THIRD-PARTY LITIGATION FUNDING IN THE EUROPEAN UNION: REGULATORY CHALLENGES

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The landscape of third-party litigation funding (TPLF) within the European Union is undergoing significant changes, characterized by growing market maturity and increased regulatory scrutiny. This Article examines recent advancements, including the European Parliament's study and a preliminary analysis of TPLF in selected EU member states. It delves into critical areas such as capital adequacy requirements for funders, TPLF agreements, potential conflicts of interest, and the evolving role of courts in TPLF processes. The feasibility of the EU Parliament's Proposal for a Directive, especially regarding the involvement of courts and restrictions on party autonomy in TPLF agreements, is questioned. In response, the European Law Institute (ELI) Principles are emerging as a guiding light for TPLF development in the EU.

Introduction

In modern TPLF agreements, funders commit to covering civil litigation costs and sometimes take on the risk of adverse cost awards. In exchange, they seek reimbursement of litigation expenses and compensation tied to the dispute's financial outcome. The compensation for funders is contingent upon the results of the litigation and the settlement of debts by the opposing party, which adds complexity to these arrangements.[1]

More specifically, in the current understanding of TPLF, the size of the funder's remuneration depends in principle on the following three factors: the likelihood of success, presumable length of the civil proceedings, and value of the claim. According to the study on TPLF in the EU member states,[2] funders are generally more interested in funding high-value claims, given that the remuneration clearly depends on the claimant's recovery by winning the litigation.[3] Scholars have noted

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1 Gian Marco Solas, Third Party Funding: Law, Economics and Policy ch. 2 (2019). For a comparative perspective, see Am. B. Ass'n, American Bar Association Best Practices for Third-Party Litigation Funding (2020).

2 Christina Poncibò & Elena D'Alessandro, *State of Play of the EU Private Litigation Funding Landscape and the Current EU Rules Applicable to Private Litigation Funding*, *in* Responsible Private Funding of Litigation: European Added Value Assessment (Jérôme Saulnier et al., 2021). https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf See, in particular, Elena D'Alessandro & Cristina Poncibò, State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding, Research Paper prepared for the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament (2021). The research paper has been published as Annex to Jérôme Saulnier et al., p. 45 fs.

3 *Id*.

that funders usually seek a ratio of between 1 and 10 in terms of the amount of money needed to finance the dispute and the value of the financed claim.[4] According to this model, a funder is more likely to agree to fund condemnation claims rather than claims for the ascertainment of a legal right or fact, which will ultimately end with the enactment of a purely declaratory judgement. In fact, if the funded party obtains a condemnatory judgement, the counterparty will pay the sum ordered by the court and the funder will be able to retain the agreed percentage.

The funder is more likely to agree to fund a claim against a financially solvent defendant, which offers high prospects of recovering any sum that is awarded in the final judgement. The solvency of the counterparty, however, is a dynamic factor and may vary from the moment of the funding decision to the end of the dispute when the funder is expected to recover. Hence the third-party funder's investment decision suffers from an external and apparently uncontrollable risk: the counterparty's solvency risk. For the funded party—which is usually a claimant that does not meet the criteria for being granted legal aid—TPLF is an opportunity to improve its access to justice in high-value disputes and to challenge defendants greatly superior to it in terms of economic power.[5] For the party being funded, TPLF serves as a valuable tool for shifting the risk of any adverse judgment outcome, with the funder assuming full responsibility, effectively becoming the "primary risk holder."[6] However, this situation also seems to currently evidence a market failure, to the extent that no rational insurer would bear the third-party funder's solvency risk. Therefore, third-party funders' portfolios seem currently to bear a significant yet unhedged risk, which could become systemic in the case of recession.

The financial relationship between funders and lawyers is consequential, because TPLF differs from contingency and conditional fee agreements insofar as it is the funder—and not the claimant's lawyer—who is entitled to obtain reimbursement and a remuneration fee.[7] However, contingency/conditional fee agreements and TPLF agreements seem to share a common structure whereby the 'investor' providing resources—be it a lawyer or a litigation funder—agrees with a party to the case (generally the claimant) to be paid a percentage or fraction of the recovery if that party is successful. In practice, they seem to compete, with the lawyers having regulations to leverage on their side while third-party funders do not.[8]

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4 Nick Rowles-Davies & Jeremy Cousins, Third Party Litigation Funding 10 (2014).

5 TPLF clearly differs from B.T.E. insurance, as there is no payment of a premium and maximum coverage for the funder; from litigation crowdfunding, as funders are professional investors making an investment in the claim, whereas crowdfunders are usually individuals with no investment expertise and commit a small sum (often through a crowdfunding platform) to cover a small part of the costs and risks of a dispute; from sale of claim, as the claimant's claim is not purchased by the funder; and from assignment of claims for collection only, as the funder is not a claimant, whose goal is to collect the claim

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

7 Poncibò & D'Alessandro, *supra* note 2, 53.

8 *See* PACCAR Inc v. Competition Appeal Tribunal, [2023] UKSC 28, stating that litigation funding agreements ("LFAs") which entitle funders to payment based on the amount of damages recovered are

I. TPF in the European Union.

TPLF is a much-debated topic nowadays in the EU.[9] The reason why this instrument has attracted so much attention from, and stirred controversy amongst, stakeholders is that, on the one hand, it can facilitate access to justice and better enforcement of EU law,[10] while on the other, allegedly it may allow frivolous or non-meritorious or vexatious litigation to be brought forward. For this reason, the debate on whether it should be regulated, and eventually how, is animated.[11] In fact, to date, while TPLF has certainly facilitated the filing of many claims in the EU, there is not much factual evidence to show that abuses happen on a large scale, although the fact that this business remains undisclosed, at least in relation to some submarkets, prevents accurate assessments from being made. [12]

A. The Study of the European Parliament (2021)

The European Parliament (EP) previously concluded a study and commissioned a research paper covering the legal issues concerning TPLF in 2021.[13] It then formulated a proposal for a directive.

According to the EP, there is a risk that "unregulated and uncontrolled third-party financing under EU law" may proliferate without legal constraints in the internal market.[14] Thus, on 13 September 2022, it commissioned an interdisciplinary study of TPLF, which analyzed economic and legal issues and specifically focused on the risks posed by unregulated TPLF.[15] The study investigated the origin of the TPLF industry in Europe, which can be traced back to 1967 in the UK, where it is now a well-established practice.[16] The TPLF market in Europe has been developing

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damages-based agreements ("DBAs"). Consequently, such LFAs are unenforceable unless they comply with the relevant regulatory regime for DBAs, and cannot be used at all to fund opt-out collective proceedings before the Competition Appeal Tribunal (the "CAT"). While the LFAs at issue in PACCAR were entered into to support collective proceedings before the CAT, the decision stands to affect all LFAs entitling funders to payment based on the level of damages recovered.

9 Adrian Cordina & Eva Storskrubb, *The Future Regulation of Third-Party Funding in Europe, Conference Report,* 26 Nederlands-Vlaams Tijdschrift Voor Mediation En Conflictmanagement Aflevering (2022); Tessa Trapp et al., *Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications* (Amsterdam L. Sch., Research Paper No. 2024-01, 2024).

10 Maria Elvira Méndez Pinedo, *Access to Justice as Hope in the Dark in Search For a New Concept in European Law* 19 Int. J. of Human. & Soc. Sci. 11 (2011).

11 Poncibò & D'Alessandro, *supra* note 2, 45 fs.

12 Maria Dumitru-Nica, *Third Party Litigation Funding Between Business Opportunity and Facilitating Access to Justice* 9 Eur. J. of L. & Pub. Admin. 104 (2022).

13 Poncibò & D'Alessandro, *supra* note 2, 45 fs.

14 *Commission Report on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union law*, at para. 2.1.6, COM (2018) 40 final (Jan. 25, 2018) [hereinafter *Commission Report on Common Principles*].

15 Poncibò & D'Alessandro, *supra* note 2.

16 Leslie Perrin, *England and Wales, in* Third Party Litigation Funding Law Review 41, 53 (Leslie Perrin ed., 2019).

steadily since the 2008 financial crisis.[17] At present, the European market consists of several European (mainly British and German) and non-European (namely, Australian) firms.[18] The study also attempted to define TPLF in both litigation and arbitration, where the funder agrees to fund litigation by bearing the costs of the civil proceedings and to contractually assume the risk of adverse cost awards[19] in return for reimbursement of the litigation costs and remuneration. The funder's investment is not necessarily recouped or repaid, and the funder's remuneration depends on whether (and when) the funded party wins the litigation.

According to D'Alessandro & Poncibò,[20] funders are generally more interested in funding high-value claims, given that remuneration clearly depends on the claimant's recovery by winning the litigation. Scholars have noted that funders usually seek a ratio of between 1 and 10 in terms of the amount of money needed to finance the dispute and the value of the financed claim.[21] A funder is more likely to agree to fund condemnation claims rather than claims for the mere ascertainment of a legal right, which will ultimately end with the enactment of a purely declaratory judgment. In fact, if the funded party obtains a condemnatory judgment, the counterparty will pay the sum ordered by the court and the funder will be able to retain the agreed percentage. A funder is more likely to agree to fund a claim against a solvent defendant that offers good prospects of recovering any sum awarded in the final judgment. For the funded party—usually a claimant who does not meet the criteria for being granted legal aid[22]—TPLF is an opportunity to improve its access to justice in high-value disputes and to challenge defendants greatly superior to it in terms of economic power.[23] For the funded party, TPLF is also useful for

17 *See* Colum Bancroft, *The Rise and Rise of Third-Party Funding*, Alixpartners (July 5, 2021), https://www.alixpartners.com/insights/102h28a/the-rise-and-rise-of-third-party-funding/.

18 Poncibò & D'Alessandro, *supra* note 2, 50.

19 Art. 3(h) of the Directive now defines 'third-party funding agreement' as an agreement in which a litigation funder agrees to fund all or part of the costs of proceedings in exchange for receiving a share of the monetary amount awarded to the claimant or a success fee, so as to reimburse the litigation funder for the funding it provided and, where applicable, cover its remuneration for the service provided, based wholly or partially on the outcome of the proceedings. This definition covers all agreements in which such a reward is agreed, whether offered as an independent service or achieved through purchase or assignment of the claim.

20 Poncibò & D'Alessandro, *supra* note 2, 51.

21 Rowles-Davies & Cousins, *supra* note 4, at 10; Paul Fenn & Neil Rickman, *The Empirical Analysis of Litigation Funding, in* New Trends in Financing Civil Litigation in Europe: A Legal, Empirical, and Economic Analysis 175 (Mark Tuil & Louis Visscher eds., 2010).

22 Funding for respondents is rare. For this reason, this aspect will not be considered for the purposes of this Article.

23 Considering the cited characteristics, TPLF clearly differs from B.T.E. insurance, as there is no payment of a premium and maximum coverage for the funder; from litigation crowdfunding, as funders are professional investors making an investment in the claim, whereas crowdfunders are usually individuals with no investment expertise and commit a small sum (often through a crowdfunding platform) to cover a small part of the costs and risks of a dispute; from sale of claim, as the claimant's claim is not purchased by the funder; and from assignment of claims for collection only, as the funder is not a claimant, whose goal is to collect the claim

transferring the risk of any unfavorable outcome of the judgment, which is covered in full by the funder.[24]

It also need be clarified that TPLF also differs from contingency fee agreements because it is the funder—and not the claimant's lawyer—who is entitled to obtain reimbursement and a remuneration fee.[25] Moreover, contingency fee agreements and TPLF agreements seem to share a common structure whereby the 'investor' providing funds—be it a lawyer or a litigation funder—agrees with a party to the case (generally the claimant) to be paid a fixed percentage of the recovery if that party is successful. The study noted that, at the national level, only Greece[26] and Ireland[27] expressly prohibit TPLF.

Following publication of the study, the EU Parliament passed a resolution requesting the EU Commission to promulgate a new directive regulating third-party funding. In particular, the EU Parliament has added a draft directive to its resolution (the "Directive") which indicates the type of regulations that can be anticipated in EU member states in the medium term. As drafted, the Directive would apply a one-size-fits-all approach, applicable to the TPLF of all litigation and arbitration proceedings in the EU.[28] However, this proposal has been either abandoned or put on hold for the time being, leading to considerable debate and discussion within the EU institutions and among the stakeholders.

B. The European Law Institute

In the realm of TPLF, where external financiers support litigation in exchange for a share of the proceeds, transparency and accountability are paramount. The European Law Institute (ELI) recognizes this imperative and has embarked on a comprehensive project aimed at elucidating the key considerations surrounding TPLF arrangements.[29]

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24 Conversely, German TPLF model contracts usually provide for the assignment of the claim to the funder ("assignee") as security. The assignment as security should be kept confidential and cannot be revealed in court. The claim is retransferred to the assignor, once the funder has no further interest or reason to require a security. *See* Poncibò & D'Alessandro, *supra* note 2, 59, ft. 64-65.

25 Poncibò & D'Alessandro, *supra* note 2, 60.

26 [26] *Commission Report on Common Principles*, *supra* note 14.

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

28 Resolution of 13 September 2022 with Recommendations to the Commission on Responsible Private Funding of Litigation, Parl. Eur. Doc. P9_TA(2022)0308 (2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf.

29 Eur. L. Inst., Principles Governing the Third Party Funding of Litigation (2024), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf.

The multifaceted aspects of ELI's endeavor include spanning disclosure requirements, capital adequacy assessment, case control and conflict of interest, and fee regulation, with a focus on their implications for promoting fairness and bolstering confidence in the European legal landscape.[30]

Central to ELI's initiative has been the exploration of disclosure requirements concerning TPLF agreements. The institute is grappling with the delicate balance between safeguarding the confidentiality of funding arrangements and the imperative of transparency, particularly for courts and administrative bodies. By delving into when and to whom information regarding TPLF should be disclosed, ELI has tried to foster an environment where stakeholders are adequately informed, while respecting the commercial sensitivities inherent in such agreements.

Furthermore, ELI's project scrutinized the critical issue of capital adequacy assessment. By examining the responsibility and practice for evaluating the financial robustness of third-party funders and the disclosure of this information to prospective litigants, ELI aims to ensure the stability of the litigation landscape. This diligence in assessing funders' financial standing serves to safeguard the interests of all parties involved, mitigating risks and bolstering confidence in the integrity of TPLF arrangements.

Addressing concerns surrounding case control and conflict of interest has been another pivotal aspect of ELI's project: by elucidating who wields control over the litigation process in TPLF arrangements and how conflicts of interest are managed, ELI aims to fortify the integrity of the legal proceedings. Clarity on these matters is indispensable for upholding the rights of litigants and maintaining trust in the judicial system.[31]

Moreover, ELI's project analyzes the issue of fee regulation within the TPLF framework. By considering mechanisms such as caps or other regulatory measures, ELI is attempting to curb excessive fees that could compromise the fairness of the litigation process. Such oversight is instrumental in fostering equitable outcomes and bolstering confidence in the efficacy of TPLF as a financing tool.

Ultimately, the principles derived from ELI's comprehensive analysis are poised to serve as a guiding beacon for courts and legislators alike. By promoting best practices and instilling confidence in TPLF arrangements, these principles contribute to a legal landscape characterized by transparency, fairness, and accountability. ELI's unwavering commitment to advancing the rule of law and enhancing access to justice underscores its pivotal role in shaping the future of litigation funding in Europe.[32]

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30 Xandra Kramer, *The ELI-Unidroit Model European Rules of Civil Procedure: Key Features and Prospects of Costs and Funding of Collective Redress*, *in* Mélanges en l'honneur du Professeur Loïc Cadiet 823 (Soraya Amrani-Mekki et al. eds., 2023).

31 European Law Institute (2024), *supra* 30.

32 European Law Institute (2024) *supra* 30.

C. *The Study of the European Commission (2024-2025)*

Meanwhile, the European Commission (EC) recently published a new study to analyze the landscape of TPLF across the member states of the European Union. This comprehensive study is slated for completion in 2025.[33] The preliminary results indicate where TPLF is mostly practiced in the EU member states, such as Austria, Belgium, France, Germany, Italy, Spain and the Netherlands. Finally, in Slovenia, pursuant to the legislation on collective redress,[34] the "Law of Collective Actions,"[35] TPLF is permitted and regulated by Article 59, in accordance with the principles set out in the Commission Recommendation of 11 June 2013.

1. Austria

In Austria some specialized litigation funding entities have already been funding cases for several years, also in the context of mass claims. The Supreme Court recently dismissed the defendants' argument requiring standing to dispute a contingency fee agreement between a claimant and a litigation funding company, contending that the prohibition of *Pactum de Quota Litis* (PQL) in § 879 Abs 2 Z 2 of the Austrian Civil Code was only meant to protect the claimant, not his/her adversary.[36]

2. Belgium

Apart from the particular legislation concerning the transfer of claims, Belgium is also the seat of Cartel Damage Claims (CDC), a company established in 2003 to fund (and purchase) cartel damage claims. The CDC's *modus operandi*, according to information available on its website, consists in bundling and transferring cartel damage claims to *ad hoc* vehicles and enforcing the action in courts. A similar model is endorsed by another Belgian company, Deminor, but more in the context of shareholders litigation.[37]

In Belgium there has been a very interesting development concerning the transfer of claims, which has led to the introduction of some legislation that seems to have drawn inspiration from the Lex Anastasiana of Roman origin. In order to avoid

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33 The European Commission launched this study in 2024 to collect data on TPLF across member states. See Eva Lein et al., Mapping Third Party Litigation Funding in the European Union (2025), https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tplf_en.

34 Jorg Sladič, *A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions?*, *in* Transformation of Civil Justice. Unity and Diversity 213 (Alan Uzelac et al. eds., 2018).

35 *See* Chamber of Com. of the U.S., Inst. for Legal Reform, Uncharted Waters, An Analysis of Third-Party Litigation Funding in European Collective Redress (2019) (the English translation of Article 59 of Slovenian Law of Collective Action).

36 Oberster Gerichtshof [OGH] [Supreme Court], 27 Feb. 2013, 6 Ob 224/12b, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20130227_OGH0002_0060OB00224_12B0000_000/JJT_20130227_OGH0002_0060OB00224_12B0000_000.pdf.

37 For more details about this model, see Deminor Litigation Funding, https://deminor.com.

alleged speculation by so-called 'vulture funds,' purchasing sovereign debt at a high discount and then suing the debtor state has been prohibited.[38]

3. France

TPLF has started to gain traction in France, particularly in arbitration proceedings, although its usage extends beyond this context. Various players have appeared in the market, and the practice was widely discussed in a report published in 2014 by Le Club des Juristes, a legal think tank composed of leading practitioners, judges and academics, where some of the legal issues concerning TPLF in relation to French law were addressed.[39] This document first reports the discussions on the TPF contractual form, in order to assess its legality and qualification under the general terms of the *Code Civil*, and then considers a series of problematic clauses of the TPLF contract and its potential relationships with banking legislation and lawyers' deontology. For this reason, this report—which, moreover, was drafted by a group of leading French practitioners—can be taken as a very good benchmark for discussion on the legality of TPLF in France and potentially in all civil-law jurisdictions whose codes have drawn inspiration from it.

4. Germany

Similar discussions have taken place in Germany, which is one of the European civil-law jurisdictions where TPLF developed earliest, although litigation in the past two decades has also been largely funded by legal expenses insurance.[40] This is probably the reason why TPLF has grown as a *longa manus* of existing insurers; Allianz in particular funded cases in Germany, Austria and Switzerland from 2002 onwards through its subsidiary Allianz Litigation Funding, until it decided to exit this business, allegedly for reasons of conflict of interest with the parent company's insurance clients.[41] Apart from Allianz Litigation Funding, many other independent companies have provided funds directly to claimants,[42] like Roland (acquired by Omni Bridgeway in July 2017)[43] and FORIS .[44]

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38 It must be noted, however, that Belgian law seems not to have repeated the limit to assign claims entirely, but just for the entities that engage in such allegedly speculative activity against states. *See* Loi relative à la lutte contre les activités des fonds vautours [Law on Combating Vulture Fund Activities] of July 12, 2015, Moniteur Belge [M.B.] [Official Gazette of Belgium], Sept. 11, 2015, 57357 (Bel.), in www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2015-09-11&numac=2015003318&caller=summary.

39 Le Club des Juristes, Financement du Procès par les Tiers (2014), http://www.leclubdesjuristes.com/wp-content/uploads/2014/01/CDJ_Rapport_Financement-proc%C3%A8s-par-les-tiers_Juin-2014.pdf.

40 Matthias Kilian, *Alternatives to Public Provision: The Rule of Legal Expenses Insurance in Broadening Access to Justice: The German Experience*, 30 J. L. & Soc'y 1 (2003).

41 Christian Stuerwald, An Analysis of Allianz' Decision to Discontinue its Litigation Funding Business (2012), http://www.calunius.com/media/2747/cs%20-%20calunius%20article%20on%20allianz%204%20january%202012.pdf.

42 Roland Kirstein & Neil Rickman, *FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany* (Ctr. Stud. L. Econ, Discussion Paper, No. 4, 2001).

43 *See* Omni Bridgeway, https://www.roland-prozessfinanz.de.

44 *See* Foris AG, https://www.foris.com/prozessfinanzierung/.

In general, it seems that the overall civil procedural structure (and in particular, the predictability of civil litigation costs, due to close regulation and proportionality between court costs and lawyers' fees)[45] and the prohibition of the *Pactum de Quota Litis* (PQL) may have favored the emergence of TPF. Finally, it should also be noted that the German Federal Court has expressly prohibited the use of TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb).[46]

5. *The Netherlands*

TPLF has also been possible for a long time in the Netherlands,[47] where it coexists efficiently with other methods for funding litigation, like state legal aid and legal expenses insurance.[48] TPLF is widely accepted in the Netherlands, especially because of the widespread feeling that the costs of dispute resolution are very high.[49] Contingency fees are generally not permitted for lawyers. A series of actors are present in the market, from Omni Bridgeway, the oldest litigation funder, to more recent ones, such as Liesker,[50] Capaz,[51] and Redbreast.[52] The model of Omni Bridgeway, which gained experience in active enforcement funding and then moved also to passive funding on merit and then active funding in EU competition law, is quite representative of the civil law/continental approach. In order not to incur the statutory prohibitions for lawyers (like PQL), some entrepreneurial lawyers, who are no longer members of

45 Burkhard Hess & Rudolf Hubner, *Germany*, *in* The Costs and Funding of Civil Litigation: A Comparative Perspective 349 (Christopher Hodges et al. eds., 2010).

46 *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 13, 2018, I ZR 26/17, ECLI:DE:BGH:2018:130918UIZR26.17.0, p. 3581 (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=2f080727565b53639890703l5c8fa88d&Seite=1&nr=88459&anz=40&pos=30; Bundesgerichtshof [BGH] [Federal Court of Justice] May 9, 2019, I ZR 205/17, ECLI:DE:BGH:2019:090519UIZR205.17.0, p. 198 (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=3a54e207e872d6d2731da3ffbc1cfed9&nr=97127&anz=23&pos=17. The German Federal Court reached the conclusion that in actions for confiscation of profits, pursuant to Section 10 of the German Act against Unfair Competition, TPLF is not allowed, after noting that the only organizations able to file such a type of claim are those listed in Section 8. Such organizations must notify the Federation's competent agency of the lodging of claims and may request reimbursement from the Federation's competent agency for the costs that were incurred to bring the claim, insofar as they cannot obtain satisfaction from the debtor.

47 This is mainly due to the activities of the most experienced and main litigation funder Omni Bridgeway. *See* Omni Bridgeway, *supra* note 43, stating that the company started operating in 1986. It is moreover worth noting that already in 1997, a claim was funded by means of securitization, and the relative interests in it traded on the Amsterdam Stock Exchange. Even though the court ruled against the claimholder, the legality of this funding method had not been challenged. *See* Mark L. Tuil, *The Netherlands*, *in* The Costs and Funding of Civil Litigation: A Comparative Perspective 418 (Christopher Hodges et al. eds., 2010), citing Hoge Raad [HR] [Supreme Court] Oct. 13, 2006, ECLI:NL:HR:2006:AV6956 (Neth.).

48 Ianika Tzankova, *Funding of Mass Disputes: Lessons from the Netherlands,* 8 J. L. Econ. & Pol'y, 549; Carolien Klein Haarhuis & Ben Van Velthoven, *Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands*, 8 J. Empirical L. Stud. 3 (2011).

49 Tuil, *supra* note 47, at 418.

50 *See* Liesker Litigation Financing, http://liesker-procesfinanciering.nl/en.

51 *See* Capaz Procesfinanciering, http://capazbv.nl/en.

52 See Redbreast, https://redbreast.com/,

the Dutch bar, have set up and run a company and related special-purpose vehicles that manage or incorporate individual claimants' rights and enforce them in the courts on a contingency basis.[53]

6. Italy

TPLF has started to be practiced and discussed also in Italy,[54] mainly in the field of complex competition law disputes and international litigation and arbitration, and various funds are already performing TPLF transactions with Italian entities. Recently, there have also been some developments with regard to TPLF and investment arbitration involving the Italian government. In fact, the Italian state has seen rejection by an ICSID tribunal of its request for a 'security for costs' provision in arbitration brought by a company whose claim received TPLF. The application was part of arbitral proceedings initiated by Eskosol S.p.A. in liquidazione ('Eskosol') under the Energy Charter Treaty and the ICSID Convention against the Italian state. According to Lexology,[55] the Italian state argued that the fact that Eskosol had declared bankruptcy created a material risk that it would not be able to compensate the state for its costs in the case of a costs award, even if Eskosol had secured TPLF for its arbitration in the form of insurance. However, the ICSID tribunal found that the insurance of Eskosol, covering up to 1 million euros, was enough to compensate for a potential costs award.

Remarkable in the antitrust sphere is the initiative in the truck manufacturers' cartel, whereby seven trade associations cooperated with a third-party funder, Omni Bridgeway, to file their associates' claims in the Dutch courts. The case followed the decision of the European Commission sanctioning the truck cartel created by the main truck manufacturers. The case was put together using a tech platform to which the associations and truck companies could upload documents and evidence of the cartel, making them able to participate in a European collective claim.[56]

53 Pauline Van Der Grinten, *The Netherlands: Policy Observations*, *in* The Costs and Funding of Civil Litigation: A Comparative Perspective 421 (Christopher Hodges et al. eds., 2010); Tuil, *supra* note 47, at 419.

54 Gian Marco Solas, *Alternative Litigation Funding: A Comparative Overview and the Italian perspective* 24 Eur. Rev. Priv. L. 2 (2016).

55 Cristian Leathley & Nathalie Yarrow, *ICSID tribunal rules that it is neither necessary nor urgent to grant security for costs from a claimant with the benefit of third-party funding*, Lexology (July 3, 2017), https://www.lexology.com/library/detail.aspx?g=1a6a85cd-29c3-411f-8ff1-2ce50b453c0f

56 Susanna Lopopolo, Trucks Cartel: A New All-Italian Chapter (2021) *Mercato, Concorrenza e Regole*, 593-610.

7. Spain

In Spain, TPLF has been practiced for some time, mainly in the field of antitrust and other mass litigation,[57] insolvency,[58] and also investment arbitration.[59] A few companies seem to offer TPLF and/or advisory services,[60] and there are a couple of internet platforms[61] that propose no-win no-fee arrangements to process and enforce scalable small claims.[62] The emergence of these businesses seems in line with what is happening in other civil-law jurisdictions: because Spanish law, particularly Article 1459 of the *Codigo Civil*, prohibits PQL for lawyers and procurators, it is possible for other third parties to be remunerated on a contingency basis. Spanish law also limits the purchase of claims at Article 1535. Apart from these limits, no other specific prohibitions seem to apply,[63] also considering the general principle of freedom of contract as stated in Article 1255 of the *Codigo Civil*. This view is apparently confirmed by the propensity of the Spanish courts to allow TPLF. Remarkable for instance is the case of Petersen, whose insolvency plan was approved by the Spanish courts subject to Burford funding the costs of the lawsuit commenced by YPF minority shareholders—Petersen Energia Inversora SAU and Eton Park Capital Management LP—against Argentina, in relation to the seizure of the shares they held in the energy company YPF and breach of the bylaw duty to launch a tender offer for the other shares on taking control of YPF. As to the nature of the TPLF contract and the related applicable regulatory regime, it has been concluded that TPLF is not a loan or assignment of claims but rather, following prevailing opinion among Spanish scholars, a silent partnership.[64] Such contracts should therefore be regulated by Articles 239-242 of the *Código de Comercio* (Spanish Commercial Code)[65] as '*cuentas en participación*'—arrangements whereby a silent partner provides an amount of capital to another partner for the latter to pursue a given transaction, in exchange for a share of the eventual profits deriving from it.

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57 Ruben Esteller, *El fondo Therium Exigirá a Repsol, Cepsa y BP Daños por Fijar los Precios*, El Economista (July 19, 2016), http://www.eleconomista.es/empresas-finanzas/noticias/7713239/07/16/El-fondo-Therium-exigira-a-Repsol-Cepsa-y-BP-danos-por-fijar-los-precios.html; Carlos Fernandez, *El Negocio de Financiar Pleitos*, El Pais (1.6.2017), https://elpais.com/economia/2017/06/01/actualidad/1496334446_966185.html.

58 See *infra*, Petersen case.

59 Joe Tirado & Alejandro I. Garcia, *Rise of Renewable Energy Claims*, 16 Renewable Energy Focus 14 (2015).

60 *See* Ramco, https://www.ramcolf.com/; Procurator Litigation Advisors, https://pla-spain.com/en/home-2/; Paraedium, http://www.praedium.es/.

61 CarCrash.es, which sources and processes claims arising out of car accidents in scale, on a no-win no-fee basis. *See* CarCrash.es, https://www.carcrash.es/. *See also* WeLegal.es, https://www.welegal.es/, which does the same with a series of different claims.

62 This is to avoid the lawyers' prohibition in the PQL, stated at Article 1459 of the Spanish Civil Code. It is worth noting that Article 1535 of the Spanish Código Civil also limits the RL.

63 Manuel Olivier Cojo, *Third-Party Litigation Funding: Current State of Affairs and Prospects for its Further Development in Spain*, 22 Eur. Rev. Priv. L. 3 (2014).

64 *Id.*, 32-35.

65 Código de Comercio [C. Com.] [Commercial Code] art. 239-242 (Spain).

II. Current Debates on TPLF in the EU

The following sections explore the obstacles and complexities related to the legal and regulatory framework governing TPLF activities, also in light of the study by the EU Parliament and the preliminary results of the mapping of TPLF in the member states of the EU (see Part I). This includes issues such as the lack of clear regulation of the funders with respect to capital adequacy, ambiguity regarding the ethical implications of TPLF, concerns about potential conflicts of interest, and questions about the appropriate level of oversight needed to ensure fairness and transparency in TPLF arrangements.

A. Regulatory Supervision & Capital Adequacy

The study by the European Commission has shown that many funders are corporations subject to different EU company laws for the locations in which they have their registered offices, as regards setting corporate standards and the capital requirements and fiduciary duties of corporate officers and directors. Additionally, other funders, such as investment funds across Europe (only a few are listed), may be subject to EU rules that apply to capital markets. In this respect, a policy option may consist of regulatory indications regarding the insurance coverage and/or capital adequacy of funders established in the EU. However, it should be noted that many funders active in the EU have their registered offices in third countries. Consequently, they are subject to the company laws of those countries. Requiring funders to obtain insurance policies or imposing capital requirements that cover the amount of their promised contributions to litigation costs would help to limit these risks.[66]

From a comparative perspective, note that fixed capital requirements for funders have already been established by way of statute in Singapore.[67] In the UK, fixed capital requirements have been established by way of self-regulation by the Association of Litigation Funders of England and Wales (ALF).

In particular, the proposal for a Directive proposes that funders wishing to fund any claim seated in the EU would be required to obtain an authorization and conduct their business through a registered office located in the EU (see Arts. 4 and 5 of the proposal). These restrictions may have the effect of limiting parties

66 Certain publicly owned or controlled companies (precisely: banks and insurance companies) are subject to capital requirements in the EU because of their corporate purpose, which may be relevant for the public interest. In the case of funders, minimum capital requirements may also be justified because of the impact of their activities and corporate purpose on the access to justice and the functioning of the civil justice. This requirement may contribute to avoid undercapitalization problems with respect to funders.

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

with EU-seated arbitration claims to third-party funders willing to operate in the EU market, thereby excluding third-party funders in other established and competitive markets (such as the UK, North America and Australia). Where TPLF agreements are permitted in accordance with Article 4, member states shall provide that an independent public supervisory authority is responsible for overseeing the authorization of litigation funders established within its jurisdiction and offering third-party funding agreements to claimants and intended beneficiaries within its jurisdiction, or in relation to proceedings within its jurisdiction (Art. 8).

Interestingly, the Proposal would also impose strict capital adequacy requirements on third-party funders. It would require them to maintain sufficient capital to fund not only the claim itself, but "any subsequent appeal" (Art. 6). Such a rule could impose compliance limitations on funders, which typically only commit to funding an arbitration claim and not subsequent challenges to the eventual arbitral award. Although the regulations on funders themselves would not impact arbitration users directly, they could increase the costs of TPLF for EU-seated claims. These costs could be passed on to users of third-party funding or make funders less willing to fund EU-seated claims.

A code of conduct, like the one in place in the United Kingdom,[68] could be implemented on the initiative of responsible litigation funders operating in the EU market to clarify issues such as the capital adequacy and corporate standards for funders. However, we admit that there is a risk that this policy, which is dependent upon the self-initiative of responsible litigation funders, may only have a limited impact, unless funders who choose not to participate in the adoption of such a code become marginalized in the EU litigation funding market.[69]

B. TPF Agreements

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

However, to claim that the TPLF agreement is a new kind of contract, or a *sui generis* contract,[70] does not solve the problem of its qualification, and sometimes even looking at the terms and conditions agreed by the parties is not sufficient to identify the legal regime applicable to the contract. The problem of qualification recurs, for example, when the regulation applied by the parties is found to be incomplete and

68 In the United Kingdom, the Association of Litigation Funders of England and Wales (ALF) has been established, which has issued a code of conduct for their affiliates.

69 *See List of Third-Party Funders*, The Third-Party Funding, http://third-party-funding.org/list-of-funders for the list of the ALF's members.

70 Poncibò & D'Alessandro, *supra* note 2, 64.

a dispute arises between them regarding the gaps in it. The Proposal for a Directive has attempted to regulate the terms of third-party funding agreements, though this approach has been criticized as scarcely feasible given the autonomy of the parties and the confidentiality of their transactions.[71]

In addition, the Proposal for a Directive would have imposed a notable commercial limitation on the terms that funders are able to offer claimants. It is important to emphasize that it states that the amount a third-party funder would be entitled to recover *would be limited to 40%* of the claimant's recovery. Additionally, funders would not be permitted to withdraw funding mid-claim, in the absence of exceptional circumstances. They would be prohibited from terminating funding agreements unilaterally without a court's permission. Finally, the funding agreement would be required to grant the claimant priority of recovery over the funder in terms of order of payment.[72]

Clearly, the proposal was aimed at protecting claimants. However, in practice, it may have the opposite effect, particularly for sophisticated commercial parties able to negotiate with third-party funders. The regulations may increase the commercial risk of a transaction from the funder's perspective and are likely to restrict the terms it is able to offer. Some funding arrangements may have to be structured differently, or some claims may even become commercially 'unfundable.'

C. Conflict of Interest

TPLF agreements inevitably give rise to the possibility of conflicting interests among the funder, the claimant, and the lawyer. In principle, the claimant, as the holder of the right to be protected in court, remains free to choose its preferred procedural strategy, in agreement with the lawyer.[73]

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71 Article 12, "Content of third-party funding agreements," states that an agreement must include, as a minimum:

> a. the different costs and expenses that the litigation funder will cover; b. the share of any award or fees that will be paid to the litigation funder or any other third party, or any other financial costs to be borne, directly or indirectly, by the claimants, the intended beneficiaries, or both; c. a reference to the responsibility of the litigation funder as regards adverse costs, in accordance with Article 18 of this Directive; d. a clause specifying that any awards from which the fees of the funder are deductible will be paid in full first to the claimants who may then subsequently pay any agreed sums to litigation funders as fees or commission, retaining at least the minimum amounts provided for in this Directive; e. the risks that the claimants, intended beneficiaries or both are assuming, including: i. the scope for escalating costs in the litigation, and how that impacts the financial interests of the claimants, beneficiaries or both; ii. the strictly defined circumstances in which the third-party funding agreement can be terminated and the risks to claimants, beneficiaries or both in that scenario, and iii. any potential risk of having to pay adverse costs, including circumstances in which adverse costs insurance or indemnities may not cover such exposure; f. a disclaimer with regard to non-conditionality of funding in relation to procedural steps; e.g. a declaration of absence of conflict of interest by the litigation funder.

72 By contrast, currently funding arrangements typically provide for a payment "waterfall," entitling the funder to recover its share before the claimant is paid.

73 Poncibò & D'Alessandro, *supra* note 2, 70.

First, the court settlement is one of the most sensitive issues in the relationship among the claimant, its lawyer, and the funder, in respect of which there is a high risk that this last may attempt to restrict the claimant's freedom to determine the procedural strategy. In fact, many TPLF agreements require the funded party to obtain prior consent from the funder for any act of disposal of the claimed right, such as the power to enter into a settlement. A conflict of interest may also arise when the funder has an economic interest in accepting the settlement offer in order to bring the proceedings to a swift conclusion (so as to recover its own investment), while the claimant has an interest in rejecting the offer because the sum proposed by the opponent is—in the claimant's opinion—not 'satisfactory'. In this respect, it should be noted that many TPLF agreements provide that the funder's remuneration and reimbursement of its procedural costs must be the first to be paid, pursuant to so-called 'waterfall' provisions. The remainder is then paid to the funded party. The existence of a conflict of interest between the claimant and the funder places the lawyer in a very delicate position: s/he is contractually obliged to the claimant, but his/her fees are paid by funder. However, according to Paragraph 2.7 of the Code of Conduct for European Lawyers, in the event of a conflict between the claimant and the funder with regard to the procedural strategy to be followed, the lawyer must focus on the best interests of his/her client, namely the claimant. In this respect, it should also be noted that Article 10 of Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC, addresses the problem of conflict of interest between the claimant and the funder in the field of consumer collective redress.

Second, according to what is agreed in the TPLF contract, a frequent request by funders to claimants' lawyers is to receive regular information on the progress of the dispute, as well as to view the case file. According to Paragraph 3.1.2 of the Code of Conduct for European Lawyers, an obligation to provide information on the stage of proceedings only exists towards the claimant. Nevertheless, the lawyer-client agreement in force between the claimant and the lawyer, at the initiative of the funded party (as instructed by the funder), usually includes a contractual obligation for the lawyer to report to the funder on a regular basis with regard to the stage of proceedings and allow the latter to view, upon request, the case file.

Third, a potential conflict also arises when, during pre-agreement negotiations, the better-informed funder with a stronger bargaining position attempts to obtain excessive shares of the damages in case of success at the expense of claimants, thus undermining the effectiveness of access to justice.

In fact, this is obviously relative to other forms of funding of litigation, including hourly fees and insurance. With hourly fees there is a two-player relationship instead of a three-player one, which reduces transaction costs. If the claimants win, they receive the full damages. However, if they lose, they may have to pay the litigation costs—so claimants may be willing to bear the TPLF risk premium. With insurance, from an ex-post perspective, the insured may be paying the premiums for nothing if they never get into a legal dispute. This may result in a situation where, in the

aggregate, plaintiffs may be left better off with TPLF than with the two other forms of private funding.

In practice, litigation funders in Europe typically take twenty to fifty percent of the amount awarded in the case. In England and Wales, the landmark Arkin case provided strong judicial approval for TPLF and established the well-known 'Arkin Cap.'[74] It was deemed that by virtue of the fact that a professional funder could be liable for the costs of the opposing party "to the extent of the funding provided" if the claim fails, "the funding is provided on a contingency basis of recovery." The funder would therefore be entitled, as "the price of the funding," to a portion of the proceeds if the claim succeeds. The damages recovered by the successful claimant would be decreased. While the court called this "unfortunate," it saw it as a "cost that the impecunious claimant can reasonably be expected to bear." This was considered more just than a situation where successful defendants cannot recover their litigation costs from funders, whose intervention is the reason why claims, which eventually prove to be without merit, are maintained to an advanced stage. Despite the cap being subsequently criticized by many, the court here provided justification for the acquisition of shares of the damages by the funder when the funded case wins. This, however, does not satisfactorily attenuate the concern that the shares recovered by the funder could be excessive or unfair. In the Fortis collective redress case in the Netherlands, it was decided that, given the considerable procedural risks and funding costs that the claimant organizations and their litigation funders undertook for lengthy periods of time, the compensation to be paid by Ageas was not unreasonable and had not been provided at the expense of the damages paid to the shareholders.[75] This suggests that in the case of commercial parties, the chance of excessive return rates for funders would be reduced by market forces, which would lead to the normalization of rates.

In any case, our analysis has revealed the tension between public policy and freedom to contract in the case of TPLF agreements. The freedom of the parties is generally limited by public policy and by mandatory provisions of the applicable law. For example, EU consumer law includes a set of mandatory provisions to protect consumer rights in consumer contracts (eg unfair terms), and Slovenian law on collective actions sets a cap on the funders' return rate. Interestingly, in this respect, it should be noted that the EU Parliament[76] has stressed that the private autonomy of the parties in determining the remuneration may prejudice the effectiveness of the result obtained by the claimant through successful access to justice. Ultimately, the claimant has to pay a substantial part of what is recovered to the funder. In light of the foregoing, Art. 17.1 (d) of the Directive (Review of third-party funding agreements by courts and administrative authorities) attempts to limit private autonomy with respect to the public interest in protecting the effectiveness of access to justice, in

74 Arkin v Borchard Lines Ltd. (Nos. 2 and 3) [2005] 1 WLR 3055.

75 Hof Amsterdam 5 februari 2018, NJ 2018, 368 m.nt. (Ageas/VEB) (Neth.).

76 European Parliament Resolution of 4 July 2017 on Common Minimum Standards of Civil Procedure, 2018 O.J. (C 334) 39.

particular by granting the courts the power to assess that the share of any award to the litigation funder is not unfair, disproportionate and unreasonable. However, EU courts will be unwilling to review TPLF agreements for lack of competences and adequate resources.

D. Courts' Control over TPF Agreements

A very controversial issue concerns the existence of an obligation for the funded party to disclose the existence of the funding in court to make the judge aware of potential conflicts of interest, at the same time enabling the defendant to gain a better understanding of the claimant's means. At the national level, in those member states in which TPLF is more widespread (such as Austria, France, Germany, Italy, Poland, and Spain, which have been considered for the purposes of this study), where no English- or American-style 'disclosure' takes place, there is no duty for the party who receives funding to disclose this fact in court, and there is no basis for a court to order the disclosure of any potential third-party funding agreement.[77] In such member states, the decision on whether or not to disclose in court the fact that TPLF is being used lies with the claimant, as part of its procedural strategy, for instance, to avoid the risk of incurring a security-for-cost order, where permitted by national law. However, the litigation funding agreement may contain a contractual obligation for the claimant not to disclose the funder's involvement in the litigation without the funder's express written consent.

Bearing in mind the need to make the court aware of a potential conflict of interest, Rule 245 (1) of the ELI-Unidroit "Model European Rules of Civil Procedure"[78] encourages the introduction into domestic civil procedural rules of a general duty to disclose the fact that TPLF is being used and the name of the funder to the court and the other party upon commencement of the proceedings. In the case of breach of the duty to disclose, the sanction may not result in any claim dismissal in the form of an adjudication on the merits. The aim of this provision (Rule 245 (4) of the ELI-Unidroit "Model European Rules of Civil Procedure") is to clarify that TPLF cannot affect the right of the funded party to have the case decided on its merits.

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

However, Rule 245 (4) of the ELI-Unidroit "Model European Rules of Civil Procedure" proposes providing the domestic courts with the discretionary power to ask "for details of fee arrangements with a third party." After having exercised

77 Poncibò & D'Alessandro, *supra* note 2.

78 Int'l Inst. for the Unification of Priv. L., ELI\UNIDROIT Model Rules of Civil Procedure (2020).

this discretionary power, upon consulting with the parties, the court may consider the lack of fairness of such an arrangement when it makes its final decision on costs and determines the part of the claimant's costs to be reimbursed. Rule 245 (4) seems to be an attempt to protect a defendant who loses the case. Thus, particularly in the member states where the lawyers' remuneration fees to be reimbursed are not calculated according to a fixed tariff system, a defendant who loses the case may be exposed to the risk of reimbursing major legal costs because of the existing TPLF agreement. For example, because of the existing TPLF, the claimant may have made indiscriminate allegations that increased the claimant and defendant's lawyers' hourly fees and, consequently, the defendant and claimant's legal costs to be reimbursed. However, Rule 245 (4) seems unable to simultaneously protect the claimant in the event that the funder's success fee is unfair. Since the TPLF agreement appears to remain valid and effective regardless of the content of the judicial decision on the allocation of costs,[79] it is the claimant—and not the funder—who will suffer the consequences of the court cutting the claimant's costs to be reimbursed.

In this respect, Article 16 of the Proposal of a Directive has stated that the claimants or their representatives are required to inform the relevant court or administrative authority of the existence of a third-party funding agreement and the identity of the litigation funder; and to provide, at the request of the court or administrative authority or of the defendant, a complete and unredacted copy of any such third-party funding agreements relating to the proceedings before the relevant court or administrative authority at the earliest stage of those proceedings. Member states shall also ensure that defendants are made aware by the court or administrative authority of the existence of a third-party funding agreement and the identity of the litigation funder.

E. European Lawyers' Ethics

There is no doubt that the presence of a conflict of interest between the claimant and the funder puts the lawyer in a delicate position, because s/he is engaged by the claimant but paid by the funder.[80] Professional rules of ethics require lawyers to act in their client's best interests, and these rules are deemed to be relevant also with respect to TPLF. Therefore, the lawyer should only allow the level of control by the funder which is most beneficial to the claimant in the funding. Ethical standards and rules of professional responsibility must always be kept in mind during litigation, but particular attention must be paid to this aspect when a litigation funder is involved. In this regard, Paragraph 1 of the Code of Conduct for European Lawyers clarifies the commitment that a lawyer must devote to the claimant. When a litigation funder finances a dispute, the ethical principles that permeate the legal profession—such as loyalty to the client, confidentiality, independence, the claimant's freedom and

79 *Id*. at rule 245. In fact, in the economy of Rule 245, the funder does not become a party to the proceedings and therefore has the opportunity to enjoy its day in court with regard to the validity of the TPLF agreement clauses.

80 Poncibò & D'Alessandro, *supra* note 2, 71-72.

claimant's interest—all come into play. First, the fact that the lawyer must always act in the best interest of the client (Paragraph 2.7 of the Code of Conduct for European Lawyers) seems to suggest that the lawyer should inform a client who does not meet the criteria for being granted legal aid about the possibility of using TPLF. At the same time, the lawyer should make sure that the client has clearly understood what TPLF is, and what its pros and cons are.[81]-

The same Paragraph 2.7 of the Code of Conduct for European Lawyers seems to imply that if the client asks the lawyer to represent him/her in the due diligence phase with the funder, the lawyer should consider whether s/he has the experience required to negotiate with a funder. If so, the lawyer must describe to the client the relevant circumstances and related material risks. For example, if the funder seeks confidential information regarding the client, the lawyer must advise the client of the risks of disclosure. According to the same Paragraph 2.3 of the Code of Conduct for European Lawyers (confidentiality), the lawyer shall obtain the client's informed consent to disclose confidential information to the funder in the due diligence as well as in any other further stage. If a TPLF agreement is signed, the ethical principle of loyalty to the client (Principle e of the Code of Conduct for European Lawyers) implies that henceforth the lawyer must avoid any meeting with the funder in the absence of his/her client. In principle, notwithstanding the TPLF agreement, the claimant remains free to choose his/her own trusted lawyer for conducting the litigation. However, our analysis reveals that the funder sometimes acts as an intermediary between the potential claimant and the lawyer. Nevertheless, when appointed, the lawyer must act independently of the funder according to Paragraph 2.1 of the Code of Conduct for European Lawyers.[82]

Conclusion

The landscape of TPLF within the EU is evolving, marked by increasing market maturity and heightened regulatory scrutiny. Clearly, the feasibility of the EU Parliament Proposal for a Directive is questionable when it assigns an active role to the courts or severely limits the party autonomy in TPLF agreements. This Article has therefore provided insights into ongoing developments, including the EC study and the preliminary analysis of TPLF practices across EU member states. Key areas of focus have included capital adequacy requirements for funders, TPLF agreements, potential conflicts of interest, and the role of the courts in the process.

81 According to the Court of Appeal of Cologne, 5.11.2018 – 5U 33/18, Neue Juristiche Wochenschrift RR (NJW-RR) 2008, a German lawyer is under a duty to inform the client of the possibility of using TPLF. However, there is no need to provide the client with information aimed at determining the most affordable funder.

82 The Code of Conduct for European Lawyers is binding for lawyers established in the EU. *See* Council of B. & L. Soc'ys Eur., Charter of Core Principles of the European Legal Profession & Code of Conduct for European Lawyers (2019), https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf.

In light of this, the ELI Principles are emerging as a beacon of guidance for the development of TPLF within the EU. By adhering to these principles, which encapsulate best practices and foster transparency and fairness in TPLF arrangements, stakeholders can navigate the evolving landscape. As a leading guideline, the ELI Principles not only provide a robust framework for addressing the complexities of TPLF but also offer a pathway towards fostering trust and credibility of TPLF within the EU.