



2 September 2024

## Third Party Litigation Funding: contribution to the Commission study

### INTRODUCTION

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BusinessEurope attaches great importance to the topic of litigation funding by third parties as it is used to fund a wide variety of judicial claims, including consumer claims (with an increased amount of cases involving claims around technological products and their automated features), commercial, or environmental claims with one or more claimants, or even to fund arbitration cases. It is a form of financial service that operates in an unregulated way, unlike the majority of other financial services, but with an equally strong impact on society and the economy at large.

BusinessEurope has in the past supported intervention by the regulator on these financial services, in the context of the Representative Actions Directive and beyond. We do acknowledge the useful role of these services and are not calling for a ban, but there are important legal and ethical gaps that need to be solved. We have been strong supporters of the European Parliament Resolution from 2022 on Responsible Private Funding of Litigation which provides useful ideas in this regard.

We welcome the fact that the Commission has followed up on the Parliament request and is now conducting an assessment which we hope will feed into a (much needed) future EU initiative in this field.

Please find below the **answers** that BusinessEurope has prepared for the relevant parts of the survey.<sup>1</sup>

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<sup>1</sup> Our replies start from the relevant Section II: “*Questions to all stakeholders except litigation funders and their organisations*”. Section I contains questions on the profile and name of organisations filling in the study.



#### Question 4.1: Are you aware of litigation funders operating in your jurisdiction?

Yes

#### Question 4.2: names of litigation funders in your jurisdiction

Due to the lack of transparency surrounding TPLF, and the absence of an official registry for funders at European or national levels, it is not feasible to accurately depict the number of funders operating in Europe. By looking at publicly available sources (including individual sites of funders and the well-known Chambers and Partners legal professionals' lists<sup>2</sup>), we have been able to identify a strong presence of litigation funders in at least seven Member States, but we suspect this is only a small portion of the actual number of entities funding litigation in the EU.

Figures suggest the rise of litigation funder entities in the EU, while EU is expected to increase its share of the global litigation funding market until 2025<sup>3</sup>. Here are some examples of funders established in the EU:

- **43 Litigation Funders in Germany:**

- 1) 1624 LLC
- 2) Acivo Prozessfinanzierung AG
- 3) Advofin
- 4) Armida UG
- 5) B&K Prozessfinanzierung GmbH
- 6) Burford
- 7) Calunius
- 8) Cartel Damage Claims
- 9) Claims Funding Europe
- 10) Creditale Finanzierungen
- 11) Debeo GmbH
- 12) Deminor
- 13) Erste Allgemeine Schadenshilfe
- 14) ExActor Forderungsmanagement GmbH
- 15) financialright claims GmbH
- 16) Foris AG
- 17) Harbour Litigation Funding Ltd

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<sup>2</sup> <https://chambers.com/legal-rankings/litigation-funding-europe-wide-58:2816:80:1>

<sup>3</sup> See Deminor Litigation Funding, 'Litigation Funding from a European Perspective Current status of the market, recent issues and trends' page 6, available at: [deminor-litigation-funding-from-a-european-perspective-by-erik-bomans.pdf \(hubspotusercontent-na1.net\)](#).



- 18) HPG Prozessfinanzierung
- 19) Innsworth Capital Limited
- 20) iubel
- 21) JuraPlus AG
- 22) Jurfin GmbH
- 23) Legial AG
- 24) LEVANTIX Rechtsdienstleistungen GmbH
- 25) Lexdroit International
- 26) Liti-Link AG
- 27) myRight
- 28) myRight Verbraucherrechte GmbH
- 29) New Claim Funding GmbH
- 30) Nivalion AG
- 31) Obligatio GmbH
- 32) Omni Bridgeway GmbH
- 33) PatForce
- 34) Penker Prozessfinanzierung KG
- 35) Polaric Partner GmbH
- 36) Profin Prozess Finanzierung
- 37) SLB Verwaltungsgesellschaft mbH
- 38) Solvantis AG
- 39) Spreefels
- 40) Therium
- 41) TKL Forensische Dienstleistungen GmbH
- 42) Vannin Capital PPC
- 43) Youleegal GmbH

- **46 Litigation Funders in the Netherlands:**

- 1) Augusta
- 2) Bench Walk
- 3) BGPL Funding I Limited
- 4) BMS Procesfinanciering
- 5) Burford
- 6) Calunius
- 7) Capaz Procesfinanciering
- 8) Cartel Damage Claims
- 9) Claims Funding Europe
- 10) Consumer Justice Network BV
- 11) Consumer Privacy Litigation Funding LP
- 12) Corpocon Legal BV
- 13) Deminor
- 14) East-West Debt
- 15) Elco Investor Services LLC



- 16) Emission Claim Trust BV
- 17) Equilib Netherlands BV
- 18) Evest
- 19) Fortress Investment Group LLC
- 20) G&E SPG Funding LLC
- 21) Hagens Berman Sobol Shapiro LLP
- 22) Harbour Litigation Funding Ltd.
- 23) Hereford Litigation
- 24) Law Capital
- 25) Legis Capital BV
- 26) Litifund BV
- 27) Omni Bridgeway
- 28) Innsworth Capital Limited
- 29) International Litigation Funding Partners PTE LTD
- 30) International Securities Association & Foundations Management Company
- 31) IVO Capital Partners
- 32) Just Legal Finance BV
- 33) Loeff Cabraser Heimann & Bernstein
- 34) Liesker Legal (seems also to give legal advice and process management services) and Liesker Procesfinanciering BV (parent company active in litigation funding)
- 35) Marsh Funding
- 36) Nera Capital
- 37) Office Value Fund NV
- 38) Orchard
- 39) Plaza Group/Square Two Capital
- 40) Ploum & Liesker Procesfinanciering
- 41) PROFIT Procesfinanciering
- 42) Redbreast
- 43) Right to Consumer Justice BV
- 44) Taupe Ltd
- 45) Therium
- 46) Woodsford Litigation Funding

- **13 Litigation funders in Austria:**

- 1) Advofin Prozessfinanzierung AG
- 2) Burford
- 3) Cobin Claims
- 4) Creditale Finanzierungen
- 5) dP die Prozessfinanzierer GmbH
- 6) Erste Allgemeine Schadeshilfe AG
- 7) Foris AG
- 8) JuraPlus AG
- 9) Legial AG



- 10) LVA24 Prozessfinanzierung GmbH
- 11) Nivalion AG
- 12) Omni Bridgeway AG
- 13) Tom Orow Prozessfinanzierung

- **18 Litigation funders in Spain:**

- 1) Inverlitis Legal Fund
- 2) Therium
- 3) Rockmond Litigation Funding Advisors
- 4) Stonward Litigation Finance
- 5) Systema Capital
- 6) Vannin Capital
- 7) Omni Bridgeway
- 8) Ramco Litigation Funding
- 9) Fortress, Cartel Damages Claims,
- 10) Afectados por las Petroleras, SRL II (Lux)
- 11) PLA Litigation Funding
- 12) Qanlex
- 13) ClaimBnB
- 14) Deminor Litigation Funding
- 15) Burford Capital
- 16) Centerbridge
- 17) Antin Infrastructure Partners
- 18) Pemberton

- **5 Litigation funders in France:**

- 1) Cartel Damage Claims
- 2) Ivo Capital Partners
- 3) Nivalion
- 4) Profile Investment
- 5) Woodsford Litigation Funding

- **2 Litigation funders in Portugal:**

- 1) Nivalion
- 2) Ius Omnium

- **3 Litigation funders in Italy:**

- 1) Omni Bridgeway
- 2) Burford
- 3) BE CAUSE



It should be noted that several litigation funders are present and operate simultaneously in several Member States<sup>4</sup>.

### Question 4.3: average number of cases funded by TPLF

Comments:

Because of the lack of transparency around TPLF, it is difficult to make a realistic estimate of the number of cases funded in each member state on a monthly or yearly basis. In the Netherlands, it seems that the majority of opt-out collective claims under WAMCA<sup>5</sup> are backed by TPLF. The same seems to occur in the UK.

## Question 4.4

### Question 4.4.a: types of cases typically funded

The types of cases found are of a collective<sup>6</sup> (e.g. class actions or representative actions) or individual nature, seeking compensatory or declaratory court decisions, around consumer and competition law, commercial law, securities law (shareholders claims), data protection, product liability, patent claims<sup>7</sup>, and environmental claims. Funding also seems to address cases outside of courts: arbitration.<sup>8</sup>

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<sup>4</sup> Examples: Deminor Litigation Funding has several office locations in the EU: Luxembourg, Madrid, Milan, Hamburg, and Stockholm. Burford is also in different member states. Nivalion maintains offices in Switzerland, Germany, and Austria.

<sup>5</sup> WAMCA: the Dutch Act on Collective Damages Claims. Under the WAMCA, interest groups, associations, or foundations can serve as representative organizations to protect the interests of a specific group or the general public. These representative organizations must meet strict admissibility requirements.

<sup>6</sup> In countries like Spain there seem to exist two types of cases, based on the way funders obtain their return on investment. Those involving several individual claims of large amounts from which the funder charges a percentage of the amount obtained, and those involving massive claims with smaller amounts. In the latter case, the litigation funders finance the law firm that initiates the mass litigation proceedings and which usually charges for costs (often the amount of these costs doubles or triples the consumer's claim, but the consumer is completely unaware of the amount waived because he is not informed) and interest on the debt owed to the plaintiff (this interest is part of the consumer's right to redress, but the law firms do not inform the consumer about the amount it may ascend to, so the consumer waives an amount he does not know).

<sup>7</sup> This is based on the experience in the US. Last year, for example, [PurpleVine IP](#), a Chinese third-party litigation investment firm, financed multiple intellectual property lawsuits in U.S. courts against Samsung and a subsidiary alleging patent infringements. The cases are understood to be an attempt to put American and other Western technology companies of strategic importance under pressure as well as to seek disclosure of confidential intellectual property.

<sup>8</sup> The most commonly funded claims in Europe include compensation of investment losses, anti-trust damages, data breaches, general consumer rights, commercial arbitration, intellectual property, investment treaty arbitration: See Deminor Litigation Funding, 'Litigation Funding from a European Perspective Current status of the market, recent issues and trends' page 8, available at: [deminor-litigation-funding-from-a-european-perspective-by-erik-bomans.pdf \(hubspotusercontent-na1.net\)](#).

#### Question 4.b.

This is a rather opaque business. There does not seem to be any minimum, because even if the amounts involved are small (or a merely declaratory ruling is sought), the law firm that receives the financing charges the amounts of the costs. A testimony from the financial sector in Spain flags that claims for nullity of abusive clauses can amount to 2,000 or 3,000 euros. In these nullity cases, these high legal costs per claim do not depend on the economic interest behind the lawsuit (which can be smaller). This shows that even if the intrinsic value of the claim is marginal, the funder and law firms behind stand up to obtain large amounts of compensation on the costs/fees alone.

#### Question 4.4. c-e

No data

#### Question 4.4.f: origin of funding provided by the litigation funder:

The origin of the funding seems to point to the U.S., Australia, Singapore, China, Russia, the Cayman Islands, Monaco, the UK, and its offshore islands, like Jersey and Guernsey. Due to the opaque nature of many of the funds, it is difficult to identify concretely their origin or place of establishment, but there is a concern from a few press articles that some litigation funders might have ties with foreign sovereign wealth funds and state-owned enterprises originating in various parts of the world, including the Middle East, Asia, and Russia<sup>9</sup>.

#### Question 4.4.g: share of compensation of funders

Answer 'don't know'

Comments:

In the EU, there is no mandatory disclosure of litigation funding agreements, so in most cases, neither the judges nor the defendants know what share of the compensation the litigation funders are demanding as a fee (or even that a funding arrangement exists). Thus, in reality, there is limited data on the average fees that litigation funders charge; We have some indications (e.g. from industry reports) that the practice of compensation share demanded by litigation funders in the industry is around 25-40% of the compensation.<sup>10</sup>

However, compensation shares can be much higher in some cases (according to funders' own claims). In the UK, there was a case in which a Jersey-based funder (which is also active in the Netherlands and Germany), where claimant lawyers received **80% of the**

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<sup>9</sup> [Bloomberg Law](#) reported on 28 March 2024 that a Russian investment firm A1 has financed lawsuits around the world, in some cases working with the company's directors, clients, and Russian banks in an effort to evade international sanctions. A1 was able to continue its investment despite UK and EU sanctions being put in place against A1's parent company Alfa Group and its billionaire owners, who have strong ties to Vladimir Putin.

<sup>10</sup> See <http://disputeresolutionblog.practicallaw.com/funders-pricing-and-the-real-value-of-litigation-risks/>. See also <https://www.pinsentmasons.com/out-law/guides/third-party-funding-introduction>.

**settlement** in a collective action of hundreds of postmasters against the Post Office.<sup>11</sup> To provide adequate compensation to the affected postmasters, the British Government had to step in with compensation schemes paid for by British taxpayers' money. This big mediatic case in the UK has led the British Government to launch a review of litigation funding which is currently being carried out by the Civil Justice Council (CJC).<sup>12</sup> It led UK authorities to be more attentive to litigation funding and to take action. We consider that the current study/questionnaire could also look into experiences of jurisdictions close to the EU, that point to the need for action.

**Question 4.4.i: According to your information, do litigation funders have an acceptable threshold for probability of success / acceptable level of risk?**

**No.** Litigation funders might proclaim that they facilitate “access to justice” whilst at the same time having industry trends that lead to the rejection of 96,5% of funding requests that come to them and by retaining the upper hand in the screening of cases<sup>13</sup>. Some funders do not hesitate to provide numbers publicly on their website on their success rates as part of the marketing of their services.<sup>14</sup> At the same time, funders tend to accept cases in which they calculate a high probability of profit. The decision on whether or not to undertake a case has a lot to do with the economics of the case, litigation costs, and remedy pursued. This seems contradictory to the assertion of facilitating access to justice.<sup>15</sup>

**Question 4.4.j: Do you have any information on the Multiple-on-Capital (MoC) and Annualized Internal Rate of Return (IRR) of funders?**

**No overall figures for the sectors.** However, looking at publicly available information the rates of return on the investments of this type of business model can be very high. For example:

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<sup>11</sup> *Bates v Post Office Ltd* [2019] EWHC 871 (QB), aka the Post Office Group Litigation.

<sup>12</sup> The Review will be based on the CJC's function to make civil justice more accessible, fair, and efficient. <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

<sup>13</sup> We can see an example of such a statement of funding only a small percentage of claims that reach litigation funder in “*A Practical Guide to Litigation Funding*” of the British funder Woodsford, available at: <https://woodsford.com/wp-content/uploads/2021/01/Woodford-White-Paper-A-Practical-Guide-Lit-Fund-NLogo.pdf>. It can be seen in the Guide (page 8) that Woodsford only funds 3.5% of the cases that are submitted to them with a funding application. Woodsford is also active across the EU in countries such as The Netherlands and France.

<sup>14</sup> For example, Deminor, a funder with a multinational presence in various Member States, advertises a 77,8% success rate at its website, available at: <https://www.deminor.com/en/case-studies/telecoms-patent-assertion-multi-jurisdictional-campaigns>. Harbour Litigation Funding declares a similar percentage success rate of 76%, available at: <https://www.harbourlitigationfunding.com/>.

<sup>15</sup> According to the [Legal Services Board research into litigation funding](#), funders carefully select only 3 – 5% of potential cases, which is not paramount to offering wide access to justice as usually advertised by litigation funders.



- Litigation funder Bentham has stated that on average they make a **300% rate of return**,<sup>16</sup> while Burford Capital's first litigation funding agreement in the UK Mastercard litigation results in a potential **3,000% rate of return**.
- Dutch funder Liesker Legal financed a data breach collective case over leaked Covid test data against the Dutch National Health Service (GGD) in which they would generate a **500%** rate of return, according to the Dutch press<sup>17</sup>.
- In the case of the financial sector in Spain it seems that in most cases of mortgage expenses involving funders, the consumer gets an average of 1,000 euros and the law firms financed by the fund get between 1,000 and 3,000 euros. The amounts shared between the law firms and the funders remain unknown.

**Question 4.4.k. What were the outcomes of funded cases, including the effective gains for beneficiaries and funder?**

It is reported that victims/claimants usually end up with a small fraction (if anything) of the compensation that may be due to them. The remainder is to pay legal/lawyer fees and the compensation share of the litigation funder. In the UK Post Office case, the funders and lawyers arguably took 80%. In the UK Mastercard case, funders hoped to take GBP 1 billion and had an arrangement whereby funders would get paid in priority over victims.

**Question 4.4.l: are funding agreements disclosed to the court?**

**No.** We have not heard that such disclosures usually happen. There are no rules at EU or national level ordering funding agreements to be disclosed, to our best knowledge.

**Question 4.4.m: When funding a dispute, would you say litigation funders exercise any form of control over the legal proceedings?**

**Yes**

**If yes, please indicate what type of control:**

We assume **all indicated**:

- Choice of lawyer
- Consent for settlement
- Consent for appeal
- Consent for expert evidence
- Agreement on strategy

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<sup>16</sup> See Bentham Europe Limited's (now known as Omni Bridgeway) Submission to the Ministry of Security and Justice: Dutch Draft Bill on Redress of Mass Damages in a Collective Action, 14 October 2014, p. 5, para. 2.15.

<sup>17</sup> See here a press article on the Dutch privacy class action: <https://www.houthoff.com/insights/news-update/multibillion-euro-privacy-claim-off-the-table>.



Comment:

In litigation funding agreements, litigation funders are often given powers allowing them to take or influence decisions in connection with specific claims pursued, they can have a role in selecting the litigation law firms that will take up the case, on settlement, on management of expenses, or provision of capital. They are not subject to any fiduciary duties by law that would ensure undue control is not exercised.

**Question 4.4.n: about the relationship between litigation funders and the claimant lawyers**

There are no rules at the European level around specific conflicts of interest between lawyers and litigation funders. Nevertheless, considering that lawyers might be suggested by the funders and end up depending on funders to get paid (or count on their financing in future cases), they may face pressure to let the funders take control. This creates a power dynamic that can undermine the interests of the claimants in the case and the proper functioning of the courts.

**Question 4.4.o: When funding a dispute, is it possible for the litigation funder to withdraw funding during the litigation process?**

**Yes.** This is because there is no specific legal framework determining these types of funding and financial arrangements, so it cannot be excluded that withdrawal can occur in a damaging way for the victim/claimant. It depends also on the funding agreement, but this is opaque.

**Question 4.4.p: According to your information, do funders have any safeguards in place to avoid conflicts of interest?**

**No.** Article 10(1) of the 2020 [EU Directive on Representative Actions](#) stipulates that EU Member States shall ensure that conflicts of interest are prevented. However, this safeguard only applies to collective actions brought under this EU Directive that only covers B2C cases, leaving out many areas of law that are also covered by funding agreements. In the interest of consumers – and other claimants in general – this safeguard should apply to all types of litigation including intellectual property cases, insolvency cases, etc., and arbitration. It should apply to all fields of law and not only to consumer cases. We strongly support the European Parliament Resolution from September 2022 on “Responsible Private Funding of Litigation” which proposed in Article 13(1) a provision that extends conflict of interest rules to all types of litigation and to all fields of law.



A law is currently being developed in Spain to regulate the activities of litigation funding firms, which have their own capital, act as intermediaries, or both, and they finance the costs of court or arbitration proceedings.<sup>18</sup> This law includes a provision allowing judges to determine the validity of financing provided by litigation funding firms. Judges will have the authority to reject financing in cases where there is a conflict of interest or where the fund serves interests other than compensating the affected consumer or claimant.

**Question 4.4.q: According to your information, does the funding agreement typically cover the issue of liability as to costs in the event of an unsuccessful outcome (“adverse costs”)?**

**No.**

**Comments:**

It is not always the case that funders cover adverse costs. Even in jurisdictions that do have adverse costs or “fee-shifting” rules in place, funders would not be covered as they are a third party to the claim and may even be based outside the jurisdiction. This is why we support EU action taking inspiration from the European Parliament Resolution on Responsible Private Funding of Litigation. One rule could be to impose responsibility for adverse costs on TPLF funders, to ensure that funders cover relevant adverse costs, including damages resulting from counterclaims by the defendant.

**Question 4.4.r.: According to your information, do litigation cost agreements usually include the requirement for After the Event (ATE) insurance?**

Don't Know

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<sup>18</sup> See [https://www.elconfidencial.com/juridico/2024-08-27/firmas-financiacion-litigios-espana\\_3948980/](https://www.elconfidencial.com/juridico/2024-08-27/firmas-financiacion-litigios-espana_3948980/).



## Section IV. Questions to all stakeholders

### Question 9: Is there existing legislation on TPLF in your jurisdiction?

There is no general EU legislation regulating TPLF.

The EU Directive on Representative Actions (RAD) only contained minimal safeguards on TPLF, which only apply to collective actions under this Directive and only to consumer claims. These are the relevant rules:

- 1) Conflicts of interest should be prevented: Article 4(3)(e) and 10(1).
- 2) There should be no funder control: Article 4(3)(e) and 10(2).
- 3) A financial overview listing sources of funds used to support the representative action may be requested to be disclosed to the Court or administrative authority: Article 10(3) read together with Recital 52.
- 4) The qualified entities have to provide “information about the sources of its funding”: Article 4(3)(f).

In national laws transposing the RAD, some Member States included additional safeguards for TPLF, including Germany, the Czech Republic (not formally adopted as of 28 June 2024), and Portugal. The Netherlands included the option for the judge in a case to review the applicable funding agreement. However, this option is not stated in the operational part of the Act, but only in the Explanatory Memorandum which is not binding. Greece banned TPLF from collective actions under the RAD and Ireland maintained its ban on TPLF under existing laws on maintenance and champerty. Slovenia has adopted additional safeguards for TPLF following the EU's 2013 Recommendation on Collective Redress in full. Even with these minimal rules, there is a risk of forum shopping (funders choosing to bring claims in jurisdictions where there is less oversight of their practices) given the diverging approaches in member states.

The fact that there are no rules in the B2B context or around arbitration, where funders are also active, led the Swedish [SCC Arbitration Institute in 2019 to adopt a policy](#) to encourage the parties to disclose the identity of any third party with a significant interest in the outcome of the dispute (including among other things third party litigation funders). It shall be noted that the ELI – UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE already provide something in this regard; Rule 237 establishes that the claimant must disclose that they are receiving such funding and identify the funder at the beginning of proceedings. The details of the funding agreement are typically confidential and should only be disclosed upon the court's request.<sup>19</sup>

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<sup>19</sup> See [ELI – UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE](#), Rule 237, page 409.

**Question 10a: have you observed negative effects of TPLF in the EU?**

Yes.

**Question 10c: If negative effects indicated: Please indicate the negative effects of the current practice of TPLF in the EU you have observed:**

- Conflicts of interest involving litigation funding.
- Undue influence on the substantive and procedural decisions of the funded beneficiaries, including settlements and appeals.
- Funding of frivolous claims with the aim of reaching an extorted settlement, or other forms of abuse.
- Funding aimed at obtaining confidential information from the defendant through court-ordered disclosure of evidence.
- Reduction of compensation for the claimant.
- Extension of the duration of proceedings.

Other negative effects (please specify below):

- It causes funded parties to be under-compensated, as the funder may take their return on investment, with the result that the funded party is not fully compensated for the harm they have suffered.
- Legal costs might increase as well as the price of insurance premiums.

**Please describe the observed negative effects/forms of abuse, and provide details in terms of the relevant cases:**

Due to the secretive nature of most funding arrangements, and the fact that settlements reached are not always made public, the true scale of the negative effects arising from funding arrangements remains unknown. There are increasing concerns regarding litigation being sponsored by parties with unclear motives, potentially ranging from gaining illicit access to business secrets through the litigation process (making use of evidence requests), the laundering of proceeds from illicit activities, interference with the judicial process, attempts to undermine competitors, or potentially even the pursuit of motives with geopolitical dimensions. Some ideas on the type of effects can be drawn from punctual evidence in press reports. Here are some examples:

- In October 2023 a securities class action against **Airbus** was thrown out by the judge of the District Court in The Hague who established that the funder initiated the case, attracted claimants, registered their claims, gathered evidence, and wrote the writ of summons, and filed the case at



the court; the claim foundation was found by the Court to be an “empty shell” created by the funders.<sup>20</sup>

- In the Netherlands, the claim organisation suing the national lottery (“Staatsloterij”) used the **money (that should have been destined to fund the case) to buy villas and luxury cars**. The director of the organisation embezzled 3 million euros from the fees paid in by the claimants and committed tax fraud. In 2021, he was sentenced to two years in prison.<sup>21</sup>
- In the Netherlands, an ad hoc claim foundation is **suing the Dutch National Health Service (GGD)** over a data breach in a Covid test results database. It claims an amount of **EUR 3.2 billion**. The claim foundation and the funder allege that 6.5 million people were affected. The GGD points out that the data of only 1,250 people was “misused” and led to them receiving a WhatsApp message wishing them well. A Dutch funder is investing 1 million euros in the case and if the case is won, the **funder will make a 500% rate of return on his investment**.<sup>22</sup>
- In the UK, funder Therium (which is also active in the Netherlands and Germany) and the claimant lawyers **took 80% of the settlement** as fees in the postmasters’ collective case against the Post Office.
- In the Banksia case, 16,000 debenture holders were charged legal fees and funder commissions of almost \$20 million out of a \$64 million payout, which the court found not only egregious but that some of the fees were fabricated and some were grossly inflated “with dishonest intention. In a ruling of the Supreme Court of the State of Victoria, it was concluded that the plaintiff lawyers and funders had developed a scheme to **defraud the claimants**. They **intimidated and threatened** the claimants with bankruptcy in case they would continue to question their fees. **Evidence was destroyed, invoices were inflated, cheques were faked, lawyers and funders lied to the court** about the funding agreement, and there was a **conflict of interest** because the lawyers had a stake in the funder and they **breached their fiduciary duty** vis-à-vis the claimants.<sup>23</sup>

### Question 11: Would you say other instruments, such as legal aid, public fund, philanthropic funding, crowdfunding, or legal cost insurance, can be as effective as TPLF to facilitate access to justice?

**Yes.**

Other forms of financial assistance or support, like legal aid or legal insurance products, have already been tested and can be also effective in providing fair access to justice. Because TPLF is unregulated it does not provide the same level of guarantees for vulnerable

<sup>20</sup> <https://www.deminor.com/en/news-insights/groundbreaking-judgement-in-dutch-collective-opt-out-proceedings-against-airbus-both-claim-foundations-declared-inadmissible>.

<sup>21</sup> Source: multiple articles in the Dutch press. There are similar examples in [the UK](#), [the US](#), and [in Australia](#): ‘Utterly dishonest’ Axiom fund solicitor jailed for fraud | News | Law Gazette  
New York lawyer disbarred after admitting litigation funding scam | Reuters  
Litigation funder lurches towards the abyss as directors go to war (insolvencynewsonline.com.au).

<sup>22</sup> Source: multiple articles in the Dutch press e.g. see <https://www.houthoff.com/insights/news-update/multibillion-euro-privacy-claim-off-the-table>.

<sup>23</sup> Source: <https://www.abc.net.au/news/2023-08-07/banksia-securities-collapse-class-action-merit-challenging-fees/102689008> .



parties. This does not mean that TPLF is to be prohibited<sup>24</sup>, instead, it needs to abide by a few minimum rules at EU level like any other financial service.

**Question 13: can ADR/ODR, Ombudsman, grievance systems of companies be as effective or more effective than TPLF to seek redress?**

**Yes.**

**Would you say they could result in faster and more adequate compensation for claimants?**

**Yes.**

**14. Do you have indications that the use of TPLF in your jurisdiction has led to economic impacts (e.g. on costs of litigation, increasing costs of legal insurance etc)?**

**Yes.**

**15. Do you see a need for a regulation of TPLF at national or EU level?**

**Yes, at EU level.**

**Please explain:**

There is a case for regulating TPLF on the following major justifications:

- (1) **regulating a financial service that operates in total freedom** and provides services to often vulnerable parties;
- (2) regulating a **service that has a role in the justice system** just as lawyers;
- (3) avoiding abuses in litigation also via **forum shopping and instrumentalization of access to justice** for obscure objectives;
- (4) **avoiding legal fragmentation** in the internal market;
- (5) granting some **protection against foreign interference** via our judicial system.<sup>25</sup>

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<sup>24</sup> In this regard inspiration could be taken from Rule 237 of the [ELI – UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE](#), which states that TPLF is not prohibited however posing certain preconditions and standards for allowing funding to judicial proceedings (e.g. disclosure of the fact that the claim is funded and disclosure of the details of the funding agreement upon the court's request).

<sup>25</sup> In September 2023, the U.S. Senate introduced a bipartisan "[Protecting Our Courts from Foreign Manipulation Act](#)" to end overseas meddling in litigation in the USA. It proposes safeguards to require greater transparency and accountability with regard to foreign actors such as China and Russia using third-party litigation funding to support targeted lawsuits undermining the national and economic security of the U.S. To our knowledge, no such initiative is underway in the EU, though the risks appear to be the same.

We would encourage the adoption of the safeguards proposed in the Resolution on Responsible Private Funding of litigation, which was adopted by an overwhelming majority (504 votes to 57, with 65 abstentions) of the European Parliament.

**Question 16: effectiveness of safeguards proposed in the Directive in the EP's Resolution on Responsible Private Funding of Litigation**

**All safeguards proposed are very effective.**

**Question 17: any other potential measure that might be effective**

- The discrepancy between the profit-making potential of funders, who can secure significant percentages and interests on compensation, and the right of claimants /consumers to receive full compensation for their grievances, urges to call for greater transparency. Transparency should thus focus on the disclosure of the funding agreement. Furthermore, the claimant's estimated remuneration and the remuneration finally charged by the law firm/ lawyer at the claimant's expense by way of costs and interest for late payment, should be transparent and disclosed to the claimant.
- Transparency is also needed to assess where the funders' money is originating from, in order to protect the greater public interest and safeguard EU security and stability.
- Consider further measures (e.g. sanctions policy or foreign direct investment policy) that address the risks posed by the financing of litigation funding by sovereign wealth funds, nefarious foreign actors, and/or as a tool to launder money or circumvent trade sanctions<sup>26</sup>.

**Question 18: Please provide any other comment that you have**

Further comments regarding the rationale and policy behind regulating TPLF that should be taken into account:

- There is momentum building to regulate a largely unregulated financial instrument (TPLF). Therefore, we consider it crucial for DG FISMA to be involved and collaborate actively with DG JUST in this endeavour to examine TPLF regulation opportunities in the EU.
- Establishing licensing/authorisation of litigation funders as providers of regulated financial services to be considered. TPLF market players should be transparent, registered, and institutionally supervised.
- If not effectively regulated, we could witness the rise of a highly litigious trend in the EU negatively impacting competitiveness and the overall investment climate.

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See also [TPLF-Grim-Realities-8.29.24.pdf \(institutelegalreform.com\)](#), page 12.

<sup>26</sup> [TPLF-Grim-Realities-8.29.24.pdf \(institutelegalreform.com\)](#), page 12, 13 and 15.





Providing more space for opportunistic or frivolous claims could discourage businesses from taking risks, thereby hindering business innovation and competitiveness.

- TPLF could result in excessive costs and even trigger the phenomenon of “social inflation”.<sup>27</sup> This could lead to higher prices for customers of companies targeted by litigation and increased insurance premiums.<sup>28</sup>
- Therefore, it is essential to strike a balance between protecting legal rights and maintaining an attractive investment environment.
- The geopolitical implications of TPLF should not be underestimated, as third-party funding of claims outside the EU could be used to influence the political stability and competitiveness climate within the EU.<sup>29</sup>
- We highly support the European Parliament of the Resolution on Responsible Private Funding of Litigation as a global standard-setter regulating TPLF at EU level.

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<sup>27</sup> Social inflation refers to a trend where the costs and verdicts associated with civil litigation rise significantly, outpacing general economic inflation, without necessarily corresponding changes in the legal or factual grounds of claims to justify such increases.

<sup>28</sup> For more see [US litigation funding and social inflation: the rising costs of legal liability | Swiss Re](#).

<sup>29</sup> See also EPRS, ‘Responsible private funding of litigation European added value assessment’, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS\\_STU\(2021\)662612\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf), page I (Why should the EU act?).