore. See Article 49 A and 49 B local [Legal Profession \(Professional Conduct\) Rules of 2015](#).

¹⁶⁷ Note that the 2017 Recommendation to the Commission for a directive of the European Parliament and of the Council on common minimum standards of civil procedure in the EU (2015/2084(INL), after having shown the EU the added value of such an initiative, made an attempt to offer a broad definition of the wording 'disputes having cross-border implications' pursuant to Article 81 (2) Treaty on the Functioning of the European Union, which included cross-border and domestic disputes whose matters fall within the scope of EU law (Article 3).

¹⁶⁸ See [ELI – UNIDROIT Model European Rules of Civil Procedure](#), final draft, 26.5.2020, rule 2 (p. 34-35).

¹⁶⁹ In that respect, a uniform EU approach seems hard to find, as the Member States are currently adopting a different approach to sanctions, which is a consequence of differing ideas concerning the purpose of civil procedure across European jurisdictions (see [ELI – UNIDROIT Model European Rules of Civil Procedure](#), final draft, 26.5.2020, rule 27, p. 76).

4.5.2 On the risk of influencing decisions on procedural strategies, including settlements

The study has revealed¹⁷⁰ that an attempt made by the funder to influence decisions on procedural strategies, including settlements, might result in a conflict of interests between the claimant and the funder. In consumer collective redress, such a risk has been addressed by virtue of Directive 2020/1828/EU.¹⁷¹

A similar EU action with respect to individual claims has been suggested by Article 16, paragraph 1 (a) of the 2017 proposal for a directive of the European Parliament and of the Council on common minimum standards of civil procedure in the EU (2015/2084(INL)).¹⁷²

In light of such a proposal, a possible way of managing such a risk may be that of adopting an EU instrument on third party funding for 'disputes having cross-border implications'¹⁷³ aimed at introducing, inter alia, a duty for the Member States to ensure that, in cases where a legal action is funded by a private third party, the funder shall not seek to influence the procedural decisions of the claimant, including on settlements, generating a conflict of interests between the funder and the claimant.

4.6 Consumer collective redress

At this stage, the provisions contained in the Directive 2020/1828/EU address the main issues in regulating TPLF in the context of consumer collective or representative claims.¹⁷⁴ However, two sensitive issues remain unsolved by the Directive. Firstly, it does not provide for a cap on funders' return rates. Secondly, it does not clarify how TPLF works with respect to an opt-out mechanism.¹⁷⁵ It should be noted that, in implementing Directive 2020/1828/EU, the Member States will have the opportunity to extend the safeguards provided for consumer collective redress also to individual cases (see Table 13 below).

4.7 Risk/benefit analysis of TPLF

In light of our analysis, the risks and benefits of TPLF can be identified as follows (see Table 12 below):

¹⁷⁰ *Supra*, paragraph 3.2.2.

¹⁷¹ *Supra*, paragraph 4.6.

¹⁷² 'Member States shall ensure that in cases where a legal action is funded by a private third party, the private third party shall not: (a) seek to influence procedural decisions of the claimant party, including on settlements'.

¹⁷³ See paragraph 4.5.1.

¹⁷⁴ See *supra*, paragraph 3.4.

¹⁷⁵ See paragraph 3.4.1.

Table 12: Risk/benefit analysis of TPLF

| Benefits | Risks | Policy options (in case of lack of existing EU rules) |
|--|---|--|
| Increasing access to justice – By assuming the cost, TPLF facilitates access to justice for parties with legitimate claims who may not wish to, or be able to, fund them. Due diligence ensures that only cases that have substantial merit and good prospects of success are selected for litigation funding. | Flood of litigation in portfolio litigation – risks for the functioning of judicial systems. | Find a balanced approach to facilitate access to justice through TPLF, at the same time limiting the risks posed by TPLF. A 'regulatory safety net' is needed in this respect. |
| Increasing access to justice (see above) | TPLF capital inadequacy – Funders with insufficient cash on hand to fund in full their portfolio of investments in disputes may leave the funded party without financing. | Ruling on insurance cover and/or capital adequacy for funders established in the EU. |
| Increasing access to justice (see above) | TPLF remuneration fees – TPLF is expensive and is not suitable for all cases. Apart from pre-funding costs, in return for funding a claim, a funder typically takes a 20 % to 50 % share of the amount awarded in the case or a multiple of the funding provided. However, the funder may charge excessive fees to the claimant and thus deprive him or her of a substantial part of the outcome of litigation. In this way, the effectiveness of the result obtained by the claimant through successful access to justice may be prejudiced. | Balance private autonomy with the public interest of protecting the effectiveness of access to justice, for instance by encouraging funders to make public the return rates or, eventually, by putting a cap on funders' return rates. |
| Increasing access to justice (see above) | Conflict of interests – TPLF agreements may lead to undisclosed conflicts if there is a pre-existing relationship between the funder and the claimant's or the defendant's lawyers or between the claimant and the claimant's lawyer. | Provide a duty to disclose to the court and to the other party the fact that TPLF is being used, together with the name of the funder. Ensure that the funder shall not seek to influence the procedural decisions of the claimant. |

| Benefits | Risks | Policy options (in case of lack of existing EU rules) |
|---|---|---|
| Increasing access to justice (see above) | Confidentiality – In order to obtain TPLF, commercial and potentially sensitive information concerning the claimant and the potential defendant may be provided to the potential funder. | Provide a duty to disclose to the court and to the other party the fact that TPLF is being used. |
| Increasing access to justice (see above) | Defendant's recovery of procedural costs – The defendant winning the case has no direct action against the funder to recover procedural costs. A funder, who benefits financially if the claimant wins, is able to walk away without any responsibility for adverse costs if the claimant loses. | Provide the defendant winning the case with a direct action against the funder for the recovery of procedural costs if the funded party fails to pay. |
| Managing risks for claimants (especially well-resourced companies) – The results of ongoing proceedings are generally difficult to predict, particularly where there is no 'binding precedent'. TPLF provides a solution to this problem by strengthening a company's risk management. | | |

In light of our analysis, the risks and benefits of TPLF in consumer collective redress can be identified as follows (see Table 13 below):

Table 13: Risk/benefit analysis of TPLF and consumer collective redress

| Benefits | Risks | Policy options (in case of lack of existing EU rules) |
|---|---|---|
| Increasing access to justice for consumers in collective redress cases – TPLF may contribute to increasing access to justice for consumers in collective redress cases. | Flood of litigation – Risks for the functioning of judicial systems. | |
| Increasing access to justice for consumers in collective redress cases (see above) | Conflict of interests – TPLF agreements may lead to undisclosed conflicts if there is a pre-existing relationship between the funder and the claimant's or the defendant's lawyers. Additionally, in collective redress the lawyer – whose fees are paid by the funder – may be placed in a conflict of interests with the group members with regard to the litigation strategy (settlement). | |
| Increasing access to justice for consumers in collective redress cases (see above) | Remuneration fees – Charging excessive fees to the group members and thus depriving them of a substantial part of the outcome of the litigation. This way, the effectiveness of access to justice is undermined. | Balance private autonomy with the public interest of protecting the effectiveness of access to justice, for instance by putting a cap on funders' return rates. |
| Increasing access to justice for consumers in collective redress cases (see above) | Legal uncertainty – In the Member States which have adopted an opt-out mechanism, it may be very difficult to determine how TPLF works in consumer collective redress. | Clarify how TPLF works with respect to an opt-out mechanism, for example, by adopting a 'common fund' approach. |

5 Conclusions

This study has explored the growing market for TPLF within the EU.

Combining legal-normative, comparative law and qualitative research, the study has (i) analysed the development of TPLF in the EU; (ii) discussed TPLF against the background of securing access to justice; and (iii) devised a regulatory safety net for a balanced funding system.

The analysis has revealed the main contractual, ethical and procedural legal issues raised by litigation funding.

The outcome of the research is that effective safeguards are needed to develop responsible TPLF in the EU. More specifically, the study envisages the following regulatory options:

- the Code of Conduct for European Lawyers may be amended, inserting a provision dedicated to TPLF¹⁷⁶;
- with specific reference to cross-border disputes, the option of adopting an EU instrument on certain minimum standards of TPLF may be considered. An EU instrument may avoid a risk of forum shopping by funders which could be influenced by the favourability of national regimes concerning their establishment, the law applicable to the funding agreement and the local procedural rules. In such a case, the study recommends inserting into the EU instrument the following safeguards:
 - a. definition of 'third party funder' and 'third party funding';
 - b. insurance cover and/or capital adequacy for funders established in the EU;
 - c. encouraging funders to make their return rates public and/or eventually, putting a cap on funders' return rates to balance private autonomy with the public interest of protecting the effectiveness of access to justice;
 - d. a duty to disclose to the court and to the counterparty the fact that TPLF is being used and the name of the funder;
 - e. a duty to provide an adequate sanction for a breach of the aforementioned duty to disclose;
 - f. a duty to ensure that the funder shall not seek to influence the procedural decisions of the claimant, including on settlements;
 - g. provide the defendant winning the case with a possibility for direct action against the funder for the recovery of procedural costs if the funded party fails to pay;
 - h. clarify how TPLF works in consumer collective redress with respect to an opt-out mechanism, for example, by adopting a 'common fund' approach.¹⁷⁷
- An additional safeguard, which is, however, dependent upon the own initiative of responsible litigation funders, may consist of the self-regulation of funders.¹⁷⁸

In conclusion, a regulatory safety net for TPLF is needed, as TPLF could be partly beneficial in some cases, as it could contribute to enhancing access to justice, yet it could also present major risks, costs for businesses and significant potential for conflicts of interests.

¹⁷⁶ See paragraph 4.5.1.

¹⁷⁷ See paragraph 3.4.1.

¹⁷⁸ See paragraph 4.2.1.

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ANNEX 1: MAIN LITIGATION FUNDERS ACTIVE IN THE EUROPEAN UNION

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|--|--|--|---|--|
| Acivo Jena, Germany www.acivo.de | AG, litigation funder | Labour, property, inheritance, intellectual property, insolvency, contract (distribution), patents, tort (traffic), tax, insurance, competition. | €10,000 | Up to €50,000 50 % €50,000 – 500,000 30 % Over €500,000 20 % |
| Advofin Vienna, Austria www.advofin.at | AG, litigation funder | Collective redress. | N/A | 'Online casino in Austria and Germany' - Remuneration fee: 37 % of the outcome of the dispute, 19 % in case of settlement. 'Infinus'- Remuneration fee: 37 % of the outcome of the dispute. 'Daimler AG class action (diesel scandal)' - Remuneration fee: 39 % of the outcome of the dispute. |
| Annecto Legal Redhill, UK www.annectolegal.co.uk | Ltd, litigation consultancy and funder | Commercial, consumer, employment, tax, insolvency matters. | N/A | N/A |
| Apex Litigation Finance London, UK www.apexlitigation.com | Ltd, AI-driven litigation funding | Commercial, insolvency and personal matters. | There is no minimum amount for being eligible for funding. However, Apex claims to have particular expertise in medium-sized cases (£100k to £5 million). | N/A |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|--|----------------------------------|--|---|---|
| Augusta Ventures London, UK www.augustaventures.com | Ltd, litigation funding | Commercial law, IP law, collective redress. | £200,000. Also, the case must have a minimum 1:5 costs to award ratio. | N/A |
| Balance Legal Capital London, UK www.balancelegalcapital.com | LLP, litigation funding | Commercial law. | N/A | N/A |
| B&K Prozessfinanzierung Münster, Germany www.bk-prozessfinanzierung.de/kontakt/ | GmbH, litigation funder | N/A | N/A | N/A |
| Burford Capital New York, USA and London, UK www.burfordcapital.com | Ltd, litigation funder | Commercial law, antitrust and competition law, IP law, insolvency law. | The amount requested shall be at least £2 million. | In principle, Burford seeks an investment ratio of 1:10 - for an investment of \$2 million, the expected damages should be around \$20 million. |
| Calunius Capital London, UK www.calunius.com | LLP, litigation funder | N/A | N/A | N/A |
| Claims Funding Europe Dublin, Ireland www.claimsfunding.eu | Ltd, litigation funder | Multi-party actions. | N/A | N/A |
| Creditale Neu-Ulm, Germany www.creditale.com | GmbH, litigation funder | Competition law. | N/A | N/A |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|---|---|--|---|---|
| Cobin Claims Vienna, Austria www.cobinclaims.at | Collective redress online platform | Collective redress. | N/A | Between 20 and 40 % |
| Deminor Luxembourg, Luxembourg Also: Brussels, Belgium; Milan, Italy; London, UK www.drs.deminor.com | SàRL, asset recovery and litigation finance | Competition law (both individual and collective claims), company law, contract law, finance law, insurance law, tort law, intellectual property law. Both court and arbitration proceedings. | No minimum threshold | N/A |
| Exactor Erfurt, Germany www.exactor.de | GmbH, litigation funder | Monetary credits. | Up to €100,000 | 50 % up to €25,000 40 % up to €50,000 30 % up to €100,000 |
| Foris Bonn, Germany www.foris.com | AG, litigation funder, listed company | Arbitration, medical malpractice, banking and capital markets law, inheritance law, company law and post M&A, tax law, copyright and intellectual property law, competition law, bankruptcy law. | Claims from €100,000 to €150,000,000. Defendant's financial capability granted. | 10.00 % |
| Fulbrook Capital Management New York and Washington (USA) www.fulbrookmanagement.com | Litigation funder | N/A | N/A | N/A |
| Harbour London, UK www.harbourlitigationfunding.com | Ltd, litigation funder | N/A | For claims below £20 million, the ratio of claim value to claim budgets shall be at least 10:1. | N/A |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|---|---------------------------------------|--|--|---|
| Invenium Milan, Italy www.invenium.it | Asset recovery and litigation finance | N/A | N/A | N/A |
| Inverlitis, Madrid, Barcelona, Spain www.inverlitis.com | Legal fund, litigation funder | Medical malpractice, company law, contract law, insolvency law. | N/A | N/A |
| Jura Plus Zurich, Switzerland www.jura-plus.ch | Litigation funding | N/A | Claims from CHF 300,000 | N/A |
| Juridica Investments Guernsey, UK www.juridicainvestments.com | Ltd, litigation funder | N/A | N/A | N/A |
| La Française Paris, France www.la-francaise.com | Litigation funder | N/A | N/A | N/A |
| Legial Munich, Germany www.legial.de | AG, litigation funder | Medical malpractice, inheritance law, competition law, bankruptcy law, consumer law, insurance law. | At least €100,000 claims (in bankruptcy law, €50,000). Defendant's financial capability granted. Only German litigation. | Up to €500,000 30 %. Over €500,000 20 % 20 % in case of ADR or settlement. |
| Lexdroit Dresden, Germany www.lexdroit.com | GmbH, litigation funder | Claims against financial institutions, insurance companies, professionals. | At least €100,000 (also bundle of claims by more than one claimant) and defendant sufficiently creditworthy. | N/A |
| Liesker Brussels, Belgium Breda, the Netherlands www.lieskerlitigationfunding.com www.liesker-procesfinanciering.nl | Litigation funder | Commercial disputes, collective actions, competition law, patent, arbitrations cases, shareholder actions. | €500,000 | Usually 30 % |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|--|---|---|--|--|
| LVA 24 Prozessfinanzierung Vienna, Austria https://www.lva24.at/at/ | GmbH, litigation funder | Collective Redress | N/A | 35% |
| Manolete Partners London, UK www.manolete-partners.com | Plc, litigation funder | Insolvency. | No minimum size | Variable. They also offer a 'full cash-out option' (i.e. to purchase the proceeds entirely in exchange for an upfront amount). |
| MV Prozessfinanzierung Vienna, Austria www.mvprozessfinanzierung.at | GmbH, litigation funder | N/A | N/A | N/A |
| Nivalion AG Steinhausen/Zug, Switzerland and Munich, Germany www.nivalion.com | AG, litigation funder | N/A | N/A | N/A |
| Omnibridgeway Australia; Amsterdam, the Netherlands and Cologne, Germany www.omnibridgeway.de | Australian corporation, litigation funder | All areas | At least €100,000. Defendant's financial capability granted. | From 20 % to 30 % |
| Profile Investment Paris, France www.profileinvestment.com | Société par actions simplifiée, litigation funder | Non-recourse financing for disputes and particular focus on arbitration. Also cross-border litigation, enforcement of awards and judgments and commercial litigation. | N/A | N/A |
| Profina, Zurich, Switzerland www.profina.ch | GmbH, litigation funder | Insolvency law, contract law. | N/A | Usually 30 % |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|--|----------------------------------|---|----------------------------|------------------|
| Prozessfinanzierung Mannheim, Germany www.profin.one | GmbH, litigation funder | Very active on the diesel-gate matter. | N/A | Maximum 25 % |
| Ramco Litigation Funding Hamilton, Scotland, UK | Ltd, litigation funder | Cartel lawsuits | N/A | N/A |
| Redbreast The Hague, the Netherlands www.rebreast.com | Litigation funder | M&A and business transactions, corporate, bankruptcy, distribution and agency, competition law, intellectual property and any claims for damages arising from any type of breach, abuse, fraudulent or wrongful action. | €5,000,000 | N/A |
| Redress Solutions London, UK www.redressolutions.co.uk | Plc, litigation funder | Commercial and insolvency disputes. | N/A | N/A |
| Rockmond, London, UK and Madrid, Spain www.rockmond.com | Litigation funder | N/A | N/A | N/A |
| Rosenblatt Litigation Funding London, UK N/A | Ltd, litigation funder | N/A | N/A | N/A |
| Sparkle Capital London, UK www.sparklecapital.co.uk | Ltd, litigation funder | Sparkle only funds cases in England and Wales and, under exceptional circumstances, Scotland and Northern Ireland. | N/A | N/A |
| The Judge London, UK www.thejudgeglobal.com | Ltd, litigation funder | N/A | N/A | N/A |

| Funder (registered office and website) | Corporate structure and activity | Funded litigation cases | Minimum funded claim value | Remuneration Fee |
|---|----------------------------------|---|--|--|
| Therium Group Holdings London, UK www.therium.com | Ltd, litigation funder | N/A | There is no minimum case size. However, typically, Therium invests £15m or more as long as damages are at least 6x the amount of the investment. | N/A |
| Tom Orrow Prozessfinanzierung Vienna, Austria www.tom-orrow.at , www.tom-orrow.net , www.online-casino-geld-zurueck.at | GmbH, litigation funder | Collective redress (online gambling losses) | N/A | Online-casino in Austria and Germany - Remuneration fee: 33 % of the out-come of the dispute |
| Vannin Capital Holdings London, UK www.vannin.com | Plc, litigation funder | N/A | N/A | N/A |
| Woodsford North Wales, USA London, UK www.woodsfordlitigationfunding.com | Litigation funder | Antitrust/Competition law; High-value divorces | N/A | N/A |
| 1624 Capital New York, USA www.1624capital.com | Litigation funder | Intellectual property infringement cases | N/A | N/A |

ANNEX 2: SELECTED CASE LAW ON TPLF IN THE EU

| Jurisdiction | Case | Relevant Topic | Key Legal Points |
|----------------|--|---|---|
| Austria | Austrian Supreme Court of Justice, 27.2.2013, 6 Ob 224/12b | TPLF agreement - collective redress | The Supreme Court explicitly confirmed the admissibility of third party funding in the Austrian-style collective redress. |
| Austria | Court of Appeal of Vienna, 23.8.2012, 3 R 41/12i | TPLF Collective Redress | The Court of Appeal of Vienna stated that TPLF does not violate the 'quota litis prohibition'. |
| Austria | Commercial Court of Vienna, 7.12.2011, 47 Cg 77/10s | TPLF Collective Redress | The Commercial Court of Vienna stated that TPLF does not violate the 'quota litis prohibition'. |
| France | Cour de Cassation, Civ. I, 23.11.2011, n 10-16770, P+B. | TPLF agreement - legal qualification | The French Court of Cassation implicitly qualified the TPLF agreement as a contract of enterprise, i.e. a contract involving the provision of immaterial services by an independent contractor. Indeed, it applied to the TPLF agreement some specific and exceptional provisions conceived for the contract of enterprise, namely the possibility for the judge to reduce the price. |
| France | Court of Appeal of Versailles, 1.6.2006, no 05/01038 | TPLF agreement - legal qualification | The Court of Appeal of Versailles qualified the TPLF agreement as a new kind of contract, or a <i>sui generis</i> contract. |
| Germany | German Federal Court (BGH), 13.9.2018 – I ZR 26/17, ("Prozessfinanzierer I") | Prohibition on TPLF in actions for confiscation of profits | The German Federal Court prohibited the use of TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act against Unfair Competition (<i>Gesetz gegen den unlauteren Wettbewerb</i>). As a consequence of the use of TPLF, the claim was rejected on grounds of inadmissibility. |
| Germany | German Federal Court (BGH) 9.5.2019-I ZR 205/17 ("Prozessfinanzierer II") | Prohibition on TPLF in actions for confiscation of profits | The German Federal Court reached the conclusion that in actions for confiscation of profits, pursuant to Section 10 of the German Act against Unfair Competition, TPLF is not allowed, after noting that the only organisations able to file such a type of claim are those listed in Section 8. Such organisations must notify the |

| Jurisdiction | Case | Relevant Topic | Key Legal Points |
|----------------|---|---|---|
| | | | Federation's competent agency of the lodging of claims and may request reimbursement from that agency for costs incurred in bringing the claim, insofar as they cannot obtain satisfaction from the debtor. As a consequence, the claim was rejected on grounds of inadmissibility. |
| Germany | German Federal Court (BGH), 27.11.2019 – VIII ZR 285/18 | TPLF assignment of a claim for purposes of collection TPLF - legal qualification | A collection service provider, while carrying out collection services shall enter into a TPLF agreement, given that in TPLF funder and claimant pursue a joint goal. The TPLF agreement shall be qualified as a partnership under civil law. |
| Germany | Court of Appeal of Cologne, 26.6.2020-6 U 37/20 | Claimant's right to choose a lawyer freely and TPLF | Many funders act as intermediaries between the claimant and the lawyer. According to the Court of Appeal of Cologne, such intermediation does not breach the claimant's right to choose a lawyer freely. |
| Germany | Court of Appeal of Cologne, 5.11.2018 – 5U 33/18 | Duty to inform the client of the possibility of using TPLF | According to the Court of Appeal of Cologne, a lawyer shall inform his client of the possibility of using TPLF. However, there is no need to provide the client with information aimed at determining the most affordable funder. |
| Germany | Court of Appeal of Frankfurt, 22.8.2017 -16 U 253/16 | TPLF agreement - legal qualification | The Court of Appeal of Frankfurt suggested possibly identifying TPLF as a loan, as both contracts share the same financing function. |
| Germany | Court of Appeal of Munich, 31.3.2015-15 U 2227/14 | TPLF agreement - public policy issues: funder's remuneration fee | The Court of Appeal of Munich upheld that a remuneration fee of 50 per cent is not contrary to German public policy. |
| Germany | Tribunal of Munich, 7.2.2020 – 37 O 18934/17 | TPLF assignment of a claim for purposes of collection | A funding agreement may create dependency of the collection service provider (the claimant) on the funder and may entail the risk of the claimant not acting in the sole interests of the assignors. |

| Jurisdiction | Case | Relevant Topic | Key Legal Points |
|------------------------|--|---|--|
| Germany | Tribunal of Cologne, 4.10.2002- 81 O 78/02 | TPLF agreement - legal qualification | The Tribunal of Cologne upheld the qualification of the TPLF agreement as a partnership under civil law, given that in TPLF the parties pursue a joint goal (i.e. the success of the claim). |
| Germany | Tribunal of Bonn, 25.8.2006, 15 O 198/06 | TPLF agreement - legal qualification | The Tribunal of Bonn rejected the qualification of the TPLF agreement as a partnership contract. |
| Germany | Fiscal court of Baden-Württemberg 29.8.2013 – 1 V 1086/13, | TPLF- Fiscal liability of the funders | Funders are exempt from the payment of the turnover tax. |
| Germany | German Federal Insurance Supervisory Office, 29.4.1999 | TPLF agreement - legal qualification | The German Federal Financial Supervisory Authority stated that litigation funding does not fall under the concept of insurance and the TPLF agreement is, therefore, not subject to its control. |
| Ireland | Supreme Court of Ireland, <i>Persona Digital Telephony Ltd v Minister for Public Enterprise</i> , Ireland, [2017] IESC 27. | Prohibition on TPLF | According to the Supreme Court of Ireland, a TPLF agreement is champertous and, therefore, illegal. |
| Spain | Commercial Court of Barcelona, 2.11.2018 | TPLF agreement funder's remuneration fee | A company in liquidation (Unipost) was authorised by the Commercial Court of Barcelona to enter into a TPLF agreement with a litigation funder, as it was the only way of gaining access to justice. The signature of the TPLF agreement was authorised by the court under the following conditions: (i) there must be no cost for Unipost if the case is lost, and (ii) the funder's remuneration fees cannot exceed 30% of the outcome of the dispute. |
| The Netherlands | Court of Appeal of Amsterdam, 5.2.2018 (ECLI:NL:GHAMS:2018:368) | TPLF - remuneration fee | In case of commercial parties, the risk of excessive remuneration fee for funders will be mitigated by the market forces, which will lead to the normalisation of rates. |

European Parliament legislative-initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union are automatically accompanied by a European added value assessment (EAVA). Such assessments are aimed at evaluating the potential impacts, and identifying the advantages, of proposals made in legislative-initiative reports.

This EAVA accompanies a resolution based on a legislative-initiative report prepared by Parliament's Committee on Legal Affairs (JURI), presenting recommendations to the European Commission on responsible private funding of litigation.

The main purpose of the EAVA is to identify the possible gaps in European Union (EU) legislation. The various policy options to address this gap are then analysed and their potential costs and benefits are assessed.

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