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CONFIDENTIAL

Brussels, 7 March 2022

To:
Andreas Stein
European Commission
DG Justice and Consumers
Unit A.1
B-1049 Brussels, Belgium

Re: Regulation of third-party litigation funding in the EU

Dear Andreas Stein,

This letter is submitted by the International Legal Finance Association (***ILFA***), a global trade association for commercial legal finance companies. ILFA is a non-profit trade association, founded in September 2020, which promotes the highest standards of service within the commercial legal finance sector along with a commitment to the rule of law.[1] ILFA comprises 14 members, namely Burford Capital, Harbour Litigation Funding, Longford Capital, Omni Bridgeway, Therium, Woodsford, Law Finance Group, Nivalion, D E Shaw & Co, Innsworth, Fortress, Parabellum Capital, TRGP Capital, and Validity.[2]

By way of this letter, ILFA wishes to express its members' position with regard to the report of 17 June 2021 by Mr Axel Voss MEP to the Legal Affairs Committee (the ***Voss Report***), proposing the adoption of a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding in the EU (the ***Proposed Directive***).[3] Third party litigation funding (***TPLF***)

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1 *See* ILFA's website: https://www.ilfa.com. ILFA's members account for approximately 90% of the TPLF investments in the EU. *See Third-party funding in arbitration – the funders' perspective. A Q&A with Woodsford Litigation Funding, Harbour Litigation Funding and Burford Capital*" (September 2016), available at: https://www.nortonrosefulbright.com/en/knowledge/publications/8b8db7d0/third-party-funding-in-arbitration---the-funders-perspective.

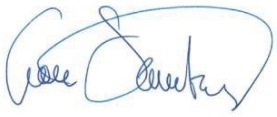
2 *See,* ILFA's membership list at: https://www.ilfa.com/membership-directory.

3 European Parliament, *"Draft Report with recommendations to the Commission on Responsible funding of litigation"* (2020/2130(INL) (17 June 2021). Available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf. See also: European

involves commercial investors (***litigation funders*** or ***funders***) paying legal expenses on behalf of a claimant in return for recovering the cost of their investment plus a fee based on the potential reward. For the present purposes, TPLF (which is also referred to as legal dispute or litigation finance) covers both financing of court-based litigation and arbitration.

ILFA would welcome the opportunity to discuss its concerns with the Commission and welcomes any questions in relation to these submissions.

Sincerely,



Lena Sandberg

Parliamentary Research Service, *"Responsible private funding of litigation: European added value assessment"* (March 2021) (the EPRS study). Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf

Regulation of third-party litigation funding in the EU

Executive Summary

This letter sets out ILFA's view on the Voss Report, which includes the proposal for the adoption of a Directive regulating TPLF in the EU. ILFA considers that the Proposed Directive, in its current form, is discriminatory, unnecessary and overburdensome. In particular:

i. The need for the Proposed Directive is not supported by any empirical data, stakeholder consultations, analysis of existing EU or national law, or concrete cases. The Proposed Directive refers to the common law jurisdiction of Australia, which is not relevant to the civil law jurisdictions of almost all EU Member States. In such civil law jurisdictions TPLF is permitted on the basis of the principle of freedom of contract and any restriction on TPLF would constitute a restriction of that basic freedom.

ii. In any event, the Proposed Directive is based on a misunderstanding of how TPLF functions and the level of risk undertaken by litigation funders. Since a funder always faces the risk of losing its entire investment, any return it may obtain will always be commensurate with the magnitude of the risks being undertaken. Indeed, if a claim is unsuccessful the funder will lose not only its entitlement to a fee but will also be exposed to all of its costs and expenses. Even in successful cases, any reimbursement of a funders' expenses only occurs when legal proceedings come to an end, generally many years after the expenses have been incurred.

iii. The Proposed Directive does not comply with the EU principles of subsidiarity and proportionality which provides that action at EU level shall only be taken if the objectives pursued cannot be sufficiently achieved at national level. There is no evidence in the Voss Report or the Proposed Directive that regulation of TPLF is necessary either at an EU level or a national level, in particular given that consumers already enjoy ample protection under existing and proposed national consumer rights legislation (including legislation resulting from implementation of the Collective Redress Directive regulating TPLF in the context of class actions).

iv. By restricting access to funding for litigation obtained through TPLF, and not to funding obtained from other sources, such as banks or other financial institutions, the Proposed Directive discriminates between capital sources contrary to the fundamental right to the free movement of capital in the EU.

TPLF provides access to justice and supports the application and enforcement of EU law by enabling the pursuit of meritorious claims, which would otherwise be prevented due to lack of funding. This is particularly the case in relation to follow-on litigation damages claims against a cartel. Indeed, TPLF-funded follow-on damages claims in such cases have allowed injured parties to pursue and enforce their rights and secure the EU's objective of ensuring that victims of competition law infringements are compensated for their losses. The importance of TPLF has been widely recognised in this regard, both at EU and Member State level. If access to TPLF is restricted for claimants many

actions will become uneconomic for claimants to the benefit of those that have violated EU rules in the area of antitrust, securities and other rules.

I. Introduction and background

1. The background for the adoption of the Voss Report and the related Proposed Directive may be summarised as follows:

- In 2013 the Commission issued a Communication "*Towards European Horizontal Framework for Collective redress*" which led the Commission to adopt a recommendation on common principles for injunctive and compensatory collective redress.[4]

- Five years later, in its 2018 report on injunctive and compensatory collective redress mechanisms, the Commission stated that TPLF should not be prohibited.[5]

- On 25 November 2020 the EU adopted Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (the ***Collective Redress Directive***)[6] which regulates TPLF in the context of compensatory consumer collective redress.

- In March 2021, the European Parliamentary Research Service (the ***EPRS***) published a study entitled "*Responsible private funding of litigation – European added value assessment*" (the ***EPRS Study***) which examined the need for regulating TPLF in the EU.

2. On 17 June 2021, Mr Axel Voss MEP, a member of the European Parliament's Committee on Legal Affairs and Vice-Chair of the Delegation for relations with Australia and New Zealand, presented the Voss Report which proposed the adoption of a Directive aimed at regulating TPLF in the EU. Since then, the European Parliament's Legal Affairs Committee has repeatedly abstained from voting in favour of sending the Voss Report to the Plenary. To date, the proposal for a Directive regulating TPLF has not been sent to the Commission. According to the European Parliament's website, the next date that the plenary of the European Parliament may vote on the Voss Report is 23 March 2022 (assuming that the Legal Affairs Committee would have voted to send the Voss Report to the Plenary).

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[4] 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, p. 60–65.

[5] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0040&from=en

[6] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020, OJ L 409, 4.12.2020, p. 1–27 according to which Member States must apply implementing measures at the latest from 25 June 2023.

3. This background regarding initiatives undertaken by the European institutions to address TPLF is instructive for assessing the Voss Report and the Proposed Directive. ILFA stands ready to assist the Commission and invites the Commission to engage with it and its members to obtain information from the industry as part of the process going forward.

4. As a preliminary point, ILFA is not against regulation *per se* – indeed, ILFA's members are presently subject to and comply with a variety of regulatory frameworks in several jurisdictions worldwide, including in the EU.[7] However, ILFA does object to regulation that is discriminatory, unnecessary and overburdensome. In general, any regulation should be restricted to situations where it is necessary to intervene due to a market failure, and furthermore, even if regulation is deemed necessary, it must be proportionate.[8] In the case of TPLF in the EU, there is no market failure to correct and there is no evidence to sustain the assertions in the Voss Report, particularly that third-party funders engage in abusive practices in any EU Member State. Therefore, ILFA rejects the Voss Report and the Proposed Directive. As ILFA's comments on the Voss Report and the Proposed Directive demonstrate, the concerns underlying the Proposed Directive are without reason, making any new regulation unnecessary and, in fact, counterproductive.

5. *First*, much like the Voss Report and the EPRS Study, the adoption of a Directive regulating TPLF is not supported by any empirical data or statistics, stakeholders' consultations, analysis of the existing EU or national law, let alone concrete cases.

6. *Second*, the Proposed Directive is based on a misunderstanding about how TPLF functions and the level of risks undertaken by funders. Apart from the fact that the EU should not even be

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[7] Inside the EU, all funders are subject to regulation in the context of collective redress procedures for consumers, pursuant to the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27. Additionally, publicly-traded funders are regulated through EU legislation on securities and are controlled by the financial authorities in the jurisdictions in which they operate, such as the stock exchanges in Paris, Amsterdam and Frankfurt (or outside the EU, the U.S. Securities and Exchange Commission and the London Stock Exchange). Outside the EU all of the most important funders, including Burford Capital, Omni Bridgeway, Harbour, Therium, Woodsford, Augusta, and Innsworth, respect the Code of Conduct for Litigation Funders published by the Civil Justice Council, available at: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf. *Further,* in 2017, the Hong Kong Parliament passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance order No. 6 of 2017 allowing TPLF for arbitration, mediation, and other related proceedings, available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf. In Singapore, as of 2017 TPLF is also allowed for arbitration and other ADR proceedings thanks to the Civil Law (Third-Party Funding) Regulations 2017, available at: https://sso.agc.gov.sg/SL-Supp/S68-2017/Published/20170224?DocDate=20170224.

[8] *See,* Article 5(3) of the TEU stating that: *"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol." See also*, Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

regulating pricing in open competitive markets, any return obtained by funders is commensurate to the magnitude of risks undertaken by them and is therefore not excessive.

7. *Third*, the Proposed Directive is based on incorrect assumptions regarding TPLF claimants' profiles. Whilst the Proposed Directive appears to be aimed at addressing cases involving individuals or consumers, in practice the vast majority of TPLF users are sophisticated entities, ranging from Small and Medium Sized Enterprises (***SMEs***), large companies, Governmental or quasi-Governmental entities (*e.g.,* State export credit agencies, municipalities), or large consumer organisations (which regularly rely on TPLF to fund their claims)[9] that do not need protection against any perceived asymmetry of information. In any case, both consumers and corporations are adequately protected under existing EU and national rules. Indeed, consumers enjoy ample protection under existing national legislation as well as under forthcoming national legislation adopted to implement the Collective Redress Directive. Further, existing national legislation in EU Member States also protects corporations and consumers alike against abuse in commercial arrangements (which include funding arrangements), such as rules concerning torts and fraud.[10]

8. *Fourth*, while the Voss Report and the Proposed Directive appear to be heavily influenced by, and rely solely on, empirical data from the common law jurisdiction of Australia, neither of these documents explain how the Australian context is relevant to the civil law jurisdictions of the 27 EU Member States.[11]

9. *Fifth*, TPLF provides access to justice, supports the application and enforcement of EU law and relieves the European court system from repetitive and unmeritorious claims. By enabling the pursuit of meritorious claims for European corporation and consumers, TPLF creates

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[9] The Austrian *Verein für Konsumenten-Information* association (***VKI***) (https://vki.at/wer-wir-sind/5175) of which the Austrian state itself is a member is an example of such a consumer organisation. The VKI regularly uses TPLF to finance claims on behalf of its consumer members and is a strong supporter of TPLF.

[10] See, for instance, British Institute of International and Comparative Law, "Unfair Commercial practices (National Reports)" (November 2005), available at: https://www.biicl.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf. See also, EY "Global Legal Commercial Terms Handbook 2020" (October 2020), available at: https://www.eylaw.be/wp-content/uploads/publications/EY-Global-Legal-Commercial-Terms-Handbook.pdf. To name but a few examples: the Belgian Code of Economic Law defines an "abusive clause" as "any term or condition in a contract between a company and a consumer which, either alone or in combination with one or more other terms or conditions, creates a manifest imbalance between the rights and obligations of the parties to the detriment of the consumer"; such clause is prohibited, null, and void (Article VI.84 Belgian Code of Economic Law). Article 36 of the Danish Contracts Act stipulates that agreement can be set aside if they are unreasonable or unfair. Article L.442-1 of the French Commercial Code (applicable to commercial contracts) prohibits significant imbalance provisions, such as a clause that results in one party being at an unfair disadvantage or disproportionately burdened as compared to the other party. Section 242 of the German Civil Code also obliges the parties to abide by the principle of good faith and fair dealing (*Treu und Glauben*) which entails that the agreement cannot be disproportionately disadvantageous for one party.

[11] It is notable that the Australian legislation recently was abandoned after running into several obstacles, including constitutional and other concerns. *See,* '*No time for federal ICAC: Cash'*, by Michael Pelly, *The Australian Financial Review*, published on 7 February 2022. Available at: https://www.afr.com/politics/no-time-for-federal-icac-cash-20220204-p59tsp.

equality of resources between unequal parties to a dispute. For example, in order to counter well-funded and organised parties in collective redress cases (such as follow-on cases against a cartel), claimants require both financial and organisational resources as well as data gathering and expert evidence by top experts that are frequently too expensive for the vast majority of affected parties. By regulating TPLF through the Proposed Directive, many actions will become uneconomical for claimants who will be restricted from having access to TPLF and thereby access to justice. In the same vein, any restriction of TPLF will prevent many claims aimed at enforcing EU law and thereby prevent the '*effet utile'* of EU legislation. This will inure to the benefit of those who have participated in antitrust infringements or securities fraud or similar illegal behaviour. That cannot be in the interests of the EU.[12]

10. *Sixth*, all EU Member States are civil law countries and TPLF is permitted based on the principle of freedom of contract such that any restriction on TPLF agreements constitutes a restriction of this basic freedom. TPLF is also an economic activity like any other and is therefore also protected under the rules on the freedom to choose an occupation, engage in work and to conduct a business, enshrined in Articles 15-16 of the Charter of Fundamental Rights of the EU,[13] the constitutions of EU Members States granting people the freedom to choose and pursue an occupation or conduct a business, and in Articles 49 and 56 TFEU on the freedoms to be established and provide services in any EU Member State.

11. *Seventh,* disclosure of TPLF agreements to opposing parties in litigation proceedings serves no purpose for the protection of claimants; rather it gives an opportunity to opposing parties to engage in 'fishing expeditions' to attempt to uncover privileged information regarding the claimant's strategy in the case. Although the Voss Report states that where a TPLF agreement is disclosed a national court may reduce the amount to be awarded to a claimant if a TPLF agreement exists, this infringes fundamental legal principles. Indeed, national courts are bound by the rule of law and must therefore determine the outcome of proceedings solely on the basis of the severity of the infringement in question.

12. *Eighth,* by only regulating funding for litigation obtained through TPLF (as opposed to from banks or other financial institutions), the Proposed Directive discriminates between capital sources and thereby violates the free movement of capital in the EU under Article 63 TFEU. This type of discrimination is a serious infringement in the hierarchy of EU law.

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12 *Ibid.*

13 The European Court of Human Rights (ECtHR) has recognised elements of the right in the European Convention on Human Rights (ECHR), particularly those deriving from the freedom to enjoy the right to property (Article 1 of the Protocol No. 1 to the ECHR; see ECtHR, *Smith Kline and French Laboratories v. the Netherlands*, No. 12633/87, 4 October 1990) and those related to the freedom of expression (Article 10 of the ECHR, freedom of 'commercial' expression; see ECtHR, *Krone Verlag GmbH & Co. KG v. Austria* (No. 3), No. 39069/97, 11 December 2003; ECtHR, *Casado Coca v. Spain*, No. 15450/89, judgment of 24 February 1994; ECtHR, *Barthold v. Germany*, No. 8734/79, 25 March 1985. See also ECtHR, *Anheuser Busch v. Portugal*, No. 73049/01, 11 January 2007, para. 72; ECtHR, *Ghigo v. Malta*, No. 31122/05, 26 September 2006, para. 50).

II. The functioning of TPLF

13. When relying on TPLF, claimants use the asset value of potential court litigation or arbitration to secure capital from third parties.[14] An important feature of TPLF is that the risk assumed by the funder in exchange for receiving a share of the potential award is 'non-recourse'. This means that the funder has no entitlement to any collateral except the litigation proceeds. Thus, if the litigation is unsuccessful, funders will not only forego a fee but will not even have their expenses covered.[15] This has consequences both for the funded party and for the funder.

14. *First,* for the funded party, the fact that in unsuccessful cases the funder does not have recourse to a party's collateral (other than the litigation proceeds), means that TPLF is also viewed as a risk and capital management tool. Thus, TPLF is not only used by less resourced claimants who cannot afford to bring a claim, but it is to a large extent also used by all types of businesses for managing their litigation risk. The vast majority of clients of ILFA's members (which account for approximately 90% of the TPLF investments in the EU)[16] are large, well-capitalised companies with strong balance sheets which use TPLF as a corporate finance and risk management tool[17] *inter alia* to avoid that litigation costs are reflected in their profit and loss statements or balance sheets, or for fiscal reasons.[18]

15. *Second,* given that funding is 'non-recourse' and that the outcome of litigation is inherently uncertain, it does not make economic sense for funders to invest in a claim that they know to be frivolous and without legal merit. Therefore, precisely to avoid funding such claims, funders perform significant due diligence prior to agreeing to fund a case. As stated in the EPRS Study and the Voss Report, funders are very critical of the cases they take on and thus generally reject around 95% funding requests.[19] The EPRS Study acknowledges this economic reality by

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[14] That capital may not only be used to finance the litigation but also to finance the business in general.

[15] Indeed, as opposed to banks having funded cases, funders are not entitled to receive the invested capital back.

[16] For example, it appears from page 11 of the Omni Bridgeway's half-year results for 2021, that only 3% of the claims relate to product liability and from page 48 of Burford Capital's 2020 Annual Report that only 3% of claims relate to non-business torts, regulatory and other issues.

[17] In the Norton Rose Fulbright report entitled, "*Third-party funding in arbitration – the funders' perspective. A Q&A with Woodsford Litigation Funding, Harbour Litigation Funding and Burford Capital*" (September 2016), the answer by Ruth Stackpool-Moore, Harbour Litigation Funding to question 1 was *"The past 12 months have seen further exponential growth in the use of third-party funding generally, and particularly an increase in the number of inquiries regarding arbitrations. Demand for funding in investment treaty arbitrations has historically been strong but we are now also seeing an increase in demand for funding in commercial arbitrations. Increasingly, this comes from large, well-capitalised companies which may, in the past, have considered that funding was not for them"*. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/8b8db7d0/third-party-funding-in-arbitration---the-funders-perspective?_sm_au_=iHVt0N22FR3470D2FcVTvKQkcK8MG.

[18] Funding is also used to access funders' experience in judgment enforcement, asset tracking, or gathering expert evidence.

[19] *See,* whereas E of the Voss Report referring to Australian Law Reform Commission, *"Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (2018),"* at page 50. In its FY2021 Results Presentation of August 2021, Omni Bridgeway states that out of 1727 applications, it could only fund 77 (4.46%). In its Practical Guide to Litigation Funding, Woodsford also mentions that it can only fund 3.5% of the applications it receives; *see* Woodsford, "A Practical Guide to Litigation Funding"

explaining that *"in TPLF, the risk of vexatious litigation is extremely low with respect to the litigation financing of single cases, as funders tend to filter out unmeritorious individual claims and do not take on the high risk of such cases."*[20]

16. Whilst by filtering out unmeritorious cases funders contribute to alleviating the litigation burden on courts, national courts also have other tools at their disposal to exclude frivolous claims or claims without merit. Therefore, while the EPRS Study repeatedly refers to the alleged risk that TPLF will increase frivolous claims, this is simply not the case, and neither the EPRS Study nor the Voss Report furnish a single piece of data to support that claim.

III. TPLF activities are widely accepted and protected

17. TPLF is an economic activity like any other and is therefore protected under rules on the freedom to choose an occupation, engage in work and to conduct a business, enshrined in Articles 15-16 of the Charter of Fundamental Rights of the EU.[21] These freedoms are also mirrored, and thus protected, under the constitutions of EU Member States, which provide that people have the freedom to choose and pursue an occupation or conduct a business. Further, these rights are also complemented in the EU pursuant to Articles 49 and 56 TFEU, *i.e.*, the freedoms to be established and provide services in any Member State in the EU.

18. TPLF, having existed for over several decades in Continental Europe, is not a recent invention. Indeed, one of the world's largest funders started its activities in the Netherlands in 1986.[22] Since then, several national courts in EU Member States have expressly accepted and embraced TPLF and in some cases also laid down certain boundaries. However, although TPLF has existed for such a long time and national courts have developed case law explicitly accepting, and in some cases, welcoming TPLF, no EU Member State has found it necessary to introduce

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at page 8. Available at: https://woodsfordlitigationfunding.com/wp-content/uploads/2021/01/Woodford-White-Paper-A-Practical-Guide-Lit-Fund-NLogo.pdf.

[20] *See,* page 74. *See also* the reference to Lord Jackson, Review of Civil Litigation Costs: Final Report: Final Report, 2009, Ministry of Justice, p. 117. This is also confirmed by multiple articles on this subject: "*All else being equal, therefore, the involvement of a funder may indicate that the case had more compelling merits than other, more traditional sources of funding, because a sophisticated party with experience in investment claims (and often a broader statistical perspective than the party or its counsel) thinks it is likely to succeed,*" *See,* I Popova and K Seifert, *"Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration"* in K Facj Gomez, ed, Private Actors in International Investment Law (Springer, 2021), page 135.

[21] *See* n. 10, *supra*.

[22] In 1986, *Omni Bridgeway* started funding cross border claim recoveries for state export credit agencies and credit political risk insurers. German litigation funders, such as *FORIS AG*, listed and founded in Germany in 1996 funds (inter alia) claims of insolvency trustees. *Roland Prozessfinanz* started its activities in 2001 with a similar focus.

legislation expressly prohibiting or otherwise restricting TPLF.[23] This is a clear signal that EU Member States consider the approach developed by the case law of national courts to be satisfactory and thus do not desire to regulate TPLF.

19. This is all the more so since the EU has already adopted the Collective Redress Directive,[24] which requires EU Member States to adopt by December 2022 rules regulating TPLF in the context of consumer based collective redress cases. While ILFA does not agree with the regulation of TPLF in the Collective Redress Directive, the fact that it will be implemented in the 27 EU national legislative frameworks would be completely at odds with further regulation in that area and cannot be justified. In addition, while consumers in the EU are extensively protected through a series of EU Directives, as explained below, the Voss Report does not explain or justify why these Directives do not sufficiently protect EU consumers in the context of TPLF.[25]

- Directive 2011/83 on consumer rights requires the consumer's counterparty (here the funder) to inform the consumer in clear terms of the main characteristics and price (including taxes) of the services sold and of the trader's name, address, telephone number, as well as of the payment arrangement (which in the context of TPLF includes providing information on the share of the litigation proceeds to which the funder may be entitled and of other main conditions in the contract).[26]

- Directive 2005/29 on unfair business-to-consumer commercial practices requires the consumers' counterparty not to (i) engage in practices that are contrary to the requirements of professional diligence; (ii) provide misleading or deceptive information; or (iii) impair the consumer's freedom of choice or conduct, including by causing the consumer to take decisions it would not otherwise have taken.[27]

- Directive 93/13/EEC on unfair terms in consumer contracts required that contract terms are individually negotiated and that the terms do not include any unfair terms, taking

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[23] While the Irish Supreme Court has ruled that champerty is applicable and thus that TPLF is prohibited in Ireland, no Member State has introduced legislation prohibiting or restricting TPLF apart from legislation that will be adopted by Member States in order to comply with the Collective Redress Directive by 2023.

[24] See n. 7, *supra*.

[25] *See,* European Parliamentary Research Service, *"Responsible private funding of litigation: European added value assessment"* (March 2021) (the EPRS study). Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf

[26] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, (OJ L 304, 22.11.2011, p. 64–88).

[27] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22–39).

account of the nature of the contract, the circumstances and any related contracts. The rules apply irrespective of the parties' choice of law.[28]

20. Hence, not only has TPLF been regulated for consumers by the Collective Redress Directive, but the EU has adopted a robust body of regulations that afford a high level of consumer protection. In addition, all Member States have adopted rules on tort and fraud which enable corporations, consumers and individuals to pursue damage claims. Indeed, the European Courts have consistently declared that a national court may assume international jurisdiction in cross-border claims, thereby enabling tort law to be enforced.[29]

21. In addition, publicly-traded funders are regulated in the EU through legislation on securities and are controlled by the financial authorities in the jurisdictions in which they operate, such as the stock exchanges in Paris, Amsterdam and Frankfurt. Indeed, if the funder is a listed company which fund claims by means of financial instruments the following are examples of EU rules that apply:

- the Shareholder Rights Directive 2007/36 which requires directors to inform shareholders of their remuneration and ensure that shareholders may always be identified, thereby ensuring that funders investment strategies are solid;

- the Prospectus Regulation 2017/1129 which requires a prospectus to be drawn up where securities are either offered to the public or admitted to trading, thereby ensuring that funders operate on a very transparent basis; and

- the MiFID II Directive 2014/65 which requires traders to report products traded on European trading venues to the respective financial regulators in the relevant Member State, thereby ensuring that funders' funds are legitimately obtained and that those cases where funders fund claimants through securities are subject to control.

22. Further, not only do existing rules adequately protect parties to TPLF agreements, but the national courts of the Member States have developed a body of case law which has not only found TPLF to be permissible, but has also embraced it and even, in several cases, advocated in favour of TPLF.

i. **Austria**: The Austrian courts have endorsed TPLF which is used both by corporations and individuals in litigation and arbitration cases for a broad variety of civil claims.[30] In particular, many claims relying on TPLF have been brought pursuant to the well-

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[28] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) (OJ L 95, 21.4.1993, p. 29–34).

[29] Judgment of 12 September 2018, Löber, C-304/17, EU:C:2018:701, in which the European Courts reconciled two opposing judgments and found that the claimant was justified in bringing the claim before the relevant national court.

[30] *See,* '*The Third Party Litigation Funding Law Review: Austria'*, by Marcel Wegmueller and Jonathan Barnett, published on 22 November 2021, which states that portfolio funding is also possible. Available at: https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/austria.

tested Austrian class action mechanism, whereby both the original claim owner and a third party (to which the claim has been assigned) may bring claims bundled into one action. In a case brought by the large consumer organization VKI (*Verein für Konsumenteninformation*) in 2013, the Supreme Court explicitly confirmed the legality of funding such Austrian-style class actions.[31] As stated in February 2012 by VKI's general counsel: *"Due to litigation financing, our class action lawsuits are an important opportunity for the majority of those who have suffered damages to assert their claims without the risk of legal costs. It is only because of this construction that many do not to give up their claims, but instead pursue them."* Other cases include class actions against Volkswagen, the trucks cartel and GIS and AWD. Further, in two separate rulings handed down in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding.[32]

ii. **France**: As stated in the Paris Bar Council Resolution of 21 February 2017, TPLF is not only accepted and embraced, but is favourable for litigants and lawyers: "*it [TPLF] is favourable to the interest of litigants and lawyers (members of the Paris Bar), particularly in international arbitration.*" The French courts have consistently accepted TPLF and in certain individual cases laid down boundaries where advisable, demonstrating that the existing judicial framework allows for corrective measures in specific cases.[33]

iii. **Germany:** Third party funders have been active in Germany since the 1990s, and the German courts have repeatedly found TPLF to be admissible in civil proceedings for damages claims, while also providing protections for claimants. The German courts have even found that attorneys must inform their clients of the availability of litigation funding.[34] In addition, the model whereby the TPLF provider (usually backed by investors which collect and enforce mass claims based on specialised counsel) receives a 'success fee' was approved by the German Federal Supreme Court (*Bundesgerichtshof*) on 27 November 2019.[35] Further, in August 2017, the Higher Regional Court in Frankfurt held that the question of whether third party funding may be classified as a loan agreement, an insurance contract, a purchase of receivables, or a partnership is still undecided, thereby evidencing that the German courts have reached a mature stage where TPLF is being examined at a very detailed level. One of the most prominent cases that have been brought before the German Courts (reaching

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31 *See,* OGH, 27 February 2013, 6 Ob 224/12b. The 'Austrian-style class action' mechanism has existed in Austria for over 10 years (Sections 11, 187 and 227, ZPO (Austrian Code of Civil Procedure). As claim size restrictions do not apply where the assignee and class action claimant are part of a specific association, the bundle of claims may even be brought before the Supreme Court.

32 *See,* HG Wien 7 December 2011, 47 Cg 77/10s and OLG Wien 23.8.2012, 3 R 41/12i.

33 Cass. 1ere civ., 23 November 2011, No. 10-16.770, and Paris Court of Appeal, Pole 3, 1st Chamber, 17 October 2012, No. 11/22443.

34 OLG Köln decision of 5 November 2019, 5 U 33/18 para. 6.

35 Case VIII ZR 285/18 Lexfox I.

the highest court of civil jurisdiction, the Federal Court of Justice) with the help of litigation funding is the "Dieselgate" case based on the finding by US Environmental Protection Agency in September 2015 that Volkswagen had programmed its diesel engines to activate emissions controls only during laboratory emissions testing.[36]

iv. **The Netherlands:** The Dutch courts have consistently found claims funded by third party litigation funds to be admissible and considered TPLF to be an important tool for parties who lack the means to bring a valid claim, including for well-founded class actions. For example, in the EUR 1.3 billion settlement between Ageas (previously Fortis) and investors (stemming from claims based on Fortis' 2007 acquisition of ABN AMRO Bank), the Amsterdam Court of Appeals confirmed and accepted that the settlement allowed compensation to be made to funders. Further, in a 2014 air cargo follow-on action for damages, the Amsterdam Court of Appeals considered that the existence of a third party funder could not justify the conclusion that Dutch procedural law was being abused, or that there had been inadmissible conduct in the context of obtaining compensation for damages.[37] In April 2020 in the *Victimes Des Dechets Toxiques Cote d'Ivoire Stichting* case regarding toxic waste dumping around the Ivory Coast, the applicants relied on TPLF in order to bring proceedings. While the Amsterdam Court found that the applicants did not have legal standing to bring their claims, the Amsterdam Court of Appeals overruled this position and found that the applicants had legal standing. On 30 June 2021 in the *Data Privacy Stichting* case, the first instance court, *i.e.*, the District Court of Amsterdam, declared that the applicant, relying on third-party funding, did have legal standing to bring a claim against Facebook for its alleged violation of the data protection rights of its users.[38] In addition, the Amsterdam Court of Appeals dismissed a claim that since the funder claimed 40% of the award (exclusive of VAT and after deduction of its costs) the funding agreement should be held invalid, by stating that the fact that one third-party funder charges a higher amount than another funding provider does not violate public policy or good morals.[39]

v. **Sweden and Denmark:** TPLF is fairly common in Sweden and the Swedish courts have also accepted and embraced TPLF for all types of lawsuits. Swedish Courts have a tendency to rely on soft law guidance from the International Bar Association and have developed case law on various issues that arise in the context of TPLF, such as

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[36] *See*: Bundesgerichtshof, Nr. 063/2020, Schadensersatzklage im sogenannten "Dieselfall" gegen die VW AG überwiegend erfolgreich (25 May 2020).

[37] Court of Appeal Amsterdam, 7 January 2014, ECLI:NL:GHAMS:2014:27, paragraph 2.10.

[38] *See, 'Litigation 2022: Netherlands'*, by Yvette Borrius, Emille Buziau and Jaap Tromp, published on 2 December 2021. Available here: https://practiceguides.chambers.com/practice-guides/litigation-2022/netherlands. *See* also *'The Third Party Litigation Funding Law Review: Netherlands'*, by Rein Philips, published on 2 November 2021. Available at: https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/netherlands.

[39] *See,* ECLI:NL:GHAMS:2011:BU8763.

conflict of interest. The Danish courts have also accepted TPLF since at least 2012, when the Danish Supreme Court ruled that a funding agreement according to which a creditor provided security for the costs of the case against receiving 50% of the litigation proceeds was legal without laying down any restrictions.[40]

vi. **Luxembourg**: The Luxembourgish courts have found TPLF to be permissible also in high profile cases. For example, TPLF was used to fund cases initiated by victims of Bernard Madoff's Ponzi-schemes against investment managers and custodian banks in charge of Luxembourg funds that were defrauded by Madoff.[41]

23. Furthermore, globally, many jurisdictions have developed a legislative or a judicial acceptance towards TPLF. For instance, in Switzerland, the Federal Supreme Court has not only found TPLF to be permissible, but has also stated that claimants can greatly benefit from it.[42] In the same judgment, the Federal Supreme Court clarified that it forms part of the lawyer's professional duty established in the Federal Act on the Freedom of Movement for Lawyers to inform claimants about the availability of litigation funding. In addition, the recent trend is that States are changing their laws in order to permit TPLF. For example, TPLF is allowed in England and Wales and the UK Government has opted to allow funders to self-regulate with the establishment of the ALF Code of Conduct.[43] In 2017, the Hong Kong Parliament passed legislation allowing TPLF for arbitration, mediation, and other related proceedings.[44] In

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[40] *See,* the Supreme Court's judgment of 23 March 2017 in matter no 266/2015 (published as U2017.1815H in the Danish weekly law reports). *See* also https://kennedyslaw.com/thought-leadership/article/tredjemands-finansiering-af-retssager/. OW Bunker, a marine fuel supplier, listed by a capital fund on Nasdaq Copenhagen, went bankrupt in 2014 which had a knock-on effect on global marine fuel supplies. Although the liquidator identified "a major potential claim against both the capital fund and the management of OW Bunker" as almost all assets of OW Bunker had been pledged to financial creditors, there were no funds to bring the claim. The estate entered into an agreement with a third-party litigation funder and brought the claim: https://redresssolutions.co.uk/blog-litigation-funding-unlocks-new-horizons-for-denmark).

[41] Tribunal d'arrondissement de Luxembourg (4 March 2010) decision no. 312/10. Available at (only as summary): https://judoc.public.lu/ECLI_LU_TAL_2010_00312-0304.pdf.

[42] *See,* Bundesgericht, BGE 131 I 223 (2004) (the case referred in the text). Available at: http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F131-I-223%3Ade&lang=de&type=show_document&zoom=YES&. In 2004 the Federal Supreme Court also held that litigation funding agreements can be inadmissible if the funder is granted an excessive share of the proceeds of the litigation (c.4.6.6.) and that concerns relating to conflict of interest are already addressed through the existence of the lawyer's legal obligation always to put the client's interests first, coupled with the threat of severe sanctions in the event of a breach (c.4.6.3, c.4.6.4, and c.4.6.6.). In 2014, the Federal Supreme Court confirmed its decision and emphasised that litigation funding has become common practice in Switzerland. *See*: Bundesgericht, BGE 2C_814/2014. Available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F22-01-2015-2C_814-2014&lang=de&type=show_document&zoom=YES&.

[43] See the website of the Association of Litigation Funders of England and Wales: https://associationoflitigationfunders.com/code-of-conduct/. The Code of Conduct for Litigation Funders was published by the Civil Justice Council – an agency of the UK's Ministry of Justice – in November 2011, and the Association of Litigation Funders has been charged with administering self-regulation of the industry in line with the Code. It was written after months of research by a high-level Working Party that included senior lawyers, academics and business managers.

[44] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance order No. 6 of 2017. Available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf. The Ordinance held that

Singapore, as of 2017, TPLF is also permitted for arbitration and other ADR proceedings.[45] Finally, the Supreme Court of India has held TPLF to be admissible.[46]

IV. The conditions for adopting EU legislation are not met – the subsidiarity principle

24. According to the subsidiarity principle pursuant to Article 5 TEU, the EU may not legislate (except in the areas that fall within its exclusive competence), unless EU legislation would be more effective than rules adopted at Member States' national level.[47] In other words, the EU may only legislate in an area where Member States are unable to satisfactorily achieve the objective. In practice, the subsidiarity principle is considered to be fulfilled where both of the following questions are answered in the positive: 'Is action by the EU needed to achieve the objective?' and 'Would action at EU level provide greater benefits than Member States' actions?'.

25. When it comes to TPLF, both questions must be answered in the negative. Thus, the Proposed Directive does not satisfy the subsidiarity principle for adopting EU legislation.

26. *First,* as explained above, despite TPLF having existed for decades and numerous courts having found it admissible, Member States have not considered it necessary to legislate on TPLF. This clearly signals that Member States' courts are considered to be capable of sufficiently addressing TPLF and, therefore, that neither national nor EU legislation are necessary.

27. *Second,* there is no evidence justifying that legislating at the EU level will provide greater benefits than the Member States' court-based approach. Neither the EPRS Study nor the Voss Report provide any examples of TPLF abuse or any shortcomings of the Member States' court-based approach. The EPRS Study and the Voss Report do not even provide any empirical analyses or assessment of the current state of the law and practice governing TPLF in the Member States. There is also no explanation as to why general civil contract law principles, consumer protection laws, and the rules on torts and fraud are insufficient for addressing the practice of TPLF. Instead, the EPRS Study and the Voss Report refer to the common law jurisdiction of Australia without explaining why Australia should have any relevance for

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funders cannot seek to influence the funded party or the funded party's legal representative and must avoid any conflict of interest (paragraph 98Q).

[45] Civil Law (Third-Party Funding) Regulations 2017. Available at: https://sso.agc.gov.sg/SL-Supp/S68-2017/Published/20170224?DocDate=20170224. These Regulations contain requirements on the minimum paid-up share capital required of a funder.

[46] Supreme Court of India, Bar Council of India v AK Balaji (2018). Available at: https://indiankanoon.org/doc/132041574/?__cf_chl_f_tk=PUF2qWfaIRW.oqi6juxwQ_qRP40XwJuitjTAJ4Lqu1E-1642443257-0-gaNycGzNCiU. The courts can also review the TPLF agreement for being extortionate, unconscionable and against public policy. See, for example, Andhra Pradesh High Court, Nuthaki Veukataswami v Katta Nagireddy (1962), available at: https://www.casemine.com/judgement/in/56e668ff607dba6b53434294.

[47] Article 5 TEU states that "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*"

continental European civil law jurisdictions, which are based on the principle of freedom to contract, do not prohibit TPLF, and have national rules that sufficiently protect the parties from fraudulent behaviour.

28. *Third,* neither the EPRS nor Mr Voss conducted (or relied on) any consultation with key European stakeholders to better understand how TPLF functions. Instead, the Voss Report calls for urgent and strict regulation at EU level without even attempting to understand the market. As is clear from the above, a consultation with the stakeholders, including the Member States, as well as any form of analysis of the industry and relevant practices and markets in the EU, would have revealed that EU laws and national legislation in the Member States provide a sufficient level of protection in the EU.

29. Specifically, the Voss Report states that EU regulation is necessary in order to address concerns related to (i) the secrecy of TPLF agreements; (ii) conflicts of interests; and (iii) funders' allegedly excessive returns. However, apart from the fact that the Voss Report does not provide any evidence to support any of these claims, the following explains that the concerns underlying these issues are unwarranted.

a. Disclosure of TPLF agreements

30. While the Proposed Directive requires the parties to a TPLF agreement to disclose this agreement to courts and administrative authorities, such disclosure obligation is not only unjustified but could lead to abuse by litigants.

31. *First,* litigation funders do not operate in secrecy. A subset of the professional litigation funders are in fact publicly listed companies which publish overviews of their practices and finances as part of their exchange regulation obligations, which includes their annual reports. Furthermore, all of ILFA's members, which are the most important funders in the EU, are regularly audited by prominent auditing firms.

32. *Second,* parties that cannot afford, or do not wish, to pay their legal fees and expenses out of pocket could, instead of relying on TPLF, turn to external financing sources such as financial institutions (including banks) or private funds to secure loans, equity instruments or insurance compensation. Given that these 'recourse' financing sources include litigation finance providers, there is no rationale for only requiring disclosure of TPLF agreements and not of these other financing agreements. If anything, such recourse funding sources may be able to exercise much more influence over a claimant than a non-recourse funder whose return is exclusively dependent on the litigation proceeds. Thus, the disclosure rule may be considered to engender discrimination, which the EU Courts have struck down on several occasions.[48]

[48] For example, in the Court of Justice case, C-78/18 Commission v Hungary, the Court of Justice ruled that a law which requires only NGOs to disclose the identity of foreign donors and their support amount is discriminatory and violates the rules on free movement of capital in Article 63 TFEU. Since the Proposed Directive linked to the Voss Report also requires parties to disclose the identity and support amount only if the funding is provided by third party funders (as opposed to by banks or insurance companies etc), it is also discriminatory and violates the free movement of capital rules laid down in Article 63 TFEU.

33. *Third,* for the same reason, national courts should not be able to decide on the level of funders' compensation, as suggested in the Proposed Directive. The courts are governed by the rule of law, such that issue their rulings on the basis of their assessment of the merits in the relevant case, and not on the basis of the funding source(s) that the claimants use. Indeed, any restriction of funders' returns is discriminatory since there are no rules restricting the returns of other finance providers, such as banks, even if, as mentioned above, banks may exert more influence on claimants compared to funders.

34. *Fourth,* the disclosure rule risks providing the responsible party with the means to engage in 'fishing expeditions' as part of a 'long-game' strategy of wearing a claimant down or to seek to discover privileged information concerning the claimant's strategy or assessment of the case.

35. *Fifth,* if a disclosure rule were considered necessary in certain instances, such disclosure rule should focus on the proper purpose of such a rule in the case at hand, such as to identify potential conflicts of interest between parties to the legal proceedings and the funder. The Proposed Directive does not do so, as the requirement obligating the claimant to disclose the funding agreement and empowering courts to request details of the level of the funder's return are irrelevant to the issue of conflicts and would create the possibility for abuse by the defendant through for instance plotting a procedural delay strategy pursuing ancillary disclosure related litigation in an attempt to exhaust the claimant's resources.

b. Conflicts of interests

36. Notwithstanding, as stated above, that funders select their cases based on strict due diligence, once they have invested in a case they become a passive investor and do not interfere with the conduct of the funded litigation or arbitration, unless specifically requested by the funded party and only usually in very limited specific scenarios, such as enforcement matters. The vast majority of users of TPLF are professional contracting parties who receive ample legal advice and may decide to contractually regulate and apportion risks as they see fit, be it risks of a conflict of interest with contracting parties, risks that are present when dealing with banks, insurance companies, off takers or any other risks. There is no asymmetry of information in those cases that requires additional regulatory interference. In respect of cases concerning natural persons / consumers, the relevant risks are more than adequately protected by existing national and European legislation including the EC Directives cited above.

37. In addition, as stated above, the Proposed Directive deliberately focuses only on TPLF as opposed to recourse financing sources (*e.g.,* banks, insurance companies, franchise agreements, lease agreements, profit sharing agreements, indemnity agreements, etc). If the true motivation of the Directive was a genuine desire for a robust disclosure of conflicts then *all* financial investors should be subject to disclosure requirements, but this is not what the Proposed Directive does and therefore it is discriminatory in nature.

c. The level of the funders' returns

38. As noted, all EU Member States are civil law countries where the point of departure is that TPLF is permitted based on the principle of freedom of contract, meaning that any restriction on TPLF agreements constitutes a restriction of this basic freedom. Indeed, when entering into a TPLF agreement, the claimant may choose not to conclude the agreement if it considers the contract to be unreasonable. Thus, already for that reason, the funder's return agreed with the TPLF agreement is aligned with what the claimant finds to be acceptable.

39. Further, funders' average returns are commensurate to the risk that funders undertake.

40. *First,* based on the non-recourse character of the funder's investment, an ex-post analysis of the return (such as the one made in the Voss Report, claiming that funders' returns go up to 100%), does not take into consideration that (i) the funder faces the risk of losing the investment when taking on the liability to fund a case and (ii) if the claim is successful and the funder's investment is reimbursed, this only occurs at the end of the legal proceedings.

41. As explained above, TPLF is not a loan but an investment, meaning that funders bear a much greater risk than, for example, financial institutions granting a loan, as the funder may only obtain remuneration from the litigation proceeds and has no right to any collateral. For this reason, the interest rates of banks cannot be compared with funders' returns. Instead, the assessment of funders' returns should be based on a metric which may be used in order to compare the returns of different types of investments, such as the Internal Rate of Return (***IRR***). Indeed, many of the funders' cases (such as follow-on cases from cartels) last 8-10 years, meaning that funders do not receive a return before the end of the investment period (if at all). Precisely taking into account these circumstances, the IRR measures the investment's growth rate over the entire duration of the investment and thus reflects a return being received at the end of the investment period. For example, if a funder makes an investment of EUR 100 in year 1 and receives a pay-out of 100% at the end of the proceedings, the pay-out may would be in year 10, meaning that the value of the investment would be heavily discounted. In that case, the funder's IRR may be below 10% on an annual basis (not 100% or more).[49] The IRR of TPLF can therefore be much lower than for other types of investments, such as venture capital or private equity, where the cash distribution occurs sooner during the investment period.[50] This is all the more so in view of the fact that if the risk profile of the asset class is high, such as is the case for many TPLF cases, the return should be correspondingly higher. For that reason also, funders do not receive excessive returns.

42. *Second*, not all cases are resolved successfully and, when a case is unsuccessful, the funder loses all of its investment and receives no fee. Thus, the basis for any comparison with other investments should be the entire funded portfolio, not just a single case.

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[49] *See, 'Costs, damages and duration in investor-State arbitration'*, by BIICL and Allen & Overy, published on 2 June 2021.

[50] *See, 'The Venture Capital Risk and Return Matrix',* by Hans Swildens and Eric Yee, published on 7 February 2017. Available at: https://conferences.law.stanford.edu/vcs2019/wp-content/uploads/sites/63/2018/09/003-The-Venture-Capital-Risk-Return-Matrix.pdf

43. In any case, it is not necessary to introduce rules limiting funders' share of the award to 40%, as the Voss Report calls for, because that limit is arbitrary and, in any event, is already respected in the majority of cases. Indeed, as stated in Section 3.2.8 of the EPRS study, while all 45 funders active in the EU usually request 20%-50% of the award (funders *"typically take a 20% to 50% share of the amount awarded"*), funders only request a success fee of 40-50% share when the award is relatively small compared to the costs that are to be funded.

44. Finally, claimants are already protected through the prohibition by national laws in many EU Member States of contingency fees and exploitative fees. For example, in France, attorneys advising clients in relation to third-party funding must abide by the bar rules, which in addition to containing a duty of professional secrecy, the duty of independence, provide that contingency fees in litigation and domestic arbitration are prohibited. Further, pursuant to Article 1 of the Austrian Act against Profiteering, a third-party funding agreement must not constitute profiteering *i.e.*, constitute exploitation of a person in need. On the basis of the same principle, *i.e.*, that exploitative fees are prohibited, the German courts have either confirmed the legality of third-party funders' return or reduced it on an *ad hoc* basis. In the Netherlands, the funders' fees must comply with fundamental principles *i.e.*, not violate rules on public policy, good morals, reasonableness and fairness. However, there appear to be no cases where the Dutch courts have relied on these principles in order to reduce funders' fees.

d. The choice of applicable law

45. The Proposed Directive provides that the choice of law governing disputes regarding the TPLF agreements must that "*of the Member State of the claimant or intended beneficiaries*" and thus must be the law of one of the Member States.

46. As a preliminary point, the provision suffers from various technical flaws. First, given that there may be several claimants with different nationalities which together bring one action, it is not always clear which Member State's law should be chosen. Second, the fact that the Proposed Directive provides that the governing law must be one of the Member States' laws while at the same time requiring that the governing law should be that of the claimant (or intended beneficiaries) means that there is an inherent potential conflict. Indeed, if a claimant is based outside the EU, for example in Canada, the governing law cannot be that of the claimant (*i.e.*, Canadian law) because Canada is not a Member State.

47. In addition, the choice of law is an expression of the freedom to contract. Thus, if any restriction of this freedom should be permitted at all it should be properly justified. However, no such justification has been provided and the Voss Report provides no examples of funders having chosen the governing law to the detriment of consumers because no such example exists. Indeed, in the majority of cases it is the *claimant* that decides the governing law based on the location of its residence.[51] However, even in the very few cases where funders choose the

[51] According to Lake Whillans & Above the Law, *"2021 Litigation Finance Survey Report,"* 94% of the respondents have stated that the main driver for "seeking litigation funding" was the client, the client's legal department or general counsel, or the outside counsel representing the client. See also Omni Bridgeway

governing law, their choice is usually based on the country with most sector experience in light of the issue at stake.

V. TPLF provides access to justice and supports the enforcement of EU law (*effet utile*)

48. Legal finance supports the rule of law. Any restriction on the availability of legal finance to wronged investors would prevent some of them from taking legal action to hold wrongdoers accountable and recover compensation for their losses. This would have the effect of allowing wrongdoers to ignore rules of EU Member States' national legislation and EU Treaty obligations and would thus undermine the rule of law. Since 2017, the Commission imposed more than EUR 6.25 billion in fines against cartel participants[52] and more than EUR 10 billion in fines on undertakings abusing their dominant position. However, given that in antitrust infringement cases, victims will only be fully compensated through seeking compensation for damages,[53] fines for EU antitrust infringements clearly do not reflect the full benefit gained by the wrongdoers.[54] In that perspective compared to the significant amounts earned by the antitrust wrongdoers, the returns of funders represent a relatively small amount. Yet without the funders, many follow-on cases involving victims of antitrust infringements seeking compensation for damages, would not exist. Thus, by enabling the pursuit of meritorious claims for European corporation and consumers, TPLF levels the playing field and creates equality of arms between unequal parties to a dispute.

49. The importance of TPLF is evident particularly in complex cases, where the undertaking that has breached EU law is trying to slow down proceedings through procedural objections and thereby increase the claimants' costs. In the Diesel-gate scandal case, the European Consumer Organisation stated: *"the proceedings have been lengthy and complex. In several countries,*

FY2020 Results Presentation (page 25): *"Opportunities are primarily originated through potential clients, advisors, other third parties or internally by formulating a funding idea before an approach from a third party."*

52 *See,* https://ec.europa.eu/competition-policy/system/files/2021-12/cartels_cases_statistics_0.pdf.

53 *See,* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1–19), recital 3: "[…] *The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions.*" In the same vein, see judgment of 5 June 2014, C-557/12, Kone and Others, EU:C:2014:1317, paragraph 21.

54 In paragraph 143 of the Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU the Commission recalls a 2009 study according to which in 93% of all cartel cases, the cartel led to a 20% overcharge (see recital 143). Given that EU antitrust fines may maximum represent 10% of the wrongdoers' worldwide turnover, the fines are well below the benefit obtained from the infringement.

Volkswagen has raised procedural barriers, tried to exploit loopholes in EU legislation and used differences in national rules and standards of proof to slow down the proceedings."[55]

50. For example, in the Trucks Cartel cases currently pending in The Netherlands,[56] a handful of organised funding vehicles (SPVs) represent well over 200,000 entities whose claims run efficiently. If TPLF were not available (or not be commercially viable) for these claimants, either the claims would not have been launched, or the claims would have been brought on an individual basis which would have quickly led to the European court system becoming overburdened.

51. Other examples include:

    a. The *elevator cartel* case[57] in which the municipalities of Rotterdam and Amsterdam, Schiphol Airport, and others suffered damages from a competition law infringement but could only claim damages with the help of a funder because they had no budget to conduct such a complex and costly case. The European Commission has experienced firsthand how risky these cases are in its claim against the members of the Elevator cartel for the maintenance of the elevators in its buildings in Belgium and Luxembourg, and how high the professionalism requirement is with respect to, for example, the data gathering and evidence of damages.

    b. The *VKI v Amazon* case[58] in which the Austrian Consumer Association VKI, with the help of TPLF, brought an action on behalf of multiple customers against Amazon in relation to its data processing practice.

    c. The *Diesel-Gate* case[59] in which more than 200,000 claimants with the help of TPLF were able to bring Volkswagen to justice for its environment-threatening fraud. On 11 August 2020, the Commissioner for Justice and Consumers, Mr Didier Reynders, wrote to the Volkswagen Group to strongly encourage the group to offer fair compensation to all affected EU consumers, stressing that consumers expect to be treated with fairness

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55 *See*, BEUC, *"Five years of Dieselgate: A Bitter Anniversary 2015-2020: A long and bumpy road towards compensation for European consumers,"* dated 9 October 2020. Available at: https://www.beuc.eu/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf.

56 *See*, statements of the Commission in case AT. 39824 Trucks.

57 Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the EC Treaty Case COMP/E-1/38.823 - PO/Elevators and Escalators. See also: Judgement of the Court of Justice of 18 July 2013 in case C-501/11 P - Schindler Holding and Others v Commission ECLI:EU:C:2013:522.

58 Judgement of the Court of Justice of 28 July 2016 in case C-191/15 - Verein für Konsumenteninformation ECLI:EU:C:2016:612 .

59 *See,* for example: Bundesgerichtshof, Nr. 063/2020, Schadensersatzklage im sogenannten "Dieselfall" gegen die VW AG überwiegend erfolgreich (25 May 2020).

and receive adequate compensation for the damage they have suffered in a similar way across the Union.[60]

d. Securities damages cases[61] in which consumers have suffered damages from pyramid schemes or from an undertaking's misleading and fraudulent behaviour.[62]

e. Covid-19 cases in which companies are compensated for damages due to the pandemic.[63]

f. European Development Fund cases, for example, a case in which funding supported a European company abroad.[64]

52. Further, many of the funded cases have also resulted in rulings that have set legal precedents which other (less financially solid) claimants can subsequently rely on without first having to go to court. Examples are compensation cases in the aforementioned truck cartels and the "Dieselgate" scandal, as well as the airfreight cartel and others.[65]

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[60] From https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/dieselgate_en and Reuters: https://www.reuters.com/business/autos-transportation/eu-executive-urges-vw-compensate-all-eu-consumers-over-dieselgate-2021-09-28/.

[61] *See,* for example, Gerechtshof Amsterdam, 200.191.713/01 (Fortis)(13 July 2018).

[62] For example, in the *Ageas* case, the claimants alleged that Fortis' communication on the takeover on ABN Amro (on or around May 29, 2007 until the dismantling of the group in early October 2008) which allegedly deprived Fortis of most of its assets. The alleged misleading communication related to its subprime exposure, liquidity and solvency, commitments not to launch dilutive share issues and maintain the dividend policy. Based on this misleading information investors bought or held Fortis shares and suffered losses as a result of the significant fall of the stock price after the market became aware of Fortis' true situation. In addition, in the *Wirecard* case, Wirecard AG (Wirecard), a payment processor headquartered in Munich, Germany, filed for insolvency on June 25, 2020, after admitting $2.1 billion (€1.9 billion) in cash on its balance sheets probably never existed. The scandal, which was fully disclosed by June 2020, caused Wirecard's shares to plummet by more than 90% over a seven-day trading period. Five opt-in proceedings have started in Germany against Wirecard's auditor, Ernst & Young (E&Y) and/or the German Federal Financial Supervisory Authority (BaFin)/German Financial Reporting Enforcement Panel (FREP/ DPR). All of these cases are possible through TPLF.

[63] An example is third party funding of a case against a German insurance company that refused to cover the costs of youth hostels that were ordered to close by the German Government due to the pandemic. Despite the costs clearly being covered by the insurance, the insurer offered a "low ball" settlement amount which many hostels seriously considered due to their financially strapped conditions. The mere presence of the funding caused the insurance company to increase its offer to the level of damages demanded and the case did not go to court.

[64] While EU funding was granted by the European Development fund to an African State for the purposes of paying the costs of rehabilitating a roadway between two major cities, the African state refused to pay – even after an arbitration ruling had confirmed its obligation to do so – any amount exceeding 34 million USD to the European infrastructure company carrying out the works. The European company engaged a funder, as a result of which a settlement was negotiated which was fully in line with the financial outstanding required by the European company.

[65] Commission Decision 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (AT. 39824 – Trucks) and Commission Decision of 27 September 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT. 39824 – Trucks);

53. Further, while the 'effet utile' principle of EU Law requires all institutions to give full force and effect to EU law, the restriction of TPLF would prevent EU law from having full effect.

54. A relevant example is that TPLF helps the enforcement of EU antitrust law at Member State level. There are numerous examples whereby TPLF-funded antitrust damages lawsuits have helped injured parties to enforce their individual claims and thereby secure the EU's objective to ensure fair competition across the single market. Funders also enable most arbitration cases to be resolved in the EU.[66]

55. In addition, in an online workshop on the implementation of the Collective Redress Directive, the Commission itself clearly recognised the significant benefits of TPLF for consumers and other claimants' access to justice: *"Funding of representative actions is key for the effective functioning of the Directive. The qualified entities that bring representative actions to protect the interests of consumers have in general limited human and financial resources, in particular in light of the obligation to have a non-profit-making character (Article 4(3)(c) of the Directive). Without adequate resources to be able to cover all the costs of the proceedings, qualified entities may be deterred from bringing representative actions and access to justice may be hindered*."[67]

56. By restricting TPLF (and thus corporate claimants' access to funding), many of these cases will not be brought to justice, thereby protecting wrongdoers and ultimately jeopardising the enforcement of the rule of law. This is not in the interests of EU citizens and undermines EU Law internally.

VI. CONCLUSION

57. The Voss Report proposes the adoption of a Directive without providing any evidence or empirical analyses regarding TPLF practice in the EU. If the EPRS or Mr Voss had conducted a consultation with stakeholders or an analysis of the industry, they would have found that Member States and national courts not only allow TPLF, but consider it to enhance claimants' access to justice. They would also find that funders apply the highest standards when performing their activities, including by paying for adverse costs and avoiding conflicts of interest. The fact that TPLF has existed in the EU for decades, and that no Member State has

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Commission Decision of 17 March 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (AT. 39258 – Airfreight); and C-693/18 - *CLCV and Others* (Defeat device on diesel engines), EU:C:2020:1040 (17 December 2020).

[66] In 2021 alone, the use of third-party funding has been recognised expressly in the rules of at least five international arbitral institutions. *See,* ICC, Article 11(7), available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/; SIAC, Article 24(l), available at: https://www.siac.org.sg/index.php; HKIAC, Article 44, available at: https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-2#44; CIETAC, Article 27, available at: http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en (also guidelines, available at: https://hkarbitration.files.wordpress.com/2016/05/cietac-draft-guidelines-17-may-16.pdf).

[67] Online workshop on the implementation of the Representative Actions Directive (Brussels, 26 November 2021), discussion paper titled "*Thematic debate on funding of actions and public assistance to qualified entities.*"

so far desired to regulate it on a national basis, speaks volumes of the lack of a need to introduce EU regulation. Thus, if the Proposed Directive is adopted, many claimants will lose access to justice. This reveals the true objective of the Proposed Directive: those who breach EU law will be able to outspend any competitor or consumer, thus discouraging smaller undertakings and consumers from initiating legal proceedings against them.

ILFA is available to provide more information and meet with you to explain the above further, as necessary.