



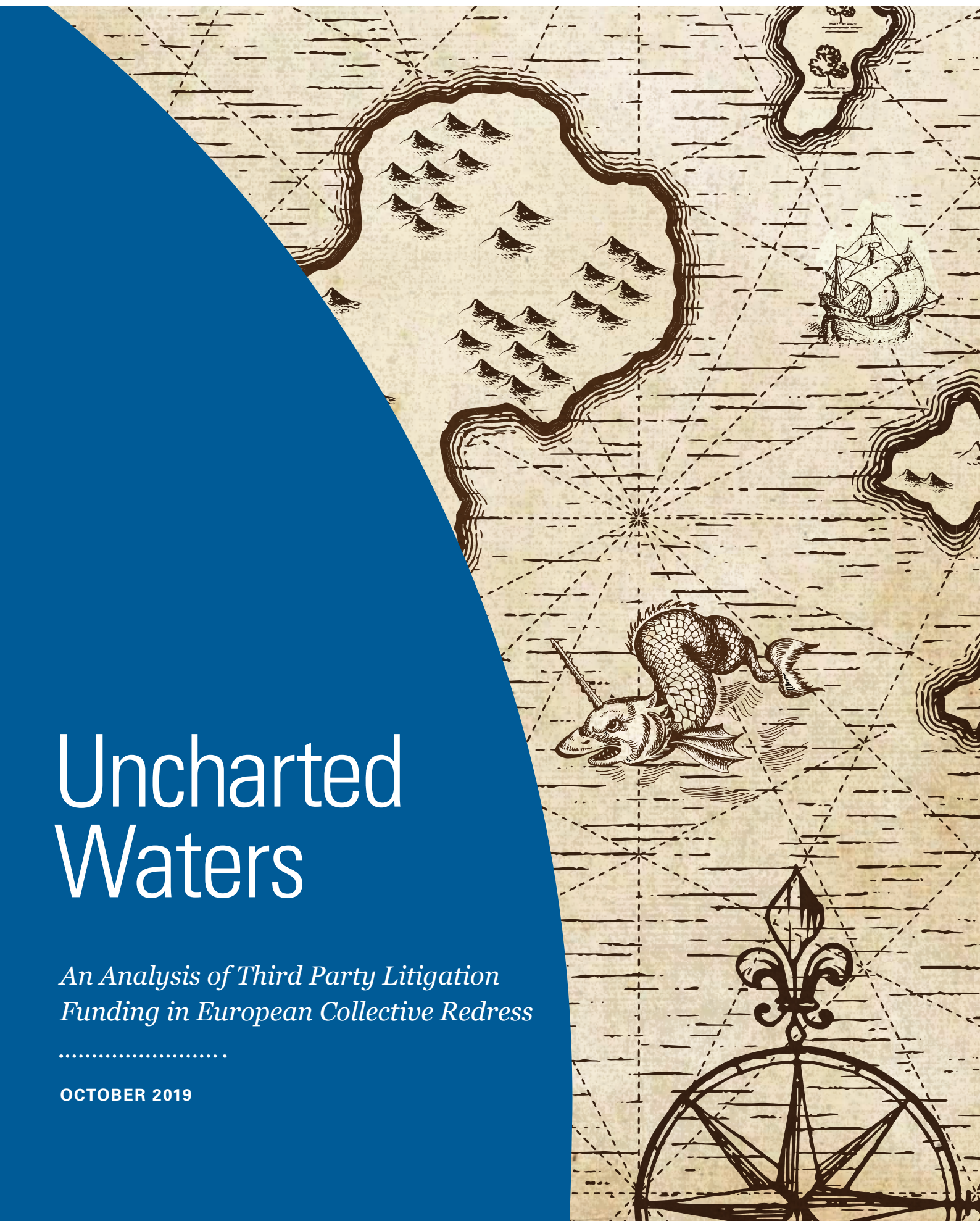
U.S. CHAMBER
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Uncharted Waters

*An Analysis of Third Party Litigation
Funding in European Collective Redress*

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U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

Third party litigation funding (TPLF) has become a highly debated topic in jurisdictions around the world. Legislators in Europe, North America, Asia, and Australia have struggled to understand exactly what TPLF is and how it works, as well as the potential for abuses that undermine the advantages of this instrument that is purported to ease access to justice. This is true particularly in collective redress proceedings.

At the European Union (EU) level, TPLF was put under the spotlight of policymakers approximately a decade ago. Legislative initiatives that include safeguards for TPLF have picked up momentum since 2013, with the adoption of the European Commission's (Commission) Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States (MS),¹ and more recently, with the adoption of the Proposal for a Directive on representative actions for the protection of the collective interests of consumers.² The Commission's Proposal continues to make its way through the EU's legislative procedure, and elements of the 2013 Recommendation have only just begun to be transposed into the MS' legislation. Existing national efforts demonstrate the pitfalls of EU regulation and struggles with its implementation in national legal orders, as well as its application in practice.

The purpose of this paper is to evaluate, from the perspective of comparative regulatory trends, the adequacy of the

existing and proposed EU regulation of TPLF within collective redress, and to present ideas for its optimization from the point of view of both substance and regulation. The analytical framework laid down in this paper may be taken into consideration by EU lawmakers beyond the issue of optimising the 2018 Proposal Directive on consumer collective redress. It may also serve as a blueprint for a horizontal approach to EU regulation of TPLF in collective redress, or for EU MS efforts to regulate TPLF in national legislation.

This paper begins with a general overview of TPLF focusing on its origins, its development, and how it functions. One of the starting points was to find a proper working definition of TPLF, which is oftentimes not provided by those applying the term in literature or in practice. To this end, we have delimited TPLF in its strictest sense from other funding arrangements available to litigants. From this, we discerned the economic rationale of TPLF, the structure of a typical litigation funding

agreement (LFA) and allocation of risks. We have also critically assessed the controversies surrounding TPLF that are typically at the centre of TPLF regulation and analysis. At this stage, we also identify certain public policy considerations that may call for more attention from regulators in the future.

In order to have insight into the TPLF mechanism and to detect potential best practices, as well as the problems encountered by its application in practice, we have made a comparative study of the legal and regulatory framework of TPLF in select jurisdictions. As TPLF is a fast-evolving phenomenon, this part of the paper also aims to introduce current comparative legal and regulatory trends, initiatives, and perspectives, which might help EU regulators better understand how TPLF fits into different civil justice systems and legal traditions, subject to adequate safeguards.

Common law jurisdictions where TPLF has evolved, and in recent decades intensified, have been analysed first. Comparative analysis reveals that in five of the world's leading non-European litigation venues (Australia, U.S., Canada, Singapore, and Hong Kong) some level of oversight of TPLF, mostly judicial, already exists. Regulatory approaches, however, vary considerably in scope and legal effect, do not in most instances define penalties for breaches of standards, and do not rely on government agencies for oversight apart from the courts. Common law jurisdictions' regulatory efforts tend to be either court-made, with limitations such as the scope of that court's jurisdiction (Canada); or they are soft-law principles or voluntary codes of conduct that are not strictly policed and cannot be enforced through sanction. To the extent that such efforts cover

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disclosure, they do not always require full disclosure to the parties and the court but vary in the scope of the disclosure requirements.

Comparative analysis of TPLF regulation in selected European legal systems follows, in order to find if and to what extent TPLF has already been addressed in the European legal environment, particularly by jurisprudence, legislators, and professional associations. In most of Europe, TPLF is a rather underdeveloped concept, both in terms of jurisprudence and existing regulation. Exceptions include England and Wales, and to a limited extent also Germany, the Netherlands, and Switzerland. In most EU MS there is no reported case law on TPLF, and empirical data and experience are scarce. To date, only two MS have specific regulation of TPLF in place, Slovenia in its 2017 Collective Actions Act (CAA) and the Netherlands in the soft-law 2019 Claim Code.

The paper then focuses on the regulation of TPLF in collective redress at the EU level. For this purpose, we analysed EU draft legislation and other relevant acts on collective redress. These have emphasised the aim of the EU to protect the collective

“ The Commission stressed that any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice, meaning that they must not attract abusive litigation ... ”

interests of aggrieved individuals, while ensuring appropriate safeguards to avoid abusive litigation. The 2008 Green Paper on consumer collective redress³ is the first document revealing the details of the Commission’s position on how to best regulate collective redress in the EU. It is also probably the first EU policy document mentioning TPLF and analysing safeguards against abuses in collective proceedings. After failed attempts to regulate compensatory collective actions in directives within specific fields of law, such as consumer protection and antitrust, the Commission decided in 2010 to regulate collective redress horizontally by way of a soft-law approach.

On 11 June 2013, the Commission issued a Communication to the European Parliament, the Council of the European Union (Council), the European Economic and Social Committee, and the Committee

of the Regions, titled “Towards a European Horizontal Framework for Collective Redress”.⁴ The Commission stressed that any measures for judicial redress need to be appropriate, effective and bring balanced solutions supporting European growth, while ensuring effective access to justice, meaning that they must not attract abusive litigation or have effects detrimental to respondents, regardless of the results of the proceedings. This was also the preponderant view of the stakeholders participating in the public consultation leading to the enactment of the Communication.

On the same day, the Commission also enacted the 2013 Recommendation on collective redress, which is the first EU act to set out specific provisions for TPLF. The 2013 Recommendation suggested safeguards against possible abuses, such as: (i) requiring the claimant to declare to the court at the outset of the proceedings the source of the funds; (ii) enabling the court to “stay” the proceedings if required when (a) there is a conflict of interest between the funder and the claimant or its members, (b) the funder has insufficient resources in order to meet its financial commitments to the claimant, or (c) the claimant has insufficient resources to meet any adverse costs should the collective procedure fail; (iii) prohibiting the funder from (a) seeking to influence procedural decisions of the claimant, including on settlements, (b) providing financing for a collective action against a competitor of the funder or against a defendant on whom the funder is dependent, and from (c) charging excessive interest on the funds provided; and (iv) prohibiting remuneration given to, or interest charged by the funder, to be based on the amount of the settlement reached or the compensation awarded, unless that funding arrangement is

regulated by a public authority to ensure the interests of the parties.

The Commission has neither provided any detailed explanation on the rationale of the 2013 Recommendation's provisions nor guidance for implementing it. Based upon the unique Slovenian experience in implementing the 2013 Recommendation into the Slovenian Collective Actions Act (CAA), it is obvious that the Commission had not sufficiently addressed all relevant issues of TPLF in collective redress, and certainly had not anticipated all plausible problems arising with the implementation of its 2013 Recommendation in practice.

The regulatory framework for TPLF in the 2013 Recommendation was, in turn, substantially amended by the 2018 Proposal Directive for consumer representative actions, which is—first and foremost—limited in scope in comparison to the entirely horizontal scope of the 2013 Recommendation, leading also to limited regulation of TPLF in collective redress. In comparison to the soft-law approach of the 2013 Recommendation, the directive will be binding on the MS, requiring them to adopt national legislation in line with the Directive. It is clear from the Proposal Directive that in the past five years, the policy of European lawmakers has shifted dramatically towards cutting down certain safeguards against abusive litigation that were originally introduced in the form of soft law by the 2013 Recommendation.

The Proposal abolishes a handful of safeguards from potentially abusive litigation, enshrined in the 2013 Recommendation, including: (i) the powers of the court to stay the proceedings if there is a conflict of interest between the funder and the claimant and its members; (ii) a requirement that the funder must have

sufficient resources in order to meet its financial commitments to the claimant initiating the collective redress procedure; (iii) a prohibition against funders charging excessive interest on the funds provided; and (iv) a prohibition against basing the remuneration given to, or interest charged by the funder, on the amount of the settlement reached or the compensation awarded, except in cases where the funding arrangement is regulated by a public authority to ensure the interests of the parties. It seems that the Proposal Directive's safeguards are more oriented towards preventing abuses of the collective proceedings (e.g., weakening the funder's competitor, fishing expeditions of defendant's competitors), than preventing funding arrangements that might lead to high profits for the funders at the expense of the consumers, who might otherwise not obtain any redress. It seems, however, that the latter is also perceived as an abuse by the Commission.

In March 2019, the European Parliament published its Legislative Resolution introducing several amendments to the text of the Proposal Directive, which do not attempt to reverse this trend. Consequently, the Proposal Directive, as it stands now, essentially deals (only) with two regulatory aspects of TPLF in collective redress: (i) disclosure of the "source of funding" to the court; and (ii) conflict of interest. Crucial areas of regulation, such as the reasonableness and possible capping of the funder's remuneration, and judicial control (scrutiny) of the funding arrangements, have been completely left out of the regulatory agenda. And more so, even where the Proposal Directive does attempt to regulate TPLF (disclosure and conflict of interest), it does so in a very limited manner and without basing its legislative solutions on intensive comparative research and

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simulations of how exactly a specific provision would operate in practice. As a result, the Proposal Directive, in its current form, may not be able to achieve one of its proclaimed goals: to strike a balance between facilitating access to justice for consumers and ensuring adequate safeguards from abusive litigation.

Finally, the paper suggests that it would be prudent for European lawmakers—whether at the EU or national level—to revisit the approach to regulation of TPLF in Art. 7 of the 2018 Directive in order to avoid premature and ill-considered solutions. Albeit far from ideal, the safeguards in the 2013 Recommendation might serve as foundations upon which effective regulation of TPLF in collective redress could be built. The analytical framework laid down in this paper may be taken into consideration by the European lawmakers for that purpose and beyond, particularly for a possible horizontal approach to EU regulation of TPLF in collective redress, or any kind of regulatory scheme that the EU and its MS might decide to follow in the future. In any event, considering that TPLF in collective redress is a stranger to the *acquis*, this task should be approached systematically and with due regard to comparative legal and regulatory trends.

This paper thus suggests a three-tiered approach for European lawmakers:

1. The initial step would be a meticulous analysis of TPLF in general, including its economic rationale, typical structure, allocation of risks between the participating parties, and comparison of various dispute funding models available on the European market and abroad. This would allow lawmakers to:
 - Develop definitions of principal terms, such as “TPLF”, “LFA”, “third party litigation funder” and “funded party”.
 - Identify the main risks that TPLF may pose to the proper administration of justice in collective redress in the EU.
 - Make an informed decision about which of those risks require specific regulatory safeguards in place to prevent abusive litigation (e.g., encouraging frivolous lawsuits by creating economic incentives for third parties to litigate, creating conflicts of interest, undue influence on key procedural decisions, and potentially unreasonable returns for funders).
2. The second step would be to decide on the appropriate scope of regulation, by differentiating between three interdependent categories of issues:
 - Regulation of corporate governance standards for the TPLF industry, such as licensing requirements, capital adequacy and liquidity requirements, mandatory conflict of interest management

schemes, oversight by public authorities, and reporting obligations.

- Regulation of key features and mandatory provisions of litigation funding agreements (LFAs) (e.g., termination rights, indemnification of a funded party for adverse costs).
 - Regulation of effective procedural safeguards against abusive litigation in the context of collective redress, with the aim of striking a balance between facilitating access to justice to safeguard consumers' interests and ensuring adequate safeguards from abusive litigation. This could be done, for instance, by mandating adequate disclosure of TPLF and conferring powers on courts in different stages of collective proceedings to assess all relevant issues, such as the existence of conflict of interest, level of the funder's control over the proceedings, financial standing of the claimant and the funder, the need for security for costs, reasonableness of the funder's return, and if necessary, to levy appropriate consequences such as refusal to certify a collective action or approve a collective settlement, or termination or stay of the proceedings.
3. Given the fact that TPLF in the EU is an underdeveloped concept, the regulation of corporate governance standards for funders or prescribing mandatory requirements for LFAs may at this point not be realistic at the EU level. European lawmakers should thus maintain their focus on the proper regulation of effective procedural safeguards against abusive litigation in collective proceedings, which would ideally be the third step. Key safeguards include:
- **An obligation to disclose TPLF, which is a prerequisite for the proper functioning of other safeguards.** This safeguard is of paramount importance. From a comparative stance, EU lawmakers should approach regulating the disclosure requirement from four different angles: (i) the purposes and anticipated effects of disclosure (e.g., to assess potential conflict of interest, level of the funder's control over the proceedings, reasonableness of the funder's return, financial standing of the claimant and the funder); (ii) the appropriate procedural timing of disclosure; (iii) what, exactly, is to be disclosed (e.g., should disclosure be limited in scope to the funder's identity or be extended to an obligation to produce the LFA in whole or in part for court scrutiny); and (iv) the parties or entities to whom the disclosure should be made (e.g., only to the court on *ex parte* and *in camera* basis or additionally to the opposing party and the members of the claimant's group).
 - **Measures available to courts for tackling conflict of interest.** In contrast to the 2013 Recommendation, the 2018 Proposal Directive limits itself only to situations where interests of the funder conflict with those of a defendant who is a competitor of the funder or a defendant on whom the funder is dependent. It does not mention an important category of conflicts that may arise between the funder and the claimant party and its members. Comparative analysis demonstrates that European lawmakers should also take note of additional relevant categories of conflict of interest that are not envisaged in any EU policy document relating to regulation of TPLF thus far, such as conflicts between (i) the funder and the

claimant's lawyer, and (ii) the claimant and its lawyer.

- **Measures available to courts for prevention of excessive influence of the funder on claimant decisions in the context of controlling the collective proceedings, including on settlements.** European lawmakers were mindful of that issue while drafting the 2018 Proposal Directive, however, legislators should not neglect that the effectiveness of this safeguard is largely dependent on how the disclosure obligation is formulated in terms of its scope. In this context the court will often have to scrutinize the relevant provisions of the LFA, including those governing the thresholds for settlement, veto rights, choice of counsel and evidentiary consultants and experts such as accountants, and termination of the LFA.
- **Capping the funder's remuneration and judicial control and approval of the reasonableness of the funder's remuneration.** Without any explanation, the 2018 Proposal Directive now leaves the questions of the reasonableness and possible capping of the funder's remuneration completely unresolved. More importantly, it does not foresee any judicial control (scrutiny) of the reasonableness of the funding arrangement. If not willing to tackle the issue of capping funder remuneration, European legislators are well advised to revisit at least the issue of judicial control over its reasonableness and implement it in the certification phase and throughout collective proceedings. Otherwise, they risk serious prejudice to consumers' interests.

- **Cost allocation rules, liability for adverse costs and security for costs.** In addition to the "loser-pays" rule, European lawmakers should consider introducing a power of the court to order security for costs against a claimant failing to demonstrate that it has sufficient financial resources to meet any adverse costs should the action fail, and eventually refuse certification or terminate the proceedings if the order is not adhered to.
- **Regulation of contingency fee arrangements.** The 2013 Recommendation rejects contingency fees as a matter of principle, saying that they create an incentive for litigation. Curiously, the 2018 Proposal Directive is completely silent on that issue. EU lawmakers should assess the possible impact the regulation of contingency fees might have on TPLF and on the right to full compensation of injured individuals.

European legislators should be mindful of comparative regulatory trends, which indicate that, apart from the level of regulation of TPLF, a complex interplay between various other factors may decisively impact the actual demand for TPLF in collective redress. These include, *inter alia*, cost allocation rules; accessibility of alternative funding options, such as contingency fee arrangements with lawyers and public funding of collective redress; and, importantly, measures aimed at reducing the cost-risk for claimants via administrative reduction of the amount in dispute or actual costs of collective proceedings.

Part 1: General Overview of TPLF

In the evolutionary sense, TPLF is a product of the judicial systems of leading common law jurisdictions. TPLF emerged in Australia in the 1990s in litigation concerning insolvency proceedings, and its use gradually extended to collective redress, commercial disputes, civil contentious proceedings, and arbitration.

Origins and Development of TPLF

The leading commentators state various reasons for the emergence of TPLF in the Australian judicial system, but in general they all agree that a gradual abolition of traditional common law doctrines of maintenance⁵ and champerty,⁶ under which such funding agreements were previously deemed contrary to public policy, gave TPLF in Australia its initial thrust. However, the 2006 landmark decision of the High Court of Australia in *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd*⁷ enabled free expansion of the TPLF industry in Australia. In that case, the court found that: (i) the use of TPLF in itself does not constitute an abuse of process; and (ii) TPLF is not counter to public policy in jurisdictions where the maintenance and champerty doctrines have been abolished.⁸ Some authors also see the emergence of the TPLF industry in Australia as a logical reaction of the market to the prohibition of contingency fees for lawyers; that is, payment for legal services comprising a percentage of the amount awarded to the lawyer's client.⁹

The advancement of TPLF in Australia was a strong incentive for England and Wales to start using TPLF almost simultaneously. However, TPLF developed slightly differently there. Scholars explain that the emergence of TPLF in England and Wales was mostly due to the long-term efforts of policy makers to enable greater access to justice for those who cannot afford to bear the court costs. Their goal was to shift the financial burden of ensuring access to justice from the state to the market, not only by reducing barriers to TPLF, but also through various forms of market incentives for the development of specialised insurance products and remuneration of lawyers based on a contingency fee.¹⁰

An important milestone in this development was the decision of the Court of Appeal (England and Wales) from 2005 in *Arkin v Borchard Lines Ltd and others*,¹¹ where the court recognised TPLF *obiter dictum* as an important factor in access to justice. With this ruling, TPLF was *de facto* introduced to the civil judicial system of England and Wales. Shortly thereafter, the Civil Justice Council (England and Wales) went a step further in its second report from 2007,

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when it issued a recommendation to the Secretary of State for Justice stating that TPLF (provided that it is appropriately regulated) should be generally recognised as an appropriate and acceptable method of funding civil litigation.¹² Also, Lord Justice Jackson in his report from 2009 on costs in civil litigation supported TPLF in civil litigation. Among his final recommendations, he suggested that while TPLF remained in a nascent state, there should be self-regulatory rules and professional standards for funders in the form of a code of conduct, which all providers of TPLF services in England and Wales should adopt.¹³ A voluntary code was eventually adopted in 2011 in its simplified form, and later revised several times, the latest revision being effected in 2018.¹⁴ It applies only to members of the Association of Litigation Funders, which currently includes nine funders, and does not outline any penalties for breach of the code. England and Wales are perceived today as among the most attractive TPLF markets in the world.¹⁵

With a slight lag behind competing jurisdictions, TPLF also emerged in the

U.S., mostly due to competing forces in the international legal services market,¹⁶ and not so much due to market requirements. This is because the U.S. is a somewhat specific market where the required working capital for funding judicial proceedings is, to a significant degree, provided by law firms whose business model is based on the receipt of contingency fees.¹⁷ It is thus not surprising that special TPLF services developed in the U.S. to provide funds to law firms, to be repaid by litigation proceeds, which is required for the funding of such business models.¹⁸ In spite of strong competition from the law firms, the use of TPLF in the U.S. nevertheless reached a critical mass required for the official response of the American Bar Association (ABA) in 2009. The ABA confined their 2011 report,¹⁹ called the White Paper on Alternative Litigation Finance, to ethical and legal issues which lawyers might encounter when participating in proceedings funded by third parties. An important segment of the U.S. business community has been sceptical towards TPLF, especially concerning the much-publicised cases of class actions against corporations, which are considered attractive investments by funders.²⁰

In contrast with the aforementioned common law jurisdictions, TPLF has not significantly established itself in continental Europe, with the exception of Germany and the Netherlands. In Germany, a solid TPLF industry developed through an upgrade of an established business model adopted by insurance companies, who offer insurance for legal costs (so-called legal expenses insurance, or LEI).²¹ On the other hand, the Netherlands, which has been at the forefront of collective redress in Europe for two decades, is at the same time one of the most attractive and fastest-developing European markets for TPLF.²² In particular,

high-profile collective settlements under the Netherland's WCAM collective settlement regime, such as the recent EUR 1.3 billion settlement in the *Fortis* case²³, have proved to be attractive investments for funders.

Two significant regulatory developments are expected to reshape the Dutch collective redress and TPLF landscape. On 19 March 2019, the Dutch Senate approved the legislative proposal of the Act on the Resolution of Mass Claims in Collective Action²⁴, which introduces compensatory collective actions currently unavailable under Art. 3:305a of the Dutch Civil Code. Almost simultaneously, soft-law regulation²⁵ of governance rules addressing TPLF for foundations and associations (claim vehicles) has been codified with the adoption of the revised and updated "Claim Code 2019".²⁶ Transparency, disclosure obligations and management of conflict of interest are at the heart of Claim Code 2019. Although it is a non-binding instrument, it is expected that in exercising their supervisory powers in collective actions and collective settlement (WCAM) proceedings, Dutch courts will give significant weight to whether third party funded claim vehicles comply with Claim Code 2019.

The remaining European jurisdictions do not prohibit TPLF (there are no impediments in the national legal systems); however, no significant funding activity has been detected in these markets.²⁷ An interesting exception in Europe is Slovenia, where in 2017 the legislature explicitly regulated TPLF in the field of collective redress in civil, commercial and labour matters falling within the scope of their Collective Actions Act (CAA).²⁸

The evolution of TPLF shows that it is a fairly new solution designed to address what some perceive as a systemic weakness of judicial systems, i.e., restricted access to justice. Therefore, the emergence of TPLF in judicial proceedings has often been seen as a capitulation of policy makers in the field of judicial protection of rights to address their inability to ensure equal access to justice without an intervention of the market. This is also why TPLF has never been seen as an inherent part of judicial systems, but more as an experiment that ought to be carried out in a safe and regulated environment²⁹ under careful monitoring of its interactions with the fundamental principles of public policy.³⁰

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TPLF Defined

Financial participation of third parties in litigation can take many forms. It is thus often difficult to make a clear distinction among different dispute funding models. In addition to genuine TPLF, various financial arrangements with lawyers, insurance market services and other similar instruments are often considered as TPLF in the broader sense.³¹ Individual modalities of these instruments differ in nuances, but they, too, may have significant economic and legal effects.

Traditionally, parties covered their litigation costs themselves. They solved funding problems mainly by taking loans in the bank market. In the second half of the 20th century, globalisation of the legal services market and the ever-increasing complexity of disputes, costs of judicial proceedings, and legal representation caused changes. Faced with the competition for clients and under the influence of law firms from the U.S., the international legal services market developed various forms of payments subject to success for lawyers, which took the burden (at least initially) from the clients with regard to costs of legal representation (e.g., contingency fee and conditional fee agreements). Almost at the same time, specialised insurance market instruments emerged, which insured the client against

the costs of proceedings (e.g., LEI). With these financial mechanisms, clients can protect themselves against the risk of paying their own litigation costs or having to pay adverse costs. The last stage in the development of litigation funding was TPLF, which is primarily offered by specialised funders.³²

Instruments for funding litigation costs may be categorised in four groups having regard to their economic purpose and form of financial participation of the third party: (i) debt instruments; (ii) risk-avoidance instruments; (iii) equity instruments; and (iv) assignment of claims.³³

On one side of the spectrum are the classic debt instruments, basically a loan relationship between the funded party and the creditor (e.g., a bank loan). Regardless of the results of proceedings, the funded party must repay the loan. The difference compared to TPLF is clear: The funded party takes on the entire risk of failure. In such cases, the funded party retains full control over proceedings and power over the claim. On the other side of the spectrum is assignment of claims, where the claimant is replaced by another person as a party to proceedings and loses control over the claim. Both groups of instruments are fairly easily distinguishable from TPLF.

The next steps upwards from debt financing are risk-avoidance instruments. This group mainly includes funding by lawyers based on conditional fee agreements (CFA) and LEI, which includes “after the event” insurance and before the event insurance.

In case of a CFA, the lawyer agrees to represent the client under the condition that if the claim is unsuccessful, they do not receive full payment, but only a reduced payment. In the event that the claim is successful, the lawyer charges the client their usual fee and an additional success fee, which is usually calculated as a percentage of the usual fee and reflects the level of risk taken by the lawyer with such funding. In such cases, risk is shared by the lawyer and the funded party.³⁴ Under the CFA, the client retains control over the proceedings, while the lawyer usually only performs the preliminary assessment of the merit of the claim.³⁵ Due to the fact that such agreements do not protect the parties against the risk of potential adverse costs, a CFA is in practice often combined with after the event legal expenses insurance.

LEI is an insurance for costs incurred by the party due to pursuing a claim, or defence against a claim, in litigation. The majority of LEI insurance policies cover the party’s costs of proceedings and potential adverse costs. The insurance cover usually has a maximum limit. In practice, there are two types of LEI insurance: before the event legal expenses insurance (BTE) and after the event legal expenses insurance (ATE). A party usually acquires BTE insurance before the dispute (the claim) has arisen, i.e., prior to the occurrence of an event insured against, as protection against the risk of incurring future costs of proceedings. To this end, the insured subject usually pays an annual premium,³⁶ which is not subject to success of

proceedings; therefore, a BTE insurer does not have a direct economic interest in the outcome of proceedings.³⁷

The situation is different in case of ATE insurance, where the party takes out insurance after the dispute (the claim) has arisen. ATE insurance usually protects the funded party (the insured person) against adverse costs.³⁸ If the funded party succeeds in proceedings, the insurance company is entitled to an agreed premium. The payment of the premium is, therefore, deferred until the conclusion of proceedings and is activated only in the event that the funded party is successful. Insurance conditions differ in practice and sometimes include covering the costs of judicial proceedings (e.g., costs of representation of the funded party), although this is unusual. An ATE insurer usually does not pay the costs of proceedings for the funded party, but is protecting the funded party against the risk of incurring costs if the party loses the case (risk-avoidance instrument).³⁹ Funded parties, therefore, often combine ATE insurance with CFA agreements.

In the case of ATE insurance, the funded party retains only limited control over proceedings, and the insurance company performs the initial assessment of the merit of the claim and retains influence over the strategy of managing the proceedings.⁴⁰ Because payment of the premium is deferred, the insurance company has an economic interest in the outcome of proceedings. This is the characteristic in which ATE insurance is most similar to TPLF; the main difference between them is the investment aspect, which is the essential component of TPLF, but is not present in ATE insurance.⁴¹ In spite of the aforementioned, the line between TPLF and ATE insurance is often blurred.⁴²

The last group consists of equity funding instruments. Their common characteristic is an investment in another's claim, which can take many forms. This group contains contingency fee agreements, under which a lawyer undertakes to represent a client in litigation at the lawyer's own costs and risk, and the funded party undertakes to pay the lawyer a proportion (percentage) of the amount awarded to the client by the court or which the client receives under an agreed settlement. If the client is unsuccessful in proceedings, the lawyer does not receive anything.⁴³ A contingency fee agreement⁴⁴ enables the funded party to transfer their risk of having to cover the costs of legal representation to the lawyer in return for an appropriate fee.

Commentators are unanimous in emphasising that under such agreements, lawyers risk a potential loss of representation fee. Therefore, they are only prepared to enter into such agreements with clients if they assess in advance that the claim has great potential for success with regard to its cause of action and amount, and the potentially awarded amounts are high enough to outweigh the risk.⁴⁵ The lawyer and the funded party, therefore, have a shared economic title over the claim, which is a consequence of the lawyer's investment in the party's claim. CFAs thus presume that the lawyer-as-funder has a strong role and great influence over the course of proceedings and determination of the litigation strategy.⁴⁶ These characteristics make CFAs very similar to TPLF, which is why it is difficult to draw a clear line between them. The key difference between the two forms of funding is probably the fact that in the first case funders invest their services and time, and in the second case, their capital.⁴⁷

“ In the case of ATE insurance, the funded party retains only limited control over proceedings, and the insurance company performs the initial assessment of the merit of the claim and retains influence over the strategy of managing the proceedings. ”

Because TPLF is a new instrument with diverse forms, a lack of empirical data on its functioning, and confidentiality surrounding it, theory and practice have so far been unable to establish a firm and generally acceptable definition of TPLF. Definitions differ mainly in how broad a range of different forms of financial participation of third parties in litigation are included.⁴⁸ For the purpose of this paper, the authors would like to offer the following working definition of TPLF *stricto sensu*:

TPLF means that a third party ensures financial means or other material support to a party to proceedings with the view of pursuing a claim or defending against it; in return, such third party is entitled to receive repayment plus financial gain from money awarded in judicial proceedings or from the settlement reached. It is characteristic of TPLF that a funder provides the client with non-recourse financing of litigation costs in return for the agreed fee in the event that the claim is successful, usually as a

percentage of the proceeds of proceedings; in the event of failure of the claim, the funder receives nothing. Funders are not parties to the proceedings, which is why by investing as a third party they only receive economic interest in the claim (the result of proceedings), not a legal interest.

TPLF Market Drivers

There are many reasons why particular users may utilize TPLF. Without external sources for funding the costs of judicial proceedings, an impecunious party might be unable to pursue a claim.⁴⁹ However, motives of parties to use TPLF might be more sophisticated and based on a more (pragmatic) commercial logic. For example, one such motive is a desire for more neutral accounting solutions for the funding of litigation costs, which do not affect the liquidity of a party and do not impede the performance of its regular activities. Individual parties may also be unprepared to take the risk of failure in litigation and wish to share such risk with a funder. Some funders believe that the fast development of TPLF was precisely due to the fact that it enables the users to release significant capital which would otherwise be tied up in pending claims, and to thus manage the risk of failure in proceedings.⁵⁰

Of special interest are cases where parties decide to use TPLF to equalise their weapons in litigation. Whenever the opposing parties are equal in their commercial power and funding sources, both parties may afford lengthy and

expensive proceedings without a major impact on their operations. However, litigation is not always a fight between equal adversaries,⁵¹ especially within the meaning of available funds and losses which the parties are capable of absorbing. If the claimant is the weaker party, investing the majority of its available resources in the failed project, it may feel under pressure to solve the dispute as soon as possible and to secure a refund of at least a part of the invested funds with minimum costs. If one assumes that the defendant is the commercially stronger party, it may employ tactics of exhausting the adverse party by delaying proceedings and increasing its costs. In such circumstances, the weaker party will often be forced to agree to an unfavourable settlement or even withdraw its claim due to the lack of funds. Proponents argue that the use of TPLF may significantly change the balance of power in litigation.

On top of stable funding of proceedings, a funder also provides to the funded party access to legal services and an in-depth analysis of the merits of the claim.⁵² TPLF can be, therefore, also an important warning to the commercially stronger party.⁵³ But funding can also shift the balance of power in such a way as to make the claimant or claimants the stronger party, particularly in high profile collective litigation. In collective litigation, the funder and its client may be the ones asserting pressure to exhaust the defending party and compelling settlement, even if the claim is weak.

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How Does TPLF Work?

Although an extensive academic discussion is currently underway on the benefits and risks of TPLF, the actual contractual relationships in TPLF are still mostly unknown to the public. Only a limited circle of persons has an insight into the behind-the-scenes workings of TPLF and associated business practices. The information on how TPLF works usually flows between funders and law firms, who may direct their clients towards securing alternative sources of funding of litigation costs.⁵⁴ The public has gained some access to individual examples of contracts through much-publicised judicial proceedings in which the courts ordered the parties to reveal them.⁵⁵ Common standards in this field have also not been developed.⁵⁶ In practice, there have been very limited efforts to standardise the contractual regulation of TPLF on a self-regulatory level,⁵⁷ which is otherwise common with regard to transactions in the financial and insurance sectors (e.g., leasing, factoring, forfeiting, transactions concerning swaps and derivatives).⁵⁸

Funders have different procedures for making investment decisions. Following the initial contact, the client and the funder sign a non-disclosure agreement, and exchange relevant information and documentation; the prospects of success of the claim are then assessed *prima facie*; an exclusivity agreement is signed for a limited period of time; and due diligence follows, which is the basis for making an investment decision. If the claim successfully passes due diligence, the contracting parties commence negotiations to conclude a LFA and associated additional transactions (such as a waterfall or priority agreement, insurance contract, or contract for legal representation).

“ Only a limited circle of persons has an insight into the behind-the-scenes workings of TPLF and associated business practices. ”

Steinitz and Field explain that similar to venture capital, TPLF also includes the risk of information asymmetry.⁵⁹ Representations and warranties of the contracting parties are thus typical elements of a LFA. In practice, the funders usually required from the funded parties that they: (i) disclosed all material information concerning the claim upon the conclusion of the contract (full disclosure);⁶⁰ (ii) did nothing, either by act or omission to reduce the prospects of success of the claim; (iii) did not and shall not introduce parallel judicial, arbitration or other proceedings regarding the same claim; (iv) did not and shall not give any benefits from the litigation to any third party;⁶¹ (v) are not at risk of becoming insolvent.⁶²

Ideally, a LFA should also include the representations and warranties of the funder; i.e., that they have sufficient capital and financial assets to meet their contractual obligations,⁶³ as well as representations and warranties concerning the prevention of potential conflict of interest between the funder and the funded party's lawyer.⁶⁴ However, it is unclear how often, if ever, LFAs include these provisions, as they are rarely disclosed.

Funders also usually insist on including provisions regulating the duty of cooperation of the funded party. This in practice includes the obligation of the funded party to actively participate in proceedings and report to the funder periodically.⁶⁵ A basic obligation of funded parties is also to do everything in their power to enforce the judicial decision.

Protection of confidentiality is an ever-present element in LFAs. Usually, confidentiality extends to the existence of the relationship and its subject matter.⁶⁶ The obligation of protection of confidentiality under a LFA may come into conflict with the party's obligation to disclose the existence of TPLF in litigation, the identity of the funder, or even the relevant provisions of the LFA.⁶⁷

Significantly, LFAs often include provisions enabling the funder to influence strategic decisions of the funded party in litigation (e.g., selection of a lawyer,⁶⁸ settlement agreement,⁶⁹ withdrawal of a claim), as well as *ex ante* and *ex post* control over the proceedings and their costs. As already explained, such provisions, which form the essence of a LFA from the perspective of the funder, often turn out to be contentious in practice in the tripartite relationship among the funded party, their lawyer, and the funder.⁷⁰

As a general rule, a LFA also establishes circumstances under which a funder may terminate the agreement. A funder seems generally to have a right to terminate the agreement in particular in the event of a breach of material provisions of the agreement by the funded party, and in the event of a change in material circumstances which formed the basis for the conclusion of the LFA. Termination of an agreement due to a party's material breach seems less problematic, because an agreement will

usually quite clearly establish which breaches of provisions are considered material.⁷¹ In such events the party loses funding, which most often leads to termination of proceedings⁷².

More problematic is the funder's ability to terminate the agreement due to a change in the material circumstances that formed the basis for the funder's decision to take the risk upon signing of the agreement. There is a possibility that a funder would reserve too wide a margin of discretion regarding the assessment of circumstances, and could use it to justify arbitrary termination of the agreement, thereby destabilising the party's position in litigation.

A known concept in the TPLF industry permits a funder to terminate a LFA if the potential for success of the claim is significantly reduced during the course of proceedings, rendering the persistence in funding the claim irrational from the

“ A known concept in the TPLF industry permits a funder to terminate a LFA if the potential for success of the claim is significantly reduced during the course of proceedings, rendering the persistence in funding the claim irrational from the funder's business perspective. ”

funder's business perspective.⁷³ It must be taken into account that the funder's risk assessment of the investment doesn't end with the initial due diligence; funders assess the potential for success of the claim throughout the proceedings, based on new information available at each stage of proceedings. Often, important circumstances emerge during the course of proceedings which could significantly reduce the prospects of success of the claim (e.g., new evidence).

If at a certain point in proceedings the risk of failure exceeds the (contractually) determined limit, any further participation of the funder would mean that the funder is taking on unreasonable risk in the form of financing a claim with no prospects of success. In such events, funders attempt to reserve the right to withdraw, in consideration for the amount of already invested funds.⁷⁴ This approach has become a de facto standard in England and Wales,⁷⁵ supported also by the High Court of Justice (England and Wales) in *Harcus Sinclair v Buttonwood Legal Capital Ltd & Ors*.⁷⁶ Under the English practice, the contracting parties must seek a binding opinion of an independent third party with regard to the termination of the LFA as termination of one agreement may also have effects for other stakeholders.⁷⁷

The key element of a LFA is a financial plan, in which the parties determine the structure, the envisaged costs of litigation, and how the funds will be used in various stages of proceedings.⁷⁸ Often with the assistance of experienced lawyers, financial experts and business advisers, funders assess the prospect of success of each claim.⁷⁹ The higher the risk of failure of the claim, the higher the required return on investment (price) and the less capital funders are prepared to invest in the claim. Reserved funds for a potential security for

costs (which might be required by the court due to a bad financial position of the funded party) may also be part of the financial plan, as well as the funds earmarked for potential adverse costs if the funded party is not successful in its claim.⁸⁰ A greater part of the planned total costs of litigation might be the costs of legal representation, which might be subject to a contingency fee agreement. Funders are extremely hesitant in taking on unexpected costs, which is why they often protect themselves in the LFA with provisions on a maximum monetary amount they are prepared to invest in litigation.⁸¹

LFAs also set forth how the funder will participate in the monetary proceeds of litigation, and the payment mechanism. The funder's prime concern is to define proceeds in the agreement as broadly as possible, because the proceeds usually form the basis for the calculation of the funder's success fee.⁸² The latter is usually determined as follows: first, all costs of the funder in funding the litigation are deducted from the proceeds via funder reimbursement; from the remaining amount the funder then receives the contractually agreed payment, usually expressed in the percentage of a basic amount (return on the investment). The amount remaining after the deduction of the funder's success fee belongs to the funded party, provided that there are no other eligible persons with a higher priority of repayment (e.g., the party's lawyer or an ATE insurer) ensuing from the so-called priority or waterfall agreements.⁸³

The actual amount of a typical funder's success fees in practice may only be guessed at because it is nearly impossible to obtain insight into the actual agreements.⁸⁴ With the exception of a few funders that publish their business terms and conditions,⁸⁵ and those rare cases

where funders and/or funded parties are obliged to disclose the terms of their LFA in court proceedings, the majority of funders only state relative values of average fees in (significant) ranges.⁸⁶ According to anecdotal information from funders, success fees on average amount to three times the invested capital, or 20–40% of the proceeds, whichever amount is higher. Funders' goal, therefore, is to triple their investment.⁸⁷ A fee may also be variable, increasing with time.⁸⁸

Controversies Surrounding TPLF

TPLF is a controversial concept that tests the boundaries of established legal principles. As such, it is the subject of heated debates on its advantages (benefits) and disadvantages (risks), including its potential effects on litigation systems. In theory and practice, there are completely opposing views concerning basic conceptual issues like lawfulness, social acceptability, and benefits of TPLF. What the supporters view as an advantage of TPLF, the opponents often see as a detriment and vice versa. This section shall critically assess the main advantages and potential risks and detriments of the use of TPLF.

One executive of a TPLF provider has stated that in civil justice systems all over the world, the lawfulness and fairness of the system is measured by the parties'

access to justice.⁸⁹ Those who study TPLF based on the method of economic analysis see theoretical, positive external effects of TPLF in that it can re-establish the balance of financial power between the parties in litigation, in those situations where economically weaker parties with substantiated claims would be left with no effective protection of their rights. This risk primarily includes unfair settlements, which the parties could be forced to make due to their economically weaker position and the disproportionate exposure to a risk of high costs of proceedings.⁹⁰ Proponents believe that TPLF as a remedial concept can, therefore, enable access to justice only to those parties who financially cannot afford proceedings but have substantiated claims, and not to those whose claims have little potential for success and are filed *mala fide* and with the purpose of harassment.⁹¹

Opponents on the other hand insist that TPLF unnecessarily increases litigation before the courts and can promote unsubstantiated claims of parties with weak or no legal merit. They object to using the judicial system as a test site for unsubstantiated claims, where due to TPLF the clients and the lawyers are free from all financial risk associated with such claims. Moreover, they point to ethical concerns; the outsider in the relationship between the client and their lawyer may exercise excessive control over strategies and outcomes, and could encourage the lawyer

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“Prospects of success, however, do not equal ‘legal merits’, because an acceptable settlement could be achieved even in low-legal-merit cases if the defendant has other incentives to resolve the case, such as fear of reputational impacts.”

to direct the clients towards speculative litigation, or towards outcomes that maximize the benefit to the funder and the lawyer, but not to the client. They note that based on TPLF the clients are only able to access a forum, but that does not mean that there will be justice for all parties; thus, TPLF can actually limit access to justice.⁹² Some claim that funders and law firms take advantage of this injustice.⁹³ Given these controversies, the question is: what systemic safeguards are in place to prevent TPLF from being used unethically, or from encouraging abusive litigation directed towards coercing settlements in return for

dropping harassing claims?⁹⁴ It appears that at this moment, the only gatekeepers are the TPLF providers themselves.

Different types of funders have different appetites for risk taking (e.g., institutional funders, insurance companies, private capital funds, venture capital funds, and even individuals). Furthermore, funders may take on a higher level of risk in individual cases, because an investment in a particular claim is usually only a small proportion of their investment portfolio. It is critical that funders carefully assess the risk of failure of the client’s claim, based on due diligence of each individual case, and take that into account when deciding whether to fund a particular claim. Due diligence of the prospects of the success of the claim, which the funders usually perform prior to making an investment decision, should therefore, in ideal circumstances, ensure that cases with no merit do not receive funding. Under this assumption, due diligence may be established as an advantage or benefit of TPLF for the funded parties. Prospects of success, however, do not equal “legal merits”, because an acceptable settlement could be achieved even in low-legal-merit cases if the defendant has other incentives to resolve the case, such as fear of reputational impacts.

“[T]he question is: what systemic safeguards are in place to prevent TPLF from being used unethically, or from encouraging abusive litigation directed towards coercing settlements in return for dropping harassing claims? It appears that at this moment, the only gatekeepers are the TPLF providers themselves.”

The importance of due diligence has also been examined and confirmed by courts in common law jurisdictions, e.g., in *Anglo-Dutch Petroleum Inter. v Haskell*⁹⁵ and *Excalibur Ventures LLC v Texas Keystone Inc and Ors.*⁹⁶ One cannot ignore the question of whether there are any other filters besides the rational economics of funders, as stated by Hodges, Peysner and Nurse,⁹⁷ which would ensure that manifestly unsubstantiated claims would not be financed. A long-term and consistent solution would be a higher level of regulation of corporate governance standards in the TPLF industry, which would follow the example of financial institutions and determine in more detail the level of risk funders may take, and harmonise the funders' investment criteria.⁹⁸ Sadly, however, on the international scale there is currently not even consensus about who should regulate TPLF—the legislature⁹⁹ (imposed regulation), the courts, or TPLF providers themselves¹⁰⁰ (self-regulation). This is an important source of controversy concerning TPLF.

In principle, the use of TPLF could also contribute to more efficient litigation management and cost optimisation, which is in the interest of both the funder and the funded party. We can expect funders to be interested in decreasing the costs of proceedings and thereby lowering their investment in litigation. This means that, in practice, funders should perform *ex ante* and *ex post* control over the costs of proceedings. From the funder's point of view, *ex ante* influence over costs is key to establishing in as much detail as possible the structure and expected costs. Funders usually focus on the two most expensive items, the price of legal services and the cost of evidentiary contributions (i.e., experts, witnesses, documents). Funders

ideally would be very restrictive towards unexpected costs and would finance them only exceptionally, upon prior confirmation. Certain commentators see this as an added value, brought to the process by funders based on their experiences,¹⁰¹ or as claim management services.¹⁰²

Others point to the risk that under the agreement, the funded party might disproportionately transfer control over the course of proceedings and key strategic decisions to the funder, such as the selection of a lawyer, establishing proof, evaluating settlement, and power over the claim in general.¹⁰³ Theory and practice have not yet answered the question of how much the funder may influence the proceedings. Funders often claim that they are not decision-makers and that their control over proceedings does not infringe the party's right to make decisions.¹⁰⁴ This does not seem always to be the case,

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“ This leaves claimants with only a formal power to decide, when in fact it is the funder who directs litigation. ”

especially where, under the agreement with the funder, clients severely limit their own power over the claim (e.g., agreements mandating consent of the funder to withdraw or amend a claim or make a settlement).

This leaves claimants with only a formal power to decide, when in fact it is the funder who directs litigation.¹⁰⁵ The risk is much greater with financially weak parties, who may agree to unfair contractual terms and conditions, especially concerning the funder's control over proceedings, their share of proceeds of litigation, and many possibilities of unilateral termination of the LFA. In collective actions, any negative effects of the funder's excessive control over the proceedings are even broader since they might affect all represented class members, and not only a single individual.

One should also not overlook that in practice, funders may exert their influence over proceedings through the funded party's lawyer, whom they are often directly paying. It follows from the

commitment of funders in the Code of Conduct for Litigation Funders of England and Wales that this is not just a theoretical problem.¹⁰⁶ There are several open issues with regard to the relationship between the funded party and their lawyer, related to lawyers' ethics in representing clients. Although in principle, there are no doubts that in the event of a conflict of interest between the funder and the funded party the lawyer owes loyalty to the funded party, the practice shows that this is not always the case.¹⁰⁷

A conflict of interest most often emerges when a funder is interested in an early settlement to quickly make a return on their investment with as few costs as possible, while the funded party may believe that they can gain more in proceedings. When the party's lawyer is actually selected by the funder, or when the lawyer is economically dependent on the funder, there is a risk that the lawyer would advise the client to make a settlement which may not be in the client's best interest.¹⁰⁸ Lawyers may also find themselves in conflict of interest during evidentiary proceedings, when they wish to submit evidence that in their professional opinion they believe to be in the client's interest, but which the funder opposes solely due to the costs of presenting such evidence.¹⁰⁹

The aforementioned demonstrates that the use of TPLF has advantages and carries potential risks. It is the duty of stakeholders to establish, by appropriate regulation of this concept, safeguards concerning the shortcomings of the system.

Part 2: Legal and Regulatory Framework of TPLF—A Comparative Study

This part of the paper focuses on the existing legal and regulatory framework of TPLF in a wide array of selected jurisdictions, divided into two main groups: i) selected non-European jurisdictions and ii) selected European jurisdictions. This division (except for England and Wales) generally corresponds to that between common law and civil law jurisdictions.

Five of the world’s leading litigation venues form the core of the compared non-European jurisdictions. These jurisdictions could be studied more systematically because in them, TPLF is a judicially developed concept, and some level of specific regulation of TPLF already exists.¹¹⁰ As for the European jurisdictions, it would be very difficult to devote a comprehensive subchapter to each of the 28 EU MS and stay within the manageable scope of the paper. Additionally, TPLF is a rather underdeveloped concept in much of Europe, both in terms of jurisprudence and existing regulation. It thus seemed more feasible to compare the chosen twelve EU MS plus Switzerland, which represent a diverse grouping of European jurisdictions in terms of size, location, development of legal system, and existence of TPLF regulation. In order to provide a concise and workable overview with references to relevant primary sources and case law, the

comparison of TPLF in the selected jurisdictions was conducted against six basic TPLF related criteria, as shown in the table beginning on page 38.

Selected Non-European Jurisdictions

AUSTRALIA

Australia is widely regarded as one of the world’s most advanced TPLF markets. Over the past two decades Australian courts have developed a robust body of case law dealing with some of the most intricate issues pertaining to TPLF, such as: (i) the legitimacy and admissibility of the TPLF model (application of common law doctrines of champerty and maintenance);¹¹¹ (ii) the legal nature of TPLF;¹¹² (iii) possible conflict of interest inherent in TPLF;¹¹³ (iv) the power of Australian senior courts¹¹⁴ to order a non-party (including a litigation funder) to pay

adverse costs;¹¹⁵ (v) security for costs and the adequacy of ATE insurance policies, as a form of security;¹¹⁶ (vi) the limits of intervention by the Federal Court when assessing the reasonableness of the funder's return, in an application for the approval of a class action settlement;¹¹⁷ and (vii) more recently, addressing the controversial issue of whether the courts may issue "common fund orders".¹¹⁸

The Australian litigation funding industry operates in a national market, funding predominantly class actions and single party litigation. However, there is no nationwide comprehensive regulation of TPLF. Rather, the existing regulatory framework for TPLF currently in place in Australia seems to follow a light touch approach, focused only on limited areas of relevance not administered by a single entity or agency (disclosure, conflict of interest management scheme, contingency fees of attorneys).¹¹⁹ Importantly, litigation funders are not required to hold a licence to operate in Australia under the Corporations Act (2001). In 2013, following the *Chameleon* decision, they were exempted by regulation¹²⁰ from the requirement to hold an Australian Financial Services Licence (AFSL), provided that they have adequate (self-governing) practices in place for managing conflicts of interest. This effectively means that TPLF providers in Australia are not subject to the capital adequacy, corporate, and risk management requirements that apply to financial services licensees.¹²¹

The conflict of interest management regime for litigation funders is governed by the Australian Securities and Investments Commission's (ASIC) Regulatory Guide 248. This is basically a soft-law instrument giving guidance to regulated entities by explaining when and how ASIC will exercise specific powers under legislation

(primarily the Corporations Act) and explaining how ASIC interprets the law. In a nutshell, the conflict management requirement is satisfied if the practices for dealing with conflicts are documented and cover several specific matters, including written procedures for identifying and managing conflicts. The written procedures must include the topic of how to deal with a situation in which there is a pre-existing relationship between a funder, a lawyer, and a general member of the litigation funding scheme.¹²²

Disclosure obligations of the applicant's lawyers in class action proceedings in the Federal Court are set out in the 2016 Federal Court Practice Note on Class Actions (GPN-CA). The Federal Court has attempted in the GPN-CA to develop a framework in which the practical, specialised skills of class action registrars and judges can be deployed to help manage what are often complex and difficult claims and in which the potential for conflict of interest can be effectively and fairly managed.¹²³

The GPN-CA specifically requires the applicants' lawyers to disclose the costs agreements and LFAs to class members, the court, and other parties. It stipulates that the applicants' lawyers owe an obligation to notify, as soon as practicable, class members (who are clients or potential clients of the applicants' lawyers) in clear terms of any applicable legal costs and disbursements and any funder's commission, fees, and other expenses (including those estimated) to be charged to class members. This is an ongoing obligation and applies to any material changes to the costs or litigation funding charges. Failure to do so may be taken into account by the court in relation to settlement approval under Sec. 33V of the Federal Court Act.

As regards disclosure to the Court, prior to the first case management hearing, the applicants' lawyers must, on a confidential basis, email the costs agreement and any LFA to the associate of the judge presiding over the first case management hearing. Finally, subject to any objection, no later than seven days prior to the first case management hearing, the applicant's lawyers must file and serve a notice to the respondent in accordance with the "Notice of Disclosure—Litigation Funding Agreements" together with a copy of the LFA. Such disclosure may be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party, such as information as to the budget or estimate of costs for the litigation or the funds available to the applicants, and information which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any aspect of the proceeding.

Starting in 2018, litigation funders in Australia (via the Association of Litigation Funders of Australia—ALFA) have attempted self-regulation. However, these attempts still seem to be in a nascent state, taking into account that at the time of this writing, the ALFA has only six members listed on its website¹²⁴ compared to 33 litigation funders reportedly operating in the

Australian market.¹²⁵ In January 2019, ALFA produced its voluntary Code of Best Practice¹²⁶ akin to the one published earlier by its analogue, the Association of Litigation Funders of England and Wales (ALF). The ALFA Code is silent on the issue of disciplinary measures in the event of potential breaches of the Code, as is the newest (January 2018) version of the ALF Code in England and Wales. It is therefore questionable whether self-regulation has much impact on funder behaviour.

As a general rule, Australian lawyers are prohibited from billing clients on a contingency fee basis.¹²⁷ In contrast, various conditional fee structures (mainly conditional costs agreements and conditional costs agreements involving uplift fees) are generally permitted, subject to limitations and/or capping.¹²⁸

Fostif and post-*Fostif* case law provides insight into the public policy underpinning regulation of TPLF in Australia and the degree to which Australian courts are willing to intervene and scrutinize LFAs, principally in the class actions context. Jurisprudence of Australian courts has paved the way for the advent of a possible regulatory reform of TPLF, embodied in the current regulatory endeavours steered by the Victorian Law Reform Commission (VLRC)¹²⁹ for litigation in the state of Victoria, and the Australian Law Reform

“ The ALFA Code is silent on the issue of disciplinary measures in the event of potential breaches of the Code, as is the newest (January 2018) version of the ALF Code in England and Wales. It is therefore questionable whether self-regulation has much impact on funder behaviour. ”

Commission (ALRC) for federal court litigation.¹³⁰

In December 2018, the ALRC produced a report titled, “Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders”, which, *inter alia*, lays down the following recommendations:

- Providing for greater court oversight of the LFAs.
- Requiring that the funder indemnifies the lead plaintiff against an adverse costs order, and creating a presumption in favour of security for costs.
- Introducing limited percentage-based fees (contingency fees).
- Strengthening existing ways to mitigate and protect against conflict of interest in class action proceedings.
- Amending of the existing ASIC Regulatory Guide 248 so as to require funders to report to ASIC to show compliance with the requirements to meet certain obligations to avoid or mitigate conflict of interest.

- Introducing a voluntary accreditation program for solicitors who act in class action proceedings.
- Prohibiting arrangements whereby a solicitor may have an interest in the funder with whom the solicitor is working.¹³¹

CANADA

Canada is a non-unified legal system. Hence, there is no nationwide approach to regulation of TPLF. In fact, there is no specific regulation of TPLF in Canada on the provincial, territorial or national level. Nevertheless, TPLF is a familiar and commonly practiced concept in Canada that has been considered by the courts on several occasions, typically in the context of class proceedings and more recently (albeit with some reluctance¹³²) in single-party commercial litigation. This is true also for Québec.¹³³ Local legal practitioners report that Canadian courts are being asked increasingly to scrutinize LFAs, and there have been decisions in seven provinces related to LFAs and fees paid out as part of these arrangements.¹³⁴ In addition, contingency fee-based attorney financing of class actions is generally permitted (and regulated) in Canada, subject to certain statutory limitations and mandatory court approval; e.g., in Ontario¹³⁵ and British Columbia.¹³⁶

Among a variety of TPLF schemes in Canada, the Class Proceedings Fund (CPF) in Ontario also deserves attention. The CPF was established in 1992 by an amendment under the Law Society Act.¹³⁷ It provides financial support to approved class action plaintiffs for legal disbursements and indemnifies plaintiffs for costs that may be awarded against them in funded proceedings. A special Class Proceedings Committee is responsible for deciding

“ Canadian courts are being asked increasingly to scrutinize LFAs, and there have been decisions in seven provinces related to LFAs and fees paid out as part of these arrangements.”

whether applicants will receive support from the fund. The CPF is intended as a self-perpetuating statutory litigation funding scheme. As a result, it receives a levy in the amount of 10 percent of any awards or settlements in favour of the plaintiffs in funded proceedings, plus a return of any funded disbursements.¹³⁸

Some commentators argue that the CPF option is not fit for everyone since the fixed levy may be perceived as a high price to pay for financial assistance.¹³⁹ Others have voiced concerns as to the financial viability of the CPF due to the quantum of the adverse cost awards that have been made in favour of defendants in certain class action proceedings.¹⁴⁰ Similarly, in Québec, a public fund named le Fonds d'aide aux actions collectives (FAAC) was established as early as 1978.

In Canada, common law doctrines of maintenance and champerty remain relevant. As a result, the jurisprudence of Canadian courts regarding TPLF revolves around these fundamental concepts. It is widely accepted that the admissibility of TPLF was secured by the landmark decision of the Ontario Court of Appeal in *McIntyre Estate v Ontario (Attorney General)*,¹⁴¹ in the context of the contingency fee arrangements.¹⁴² In that case, the issue was whether the interests of justice can be properly served by allowing third parties (lawyers) to fund litigation (on a contingency fee basis). The court held that a determination of the agreement as champertous depended on the outcome of the litigation.

In making this finding, the court observed that: (i) a person's motive is determinative of the question of whether such an arrangement constitutes maintenance or champerty; (ii) the courts have shaped the rules relating to champerty and

maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice; (iii) whether a particular agreement is champertous is a fact-dependent determination, requiring the court to inquire into the circumstances and the terms of the agreement; and (iv) this fact-based inquiry depends in part on the "reasonableness and fairness" of the agreement.

Some commentators contend that "[i]n making these findings, it was clear that the Court was aware of increasing concerns over access to justice and the potentially beneficial role of contingency fee agreements in this regard. This evolution in the priorities of the Canadian justice system necessitated a more flexible understanding of champerty and applicability of the Champerty Act".¹⁴³

In the post-*McIntyre* era, probably the most notable decision testing the lawfulness of TPLF in class action proceedings is that of the Ontario Superior Court of Justice in *Metzler Investments GmbH v Gildan Activewear Inc.*¹⁴⁴ In *Metzler*, the plaintiff brought a motion seeking approval of a "Costs Indemnification Agreement" (actually a LFA) it entered into with an Irish funder.¹⁴⁵ The court relied heavily on the earlier *McIntyre* decision, by analogy applying the existing law on contingency fee agreements to TPLF LFAs. The court reiterated that it would be premature to assess at the beginning of the proceedings whether the LFA would be reasonable and fair, and that such determination will normally have to await the outcome of the litigation. It also ruled that LFAs do not contravene the Champerty Act *per se*, but may be champertous if driven by an "improper motive".¹⁴⁶

Following *McIntyre* and *Metzler*, class action proceedings proved to be the prevalent terrain for judicial review of LFAs. To date, Canadian courts have rendered a handful of decisions assessing the limits of LFAs in the context of class action proceedings.¹⁴⁷ A review of these decisions reveals that: (i) court approval of the LFA must be obtained and the LFA must be promptly disclosed to the court; (ii) the LFA must not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members; (iii) the representative plaintiff must retain the right to instruct and control the litigation and the representative plaintiff must not become indifferent in giving instructions to class counsel in the best interests of the class members; (iv) the third party funder may be required to pay into court security for the defendant's costs; and (v) before the certification of a proposed class action under the Class Proceedings Act (1992), the court has jurisdiction to approve a LFA and make an order binding on the putative class members, should they not opt-out of the action.¹⁴⁸

The recent *Houle* case (2017) is particularly interesting. In approving the LFA, the court stated that "[i]n the context of class proceedings, from the perspective of legal policy about the administration of justice,

third party funding agreements are justified as a matter of necessity."¹⁴⁹ The significance of this case lies in the four-tiered test developed for approval of the LFA in class action proceedings, relying on previous case law. In order to approve a LFA, the court must be satisfied that: (i) the LFA must be necessary in order to provide access to justice; (ii) the access to justice facilitated by the LFA must be substantively meaningful; (iii) the LFA must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (iv) the third party funder must not be overcompensated for assuming the risks of an adverse costs award, as this would make the LFA unfair, overreaching, and champertous.¹⁵⁰

While Canadian courts have broad supervisory powers in approving LFAs in class action proceedings, it is not clear whether such a mandate exists in single party commercial litigation. In *Seedling Life Science Ventures LLC v Pfizer Canada Inc.*,¹⁵¹ the court refused to deal with the approval of the LFA, opining that such an approval of the LFA in single party litigation is neither necessary nor ancillary to the litigation, and that it has no jurisdiction to inquire into or make any determination as to the validity or propriety of the LFA.¹⁵² Commentators argue that this view was too narrow, as it was limited to the contractual relationship between the

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“ [T]he court in *Schenk v Valeant Pharmaceuticals International Inc.* assessed the LFA and determined that it constituted maintenance and champerty. The court eventually refused to approve the LFA since it did not provide for a cap on the funder’s return, meaning that the funder could recover over 50% of the proceeds. This ‘open-ended exposure’ could result in the funder retaining the lion’s share of any proceeds.”

funded party and the funder.¹⁵³ In contrast, the court in *Schenk v Valeant Pharmaceuticals International Inc.*¹⁵⁴ assessed the LFA and determined that it constituted maintenance and champerty. The court eventually refused to approve the LFA since it did not provide for a cap on the funder’s return, meaning that the funder could recover over 50% of the proceeds. This “open-ended exposure” could result in the funder retaining the lion’s share of any proceeds. Such an agreement, in the court’s view, does not provide access to justice to the plaintiff in a true sense, but rather provides an “attractive business opportunity” to the funder who suffered no alleged wrong.

The analysis reveals that even though TPLF has become commonplace in class actions, Canadian class proceedings legislation still does not address TPLF. On the other hand, attorney financing via contingency fee arrangements is heavily regulated at the provincial level. As a result, parties to (class and single) litigation have to rely entirely on safeguards developed by the jurisprudence of Canadian courts in *McIntyre*, *Metzler*, *Fehr*, *Bayens*, *Houle*, and other landmark rulings.¹⁵⁵ However, approaches taken and standards applied by different courts may vary.

This is most evident in the case of disclosure, which should be the starting point of any regulation. Exactly what must be disclosed to a defendant when the claimant has a LFA to secure its funding has not been settled.¹⁵⁶ In Alberta and Nova Scotia, the court will approve a LFA on an *ex parte* or “seal order” basis. In New Brunswick, the defendants must be given notice, but are not provided with a copy of the LFA and can therefore only address

“ [E]ven though TPLF has become commonplace in class actions, Canadian class proceedings legislation still does not address TPLF. On the other hand, attorney financing via contingency fee arrangements is heavily regulated at the provincial level.”

overall principles without application to the specific agreement. Ontario and British Columbia require notice to the defendants, who must receive a copy of the LFA.¹⁵⁷

As TPLF in class actions in Canada is entering its maturity, one would expect legislators to follow with regulation, building on a solid body of case law available to them. Unlike Australia, there are no nationwide regulatory initiatives on the horizon.

- At the provincial level, the Law Commission of Ontario (LCO) initiated in 2017 a class actions project led by Professors Kalajdžić and Piché, to consider Ontario's experience with class actions since the Class Proceedings Act (CPA) came into force in 1993. The LCO notes that during this period, class actions have grown significantly in volume, complexity, and impact in Ontario and across Canada.¹⁵⁸ According to the LCO, class actions have had major financial, policy and even cultural implications across the country.¹⁵⁹ The LCO has received a number of submissions from a range of different stakeholders, urging codification of transparency and other requirements in relation to TPLF.¹⁶⁰ Neither legislation nor a self-regulatory model of TPLF has emerged in Ontario.
- The courts have nevertheless relied on s. 12 of the CPA to require judicial approval of TPLF prior to certification, and have developed a number of factors that must be satisfied if a LFA is to be approved.
- The courts have generally approved TPLF agreements on the basis that funding agreements are an acceptable way to promote access to justice.

- The LCO agrees that TPLF promotes access to justice.
- The LCO believes that class counsel who assume the risk of costs and carry all disbursements are entitled to a higher premium on their legal fees.
- Conversely, the presence of TPLF or the Class Proceedings Fund should result in a corresponding reduction in counsel fees, in order to ensure the net compensation to the class is appropriate.
- The requirement that a representative plaintiff bring a motion for court approval of a funding agreement should be codified in the CPA. The provisions should also address specific criteria including timing, disclosure, and right of recovery among other factors.
- The judges must have the discretion to determine what is an appropriate levy or fee in the circumstances of each type of arrangement.
- As the models of funding change, inflexible caps within the CPA would be counterproductive.
- Particular terms related to control of the litigation, reporting obligations, rights of exit and privilege are all properly within the scope of judicial scrutiny, as has been the case to date.¹⁶¹

HONG KONG

In Hong Kong, TPLF in court litigation is perceived as contrary to common law doctrines of maintenance and champerty, and thus is generally banned. However, commentators note that courts in Hong Kong have developed three narrow exceptions in which TPLF can be utilized.¹⁶² In the landmark ruling of the Court of Final Appeal of the Hong Kong Special

Administrative Region in *Unruh v. Seeberger*,¹⁶³ the Court lists the following categories of excluded cases: (i) the “common interest” category, where certain relationships have been judicially recognized as involving persons with a legitimate common interest in the outcome of litigation sufficient to justify one of them supporting the litigation conducted by another;¹⁶⁴ (ii) cases involving “access to justice” considerations;¹⁶⁵ and (iii) a miscellaneous category of practices accepted as lawful, such as insolvency cases and the development of the doctrine of subrogation as applied to contracts of insurance.¹⁶⁶ Following *Unruh*, there is a developing body of case law in Hong Kong that demonstrates a liberal approach, recognising TPLF for liquidators as a lawful exception.¹⁶⁷

In Hong Kong, lawyers may not enter into a contingency fee arrangement for acting in contentious proceedings. Pursuant to general provisions regarding remuneration in Sec. 64 of the Legal Practitioners Ordinance, the following arrangements, amounting to attorney litigation financing, are invalid: (i) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or (ii) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding.

The Hong Kong courts have power to order third parties to pay adverse costs.¹⁶⁸ However, they lack power to order third parties to provide security for costs.¹⁶⁹

As opposed to court litigation, judicial and legislative attitudes towards TPLF in Hong Kong are more relaxed in the context of arbitration.¹⁷⁰ It is noteworthy that Hong

Kong is rare among common law jurisdictions for having recently lifted a ban on TPLF in arbitrations and mediations. TPLF in arbitration has been much discussed, culminating in a report issued by the Law Reform Commission of Hong Kong (LRC) on Third Party Funding for Arbitration on 12 October 2016. After extensive public consultations, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was published in December 2016 and introduced into the Legislative Council in January 2017. In June 2017, the Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, which introduces a specific regulatory framework for TPLF in arbitration and mediation. As reported by the Law Society of Hong Kong, the Ordinance:

unequivocally provides that third party funding of arbitration and mediation are not prohibited by the common law doctrines of maintenance and champerty [...] Arbitration under the Ordinance is given an extended meaning to include not only arbitrations to which the Ordinance applies, but also proceedings before the court, proceedings before an emergency arbitrator and mediation

“ The Hong Kong courts have power to order third parties to pay adverse costs. However, they lack power to order third parties to provide security for costs. ”

proceedings [...] A code of practice and regulatory framework for arbitration funders are to be provided and issued. An authorised body is to be empowered to issue, amend or revoke the code of practice setting out practices and standards for third party funders [...] Those matters that may be covered in the code of practice (Sec. 98P(1)) and the process for issuing, amending and revoking the code of practice [...] have been laid out.¹⁷¹

The Ordinance provides useful definitions of third party funding (TPF) in arbitration (Sec. 98G), funding agreement (Sec. 98H), funded party (Sec. 98I) and third party funder (Sec. 98F), which serve as a starting point for regulation of TPLF.

Division 5 of the Ordinance, titled “Other Measures and Safeguards”, deals primarily with the disclosure obligations of the funded party. Under Sec. 98U, the funded party must give written notice to the other party and the tribunal of a LFA. Disclosure is limited to the existence of TPLF and the identity of the funder; the LFA itself need not be disclosed. As to the timing, the notice must be given: (i) for LFAs made on or before the commencement of an arbitration upon the commencement of that arbitration; or (ii) within 15 days after the LFA is made if it is made after the commencement of the arbitration. The funded party is also required to give written notice about the end of TPLF to the other party and the arbitral tribunal, by disclosing the fact that the LFA has ended and the date the LFA ended.

Interestingly, according to Sec. 98W, non-compliance with these disclosure obligations does not, of itself, render any person liable to any judicial or other proceedings. Compliance, or failure to comply, may only be taken into account by

any court or arbitral tribunal if it is relevant to a question being decided by the court or tribunal. It seems that non-compliance could only have procedural consequences in the underlying arbitration; the tribunal could take these facts into account, for example, in deciding on the allocation of costs or on the security for costs.

Sec. 89Q lists a number of safeguards intended for “light touch” regulation in the Code of Practice. The Code may, in setting out practices and standards, require TPLF providers to ensure that: (i) LFAs set out their key features, risks and terms, including the degree of control that funders will have in relation to an arbitration, whether, and to what extent, funders (or persons associated with them) will be liable to funded parties for adverse costs, insurance premiums, security for costs and other financial liabilities, and when, and on what basis, parties to LFAs may terminate the LFA or funders may withhold arbitration funding; (ii) funded parties obtain independent legal advice on LFAs before entering into them; (iii) funders have a sufficient minimum amount of capital; and (iv) funders have effective procedures for addressing potential, actual or perceived conflict of interest and the procedures to enhance the protection of funded parties.

A failure to comply with a provision of the Code of Practice does not, of itself, render any person liable to any judicial or other proceedings. It is evident that the Code of Practice itself has no teeth per Sec. 98S. Non-compliance may only be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

After public consultation, the Hong Kong Secretary of Justice issued the Code of Practice for Third Party Funding of Arbitration¹⁷² in late 2018. The code sets

out practices and standards with which funders are ordinarily expected to comply in carrying on activities in connection with TPLF in arbitration. Notable provisions of the Code include: (i) minimal capital adequacy requirement for funders of HK\$20 million;¹⁷³ (ii) funder's capacity to pay all debts when they become due and to cover its aggregate funding liabilities under all of its LFAs for a minimum period of 36 months;¹⁷⁴ (iii) funder acceptance of a continuous disclosure obligation towards the funded party in respect to the funder's capital adequacy;¹⁷⁵ (iv) procedures for managing conflict of interest;¹⁷⁶ (v) provisions of the LFA limiting the level of funder's control over the proceedings¹⁷⁷ and its liability to the funded party for costs and security for costs;¹⁷⁸ and (vi) grounds for termination of the LFA.¹⁷⁹

The analysis of both the Ordinance and the Code shows that apart from the limited disclosure obligations of the funded party, the Ordinance does not regulate other crucial safeguards and standards that apply to TPLF as a matter of policy. Rather, the Ordinance leaves that to soft law. It seems that the legislature was aware of these issues but decided not to address them at a statutory level. Given the fact that the non-observance of the soft-law standards and safeguards by funders is not strictly policed and cannot be sanctioned, it remains to be seen whether corporate

governance standards of TPLF providers will live up to the requirements embedded in the Code.

SINGAPORE

In Singapore, too, TPLF in civil court litigation runs afoul of public policy doctrines of maintenance and champerty and is generally not permitted. However, commentators contend that case law in Singapore allows for limited exemptions to this general ban, e.g., the sale of cause of action in the context of insolvency,¹⁸⁰ often referring to *Re Vanguard Energy Pte Ltd.*,¹⁸¹ where the court ruled in favour of the validity of LFAs in insolvency cases.¹⁸²

Singapore lawyers are prohibited from charging their clients on a contingency fee basis by operation of the Legal Profession Act, which does not allow a solicitor to engage in the following stipulated activities: (i) purchase or agreement to purchase the interest or any part of the interest of his client or of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or (ii) entering into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.¹⁸³

“ Given the fact that the non-observance of the soft-law standards and safeguards by funders is not strictly policed and cannot be sanctioned, it remains to be seen whether corporate governance standards of TPLF providers will live up to the requirements embedded in the Code. ”

In contrast to civil court litigation, TPLF is expressly regulated and allowed in international arbitration and ancillary court proceedings as of 2017. The Civil Law (Amendment) Act 2017 puts in place a framework for TPLF for international commercial arbitration in Singapore. The amendments, together with the Civil Law (Third Party Funding) Regulations 2017, came into force on 1 March 2017.¹⁸⁴ The Civil Law Act clarified that the common law torts of maintenance and champerty, which previously restricted the use of TPLF, were abolished.¹⁸⁵ Contracts affected by maintenance and champerty continue to be contrary to public policy or are otherwise illegal, and are thus unenforceable unless they fall under permitted categories of dispute resolution proceedings.¹⁸⁶

Civil Law TPF Regulations prescribe a closed list of permitted categories of dispute resolution proceedings: (i) international arbitration; (ii) court proceedings arising from or out of or in any way connected with international arbitration; (iii) mediation arising out of or in any way connected with international arbitration; (iv) application for a stay of proceedings referred to in Sec. 6 of the International Arbitration Act and any other application for the enforcement of an arbitration agreement; and (v) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act.

Compared to Hong Kong, the Singapore legislature went one step further by prescribing statutory capital adequacy qualifications that funders must satisfy. Importantly, the Civil Law TPF Regulations introduce a new term, “qualifying Third Party Funder”—a funder who satisfies and continues to satisfy qualifications prescribed by Civil Law TPF Regulations.

“ Compared to Hong Kong, the Singapore legislature went one step further by prescribing statutory capital adequacy qualifications that funders must satisfy. ”

Funders in Singapore may only provide funding if they meet the following qualifying criteria: (i) the funder carries on the principal business, in Singapore or elsewhere, of funding the costs of dispute resolution proceedings to which the funder is not a party; and (ii) the funder has a paid-up share capital of not less than \$5 million, or not less than \$5 million in managed assets (or the equivalent amount in foreign currency).¹⁸⁷

Entities that do not qualify to fund, or funders who do not comply with requirements imposed on them, will not be able to enforce their rights under the LFA, subject to express statutory provision.¹⁸⁸ This would include the funder’s right to receive a share of the proceeds in the event the claim succeeds. However, the funder will still be obliged to fulfil its obligations to the claimant in respect of the LFA, including its obligation to fund the claim as the rights of any other party as against the funder under the LFA are not affected.¹⁸⁹ The Court or Arbitral Tribunal may nevertheless grant relief to funders on their application if the non-compliance was inadvertent or due to some other sufficient

cause, or if it is just and equitable to do so.¹⁹⁰

In this regard a clear distinction can be drawn from the new Hong Kong legislation. While Hong Kong's 2017 Ordinance expressly waives any authority to sanction the breach of the funder's duties, noncompliance with statutory requirements and qualifications in Singapore renders the LFA unenforceable by the funder. This is arguably a strong economic incentive for compliance.

The Singapore Ministry of Law reports that: (i) related amendments to the Legal Profession Act were made to clarify that legal practitioners are able to introduce or refer funders to their clients and can advise or act for their clients in relation to the LFA as long as they do not receive any direct financial benefit¹⁹¹ from the introduction or referral;¹⁹² (ii) the Legal Profession (Professional Conduct) Rules 2015 were also amended¹⁹³ to impose a duty on lawyers to disclose the existence of any LFA through which their client is receiving funding and the identity and address of any third party funding provider involved in funding the costs of those proceedings. A legal practitioner or a law practice must not hold, whether directly or indirectly, any share or other ownership interest in a funder which they introduced or referred to their client, or which has a LFA with their client; (iii) separately, the Singapore

Institute of Arbitrators, the Singapore International Arbitration Centre and the Law Society of Singapore have promulgated soft-law instruments (guidelines) for funders,¹⁹⁴ arbitrators,¹⁹⁵ and legal practitioners.¹⁹⁶ To date, 10 funders have voluntarily signed up to the Singapore Institute of Arbitrators' guidelines.¹⁹⁷

It is worth noting that disclosure obligations are imposed on lawyers, not on funded parties as in Hong Kong. This solution seems to better serve the purpose of enhancing the fiduciary duties that lawyers owe to their clients and preventing possible conflicts of interest. Lawyers' obligation to disclose TPLF is to be understood in the context of the prohibition against financial and other interests of lawyers in third party litigation funding providers.

From 3 April to 15 May 2018 the Singapore Ministry of Law held a public consultation to seek feedback on the TPLF framework as introduced by The Civil Law (Amendment) Act 2017 and the Civil Law (Third Party Funding) Regulations 2017. The ministry has been seeking views and feedback on the operation of the current TPLF framework thus far, including any suggestions to improve the framework. Perhaps the most important question for the legislature to answer is whether to expand the "safe harbour" for funding of international arbitration cases into new areas.¹⁹⁸

“ While Hong Kong’s 2017 Ordinance expressly waives any authority to sanction the breach of the funder’s duties, noncompliance with statutory requirements and qualifications in Singapore renders the LFA unenforceable by the funder. ”

“ All in all, it could be argued that [t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach.”

UNITED STATES

From a public policy perspective, common law doctrines of maintenance and champerty are still relevant in the U.S. but are divergently applied across different states,¹⁹⁹ possibly creating “legal and ethical uncertainty for putative funders and fundees”.²⁰⁰ For instance, some states have rejected tort claims based on champerty, while others have refused to recognize champerty as anything more than a defence by a party to enforcement of the allegedly champertous agreement, implicitly rejecting a broader tort remedy. On the other hand, limited tort claims based on champerty still exist in some states; e.g., North Carolina.²⁰¹ All in all, it could be argued that “[t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach”, as the Ninth Circuit Court of Appeals put it in *Del Webb Cmtys., Inc. v. Partington*.²⁰²

TPLF in the U.S. was initially approached in the context of legal profession ethics rules. This is owed mainly to the wide acceptance of contingency fee arrangements and the traditional role U.S. lawyers have played in financing single-party and class litigation. The interaction between lawyers and the newly established TPLF industry raised concerns relating to possible impacts of

TPLF transactions on the client-lawyer relationship and the professional responsibilities of lawyers. The core responsibilities relate to management of possible conflicts of interest, control over the proceedings and attorney-client privilege. In its 2012 report, the ABA Commission on Ethics 20/20 concluded that lawyers must approach transactions involving TPLF with care, and be mindful of several core professional obligations: the lawyer’s duty to exercise independent professional judgment on behalf of a client and not be influenced by financial or other considerations; the duty not to permit a third party to interfere with the exercise of independent professional judgment; and the vigilance to prevent potentially harmful disclosure of privileged information.²⁰³ In line with the ABA findings, TPLF arrangements were not perceived as *per se* contrary to attorney ethics as early as 2011 (even before the ABA White Paper) by a formal New York City Bar Association opinion.²⁰⁴

More recently, the focus of legal profession rule makers has shifted to the issue of fee-sharing (fee splitting) with non-lawyers. This is mainly due to the emergence of new funding models, which encompass various contingent-based transactions between funders and lawyers, including the phenomenon of “portfolio funding”²⁰⁵ in which funders take a contingent interest in the outcome of a law firm’s portfolio of litigation matters in exchange for financing that can be, but is not always, used to finance the prosecution of those cases. The main concern of policy makers is that various forms of TPLF arrangements between funders and lawyers may disturb the traditional prohibition on fee-sharing with non-lawyers in Rule 5.4(a) of the ABA’s Model Rules of Professional Conduct.²⁰⁶ The impetus of the rule, as can

be discerned from the commentary, is to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client. As stated in Rule 5.4(c), such arrangements should not interfere with the lawyer’s professional judgment.²⁰⁷

In a recent formal opinion, the New York City Bar Association Committee on Professional Ethics resolved the issue of “whether the New York Rules of Professional Conduct²⁰⁸ permit a lawyer to enter into an agreement with a non-lawyer litigation funder, under which the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters”.²⁰⁹ It opined that lawyers may not do so under Rule 5.4 of the New York Rules of Professional Conduct.²¹⁰ The Committee explains that

the fee-sharing rule forbids two alternative arrangements: first, where an entity’s funding is not secured other than by the lawyer’s fee in one or more lawsuits, so that it is implicit that the lawyer will pay the funder only if the lawyer receives legal fees in the matter or matters; and second, where a lawyer and funder agree, whether in a recourse or non-recourse arrangement, that instead of a fixed amount or fixed rate of interest, the amount of the lawyer’s payment will depend on the amount of the lawyer’s fees—e.g., where the agreement sets a payment rate on a sliding scale based on the total legal fees or total recovery in the case or portfolio of cases.

The Committee also made it clear that “typical client-funder arrangements, where the funder agrees directly with the lawyer’s client to provide funding for a specific matter and the client agrees to make future payments if the client prevails, do not implicate Rule 5.4, because the lawyer is not a party to the arrangement and payments are made by the client out of the client’s recovery and do not affect the amount of the lawyer’s fee”.²¹¹ Lastly, the Committee noted that several bar associations in other states have also reached conclusions to similar effect.²¹² However, some commentators suggest that this recent Opinion 2018-5 diverges from the prior case law²¹³ addressing the interplay of alternative litigation financing and Rule 5.4(a); e.g., in *PNC Bank, Delaware v. Berg*,²¹⁴ *Lawsuit Funding, LLC v. Lessoff*,²¹⁵ and *Hamilton Capital VII, LLC v. Khorrami, LLP*.²¹⁶ Some have even called on the Committee to withdraw Opinion 2018-5 for reconsideration.²¹⁷ At the time of this writing, the industry awaits what, if any, influence this opinion might have on future case law.

As the U.S. TPLF market matures,²¹⁸ different stakeholders and scholars alike²¹⁹ are calling for increased regulation and rulemaking for the industry. This regulation generally falls within several categories.

First, state laws regulating consumer protection related to “lawsuit lending” transactions²²⁰ (i.e., personal loans secured by a contingent share in litigation proceeds, generally with high interest rates attached) by establishing that these transactions are subject to state regulation and setting forth requirements regarding disclosure, licensing, funding company and attorney responsibilities. Regulations also include mandatory provisions for LFAs, limitations on interest that can be charged, reporting requirements, and penalties for violations.

Such regulations have been imposed in Tennessee,²²¹ Vermont,²²² New Jersey,²²³ Ohio,²²⁴ Indiana,²²⁵ and other states. A similar piece of legislation awaits enactment in New York.²²⁶

Second, state and local regulations mandating disclosure of TPLF in a commercial or class litigation setting are beginning to emerge, as in Wisconsin, introduced in 2018 via statute.²²⁷ Apart from legislative regulation, some courts have developed local rules of procedure that apply to civil actions. Pursuant to Rule 3-15 of the Local Rules of Practice in Civil Proceedings before the U.S. District Court for the Northern District of California, upon making a first appearance in any proceeding in the court, each party must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either a financial interest of any kind in the subject matter in controversy or in a party to the proceeding, or any other kind of interest that could be substantially affected by the outcome of the proceeding.²²⁸

Third, there is self-regulation of individual funders, as well as association codes, such

as the Industry Best Practices of the Alliance for Responsible Consumer Legal Funding (ARC), a group of lawsuit lenders.²²⁹

More recently, calls for regulation have also begun to reach the federal level. In 2017, on behalf of multiple business associations and NGOs, the U.S. Chamber Institute for Legal Reform and others revived an initial proposal from 2014 to amend Rule 26(a)(1) (A) of the Federal Rules of Civil Procedure that would require disclosure of third party funding agreements in any civil action filed in federal court.²³⁰ Proposals of a general disclosure obligation are strongly objected to by the U.S. litigation funding industry,²³¹ while some commentators suggest disclosure should be limited and conducted *in camera*.²³²

Another noteworthy initiative is that of Sens. Chuck Grassley, Thom Tillis and John Cornyn, who in February 2019 reintroduced the Litigation Funding Transparency Act of 2019 (LFTA). The LFTA would require class counsel in federal class actions to: (i) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and (ii) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right. Disclosure must be made no later than the later of 10 days after execution of any LFA or the time of service of the action.²³³ The proposed LFTA is facing strong opposition from funders.²³⁴

“ *As the U.S. TPLF market matures, different stakeholders and scholars alike are calling for increased regulation and rulemaking for the industry.* ”

Selected European Jurisdictions

In analysing six facets of potential TPLF-related oversight and restraints, the table below demonstrates the variance amongst European countries in the absence of unifying EU regulation.

AUSTRIA

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

The Austrian Supreme Court (*OGH, 27.2.2013, 6 Ob 224/12b*): A potential invalidity of the LFA does not affect the validity of the assignment of claims and the defendant in the funded dispute has no standing to challenge the LFA.²³⁵

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

Commercial Court in Vienna (*HG Wien, 7.12.2011, 47 Cg 77/10s*): Financing of a lawsuit against a success fee by a funder does not violate the prohibition of "quota litis". The statutory prohibition concerns only lawyers. Third party funders are not lawyers and are not subject to the ban if they contract for success fees.²³⁶

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (§ 41 ZPO).

Adverse costs cannot be ordered against a non-party (third party).

Only claimants domiciled outside Austria may, at the request of the defendant, be ordered to furnish security for costs, unless otherwise provided by international treaties (§ 57/1 ZPO).

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are prohibited; such agreements are null and void (§ 879(2)(2) ABGB).

ENGLAND AND WALES

General admissibility of TPLF/public policy considerations

TPLF is a permitted and well-established practice.²³⁷

Access to justice rationale: Court of Appeal (England and Wales): *Arkin v Borchard Lines Ltd and others*;²³⁸ *Gulf Azov Shipping Company v Idisi*.²³⁹

Existing legal and regulatory framework for TPLF (specific and general)

Self-regulation of funders via Voluntary Code of Conduct for Litigation Funders (rev. January 2018), The Association of Litigation Funders of England & Wales.²⁴⁰

Key aspects of the code:

- Application only to members (nine as of this writing).
- Capital adequacy of funders.
- Provisions of the LFA dealing with, inter alia, the funder's liability to the funded party to meet any liability for adverse costs, to provide security for costs, etc.; termination of the LFA.
- Approval of settlements.
- Control of the proceedings.

Breach of the code is subject to the imposition of a fine payable by the member to the ALF, up to a limit of £500.

Public body responsible for the monitoring of the application of the ALF Code of Conduct: Civil Justice Council—an agency of the UK's Ministry of Justice.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

Commercial Court (England and Wales); *Wall v The Royal Bank of Scotland plc*:²⁴¹ The Court ordered a claimant to disclose the identity of a funder in the context of an application for security for costs.

Possible limits on the funder's return (success fees, caps, interest charged)

ALF Code of Conduct (Para. 2.6): "A funder does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA".

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (CPR, Rule 44.2²⁴²).

Commercial Court (England and Wales); *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*: The court rejected an application to set aside an ICC arbitral award made under the ICC Rules and S.61(1) of the English Arbitration Act 1996 entitling the respondent to its costs of TPLF (including the funders fee/uplift).²⁴³

Adverse costs can be ordered against a non-party (third party) as per Sec. 51 of the Supreme Court Act 1981.²⁴⁴

Court of Appeal (England and Wales); *Arkin v Borchard Lines Ltd and others*: The court established (limited) liability of a third party funder for adverse costs to the extent of the funding provided (the "Arkin cap").

However, the High Court's recent decision in *Davey v Money and others* ((2019) EWHC 997) eliminated this cap, continuing the trend of recent cases and reflecting both a more robust judicial attitude to the liability of funders for adverse costs and a further judicial acknowledgment that the funding market has matured greatly over the last 14 years.

A court can order the claimant to lodge security for costs (CPR, Rule 25.13). It may also make an order against a person who contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings (Rule 25.14).²⁴⁵

(In)admissibility of contingency fee arrangements for attorneys

A conditional fee agreement (CFA) is an arrangement under which a lawyer agrees with a client that they will only be paid in specified circumstances (usually where the case ends in 'success' for the client). These are commonly known as 'no win, no fee' agreements. Secs. 58 and 58A of the Courts and Legal Services Act 1990²⁴⁶ (CSLA) make provisions regarding the regulation of CFAs. The success fee is capped at 100% of the basic fee.

Under a damages-based agreement (DBA) the lawyer receives a proportion of the client's damages if the case is successful. DBAs are governed by Sec. 58AA of the CSLA and the Damages-Based Agreements Regulations 2013. The amount of fees the client can be liable to pay is capped at 50% of damages.²⁴⁷

A special regime applies to DBAs in opt-out collective proceedings. Under Article 47C(8) of the Competition Act 1998, a DBA is unenforceable if it relates to opt-out collective proceedings.²⁴⁸ DBA rules do not apply to funders.

FRANCE

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

Versailles Court of Appeal; *Société Foris AG v SA Veolia Properte, CA Versailles, No 05/01038, 1.6.2006*.²⁴⁹ The court held that it lacked jurisdiction to assess LFA validity in an international arbitration.²⁵⁰ It noted that the trial financing contract is *sui generis* and is unknown to the EU MS, with the exception of those with Germanic legal tradition.²⁵¹

In a Resolution of 21.2.2017, the Paris Bar Council expressed its support for TPLF and stated that there is nothing in French law that precludes its use in international arbitration. It also recalled the principle of lawyer's independence and duties owed to the client.²⁵²

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (French Code of Civil Procedure, Art. 696).²⁵³

Adverse costs cannot be ordered against a non-party (third party).

Parties are not required to provide security for costs.²⁵⁴

(In)admissibility of contingency fee arrangements for attorneys

Any setting of fees based only on the outcome of the case (contingency fees) is prohibited.

An agreement that provides for compensation for the duties that are carried out, as well as an additional fee based on the result that is obtained or the service rendered, shall be lawful (Art. 10/3 of the Act 71-1130 of December 31, 1971).²⁵⁵

GERMANY

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

Several cases reported dealing with the legal nature (qualification) of TPLF/LFA in a divergent manner, e.g.,:

- District Court in Bonn (*LG Bonn, 25.8.2006 - 15 O 198/06*).
- Higher Regional Court in Frankfurt (*OLG Frankfurt, 22.8.2017 - 16 U 253/16*).
- Higher Regional Court in Köln (*OLG Köln, 29.11.2007 – 18 U 179/06*).
- Higher Regional Court in Munich (*OLG München, 31.3.2015 - 15 U 2227/14*).²⁵⁶

The German Federal Court of Justice (*Bundesgerichtshof – BGH, Urteil des I. Zivilsenats vom 13.9.2018 - I ZR 26/17*): The German Federal Court of Justice held that TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act Against Unfair Competition (UWG) is inadmissible.²⁵⁷

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

Reported cases include:

- Higher Regional Court in Munich (*OLG München, 31.3.2015 - 15 U 2227/14*): Upholding a 50% success fee in specific circumstances, where the funder only stepped in to finance the appeal proceedings, while

the self-funded case has already been lost at the first instance.²⁵⁸

- Higher Regional Court in Munich (*OLG München, 13.10.2004 - 7 U 3722/04*): Holding that a share of proceeds attributed to the funder of more than 66% could possibly violate public policy.²⁵⁹

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (ZPO, Sec. 91).²⁶⁰

Adverse costs cannot be ordered against a non-party (third party) as per ZPO, Sec. 91.

Per general rule in Sec. 110(1) of the ZPO, only plaintiffs who do not have their habitual place of abode in a MS of the EU or in a signatory state of the Agreement on the European Economic Area shall provide security for the costs of the proceedings (Prozesskostensicherheit) should the defendant so demand.

Higher Regional Court in Düsseldorf (*OLG Düsseldorf, 18.2.2015 - VI- U (Kart) 3/14*): Cession of damages claims for antitrust injury to a third party (SPV) without the necessary resources for satisfying a potential adverse cost order was declared against public policy and thus null and void.²⁶¹

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees (Erfolgshonorar, quota litis) are allowed only exceptionally per Sec. 4a of the Rechtsanwaltsvergütungsgesetz (RVG). This applies only in an individual case and only if the client, upon reasonable consideration, would be deterred from taking legal proceedings without the agreement of quota litis on account of his economic situation. In court proceedings, it may be agreed that in case of failure, no remuneration, or a lower amount than the statutory remuneration, is to be paid if it is agreed that an appropriate supplement should be paid on the statutory remuneration in case of success.²⁶²

Sec. 49b(2) Bundesrechtsanwaltsordnung (BRAO) prohibits agreements where the lawyer undertakes to pay court, administrative or other party's costs.²⁶³

IRELAND

General admissibility of TPLF/public policy considerations

TPLF is generally not permitted; common law doctrines of maintenance and champerty are strictly applied.

High Court, Ireland; *Thema International Fund Plc v. HSBC Institutional Trust Services*:²⁶⁴ In Ireland it is unlawful for a party without an interest in litigation (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds.

Irish Supreme Court; *Persona Digital Telephony Ltd and another v. The Minister for Public Enterprise, Ireland and others*:²⁶⁵ The court considered whether TPLF amounted to maintenance and champerty and is as such prohibited by law. It held that the LFA amounted to unlawful maintenance or champerty, and that to vary the scope of these offences considering modern policy was a multifaceted issue more suited to a full legislative analysis.²⁶⁶

ATE insurance is permissible in Ireland (*Greenclean Waste Management v. Leahy*).²⁶⁷

Existing legal and regulatory framework for TPLF (specific and general)

TPLF is generally not permitted; common law doctrines of maintenance and champerty are strictly applied.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

TPLF is generally not permitted; common law doctrines of maintenance and champerty are strictly applied.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation.

Adverse costs can be ordered against a non-party (third party) in accordance with the Rules of the Superior Courts, which was confirmed in *Moorview Developments & Ors v. First Active PLC & Ors*.²⁶⁸

Security for costs can be obtained under Order 29 of the Rules of the Superior Courts.²⁶⁹

(In)admissibility of contingency fee arrangements for attorneys

Irish lawyers are expressly prohibited from charging fees that are calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client (Solicitors Amendment Act, 1994, s. 68/2).²⁷⁰

Lawyers in Ireland may charge on a conditional fee basis.

ITALY

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (Codice di Procedura Civile, Art. 91).²⁷¹

Adverse costs cannot be ordered against a non-party (third party).

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are forbidden. Lawyers are not allowed to accept a share of the asset that is challenged in the case (Italian Law No. 247/2012, Art. 13).²⁷²

THE NETHERLANDS

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

Reported case law of the Amsterdam Court of Appeal:

- *ECLI:NL:GHAMS:2011:BU8763 (13.12.2011)*:²⁷³ The agreement containing a no cure-no pay clause was in that case acceptable and therefore not in conflict with public order.
- *ECLI:NL:GHAMS:2014:27 (7.1.2014)*:²⁷⁴ In a class action the Court decided that there was “no misuse of litigation or otherwise unlawful or impermissible behaviour in obtaining damages”.²⁷⁵

Existing legal and regulatory framework for TPLF (specific and general)

No specific statutory regulations.

As of March 2019, soft-law regulation of TPLF in collective redress is in place (revised Claim Code 2019²⁷⁶); Key features of “Principle No. III” of the Claim Code dealing with TPLF:

- Claim vehicle may arrange for TPLF with a “solid funder”.
- Funding conditions cannot conflict with interests of the persons that the vehicle seeks to protect.
- Claim vehicle must have exclusive control over the proceedings and negotiations.

- Board members, supervisory board members, claim vehicle’s lawyer and other parties in a collective action must be independent of the funder and its related legal and natural persons.
- Claim vehicle must disclose on a publicly accessible website: (i) that it obtained TPLF for its activities; (ii) who the funder is; (iii) what arrangements have been made between the vehicle and the funder; and (iv) what, if any, percentage of the awarded damages or settlement will be paid to the funder.
- As a rule, the funder cannot terminate the LFA before a judgment in the first instance has been obtained.²⁷⁷

No public body/regulatory oversight.

Disclosure and management of conflict of interest

Disclosure requirements set out in soft law—Claim Code 2019—see previous category.

Possible limits on the funder’s return (success fees, caps, interest charged)

Subject to general principles of contract law.

Dutch courts have dealt with the issue of funding costs in the context of the collective settlement (WCAM) proceedings, e.g., in the *Fortis* case; *ECLI:NL:GHAMS:2018:2422 (13.7.2018)*, Amsterdam Court of Appeal.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (art. 237/1 Code of Civil Procedure).²⁷⁸

Adverse costs cannot be ordered against a non-party (third party).

Only claimants domiciled outside the Netherlands may, at the request of the defendant, be ordered to furnish security for the costs of the proceedings, unless otherwise provided by international treaties.

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees and no-win no-fee arrangements are generally not allowed in the Netherlands (Art. 25 of the Gedragsregels 1992).²⁷⁹

POLAND

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation.

Adverse costs cannot be ordered against a non-party (third party).

Only claimants domiciled outside Poland may, at the request of the defendant, be ordered to furnish security for costs, unless otherwise provided by international treaties.

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are:

- generally not allowed, if the whole fee is payable only upon success.
- allowed in class actions but capped at 20% of the proceeds.²⁸⁰

PORTUGAL

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation.

Adverse costs cannot be ordered against a non-party (third party).

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are not allowed.²⁸¹

SLOVENIA

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

TPLF is explicitly allowed and regulated in collective actions (2017 CAA).

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

Specific regulation of TPLF and “attorney-financing” in collective actions. Focal points of regulation:

- Amount in dispute set to 20% of actual aggregate value of all claims (Art. 58).
- Disclosure of the “source” of TPLF (Art. 59/1).
- Conflict of interest (Art. 59/2).
- Financial capability of funder (Art. 59/2).
- Financial capability of claimant to meet a potential adverse cost order (Art. 59/2).
- Inadmissible conduct by the funder (e.g., excessive control, conflict of interest, excessive fees/returns (Art. 59/2)).
- Contingency fee arrangements (Art. 61/1).
- “*Sui generis* attorney TPLF” (Art. 61/1).
- Court scrutiny of funding arrangement (Art. 28/4).
- Security for costs (Art. 29/3).

No public body/regulatory oversight.

Disclosure and management of conflict of interest

Mandatory disclosure of the “source” of TPLF (Art. 59/1).

The court may refuse to certify the collective action if there is a conflict of interest between funder and claimant and the members of the collective action (Art. 59/2).

Inadmissible for the funder to finance a collective action against a funder's competitor or against a defendant on whom the funder is dependent (Art. 59/3).

Inadmissible for a funder to attempt to exercise "decisive" control over the proceedings or the settlement (Art. 59/3).

Possible limits on the funder's return (success fees, caps, interest charged)

The "interest" (premium/success fee) a funder may charge is capped, "not to exceed the statutory interest rate in Slovenia" (Art. 59/3).

Contingency fee arrangements with attorneys capped at 15% of the proceeds (Art. 61/1).

Attorneys may receive up to 30% of the proceeds, if they undertake a legal obligation/liability (towards the funded party) to bear all costs of the proceedings, including possible adverse costs (Art. 61/1).

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation, generally (Civil Procedure Act, Art. 154/1) and in collective actions alike (Art. 60).

Adverse costs cannot be ordered against a non-party (third party).

The court may, at its sole discretion, as a prerequisite for the certification of a collective action, order the claimant to lodge security for costs (Art. 29/4).

(In)admissibility of contingency fee arrangements for attorneys

Generally, contingency fees are allowed in Slovenia and capped at 15%, as per Slovenian Attorneys Act, Art. 17/3.

Contingency fee arrangements in collective actions are also, as a rule, allowed and capped at 15% of the proceeds (Art. 61/1 CAA). An attorney may, however, receive up to 30% of the proceeds if he undertakes a legal obligation/liability (towards the funded party) to bear all costs of the proceedings, including possible adverse costs. This amounts to "sui generis attorney TPLF".

SPAIN

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies (Spanish Law on Civil Procedure, Art. 394).²⁸² A tailor-made law was adopted (Royal Decree-Law 1/2017) restricting the application of the loser-pays rule in specific banking litigation cases (interest floor clauses in mortgage loans).²⁸³

Adverse costs cannot be ordered against a non-party (third party).

Security for costs does not exist in Spanish law.²⁸⁴

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are permitted under Spanish law. They were prohibited until 2008, when the Supreme Court quashed the prohibition.²⁸⁵

SWEDEN

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

No reported case law.

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

No reported case law.

Cost allocation rules, liability for adverse costs and security for costs issues

Loser-pays rule applies to cost allocation (Swedish Code of Judicial Procedure, Ch. 18, Sec. 1).²⁸⁶

Reportedly, Swedish courts have ordered adverse costs against third parties in the context of the transfers of claims (so-called claims vehicles, effective beneficiaries in the dispute), i.e., holding shareholders personally liable for legal fees and costs.²⁸⁷

(In)admissibility of contingency fee arrangements for attorneys

Contingency fees are generally prohibited as per Sec. 4.2.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (2008). An advocate may not, except for special cause, enter into a fee agreement giving a right to a quota of the result of the mandate. Specific cases for allowing such an agreement are, e.g., when he or she is representing the interests of a collective action or is engaged in a cross-border mandate, the handling of which is required outside Sweden; or when a client without a quota agreement finds it difficult to get access to justice.²⁸⁸

SWITZERLAND

General admissibility of TPLF/public policy considerations

No prohibitions against TPLF.

Swiss Federal Supreme Court; *BGE 131/223, (10.12.2004)*.²⁸⁹ The court reviewed the constitutionality of a provision of the 2003 Zurich Cantonal Act on the Legal Profession that made it illegal to fund a lawsuit on a commercial basis (i.e., against participation in the success of the suit). It found that the provision violated freedom of commerce as guaranteed by the Swiss Federal Constitution and quashed it.²⁹⁰

Existing legal and regulatory framework for TPLF (specific and general)

No specific regulations.

No public body/regulatory oversight.

The Swiss Federal Supreme Court exempted TPLF from insurance products, hence it is not subject to supervision by a specialized agency.²⁹¹

Disclosure and management of conflict of interest

No specific rules/regulations mandating disclosure or managing conflicts.

No reported case law.

Possible limits on the funder's return (success fees, caps, interest charged)

Subject to general principles of contract law.

The Swiss Federal Supreme Court; *2C_814/2014 (22.1.2015)*.²⁹² By representing both parties to the LFA (funder and the funded party), the lawyer created the concrete risk of a conflict of interest.

**Cost allocation rules,
liability for adverse costs
and security for costs issues**

Loser-pays rule applies to cost allocation (Swiss Civil Procedure Code, Art. 106).²⁹³

Adverse costs may not be ordered against a non-party (third party).

At the request of the defendant, security for costs can be ordered against the claimant in limited instances, e.g., if it has no residence in Switzerland or if it appears insolvent (Swiss Civil Procedure Code, Art. 99).

**(In)admissibility of
contingency fee
arrangements for attorneys**

Contingency fees, where remuneration entirely depends on the outcome of the case or where the whole remuneration is based on a quota of the proceeds, are inadmissible. Lawyers can, however, make conditional fee arrangements.²⁹⁴

Part 3: Regulation of TPLF in Collective Redress in the EU

Ideas to regulate and harmonize collective actions in modern continental European legal environments have only emerged in the last couple of decades. An effort to this end was begun at the EU level in the 1980s, but it has been slow and gradual and has to date not been completed.

This effort first resulted in adopting legislation on collective injunctive and declaratory relief for the protection of specific interests, such as consumers and the environment, and later focused on expanding the rules to other areas of law and developing rules on collective compensatory redress. In contrast to injunctive collective redress, which is regulated in a series of directives,²⁹⁵ compensatory collective redress has to date not been regulated in binding EU law. Having regard to the limited scope of collective redress regulation at the EU level, the Court of Justice of the European Union's (CJEU) case law interpreting and/or assessing it is also scarce.²⁹⁶ There is, however, a plethora of documents in the form of studies, reports, green papers, white papers, resolutions, communications, recommendations, proposals, etc., that have touched upon rather imprecisely the issues of compensatory collective redress, including TPLF.

TPLF in collective redress has been explicitly addressed in the EU only in the last decade when the regulation of

compensatory collective redress started to evolve. Because injunctive relief is unattractive for TPLF funders, the injunctions directives do not regulate or mention funding, abuse, safeguards, costs and other notions usually applied when addressing TPLF. Only the general problems of the costs of employing redress have been addressed in various acts reporting on the implementation of the directives.²⁹⁷ TPLF has also not been the subject of any acts of EU law covering procedures outside collective redress procedures.

TPLF in the First Documents on Compensatory Relief

Initial attempts to regulate compensatory collective redress at the EU level focused on two specific areas of law: antitrust and consumer protection. Whereas the acts on collective redress in antitrust damages actions did not specifically touch upon TPLF and merely warned against potential abuses,²⁹⁸ the acts on collective redress in consumer cases explicitly addressed TPLF.

The 2008 Green Paper on consumer collective redress²⁹⁹ is the first document revealing the details of the Commission's position on how to best regulate collective redress in the EU. It is probably the first Commission document mentioning TPLF and analysing safeguards against abuses of collective proceedings.

The Commission explained that the elements contributing to the effectiveness and efficiency of a collective redress mechanism include political and financial support from governments, high media coverage, no or low litigation fees for consumers, no or reduced litigation fees for representatives, flexible solutions regarding lawyers' fees, and bypassing the formalities of normal civil procedures.³⁰⁰ The Commission detected various issues to be decided when regulating collective actions, including the financing of the procedure, preventing unmeritorious claims, standing in court, the question of an opt-in or opt-out procedure, and the distribution of compensation. In the opinion of the Commission, collective actions should avoid the elements which are said to encourage a litigation culture in some non-European countries, such as punitive damages and contingency fees.

One partial solution to address these problems was to focus on cutting costs by exempting collective actions from court fees, or by capping legal fees.³⁰¹ The Commission also stressed that the financing of entities representing consumers is crucial and thus, that allocating a share of the compensation to the organisation to cover its costs could be considered. It added that a third party (e.g., banks) or a public body could grant a loan to cover possibly needed pre-financing of court proceedings, and that litigation funding by private third parties (e.g., companies specialising in financing

“ In the opinion of the Commission, collective actions should avoid the elements which are said to encourage a litigation culture in some non-European countries, such as punitive damages and contingency fees. ”

litigation) is practiced successfully in some MS.³⁰² Another solution could be public funding by the MS.³⁰³ Different funding solutions could also be combined.³⁰⁴

The Green Paper stated that a collective litigation mechanism at the EU level should facilitate meritorious claims and benefit consumers, whereby businesses would avoid losses from unfair competition, gain more legal certainty, and reduce some of their litigation costs by being able to bundle the claims against them.³⁰⁵ It stressed, however, that at the same time, the necessary safeguards have to be taken not to burden business with unmeritorious claims, punitive damages, or excessive costs.³⁰⁶ It added that the collective redress mechanism at the EU level needs to discourage a litigation industry, as this would benefit lawyers rather than consumers and create high costs for defendants.³⁰⁷

In order to avoid the possibility of abuse of a collective redress mechanism, the Commission pointed out several elements that could act as safeguards and help to prevent unmeritorious claims: the judge can

play an important role by deciding whether a collective claim is unmeritorious or admissible; certification of the representative entity could act as a gatekeeper, as could the loser-pays principle in the MS where it exists; and public authorities could serve as gatekeepers when making decisions about funding collective redress actions by refusing to allocate resources to unmeritorious claims.³⁰⁸

These first attempts to regulate compensatory collective actions in the fields of antitrust and consumer protection law failed, and the Commission decided to regulate collective redress horizontally. In 2010, it launched a public consultation “Towards a more coherent European approach to collective redress”, guaranteeing, *inter alia*, that the new approach would contain proper regulation of financing of collective actions and safeguards against abuse in order to avoid the pitfalls of the U.S. class action system. In its 2012 Resolution “Towards a Coherent European Approach to Collective Redress”,³⁰⁹ the European Parliament in turn stressed the importance of measures

for the prevention of procedural abuses, and emphasised that MS’ national legal traditions should receive due regard.

In order to avoid unmeritorious claims and misuse of collective redress, and to guarantee fair court proceedings, it recommended the following safeguards: limited standing, full compensation for actual damage, access to evidence, loser-pays principle, and—significantly for our purposes—no third party funding. With regard to the latter element, the Parliament stressed that the Commission must not set out any conditions or guidelines on the funding of damages claims, as recourse to third party funding is unknown in most MS’ legal systems. This does not preclude MS setting out conditions or guidelines on the funding of damages claims. It also added that punitive damages and success fees are not appropriate.

TPLF in Horizontal, Soft-Law Approach to Regulating Collective Redress

On 11 June 2013, the Commission issued a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions titled “Towards a European Horizontal Framework for Collective Redress”.³¹⁰ The Communication’s aim was to report the main views expressed in the public consultation that took place in the preceding years, and to reflect the position of the Commission on some central issues regarding collective redress.

The Commission stressed that any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European

“ [T]he collective redress mechanism at the EU level needs to discourage a litigation industry, as this would benefit lawyers rather than consumers and create high costs for defendants.”

growth, while ensuring effective access to justice, meaning that they must not attract abusive litigation.³¹¹ This was also the preponderant view of the stakeholders participating in the public consultation leading to the enactment of the Communication. The Commission added that examples of such adverse effects can be seen in particular in “class actions” as known in the U.S. The European approach to collective redress must thus, in the opinion of the Commission, give proper thought to preventing these negative effects and devising adequate safeguards against them. The Communication addressed these also throughout the analysis of the focal collective redress elements, including funding.

The risk of abusive litigation was presented as the main disadvantage of collective redress. The Commission explained that litigation can be considered abusive when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them. It added that there is the risk that the mere allegation of infringements could have a negative influence on the perception of the defendant by its existing or potential clients, and that law-abiding defendants may be prone to settle the case only to prevent possible damage. The costs of legal representation in a complex case may, in the view of the Commission, also constitute substantial expenditure, in particular for smaller economic operators.³¹²

The 2013 Communication is the only document where the Commission has elaborated on the pitfalls of the U.S. class action system. It described class actions as a best-known example of a form of collective redress, but also as an illustration of the vulnerability of a system to abusive litigation. It pointed out that several

“ In order to avoid unmeritorious claims and misuse of collective redress, and to guarantee fair court proceedings, it recommended the following safeguards: limited standing, full compensation for actual damage, access to evidence, loser-pays principle, and—significantly for our purposes—no third party funding. ”

features of the U.S. legal system have made class actions a powerful instrument; however, it is feared by businesses on the defending side, as it can be used as a forceful tool to compel them to settle a case which may not necessarily be well-founded. The Commission explained that such coercive features are contingency fees of attorneys or the discovery of documents procedure that allows “fishing expeditions”. It added that another important feature of the U.S. legal system is the possibility to seek punitive damages, which increases the economic interests at stake in class actions, enhanced by the fact that U.S. class actions are “opt-out” procedures in most cases.

It added that U.S. Supreme Court decisions have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation.³¹³ In the subchapter on funding of collective actions, the Commission explained that in the case of collective

“ As to TPLF, the Commission explained that financial support by a private third party could take different forms. Unless properly regulated, direct TPLF of collective actions is seen as a potential factor driving abusive litigation. ”

redress, costs usually borne by the parties could be relatively high, and while lack of funding should not limit access to justice, funding mechanisms should not create incentives for abusive litigation.

As to TPLF, the Commission explained that financial support by a private third party could take different forms. Unless properly regulated, direct TPLF of collective actions is seen as a potential factor driving abusive litigation. Legal expenses insurance is perceived by some as more neutral and after the event insurance could have some relevance for collective actions.

The Commission added that contingency fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management constitute *de facto* TPLF. It explained that the solutions of the MS range from prohibition to acceptance and revealed that some stakeholders consider the abolition of contingency fees as an important safeguard against abusive litigation, while others see contingency fees as a useful method of financing collective actions. In the opinion of the Commission, TPLF is an area which needs to be designed in a way that it serves in a proportionate manner the objective of ensuring access to justice. The Recommendation thus made it subject to certain conditions.

As to public funding, favoured by consumer organisations and some lawyers, the

Commission was reserved. It explained that since collective redress would be a procedure arising in the context of a civil dispute between two parties, even if one of them is composed of a number of claimants, and deterrence will be a side-effect of the proceedings, it did not find it necessary to recommend direct support from public funds. In the Commission's view, if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs.

The Commission had no doubts as to the value of the loser-pays principle embedded in the European legal tradition, although it is neither present in every jurisdiction of the EU nor regulated uniformly. It added that in the public consultation, all stakeholders agreed that this principle should apply to collective redress cases.

These Commission positions are reflected in its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the MS concerning violations of rights granted under EU law (Recommendation).³¹⁴ This act of soft law was issued to the MS the same day as the Communication was issued to the European Parliament and the Council. Its aim is to facilitate the access to justice in relation to violations of rights under EU law and to that end, to recommend that all MS have national collective redress systems that follow the same basic principles throughout the EU,

“ [The Recommendation] recommends that the MS ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties. ”

taking into account their legal traditions and including safeguards against abuse.³¹⁵

In order to avoid the development of an abusive litigation culture in mass harm situations, fundamental safeguards are set out in the Recommendation.³¹⁶ The prevention of abuse is mentioned seven times in the Preamble to the Recommendation³¹⁷ as well as in the provision on the purpose and scope of the Recommendation.³¹⁸ In supervising the implementation of the Recommendation in the MS, the Commission said it would particularly evaluate the impact of the Recommendation on the need to prevent abusive litigation.³¹⁹

The Recommendation favours the loser-pays principle.³²⁰ It recommends that the MS ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.³²¹ The MS should not permit contingency fees, which risk creating such an incentive, while the MS that exceptionally allow for contingency fees (including Slovenia) should provide for appropriate national regulation of those fees in collective redress cases, taking into

account in particular the right to full compensation.³²²

The Recommendation also sets forth general principles on TPLF in a special chapter on funding.³²³ These are sketched initially in the Preamble which states that the MS should, in addition to the general principles of private TPLF for cases seeking compensatory collective redress, ensure a prohibition to base remuneration given to, or interest charged by, the funder on the amount of the settlement reached or the compensation awarded, unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.³²⁴

The Recommendation recommends that MS require the claimant to declare to the court at the outset of the proceedings the source of the funds that it will use to support the legal action.³²⁵ The court should be allowed to stay the proceedings if, in the case of third party financing: (i) there is a conflict of interest between the third party and the claimant and its members; (ii) the third party has insufficient resources to meet its financial commitments to the

“ The Commission had no doubts as to the value of the loser-pays principle embedded in the European legal tradition, although it is neither present in every jurisdiction of the EU nor regulated uniformly. ”

claimant; or (iii) the claimant has insufficient resources to meet any adverse costs, should the collective procedure fail.³²⁶ It is not clear what “staying” the proceedings means in this instance.³²⁷

The Recommendation further states that the MS should prohibit a third party funder from: (i) seeking to influence procedural decisions of the claimant, including settlements; (ii) providing financing for a collective action against a competitor of the funder or against a defendant on whom the funder is dependent; and (iii) charging excessive interest on the funds provided.³²⁸ It must be observed here that the Recommendation does not state what the penalty should be if these prohibitions are not abided by.

Further, the following requirement from the Preamble is reiterated in the chapter on funding: the MS should ensure that, in addition to the general principles of funding, for cases of private TPLF of compensatory collective redress, it is prohibited to base remuneration given to, or interest charged by, the funder on the amount of the settlement reached or the compensation awarded, unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.³²⁹

In its Report on the implementation of the 2013 Recommendation³³⁰ issued in January 2018, the Commission stated that without a clear, fair, transparent and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often vulnerable to abuse negatively affecting both parties to the dispute.³³¹ The Report stresses that there has been a rather limited follow-up to the Recommendation in the MS and that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very uneven across the EU.³³² (The table above, focused on TPLF, illustrates that finding.)

The actions announced by the Report included: (i) further promotion of the principles set out in the 2013 Recommendation across all areas, both in terms of availability of collective redress actions in national legislation and thus of improving access to justice, and in terms of providing the necessary safeguards against abusive litigation; and (b) further analysis of some aspects of the Recommendation which are key to preventing abuses and to ensuring safe use of collective redress mechanisms, such as funding of collective actions.³³³

“ The Report stresses that there has been a rather limited follow-up to the Recommendation in the MS and that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very uneven across the EU. ”

Select data from the survey conducted for the Study supporting the assessment of the implementation of the 2013 Recommendation³³⁴ show the following views of those interviewed regarding abuses and safeguards against them within the collective redress system: more than 50% (37 out of 73 respondents) thought that there are risks of abusive litigation; about 23% (14 out of 61) answered that there have been instances of abusive litigation; more than 90% (66 out of 72) replied that they are not aware of any circumstances in which a conflict of interest has arisen in practice between a funder and a claimant; more than 88% (61 out of 69) replied that they are not aware of any situations in which a funder has attempted to influence the decisions of a claimant; and almost 97% (64 out of 66) replied that they are not aware of any situations in which a funder provided funding for an action against a competitor or against a defendant on whom the funder is dependent.

The results of this survey might not, however, be particularly conclusive. First, the number of those providing answers is rather small. Second, it is not clear who was interviewed, what the scope of the interview was, who was contacted that might have refused an interview, and the professional profile of the interviewees. Third, the questions were not detailed enough to reveal why those interviewed answered in a particular way. Thus, the negative answers cannot form the basis for a general conclusion on the status of abuse and TPLF in Europe, let alone one relevant for deciding whether to address this issue in the future legislative processes. Despite this, the Commission refers to them in its 2018 Staff Working Document Impact Assessment accompanying the Proposal for a new directive on representative

actions for the protection of the collective interests of consumers by stating that the results of the study suggest that concerns regarding TPLF are rather hypothetical.³³⁵

In April 2018, the Commission published the Proposal for a new directive on representative actions for the protection of the collective interests of consumers (Proposal Directive)³³⁶ signalling its discontent with the implementation of the 2013 Recommendation. This Proposal Directive resulted from the Commission's decision in 2017 to adopt a "New Deal for Consumers", a revision of consumer directives laying down substantive rules for consumer protection that would be complemented by strengthened procedural rules for enforcing consumers' rights.³³⁷

TPLF in the 2018 Proposal Directive on Consumer Representative Actions

Prima facie, the 2018 Proposal Directive on consumer representative actions provides for a similar regulation of TPLF to that laid down in the 2013 Recommendation. However, as the analysis of the details of both acts shows, they are not at all identical.

The Commission states that the Proposal Directive strikes a balance between facilitating access to justice to safeguard consumers' interests and ensuring adequate safeguards from abusive litigation.³³⁸ It clarifies that the proposed representative action model, within which qualified entities need to be designated by the MS against minimum reputational criteria, is a strong safeguard against frivolous actions,³³⁹ and adds that the MS or the Commission will be able to raise concerns about qualified entities that have legal standing in other MS.

“ The Proposal Directive requires that the entities demonstrate that they have sufficient financial resources to represent the best interests of the consumers concerned, and to meet any adverse costs should the action fail. ”

The Commission further explains that in redress actions, qualified entities must be transparent about their source of funding in order to enable the court or administrative authority to ensure that there are no conflicts of interest or risks of abuse in a given case.³⁴⁰ If the representative action concludes with a settlement, the court or authority will scrutinise the legality and the fairness of that outcome to ensure that it takes into consideration the interests of all parties involved.³⁴¹ Taking this into account, the Preamble emphasises the need for a balance between access to justice and procedural safeguards against abusive litigation which could unjustifiably hinder the ability of businesses to operate in the Single Market.³⁴² The abuse is then mentioned only in one further recital,³⁴³ but the prevention of abusive litigation is emphasised in the very definition of the scope of the Directive.³⁴⁴

According to Art. 7/1 of the Proposal, the qualified entity seeking a compensatory redress order³⁴⁵ shall declare at an early stage of the action the source of the funds

used for its activity in general and the funds that it uses to support the specific action in question. The Proposal Directive requires that the entities demonstrate that they have sufficient financial resources to represent the best interests of the consumers concerned, and to meet any adverse costs should the action fail.

According to Art. 7/2, MS shall ensure that in cases where a representative action for redress is funded by a third party, it is prohibited for the funder: (a) to influence decisions of the qualified entity in the context of a representative action, including settlements; and (b) to provide financing for a collective action against a defendant who is a competitor of the funder or against a defendant on whom the funder is dependent. Art. 7/3 adds that MS shall ensure that courts and administrative authorities are empowered to assess these circumstances and accordingly require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case. It does not state, however, what the reaction of the court may be if these circumstances arise after the action has been certified and the funding accepted.

Important substantive differences exist between the regulation of TPLF in the 2013 Recommendation and the 2018 Proposal Directive. In contrast to the Proposal Directive, the Recommendation (para. 14) does not require revealing the source of funding of the entity's activity in general; only the source of the funds that the entity is going to use to support the legal action must be declared to the court.³⁴⁶ The Proposal does not list the following two circumstances listed in the Recommendation (para. 15(a) and (b)) enabling the court to “stay” the proceedings (Rec. 25 of the Proposal Directive, however, does list them):

(i) conflict of interest between the third party and the claimant party and its members; or (ii) the third party has insufficient resources to meet its financial commitments to the claimant. The Proposal Directive requires only that the qualified entity prove that it has sufficient financial resources to represent the interests of the consumers in question and to cover all costs of the other party in case the claimant does not succeed. It does not state the consequence if this requirement is not met.

The Recommendation rule (para. 16(c)) prohibiting the charging of excessive interest is not set out in the Proposal Directive. Also missing from the Proposal Directive is the Recommendation rule (para. 32) prohibiting base remuneration given to, or interest charged by, the funder on the amount of the settlement reached or the compensation awarded, unless that funding arrangement is regulated by a public authority to ensure the interests of the parties. In addition to TPLF, the Proposal Directive sets forth rules on public financial assistance. Art. 15 lists such assistance among the measures required by the MS to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively exercise collective redress under the Directive. Rec. 39 of the Preamble explains that having regard to the fact that representative actions pursue a public interest by protecting the collective interests of consumers, MS should ensure that qualified entities are not prevented from bringing representative actions under the Directive because of the costs involved with the procedures.

In contrast to the 2013 Recommendation that is in principle not in favour of contingency fees, the Proposal Directive is entirely silent on attorneys' fees. Having regard to the various mechanisms set out

in the Proposal Directive that enable entities to fund proceedings and possibly also to cover the costs if these are unsuccessful (Art. 15), such as no regulation of attorneys' fees, redirection of the redress (compensation) from actual consumers who were the victims of an infringement to a "public purpose serving the collective interests of consumers" (Art. 6/3(b)), and allocation of revenues from fines (Art. 14), one might wonder how much relevance TPLF will have for claimants in the European legal environment. Additional measures lowering the cost-risk might be set out by the MS themselves, as in the case of Slovenia, presented *infra*.

A Factsheet about the New Deal for Consumers³⁴⁷ published in April 2018 stated that "[t]hanks to numerous safeguards to avoid abuse of the procedure, the EU representative actions *will be different* from the US style class action." The Commission itself added special emphasis (the text in italics) to show that the new regulation is different from the American collective redress system (which it surely is as regards some of the elements of its structure; e.g.,

“ *In contrast to the 2013 Recommendation that is in principle not in favour of contingency fees, the Proposal Directive is entirely silent on attorneys' fees.* ”

“ The Commission explains that only qualified entities, such as consumer organisations and independent public bodies, designated by the MS according to strict criteria, will be able to launch an action, not private law firms. Rules on standing indeed differ, but this does not necessarily mean that in the EU system, law firms (hand in hand with the representative entities) would not be the motor of the proceedings.”

standing) without giving in the Factsheet or elsewhere any detailed explanation how under the new deal the alleged pitfalls of the U.S. system will actually be avoided in practice.

The Commission explains that only qualified entities, such as consumer organisations and independent public bodies, designated by the MS according to strict criteria, will be able to launch an action, not private law firms. Rules on standing indeed differ, but this does not necessarily mean that in the EU system, law firms (hand in hand with the representative entities) would not be the motor of the proceedings.

The Commission states that in order to avoid that, the qualified entities will have strict obligations of transparency regarding the source of their funding and in particular the funds used to launch a specific representative action, and that the national courts or authorities will be able to assess whether the qualified entity is strong enough to sustain the costs of a failed action or whether there may be a conflict of interest (e.g., a company should not be able to use a qualified entity to launch an action against a competitor). We shall see whether these safeguards will in fact prevent the rise of a litigation industry in Europe and whether the representative

entities themselves can serve as guarantors of fair litigation and funding for the benefit of the consumers.³⁴⁸

It seems that the Proposal Directive's safeguards are more oriented towards preventing the abuses of the collective proceedings (e.g., weakening the funder's competitor, fishing expeditions of defendant's competitors), than preventing funding that might lead to high profits of the funders at the expense of the consumers (who would, admittedly, otherwise most probably not obtain any redress). However, it is clear from the Commission's documents that the Commission also perceives excessive funder profits as an abuse.

Having regard to all the assistance offered by the Proposal Directive to the entities, one might even ask whether TPLF will at all be relevant or justified for the claimants as a means for ensuring that collective actions are filed. That is, the Proposal Directive sets forth various mechanisms to enable the entities to fund the proceedings and possibly also to cover the costs if these are eventually unsuccessful. It also provides for a redirection of the compensation from actual victims to a "public purpose serving the collective interests of consumers" (Art. 6/3(b) of the Proposal), as well as for the

allocation of revenues from fines (Art. 14 of the Proposal) which might be in the form of a redirection of the compensation and/or fines to consumer representative entities.³⁴⁹

The Commission's Proposal Directive is being assessed in the ordinary legislative procedure. At the time of this writing, discussions within the first reading at the Council and its preparatory bodies continue, while the European Parliament issued its position at first reading on 26 March 2019. The two advisory bodies, the European Economic and Social Committee and the Committee of the Regions, gave their opinions in September and October 2018, respectively. The Committee of the Regions has not touched upon TPLF or funding in general.

The European Economic and Social Committee³⁵⁰ stated in a general note that while easy and fast access to justice should be granted to EU consumers, traders should not be the target of undue litigation. It added that a tailored collective redress system is welcome and should be pragmatic, cost-effective, provide the relevant safeguards, and take into account existing national judicial systems. In their view, the Directive should, *inter alia*, ensure that the collective redress scheme contributes to a more efficient, quick, affordable and fair application of justice, enable effective and total compensation for damages and guarantee the sustainability of this mechanism in terms of adequate funding. They do not find the Proposal Directive fit to fulfil these objectives.³⁵¹

Among other remarks, the Committee supported the decision to permit TPLF under certain conditions, and found the conditions listed by the Commission, such as transparency in the origin of funds, appropriate and sufficient to prevent improper litigation.³⁵² Similar to its 2014

Opinion, the Committee stated that the MS should support the creation of litigation funds for qualified entities. In cases where damages are of a small amount and where it is impossible to track down all people who have suffered damages, the Committee supports the Commission's proposal to allocate such amounts for public purposes; however, it calls for clarification on their nature (e.g., consumer assistance, information and education programs, litigation funds). It stressed that: (i) consumer or civil society organisations should be able to receive adequate funding and legal advice to claim redress; (ii) specific funds should help qualified entities to remunerate legal counsels; and (iii) the MS should support the creation of litigation funds.

Various Parliament committees also opined on the Proposal Directive at the end of 2018. On 23 November 2018, the Parliament Committee on the Internal Market and Consumer Protection (IMCO) issued an opinion for the European Parliament's Committee on Legal Affairs (JURI) on the Proposal Directive.³⁵³ With regard to Art. 7 of the Proposal Directive, it proposed that: the source of the funds should be declared in detail at the stage of admissibility of the action, including a guarantee or indemnity from a third party subject also to Art. 7/2,3; the unsuccessful party should bear the costs of the proceedings subject to national law conditions; transparency as to the origin of the funds is ensured; and the funder should also be prohibited from receiving any direct or indirect financial benefit through the litigation process or decision.

On 26 November 2018, an opinion to JURI was issued also by the Committee on Transport and Tourism (TRAN).³⁵⁴ TRAN's amendments to Art. 7 of the Proposal Directive indicated that TPLF should be

disclosed throughout the whole procedure. TRAN suggested a new provision on the distribution of the proceeds stating that MS “shall ensure that any compensation owed by a company following a successful outcome in a representative action goes only to the consumers involved; any staff costs or legal costs incurred may be deducted if these are not refunded to the qualified entity by other means.” The costs incurred in an unsuccessful representative action must be borne by the qualified entity.

JURI issued its Report on the Proposal Directive³⁵⁵ on 7 December 2018. The solutions included in the report were almost entirely copied into the European Parliament’s Legislative Resolution of 26 March 2019³⁵⁶ presented *infra*.

A useful tool revealing the positions of the Members of the European Parliament (MEPs) on specific provisions of the Proposal Directive is JURI’s document of November 2018 presenting the amendments proposed by the MEPs.³⁵⁷ Approximately 30 out of 628 amendments focused on Art. 7 of the Proposal Directive, the TPLF article. Some MEPs opted for the total prohibition of commercial TPLF (am. 394),³⁵⁸ some added new prohibitions for third party funders, such as a ban on any

type of financial benefit deriving from the representative action, other than to cover legal costs, or to constitute any further conflict of interest between the third party, the claimant and the representative entities, or to have a stake in the winnings (ams. 400-402). Some wished to add a prohibition against charging excessive interest on the funds provided and a ban on basing remuneration, or interest, on the amount of the settlement reached or the compensation awarded (am. 404).

A group of amendments addressed the questions about the scope of the court or authority’s control over TPLF, as well as the stages of the proceedings in which such control should be carried out (ams. 406-409). One amendment proposed that the MS should provide structural support to qualified entities and to set up a dedicated fund with the objective of providing financial support to qualified entities bringing collective actions (am. 410). Some of the amendments expressly inserted a provision on contingency fees stating, for example, that “neither lawyers nor other parties assisting or representing qualified entities, or assisting consumers as intermediaries, shall charge fees based on a proportion of any award or settlement amount” (am. 412).³⁵⁹ One of the amendments required that funders and

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other intermediaries who sponsor litigation should also be obliged to pay adverse costs (am. 413).

On 25 March 2019, seven MEPs debated the Proposal Directive on the first reading after hearing the report from JURI and the address by Justice Commissioner Jourová. The Commissioner stressed, *inter alia*:

Our aim is to find solutions that safeguard consumer rights and ensure that traders are also treated fairly. From the beginning, we made it very clear that the Commission does not want to create a litigation culture in Europe, and the proposal on representative actions in no way lends itself to such an interpretation. We define a clearly European way of collective redress that is fair for consumers and businesses, that does not contain punitive damages, and is not bringing U.S.-style class actions to the EU. In particular, we set strict standards for qualified entities which want to act on behalf of consumers.³⁶⁰

The MEPs active in the debate were in favour of the Proposal Directive and supported its adoption as soon as possible. They mostly referred to the Dieseltgate claims against Volkswagen (a special topic on the agenda in the Parliament that day) and pointed to the pitfalls of the U.S. system without going into the details of the proposal's provisions.³⁶¹

In its Legislative Resolution, the European Parliament then proposed the following amendments to the text of the Proposal Directive related to TPLF in Article 7, which would be retitled from "Funding" to "Admissibility of a representative action" and partially amended as follows:

1. The qualified representative entity seeking a redress order as referred in Article 6(1) shall submit to the court or administrative authority at the earliest stage of the action a complete financial overview, listing all sources of funds used for its activity in general and the funds that it uses to support the action in order to demonstrate the absence of conflict of interest. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.
2. The representative action may be declared inadmissible by the national court if it establishes that the funding by the third party would: (i) influence decisions of the qualified representative entity in the context of a representative action, including the initiation of representative actions and decisions on settlements; or (ii) provide financing for a collective action against a defendant who is a competitor of the funder or against a defendant on whom the funder is dependent.
3. Member States shall ensure that courts and administrative authorities assess the absence of conflict of interest referred to in paragraph 1 and the circumstances referred to in paragraph 2 at the stage of admissibility of the representative action and at a later stage during the court proceedings if the circumstances only yield then.
- 3a. Member States shall ensure that the court or administrative authority has the authority to dismiss manifestly unfounded cases at the earliest possible stage of proceedings.

“ Additionally, an amendment to Article 15 imposed a ban on lawyer contingency fees ... [T]he Parliament is attempting to intensify (at least to a certain extent) the safeguards against abusive and unfair litigation.”

New rules on the application of the loser-pays principle are set out in the new Art. 7a:

Member States shall ensure that the party that loses a collective redress action reimburses the legal costs borne by the winning party, subject to the conditions provided for in national law. However, the court or administrative authority shall not award costs to the unsuccessful³⁶² party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

Additionally, an amendment to Article 15 imposed a ban on lawyer contingency fees. It ensues from the amendments that—in comparison to the Proposal Directive—the Parliament is attempting to intensify (at least to a certain extent) the safeguards against abusive and unfair litigation. It is obviously no longer entirely opposed to TPLF in collective redress (as was the case in its 2012 Resolution “Towards a coherent approach to collective redress”, where it listed a ban on TPLF as one of the mechanisms against abuses). As of this writing, we have yet to see the outcome of the legislative procedure and its solutions for TPLF.

Member State Level—The Case of Slovenia

Thus far, Slovenia is the only EU MS that has adopted specific statutory regulation of TPLF in collective actions. It did so by implementing the majority of solutions of the 2013 Commission Recommendation into its 2017 Collective Actions Act (CAA), including the provisions on TPLF and the safeguards in pursuit of sound administration of justice. It must be stressed that the CAA offers both opt-in and opt-out systems (the latter in a limited way), has a rather broad scope of application and rules on standing, and allows for contingency fees for lawyers.

“ Thus far, Slovenia is the only EU MS that has adopted specific statutory regulation of TPLF in collective actions. It did so by implementing the majority of solutions of the 2013 Commission Recommendation into its 2017 Collective Actions Act (CAA) ... ”

TPLF regulation in the CAA:

- Administratively lowers the amount in dispute in compensatory collective actions to 20% of the aggregate monetary value of all claims (Art. 58). This drastically minimizes the cost-risk for claimants and funders alike and renders collective redress in Slovenia more accessible. This (in combination with any other measures lowering the cost of the claimant) may in turn diminish actual demand for TPLF in Slovenia. The same may very well become the case in other EU MS, if legislators decide to follow the same or a similar route as Slovenia, i.e., to provide alternative funding options by liberalising the use of contingency fee arrangements and at the same time administratively reducing the cost-risk for claimants.
- Mandates upfront disclosure to the court of the “source” of (third party) funding to be used for bringing a collective action (Art. 59/1). However, it is not clear what exactly should be disclosed apart from the identity of the funder (the “source” of funding) and whether the LFA must be produced. It is also questionable whether the disclosure obligation could be interpreted beyond the limits of *ex parte* and *in camera* principles, since the CAA requires the funded party to make the disclosure to the court and does not mention other parties.
- Requires claimants to provide a statement containing information on the costs of the proceedings and any TPLF arrangement in accordance with Art. 59 (Art. 26/1(13)).
- Requires the court’s notification to the members of the collective that it has certified the collective action to include information on any contingency fee arrangement between the claimant and its attorney (Art. 32/1(8)).
- Attempts to address conflicts of interest by: (i) empowering the court to refuse certification of a collective action if there exists a conflict of interest between the funder and the claimant and the members of the collective (Art. 59/2); (ii) explicitly prohibiting the funder to finance a collective action against a funder’s competitor or a defendant on whom the funder is dependent (Art. 59/3); and (iii) forbidding the funder to exert “decisive” control over the proceedings or the settlement (Art. 59/3).
- Mandates the financial capability of the funder to meet its financial obligations under the LFA towards the funded party (Art. 59/2).
- Requires that the claimant must be financially capable of meeting a potential adverse cost order should the action fail (Art. 59/2).
- Caps the funder’s maximum return (or “interest”, in the wording of the CAA), at the statutory interest rate in Slovenia (Art. 59/3). This provision surely stems from the prohibitive language of the 2013 Commission Recommendation, para. 32: “[...] for cases of private TPLF of compensatory collective redress, it is *prohibited* to base *remuneration* given to or *interest* charged by the funder on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.” (emphasis added by the authors). Since the CAA uses the word “interest” and omits the word “remuneration”, it is unclear whether the Slovenian legislature has inadvertently

structured TPLF as a loan (i.e., recourse debt instrument).

- Includes a general “costs follow the event” rule governing the allocation of costs (Art. 60).
- Gives broad discretion to the court to order the claimant to lodge security for costs as a prerequisite for certification of a collective action (Art. 29/4).
- Caps contingency fee arrangements with attorneys at 15% of the proceeds (Art. 61/1). This provision mirrors Art. 17/3 of the Slovenian Attorneys Act under which contingency fees are generally allowed in Slovenia and capped at 15%.
- Introduces a unique provision, “*sui generis* attorney TPLF”. Article 61/1 permits attorneys to collect up to 30% of the proceeds (success fee), if they undertake a legal obligation towards the funded party to bear all costs of the proceedings, including any adverse costs (Art. 61/1). This very much resembles TPLF *stricto sensu*. However, pursuant to Art. 61/2 and 61/3, there is a “semi-safeguard” in place in cases where the opt-out system applies. In such instances, the contingency fee is calculated from the amount to be paid to the members of the collective who have *actually claimed* the awarded compensation, and this amount may not be less than 30% of the amount to which the attorney would be entitled if all the injured members would claim the awarded compensation.³⁶³ The aim of this provision is obviously to prevent an attorney from collecting an unreasonable amount in contingency fees in an opt-out (or low-claiming) scenario. The amount to which the attorney is entitled irrespective of the number of members of the collective that have actually

claimed the awarded compensation must be paid to the lawyer immediately, and the remaining balance (if any) after the expiration of a minimum 90-day deadline for claiming the awarded compensation by the remaining members of the collective.

- Creates a “statutory waterfall” giving priority to the lawyers’ commercial interests over the interests of the members of the collective to receive full compensation (Art. 61/4). In other words, if the awarded (reasonable) adverse costs that the unsuccessful party must reimburse do not suffice for the payment of the lawyer’s contingency fee, the individual payments to which the injured members of the collective are entitled are to be reduced proportionally. This provision applies to both opt-in and opt-out scenarios. It is hard to comprehend why lawyers’ commercial risks in contingency based arrangements require such statutory mitigation.³⁶⁴ Arguably, this provision contradicts the spirit of the 2013 Commission Recommendation, which in para. 30 explicitly states: “The Member States should not permit contingency fees which risk creating such an incentive [to litigation]. The Member States that *exceptionally* allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular *the right to full compensation of the members of the claimant party*” (emphasis added by the authors).
- Requires court scrutiny in the certification phase as to the reasonableness of a contingency fee arrangement with the lawyer or *sui generis* attorney TPLF arrangement (Art. 28/4(7)).

- Requires the court's assessment in the certification phase, whether mandatory safeguards for TPLF are observed, pursuant to Art. 59 (Art. 28/4(6)).
- The Slovenian Civil Procedure Act analogously applies to all matters relating to the collective proceedings and collective settlements that are not dealt with in the CAA (Art. 11).

Although the TPLF safeguards put in place by the CAA are more comprehensive than those in other nations, the legislation is not without problems. Regrettably, the CAA does not define key terms such as TPLF, LFA, and parties to the transaction. This, in combination with other unclear provisions, makes it difficult to understand how the Slovenian legislature perceives the structure (risk allocation) and legal qualification of TPLF. None of this is adequately explained in the *travaux préparatoires*. As the regulation of TPLF in the CAA was largely copied from the 2013 Recommendation, it is rather the Commission which in the first place failed to address these questions sufficiently and did not anticipate all plausible problems arising when its Recommendation was put in practice. With regard to TPLF, the Slovenian legislature merely followed the Recommendation without independently evaluating these potential problems.

Additionally, one may also question the rationale of the “*sui generis* attorney TPLF” (Art. 61/1), which goes beyond the notion of traditional contingency fee arrangements and significantly deviates from the 2013 Recommendation. All in all, the goals of the Slovenian legislation seem to be somewhat conflicting. On one hand, TPLF in Art. 59 is highly restricted and the way it is structured is commercially non-viable. On the other hand, in addition to pure contingency fees, the allowable “*sui generis* attorney TPLF” in Art. 61 enables lawyers to gain significantly by assuming very moderate cost-risks. By giving the lawyers preferential treatment, Art. 61 runs a risk of creating an economic incentive for litigation for lawyers.

In the public consultation, different stakeholders expressed their opinions on TPLF, the loser-pays principle and contingency fees arrangements as set out in the Proposal CAA. Their comments mostly were not taken into account by the Ministry of Justice in finalising the act. In the process of adopting the CAA, the Slovenian National Assembly did not discuss the provisions dealing with TPLF and contingency fee arrangements in collective actions, while at the time, other issues of the CAA, such as its scope and temporal application, were receiving attention.³⁶⁵

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Part 4: Findings and Recommendations

The evolution of TPLF shows that it is a fairly new solution purporting to address restricted access to justice. The emergence of TPLF in judicial proceedings was often seen as a capitulation of policy makers in the field of judicial protection of rights, who were unable to envision a mechanism that would ensure equal access to justice without an intervention of the market and commoditization of lawsuits.

More recently, TPLF has also evolved into a tool for mitigating (sharing) parties' litigation risks and costs with third parties. For this reason, it has never been perceived by policy makers as an inherent part of judicial systems, but more as an experiment that ought to be carried out in a safe and regulated environment under careful monitoring of its interactions with the fundamental principles of public policy.

Comparative analysis of the legal and regulatory framework of TPLF reveals that in five of the world's leading non-European litigation venues (Australia, U.S., Canada, Singapore, and Hong Kong), some level of oversight of TPLF, mostly judicial, already exists. Regulatory approaches, however, vary considerably in scope and legal effect, do not in most instances define penalties for breaches of standards, and do not rely on government agencies for oversight, apart from the courts.

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Principal public policy issues raised in the courts of these jurisdictions include: (i) the legitimacy and admissibility of the TPLF model; (ii) disclosure and possible conflict of interest inherent to TPLF; (iii) influence of the funder on decisions of the funded party including the settlement; (iv) the power of a court to order a non-party (including a litigation funder) to pay adverse costs; and (v) security for costs.

As the TPLF market matures in these jurisdictions, new regulation of TPLF could be on the horizon, e.g.: (i) the ALRC report proposing a nationwide comprehensive regulatory reform of TPLF in the Australian class action system; (ii) endeavours on the provincial level in Canada (chiefly Ontario) to study the experience with TPLF in class actions and make recommendations for legal reform where appropriate; (iii) the advent of state laws in the U.S. regulating consumer lawsuit lending arrangements and judicial interest in disclosure of funding arrangements, especially in class actions; and (iv) upgrading of the existing regulation of TPLF in international arbitration in Hong Kong and Singapore.

In most of Europe, TPLF is a rather underdeveloped concept, both in terms of jurisprudence and existing regulation, with the exception of England and Wales, and to a limited extent also Germany, the Netherlands and Switzerland. In most EU MS there is no reported case law on TPLF.

“ [I]n establishing its own regulatory framework for TPLF in collective redress, [EU lawmakers] can learn from the wealth of experience of the leading non-European jurisdictions. ”

Empirical data and experience are scarce. To date, only two EU MS have specific regulation of TPLF in place, Slovenia in its 2017 CAA and the Netherlands in the 2019 Claim Code (a soft-law instrument). This, however, does not necessarily mean that TPLF is not utilized in the EU. Given the relative novelty of TPLF in much of the EU, EU lawmakers naturally cannot rely on a “pan-European experience” with TPLF in their attempts to regulate safeguards against possible abuses of TPLF in collective redress. Rather, in establishing its own regulatory framework for TPLF in collective redress, they can learn from the wealth of experience of the leading non-European jurisdictions.

Various EU acts regulating collective redress have emphasised the aim of the EU to protect the collective interests of aggrieved individuals, while ensuring appropriate safeguards to avoid abusive

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litigation. Specific provisions for TPLF were first set out in the European Commission's 2013 Recommendation, which suggested safeguards against possible abuses by:

1. Requiring the claimant to declare to the court at the outset of the proceedings the source of the funds.
2. Enabling the court to "stay" the proceedings, if:
 - (a) There is a conflict of interest between the funder and the claimant or its members.
 - (b) The funder has insufficient resources in order to meet its financial commitments to the claimant.
 - (c) The claimant has insufficient resources to meet any adverse costs should the collective procedure fail.
3. Prohibiting the funder:
 - (a) From seeking to influence procedural decisions of the claimant, including on settlements.
 - (b) From providing financing for a collective action against a competitor of the funder or against a defendant on whom the funder is dependent.

(c) From charging excessive interest on the funds provided.

4. Prohibiting remuneration given to, or interest charged by, the funder, to be based on the amount of the settlement reached or the compensation awarded, unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

The Commission has not provided any detailed explanation for these provisions. To a limited extent, users may consult the 2013 Communication "Towards a European Horizontal Framework for Collective Redress". Drawing from the unique Slovenian experience in implementing the 2013 Recommendation, it is obvious that the Commission had not sufficiently addressed all relevant issues of TPLF in collective redress and certainly had not anticipated all plausible problems arising with the implementation of its recommendation in practice. Consequently, the Slovenian CAA lacks definitions of key terms. This, in combination with some other unclear provisions, makes it difficult to understand how the Slovenian legislation perceives TPLF.

The regulatory framework for TPLF in the 2013 Recommendation was, in turn, substantially amended by the 2018

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Proposal Directive for consumer representative actions (*nota bene*: the scope of the proposed directive is limited in comparison to the entirely horizontal scope of the 2013 Recommendation). The Proposal Directive requires an early stage disclosure of not only the source of the funds used to support the collective action, but also the source of the funds the qualified entity (representative entity/claimant) uses for its activity in general.

It does not, however, specify to whom the disclosure should be made, whether to the court only or also to the members of the collective and/or the opposing party. Similarly, as in the 2013 Recommendation, the qualified entities must demonstrate that they have sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail. However, for an unknown reason, the Proposal Directive dropped the requirement that the funder must also establish that it has sufficient resources to meet its financial commitments to the claimant. It appears that the lawmakers are not concerned with the financial standing of funders.

The Proposal Directive does not allow third party funders: (i) to influence decisions of the qualified entity in the context of a representative action, including on settlements; or (ii) to provide financing for a collective action against a defendant who is a competitor of the funder or on whom the funder is dependent. The prohibition of the 2013 Recommendation against charging excessive interest on the funds provided has been left out of the Proposal Directive. In the meantime, this vague restriction has found its way into the Slovenian CAA in exactly the same wording as in the 2013 Recommendation.

The Proposal Directive also leaves out the 2013 Recommendation's prohibition of basing the remuneration given to, or interest charged by, the funder on the amount of the settlement reached or the compensation awarded, except in cases where the funding arrangement is regulated by a public authority to ensure the interests of the parties. It is entirely unclear what the 2013 Recommendation intended by that exception. Does it entail the regulation of contingency fees in national laws governing the legal profession, usury laws of the MS, specific regulation of mandatory requirements for LFAs in MS' consumer protection legislation, or some sort of administrative control or oversight of TPLF providers by a public body or agency? In any event, the Proposal Directive now leaves a key safeguard—the questions of the reasonableness and possible capping of the funder's remuneration—completely unresolved. And more importantly, the Proposal Directive does not foresee any judicial scrutiny of the reasonableness of the funding arrangement. This is a considerable shift away from policy established by the 2013 Recommendation.

In Art. 7/3, the Proposal Directive requires the MS to ensure that courts and administrative authorities are empowered to assess the circumstances referred to in Art. 7/2, and accordingly to require the qualified entity to refuse the relevant funding and, if necessary, reject the standing of the qualified entity in a specific case. It should be noted that circumstances enabling the court to exercise these powers under the Proposal Directive are not identical to those in the 2013 Recommendation. In fact, the list of such circumstances has been narrowed down, as the Proposal Directive expressly mentions only two such circumstances

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(Art. 7/2), whereas the 2013 Recommendation’s list is broader. From the wording of Art. 7/3 of the Proposal Directive it is not clear whether the courts may exercise their powers also in the scenario referred to in Art. 7/1; i.e., where the claimant lacks sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail. This is probably a drafting lapse; other parts of the Proposal Directive also do not address this question. Another relevant question arises as to how the authorities are to react if relevant circumstances arise after the action had been certified.

In March 2019, the European Parliament published its Legislative Resolution introducing several amendments to the text of the Proposal Directive. If we limit ourselves to the regulatory framework of TPLF in Art. 7 of the Proposal Directive, we can conclude that the Parliament’s Resolution does not bring anything momentous to the table. In its proposed amendments to Art. 7/1 of the Proposal Directive, the Resolution attempts to:

- Clarify that the funded party must disclose the sources of funding to the court or administrative authority, without

mentioning the opposing party or group members (am. No. 69). This suggests that an *ex parte* approach to disclosure might be contemplated by the European Parliament.

- Emphasise the timeliness of the disclosure, by stressing that it should be done “at the earliest stage of the action” instead of “early stage” as the Proposal Directive puts it (am. No. 69). It is doubtful whether this amendment actually adds to the predictability of the timing of the disclosure.
- Broaden the scope and underscore the rationale of disclosure; i.e., to “demonstrate the absence of conflict of interests”. While the new wording “a complete financial overview, listing all sources of funds” might *prima facie* suggest that the scope of disclosure is broader, this is hardly the case, since it is still limited to the “sources” of the funds (am. No. 69). Thus, it seems that the substance of the financial arrangement itself (the LFA), which may be of paramount relevance for assessing conflict of interests, permissible level of a funder’s control, and reasonableness of the funder’s return on its investment, is not covered by the disclosure obligation.

In addition, the Legislative Resolution proposes amendments to Art. 7/2 in an attempt to:

- Specify the courts' powers in limited instances of possible abuse of process; that is, to "declare the representative action inadmissible" (am. No. 70).
- Add that a funder's undue influence on decisions of the qualified entity referred to in Art. 7/2(a) also includes influencing the initiation of representative actions and decisions on settlements (am. No. 71).

In its proposed amendments to Art. 7/3, the Resolution clarifies that the court may, throughout the whole proceedings, declare a collective action inadmissible also in situations where conflicts of interest referred to in Art. 7/1 exist (am. No. 72). But still it fails to resolve the old dilemma of whether the court, in assessing the admissibility of a collective action, may also take into account the claimant's financial standing referred to in Art. 7/1. It should be noted that in its Draft report of 12 October 2018,³⁶⁶ the European Parliament's Committee on Legal Affairs (JURI) proposed an addendum to Art. 7/3 saying that "Member States shall provide that third party funding is prohibited, except in the case of individual contributions." This proposal, however, did not make it to the Legislative Resolution (am. No. 30).

Finally, the Resolution introduces a proposal for a new para. 7/3(a) that would empower the courts to "dismiss manifestly unfounded cases at the earliest possible stage of proceedings". Such an early-dismissal mechanism relates to groundless cases, manifestly lacking merit (am. No. 73). Since this provision does not establish any correlation between TPLF and the bringing of "manifestly unfounded cases", which could possibly result in abuse of process, the new paragraph does not seem to belong in Art. 7 governing TPLF.

It is clear from the Proposal Directive that in the past five years, EU lawmakers have shifted dramatically towards cutting down certain safeguards against abusive litigation that were originally introduced in the form of soft law by the 2013 Recommendation. In its report of January 2018 on the implementation of the 2013 Recommendation (p. 20), the Commission clearly stated its intention "to further promote the principles set out in the 2013 Recommendation across all areas, both in terms of availability of collective redress actions in national legislations and thus of improving access to justice, and in terms of providing the necessary safeguards against abusive litigation". Only a couple of months later, it did the opposite.

In any event, the Proposal Directive abolishes a handful of safeguards from

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potentially abusive litigation, enshrined in the 2013 Recommendation, including: (i) the powers of the court to stay the proceedings if there is a conflict of interests between the funder and the claimant and its members (Art. 15(a) of the 2013 Recommendation); (ii) a requirement that the funder must have sufficient resources in order to meet its financial commitments to the claimant initiating the collective redress procedure (Art. 15(b) of the 2013 Recommendation); (iii) a prohibition for funders to charge excessive interest on the funds provided (Art. 16(c) of the 2013 Recommendation); and (iv) a prohibition on basing the remuneration given to or interest charged by the funder on the amount of the settlement reached or the compensation awarded, except in cases where the funding arrangement is regulated by a public authority to ensure the interests of the parties (Art. 32 of the 2013 Recommendation).

By abandoning a minimum base of safeguards against abusive litigation set out in the 2013 Recommendation, EU lawmakers run the risk of contributing to an even greater divergence in collective redress systems across the EU, encompassing both jurisdictions with lax or

no restrictions against abusive litigation and those few that have followed the route of the 2013 Recommendation. To this end, multiple commentators and stakeholders continue to raise concerns that creating an uneven playing field encourages forum shopping.³⁶⁷

As can be discerned from the above analysis, the 2019 European Parliament's Legislative Resolution does not attempt to reverse this trend. The 2018 Proposal Directive, as it stands now, essentially deals with only two regulatory aspects of TPLF in collective redress: (i) disclosure of the source of funding to the court; and (ii) conflict of interest. Crucial areas of regulation, such as the reasonableness and possible capping of the funder's remuneration, and judicial control (scrutiny) of the funding arrangements, have been completely left out of the regulatory agenda. Furthermore, even where the Proposal Directive does attempt to regulate TPLF (disclosure and conflict of interest), it does so in a very limited manner and without basing its legislative solutions on intensive comparative research and simulations of how, exactly, a specific provision will operate in practice. As a result, the Proposal Directive, in its current

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form, may not be able to achieve one of its stated goals: to strike a balance between facilitating access to justice to safeguard consumers' interests, and ensuring adequate safeguards from abusive litigation (Art. 1/1).

Recommendations

With that said, it would be prudent for European lawmakers—whether at the EU or MS level—to revisit the approach to regulation of TPLF in Art. 7 of the 2018 Proposal Directive in order to avoid premature and ill-considered solutions. Albeit far from ideal, the safeguards in the 2013 Recommendation might serve as groundwork upon which effective regulation of TPLF in collective redress could be built. The analytical framework laid down in this paper may be taken into consideration by the European lawmakers for that purpose and beyond, particularly for a possible horizontal approach to EU regulation of TPLF in collective redress (or of collective redress in general, keeping in mind that mass harm cases are not limited to “business to consumer” cases as the limited scope of the Proposal Directive suggests), or any kind of regulatory scheme that the EU and its MS might decide to follow in the future. In any event, considering that TPLF in collective redress is a stranger to the *acquis*, this task should be approached systematically and with due regard to comparative legal and regulatory trends.

STEP ONE

The initial step for European lawmakers would ideally be a meticulous analysis of TPLF in general, its economic rationale, typical structure, allocation of risks between the participating parties and

comparison of various dispute funding models available on the European market and more broadly.³⁶⁸ Drawing from empirical data would allow the lawmakers to:

1. Develop definitions of principal terms, including “TPLF”, “LFA”, “third party litigation funder” and “funded party”. To state the obvious, it is vital that the European legislator understands the subject of any given regulation. One of the central deficiencies of the 2013 Recommendation and the 2018 Proposal Directive alike is a complete lack of definitions, which is arguably a key reason for their inconsistencies and idiosyncrasies. Comparative experience confirms that any regulation of TPLF should begin with defining key terms.³⁶⁹
2. Identify the principal risks that TPLF poses to the proper administration of justice in collective redress in the EU, and make an informed decision about which of those risks require specific regulatory safeguards in place to prevent abusive litigation,³⁷⁰ e.g., encouraging frivolous lawsuits via creating economic incentives for third parties to litigate, conflicts of interest, undue influence on key procedural decisions, potentially unreasonable returns for funders at the expense of collective members, and undesired effects on the full-compensation principle. Lawmakers should also recognize that because the TPLF industry is generally not bound by the same corporate governance and transparency standards as the regulated financial institutions in the EU, some of these risks could be nascent concerns that will be difficult to verify empirically.

STEP TWO

The second step would be to decide on the scope of regulation, by differentiating between three interdependent categories of issues:

1. Regulation of corporate governance standards³⁷¹ for the TPLF industry, such as licensing requirements, capital adequacy and liquidity requirements, mandatory conflict of interest management schemes, oversight by public authorities, and reporting obligations.
2. Regulation of key features and mandatory provisions of LFAs³⁷² (e.g., termination rights, indemnification of a funded party for adverse costs).
3. Regulation of effective safeguards³⁷³ against abusive litigation in the context of collective redress, with an aim to strike a balance between facilitating access to justice to safeguard consumers' interests, and ensuring adequate safeguards from abusive litigation. This could be done, for instance, by mandating adequate disclosure of TPLF and conferring powers on courts in different stages of collective proceedings to assess all relevant issues, such as the existence of conflicts of interest, level of the funder's control over the proceedings, financial standing of the claimant and the funder, the need for security for costs, reasonableness of the funder's return, and if necessary, to draw appropriate consequences, such as refusal to certify a collective action or approve a collective settlement, or termination or stay of the proceedings.

Given the fact that TPLF in much of the EU is an underdeveloped concept, the regulation of corporate governance

standards for funders or prescribing mandatory requirements for LFAs may at this point not be realistic at the EU level. European lawmakers should thus maintain their focus on the proper regulation of effective procedural safeguards against abusive litigation in collective proceedings, which has been the "fil rouge" of TPLF regulation in the EU ever since the 2013 Recommendation.

STEP THREE

The third step for European lawmakers would be to implement effective procedural safeguards against abusive litigation in the EU collective actions regulatory framework. If the EU regulatory enactments remain inadequate, MS will have to step forward to implement these safeguards at a national level. Comparative trends³⁷⁴ confirm that in jurisdictions with a mature TPLF market and wealth of experience in collective redress and TPLF-related jurisprudence, the following procedural safeguards are usually contemplated by the regulators:

1. **An obligation to disclose TPLF, which is a prerequisite for the proper functioning of other safeguards and as such is of paramount importance.** Judging from the wording of Art. 7/1 of the 2018 Proposal Directive and am. 69 of the European Parliament's Legislative Resolution, it is evident that EU lawmakers are not fully aware of the dimensions of the disclosure obligation and its interplay with other safeguards. From a comparative stance,³⁷⁵ EU lawmakers should approach regulating the disclosure requirement from four different angles: (i) the purposes and anticipated effects of disclosure (e.g., to assess potential conflict of interest, level of the funder's control over the proceedings, reasonableness of the funder's return, financial standing of the

claimant and the funder, and the need for security for costs); (ii) the timing when disclosure should occur (e.g., upon filing of the collective action or within a certain time period after the LFA is concluded or amended); (iii) what, exactly, is to be disclosed (e.g., should it be limited in scope to the funder's identity—the "source" of funding, or be extended also to an obligation to produce the LFA in whole or in part for court scrutiny, and if production occurs, whether certain terms of the LFA of strategic concern to funders or claimants should be redacted, and who should decide on that); and (iv) the parties or entities to whom the disclosure should be made (e.g., only to the court on an *ex parte* and *in camera* basis, or additionally to the opposing party and the members of the claimant's group, who may in turn be financially affected by the LFA). Despite other controversies, the new Dutch 2019 Claim Code, albeit a soft-law instrument, is an example of such an approach.

2. **Measures available to courts for tackling conflicts of interest.** Similarly, EU lawmakers have failed to identify a variety of possible conflicts of interest that may occur in third party funded collective proceedings. As explained *supra*, Article 7/2(b) of the 2018 Proposal Directive limits itself only to situations where interests of the funder conflict with those of a defendant who is a competitor of the funder or a defendant on whom the funder is dependent. In contrast to the 2013 Recommendation, it does not mention an important category of conflicts that may arise between the funder and the claimant party and its members. In addition, comparative analysis³⁷⁶ and

jurisprudence³⁷⁷ demonstrate that European lawmakers should also take note of additional relevant categories of conflict of interest that are not envisaged in any EU document relating to regulation of TPLF so far, such as conflicts between (i) the third party funding provider and the claimant's lawyer, and (ii) the claimant and its lawyer.

3. **Measures available to courts for prevention of excessive influence of the funder on claimant decisions in the context of controlling the collective proceedings, including on settlements.** EU lawmakers were mindful of that issue, but at the same time legislators should not neglect that the effectiveness of this safeguard is largely dependent on how the disclosure obligation is formulated in terms of its scope. As with the conflict of interest issue, legislators should first establish how exactly funders might exercise their control in practice. Comparative experience and jurisprudence show that in order to assess the level of funder control and its admissibility, the court will often have to scrutinize the relevant provisions of the LFA, including those governing the thresholds for settlement, veto rights, choice of counsel, evidentiary consultants and experts such as accountants, and termination of the LFA.
4. **Capping the funder's remuneration and judicial scrutiny and approval of the reasonableness of the funder's remuneration.** Without any explanation, the 2018 Proposal Directive now leaves the questions of the reasonableness and possible capping of the funder's remuneration completely unresolved. More importantly, it does

not foresee any judicial scrutiny³⁷⁸ of the reasonableness of the funding arrangement. If unwilling to tackle the issue of capping funder remuneration, European legislators are well advised to at least revisit the issue of judicial scrutiny of its reasonableness, and implement it in the certification phase and throughout the collective proceedings. Otherwise they risk serious prejudice to consumers' interests and at the same time the failure of the underlying principle: to prevent abusive litigation.

5. **Cost allocation rules, liability for adverse costs and security for costs.**

As explained *supra*, the 2018 Proposal Directive envisages that claimants will bear potential liability for adverse costs in Art. 7/1, by requiring the claimant to demonstrate its financial capability of meeting any adverse costs should the action fail. However, it does not provide for the loser-pays rule. The 2019 European Parliament's Legislative Resolution attempts to fill this gap by proposing a new Art. 7a, governing the loser-pays principle (am. No. 74). This proposal should be commended. In addition, the European lawmakers should consider introducing a power of the court to order security for costs against a claimant failing to demonstrate that it has sufficient financial resources to meet any adverse costs should the action fail, and eventually refuse certification or terminate the proceedings if the order is not adhered to. Without these safeguards,³⁷⁹ the requirement of Art. 7/1 is very likely to be ineffective.

6. **Regulation of contingency fee arrangements.** Although contingency fee arrangements with lawyers should, from a technical standpoint, ideally be dealt with separately from TPLF *stricto sensu*, the two are inseparably linked. The 2013 Recommendation rejects contingency fees as a matter of principle (para. 30), saying that they create an incentive for litigation. Curiously, the 2018 Proposal Directive is completely silent on that issue. It is understandable that it would be difficult to strike a balance between the minority of EU MS (including Slovenia) who permit contingency fees and the majority of those who do not.³⁸⁰ Nonetheless, the EU lawmakers should assess the possible impact the regulation of contingency fees might have on TPLF and on the right to full compensation of the injured individuals.

European legislators should be mindful of comparative regulatory trends, which indicate that, apart from the level of regulation of TPLF, a complex interplay between various other factors may decisively affect the actual demand for TPLF in collective redress in an individual EU MS. Such factors include, *inter alia*, cost allocation rules; accessibility of alternative funding options such as contingency fee arrangements with lawyers and public funding of collective redress; and, importantly, measures aimed at reducing the cost-risk for claimants via administrative reduction of the amount in dispute or actual costs of collective proceedings.

Glossary

ABA – American Bar Association

AFSL – Australian Financial Services Licence

ALF – Association of Litigation Funders of England and Wales

ALFA – Association of Litigation Funders of Australia

ALRC – Australian Law Reform Commission

am. – Amendment

Art. – Article

ASIC – Australian Securities and Investments Commission

ATE – After the event legal expenses insurance

BTE – Before the event legal expenses insurance

CAA – Slovenian Collective Actions Act

CFA – Conditional fee agreement

Ch. – Chapter

CJEU – Court of Justice of the European Union

Commission – European Commission

CPF – Class Proceedings Fund, Ontario

Council – The Council of the European Union

DBA – Damages-based agreement

EU – European Union

FAAC – Fonds d’aide aux actions collectives, Quebec

ff. – Folio, and the following pages

GPN-CA – Federal Court Practice Note on Class Actions

JURI – European Parliament’s Committee on Legal Affairs

LCO – Law Commission of Ontario

LEI – Legal Expenses Insurance

LFA – Litigation funding agreement

LFTA – Litigation Funding Transparency Act of 2019

MEPs – Members of the European Parliament

MS – Member State(s)

Rec. – Recital

TPF – Third party funding

TPLF – Third party litigation funding

VLRC – Victorian Law Reform Commission

Endnotes

- 1 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013.
- 2 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (Text with EEA relevance) {SWD(2018) 96 final} - {SWD(2018) 98 final}, COM(2018) 184 final 2018/0089 (COD), 11.4.2018.
- 3 27.11.2008, COM(2008)794.
- 4 COM(2013) 401 final, <http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-401-EN-F1-1.pdf>.
- 5 See B. A. Garner (ed.): Black's Law Dictionary, West Group, 2004, p. 246: "An agreement between an officious intermeddler in a lawsuit and a litigant which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgement proceeds [...]".
- 6 *Ibid.*, p. 973: "The continuation of something, such as a lawsuit".
- 7 *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386 (Austl.).
- 8 See D. S. Abrams, D. L. Chen: A Market for Justice: A First Empirical Look at Third Party Litigation Funding, University of Pennsylvania Journal of Business Law, vol. 15, 2013, pp. 1082–1087; M. Steinitz: Whose Claim is This Anyway? Third Party Litigation Funding (2 August 2010), Minnesota Law Review, vol. 95, no. 4, 2011; Iowa Legal Studies Research Paper No. 11-31, pp. 1278-1282; C. Hodges, J. Peysner, A. Nurse: Litigation Funding: Status and Issues, University of Oxford, Legal Research Paper Series, no. 49, 2012, pp. 48-57.
- 9 See U.S. Chamber Institute for Legal Reform: Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States, 2009, p. 9.
- 10 C. Hodges, J. Peysner, A. Nurse: Litigation Funding: Status and Issues, University of Oxford, Legal Research Paper Series, no. 49, 2012.
- 11 [2005] EWCA Civ 655, paras. 39 and 40. See also the decision of the Court of Appeal (England and Wales) in *Gulf Azov Shipping Company v Idisi* [2001] EWCA Civ 21, para. 54. of the reasoning (by Lord Phillips).
- 12 Civil Justice Council: The Future Funding of Litigation – Alternative Funding Structures, 2007, p. 12.
- 13 Lord Justice Rupert Jackson: Review of Civil Litigation Costs: Final Report (2009), pp. 117-124.
- 14 Code of Conduct for Litigation Funders (rev. January 2018), Association of Litigation Funders of England & Wales.
- 15 See C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 15-37.
- 16 M. Steinitz (2011), op. cit., p. 1281.
- 17 See C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 43-45.
- 18 S. Seidel: Third Party Capital Funding of Commercial Claims: A Nutshell Primer, Fulbrook Management, 2012, p. 4.
- 19 See ABA Commission on Ethics 20/20 White Paper on Alternative Litigation Finance.
- 20 See U.S. Chamber Institute for Legal Reform (2009), op. cit., p. 9.
- 21 C. Hodges, J. Peysner, A. Nurse, op. cit., p. 39.
- 22 Two mechanisms are being used for collective redress in the Netherlands, i.e., declaratory collective actions by representative foundations or associations (the so-called "305.a collective actions"), and, as of 2005, also collective settlements of mass claims pursuant to the Dutch Collective Settlement of Mass Claims Act (Wet collectieve afwikkeling massaschade (WCAM)). The "305.a collective actions" are governed by the Dutch Civil Code, Art. 3:305a, available at <http://www.dutchcivillaw.com/civilcodebook033.htm>. The WCAM is implemented in the Civil Code Art.

- 7:907-910 and the Code of Civil Procedure Art. 1013-1018, available at <http://www.dutchcivillaw.com/civilprocedureleg.htm>. For a detailed overview of the Dutch collective redress landscape, see *Collective Redress in the Netherlands*, U.S. Chamber Institute for Legal Reform, February 6, 2012, available at https://www.instituteforlegalreform.com/uploads/sites/1/Collective_Redress_Netherlands.pdf.
- 23 Amsterdam Court of Appeal, 13. 7. 2018 (ECLI:NL:GHAMS:2018:2422), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2422>.
- 24 Wet Afwikkeling Massaschade in Collectieve Actie - (WAMCA). Pursuant to its Art. VI, the act will enter into force on a date to be decided by Royal Decree, which is expected to be in 2019 or early 2020. Informal and unauthorised English translation is available at https://www.houthoff.com/doc/English_translation-Bill_on_Redress_of_Mass_Damages_in_a_collective_action.pdf.
- 25 “Soft law” refers to rules not legally binding, such as codes of conduct and recommendations of professional associations. In EU law, the term “soft law” covers a plethora of acts issued by the EU institutions and other bodies, such as recommendations, communications, white papers, green papers, guidelines, notices, etc. In contrast, directives, regulations and decisions of EU institutions are binding. According to CJEU’s case law, soft law, too, may have a limited effect and is binding on the institution issuing it, but not on the addressees.
- 26 See *The Claim Code 2019, Principe III (“Externe Financiering”)*, Den Haag, Boom Juridisch, 2019, pp. 10-13, available at https://warehouse.budh.nl/system/assets/uploads/001/111/662/23f-4d501a23fc1e779865e822c7cc0c5a1b30345/Claimcode_2019_9789462906082_original.pdf.
- 27 Cf. C. A. Rogers: *Gamblers, Loan Sharks & Third-Party Funders in: Ethics in International Arbitration*, Oxford University Press, Oxford 2014, pp. 4-5.
- 28 Zakon o kolektivnih tožbah (ZKoliT).
- 29 Cf., e.g., final recommendations in Lord Justice Rupert Jackson (2009), op. cit., p. 124.
- 30 Cf. with the afore-cited decision of the High Court of Australia in the *Fostif* case.
- 31 Cf. V. S. Sahani, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., pp. 4-7.
- 32 See S. Seidel, op. cit. (2012), pp. 4-5.
- 33 Categorization according to W. H. van Boom, *Third-Party Financing in International Investment Arbitration*, Erasmus School of Law, Erasmus Universiteit Rotterdam, 2011, pp. 25-28. See also W. W. Park, C. A. Rogers, op. cit., p. 4.
- 34 C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 11 and 17–18. See also V. S. Sahani, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., p. 5.
- 35 W. H. van Boom, op. cit., pp. 26-27.
- 36 See also V. S. Sahani, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., p. 11.
- 37 See J. Clanchy: *Third Party Funding in Arbitration: Breaking Down Barriers and Building Bridges*, Croatian Arbitration Yearbook, vol. 23 (2016), p. 66.
- 38 M. Kantor: *Risk Management Tools for Respondents – Here be Dragons*, in: B. M. Cremades, A. Dimolitsa (eds.), op. cit., p. 57.
- 39 J. Clanchy: op. cit., pp. 58-59.
- 40 W. H. van Boom, op. cit., p. 28.
- 41 S. Seidel: *Insurers Today, Third-Party Funders Tomorrow*, Insurance Day, 2011, p. 2.
- 42 Cf. M. de Morpurgo, op. cit., p. 353.
- 43 M. Steinitz (2011), op. cit., p. 1292; V. S. Sahani, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., p. 5.
- 44 Such agreements are forbidden in some jurisdictions (e.g., in Austria, Belgium, Netherlands, France, and Ireland), and permitted in others (USA, Canada, Italy, Spain, Germany, and Slovenia). C. Veljanovski offers an overview of various jurisdictions, op. cit., p. 409.
- 45 S. Khouri, K. Hurford, op. cit., p. 12.
- 46 W. H. van Boom, op. cit., pp. 27-28.
- 47 Cf. M. Steinitz (2011), op. cit., pp. 1293-1294.
- 48 See, e.g., definitions by S. Khouri, K. Hurford, op. cit., p. 3, and W. W. Park, C. A. Rogers: *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, Austrian Yearbook on International Arbitration, 2015; Boston Univ. School of Law, Public Law Research Paper No. 14-67; Penn State Law Research Paper No. 42-2014, pp. 4-5.

- 49 See R. Happ, in: V. S. Sahani, L. Bench-Nieuwveld, *Third Party Funding in International Arbitration*, Kluwer Law International, 2012, p. xix. Happ states that in his experience, only one in five parties has the required funds to fund its own claim.
- 50 C. P. Bogart: *Third-Party Financing in International Arbitration: An Overview of Arbitration Finance*, Burford Capital (2013), p. 2. See also C. A. Rogers, *op. cit.*, p. 3.
- 51 See M. Galanter: *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, in: *Law & Society Review*, vol. 9, no. 1, *Litigation and Dispute Processing: Part One*, 1974, pp. 97-114.
- 52 More on this in M. Steinitz (2011), *op. cit.*, pp. 1300-1318.
- 53 See M. de Morpurgo: *A Comparative Legal and Economic Approach to Third-party Litigation Funding*, 2011, *Cardozo Journal of International and Comparative Law*, vol. 19, pp. 382-383.
- 54 The funders admit that the majority of their clients (even up to 80% with certain funders) are referred to them by law firms, with which they have continuous business relationships. See M. Scherer, A. Goldsmith, C. Fléchet: *Third Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives*, *International Business Law Journal*, No. 2, 2012, p. 219.
- 55 *Ibid.*, p. 719, fn. 31. The authors cite much publicised cases in which funding contracts were disclosed during judicial proceedings. The most prominent is the contract on the funding of the USD 18 billion environmental dispute between Chevron and Ecuador. See also Therium’s LFA that was disclosed in *Gbarabe, et al. v. Chevron*, a class action brought against the energy giant in San Francisco federal court, <https://www.documentcloud.org/documents/3898552-Funding-Agreement.html>; Therium’s LFA for funding of an investment treaty arbitration pursuant to the United States – Panama TPA and the BIT between the United States and Panama, <https://www.lawinsider.com/contracts/2Bz778lIDmLXUk9rRNi8NU/dominion-minerals-corp/litigation-funding-agreement/2017-02-14>; Bentham’s LFA (partly redacted), <https://www.sec.gov/Archives/edgar/data/1077370/000143774917013467/ex10-10.htm>.
- 56 M. Steinitz, A. Field: *A Model Litigation Finance Contract*, 99 *Iowa L. Rev.* 711, 2014, *U Iowa Legal Studies Research Paper No. 13-32*, p. 718.
- 57 In England and Wales (i.e., locally), incentives for self-regulation were the recommendations of Lord Jackson from 2009; the Code of Conduct for Litigation Funders now regulates some of the essential elements of a funding contract, which have shown to be a source of concern in practice.
- 58 See, e.g., *International Swaps and Derivatives Association (ISDA)*.
- 59 M. Steinitz, A. Field, *op. cit.*, p. 729.
- 60 M. Steinitz, A. Field, *op. cit.*, p. 757, para. 2.1.2. Cf. also the excerpt from the contract, based on which Burford Capital funded the claims of Ecuadorian claimants in the environmental dispute against Chevron, as cited by M. Steinitz: *The Litigation Finance Contract*, 54 *William & Mary Law Review*, 455 (2012); *U Iowa Legal Studies Research Paper No. 12-11*, p. 477.
- 61 M. Steinitz, A. Field, *op. cit.*, p. 758, para. 2.1.4.2.
- 62 Cf. Art. 2(1) of the ROLAND LFA.
- 63 The aspect of capital adequacy and solvency of the funder is of key importance to the funded party, as they may lose the opportunity to pursue their claim. This aspect is slowly becoming a standard in the TPLF industry and is especially emphasised, e.g., in the Code of Conduct for Litigation Funders. See also M. Steinitz, A. Field, *op. cit.*, p. 758, para. 2.2.1.
- 64 *Ibid.*, pp. 758-760. In addition to the aforementioned warranties, a specimen contract would also include the funder’s warranty that they have no obligations towards third parties (usually investors) under which they would have to monetise the claim in a specific time period, or warranty that they shall not use securitisation, i.e., that the funder shall not sell their interest in the claim on a secondary market.
- 65 *Ibid.*, pp. 760-761, para. 3.1.2.
- 66 See also Art. 11(1), (2) of the ROLAND LFA.
- 67 M. Steinitz, A. Field, *op. cit.*, pp. 763-764, para. 4.3.
- 68 In the LFA between Burford Capital and the Ecuadorian claimants in the dispute against

- Chevron, the funder Burford reserved the right to mandatory consent, which gave them a decisive influence over the selection of the party's lawyer—which (under the LFA) was a material condition for funding the dispute. See M. Steinitz (2012), op. cit., pp. 472-473. Note: the primary source (litigation funding agreement), which the author cites, is not freely accessible.
- 69 See, e.g., Art. 3(c) of the ROLAND LFA; Code of Conduct for Litigation Funders, para. 11.1.
- 70 Cf. Code of Conduct for Litigation Funders, paras. 9.2 and 9.3. See also M. Steinitz, A. Field, op. cit., pp. 759, para. 2.2.3.
- 71 M. Steinitz, A. Field, op. cit., p. 768, para. 7.1.1.
- 72 See, e.g., *S&T Oil Equipment & Machinery Ltd. v. Romania* (ICSID Case No. ARB/07/13).
- 73 M. Smith, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., p. 22.
- 74 In this case, the funder's recourse is also expressly excluded under the Code of Conduct for Litigation Funders, para. 13.1.
- 75 Cf. Code of Conduct for Litigation Funders, paras. 11 and 12.
- 76 See *Harcus Sinclair v Buttonwood Legal Capital Ltd & Ors* [2013] EWHC 1193 (Ch.).
- 77 This concerns the so-called QC Clauses or their equivalent. See Code of Conduct for Litigation Funders, para. 13.2.
- 78 Part of the theory concerns the so-called staged financing. See M. Steinitz (2012), op. cit., pp. 472-473 and 506-507.
- 79 See also C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 15-65.
- 80 Cf. Code of Conduct for Litigation Funders, para. 10.
- 81 See also M. Steinitz, A. Field, op. cit., p. 764, para. 5.1.
- 82 See, e.g., Art. 5(b) of the ROLAND LFA.
- 83 M. Smith, in: V. S. Sahani, L. Bench-Nieuwveld, op. cit., pp. 24-25.
- 84 See M. Steinitz (2012), op. cit., pp. 467-468, who discloses the contents of the financial arrangement between Burford Capital and the claimants in the dispute against Chevron. It follows from her summary that Burford funded the proceedings in three stages: the first for USD 4 million, and two for USD 5.5 million each. With the said investment, Burford acquired a right to a 5.5% participation in proceeds from proceedings. See also the key parts of the LFA behind the Mastercard collective action claim, published in the Appendix to the CAT judgment [2017] CAT 16 of 21 July 2017, https://www.catribunal.org.uk/sites/default/files/2.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf. The "Total Investment Return" is defined as "an amount of the Undistributed Proceeds and any Costs Award equal to the sum of: (a) the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Proceeds up to £1 billion, plus 20% of the Undistributed Proceeds in excess of £1 billion; plus (b) the Late Payment Interest, if any". Some of these examples clearly demonstrate that TPLF is a for-profit commercial activity. In the context of collective redress in the EU, European lawmakers should thus pay due attention to balancing the commercial interests of the funders with those of the injured individuals in obtaining full compensation.
- 85 The German funder Allianz Prozessfinanz, e.g., advertises the following conditions: (i) 20% of proceeds from out-of-court settlement or mediation; (ii) 30% of proceeds from a judicial decision or an arbitral award, court settlement or arbitral award on agreed terms to a maximum of EUR 500,000; (iii) 20% of each amount exceeding EUR 500,000 (<https://profi.allianz.de/>). See also Art. 5(a) of the ROLAND LFA.
- 86 See M. Scherer, A. Goldsmith, C. Fléchet, op. cit., pp. 213-214. The majority of funders state the rates of 10-40%, depending on the case. Some of them are also in favour of limiting participation to a maximum of 50%, with the exception of insolvency proceedings.
- 87 Seidel, S., op. cit. (2012), p. 27.
- 88 S. Khouri, K. Hurford, op. cit., p. 3.
- 89 C. P. Bogart: Overview of Arbitration Finance, in: B. M. Cremades, A. Dimolitsa (eds.), op. cit., p. 51.
- 90 See M. de Morpurgo, op. cit., pp. 381-383.
- 91 The theory of access to justice in connection with the use of TPLF was developed by the courts in common law jurisdictions. Cf. the decisions of the Court of Appeal (England and Wales) in the cases *Arkin v Borchard Lines Ltd and others* and *Gulf Azov Shipping Company v Idisi*. Cf. Lord Justice Rupert Jackson (2009), op. cit., p. 117-124 and C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 117-118.
- 92 See U.S. Chamber Institute for Legal Reform (2009), op. cit., pp. 4-7.

- 93 P. Eberhardt, C. Olivet et al.: Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Corporate Europe Observatory in the Transnational Institute, 2012.
- 94 See M. K. Velchik, J. Y. Zhang, Islands of Litigation Finance, Harvard, John M. Olin Center for Law, Economics, And Business Fellows' discussion Paper Series, Discussion Paper No. 71, 2017, pp. 32-33.
- 95 See the decision of the Court of Appeals of Texas in *Anglo-Dutch Petroleum Inter. v. Haskell*, 193 S.W.3d 87 (Tex. App. 2006), p. 105.
- 96 See the decision of the Court of Appeal (England and Wales) in *Excalibur Ventures LLC v Texas Keystone Inc and Ors* (Rev 2) [2014] EWHC 3436 Comm, para. 129.
- 97 C. Hodges, J. Peysner, A. Nurse, op. cit., pp. 15-65.
- 98 See S. Seidel and S. Sherman: Lawyer's "Competence" in the Funding World, New York State Bar Association, New York Dispute Resolution Lawyer, vol. 7 (2014), No. 2, pp. 33-34.
- 99 See the Singaporean Civil Law (Amendment) Bill 38/2016.
- 100 See, e.g., Code of Conduct for Litigation Funders.
- 101 Cf. S. Khouri, K. Hurford, C. Bowman, op. cit., p. 5; C. Veljanovski, op. cit., p. 408.
- 102 Cf. G. Affaki, in: B. M. Cremades, A. Dimolitsa (eds.), op. cit., pp. 11-12.
- 103 R. Lowe: Speculate and Arbitrate to Accumulate, International Bar Association, 2013.
- 104 S. Seidel, op. cit. (2012), pp. 18-19.
- 105 The following case of investment arbitration is often cited: *S&T Oil Equipment & Machinery Ltd. v. Romania* (ICSID Case No. ARB/07/13).
- 106 Code of Conduct for Litigation Funders, para. 9.3. Cf. also ABA Commission on Ethics 20/20 White Paper on Alternative Litigation Finance, pp. 21-24.
- 107 See also S. Seidel and S. Sherman, op. cit., pp. 20-23.
- 108 S. Khouri, K. Hurford, op. cit., pp. 7-8.
- 109 C. A. Rogers, op. cit., pp. 22-24.
- 110 Another jurisdiction with some case law on TPLF is Israel where the courts are opposed to private entity third party funding in class actions (as opposed to regulated public funding in the form of a public fund for financing class actions, established by the State of Israel assisting potential representative claimants to bring applications for approval where the claim carries public and social importance), though they are prepared to hear arguments for third party funding, provided full disclosure is made. G. Rozent, H. Ashlagi, R. Karmi: Class/collective actions in Israel: overview, [https://uk.practicallaw.thomsonreuters.com/8-617-6659?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-617-6659?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).
- 111 *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386 (Austl.).
- 112 See *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11, where the Federal Court held by a majority decision that funding arrangements qualified as a managed investment scheme (MIS) under the Corporations Act 2001. In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, the High Court adopted a different view, by determining that litigation funders do not require an Australian Financial Services Licence (AFSL).
- 113 In *Bolitho v. Banksia Securities Limited (No 4)* [2014] VSC 582 the court restrained the plaintiff's lawyers with a financial interest in the litigation funder from acting in a funded class action. The Court held that a solicitor and senior counsel with a pecuniary interest in the outcome of the case, beyond their legal fees, should be restrained from acting for the lead plaintiff. The concern was that the substantial (direct or indirect) shareholding of the two legal practitioners in the litigation funder, which was funding the class action, may impinge, or have the appearance of impinging, on the integrity of the judicial process. See Jones Day Commentary of the Banksia Securities case, available at <https://www.jonesday.com/>, while the full text of the decision is available at <https://jade.io/article/352226>.
- 114 See, e.g., Civil Procedure Act 2005 No 28 (NSW), Sec. 98.
- 115 In a pivotal case *Knight v F.P Special Assets Limited and Others* (1992) 174 CLR 178, para. 34, the High Court of Australia held receivers of a company personally liable for the costs that the company, as a losing party, would

- otherwise have been liable to pay." See also *Gore v Justice Corp Pty Ltd* [2002] FCA 354 and *Ryan Carter and Esplanade Holdings Pty Ltd v Caason* [2016] VSCA 236.
- 116 See, e.g., *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited*, [2017] FCA 699.
- 117 See, e.g., *Earglow Pty Ltd v. Newcrest Mining Limited* [2016] FCA 1433, where the Court held it had power to reduce the funding commission to be deducted under the settlement. The question, whether the Federal Court has the power to vary or set LFAs at the time of approving the class action settlement, or whether the power of the Court under Sec. 33V of the Federal Court Act 1976 is limited to either approving or rejecting the settlement, remains unsettled. See J. Geisker, J. Tallis, Third party litigation funding law review, Law Business Research Ltd., London, 2018, p. 9, citing *Liverpool City Council v. McGraw-Hill Financial, Inc (now known as S&P Global Inc)*, [2018] FCA 1289.
- 118 See *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited*. [2016] FCAFC 148; 245 FCR 191, where the Court made a common fund order enabling the litigation funder to charge a reduced funding fee to the entire class, not just to those class members who had signed the LFA.
- 119 This is considered to be insufficient by stakeholders representing the business community. See U.S. Chamber Institute for Legal Reform, Submission to the Australian Law Reform Commission, 1 August 2018, p. 3.
- 120 See Corporations Amendment Regulation 2012 (No. 6), SLI 2012 No. 172, available at <https://www.legislation.gov.au/Details/F2013C00050>.
- 121 See J. Geisker, J. Tallis, Third party litigation funding law review, Law Business Research Ltd., London, 2018, p. 4.
- 122 See *Bolitho v. Banksia Securities Limited (No 4)* [2014] VSC 582, paras. 34-38.
- 123 See Chief Justice Allsop AO, Keynote address at Law Council of Australia Forum, 13 October 2016, available at <http://classic.austlii.edu.au/au/journals/FedJSchol/2016/14.html>.
- 124 Available at <https://www.associationoflitigationfunders.com.au/>.
- 125 See Appendix G (Table of Third-Party Litigation Funders) to the ALRC Report No. 134: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: December 2018, pp. 325-326.
- 126 Available at https://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf.
- 127 Cf. Legal Profession Uniform Law (NSW), Sec. 183; Legal Profession Act 2008 (WA) – Sec. 285; Legal Profession Act 2006 (ACT), Sec. 285.
- 128 See, e.g., Legal Profession Uniform Law (NSW), secs. 181 and 182.
- 129 See the VLRC's report, Access to Justice – Litigation Funding and Group Proceedings (March 2018), available at <http://lawreform.vic.gov.au/projects/litigation-funding-and-group-proceedings/litigation-funding-and-group-proceedings-report>.
- 130 On 11 December 2017, the Attorney-General of Australia asked the ALRC to consider whether and to what extent class action proceedings and TPLF should be subject to Commonwealth regulation. The Terms of Reference require the ALRC to consider: (i) whether there is adequate regulation of conflict of interest between litigation funder and plaintiffs and between lawyer and litigation funder; (ii) the desirability of imposing prudential requirements, including relating to capital adequacy, and also requirements relating to the character and suitability of litigation funders; and (iii) the adequacy of regulation around the costs charged by solicitors in funded litigation and, in particular, whether there is adequate regulation of the distribution of proceeds of litigation, including a consideration of the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders.
- 131 See https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf.
- 132 See *Seedling Life Science Ventures LLC v. Pfizer Canada Inc.*, 2017 FC 826.
- 133 See, e.g., *Marcotte c. Banque de Montréal*, 2015 QCCS 1915; *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) and Ernst & Young Inc.*, 2018 QCCS 1040. See also Hugh A. Meighen, op. cit., p. 42.

- 134 See, e.g., S. Kari, Third-party litigation funding, *Canadian Lawyer*, January 3, 2017, available at <https://www.canadianlawyermag.com/author/shannon-kari/third-party-litigation-funding-3488/>.
- 135 O. Reg. 195/04: Contingency Fee Agreements (under Solicitors Act, R.S.O. 1990, c. S.15). See also Class Proceedings Act, 1992, S.O. 1992, c. 6, Arts. 32 and 33.
- 136 See Class Proceedings Act [RSBC 1996] Ch. 50, Arts. 37 and 38.
- 137 See Law Society Act, R.S.O. 1990, c. L.8., art. 59.1.
- 138 For more information about the CPF, see <http://www.lawfoundation.on.ca/class-proceedings-fund/>.
- 139 See A. Dantowitz, Commercial Third Party Funding of Class Actions in Ontario: Eight Early Lessons, Second Annual Securities Litigation Practice Group Symposium, The Advocates' Society, September 13, 2012, p. 8.
- 140 *Painting an Unsettling Landscape*, Canadian Class Actions 2011-2014, U.S. Chamber Institute for Legal Reform, March 2015, p. 34.
- 141 (2002), 61 O.R. (3d) 257.
- 142 See ALRC Report No. 134, pp. 56-57.
- 143 Summarized after H. A. Meighen, in: Third party litigation funding law review, Law Business Research Ltd., London, 2018, pp. 37-38.
- 144 2009 CanLII 41540 (ONSC).
- 145 The LFA provided that the commission shall be seven percent of the amount of a settlement or judgment, after deduction of lawyers' fees and disbursements and any administration expenses associated with such settlement or judgment. *Ibid.*, paras. 2 and 13.
- 146 *Ibid.*, paras. 45 and 69.
- 147 See A. Dantowitz, op. cit., p. 8-17; H. A. Meighen, op. cit., pp. 39-41.
- 148 *Ibid.*, paras. 64-68.
- 149 *Ibid.*, para. 73.
- 150 *Ibid.*, para. 63. See also H. A. Meighen, op. cit., p. 40.
- 151 2017 FC 826.
- 152 *Ibid.*, para. 7.
- 153 See H. A. Meighen, op. cit., p. 44.
- 154 2015 ONSC 3215.
- 155 Cf. *Painting an Unsettling Landscape*, op. cit. p. 34.
- 156 See S. Kari, op. cit.
- 157 Summarized after H. A. Meighen, op. cit., p. 44.
- 158 See *Class Actions: Objectives, Experiences and Reforms*, Consultation Paper, March 2018, The Law Commission of Ontario, p. 1., available at <https://www.lco-cdo.org/en/our-current-projects/class-actions/>.
- 159 *Ibid.*
- 160 Among those proposals are prompt disclosure of LFAs to the court and defendants, mandatory court approval of LFAs in advance, reasonableness of funder's compensation, funder's direct liability for adverse costs akin to the successful defendant's direct right of action against the Ontario CPF granted by the 1990 Law Society Act, funder's financial ability to satisfy adverse cost orders and to lodge security for costs. See submission of The U.S. Chamber Institute for Legal Reform (ILR), <https://www.lco-cdo.org/wp-content/uploads/2018/06/U.S.-Chamber-Institute-for-Legal-Reform-CA-Submission.pdf>, pp. 7-11. See also *Recipe for Reform: A Proposal for Improving Canadian Class Actions Procedures*, U.S. Chamber Institute for Legal Reform, October 2017, pp. 16-18.
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- 165 *Ibid.*, paras. 95-97.
- 166 *Ibid.*, para. 98.
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- 186 Sec. 5B(1) of the Civil Law Act, read together with Sec. 3 of the Civil Law TPF Regulations.
- 187 Sec. 4(1) of the Civil Law TPF Regulations.
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- 296 One of the rare cases where the mechanism of collective redress has been touched upon is C-195/98 *Österreichischer Gewerkschaftsbund*, where in his opinion, ECLI:EU:C:2000:50, para. 47, Advocate General Jacobs shared his thoughts on the importance and functioning of collective redress in the EU, and even mentioned the problem of potential abuse of collective redress.
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- 299 27.11.2008, COM(2008)794.
- 300 Para. 13.
- 301 Para. 50 of the Green Paper.
- 302 Para. 51 of the Green Paper.
- 303 *Ibid.*
- 304 *Ibid.*
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- 308 *Ibid.*
- 309 European Parliament resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress" (2011/2089(INI)).
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- 311 *Ibid.*, p. 3.
- 312 Sec. 2.2.2. of the Communication.
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- 314 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013.

- 315 Recs. 10, 13 of the Preamble.
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- 317 Recs. 10, 13, 15, 19, 20, 22, 26 of the Preamble.
- 318 Para. 1 of the Recommendation.
- 319 Para. 41 of the Recommendation.
- 320 Para. 13 of the Recommendation.
- 321 Para. 29 of the Recommendation.
- 322 Para. 30 of the Recommendation.
- 323 Paras. 14-16 of the Recommendation.
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- 325 Para. 14 of the Recommendation.
- 326 Para. 15 of the Recommendation.
- 327 The Slovenian text uses the expression “stopping” of the proceedings (“ustavi”), while “staying” the proceeding usually refers to mere suspension or temporary “freezing” of the proceedings that could, e.g., be continued after the prohibited circumstances are abolished. The German text uses “aussetzen”, the Italian “sospendere”, the Czech “přerušit”, the Slovak “zastaviť”, the Greek “Δυνατότητα αναστολής” (possibility of suspension), the Dutch “schorsen”.
- 328 Para. 16 of the Recommendation.
- 329 Para. 32 of the Recommendation.
- 330 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the 2013 Recommendation, 25.1.2018, COM(2018) 40 final.
- 331 Ch. 3 of the Report.
- 332 *Ibid.*
- 333 *Ibid.*
- 334 Both the Report of 2018 on the implementation of the 2013 Recommendation and the Staff Working Document refer to it but do not offer any reference to where it was published.
- 335 Ch. 8.3. of the Commission Staff Working Document, Impact Assessment Accompanying the document Proposals for Directives of the European Parliament and of the Council: (i) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules; and (ii) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, SWD/2018/096 final - 2018/089 (COD).
- 336 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final - 2018/089 (COD).
- 337 *See* European Parliament’s Recommendation following Dieselgate issued in April 2017, Study for the Fitness Check of EU consumer and marketing law issued in May 2017, the Commission Work Programme for 2018, etc.
- 338 Ch. 1 of the Proposal.
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- 341 *Ibid.*
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- 344 Art. 1/1 of the Proposal.
- 345 *See* Art. 6/1 of the Directive.
- 346 The text of the Proposal written as is might also suggest that not only the source of the funds used to support the action but also the funds themselves (the amount) is to be declared.
- 347 *See* https://ec.europa.eu/info/sites/info/files/ndc_factsheet4_redress_mechanism.pdf.
- 348 The Staff Working Document mentions in Annex 5 that the Injunctions Directive regulates representative action initiated by qualified entities in particular in the form of non-profit organisations or public authorities in relation to which concerns regarding abusive litigation driven by profit interests of third party funders appear to be unfounded. In Slovenia, e.g., the Dieselgate case was eventually dealt with by way of initially gratuitous assignment of claims to a German company whereby it was agreed that in case of success, the following distribution of the proceeds will be made: 65% of any repayment goes to the consumers, 35% to the lawyers and Slovene Consumers’ Association. 6,500 consumers

- joined the campaign and the action was filed with the District court in Braunschweig on 9 April 2018 (see, e.g., <http://www.prevwara.si/>). The Slovenian Consumers' Association has on the other hand not filed a single action for injunctive relief although it has had standing to do this since 1998.
- 349 See also p. 39 of the Staff Working Document.
- 350 See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018AE2126>.
- 351 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.170.01.0068.01.ENG&toc=OJ:C:2014:170:TOC.
- 352 Point 4.9. of the Communication.
- 353 See http://www.europarl.europa.eu/doceo/document/A-8-2018-0447_EN.html?redirect#title2.
- 354 See http://www.europarl.europa.eu/doceo/document/A-8-2018-0447_EN.html?redirect#title3.
- 355 See http://www.europarl.europa.eu/doceo/document/A-8-2018-0447_EN.pdf.
- 356 European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)), TA/2019/0222.
- 357 Amendments to Art. 6 ff. are available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-630.456+01+DOC+PDF+V0//EN&language=EN>, pp. 25-39.
- 358 “The fundamental driver of abuses in class action cases is the possibility for external parties to reap profit from consumers’ grievances. Given the chance, those actors will try to generate fees and take the highest share they can get from the damages. Therefore, each entity should be independent of third party interest and all forms of external influence on qualified entities should be prevented from the very beginning. Entities with solely commercial interest (e.g., weakening the business competition), with dependence on third party funds (e.g., law firms funded by hedge funds as in the USA) or any other forms of own profit-making ambition (e.g., the need to pay high salaries to employees or high payments for consultants) should be excluded from the scope of this proposal. Moreover, one should also prevent scenarios such as politically or commercially motivated cases, or attacks from non-European enterprises or non-European states.”
- 359 “The 2013 Recommendation clearly stated that contingency fees present profound risks. As already stated in paragraph 2, it would give actors—just pursuing their own financial interests—an important incentive. The money spent on contingency fees will be subtracted from the amount paid out to consumers. As those kind of fees and awards are thus severely harming the consumer interest and are reducing the redress the consumers would receive, they should be prohibited.”
- 360 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20190325+ITEM-017+DOC+XML+V0//EN&language=EN>.
- 361 *Ibid.*
- 362 Probably an error in the texts as “successful” would be the appropriate word instead of “unsuccessful”.
- 363 The initial CAA article on contingency fees was different as it enabled contingency fees up to 15% only if the attorneys agreed that in the case the claimant is unsuccessful, they would cover at least 30% of its costs.
- 364 The official explanation of Art. 61/4 in the Proposal CAA (p. 121, <http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/novice/2017/Junij/ZKolt.pdf>) is rather sketchy, saying only that “it is understandable that any balance should be covered from the funds that the members would otherwise receive”.
- 365 For further details on the drafting process of the CAA, see A. Galič, A. Vlahek, *Zakon o kolektivnih tožbah*, Pravosodni bilten, 2/2018.
- 366 2018/0089(COD).
- 367 See Ž. Juška, *The Potential of Antitrust Collective Litigation in 2017: Beyond the Recommendation and the Directive*, *Journal of Comparative Law and Governance*, Volume 4: Issue 4 (2017), p. 345; T. Fox, A. Williams, *Class and Group Actions 2019 | EU Developments in Relation to Collective Redress*, *The International Comparative Legal Guides (ICLG)*, Global Legal Group, 2019, <https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/eu-developments-in-relation-to-collective-redress>. See also the submission of Baker & McKenzie on the European Commission’s

- 2018 Proposal Directive, pp. 7 and 11, https://webcache.googleusercontent.com/search?q=cache:HQM0wfln1V4J:https://ec.europa.eu/info/law/better-regulation/feedback/12242/attachment/090166e5bba36c5e_sk+&cd=31&hl=sl&ct=clnk&gl=si&client=firefox-b-d; Collective Redress Tourism: Preventing Forum Shopping in the EU, U.S. Chamber Institute for Legal Reform, October 2017, p. 6.
- 368 *Cf., e.g.*, the ALRC Report No. 134 (Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders), December 2018; Report of the Law Reform Commission of Hong Kong (LRC) on Third Party Funding for Arbitration, 12 October 2016; Lord Justice Rupert Jackson: Review of Civil Litigation Costs: Final Report (2009).
- 369 *Cf., e.g.*, the Singapore Civil Law (Amendment) Act 2017; Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Consumer Litigation Funding Act (2015, The State of New Jersey); Australian Securities and Investments Commission's Regulatory Guide 248.
- 370 *Cf.* Class Actions: Objectives, Experiences and Reforms, Consultation Paper, March 2018, The Law Commission of Ontario; ALRC Report No. 134.
- 371 *Cf.* Consumer Litigation Funding Act, 2018 (The State of New York); Singapore Civil Law (Amendment) Act 2017; ASIC Regulatory Guide 248; the ALRC Report No. 134.
- 372 *Cf.* Consumer Litigation Funding Act (2015, The State of New Jersey), 2019 Claimcode (Netherlands); Code of Conduct for Litigation Funders (rev. January 2018), The Association of Litigation Funders of England & Wales.
- 373 2017 Slovenian CAA; Singapore Civil Law (Amendment) Act 2017, The Litigation Funding Transparency Act of 2019 (USA, proposal), 2016 GPN-CA – Federal Court Practice Note on Class Actions (Australia).
- 374 *Cf.* ALRC Report No. 134, December 2018; Report of the Law Reform Commission of Hong Kong (LRC) on Third Party Funding for Arbitration, 12 October 2016; Class Actions: Objectives, Experiences and Reforms, Consultation Paper, March 2018, The Law Commission of Ontario.
- 375 *Cf.* Singapore Civil Law (Amendment) Act 2017, The Litigation Funding Transparency Act of 2019 (USA, proposal), 2016 GPN-CA – Federal Court Practice Note on Class Actions (Australia).
- 376 *Cf.* ASIC Regulatory Guide 248; ABA Commission on Ethics 20/20 White Paper on Alternative Litigation Finance (2012); ABA White Paper (2011); 2019 Claim Code (Netherlands).
- 377 *See, e.g.*, The Swiss Federal Supreme Court: 2C_814/2014 (22.1.2015).
- 378 *Cf.* Commercial in Court Vienna (HG Wien, 7.12.2011, 47 Cg 77/10s); Higher Regional Court in München (OLG München, 31.03.2015 - 15 U 2227/14, OLG München, 13.10.2004 - 7 U 3722/04).
- 379 *See, e.g.*, the Slovenian CAA (2017), Art. 29/3.
- 380 *See* the comparative analysis of selected European jurisdiction, *supra*.



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