The consultation closes on **3 March 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to CJCLitigationFundingReview@judiciary.uk. If you have any questions about the consultation or submission process, please contact CJC@judiciary.uk.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

**You must fill in the following and submit this sheet with your response:**

| | |
|---|---|
| Your response is (public/anonymous/confidential): | *Public (except one "confidential" marked attachment)* |
| First name: | *Ekkart / Herbert* |
| Last name: | *Kaske / Woopen* |
| Location: | *Brussels* |
| Role: | *Management / Management* |
| Job title: | *Executive Director / Director of Legal Policy* |
| Organisation: | *European Justice Forum AISBL (EJF)* |
| Are you responding on behalf of your organisation? | *Yes* |
| Your email address: | [redacted] |

**Information provided to the Civil Justice Council:**

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

***About the contributor***

*The European Justice Forum is a not-for-profit business organisation based in Brussels, working to build fair, balanced, transparent and efficient civil justice laws and systems for both consumers and businesses in Europe. EJF recognises the significant challenges in dispute resolution against a backdrop of limited public funding. Our view is that litigation should be a last resort, to be used after all alternatives (e.g. mediation, ombuds or regulatory channels) have been exhausted. Litigation is generally time-consuming, stressful, extremely expensive and often fails to deliver what a party wants (e.g. an apology rather than financial reward). Therefore, we would like to see consideration of alternative routes to dispute resolution baked into legal procedure.*

*EJF is concerned by the strong growth in UK and in EU of mass litigation backed by litigation funding. Without any formal regulation in most of Europe, the situation is opaque; however, the negative consequences are becoming clearer and clearer.*

*Therefore, EJF calls for the adoption of robust regulation in the UK including transparency requirements related to funding and funding arrangements that would ensure consumers are provided with all the information that is needed for them to take important decisions related to potential litigation. Without such transparency requirements, ill-intentioned actors have the opportunity to fund litigation against UK-based organisations and even use such funding arrangements for money-laundering.*

*EJF welcomes the opportunity to provide these comments to the CJC based predominantly on our involvement in developments in Europe but also in other jurisdictions that we have studied in the course of our legal research (e.g. the Province of Québec in Canada).*

## *Executive Summary*

*The European Justice Forum (EJF) provides a detailed response to the Civil Justice Council's consultation on Third Party Litigation Funding (TPLF) regulation. The response highlights the complexities and challenges of litigation funding and emphasizes the need for transparency, competition, and oversight to ensure fair outcomes for all parties involved.*

### *Key Findings and Recommendations*

#### *1. Access to Justice and Equality of Arms*

- *TPLF can enable procedures in court in some cases, particularly collective actions, which would otherwise not have taken place. But such facilitation of court procedures remains selective and profit-driven, and it is more often than not doubtful whether the result of the procedure – which much too often consists in a settlement and not in a court decision – really produces results which can be considered to be "just and fair", so really provide an increase in "justice".*
- *Concerns exist regarding the equality of arms of the parties but just as well regarding other aspects as e.g. their vulnerability. While is taken for granted that consumer claimants are "vulnerable" and "less armed", the vulnerability of defendants to unfair public attacks is often neglected, and when such vulnerability of reputation is being taken advantage of by a multi-billion financial services providing industry, it is far from obvious on which side there are the stronger arms and where there is higher vulnerability. TPLF is often driven by financial incentives rather than by fairness or the intention of producing just results.*
- *TPLF is not the only factor influencing "equality of arms" and, therefore, it should not be discussed only from a financing perspective. A broader discussion is needed that includes other pressure points such as reputation, media, and other economic means.*

#### *2. Regulation of TPLF*

- *The UK currently has no formal regulation of TPLF, which is incongruous given its rapid growth, particularly in mass claims.*
- *Measures taken by certain EU member states include the following:*
  - *Transparency requirements for funding agreements (Germany, Portugal, Austria, Czech Republic).*
  - *Legislative caps on funders' returns (e.g. Germany: 10%, Estonia: 30%, Poland 30%).*
  - *Competence-building in courts to assess funding arrangements and their economic impact[1] – Dutch courts e.g. could but not often do consider them incidentally when comparing different claimant vehicles who apply to become sole representative of the beneficiaries.[2]*

[1] The transposition of the EU Directive on representative actions (Directive (EU) 2020/1828) into Austrian law stipulates that the Commercial Court of Vienna has exclusive jurisdiction in the first instance for all representative actions.
[2] Regarding Dutch court rulings, e.g. on TikTok or Airbus, see also our attachment on B2B cases.

  - *A regulatory framework to ensure fair distribution of litigation funding benefits (calling for at least partial public funding that should be independent and non-profit-based).*[3]
- *Recommendations include:*
  - *Mandatory registration of funders as financial service providers.*
  - *Due diligence requirements & transparency to prevent money laundering.*
  - *Court oversight or supervisory body review of funding agreements.*

### *3. Risks and Harms of TPLF*

- *Risks identified include:*
  - *Selective funding based on profit potential alone.*
  - *Lack of transparency and lack of competitive pricing.*
  - *Conflicts of interest between funders and claimants and lawyers (potentially caught in the middle, owing duties to claimant, but paid by funder, perhaps regarding a portfolio of claims).*
  - *Potential for money laundering through litigation financing.*
  - *Siphoning of value from the claims and risk management ecosystem – i.e. away from policyholders, claimants, and insurers – and transferring it to attorneys and investors.*
  - *Contributing to social inflation through e.g. increasing litigation costs and insurance premiums.*
- *Strong support for formal regulation to mitigate these risks rather than relying on self-regulation.*

### *4. Caps on Funders' Returns*

- *Lack of competition and lack of transparency allows funders to secure high returns, often at the expense of claimants.*
- *Suggested cap structure, defined by mandating a minimum pay-out for beneficiaries which ensures that cost excesses beyond cost reimbursement will be at the expense of funder's profit and not at the expense of the beneficiaries, as follows:*
  - ***Baseline:** minimum of 90% of the total compensation should be paid out to claimants/beneficiaries (based on German model of a 10% cap on the "total reward" to be paid by the defendant).*
  - ***The 90% minimum can be reduced where competition between funders is evidenced, as follows:**. **at least** 75% in consumer cases, 60% in non-consumer cases.*
  - *Courts should be empowered to adjust the minimum pay-out of compensation based on competitive tenders between funders.*

### *5. Alternative Litigation Funding Models*

- *Encouragement of public (co-)funding models such as:*
  - ***Québec Model:** Publicly managed fund in the judiciary supporting class actions, ensuring fairness and control over funding terms in contracts for complementary private Third-Party Funding.*

[3] See e.g. also our answer to question 16.

- ***Consumer Ombudsman-led funding:*** *Public bodies leading representative claims (being equipped in state budget for their running costs and possibly to a limited extent for litigation cases).*
- *Greater exploration of consistency with rules on conditional fee agreements and damages-based agreements*
- *Greater exploration of the potential of legal expenses insurance.*
- *Calls for enhanced transparency in litigation financing agreements.*

### *6. Role of Courts in Controlling TPLF*

- *Courts should have the power, means and obligation to:*
  - *Review funding agreements, particularly in consumer cases unless this task should be given to a central judicial unit – as it has been done in Austria to the federal cartel prosecutor to whom this task has been entrusted.*
  - *Approve settlements to ensure fair distribution of the total reward for the purposes of compensation, cost reimbursement and funders' profits.*
  - *Assess whether alternative dispute resolution mechanisms are more appropriate and have been exhausted before they admit collective litigation.*
  - *Require disclosure of TPLF agreements in full to supervisor (or to the court if no central judicial institution should be available) and to the opponent as redacted by the supervisor (or court) to prevent conflicts of interest and unfair litigation tactics.*

### *7. Conflicts of Interest and Market Competition*

- *Calls for increased market competition through:*
  - *Transparent tenders for funding agreements.*
  - *Independent supervision of funding arrangements.*
  - *Prohibition of funders influencing legal decisions or settlements – silent investment would remove potential for conflicts.*

### *8. Impact of TPLF on Litigation Costs and Conduct*

- *TPLF may contribute to inflated legal costs as legal fees are likely structured to consume all available funding.*
- *The relative ease of bringing "follow-on" claims in competition and securities cases makes them particularly interesting for funders financially which explains their relatively high frequency.*
- *To the extent TPLF triggers tort cases in the US, it may prolong litigation and drive social inflation there, leading to higher insurance premiums and reduced affordability of coverage.*
- *Concerns about funders prioritizing profit over fair outcomes for claimants.*

## ***Conclusion***

*The consultation response underscores the necessity to put in place a structured regulatory framework for TPLF. Without intervention, there is a risk of unchecked profiteering,*

*potential abuses, and conflicts of interest that undermine the integrity of the justice system. The EJF calls for transparency and stronger oversight to protect both claimants and defendants while maintaining access to courts and more importantly access to delivery of justice. Furthermore, a very high minimum pay-out to beneficiaries should be ensured which could easily be done by imposing e.g. a 90% ratio on funded procedures unless it can be proved as a result of a competitive tender process that the funding solution chosen reflects a real market solution at the time of the funding decision.*

**The full list of consultation questions is below:**

- **Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.**
- **All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.**
- **It is not necessary to answer all the questions.**

**Questions concerning '*whether and how, and if required, by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.**

1. To what extent, if any, does third party funding currently secure effective access to justice?[4]
   *Third Party Litigation Funding (TPLF) is one of several ways of funding litigation. Whether ~~litigation or~~ TPLF assists with securing access to justice is a case-specific question.*
   *Funding by a third party can be achieved in various forms: public funding, private funding for profit or private funding for other non-profit motives.*
   *While it is true that some cases can be brought involving funders that would not otherwise be brought (e.g. some investor state disputes in arbitrations), given that funders only accept a very small percentage of cases put to them, it cannot be said that TPLF provides a panacea in providing funding for all cases that would merit funding from a justice point of view.*
   *Against this background it should be noted that public funding of redress can also be provided*
   *a) via regulatory redress activities like lowering fines in exchange for swift, uncomplicated and appropriate compensation of victims (for instance, following the Scandinavian model of allowing public qualified entities (QEs) to bring cases to court), or*
   *b) via a separate state fund, partially co-funding or fully funding mass claim cases.*

   *Besides, there is also the option of private litigation funding, either as a non-profit activity via donations (e.g. crowd funding) or as a type of credit or investment for profit (e.g. professional private funders).*

[4] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

2. To what extent does third party funding promote equality of arms between parties to litigation?
*The discussion on equality of arms needs to consider the vulnerability of the defendants. In the case of a collective action - as opposed to a claim brought by an individual - it is questionable whether there is any inequality of arms to address in the first place. Well reputed companies creating value for society vs. funders creating profit for only a few selected investors.*
*The question seems to refer to the financial means to go through different court stages. By restricting the view to financial means the question appears to be too narrow. Equality of arms may cover a larger scope. It also may cover other forms e.g. reputational pressure via (social) media, strikes or boycotts etc. and, therefore, needs to be discussed in a broader context.*

3. Are there other benefits of third-party funding? If so, what are they?
*None. Litigation funding anyway only helps with cases that are likely, in the view of the funder, to bring in a substantial return. Claims for specific performance/non-monetary redress would not be of any interest to funders.*

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[5] If not, what improvements could be made to it?
*Currently ~~the~~ litigation funding in the UK is not subject to any statutory regulation ~~entirely unregulated~~. It is challenging ~~difficult~~ to obtain publicly available information on the growth of TPLF, but data appears to show that mass claims are growing very rapidly in the UK and, as most mass claims are supported by TPLF this growth also suggests growth of TPLF. In addition, there are reports of more than 70 litigation funders operating in the UK. It is incongruous for such an important and growing sector to be unregulated, particularly for funded consumer claims.*

*As an EU-based organisation, we believe it could be useful to give some commentary on the current position in Europe and how this might be relevant for the CJC's considerations.*

*a) In the EU, only the Representative Actions Directive proposes some regulation in the area of mass claims, which we consider itself neither sufficient nor effective. This opinion is shared by several member states as they have introduced stricter regulation on private litigation funding during the transposition of the Representative Actions Directive. Some samples:*

*- Transparency of contracts to courts (like in Germany, Portugal) or supervisor (like the Federal Cartel Prosecutor in Austria)*
*- Transparency as to the identity of the beneficial owner behind the funds (anti-*

[5] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

*money laundering approach, like in the Czech Republic)*
*- Cap on redress part for funder compensation to limit the potential for profit (like in Germany with 10%, or Estonia and Poland with 30%)*
*- A maximum loan rate with the central bank as reference (like in Slovenia).*

*Besides, for many decades already, in the Canadian Province of Québec, there has been a successful practice of public co-funding, managed by a public body.*

*b) There appears to be insufficient competence in courts and tribunals in assessing contractual economic factors and pricing. This goes to the concern that too much of a consumer's compensation may be eaten up by the returns/profits of funding companies.*

*Potential solutions:*
*- increasing competition between private funders for more price transparency and disclosure as to the payouts that beneficiaries can expect*
*- increasing competition between public and private funding for more price transparency*
*c) oversight of funders, e.g. via registration (as this can be regarded as financial service)*
*d) disclosure of litigation funding agreements (to be able to judge the economic factors and control of the funder over the conduct of the litigation) and disclosure of the identity of the beneficial owner behind the funds (anti money laundering approach).*

*<u>Reasoning:</u> Third-party litigation funders should be subject to the same anti-money laundering rules and regulations as other finance providers, such as law firms, banks and insurance companies, mirroring the regulations already in place. To the extent not covered by proposed regulation, due diligence obligations should be introduced to protect against money laundering, e.g. to check the origin of funds that private third-party funders use to finance litigation, especially as this seems not to be addressed in the Association of Litigation Funders voluntary Code of Conduct.*
*- bundling the competence in one institution would seem appropriate (e.g. court or other in a supervisory body like the Financial Services/Conduct Authority/Central Bank or Competition Regulator, or a public co-funding body).*

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
    a. The nature and seriousness of the risk and harm that occurs or might occur;
    *- selective, profit based funding*
    *- overpricing due to absence of transparent tenders and inability of claimants to competently evaluate different offers*
    *- money laundering and national security (foreign sources of funding can be invested for other motives than profits)*
    *- conflicts of interest between funders and claimant/beneficiaries either in the*

*settlement context or whether to continue a claim*
*- inadequate compensation for injured parties in comparison to the profits of intermediaries.*

b. The extent to which identified risks and harm **are addressed or mitigated by the current self-regulatory framework** and how such risks or harm might be prevented, controlled, or rectified;[6]
*According to our view only possible via regulation, state supervision and to a certain extent court control.*

c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third-party funding market.
*./.*

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
   a. If not, why not?
   *Application to all types of litigation and arbitration. Otherwise, there is a risk of circumvention.*

   *b.* If so, which types of dispute and/or form of proceedings[7] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[8]
   *Consumer disputes may allow upfront different forms of up-front settlement. E.g. Consumer Ombuds bodies or Consumer ADR, while commercial settlement may go up-front via arbitration or anti-competition bodies.*

   c. Are different approaches required where cases: (i) involve different types of funding relationship between the third-party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?
   *As soon as private litigation funding is involved the principles in point (7) should apply. There should be regulation irrespective of how TPLF is structured in a particular case. If certain structures of TPLF were unregulated,*

[6] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.
[7] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[8] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

*funders would be likely to increase use of those approaches to avoid regulation. We can see this in the EU Representative Actions Directive transposition. For instance, in Germany a cap of 10% on the redress part going to funders will make this type of mass claims less attractive for profit making to TPLF. Therefore, funders in Germany have already declared that they will continue to use the so-called "assignment model," which has no such cap, instead.*

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
***Full transparency of contracts to court or supervisory authority**, measures to increase **competition situations** (see our attached paper on competition elements in 5 different phases of mass litigation, including competition between funders), **market supervision** - being standard in most financial business sectors, **standardisation & transparent upfront information** (also to beneficiaries) of cost elements to improve comparability for claimants (as in other financial services), **no influence of funders on court proceedings**.*

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
    a. What impact, if any, has the level of litigation costs had on the development of third-party funding?
    *High UK costs of lawyers and court procedures have made TPLF attractive and with the availability of opt-out cases in competition cases litigation funding has grown with the increasing prospect of winning huge rewards. It is a dynamic that results in higher litigation costs, and not more affordable justice for the British public.*

    b. What impact, if any, does third party funding have on the level of litigation costs?
    Research indicates that TPLF contributes to social inflation by prolonging legal disputes and escalating costs for defendants and insurers. Essentially, when external financiers fund lawsuits, plaintiffs may have less incentive to settle quickly, leading to longer trials[9] (and surprisingly often to the exhaustion of the funding budgets).

    c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
    To our knowledge the self-regulatory regime has no impact at all, because it does not address the risks and problems of litigation funding and because it does not include a statutory compliance and enforcement mechanism. It is also voluntary and only a fraction of funders are members of the ALF

[9] https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf, p.7.

(Association of Litigation Funders).

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[10]
More competition elements (e.g. tenders), contract transparency and knowledge as to the funding economics as well as market oversight and safeguards against conflict of interest should contribute to bringing costs down.

e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings? No
   i. If so, why? ./.
   ii. If not, why not?
   *Driving litigation costs even higher for defendants, which may become a question of taking companies (especially SMEs) to the brink of insolvency.* This risk has already been identified and mitigated in England & Wales in relation to ATE costs. We see no reason why funding costs should be treated any differently.

9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact, if any, do they have on the availability of third party funding and/or other forms of litigation funding.
*Recoverability of adverse costs has an important beneficial effect in that the claimant needs to check thoroughly the likelihood of winning the case to start only well-founded claims. This also protects the court's time from being wasted by speculative or abusive litigation, with no risk of adverse costs awards.*
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?
*Claimant and funder(s) should be liable (jointly and severally) in full for adverse cost orders from the start.*

**Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'**

11. How do the courts and how does the third-party funding market currently control the pricing of third-party funding arrangements?
*A "market" as such does not seem to exist, as there does not seem to be real competition and certainly no oversight. There is also a lack of detailed knowledge, given the current lack of transparency in the funding market. Against this background, we do not see how the courts can currently control the pricing of third-party litigation funding agreements.*

*A valuable survey of the Class Representatives Network in the UK from 20th of September 2024 (*https://classrepresentativesnetwork.org/research-and-reports/*)*

[10] Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

*unveils the **issues of** (a) **lack of competition between funders** and (b) **insufficient internal funding expertise and external independent advice**. Proposed Class Representatives (PCRs) need to receive independent advice on funding agreements to mitigate conflicts of interest (i.e. advice by involved solicitors linked to or hired by funders may not be sufficiently independent). This may be done by an authority. E.g. in Austria, the Federal Cartel Prosecutor has the right to investigate the contracts and also designates and supervises the Qualified Entities in Representative Actions. Alternatively, the Financial Conduct Authority might be a suitable regulator given that it also has competition jurisdiction in the financial services market.*

12. Should a funder's return on any third-party funding arrangement be subject to controls, such as a cap?
    a. If so, why?

    *Generally, caps are pro-consumer as they ensure that a material sum is distributed to the class members. The caps could be relaxed a bit depending on the proven competition between funders as well as the matter area. Consumer cases should involve a lower cap than non-consumer cases.*

    *The primary goal of any mass claims system should be to maximize the share of compensation that goes to claimants and beneficiaries. Ensuring a fair and competitive funding structure is key to achieving this. A low initial cap, such as the 10% limit in Germany for Representative Actions, could work as an initial safeguard and be adjusted if there is sufficient competition among litigation funders.*

    *One way to establish such competition would be through a transparent tender process, requiring multiple bids (e.g., 3–5 offers). This would allow the funding cap to increase beyond the baseline 10% to the best available offer while ensuring that claimants retain the largest possible share of compensation. To maintain fairness, a reasonable minimum limit of beneficiaries' share could be based on the order of magnitude already defined in the approach taken by the Amsterdam courts:*

    - ***Maximum share of a funder in the compensation of 25% for consumer matters**, ensuring that at least **75% of the compensation intended for the beneficiaries really remains with the beneficiaries***
    - ***40% maximum for the funder of the beneficiaries' compensation in non-consumer matters**, ensuring that at least **60% of the compensation remains with the beneficiaries.***

    ***Cost reimbursements to funders need to be left out in this consideration to ensure that the compensation perspective prevails for the beneficiaries and is not mingled with the perspective of a "total award" which includes cost considerations.***

*By fostering competition among private funders across all mass claims measures, this approach ensures that legal and funding costs are kept in check. As a result, a greater percentage of the awarded compensation is retained by those who have suffered harm, rather than being absorbed by legal fees and funders' commissions*

b. If not, why not?
./.

13. If a cap should be applied to a funder's return:
    a. What level should it be set at and why?
    *See question 12.*

    b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
    *Yes, by legislation at e.g. minimum compensation of 90% in consumer cases (approx. 10% max. share achievable by the funder) and 60% in non-consumer cases. The court should be given the power to lower the minimum compensation for the beneficiaries (at the same time raising such a cap) in line with the public supervisory authority's recommendation that is based on its review of the various funding offers provided in a tender. The Amsterdam court chose 25% for consumer matters which should be translated rather into 75% minimum payout of the compensation for the damage suffered and 40% for non-consumer matters which is better phrased as a 60% minimum for non-consumer matters.*

    c. At which stage in proceedings should the cap be set?
    *At the outset, before admitting the claim in the certification phase.*

    d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
    *Beyond the distinction of consumer and non-consumer matters, the factors that come to the fore in a tender procedure with 3-5 offers should be sufficient for the reviewing authority to confirm the acceptable pricing cap. Without several offers, there is a serious threat of falling back into the current practice of a symbiosis of specific law firms and funders or even of portfolio funding or law firm funding which due to their complexity denies the possibility of any competition for individual cases from the outset. In order to ensure access to the courts, other initial funding types with less profit potential for otherwise non-involved sources of funding need to be supported and developed, as explained. Even out-of-court solutions are likely to lead to more effective delivery of justice than an exploitation of injustice with costs that are out of proportion and largely excessive profits made for a small group of lawyers and funders.*

e. Should there be differential caps and, if so, in what context and on what basis?
*See question 12.*

**Questions concerning how third-party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'**

14. What are the advantages or drawbacks of third-party funding?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
See replies to all the other questions.

15. What are the alternatives to third party funding?
    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
    *Different Types of third-party funding in mass claims:*
        - *Private funding (e.g. crowd-funding, donations)*
        - *Public (Co-)Funding (by authorities bringing case to court themselves and paying the costs, such as in the Nordic countries, or via a public fund (e.g. the "Québec Model")*

    b. Can other forms of litigation funding complement third party funding?
    Alternatives include Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
    *Yes, in general.*
    *In addition to the listed options above you may also look at public (co-)-funding. This may come from a dedicated public fund. But may also include public class representatives, e.g. in the EU Representative Actions Directive both private and public Qualified Entities are able to sue as representatives in court. This can be done by public authorities, supervisors or regulators (e.g. Bank of Italy, Polish Financial Ombudsman).*
    *If we look at a more holistic model, we could even take the example of the Danish public Consumer Ombudsman or other ombuds bodies that are able to sue, even if they are (partly) industry financed.*

    *In Germany, legal expense insurance is quite frequently taken out by customers. Some insurers have developed a "service clause" to reduce the risk of legal professionals taking advantage of such policies. Without this clause,*

*lawyers might amass individual claims instead of using more efficient procedures.*
*Under the service clause, the insured receives a discount on their premium if they contact their insurer first before reaching out to a lawyer. This allows the insurer to advise them on alternative ways to seek redress. These may include regulatory redress, ombuds solutions, or even a group or other collective claim.*
*Following such a recourse option is likely to cost the insurer less than handling multiple individual claims in court. The latter would also clog up the court system with claims that do not merit such significant public resources. Again, these claims would primarily serve the revenue interests of lawyers rather than the claimants' interest in obtaining redress.*

c. If so, when and how?
*See b.*

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
*The "Québec Model" is strongly recommended: A very interesting, exemplary and apparently well-working solution can be found in the Canadian province of Québec which established as part of the Judiciary (not part of the executive power) a small, highly qualified and specialized team, supervised by the Québec Ministry of Justice. They have built up over the past 40 years a fund of their own with total assets of approx. 48.5m Canadian Dollars (ca. £27m) end of 2024 from which they can initiate collective actions which in their perspective truly are in the public interest. As they fund initial actions without charging interest at all, they are the first body which learns about upcoming intentions to start new collective actions. They then assist claimants in obtaining additional commercial TPLF (where necessary) and review the contracts to ensure that their terms are fair, players "fit and proper" and persons involved in funding and the action itself able to handle such case (https://faac.justice.gouv.qc.ca).*

*As TPLF in the UK provides funding for only a very small subset of cases proposed to them, it would seem that the Québec model may be a good alternative for really broadening access to justice, without the concerns regarding conflicts of interest, capital inadequacy, profits eating into claimants' compensation and indeed unfair contractual provisions.*

17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?
*Any insurance issues should be discussed directly with the insurance industry. We can certainly see (from the example of Germany) that the problems around conflicts of interest between funders and the funded party are resolved in the German legal expenses area, as, when coverage for legal costs has been confirmed, the legal expense insurer funding the case has no say over the strategy of the claim. It is down to the insured person and the lawyer to determine strategy, settlement etc. We see merit in this approach in any funding to avoid conflicts.*
*Furthermore, another advantage of legal expense insurance is that it is already subject to strict regulation.*

19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third-party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?
*Any insurance issues should be discussed directly with the insurance industry.*

20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
*Also for crowdfunding same rules should apply as for other private litigation funding. See basic principles in point 7.*

21. Are there any reforms to portfolio funding that you consider necessary? If so, what are they and why?
As portfolio funding makes a law firm dependent on a funder, it should be compulsory for the law firms to make this dependency transparent so as to enable the potential client to understand to which extent the law firm's objectivity towards the client's case may be endangered by the firm's own economic interest.

22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?
*See comments on public (co-)funding, point 16.*

**Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'**

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

*We suggest enshrining into law the principles applied in the Riefa Case (1602/7/7/23 Christine Riefa Class Representative Limited v Apple Inc. & Others - Judgment (CPO application) [2025] CAT 5 | 14 Jan 2025).*

24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?
    May require further consideration.

25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?
    ./.

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?
    *The court should in the admission phase in all cases check whether there are other more effective and efficient ways of dispute resolution and test them first. For example, public redress or ombuds solutions, or ADR or Arbitration possibilities.*

27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?
    *In the transposition of the EU Representative Actions Directive, several countries have gone beyond the safeguards for private litigation funding and explicitly given the court the power to look into the contract (e.g. Germany, Portugal) or allowed a public body, in Austria the Federal Cartel Prosecutor, to be able to request the contract. See also principles stated in point 7. We see considerable merit in this approach, for the protection of funded parties and defendants alike.*

**Questions concerning provision to protect claimants.**

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?
    *There should be no control (as it is the case already in the German legal expense insurance sphere where the issue of potential conflict has been recognized and resolved). But funders have a natural economic interest to influence decisions or settlements as these influence their ROIs.*
    *See here also recent feedback of the funder as settlement was found at the Merricks vs. Mastercard case (https://www.lawgazette.co.uk/news/funder-to-challenge-premature-mastercard-case-settlement/5121721.article).*

    *The most important instrument of control for funders is their right to withdraw funding, but there are concerns also around control of settlement*

*discussions/initiatives. As referenced above, funders should not be permitted to influence strategic decisions in the case to avoid conflicts of interest.*

29. What effect do different funding mechanisms have on the settlement of proceedings?
*Public funding has no effect on settlement, whereas private funders may want to have influence and exercise influence as they have direct economic interests in the outcome of the case. So, there is a potential conflict between the interests of the beneficiaries, the interests of the law firms (but bound by fiduciary duties) and the interests of funders (so far unfortunately not bound by fiduciary duties).*

30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?
*Courts should be required to consider also the parts of proposed settlements which cover funders', lawyers' and experts' interests.*

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
*Balancing interests of defendants and claimants/beneficiaries and review funders' and other service providers' remuneration. See above 30.*

32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?
*In a more general sense: Detecting conflicts of interest requires the disclosure of litigation funding agreements, and checks by the judges or judiciary-led independent institutions/organisations.*

33. To what extent does the third-party funding market enable claimants to compare funding options different funders provide effectively?
*The "market" shows a very low degree of competition which means that claimants cannot compare different options. To speak of a "market", various requirements have to be fulfilled: e.g. transparency of offers, tender process, licensing of market players, standardization of information, knowledge building, …*

*The lawyers acting for funded parties should have the obligation to explain litigation funding options to the funded parties and their relationship, if any, to the funder. For example, if a law firm is engaged by the funder to pursue a portfolio of claims, this should be disclosed to the funded party (see also above Question 21.).*

34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third-party funders where third party funding is provided?
*Structurally – based on different interests – always, as already explained.*

35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.
*See here principles in point 7.*
*Detecting conflicts of interest requires the disclosure of litigation funding agreements to the court, supervision and checks by judges or independent and knowledgeable institutions/organisations. We suggest that the funders be "silent investors," once funding has been provided, to avoid conflicts of interest, akin to the position in the German legal expenses insurance market.*

**Questions concerning the encouragement of litigation.**

36. To what extent, if any, does the availability of third-party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
    a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
    *Selectively only, driven by risk and return ratio of funders.*
    b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?
    *Focus on economic incentives may set the wrong perspective vs. outcome-based approach from beneficiaries' perspective. Where it is funding for profit only, publicly vulnerable, well reputed companies may become targets for such approaches. In the U.S., claimant lawyers and funders will seek to force companies to settle, which they often do for a variety of reasons, even when companies would ultimately prevail in court. The growth of unregulated litigation funding in the UK risks increasing the chances that regardless of whether cases are vexatious or not they will be launched against successful companies.*

    c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?
    *Yes - the higher the economic incentives, the higher the attractiveness.*

    When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.
    *Private litigation funding for profit as an investment/asset class.*

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.
*Referring to competition and securities cases (36 a)): Authorities having confirmed objectionable behavior could themselves order that redress be made. Execution might be entrusted to lower levels of these public bodies, or even to one central, ombuds institution as a common infrastructure for all such public authorities.*

38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?
*a) Co-financing by a public body (see „Québec Model“) acting also as a center of competence for screening of additional private financing offers.*
*b) Standardising of contractual information for better comparison (like respective regulation existing for other financial products, e.g. loans, investment fonds, insurances)*
*c) Upfront standardized information on costs not only to class representative (signing the funding contract on behalf of the beneficiaries) but also the beneficiaries themselves to agree with the conditions.*

## General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[11]

*a) To enhance market oversight and ensure informed decision-making, the necessary competences should be consolidated within a dedicated court or authority, allowing for the development of specialized expertise. This would also prevent “court shopping” (i.e. funders may avoid certain courts when they limit the profits or are more critical to the conditions of funders). At the court level, judges should be empowered to review Litigation Funding Agreements, supported by proper training and access to funding specialists. To sustain this judicial competency, a portion of litigation funding fees could be allocated to strengthen expertise within the judiciary. In case a fully centralized solution may not be feasible in the UK, embedding these capabilities within individual courts would ensure more effective oversight and fairer outcomes.*

*b) Impose fiduciary duties in favor of consumer claimants in order to bind funders. Fiduciary duties are owed to funded claimants by their legal representatives. In funded consumer claims, fiduciary duties should also be owed by third-party litigation funders to the funded beneficiaries, e.g. to act in the best interests of the beneficiaries and the consumer claimant. There can be conflicts of interests between funders, law firms, claimants and beneficiaries. To address that, funders and other financial stakeholders on the claimant side (who approach consumers as a “package”) should owe a higher duty of care to beneficiaries and consumer claimant.*

*According to the CMS European Class Action Report 2024 (https://cms.law/en/int/publication/cms-european-class-action-report-2024) The UK continues to see the highest figures, with claimed quantum now exceeding **€145bn**, reinforcing the need from an economic standpoint for public*

[11] Please note that the Working Party is not considering civil legal aid.

*intervention to address the unintended consequences of unfettered TPLF as highlighted in this submission.*

c) *For the preference of funders for follow-on litigation (question 36a) see section 3 of the attached paper on funded B2B cases.*

d) *Concerning the importance of the competition elements see attachment on "Third-Party Litigation Funding in search of competition"*

# Non-Paper: Growth of Third-Party Litigation Funding (TPLF) in Europe and its Use Outside of Consumer Cases

## 1. Introduction: growth of TPLF in Europe

The phenomenon of third-party litigation funding (TPLF) started in Australia in the 1990s and quickly spread to the United States. TPLF is well developed in the UK and in some Member States, like the Netherlands and Portugal, and is spreading rapidly around the EU.

**In the Netherlands**, a recent report[1] commissioned by the Dutch Ministry of Justice and Security found that **most collective actions seeking damages brought under the Dutch collective action law (WAMCA) have an international dimension** and that **all** of these claims for damages are brought **with the help of TPLF**.

Legal finance is already mainstream. A 2024 survey of 400 senior in-house lawyers and finance leaders revealed that **nearly three-quarters (73%) had either used legal finance (39%) or were open to considering it (34%)**.[2] As one of the major players in litigation funding in Europe recently put it, **Europe is one of the fastest-growing jurisdictions in the litigation funding market.** In Western Europe (excluding the UK), this funder predicts that the market more than doubled between 2020 and 2025. This is attributed to two major factors, i.e. the growth of the market for legal services and the fact that companies and law firms are increasingly using TPLF.[3]

Funders often work on a **"no-win no-fee" basis** (e.g. in anti-trust cases) when there are prohibitions of contingency fees-type remuneration that lawyers are submitted to in many EU jurisdictions.[4] This allows the circumvention of an important safeguard in EU legal systems against contingency fees to prevent the filing of speculative or frivolous litigation.

To date, we know of over **100 litigation funders operating in Europe**.[5] Some funders also operate in more than one Member State. Due to the lack of transparency surrounding TPLF, it is impossible for us to have the full picture of the number and type of cases in Europe backed by outside funding and of who is funding these lawsuits and for what

[1] See Tilburg University, Report for the Research and Documentation Centre (WODC), 2023, available at: https://repository.wodc.nl/bitstream/handle/20.500.12832/3294/3279-nut-noodzaak-vormgeving-kosten-processenfonds-collectieve-acties-summary.pdf.
[2] See https://www.burfordcapital.com/insights-news-events/burford-quarterly/2024-issue-4/15-years-of-legal-finance-data/.
[3] See Deminor Litigation Funding, 'Litigation Funding from a European Perspective Current status of the market, recent issues and trends' page 6-7, available at: https://www.deminor.com/en/litigation-funding-european-perspective.
[4] See CDC Cartel Damage Claims Consulting, available at: https://globalcompetitionreview.com/organisation/cdc-cartel-damage-claims-consulting, and Deminor Litigation Funding 'Whitepaper: Litigation Funding from a European Perspective', available at: https://www.deminor.com/en/litigation-funding-european-perspective.
[5] https://financialpost.com/pmn/business-pmn/hedge-funds-target-catastrophic-esg-lapses-for-huge-returns

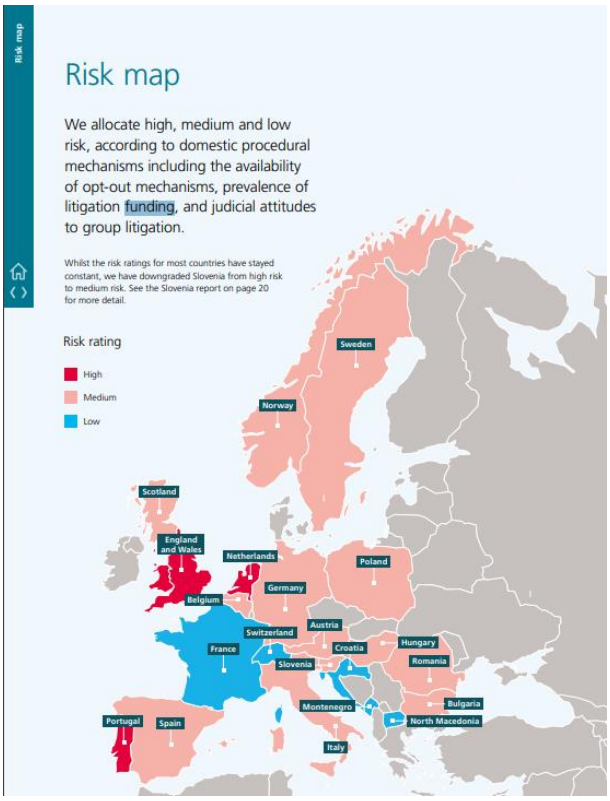
gains, either monetary or strategic. There are also concerns regarding the lack of competition/legal expertise in the sector.[6]

The use of TPLF in consumer collective actions is often spotlighted, due to the concern over funders' taking the lion's share of the consumer's final award and their lack of knowledge of the involvement of a funder in the proceedings, among other issues. But **TPLF is also widely used in other types of litigation beyond B2C, including securities lawsuits, patent litigation, and arbitration, among others**.

## 2. Context of increasing litigation

- The highest number of class actions filed in Europe was 133 in 2023, the highest number to date, with over €147 billion total in opt-out claims over the last seven years.[7] The countries showing the most growth in claims are the Netherlands and Portugal, with Portugal making up 23% of all European claims and the Netherlands 18%.[8] The rise in claims in Portugal coincides with the arrival of litigation funders to their market.

- Below is a Risk Map regarding the prevalence of litigation funding in Europe taken from the European Class Action Report 2024 (CMS, July 2024), p 18:




[6] UK survey of the Class Representatives Network from 20th of September which unveils the issues of
(a) lack of competition between funders and
(b) not sufficient internal funding expertise and external independent advice. See,
https://classrepresentativesnetwork.org/research-and-reports

[7] See the European Class Action Report 2024 (CMS, July 2024), p 11.

[8] See the European Class Action Report 2024 (CMS, July 2024), p 13.

### 3. Types of cases funded

**The most commonly funded claims in the EU** involve both B2B and B2C claims, including **compensation of investment losses, anti-trust damages, data breaches, consumer rights, commercial arbitration, intellectual property, and investment treaty arbitration**. We are also seeing a rise in ESG litigation (human rights and climate action cases) with commercial claims on the rise both worldwide and within Europe.[9] Funders also acknowledge that cartel cases are on the rise in the EU and also cover B2B compensation claims.[10]

- **Securities/shareholder litigation**: TPLF in Europe has contributed to the eruption of (thinly based) claims on behalf of investors. While already a huge area of litigation in the U.S., these claims are growing in popularity in Europe. In the Netherlands, there are around 30 securities class actions.

    - A recent example is the securities case against Airbus which was thrown out by the District Court in The Hague over funder control. The Dutch claim foundation "Stichting Investor Loss Compensation" (SILC) represented 157 institutional investors and 500 retail shareholders. The claim was funded by Bahamas-based DRRT and later on by Jersey-based Therium.[11] The Court established that the claim foundation had "delegated" almost all of its activities to funder DRRT. The funder initiated the case, attracted claimants, registered their claims, gathered evidence, and filed the case at the court. The Court concluded that the claim foundation was an empty shell created by the funders.[12]

    - A group of 158 European and U.S. institutional investors have launched a collective action against ING in the Netherlands for €500 million in damages over the inadequate provision of information in its annual reports. The claim is funded by DRRT.[13]

    - There is a shareholder case against Brazilian Oil Company Petrobas in the Netherlands funded by International Securities Associations and Foundations Management Company [ISAF], based in the Cayman Islands.[14]

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[9] See Deminor Litigation Funding, 'Litigation Funding from a European Perspective Current status of the market, recent issues and trends' page 8, 9 available at: https://www.deminor.com/en/litigation-funding-european-perspective.

[10] CDC (cartel damage claims) is a litigation funder based in Luxembourg, Belgium, Netherlands, and France, advertised as a pioneer and leader in antitrust damage recovery in Europe. Available at https://carteldamageclaims.com/about-us/our-approach/.

[11] https://www.airbusclaim.com/documents/20240624%20Board%20report.pdf

[12] https://denhollander.info/artikel/17966

[13] https://nltimes.nl/2024/02/08/investors-demand-eu500-mil-ing-disclosing-major-anti-money-laundering-case

[14] https://isafmanagement.com/big-step-towards-compensation-for-international-shareholders-and-investors-against-petrobras-in-eu-based-class-action-in-netherlands-court/

- There is a recent shareholder class action against Stellantis in the Netherlands. The Dutch claim foundation behind the case is backed by U.S. plaintiffs' firm Scott + Scott and is funded by an external financier associated with U.S. asset manager Fortress Investment Group, according to the foundation website.[15]

- Litigation funder Deminor backed a securities class action in the Netherlands against South African furniture maker Steinhoff. The resulting settlement (800 million euros) was the second largest shareholder settlement in the European continent.[16]

- Another example is the 2023 claim against Ericsson which style and nature was a novelty in the Swedish judicial/legal system and that would have not happened without a funder behind it. The shareholders, which include investment firms and pension funds, sued for $175 million to $300 million in damages citing the EU Market Abuse Regulation. Ericsson prevailed in the lawsuit, but as a consequence of the negative publicity around this case, the shares of Ericsson dropped 25%.[17]

- In the UK, litigation funder Theirum backed a shareholder action (to the tune of £21m) against Lloyds Bank over its takeover of HBOS during the 2008 financial crisis. The shareholders lost the claim. The case brough up the issue of whether litigation funders should be responsible for adverse costs. Therium argued they should only be liable to the extent that the claimants do not satisfy the adverse cost order. The judge did not see why Therium's liability should be secondary to the claimants. [18]

[15] https://www.reuters.com/business/autos-transportation/dutch-group-sues-stellantis-over-alleged-emissions-cheating-2024-08-28/
[16] https://www.deminor.com/en/news-insights/why-the-steinhoff-settlement-is-ground-breaking-for-investors
[17] See https://www.reuters.com/legal/ericsson-beats-us-shareholder-lawsuit-over-bribery-disclosures-2023-05-24/
[18] https://www.nortonrosefulbright.com/en/inside-disputes/blog/risk-v-reward-cost-liability-in-lloyds-hbs-group-litigation

- **Anti-trust/cartel/competition claims:** competition claims are the second largest category of claims in Europe (accounting for 19% of all claims), eclipsed only by product liability/consumer law/personal injury claims.[19]

    - ICAP, Rabobank, UBS, and Lloyds Bank are facing a funded cartel case in the Netherlands on behalf of institutional investors over the alleged rigging of the Libor rate (i.e. interbank interest rate). The claim is backed by an anonymous U.S. based funder.[20]

    - Airlines such as KLM, Lufthansa and BA face a funded class action over an alleged cartel of their cargo business. The case is funded by Omni Bridgeway, East-West Debt, and Claims Funding Europe.[21]

    - In the Netherlands, truck companies that were hit by a fine from the European Commission over an alleged cartel – DAF Trucks, Daimler, Iveco, MAN, Renault, Scania, and Volvo - are individually hit by at least five B2B class actions, which are backed by TPLF. The claimants in these cases are truck companies. Similar truck cartel cases have also been launched in Belgium, Germany Spain, and the UK. Some of the litigation funders behind the claims include Bentham Europe[22] and Claims Funding Europe[23].

    - In the UK, litigation funder Therium backed a £300m competition damages claim against MasterCard and Visa on behalf of a group of 27 high street retailers.[24]

    - Germany is becoming an attractive forum for antitrust litigation due to an increasing acceptance of the assignment model for antitrust cases. Under this model, individual claimants assign their damages claims to a specialized legal service provider. The legal service provider then bundles the claims and pursues them in its own name. In doing so, the provider bears all costs associated with the enforcement of the claims and, in return, receives a success fee. Particularly in larger cases, the legal service provider enters into a funding agreement with a litigation funder which in turn receives a share of the potential earnings. This has been recognised in two recent cases: Log Cartel and Trucks Cartel.[25]

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[19] https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4
[20] https://fd.nl/ondernemen/1232446/claimstichting-wil-schadevergoeding-rabo-om-manipulatie-libor
[21] https://www.politico.eu/article/airline-industry-hits-turbulence-on-shipping-costs/
[22] https://www.reuters.com/article/business/europes-top-truck-makers-could-face-100-billion-euro-cartel-damages-claim-idUSKBN13900J/
[23] https://www.claimsfundingeurope.eu/projects/european-truck-cartel/
[24] https://www.cityam.com/267285-mastercard-and-visa-see-uk-legal-claims-high-street-names/
[25] BGH Judgment, 13. June 2022, VIa ZR 418/21 – financialright; Higher Regional Court of Studgart Judgement of 15 August 2024 – 2 U 30/22).
See also an analysis at: Hausfeld | Collective redress in Germany for cartel damages claims and Germany becomes more attractive for antitrust litigation thanks to an increasing acceptance of the assignment model | Antitrust Alliance.

- **Data breach:** Data protection claims are particularly dominant in the Netherlands, representing an overwhelming majority of claims over the last seven years and €28.53 billion in total.
    - A famous case against TikTok in the Netherlands (for €10 billion) centered around non-material damages for breaching GDPR. The three claim foundations involved were all backed by litigation funders.[26] The judge ordered the claim foundations to change the litigation funding agreements to ensure there is no funder control.[27]

- **Intellectual property claims:** In jurisdictions and areas of law where we have been able to gather specific data, such as patent litigation in the U.S., a striking picture begins to emerge - over **30% of all patent claims filed in the U.S. are backed by TPLF**.[28] Some researchers believe this number is even higher in Europe, where litigation funders are setting up shell companies to bring IP claims.

    - According to testimony by Allon Stabinsky, Chief Deputy General Counsel at Intel, before the U.S. Senate Committee on the Judiciary, hedge funds and other deep-pocketed entities are increasingly funding third-party patent litigation in the hopes of seeing huge returns on their "litigation investments". They are buying massive numbers of low-quality, overly broad patents from failed or bankrupt companies, acquiring distressed assets for very little. They don't use these patents to actually make or sell anything; rather, they only use them to extract payments from companies large and small that do create new inventions, manufacture products, and add real value to the economy.[29]

    - Fortress litigation funder in particular has formed a team devoted to IP investment that has reportedly directed $900 million to 40 IP-related investments.[30] Mr. Stabinsky's testimony alleges that Fortress uses shell companies and a complex web of corporate structures to hide their involvement and bring patent claims through this secretive structure.[31]

    - Burford Capital, Curiam Capital, Longford Capital Management LP, Omni Bridgeway, Parabellum Capital, Starboard Value LP, GLS Capital, and others, are also regularly involved in patent litigation. [32]

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[26] https://www.netkwesties.nl/1721/terugslag-voor-massaclaims-miljoenen.htm
[27] https://www.lexology.com/pro/content/tiktok-dutch-claim-allowed-proceed
[28] https://www.wsj.com/articles/patent-lawsuits-are-a-national-security-threat-secretly-funded-litigation-f3cd5bd4?mod=opinion_feat2_commentary_pos1.
[29] https://www.judiciary.senate.gov/imo/media/doc/Stabinsky%20-%20Testimony.pdf
[30] Richard Lloyd, *Fortress's latest patent fund could top $900 million*, IAM-Media, Apr. 9, 2021, available at https://www.iam-media.com/finance/fortresss-latest-patent-fund-could-top-900- million (last visited Oct. 14, 2021).
[31] https://www.judiciary.senate.gov/imo/media/doc/Stabinsky%20-%20Testimony.pdf
[32] *See, e.g.*, Chambers and Partners, *Litigation Funding in USA – Nationwide: Intellectual Property*, available at https://chambers.com/legal-rankings/litigation-funding-intellectual- property-usa-nationwide-58:3213:12788:1 (last visited Oct. 14, 2021); *Acacia Research*

- Last year, 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 technology companies of strategic importance under pressure as well as to seek disclosure of confidential intellectual property.[33]

- **Energy transition** (i.e. the transition to renewable sources of energy) inevitably brings to the table new forms of disputes; this is well acknowledged by litigation funders as a factor in rising commercial disputes relating to new business models, choices, and investments.[34] While energy transition-related disputes are already a present reality, with most (76%) General Counsels reporting having already encountered such disputes, nearly half (47%) are expecting a rise in dispute volumes related to the energy transition over the next decade.[35] 63% of General Counsels in a Burford's survey expect costs and expenses relating to energy cases to exceed $4 million per case, while a minority of General Counsel (29%) estimate it at $10 million fees/costs per case.[36]

- **Insolvency claims**: In some jurisdictions (like Denmark and Hong Kong), **TPLF is primarily used in the insolvency** context. In others (such as the UK, Singapore, and in various parts of the EU), litigation funding for insolvency claims forms part of a wider market.[37] The studies conducted for the European Parliament list 16 funding firms operating in the EU in the sphere of insolvency funding.[38]

- **Arbitration:** Litigation funding has also become a point of concern within international investment arbitration where cases that tend to involve States attract great potential for return on investment for funders as well as conflict of interest. Third-party funding has been increasingly popular in this context of arbitration.[39] Taking the wider example of international investment dispute

[33] https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties

[34] See Burford Capital, 'Energy transition disputes: GCs and senior lawyers on the business impacts of legal challenges to come' November 13, 2024, available at: https://www.burfordcapital.com/eu/insights-news-events/insights-research/2024-energy-transition-research/, page 1. This research represents a wide scale of business in sectors all across supply chains spanning North America, Europe, Asia and Australia (see page 22).

[35] See Burford Capital, 'Energy transition disputes: GCs and senior lawyers on the business impacts of legal challenges to come' November 13, 2024, available at: https://www.burfordcapital.com/eu/insights-news-events/insights-research/2024-energy-transition-research/, page 3.

[36] See Burford Capital, 'Energy transition disputes: GCs and senior lawyers on the business impacts of legal challenges to come' November 13, 2024, available at: https://www.burfordcapital.com/eu/insights-news-events/insights-research/2024-energy-transition-research/, page 10.

[37] See ELI, Principles Governing the Third Party Funding of Litigation, available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, page 61 (ii), Insolvency proceedings.

[38] Ibid. Insolvency is also identified as a common type of funded case by Woodsford Litigation Funding: https://www.harbourlitigationfunding.com/what-we-offer/types-of-dispute/. In general, cases where companies are hesitant to allocate resources or fail to identify all potential ways for generating revenue, can attract litigation funders (e.g. IP enforcement).

[39] See ELI, Principles Governing the Third Party Funding of Litigation, available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, page 62. See also Woodsford - Charlie Morris and Jordan Howells

resolution, it is worth mentioning that according to ICSID's[40] annual report of 2024, the Centre has seen the second-highest number of registered and administered cases in ICSID's history. It administered 341 cases in the financial year 2024, compared to 329 the previous year.[41] This figure amounts to 34% of ICSID's lifelong caseload, which is over 1000 cases.[42] In 2024, States from most geographic regions of the world were involved in ICSID proceedings, with 10% being states from Western Europe.[43] A substantial portion of cases involved the Oil, Gas, and Mining sector (28%), while 17% pertained to the Electric Power and Other Energy sector.

- **Funders investing in ESG Claims:** George Soros-backed litigation funder Aristata Capital is targeting ESG claims, with up to 50% of cases in their pipeline related to climate and the environment. Therium, Woodsford, and Omni Bridgeway are also "prioritizing" ESG claims.[44] U.S. hedge fund Gramercy provided UK law firm Pogust Goodhead with over $500 million in funding for ESG claims.[45]

    - BHP is facing a funded class action in the Netherlands over a dam breach in Brazil on behalf of 77,000 people but also on behalf 1,000 companies and 7 municipalities.
    - In an article in the Financial Post, the CEO of litigation funder Woodsford, "says his ESG team is 'closely monitoring' the regulatory development in Europe [such as the Corporate Sustainability Due Diligence Directive], which he says is 'highly likely' to shape his firm's work."[46]

'Third-party funding in international arbitration', available at: https://woodsford.com/wp-content/uploads/2024/07/Lexology-Panoramic-Litigation-Funding-2024.pdf, page 8.

[40] ICSID (The international Investment Dispute Settlement) is an international facility available to States and foreign investors for the resolution of investment disputes.

[41] See ICSID, Annual Report 2024, available at: ICSID-AR2024-WEB.pdf, page 9.

[42] See Search Cases | ICSID.

[43] See ICSID, Annual Report 2024, available at: ICSID-AR2024-WEB.pdf, page 10.

[44] Reference for the Aristata and Theirum data points: https://funds-europe.com/esg-soros-aristata-fund-esg-litigation-profitable-investment/

[45] https://pogustgoodhead.com/largest-litigation-funding-deal-in-history/

[46] https://financialpost.com/pmn/business-pmn/hedge-funds-target-catastrophic-esg-lapses-for-huge-returns

## 4. Different regulatory and governmental approaches

### 4.1 inside the EU

**Article 10(1) of the 2020 EU Directive on Representative Actions (Directive 2020/1828)** stipulates rules around conflicts of interest, prevention of undue influence in the case[47]. However, these safeguards only apply 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 terms of transposition:

- Some member states have not yet transposed the directive[48].
- Some member states went beyond Article 10 (creating a fragmented approach).[49]

**The European Parliament resolution from 2022 on TPLF[50]** which proposes an EU directive regulating the sector of TPLF with specific rules on licensing, minimum requirements, oversights etc. Following this request, the **European Commission** has currently conducting (since summer 2024) a mapping study of TPLF across the EU.

In 2023 **the Irish Government** commissioned a study to the **Irish Law Commission on TPLF[51]**. In its consultation paper, the Irish Law Commission set out the following arguments against legalising third-party funding:

- It might encourage the bringing of vexatious and meritless disputes.
- It causes funded parties to be under-compensated, as the funder may take their return on investment, resulting in the funded party not being fully compensated for the harm they have suffered.
- Legal costs might increase as well as the price of insurance premiums.
- It might not be appropriate in all types of disputes.

[47] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020L1828-20230502

[48] In September 2024, RAD was adopted and applicable in only 22 Member states; It shall be noted that the official date for national transposition was the end of December 2022. Four Member states ( Estonia, France, Luxembourg and Spain) had Parliamentary discussions, while Bulgaria had only a draft law.

[49] For the national transposition of the Representative Actions Directive, certain EU member states have already decided to go beyond the limited - very generally held - safeguards of the Directive. Some examples on additional safeguards which can be found in the transposing national laws:

- Not more than 10% of total awards to funders (Germany)
- Cap on loan fees to the percentage of statutory interest on arrears (Slovenia)
- Disclosure of funding agreement to court (Bulgaria, Germany, Portugal)
- Disclosure of the beneficial owner behind funders required – Anti-Money Laundering / AML approach (Czech Republic)
- Declaration on the honour by Qualified Entity that action exclusively pursues consumer interests (France)
- No TPLF at all allowed (Greece)

[50] https://www.europarl.europa.eu/legislative-train/theme-legal-affairs-juri/file-third-party-funding-of-civil-litigation#:~:text=Parliament%20calls%20upon%20the%20Commission,fees%2C%20in%20exchange%20for%20a

[51] https://www.lawreform.ie/_fileupload/consultation%20papers/lrc-cp-69-2023-third-party-funding-full-text.pdf

### 4.2 Outside the EU

**UK:** The UK's Civil Justice Council (CJC) has initiated a formal review of litigation funding. The CJC is expected to release a final report by summer/early autumn 2025. The CJC will make recommendations, which could extend to formal regulation of litigation funding in England and Wales. The UK Supreme Court's *PACCAR*[52] decision in July 2023 held that litigation funding agreements (LFAs) typically used in UK group actions entitling funders to recover a percentage of any damages recovered are "*damages-based agreements*" (DBAs) pursuant to the Courts and Legal Services Act 1990 (CLSA). That meant that, unless the LFAs complied with the requirements of the CLSA and corresponding regulations, they were unenforceable. Due to this ruling, many funders renegotiated their funding agreements so that their return is calculated as a multiple rather than a percentage, hoping to find a loophole around the DBA definition. **Also in the UK**, **only 12 out of 70 funders are members of the Association of Litigation Funders which operates a self-regulatory code**. The code foresees relatively mild sanctions for its breaches (eg, a 500 GBP fine or expulsion from the association), and thus fails to disincentivize abusive activities.

**United States:** The U.S. Congress has also considered the risks posed by opaque TPLF and how to address them. In October of last year, Members of the House of Representatives introduced H.R. 9922, the Litigation Transparency Act of 2024. The bill would require third-party litigation funding agreements to be disclosed and produced in all federal civil litigation.

Another proposal before Congress is the Protecting Our Courts from Foreign Manipulation Act (POCFMA) of 2023—a bipartisan bill introduced by Members of the Senate. That bill would require disclosure of foreign sources of TPLF in American courts and ban sovereign wealth funds and foreign governments from investing in U.S. litigation.

There is also increasing judicial recognition of the need to make TPLF more transparent in the U.S., with a growing number of district courts and individual judges requiring some form of TPLF disclosure. For example, the District of New Jersey requires that each party must disclose the identity of any litigation funder behind their case, whether the funder's approval is necessary for litigation and settlement decisions and provide a description of the nature of the financial interest. The judge can also authorize discovery related to TPLF, including production of the funding agreement itself.[53] A similar disclosure requirement in the District of Delaware is what led to the discovery of a Chinese investment firm backing intellectual property litigation against Samsung.[54]

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[52] See https://www.cliffordchance.com/insights/resources/blogs/group-litigation-and-class-actions/2024/11/litigation-funding.html#:~:text=The%20PACCAR%20decision%20in%20July,1990%20(%22CLSA%22. See also European Class Action Report 2024 (CMS, July 2024), p 25.

[53] See *Grim Realities: Debunking Myths in Third Party Litigation Funding*, U.S. Chamber Institute for Legal Reform, pg. 24-25.

[54] https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties.

**International Treaties:** Requirements for disclosure of the identity of a third-party funder have been introduced already in recent EU free trade agreements, such as the one between EU-Canada (CETA) from 2017 (see article 8.26).[55]

**OECD:** The OECD is also looking at litigation funding within the context of Illicit Trading, with a workshop having taken place in June 2024. Potential actions at OECD level are not excluded given the concerns expressed by some OECD delegations on the link between uncontrolled/untransparent litigation funding and illicit trading activities. The OECD is also looking at TPLF in the context of foreign interference, raising the issue during ongoing high-level dialogues on building resilience to foreign interference.

**Canada (Quebec and Ontario) and Israel went for a public litigation fund:** "*Different choices have been made in these countries, both with regard to the financing of the fund and the type of cases that are financed and type of costs that can be reimbursed. The 'most broad' litigation fund is Quebec's which, unlike Ontario's and Israel's, is not limited to public interest cases*[56]*. In principle, all cases and types of costs, including lawyers' fees, are eligible for reimbursement when they cannot be funded by other means. The fund is fed by contributions from all collective actions, regardless of whether those cases themselves have used the fund. About 50% of cases receive reimbursement from the fund. The fund in Ontario does not reimburse lawyers' fees and the fund itself is funded by contributions from successful cases funded by the fund, with a standard 10% fee being levied regardless of the size of the funding or outcome. About 10% of cases is funded this way. Cases that contribute to legal development or the public interest may be eligible for funding. The 'overhead' of this fund is low, as it is run by volunteers, which can be seen as problematic for other reasons, such as lack of capacity and transparency. The Israeli fund is fed entirely by government funding and gives only a small contribution to (a large number of) public interest cases. This fund can be seen as a private mechanism with a public regulatory effect, as it enables public interest actions and/or the address of scattered damages, where public bodies and regulators also (may) have a role"*[57]

Given the rise of TPLF, **arbitral rules and associated guidance have started to address TPLF use** with increasing frequency.[58]

[55] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)

[56] Québec has a small highly qualified and specialized team supervised by the Québec Ministry of Justice. They have a fund of their own from which they can initialise collective actions which in their perspective truly are in the public interest. As they fund initial actions without charging interest at all they are the first body which learns about upcoming intentions to start new collective actions. They can then assist claimants in obtaining additional commercial TPLF and review the contracts to ensure that their terms are fair players "fit and proper" and persons involved in funding and the action itself able to handle such case. (https://faac.justice.gouv.qc.ca).

[57] See Tilburg University, Report for the Research and Documentation Centre (WODC), 2023, available at: https://repository.wodc.nl/bitstream/handle/20.500.12832/3294/3279-nut-noodzaak-vormgeving-kosten-processenfonds-collectieve-acties-summary.pdf.

[58] 2018 ICCA-Queen Mary Report on Third Party Funding in International Arbitration, available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf.

In 2022 **New Zealand's Law Commission** proposed regulation of third-party litigation funding via a Class Actions Act.[59] This proposed legislation would provide that a litigation funding agreement is enforceable only when approved by a court, and that supervisory powers should be given to courts to manage potential conflicts of interest, require security of costs/payment of adverse costs, and fixing the amount of commission that a funder could claim. The justification for this approach was to improve access to justice and promote litigation efficiency. A recent academic analysis of the evolving New Zealand, Australian and UK approaches to regulating litigation funding concluded that "mandatory, measured and tailor regulation [of third-party litigation funding] is required".[60]

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[59] New Zealand Law Reform Commission, Class Actions and Litigation Funding (NZLC R147), 2022, Available at: https://www.lawcom.govt.nz/our-work/class-actions-and-litigation-funding/tab/report.
[60] Chamberlain, Nikki and Waye, Vicki C. and Morabito, Vince, 'How to Address the Regulation of Third-Party Litigation Funding of Class Actions?' (November 01, 2024). (2025) 141 L.Q.R. 131, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5083425.