EXECUTIVE SUMMARY

Legal finance is an established practice that increases access to justice for millions of Europeans and strengthens the rule of law. Legal finance is a method of funding legal cases where a funder provides legal finance to one of the two parties to a legal case. It is a powerful tool for claimants seeking to take a case against a better-resourced defendant.

It addresses two major obstacles which deter businesses and individuals from taking legal action: lack of resources and the high risks and uncertainty associated with taking legal action. Legal finance has been labelled “one of the most innovative trends in civil litigation financing” by allowing claimants to overcome these two major barriers, which were traditionally considered inevitable.

In this way, legal finance allows meritorious cases to achieve justice where they otherwise would not have been able to afford to proceed, in exchange for a share of the fee in the event of a successful case. Crucially, legal finance agreements are non-recourse, meaning that the funder cannot charge a fee in the event of an unsuccessful case.

However, the future of legal finance in the European Union is under threat, with potential unforeseen consequences for business and consumer rights across Europe and the rule of law.

The Proposed Reforms
In October 2022, Axel Voss MEP presented an own-initiative report to the European Parliament that outlined several measures that will undermine the availability of legal finance in the EU. Among the measures proposed in the report are:

1. A 40% cap on the amount funders can recoup from damage awards in the event of a successful case (the “fee cap”)
2. A duty on claimants to disclose third-party funding (“mandatory disclosure”).

These measures will stifle the legal finance sector and deny access to justice. Moreover, the concerns raised in the report are not based on robust evidence, or any engagement with relevant stakeholders.

Firstly, an arbitrary 40% fee cap will make it uneconomical for funders to side with smaller parties in complex and costly cases, even where those claims are legitimate.

As it stands, fees are calculated based on the risks and length of a trial. Analysis of a 30% fee cap proposed in Australia found that it would have prevented 36% of legitimate cases from being pursued. This stands to benefit large powerful companies by allowing them to violate consumer rights and the law with impunity.

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1 PWC. Models for the Regulation of Returns to Litigation Funders. March 2021.
2 Morpurgo, M. A Comparative Legal and Economic Approach to third-party Litigation Funding. April 2011.
Secondly, mandatory disclosure will deter cases from being brought and benefit powerful corporate defendants. For example, if the details of a plaintiff consumer group’s agreement with a funder were made public, the defendant would gain insights into (a) the strengths and weaknesses of a case, (b) the amount of funding, and (c) the predicted length of a case. The first would give a clear unfair advantage to the defence, while the latter two would embolden companies to simply outspend their rivals.

**Enforcing European Rule of Law**

ILFA believes that legislating for the recommendations of the Voss proposal would provide a charter for large companies to infringe on the rights of the smaller businesses that are the backbone of the European economy. This is because there has not been an evidence-based analysis of the legal finance sector to date and a lack of consideration of the consequences.

It is vital that the EU does not disincentivise funders from shouldering the costs and risks associated with complex court cases, as this will lead to a reduction in the number of legitimate cases being heard. The current proposals ultimately stand to benefit large companies whose actions – such as engaging in anti-competitive or monopolistic practices – fly in the face of fundamental EU principles.

Resourcing the rule of law strengthens the so-called “Brussels Effect”: Europe’s ability to externalise its laws outside its borders and a key component of EU soft power. Conversely, the current proposals risk jeopardising Europe’s position as a global standard-setter.

**Access to Justice for Consumers**

The Representative Actions Directive (RAD) was implemented in December 2020 and outlines a common framework for consumer class actions. It is crucial to the EU’s “New Deal for Consumers.” Under the RAD, consumers will be entitled to bring class actions on a range of issues, including data protection and misleading advertising. However, the vast majority of EU Member States have not transposed the RAD and the EU has announced that it will begin legal action against the outstanding member states in June 2023.

The Voss proposals will undermine the RAD in two ways. Firstly, by increasing the complexity of the field at a time when lawmakers are already struggling to implement the RAD. More fundamentally, the proposed cap on fees will drive funders out of the EU market, clipping the wings of the RAD before it gets off the ground.

Legal finance has allowed tens of thousands of EU citizens to pursue justice, while consumer organisations cite a lack of funding as a barrier to justice. This report examines a number of cases which illustrate the necessity for legal finance.

**Access to Justice for SMEs**

Legal finance is helpful for businesses regardless of their size but is particularly useful for levelling the playing field between small and medium-sized enterprises (SMEs) and larger competitors. This is crucial for Europe’s economy, 99% of which is constituted of SMEs. In this way, legal finance benefits the 100 million Europeans employed by SMEs.

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4 [BEUC](https://www.beuc.eu/). Stepping up the enforcement of consumer protection rules. September 2020.
Legal finance has been frequently used in antitrust cases. As well as achieving justice for SMEs, legal finance strengthens rule of law by allowing the application of fundamental EU principles. For example, through Article 101 TFEU, a core pillar of EU law.

**Recommendations**

ILFA recommends that, before considering any further EU legislation regarding legal finance, the EU should:

1. Await the full transposition and implementation of the RAD in all member states for a sufficient period of time in order to properly assess the need for further regulation, and to gather evidence on the legal finance model of investment in particular on the interconnection between consumer rights, collective redress and B2B litigation;

2. Consult with key consumer rights groups, the European Innovation Council and SMEs Executive Agency on the impact of curbing legal finance on emerging technologies and breakthrough innovations; and

3. Ensure that any proposals on regulating legal finance are based on evidence which demonstrates a need for EU intervention, in line with the principle of subsidiarity.
1. Introduction

Legal finance is a proven route to justice for EU citizens. It also empowers consumers and small businesses to take on corporate giants in meritorious lawsuits with the help of funding. Without legal finance, individual citizens or consumer groups would not be in a position to seek redress from large corporations, while SMEs would be unable to fight contractual and IP disputes. There are extremely limited options for litigants with meritorious claims to secure investment in the high level of legal fees needed to win a case. Legal finance brings together legal and financial investment expertise to ensure access to justice. However, it is also utilised by many larger corporates that find it to be a beneficial financing tool, which allows them to maintain operating capital and mitigate risk.

Legal finance addresses two major obstacles that deter businesses and individuals from taking legal action: lack of resources and the high risks and uncertainty associated with legal action.\(^5\) Legal finance has been labelled “one of the most innovative trends in civil litigation financing” by allowing claimants to overcome these two major barriers which were traditionally considered inevitable.\(^6\) According to one expert:

“[Without legal finance] only those who feel particularly aggrieved or determined, or with deep pockets and a sufficient stake will be inclined to embark on litigation.”\(^7\)

Contrary to portrayals as a non-European legal concept, legal finance is an established part of European law and has funded many important cases in recent years. For example, settlements totalling billions of euros were paid out to EU consumers as a result of funded lawsuits following landmark European Commission fines for vehicle manufacturers over emissions scandals. These lawsuits were widely heralded as bringing justice to EU citizens and established a landmark in environmental protections being implemented.

### International commerce’s opposition to Legal Finance

In the UK, the US Chamber of Commerce has long opposed measures which have made legal finance more accessible to consumers and SMEs. Beginning in 2015, the US Chamber of Commerce opposed class actions in the UK through the lobbying group “Justice not Profit”. The group was concerned about so-called “US-style class actions” and the role of litigation funding in facilitating class actions which otherwise would not be taken.\(^8\)

The now-defunct group opposed the consumer protections introduced by the UK’s Consumer Rights Act 2015. In particular, they opposed the introduction of an opt-out class action regime intended to level the legal playing field and allow consumers and SMEs to hold businesses accountable for breaches of competition law.\(^9\)

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5 PWC. Models for the Regulation of Returns to Litigation Funders. March 2021.
6 Morpurgo, M. A Comparative Legal and Economic Approach to third-party Litigation Funding. April 2011.
7 Veljanovski, C. Third-party Litigation Funding in Europe. December 2012.

In December 2022, the US Chamber of Commerce launched “Fair Civil Justice UK”, a group aimed at combating the perceived increase in litigiousness in the UK. The group was founded following the spate of high-profile collective actions claims against large US-based companies, for example: Apple, Meta and Facebook and is led by a former Conservative UK MP. The group is concerned with tackling the so-called “growth in compensation culture” in the UK.

Recent proposals around legal finance regulation expose the fears of old economy sectors to being challenged on a level playing field in the courts. However, with the prospect of the power of Big Tech, Artificial Intelligence (AI) and multinational corporations combining to shape the new emerging economy, legal finance could become a vital tool in the armoury of enforcing EU regulation.

This paper sets out why the Voss Report is based on unstable foundations and lacks an evidenced understanding of the legal finance sector in Europe as it is and as it may be needed in the future.

Fee caps disincentivise legal finance, reducing meritorious cases

A major component of the Voss proposal is to implement a fee cap of 40% on legal finance providers. The purported aim is to ensure that claimants maintain a minimum of 60% of any award. However, this figure has not been justified with reference to any legal finance research or stakeholder consultation. The proposal points to a 30% cap mooted in Australia; however, this is controversial as research by PWC found that a 30% fee cap would lead to a 36% reduction in legitimate claims. Funders’ fees are calculated based on the risk that the case is unsuccessful, as well as the length of the case. Funded cases can last over a decade in some cases, adding significant risk to funders. By disincentivising funders from shouldering the costs and risks associated with complex court cases, fee caps negatively impact claimants.

Without legal finance, businesses must self-fund, if they can, or avail themselves of traditional bank loans to fund a case, although these are not often available for case funding. Unlike legal finance agreements, which are non-recourse, a bank loan must be repaid in any outcome of the case with financing based on non-specialist litigation risk assessment. The risk of an adverse judgment and the lack of independent expertise on risk will disincentivise SMEs from taking a case, albeit a worthy one. There has been no assessment of the problem to businesses of the interest accrued on a loan over the course of a potentially lengthy case. By favouring traditional loans over legal finance, the Voss proposal runs contrary to the right to free movement of capital, a fundamental pillar of European Union law.

ILFA believes rules concerning legal finance should exist only where required by a proven market failure. Any regulation should take into account that legal finance serves first and foremost to uphold the rule of law.

10 Law.com US Chamber of Commerce launches group to fight UK’s ‘predatory claims culture
A healthy, well-funded legal system will provide better outcomes and a higher calibre of litigation and argument in European courts. Better legal arguments help judges reach the correct outcome, the outcome that is consistent with the law and consistent across cases. Funding means that meritorious claims by consumers, SMEs, large companies, governmental or quasi-governmental institutions (e.g., state export credit agencies and municipalities) and large consumer organisations (which regularly rely on legal finance to enforce their claims) can happen.

Legal finance could be a vital component in the future battles on data, AI and new technologies involving analysis of complex issues and new legal concepts. This will require resourcing to ensure that the “Brussels Effect” – Europe’s role as a global standard setter – is maintained.

Gomes v Mastercard

In 2020, former Portuguese MEP Ana Gomes initiated a collective action on behalf of all Portuguese consumers. As in the UK-based case Merricks v Mastercard, it is alleged that Mastercard engaged in anticompetitive practices to the detriment of ordinary consumers. The case is funded by Nivalion (a Switzerland-based funder and ILFA member) on behalf of IUS Omnibus – the organisation which has collected the claims.

The case follows a January 2019 fine by the European Commission. Justifying the €570m fine, Commissioner Margrethe Vestager highlighted the damage such anti-competitive behaviour has wrought on ordinary consumers. According to Vestager, Mastercard artificially raised the costs of card payments, affecting everything from online shopping to fundamental necessities such as food. Cases such as these help to strengthen the rule of law while providing restitution for victims.

According to IUS Omnibus, legal finance is “the only way to pursue an action of this type”, as a lack of financial resources is the number one barrier to bringing claims on behalf of consumers. The claimants are seeking €400m, an average of €40 per consumer. Some proceeds of the case will also be donated to the Portuguese Ministry of Justice to facilitate access to justice and allow for further collective actions.

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14 IUS Omnibus.
2. Legal Finance in Europe

All EU member states besides Ireland and Cyprus are civil law jurisdictions. The freedom to contract is a fundamental tenet of European civil law jurisdictions and a fundamental pillar of European Union civil law. According to Article 1: 102 of the Principles of European Common Law (PECL), “parties are free to enter into a contract and to determine its contents, subject to good faith and fair dealing”.

The principle of freedom to contract is key to the concept of legal finance, which is not new to the EU, nor is it a practice which has been recently imported from other jurisdictions. Legal finance has existed in some form in several member states for decades and by 2011, legal finance in some form could be found in almost all EU jurisdictions, save for two outliers where it was prohibited: Portugal, which no longer prohibits legal finance, and Greece.16

In Germany, the freedom to contract means that legal finance is “widely accepted” and permitted in civil proceedings, with the exception of cases involving the confiscation of profits.19 The first major legal finance providers entered the German market in 1998. Therefore, the legal finance sector is “relatively mature and well-developed”20, even relative to all other jurisdictions with large legal finance sectors. Legal finance in Germany is generally focused on business-to-business cases with damages of €25,000-100,000 on average.21

In the Netherlands, the Civil Code does not restrict the use of legal finance, so that “parties are generally free to shape their funding agreement as they like”. In recent years, SMEs have been availing of legal finance in order to take cases against more well-resourced companies.22 The growing role of legal finance in the Netherlands has made it an important venue for high-profile international cases against powerful multinational corporations for anti-competitive behaviour and securities fraud.23

Germany and the Netherlands

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17 ILFA FOLLOW UP SUBMISSION TO THE EUROPEAN COMMISSION ON THIRD PARTY LITIGATION FUNDING 19.01.2023
23 Thompson, L, How the Netherlands Became Europe’s Prime Class Action Jurisdiction. February 2022
Take Back Your Privacy Foundation and Consumentenbond v TikTok

In the Netherlands, the Take Back Your Privacy Foundation and consumer rights group Consumentenbond launched a civil claim against TikTok alleging that the app:

(i) processes the personal data of children on a large scale without a lawful justification to do so nor do they have a system for checking how old users are, and whether children have parental consent when required by law.
(ii) provides insufficient information about the privacy and consumer rights of children using the platform which means they are not aware that their privacy and consumer rights are being violated.
(iii) exposes children to a harmful situation including security problems given personal data is sent to countries such as China and the app also shows children harmful videos and advertising.

The foundations are demanding billions of euros in damages from TikTok for breaching the privacy of 4.5 million Dutch users. The case is funded by IVO Capital, a litigation funder.

France and Spain

In France, the use of legal finance in domestic courts is uncommon but growing, with an increasing recognition of the benefits of legal finance for antitrust and consumer protection claims. On the other hand, Paris has become a hub for legal finance in international arbitration cases.24 Class actions are uncommon, however. The Depakine case is the first example of a French class action, the claimants in which, as discussed below, may have benefited from legal finance. 25 While the domestic legal finance sector in France is still developing, as mentioned above the use of legal finance for international arbitration is well-established in Paris. The Paris Bar Council has explicitly recognised the value of legal finance for international arbitration, arguing that it increases access to justice and aligns with French Civil Law.26

Legal finance is also a relatively new and underdeveloped sector in Spain, with legal finance providers first entering the market in 2016. As in the jurisdictions above, legal finance is permitted under Spanish civil law, due to the freedom to contract. Although legal finance is a new development, consumer protection legal actions have a longer history in Spain, as the landmark 1997 Colza Oil case demonstrates. In 1997, Spanish consumer group OCU won €3bn for 20,000 individuals who suffered from the Colza Oil poisoning scandal in 1981, where over 600 people died and a further 25,000 were poisoned due to consuming industrial-grade rapeseed oil.27

As demonstrated by the above, legal finance is not a recent import to Europe. Rather, it is a large and growing sector that is not only entirely in accordance with the freedom to contract enshrined in European civil law but stands on its shoulders. The following section will explore in greater depth how legal finance benefits the rule of law and strengthens fundamental EU principles such as free competition in open, fair markets.

3. Upholding European Rule of Law

The Voss proposal will, perhaps unintentionally, affect the rule of law, undermining fair competition and antitrust law and weakening European soft power.

"Restricting the availability of legal finance to those who have been wronged prevents them from holding wrongdoers accountable and recovering the compensation for their losses that justice requires. Lack of legal finance allows wrongdoers to ignore laws and thus undermines the rule of law. By enabling the pursuit of meritorious claims on behalf of corporations and individuals, legal finance creates equality of resources – also referred to as equality of arms – between unequal parties, which contributes to the equal protection of the laws."

The rule of law and the legal system benefit when well-argued, meritorious cases can be heard. By allowing such cases to proceed regardless of the complexity or length of litigation, legal finance will improve outcomes by allowing for the correct application of EU law. Overburdensome regulation, such as a cap on fees, would have the negative effect of disincentivizing finance providers from investing in lengthy and complex cases, which would not support the goals of the European Union or the proper development of European jurisprudence.

Legal finance provides access to justice and supports the enforcement of EU law by enabling the assertion of meritorious claims that would otherwise not be brought due to lack of funding. It is particularly useful for lengthy, complex cases which are both risky and expensive. Legal finance also creates a level playing field for all participants in a case, allowing both parties to avail themselves of quality legal representation and adequate resources to fully present their case. From contract disputes to competition and antitrust regulation, legal finance can serve to strengthen European rule of law.

On competition law, legal finance can help to protect Europe's SMEs from large companies’ abuse of their market dominance. As tech giants increasingly dominate not only the tech sector, but also manufacturing, legal finance is essential to level the playing field and allow European businesses both large and small to protect their rights.

Legal finance furthers the application of fundamental EU legal principles which protect fair competition. For example, legal finance allows SMEs to hold companies to account for infringing Article 101 TFEU (previously Article 81 TEC), which prohibits price fixing, collusion and other anti-competitive behaviour.

The EU’s Antitrust Damages Directive recognises that private damages claims are an important tool for enforcing corporate responsibility, complementing public enforcement mechanisms such as fines. Furthermore, in 2014, the Court of Justice of the EU (CJEU) ruled that victims who have suffered a loss due to a cartel may seek “umbrella damages”. This entitles victims to damages even if they did not purchase directly from a cartel member.

28 How Legal Finance Promotes the Rule of Law - Gary Barnett, ILFA Executive Director - speech at The Brown Rudnick European Litigation Finance Conference (17 May 2022)

Google Advertising Case

In 2022, Geradin Partners – a Belgian law firm – announced that it is bringing a case against Google in the Netherlands on behalf of publishers – from national to local media – who, it argues, have suffered due to Google’s alleged anticompetitive conduct in online advertising. According to Geradin Partners, the case could not be taken if it was not for funding provided by Harbour, a global legal finance provider and ILFA-member.

The case was filed in the Netherlands in cooperation with Dutch law firm Stek, who contend that Google had “engag[ed] in various forms of self-preferencing in its advertising tools”, in breach of Article 102 TFEU. This followed a ruling by the French Competition Authority, who previously fined Google €200m for violating Article 102 TFEU.

In this case legal finance provided by Harbour has empowered cash-strapped local newspapers to pursue action against Google, the sixth largest company in the world by market capitalization. European publishers have long alleged that Google has been involved in anti-competitive ad tech practices. In February 2022, the European Publishers Council, which represents publishers across the EU, filed an antitrust complaint against Google alleging anti-competitive ad tech practices.

Similar collective actions have been filed in the UK, where it is alleged that Google has also abused its market-dominant position, leading to reduced ad revenues of up to 40% for traditional publishers. A former editor of the Guardian Newspaper is leading the claim for £3.4bn in compensation for UK publishers, while a former Director of Ofcom – the UK’s communications regulator – is seeking £13.6bn in a similar claim.

The threats to fair competition from larger companies will only be heightened by new “transversal technologies” ushered in by recent technological innovations. These are new, powerful technologies that have uses across every sector of the economy.

Europe is already behind on the development of the majority of these new transversal technologies, such as AI and quantum computing. For example, 50% of the top quantum computing companies are based in the US, while 40% are based in China, and none in the EU. Similarly, in AI, 40% of available R&D funding was captured by US-based companies, Asia captured 32% and only 12% was secured by European companies.

According to McKinsey, larger companies’ dominance in these technologies “jeopardises [Europe’s] position in nearly all sectors, including

31 Stek. Stek brings damages action against Google on behalf of publishers
current strongholds like automotive and luxury goods. The European Political Strategy Centre (EPSC) has echoed this concern that even traditionally strong European industries risk losing out to larger competitors based abroad.

Large tech companies are already beginning to develop a “systemic presence across sectors” – for example, Amazon, Apple, Tencent and Meta are increasingly producing both software and physical products (internet of things and smart devices). This is especially apparent in the traditionally secure automotive manufacturing industry in Europe. Companies such as Waymo – a subsidiary of Alphabet – as well as Apple, Nvidia, Microsoft and Uber exploring self-driving technology. Self-driving technology, therefore, is dominated by major US tech companies. Conversely, electric car manufacturing is dominated by China. According to the EPSC, competition from US and Chinese companies has meant that “the future of Europe’s car industry could not be more uncertain”.

The Foundation contends that both platforms imposed higher costs on consumers due to a lack of competition to their app stores – in some cases securing a premium of up to 30%. According to Alexander Klopping – the tech entrepreneur leading the case – the two companies were empowered to extract rents of up to 30% from every purchase on their platform due to their duopoly in the market. This case was made possible by litigation funding; without litigation funding, many consumers would lack the resources to take a risky case against a better resourced firm. Legal finance also empowers consumers to avail of sophisticated legal counsel.

Lastly, the rule of law is vital to the ability of the EU to enable the process of unilateral regulatory globalisation and to externalise its laws outside its borders through market mechanisms. This ability, commonly known as the “Brussels Effect” is a key component of European soft power. If European rule of law is diminished, there is little incentive for global companies to conform to the standards set by the EU, jeopardising its position as a global standard-setter.

The importance of Europe’s soft power is apparent in the tech sector in particular. Here, according to the EPSC, a strong competitive market is required in order to ensure Europe’s strategic interests. If Europe’s SMEs fall behind larger rivals, particularly those from China, the EU’s ability to shape new technology according to its own preferences will be undermined, leaving it to take a reactive approach. This risk is

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39 EPSC. EU Industrial Policy after Siemens-Alstom. 18th March 2019
40 EPSC. EU Industrial Policy after Siemens-Alstom. 18th March 2019
41 See: Rechtspraak. Stichting App Store Claims v Alphabet Inc.
42 Netherlands Times. Dutch group claims billions from Apple for overcharging in App Store. April 2022.
43 Eevendaag. Professor thinks that a billion euro claim against Apple and Google has a chance of success. February 2022.
especially acute given the destructive potential of new technologies such as AI deepfakes and algorithmic biases.\textsuperscript{45}

The EU has begun to recognise the risks associated with AI and in May 2023 began the process of drafting the first rules on AI.\textsuperscript{46}

In summary legal finance will – by allowing cases to be heard on their merits – enable the proper and intended application of EU law. For example, it allows for the enforcement of Article 101 TFEU (previously Article 81 TEC), a fundamental pillar of EU law which ensures open and competitive markets. By strengthening the rule of law, legal finance will allow Europe to continue to exercise its soft power, shaping the development of new and potentially dangerous technologies.

\textsuperscript{45} EPSC. Rethinking Strategic Autonomy in the Digital Age. July 2019.

\textsuperscript{46} European Parliament. AI Act: a step closer to the first rules on Artificial Intelligence. May 2023
4. Protecting Europe’s SMEs

In 2022, 16% of the global legal finance sector was Europe-based, having seen significant growth in recent years, and is predicted to grow further. This will allow more SMEs to pursue claims as either a way to maintain operating capital in their business or to level the playing field against better-funded adversaries. As we enter a new period of rapid technological expansion with the rise of AI, cloud technology and quantum computing, legal finance is an invaluable tool for protecting the interests of EU businesses against external threats, particularly for SMEs, start-ups and scale-ups.

Currently, the EU lags behind the world in tech businesses, falling far short of America and China. In 2016, the value of the EU’s top eight companies was worth just 10% of US-based Facebook and 6% of Google. Of the 30 largest technology companies, only one is EU-based; according to the Progressive Policy Institute, this demonstrates the importance of tech SMEs to the EU economy as a whole. The EU itself has recognized that SMEs are the majority of its economy, equal to 99% of all EU businesses. Europe’s SME-dominated economy includes 160,000 start-ups and approximately 2.6 million start-up employees.

Europe was left behind after the last internet revolution: allowing its SMEs to thrive can ensure that Europe is better equipped to deal with the upcoming seismic changes ushered in by new and emerging technologies. Increased competition and innovation comes with the potential for increased anti-competitive behaviour by large US and Chinese tech giants, as well as intellectual property (IP) theft by large companies from European SMEs. Legal finance has already been shown to be beneficial in several high-profile antitrust cases in traditional European industries, such as construction and automotive manufacturing.

The German Cement Cartel Case

Between 1991 and 2002, a number of large German cement manufacturers formed a cartel and engaged in market-sharing agreements contrary to competition law. The cartel had a significant impact on the market, driving up the costs for consumers by between 20.3-26.5%. The knock-on effects of criminal activity such as this are felt throughout the supply chain, affecting everyone from SME building firms purchasing the cement, to ordinary consumers buying houses.

In 2015, a special-purpose vehicle (SPV) – which bundled together several claims of affected parties – was not permitted to take a claim against the manufacturers, due to a lack of funding. The Higher Court of Dusseldorf ruled that the SPV did not have sufficient resources to reimburse the defendant in the case of.

47 The Global Legal Post, Europe’s share of litigation funding market set to grow as ESG and human rights fuel cases, report finds. July 2022.
48 Moritz, M. Europe should forget Google and investigate its own shortcomings, Financial Times, 22 April 2016.
49 PPI, Encouraging AI Adoption by EU SMEs. March 2021.
52 Harrington et al, The Case of the German Cement Cartel. 2014.
This demonstrates the potential value of legal finance for claimants bringing meritorious, but expensive and potentially complex, actions against more powerful businesses.

The weaknesses of the European tech sector vis-à-vis the US and China has been well documented. Europe's SME-dominated tech sector has already faced pressures from US-based tech giants on the one hand and Chinese state-based companies on the other.

It is increasingly apparent that large multinational corporations present a current and future risk to the growth of the EU's tech sector: Google and its parent company Alphabet have already faced significant regulatory action from the EU. Beginning with a €2.42bn fine for abusing its market position, Google has been fined a cumulative €8.25bn in three separate Commission investigations. However, the Commission's enforcement has been viewed as insufficient by many of the EU startups affected. In 2020, a coalition of 135 startups signed a letter directed to the Commission which urged the Commission to do more to curb Google's dominant position. This demonstrates the value of legal finance, which provides SMEs with the resources to collectively challenge larger rivals. In other areas, class actions have followed EU rulings on anti-competitive behaviour, serving to reinforce European rule of law by securing follow-on damages for affected companies, as well as the initial Commission fine. By 2021, 40% of financed cases in Europe involved competition law in the tech sector.

The European Trucking Cartel Case

In 2016, the European Commission found that several large truck manufacturing companies were guilty of violating competition law by fixing the price of trucks between 1997 and 2011. The companies, which include Daimler, Volvo, Iveco and MAN, were also found guilty of passing on compliance costs of emission rules to consumers.

The effects of the manufacturers' collusion were felt by over 600,000 hauliers across the EU, the majority of which are SMEs. Many affected businesses have turned to legal finance in order to recover damages from the cartel: the purchasers of over 450,000 trucks have taken cases against the cartel in many member states including Germany, the Netherlands and the UK. One case in Germany involves over 11,000 claimants seeking €100m in total damages, while a parallel case in the Netherlands has been initiated on behalf of 13,000 claimants.

In Germany, railway company Deutsche Bahn brought a case against the cartel on behalf of itself and 40 other European entities, including the German Army. The lawsuit covered more than 35,000 trucks worth €2bn purchased between 1997-2011.

Intellectual property

In January 2023, the European Union Intellectual Property Office (EUIPO) identified intellectual property theft as a major threat to the survival of small and medium-sized businesses.

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54 OLG Dusseldorf 18 Februar 2015 (Az. VI U3/14)
56 Tech Crunch. Act now before Google kills us, 135-strong coalition of startups warns EU antitrust chief. November 2020
57 CMS. European Class Action Report 2022.
58 European Commission, Antitrust: Commission fines truck producers €2.93 billion
59 Hausfeld. The Trucks Cartel
60 Lief Cabraser. European Truck Cartel litigation.
61 Reuters. Deutsche Bahn to lead claim for damages against truck cartel. December 2017
of European SMEs. According to the report, 15% of SMEs who own IP have experienced an IP violation, and SMEs whose IP is stolen are 34% less likely to survive after 5 years, particularly in cases relating to patent infringement. One reason why is that SMEs, as well as startups, lack the necessary resources to protect their IP. The infringed party often faces the dilemma of seeking legal recourse or depleting their operating capital.

The majority of IP violations come from companies based outside of the EU, particularly in China. In 2017, over 1,560 cases of IP violations by Chinese companies were detected in exports to the US. The risks of IP violations are increasing due to the digitalisation of SMEs – a trend which, sped along by the Covid-19 pandemic, is likely to continue.

The Commission has recognised this, launching its SME fund which includes IP vouchers to allow SMEs to protect their IP rights. Legal finance would serve as another tool in the arsenal of SMEs.

Legal finance will be required to level the playing field between European SMEs and Chinese companies, given the asymmetry of power between the two. China has “played outside the rules” on economic and trade policy, using state support to fund mergers and acquisitions in EU markets. It is necessary to provide European SMEs with the tools to pursue justice, particularly at a time when Chinese investment in the EU has brought with it a number of security issues.

62 EUIPO-OECD. Risks of Illicit Trade in Counterfeits to Small and Medium-Sized Firms. January 2023.
63 Reuters. China detected more than 1,560 cases of U.S.-related IP infringement this year. November 2017.
64 EUIPO-OECD. Risks of Illicit Trade in Counterfeits to Small and Medium-Sized Firms. January 2023.
66 EPSC. EU Industrial Policy after Siemens-Alstrom. 18th March 2019.
67 See, for e.g.: European Council on Foreign Relations. China at the Gates: A New Power Audit of EU-China Relations. December 2017.
5. Enhancing Consumer Rights

This section examines how legal finance benefits individual European consumers – from medical negligence to digital rights to securities fraud, legal finance allows individuals to take collective claims against larger and better-resourced adversaries. Given the time and resources required to bundle claims together, overburdensome regulations, such as the fee cap in the Voss proposal, would disincentive finance providers from taking meritorious cases such as these.

In a 2020 study, BEUC – the European Consumer organisation – found that consumer rights groups were discouraged from taking class actions due to high costs and lack of funding. As a result, consumer groups are increasingly turning to legal finance to hold companies to account. In the tech sector, data protection and consumer liability issues together represented 60% of financed cases in 2021.

The Depakine Case

January 2022 saw the first class action in France, when the Paris Judicial Tribunal ruled that a class action was admissible and that 7,500 families – represented by the victims’ organisation APESAC – may take a case against Sanofi, the largest pharmaceutical manufacturer in France. The case relates to an epilepsy drug – Depakine – which, when taken by pregnant women, caused birth defects in children. Although its manufacturer was aware of the high risk of serious congenital birth defects, such as spina bifida and autism in babies, this information was never adequately communicated.

Although consumer protection class actions were introduced into French law in March 2014, and later extended to healthcare, environment, data protection and discrimination cases, the Depakine trial is the first actual use of a class action in France. According to a woman affected by the drug, the case demonstrates that “A small person can win against Big Pharma […] it is possible.”

However, it has been noted by Pogust Goodhead that a lack of funding for the plaintiffs has been an issue in the case, due to the “the lack of an effective third-party litigation funding system in France.” While Sanofi has been ordered to cover €160,000 of APESAC’s legal costs, this falls short of the predicted cost of €1,125,000. This leaves associations such as APESAC to fund the remainder of their costs, and risks deterring meritorious cases.

In the past, legal finance has also been used to seek justice in the emerging field of digital rights. For example, legal finance played a role in enforcing GDPR in the Marriott data leak case.

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68 BEUC. Stepping up the enforcement of consumer protection rules. September 2020.
69 CMS. European Class Action Report 2022.
74 Buisson, E. and Krestin, M. The Sanofi Ruling (5th January 2022 – N°RG 17/07001)
75 Buisson, E. and Krestin, M. The Sanofi Ruling (5th January 2022 – N°RG 17/07001)
The Marriott GDPR Case

In 2018, the data of over 500m Marriott customers was stolen in one of the largest data leaks in history. For 327m customers, the data leak included data that could jeopardise consumers’ privacy rights, including extremely sensitive information such as passport numbers, addresses and payment information.76

In 2020, the UK’s Information Commissioner’s Office (ICO) found that Marriott had not taken sufficient steps to protect customers’ data against loss or unlawful processing as required by Articles 5(1)(f) and 32 GDPR and fined the company £18.4 million.77 Following the ICO’s announcement of its intention to fine Marriott for infringing GDPR regulations, a funded action was announced by Hausfeld law firm and ILFA member Harbour Litigation Funding. According to reporting at the time, the leak was conducted by Chinese hackers.78

The Marriott case was brought in the UK while it was still a member of the EU and demonstrates how legal finance can assist in applying European rule of law. While this case was ultimately discontinued, it demonstrates the potential for legal finance to facilitate mass consumer claims which serve the public interest. Additionally, in this case and others, litigation makes the corporate calculation on violating EU law expensive and reputationally risky, enhancing consumer rights.

Major legal finance providers have begun to prioritise cases where companies are held to account for malfeasance or criminal behaviour.79 These resources allow shareholders to collectively take meritorious claims against larger companies, enforcing good corporate governance while achieving justice for ordinary “mum and dad shareholders”. Recent examples include the Fortis/Aegis Case and the Petrobras case.

The Fortis/Ageas Case

The Fortis/Ageas Case involving securities fraud was the largest case between a company and its shareholders in the EU’s history. It concluded in 2018 after seven years of litigation.80 Belgian financial services firm Fortis was sued by its shareholders – represented by commercial and non-profit organisations – for securities fraud. It was accepted that Fortis misled its investors about the value of its debt obligations and exposure to risks posed by subprime mortgages following its collapse amidst the 2008 financial crisis.81 This came after the governments of Belgium, Luxembourg and the Netherlands invested €11bn to prevent the firm’s collapse.

As Belgium’s largest bank at the time of the financial crisis, Fortis’s malpractice exposed thousands of ordinary, “mum

76 Marriott International. Marriott Announces Starwood Guest reservation Database security incident.
79 Funds Europe. ESG: Soros-backed Aristate fund aims to turn ESG litigation into a profitable investment. October 2022.
80 Reuters. Dutch court Approves $1.5 billion Fortis shareholder deal, July 2018.
81 Investment and Pensions. Europe Dutch court approves €1.3bn Fortis settlement
and dad shareholders” to significant risk. Fortis misled consumers that its exposure to sub-prime mortgages was €20m, when the actual number was closer to €8bn. As a result, the stock price fell causing damages to investors of approximately €18bn. In 2022, Ageas completed its final payments of €1.3bn to the more than 279,000 claimants.

Supported by the Brussels-headquartered legal finance firm Deminor, the Fortis Case has been called a “game changer” in paving the way for investors to hold corporate entities to account for malfeasance. Albeit based in the Netherlands, the case was taken against a Belgian company and represented shareholders worldwide, demonstrating that the Dutch collective action process can be used to hold global companies to account.

As well as holding businesses accountable for malfeasance, legal finance allows EU citizen investors to seek compensation for a loss of income from corporate malpractice. Without legal finance, which allows shareholders to bundle their claims, ordinary investors could not take individual cases to court for compensation. Not only would individual investors lack the resources to challenge large financial institutions with sophisticated legal counsel, but a glut of individual cases would overwhelm the justice system.

Petrobras Shareholders Case

Legal finance was used by investors to hold Petrobras to account following a multi-billion-dollar bribery scandal at the Brazilian state-run oil company. In one of the largest corruption scandals in history, Petrobras executives diverted up to 3% of all funds generated from oil contracts to the Brazilian Workers’ Party (PT).

In 2021, a Dutch court ruled that international shareholders — both institutional and consumer — may move ahead with a class action requesting compensation for all investors who purchased shares in Petrobras on the Brazilian or European stock exchanges between 2004-2015. This process is using the Dutch WCAM collective redress mechanism, an opt-out collective redress system that allows for international class actions.

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83 Ageas. Ageas announces the payment of final instalments in the Fortis settlement.
6. Australia’s “U-turn” on Regulation

The proposed European directive justifies its aims by referring to the Australian experience with legal finance, stating that such an intervention is required specifically in order to “spare European citizens from the unjust legal outcomes that thousands of Australians [...] have had to face in recent years”. However, the Liberal Party’s crackdown in Australia on legal finance was politically controversial and was criticised for favouring big business and for its lack of evidence.

The overbroad regulations were perceived in the media to have been pushed by the Morrison-led Liberal Party with support from powerful corporate and foreign lobbying interests. This politically motivated crackdown on legal finance also met with significant political opposition from the Labour Party, among others. As early as 2019, the Morrison-led government had criticised legal finance providers for funding cases in which shareholders sought to hold companies to account. In 2020, the Liberal-controlled Australian government passed the Corporations Amendment (Litigation Funding) Regulations 2020, which increased regulatory oversight of the legal finance sector. At the same time, the Treasury suspended continuous disclosure laws during the Covid-19 pandemic in order to protect companies from facing consequences for misleading their shareholders. This was criticised by lawyers as “watering down corporate responsibility” which would “advantage powerful company directors over mum and dad investors”.

In May 2020, an inquiry by the Liberal-controlled Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) made reference to the “significant growth in shareholder class actions” and recommended a minimum 70% return to class members. The report also aimed to make permanent the suspension of continuous disclosure introduced during the pandemic. The PJCCFS report was supported by the US Chamber of Commerce’s Institute for Legal Reform, who criticised Australia’s “plaintiff friendly” class action regime.

Labour members of the PJCCFS stated that the process was “an embarrassing shambles” and that “some of the statements in the report are just factually wrong”. The justification for fee caps in particular was not sufficiently evidenced. The Labour minority report contended that the report was an ideologically driven attempt by the Liberal party to reduce checks and balances on businesses. The Labour MPs also criticised the role of lobbying by organisations with links

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86 European Parliament. Report with recommendations to the Commission on responsible private funding of litigation
87 Lawyerly. Law Firms Livid as powerful US group throws money into class action debate. June 2020.
88 The Guardian. Australian litigation funding giant rejects Christian Porter’s Lawfare Claim
90 The Guardian. Josh Frydenberg’s plan to water down company disclosure laws condemned. February 2021
91 Parliament of Australia. Call for Evidence: Litigation Funding and the Regulation of the Class Action Industry
92 PICCFS. Report: Litigation funding and the regulation of the class action industry
94 PICCFS. Report: Litigation funding and the regulation of the class action industry - Labour Minority Report
The Stolen Generation case

The case, which was made possible by support from ILFA member Omni Bridgeway, related to the forced separation of Indigenous Australian children from their families. In April 2023, a Supreme Court of New South Wales ruling awarded $50 million to “removed children” who were forcibly displaced from the Northern Territories between 1912-1973.

Despite this, the Liberal Government introduced the The Litigation Funders Bill in 2021. The consultation period for the Bill was similarly controversial, and was an unusually brief process for a major piece of legislation: the window fee cap would lead to a reduction in the overall availability of meritorious class actions. The study found that, if a 30% cap were imposed, 36% of previous successful cases would not have been taken. However, the Bill elapsed as it failed to pass through the Senate prior to the 2022 elections.

Furthermore, many of these rashly imposed regulations on the legal finance industry are now being unwound. The Labour Government has now not only disavowed that proposal but has removed regulations relating to the Australian Financial Service License, managed investment scheme and other corporate regulatory regimes for legal finance providers. The Labour Government has signalled further interest in enacting legal finance regulations to increase access to justice in Australia.

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98 PWC. Litigation Funding - Final Report.
As described above, the Voss proposal is based on several false premises, misinformation and lack of data. In its zeal to restrict access to legal finance by imposing burdensome regulations on the legal finance industry, it would force the disclosure of sensitive information included in funding agreements and limit the fees necessary for bearing the high costs and risk of litigation, among other provisions.

As shown, legal finance benefits both SMEs and consumers alike. Second, Australia is not an example of a regulatory regime that worked, nor is Australia analogous to the European context, and the regulations were politically and ideologically driven by foreign lobbying interests, which should not form the basis for European regulation. Third, legal finance is not a recent import into European jurisdictions. This report has demonstrated that legal finance has existed in the EU for decades, upholds the rule of law, and protects Europe’s SMEs and consumers alike.

**Recommendations**

ILFA recommends that, before introducing any further EU legislation regarding legal finance, the EU should:

A. Await the full transposition and implementation of the RAD in all member states for a sufficient period of time in order to properly assess the need for further regulation, and to gather evidence on the legal finance model of investment in particular on the interconnection between consumer rights, collective redress, and B2B litigation;

B. Consult with key consumer rights groups, the European Innovation Council and SMEs Executive Agency on the impact of curbing legal finance on emerging technologies and breakthrough innovations; and

C. Ensure that any proposals on regulating legal finance are based on evidence which demonstrates a need for EU intervention, in line with the principle of subsidiarity.
Legal Finance

- Legal Finance, or Third-party litigation funding, is a method of financing legal cases whereby a funder who is not party to the lawsuit – meaning they are neither the claimant nor the defendant in the case and do not control the litigation – agrees to provide capital to one of the parties directly involved in the case.
- The funder agrees to fund the case in exchange for a share of the potential recovery following the settlement. Crucially, legal finance agreements are non-recourse, meaning that the recipient of the funding is not obliged to repay the funder if their case is unsuccessful.
- The legal finance industry is divided into two distinct sectors: Commercial legal finance and consumer litigation finance. Commercial legal finance refers to the financing of disputes between companies or other corporate entities, generally involving multi-million-euro disputes with sophisticated legal counsel on both sides. Consumer litigation funding, on the other hand, is far less common and refers to the funding of cases for private individuals.
- As it stands, there is no regulatory regime specific to legal finance providers in the EU. Rather, legal finance is regulated like any other financial service such as services offered by banks and investment firms.
- However, unlike other financial services providers, legal finance providers are bound by voluntary professional codes of conduct such as that promulgated by ILFA and the Association of Litigation Funders of England and Wales (ALF), and also by rules governing courts and other tribunals and rules of professional responsibility governing the practise of law. In addition, some legal finance providers are publicly traded companies that must comply with global financial market regulations.

The Representative Actions Directive (‘RAD’)

- The Representative Actions Directive (‘RAD’), is an EU directive, which came into force on 24 December 2020 and outlines an EU-wide common framework for collective actions (‘CAs’).
- Under the RAD, groups of consumers will be entitled to bring CAs against businesses and other institutions on a range of issues including data protection, misleading information and unfair contract terms.
- Under the RAD, CAs must be initiated by Qualified Entities (QEs) – independent, non-profit organisations which represent the interests of consumers. QEs, rather than individual consumers themselves, will be the parties to the case and thus liable for costs incurred.
- EU Member States (MS) were given two years to transpose the RAD into their national law. However, by the December 2022 deadline, only three MS had done so with the threat of legal action by the EU looming after June 2023.

The Voss Report/Proposal

- “The Report with recommendations to the Commission on responsible private funding of litigation” or the “Voss Report” is an Own-initiative Report presented by Axel Voss MEP to the European Parliament in October 2022.104

- Voss is a German MEP, a member of the centre-right European People’s Party, a lawyer at the law firm Bietmann and a member of Deutsche Telkom’s advisory board.105

- The Own-initiative report proposes a number of broad constraints on the legal finance sector, including a cap of the fees a funder can charge following a successful case, and a duty for funders to disclose the details of their funding agreement.

- Voss’s proposal was endorsed by a plenary vote of MEPs, garnering the support of 81% of MEPs, with 9% in opposition.

- Own-initiative reports are not legislation. They are simply a way for the rapporteur to raise an issue about which they feel strongly and have this issue voted on at plenary.

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104 European Parliament. The Report with recommendations to the Commission on responsible private funding of litigation.
105 Politico. MEPs hold ethically slippery side jobs — but they’re perfectly legal
About ILFA

The International Legal Finance Association (ILFA) is an independent, non-profit global association of commercial legal finance companies. ILFA has chapters across the world, including a sizable chapter representing legal finance providers based in the EU and with significant EU business presence.

ILFA stands for the promotion of the highest standards of service in the commercial legal finance sector and is committed to the rule of law. ILFA’s members comply with self-imposed rules establishing high standards that are the benchmark for legal finance both in the EU and worldwide and some are publicly traded companies that must comply with global financial market regulations.

ILFA’s mission is to advocate on behalf of commercial legal finance providers and educate policymakers on its benefits. ILFA has established a code of best practice that includes a commitment to the following principles:

- Clarity
- Respecting duties to the courts
- Avoid conflicts of interest
- Preserve confidentiality and legal privilege
- Capital adequacy