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REPORT

with recommendations to the Commission on Responsible private funding of litigation
(2020/2130(INL))

Committee on Legal Affairs

Rapporteur: Axel Voss

(Initiative – Rule 47 of the Rules of Procedure)

CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
ANNEX TO THE MOTION FOR A RESOLUTION: RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED	9
EXPLANATORY STATEMENT	30
INFORMATION ON ADOPTION IN COMMITTEE RESPONSIBLE.....	34
FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE	35

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))

The European Parliament,

- having regard to Article 225 of the Treaty on the Functioning of the European Union,
 - having regard to Article 47 of the Charter of Fundamental Rights of the European Union,
 - having regard to Article 5 of the Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament¹,
 - having regard to 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/EC²,
 - having regard to 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,
 - having regard to the Study conducted by the European Parliament Research Service ‘Responsible Private Funding of Litigation’ of March 2021,
 - having regard to Rules 47 and 54 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A9-0218/2022),
- A. whereas Member States have a primary responsibility to make adequate legal aid available to those who lack sufficient resources with a view to ensuring access to justice for all, in line with Article 47 of the Charter of Fundamental Rights of the European Union; whereas public legal aid and public prosecution are and must remain the central mechanisms to guarantee the fundamental right to an effective remedy and to a fair trial;
- B. whereas commercial third party litigation funding (TPLF) is a growing practice whereby private investors (‘litigation funders’) who are not a party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award; whereas collective redress is only one type of litigation in which TPLF is currently used, with other examples being arbitration, insolvency proceedings, investment recovery, anti-trust claims and others;
- C. whereas TPLF could, if properly regulated, be used more often as a tool to support access to justice, especially in countries where legal costs are very high or for women

¹ OJ L 262, 7.10.2005, p. 1.

² OJ L 409, 4.12.2020, p. 1.

and marginalised groups with additional funding barriers; whereas TPLF could also increasingly help to ensure that public interest cases are brought to court and to reduce significant economic imbalances that exist between corporations and those citizens seeking redress, and thereby ensure appropriate corporate accountability;

- D. whereas the British Institute of International and Comparative Law (BIICL) report on the ‘State of Collective Redress in the EU in the context of the Commission Recommendation’ highlights that in some Member States, third party funding has become an essential factor in the realisation of collective redress³; whereas the Commission Report COM(2018)0040 on the implementation of the 2013 non-binding recommendations on collective redress highlights the fact that TPLF is a key aspect of collective redress, which has an important cross-border dimension;⁴
- E. whereas litigation funders involved in legal proceedings may act in their own economic interest, rather than in the interest of claimants; whereas they may seek to control the litigation and demand an outcome that pays them the greatest return and in the shortest amount of time⁵; whereas it is essential to ensure that adequate damages are paid to victims;
- F. whereas, while TPLF is virtually non-existent in Europe, it is a booming phenomenon in investment arbitration that multiplies the number and the volume of claims of private investors against States;
- G. whereas, according to the available data, litigation funders may, in certain Member States, demand a disproportionate share of the proceeds that exceed the typical returns of other types of investments; whereas the amounts claimed by litigation funders normally range across the Union from 20% to 50% of the award ⁶, but outside the Union such claims can in some cases represent returns on investment of up to 300%; whereas rules should be introduced to ensure that the fees paid to litigation funders are proportionate and the award is granted first to the claimants, before the fee is paid to the litigation funder;
- H. whereas TPLF is not the only way to facilitate access to justice, and other instruments, such as legal aid or legal cost insurance, are available to facilitate such access, and extrajudicial remedies also exist to seek redress, such as mediation, ADR/ODR, the Ombudsman or through grievance systems managed by companies; whereas those solutions could result in faster and more adequate compensation for claimants although such remedies are not always necessarily effective enough in providing adequate redress; whereas claimants should always be given the possibility of directly seeking a judicial remedy;

³ https://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf, page 19.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0040&from=EN>, page 10.

⁵ The Australian Parliament concluded “the level of power and influence litigation funders have in class actions gives rise to situations where their financial interests trump those of the representative plaintiff and class members”, see Australian Law Reform Commission (2019): An Inquiry into Class Action Proceedings and Third-Party Litigation funders, p. 19.

⁶ EPRS Study (2021): Responsible private funding of litigation. Annex - State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding.

- I. whereas TPLF is prevalent in Australia, the USA, Canada, the United Kingdom and the Netherlands, and it is regarded by some as a key factor in ensuring that access to justice is available⁷, nevertheless, there are also concerns about abusive practices in some jurisdictions; whereas, empirical data⁸ show that litigation funders most often select cases that represent the best potential returns, and would not invest in cases they regard as too risky or not profitable enough;
- J. whereas the number of litigation funders is hard to determine, with at least 45 such funders known to operate in the Union; whereas, although in most Member States, the practice of TPLF has so far been limited in its extent, it is expected to play a growing role in the coming years, but it remains largely unregulated in the Union, despite the fact that it could present not only benefits, but also material risks to the administration of justice that need to be addressed;
- K. whereas in the current regulatory vacuum there is a risk that litigation funders operate in a non-transparent manner, with the result that courts could, on occasion, make awards to claimants without realising that a share of the award, which might sometimes be disproportionate, will subsequently be redirected to litigation funders at the expense of claimants; whereas such lack of transparency could also mean that even the potential beneficiaries have little or no knowledge about the distribution of awards or the funding agreements, in particular where an opt-out mechanism within collective redress systems applies; whereas, in the absence of common minimum standards at Union level, there is a risk of fragmentation and regulatory imbalances in the area of litigation funding;
- L. whereas Directive (EU) 2020/1828 identifies opportunities and lays down safeguards relating to litigation funding, which are, however, limited to representative actions on behalf of consumers within the remit of that Directive, and therefore does not regulate other types of action, such as those related to business or human rights, or categories of claimants, such as human rights organisations or workers; whereas effective measures and safeguards should apply to all types of claims;

Introduction

1. Observes that, although recourse to third party litigation funding is still limited, it is an expanding practice in the Union, which plays an increasing role in the justice systems of some Member States, as well as in the way European citizens can access justice, particularly as regards cross-border cases. Notes that litigation funding is so far largely unregulated at Union level;
2. Notes that regulating TPLF should go hand in hand with policies enhancing access to

⁷ See https://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf, p. 269: 'The general view of the UKs approach to third party funding was favourable and respondents rated the availability of such funding a key factor in their decision to participate in collective proceedings. The experience of third party funding of collective claims in practice was, overall, a positive one. None of the respondents had any experience of an organisation attempting to fund a claim against a competitor. None of the respondents had had an experience where a funder had overtly attempted to control the litigation although one lawyer described a situation where a funder had withdrawn funding part way through the claim leading to a premature settlement of the case'.

⁸ See Australian Law Reform Commission (2019): An Inquiry into Class Action Proceedings and Third-Party Litigation funders, p 34.

justice for claimants, such as by lowering legal costs, by providing adequate public funding to civil society organisations, including consumer protection organisations, or by promoting other practices such as legal aid or crowdfunding; calls on Member States to exchange best practice on this matter and to draw on the measures referred to in Article 20 of Directive (EU) 2020/1828 when it comes to ensuring effective access to justice;

3. Is convinced that in order to ensure access to justice for all and that justice systems prioritise redress for injured parties, and not the interests of private investors who might only be seeking commercial opportunities from legal disputes, it is necessary to establish common minimum standards at Union level, which address the key aspects relevant to TPLF, including transparency, fairness, and proportionality;
4. Stresses that the aim of such a regulatory regime would be to regulate litigation funding activities by litigation funders. Points out that such a regime should regulate funding activities in relation to all types of claims, regardless of the claims' nature, and that it should be without prejudice to existing international, Union and national law allowing claims to be brought, in particular law on the protection of the collective interests of consumers, on environmental protection, and law governing insolvency proceedings or liability;
5. Believes that establishing Union common minimum standards for TPLF will allow legislators to exercise effective oversight and adequately ensure that the interests of claimants are protected. Points out that voluntary regulatory mechanisms and codes of conduct can play a positive role, but so far have not been subscribed to by the large majority of funders, leaving claimants significantly exposed;

Regulation and supervision of litigation funders

6. Recommends the establishment of a system of authorisation for litigation funders, thereby ensuring that effective opportunities are provided to claimants to make use of TPLF and that adequate safeguards are put in place, including through the introduction of corporate governance requirements and supervisory powers to protect claimants and to ensure that funding is only provided by entities that are committed to complying with minimum standards in terms of transparency, independence, governance and capital adequacy, and to observing a fiduciary relationship vis-à-vis claimants and intended beneficiaries; stresses the need to ensure that this system does not create an excessive administrative burden for Member States or for litigation funders;

Ethical issues

7. Recommends that litigation funders be obliged to respect a fiduciary duty of care requiring them to act in the best interests of a claimant. Believes that litigation funders cannot have undue control over the legal proceedings they fund; such control over the legal proceedings must be the responsibility of the claimant and their legal representatives; such control over funded legal proceedings can consist of both formal control, such as through contractual arrangements, and informal control, such as through threats to withdraw the funding;
8. Underlines that conflicts of interest may arise where there are inappropriate

relationships between litigation funders, representative entities, law firms, aggregators, including claims-collection and award-distribution platforms, and other entities who may be involved in claims and have an interest in the outcome of a court case; notes that there is an increasing trend of litigation funders agreeing to finance law firms across a series of future cases (portfolio funding)⁹; recommends that safeguards be adopted to prevent potential conflicts of interest, to lay down claimants' rights and require disclosure of details of relationships between litigation funders and the other parties involved;

9. Believes that, except in exceptional and strictly regulated circumstances, litigation funders should not be permitted to abandon funded parties in litigation at any stage in the litigation process, leaving claimants solely responsible for all costs of the litigation, which may have only been pursued due to the involvement of the funder; stresses, therefore, that contractual arrangements on the basis of conditional funding should be considered void;
10. Believes that, just like claimants, litigation funders should be responsible for defendants' costs arising from unsuccessful litigation, such as due to an adverse cost award. Stresses that regulation should prevent litigation funders from limiting their liability to costs in the event of an unsuccessful outcome;

Incentives and limits on recovery

11. Considers that legislation should impose limits on the proportion of the award that litigation funders are entitled to receive in the event of successful litigation or a settlement and on the basis of a contractual arrangement. Believes that only under exceptional circumstances should arrangements between litigation funders and claimants depart from the general rule that a minimum of 60% of the gross settlement or damages is paid to the claimants;

Disclosure and transparency

12. Considers that there should be transparency regarding the involvement of litigation funding in legal proceedings, including obligations for claimants and their lawyers to disclose funding agreements to courts upon the court's initiative or following a request made to the court by the defendant, and to inform the court of the existence of commercial funding and the identity of the funder for the case at hand. Considers that the court should inform the defendant about the existence of TPLF and the identity of the funder. Notes that, currently, courts or administrative authorities and defendants are often not aware that a claim is funded by a commercial actor.

Powers of supervisory authorities and review by courts and administrative authorities

13. Is of the opinion that supervisory authorities, courts and administrative authorities where appropriate in accordance with national procedural law, should have the powers to facilitate the enforcement of legislation adopted to achieve the goals set out above;

⁹ EPRS Study (2021): Responsible litigation funding. State of play on the EU private litigation funding landscape and on the current EU rules applicable to private litigation funding, p. 28 -29.

recommends the establishment of a complaints system that does not give rise to excessive costs or an excessive administrative burden for Member States. Considers that supervisory authorities, courts and administrative authorities, where appropriate in accordance with national procedural law, should have the powers to address abusive practices by authorised litigation funders, while not hindering access to justice for claimants and intended beneficiaries;

Final aspects

14. Requests the Commission to closely monitor and analyse the development of third party litigation funding in the Member States, both in terms of the legal framework and practice, with particular attention to be given to the implementation of Directive (EU) 2020/1828; further requests the Commission, after the expiry of the deadline for the application of Directive (EU) 2020/1828, namely 25 June 2023, and taking into account the effects of that Directive, to submit, on the basis of Article 114 of the Treaty on the Functioning of the European Union, a proposal for a Directive to establish common minimum standards at Union level on commercial third party litigation funding, following the recommendations set out in the Annex hereto;
15. Considers that the requested proposal will not have financial implications;
16. Instructs its President to forward this resolution and the accompanying recommendations to the Commission and the Council.

**ANNEX TO THE MOTION FOR A RESOLUTION:
RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED**

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the regulation of third-party litigation funding**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,¹

Acting in accordance with the ordinary legislative procedure,²

Whereas:

- (1) Commercial third-party litigation funding is a practice which is developing into a litigation services market without a specific legislative framework being in place at Union level. Despite the fact that litigation funders are regularly established and operating in various Member States, domestically or across borders, they have so far been subject to different national rules and practices in the internal market, where generally fragmented rules and even a legislative vacuum, depending on the Member State concerned, in this area exist. Diverging rules and practices in Member States are likely to constitute an obstacle to the functioning of the internal market. A lack of clarity on the terms on which commercial third party litigation funders ('litigation funders') may operate is not compatible with the proper functioning of the internal market, in particular taking into account that it may be possible to fund cross-border cases only through a third party, and those cases are particularly attractive to litigation funders. Divergences in the legal framework applicable in each Member State entail a risk of discrimination in access to justice between claimants in different Member States, in particular in cases with a cross-border element, as well as a risk of forum shopping by litigation funders, which could be influenced by the favourability of certain national rules concerning their establishment, the law applicable to funding agreements and national procedural rules.
- (2) Union law seeks to ensure a balance between granting access to justice and providing appropriate safeguards to those engaged in proceedings, to prevent their right to access justice from being unjustly exploited. When litigation funders provide financing for legal proceedings in exchange for a share of any compensation awarded, a risk of

¹ OJ [...]

² OJ [...]

injustice can arise. That risk includes litigation funders being able to take advantage of claimants, or those whom they represent, including, where relevant, consumers whose interests are represented by qualified entities, to serve their own purposes and to maximise their own return, thus leaving claimants or intended beneficiaries with a reduced share of the potential award. The risks can be particularly acute where those expecting to benefit from litigation are consumers or victims of fundamental rights violations, who might welcome the involvement of a litigation funder ready to pay for proceedings, without appreciating that their interests could be subverted in favour of the litigation funder's own interests.

- (3) Establishing a common Union framework of minimum standards for responsible commercial third-party litigation funding would help to promote access to justice and ensure appropriate corporate accountability. Indeed, a significant economic imbalance often exists between companies and citizens seeking redress, and third-party litigation funding can help reduce that imbalance if the associated risks are mitigated, and such funding operates in complementarity with other measures removing barriers to access to justice. To that end, it is crucial to ensure a necessary balance between improving claimants' access to justice and appropriate safeguards to avoid abusive litigation. Responsible third-party litigation funding can lower costs, make them more predictable, simplify unnecessary procedures and deliver efficient services at costs that are proportionate to the amounts in dispute.
- (4) As the internal market facilitates increasing cross-border trade, as disputes are increasingly cross-border, and as the activities of litigation funders are global in nature, there is a potential risk of material divergences in Member State approaches to the safeguards and the protections necessary with regard to commercial third-party litigation funding. Voluntary approaches have been successful to some extent but not always subscribed to by the majority of industry actors, and, in any event, non-legislative measures would not be appropriate in light of such material risks, for instance for vulnerable categories of citizens, including from third countries.
- (5) This Directive aims to regulate commercial third-party litigation funding, a practice whereby third-party entities not directly involved in a dispute invest for profit in legal proceedings, typically in exchange for a percentage of any settlement or award (hereinafter 'third-party litigation funding'). Third-party litigation funding covers situations in which a commercial actor invests for profit and acts to further its business interests; therefore it does not include provision of funds to sponsor litigation on a charitable basis or on the basis of donations, where the funder simply aims to recover the costs incurred, or similar activities carried out on a pro bono publico basis. This Directive also aims to lay down safeguards, on the one hand, to ensure efficient access to justice and the protection of the interests of the parties to the dispute and, on the other hand, to prevent conflicts of interest, abusive litigation as well as the disproportionate allocation of monetary awards to litigation funders.
- (6) The term 'litigation funder' should be understood to refer to any undertaking that is not a party to proceedings, but enters into a third-party litigation funding agreement (hereinafter 'third-party funding agreement') in relation to those proceedings. In line with the case-law of the Court of Justice of the European Union, the concept of 'undertaking' includes any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and therefore includes any legal person,

including its parents, subsidiaries or affiliates and could include professional litigation-funding providers, financial services providers, claims management firms or other service providers. The concept of litigation funder is not intended to include lawyers representing a party in legal proceedings, or regulated providers of insurance services to such a party.

- (7) In accordance with the legal traditions and autonomy of the Member States, it is for each Member State to determine whether, and to what extent, the provision of litigation funding should be permitted within its own legal system. Where Member States choose to permit such third-party litigation funding, this Directive provides for minimum standards for the protection of funded claimants, so that those who might have recourse to litigation funding in the Union are covered by a minimum level of protection, which is consistent across the Union.
- (8) In those Member States where legal costs may represent a significant barrier to access to justice, however, Member States may wish to consider introducing legislation to allow third-party litigation funding and in that case should establish clear conditions and safeguards that are in accordance with this Directive. While this Directive does not apply solely to representative actions, Member States should take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek redress, in accordance with Directive (EU) 2020/1828 and in particular Article 20 thereof.
- (9) Where third-party litigation funding activity is permitted, a system for the authorisation and supervision of litigation funders by independent administrative bodies in the Member States is necessary to ensure that such litigation funders meet the minimum criteria and standards laid down in this Directive. Litigation funders should be subject to oversight in a manner similar to that of the existing prudential supervision system applicable to financial services providers.
- (10) Litigation funders active in the Union should be required to conduct their business from within the Union, be authorised within the Union, and to conclude their third-party funding agreements subject to the laws of the Member State of the proceedings or, if different, the Member State of the claimant or intended beneficiaries, in order to ensure that supervision under Union and national law is adequate.
- (11) Supervisory authorities within the Union that grant authorisations to conduct third-party litigation funding activities should be empowered to require that litigation funders comply with minimum criteria laid down by this Directive. Such criteria should include provisions relating to confidentiality, independence, governance, transparency, capital adequacy, and observance of a fiduciary duty to claimants and intended beneficiaries. Supervisory authorities should be empowered to make any necessary orders, including the power to receive from litigation funders applications for authorisation and to decide upon them, to gather any necessary information, grant, deny, suspend or withdraw any authorisation or to impose any condition, restriction or penalty upon any litigation funder, as well as to investigate without undue delay complaints against any litigation funder conducting activities within their jurisdiction submitted by any natural or legal person, with the exception of the defendant. Concerns raised by a defendant regarding the litigation funder during ongoing legal proceedings should be dealt with by the relevant court or administrative authority.

- (12) Among other authorisation criteria, Member States should require litigation funders to demonstrate that they have sufficient capital to satisfy their financial obligations. The absence of capital adequacy requirements creates a risk that an undercapitalised litigation funder enters into a third-party funding agreement and is not willing or able subsequently to cover the costs of the litigation it had agreed to support, including the costs or fees necessary to allow the proceedings to reach their conclusion, or any adverse cost award. This can expose claimants who rely on litigation funders to a risk of unforeseen material economic loss, and to the risk of the abandonment of otherwise viable proceedings due to the business circumstances or decisions of the litigation funder.
- (13) Litigation funders should be bound by a duty to act fairly, transparently, efficiently and in the best interests of claimants and intended beneficiaries of claims. A lack of a requirement to place the interests of claimants and intended beneficiaries ahead of a litigation funder's own interests may create the risk of proceedings being directed in a manner that ultimately serves the interests of the litigation funder, rather than those of the claimant.
- (14) To prevent circumvention of the requirements of this Directive, agreements entered into with litigation funders who do not have the necessary authorisation should have no legal effect. The burden to acquire the necessary authorisations should be on litigation funders themselves, and therefore claimants and intended beneficiaries should be indemnified in respect of any harm caused by a litigation funder not having the necessary authorisation.
- (15) This Directive should regulate the activities of litigation funders, but should be without prejudice to any other regulatory obligations or regimes, such as existing rules governing the provision of financial services that may apply, respecting also the legal traditions of the Member States, their autonomy and their decisions regarding the appropriateness of permitting litigation funding in their national legal systems.
- (16) To facilitate the consistent application of this Directive, Member States should ensure that their supervisory authorities apply this Directive in close cooperation with the supervisory authorities of other Member States. Coordination between supervisory authorities should be organised at Union level to avoid the divergence of supervisory standards, which could jeopardise the proper functioning of the internal market.
- (17) The Commission should coordinate the activities of supervisory authorities and facilitate the creation of a suitable cooperation network for this purpose. Supervisory authorities should be enabled to consult the Commission as necessary, and the Commission should be allowed to issue guidelines, recommendations, best practice notices or advisory opinions to supervisory authorities on the application of this Directive, and in relation to any apparent inconsistency with regard to the implementation of this Directive. Supervisory authorities should share details of their activities with the Commission to facilitate coordination, including sharing details of all decisions taken and litigation funders they authorise.
- (18) To facilitate the provision of cross border litigation funding services in those Member States where it is permitted under national law, Member States should be able to cooperate, share information and best practice, and should be required to take full

account of each other's authorisation decisions. Member States should ensure that comprehensive and clear information and guidance on the existence of funding options for claims, as well as on the conditions and requirements that apply to the funding of claims, is fully and freely accessible to all citizens who might seek redress, including to the most vulnerable groups. In line with Article 56 of the Treaty on the Functioning of the European Union, Member States should mutually recognise prior authorisations and therefore automatically grant authorisation to litigation funders operating on their territory which have been authorised to operate in another Member State, provided that the initial authorisation continues to be valid. Where a supervisory authority in a receiving Member State is aware of irregularities in the conduct of a litigation funder, it should directly inform the responsible supervisory authority.

- (19) Member States should ensure that decisions regarding the relevant legal proceedings, including decisions on settlement, are not unduly influenced or controlled by the litigation funder in a manner that would be detrimental to the interests of the claimants concerned by that action.
- (20) To redress any knowledge or resource imbalance between a litigation funder and a claimant, in assessing the suitability of a third-party funding agreement, courts or administrative authorities should take into account the level of clarity and transparency of such agreements, and the degree to which any risks and benefits were transparently presented to and knowingly undertaken by claimants or those represented by claimants.
- (21) Third party funding agreements should be presented to claimants in a language they understand, and should set out clearly and in appropriate terms the range of possible outcomes, as well as any risks and relevant limitations.
- (22) Adequate supervision of litigation funders and third-party funding agreements cannot be ensured in the absence of obligations on litigation funders to be transparent regarding their activities. This includes transparency vis-à-vis courts or administrative authorities, defendants and claimants. Obligations should therefore be laid down to inform the relevant court or administrative authority of the existence of commercial funding and the identity of the funder, as well as to disclose third-party funding agreements in full to courts or administrative authorities, upon their request or at the request of the defendant to the court and subject to appropriate limitations to protect any necessary confidentiality. Courts or administrative authorities should be empowered to access relevant information on all third-party litigation funding activity relevant to the legal proceedings under their responsibility. In addition, defendants should be made aware by the court or administrative authority of the existence of third-party litigation funding and the identity of the funder.
- (23) Courts or administrative authorities should be empowered, where a third-party funding agreement is relevant to the case before them, to assess whether the third-party funding agreement complies with this Directive and, in accordance with Article 16, to review it if necessary, either at the request of a party to the proceedings, or on the initiative of the court or administrative authority, or following an action brought before them against the administrative decision of a supervisory authority which has become final;
- (24) Litigation funders should establish internal good governance processes to avoid conflicts of interests between the litigation funder and claimants. Compliance with

transparency requirements should ensure that claimants are fully aware of any relationship a litigation funder might have with defendants, lawyers, other litigation funders, or any other third party involved in the case, which could create an actual or perceived conflict.

- (25) Litigation funders should in no case claim unfair, disproportionate or unreasonable reward at the expense of claimants. Courts or administrative authorities should be empowered to assess third-party litigation funding agreements relevant to the case before them, taking into account the circumstances and background within which the agreement was concluded, in order to determine effectively whether it is fair and complies with this Directive and all relevant Union and national legislation.
- (26) Where third-party funding agreements permit litigation funders to receive a share of any reward or certain fees as a priority in relation to any award allocated to claimants, the available award could be so reduced as to leave little or nothing for claimants. Therefore, third-party funding agreements should always ensure that any award is paid to the claimant first, that is to say that the entitlement of the claimant takes priority over that of the funder. Litigation funders should not be permitted to require the prioritisation of their own reward.
- (27) Given that in some Member States the share of any reward received by litigation funders can reduce any relief obtained by claimants, courts or administrative authorities should exercise oversight over the value and proportion of this share to prevent any disproportionate allocation of monetary awards to litigation funders. Save in exceptional circumstances, when the share of any reward claimed by a litigation funder would dilute the award, including all damages amounts, costs, fees and other expenses, available to claimants and intended beneficiaries to 60% or less, it should be presumed unfair and deemed invalid.
- (28) Additional conditions should be put in place to ensure that litigation funders do not unduly influence the decisions of claimants in the course of proceedings, that is to say in a manner that would benefit the litigation funder itself at the expense of the claimant. In particular, litigation funders should not unduly influence decisions on how cases are pursued, which interests are prioritised, or whether or not claimants should accept any particular outcome, award or settlement.
- (29) Litigation funders should not be allowed to withdraw the funding they have agreed to provide, except in limited circumstances as set out in this Directive or in national law adopted pursuant to this Directive, so that funding is not withdrawn at any stage of the litigation process, to the disadvantage of the claimants or intended beneficiaries, due to the litigation funder's business interests or incentives changing.
- (30) Where litigation funders have supported or funded proceedings which are not successful, they should be jointly liable with claimants for any adverse costs they caused defendants to incur and that may be awarded by courts or administrative authorities. Courts or administrative authorities should be granted adequate powers to ensure the effectiveness of such an obligation, and third-party funding agreements should not exclude responsibility for such adverse costs.
- (31) Member State courts or administrative authorities should be entitled to determine any adverse costs awards in accordance with national law, including by reliance on any

scientific, statistical or technical evidence as may be relevant, or through reliance on any experts, assessors or tax accountants, as may be suitable in the circumstances of the proceedings.

- (32) This Directive respects fundamental rights and observes principles recognised, in particular, by the Charter of Fundamental Rights of the European Union. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles, including those related to the right to an effective remedy and to a fair trial, as well as the right of defence.
- (33) Since the objectives of this Directive, namely to ensure the harmonisation of Member States' rules applicable to litigation funders and their activities, and thus to enable access to justice, while introducing common minimum standards for the protection of the rights of funded claimants and intended beneficiaries in proceedings financed wholly or in part by third-party funding agreements, which apply in all Member States in which litigation funding is permitted, cannot be sufficiently achieved by the Member States as litigation funders can operate in multiple Member States and are subject to different national rules and practices, but can rather be better achieved at Union level, by reason of the scale of the emerging market of third-party litigation funding, the need to avoid diverging rules and practices that are likely to constitute an obstacle to the proper functioning of the internal market and 'forum shopping' by litigation funders seeking to optimise national rules. The Union may thus adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (34) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General Provisions

Article 1

Subject Matter and purpose

This Directive sets out minimum rules applicable to commercial third-party litigation funders and their authorised activities, and provides a framework to support and protect funded claimants and intended beneficiaries, including, where relevant, those whose interests are represented by qualified entities, in proceedings financed entirely or in part by third-party litigation funding. It lays down safeguards to prevent conflicts of interest, abusive litigation as well as the disproportionate allocation of monetary awards to litigation funders, while ensuring that third-party litigation funding appropriately allows claimants and intended beneficiaries to access justice, and ensuring corporate accountability.

Article 2

Scope

This Directive applies to commercial third party litigation funders (hereinafter ‘litigation funders’) and to commercial third-party funding agreements (hereinafter ‘third-party funding agreements’), regardless of the related claims’ nature. It is without prejudice to existing international, Union and national law allowing claims to be brought, in particular law on the protection of the collective interests of consumers, on environmental protection, and law governing insolvency proceedings or liability.

Article 3

Definitions

For the purposes of this Directive, the following definitions apply:

- (a) ‘litigation funder’ means any commercial undertaking that enters into a third-party funding agreement in relation to proceedings, even though it is neither a party to those proceedings, nor a lawyer nor other legal professional representing a party to such proceedings, nor a provider of regulated insurance services to a party in such proceedings, and which has the primary aim of receiving a return on an investment it makes by providing funding in relation to those proceedings or of obtaining a competitive advantage in a specific market;
- (b) ‘claimant’ means any natural or legal person who brings or intends to bring proceedings against another party before a court or administrative authority;
- (c) ‘court or administrative authority’ means a competent court, administrative authority, arbitral body or other body tasked with adjudicating on proceedings, in accordance with national law;
- (d) ‘intended beneficiary’ means a person who is entitled to receive a share of an

award in proceedings and whose interests in the proceedings are represented by the funded claimant or a qualified entity bringing the action as a claimant party on that person's behalf in the course of representative actions;

- (e) 'proceedings' means any domestic or cross border civil or commercial litigation, or any voluntary arbitration procedure or alternative dispute resolution mechanism, through which redress before a court or administrative authority in the Union is sought concerning a dispute;
- (f) 'qualified entity' means an organisation representing consumers' interests and designated as qualified entity under Directive (EU) 2020/1828;
- (g) 'supervisory authority' means a public authority designated by a Member State to be responsible for granting, suspending or withdrawing the authorisation for litigation funders, and for supervising the activities of litigation funders;
- (h) 'third-party funding agreement' means an agreement in which a litigation funder agrees to fund all or part of the costs of proceedings in exchange for receiving a share of the monetary amount awarded to the claimant or a success fee, so as to reimburse the litigation funder for the funding it provided and, where applicable, cover its remuneration for the service provided, based wholly or partially on the outcome of the proceedings. This definition covers all agreements in which such a reward is agreed, whether offered as an independent service, or achieved through a purchase or assignment of the claim.

Chapter II

Approval of litigation funders' activities within the Union

Article 4

Authorisation system

1. Member States may determine in accordance with national law whether third-party funding agreements can be offered in relation to proceedings within their jurisdiction, for the benefit of claimants or intended beneficiaries resident within their territory.
2. Where third party funding activities are permitted, Member States shall create a system for the authorisation and monitoring of the activities of litigation funders within their territory. That system shall include designating an independent supervisory department or authority tasked with granting, suspending or withdrawing authorisations for litigation funders and supervising the activities of litigation funders.
3. The system of authorisation provided for in this Article shall apply only to the activities connected to the offering of third-party funding agreements by litigation funders. Where litigation funders are also providers of other legal, financial or claims management services supervised by another authority within the Union, this Directive shall be without prejudice to any system of supervision and authorisation that exists in relation to those other services.

Article 5

Conditions for authorisation

1. Member States shall ensure that supervisory authorities only grant or maintain authorisations, whether for domestic or cross-border litigation or other proceedings, to litigation funders who comply with this Directive, and who meet, in addition to any suitability or other criteria as may be set out in national law, at least the following criteria:
 - (a) they conduct their business through a registered office in a Member State, and apply for and maintain an authorisation in that same Member State;
 - (b) they commit to concluding third-party funding agreements subject to the laws of the Member State of any intended proceedings, or, if different, of the Member State of the claimant or intended beneficiaries;
 - (c) they demonstrate to the satisfaction of the supervisory authority that they have procedures and governance structures in place to ensure their ongoing compliance with this Directive, with the transparency requirements and fiduciary relationships this Directive provides for, and they have established internal procedures to prevent a conflict of interest between themselves and the defendants in proceedings involving the litigation funder;
 - (d) they meet the capital adequacy requirements set out in Article 6; and
 - (e) they satisfy the supervisory authority that they have the governance and procedures in place to ensure that the fiduciary duty provided for in Article 7 is discharged and respected.
2. Member States shall mutually recognise authorisation given to a litigation funder in another Member State and therefore automatically allow them to operate in their Member State, provided the initial authorisation continues to be valid.
3. The system of authorisation established under Article 4 shall be without prejudice to the application of Union law governing the provision of financial services, investment activity, or consumer protection.

Article 6

Capital adequacy

1. Member States shall ensure that supervisory authorities are empowered to verify whether litigation funders would be able to have at their disposal at all times adequate financial resources to fulfil their liabilities under their third-party funding agreements. In particular, supervisory authorities shall ensure that litigation funders have the capacity to:
 - (a) pay all debts arising from their third-party funding agreements when they become due and payable; and
 - (b) fund all stages of any proceedings they have committed to, including the trial and any subsequent appeal.

2. Member States shall ensure that litigation funders are allowed to demonstrate that they meet the criteria set out in paragraph 1 by providing certification or an attestation that an insurance scheme would fully cover all the costs referred to in paragraph 1, where necessary.
3. Member States shall ensure that supervisory authorities are empowered to verify whether litigation funders would be able to maintain access at all times to the minimum liquidity required to pay in full all foreseeable adverse costs in all proceedings they have funded. Member States shall ensure that their courts or administrative authorities can request litigation funders to provide security for costs in the forms admitted by national law, should a claimant so request based on reasoned specific concerns.
4. Member States may set up a specific insurance fund to cover all the outstanding costs of claimants that engaged in litigation in good faith, in case a litigation funder becomes insolvent in the course of the litigation procedure. Where such a fund is set up by a Member State, that Member State shall ensure that it is publicly managed and financed through annual fees payable by authorised litigation funders.

Article 7

Fiduciary duty

1. Member States shall ensure that supervisory authorities are empowered to verify that litigation funders have the governance and internal procedures in place to ensure that the third-party funding agreements they enter into are based on a fiduciary relationship and that they commit under those agreements to acting fairly, transparently and to observing a fiduciary duty of care requiring them to act in the best interests of a claimant.
2. Where a claimant intends to take a claim on behalf of others in proceedings, such as where the claimant is a qualified entity representing consumers, the litigation funder shall be required to owe a fiduciary duty to such intended beneficiaries. Litigation funders shall be obliged to act in a manner that is consistent with their fiduciary duty throughout the course of proceedings. In the event of a conflict between the interests of the litigation funder and those of the claimants or intended beneficiaries, the litigation funder shall commit to placing the interests of the claimants or intended beneficiaries above its own interests.

Chapter III

Powers of supervisory authorities and coordination between them

Article 8

Powers of supervisory authorities

1. Where third-party funding agreements are permitted in accordance with Article 4, Member States shall provide that an independent public supervisory authority is responsible for overseeing the authorisation of litigation funders established within its jurisdiction, offering third-party funding agreements to claimants and intended

beneficiaries within its jurisdiction, or in relation to proceedings within its jurisdiction.

2. Member States shall ensure that a complaint procedure is in place for any natural or legal person who wishes to raise concerns before a supervisory authority regarding the compliance of a litigation funder with its obligations under this Directive and the applicable national law.
3. Notwithstanding the complaint procedure referred to in paragraph 2, in the event of ongoing legal proceedings involving the litigation funder, concerns raised by the defendant in such proceedings regarding the compliance of a litigation funder with its obligations under this Directive and the applicable national law shall be dealt with by the competent court or administrative authority in accordance with Article 16(2).
4. Each supervisory authority shall in particular be empowered and required to:
 - (a) receive from litigation funders applications for authorisation and any information that is necessary for the purposes of considering those applications, and decide upon any such applications in a timely fashion;
 - (b) take the decisions necessary to grant or deny authorisation to any applicant litigation funder, to withdraw any authorisation, or to impose conditions, restrictions or penalties upon any authorised litigation funder;
 - (c) decide on the suitability and fitness of a litigation funder, including by reference to their experience, reputation, internal processes for the avoidance and resolution of conflicts of interest, knowledge;
 - (d) publish on its website any decision taken pursuant to point (b), having due regard to commercial confidentiality;
 - (e) assess at least every year whether an authorised litigation funder continues to comply with the criteria for authorisation referred to in Article 5(1) and ensure that such authorisation is suspended or withdrawn if the litigation funder no longer complies with one or more of those criteria. Such a suspension or withdrawal shall not affect the rights of the claimants and beneficiaries of the proceedings in which the funder may be involved; and
 - (f) under the system referred to in Article 9, receive and investigate complaints in relation to the conduct of a litigation funder and the compliance of such litigation funder with the provisions laid down in Chapter IV of this Directive and any other applicable requirements under national law.
5. Member States shall ensure that litigation funders are required to notify a supervisory authority without undue delay of any changes affecting their compliance with the capital adequacy requirements laid down in Article 6, paragraphs 1 and 2. In addition, Member States shall ensure that litigation funders certify annually that they remain in compliance with those paragraphs.
6. Member States shall ensure that supervisory authorities oversee fiduciary relationships between litigation funders and claimants and intended beneficiaries in general, and are able to make directions and orders to ensure that claimants' interests and those of

intended beneficiaries are protected.

Article 9

Investigations and complaints

1. Member States shall ensure that a complaints system is in place which allows for the reception and investigation of complaints as referred to in Article 8, paragraph 2.
2. Under the complaints system referred to in paragraph 1, Member States shall ensure that supervisory authorities are empowered to assess without undue delay whether a litigation funder is in compliance with any obligations or conditions associated with its authorisation, with the provisions of this Directive and with any other applicable requirements under national law.
3. Member States shall ensure that, in exercising their oversight with regard to litigation funders' compliance with obligations or conditions associated with their authorisation, supervisory authorities shall be empowered to
 - (i) investigate complaints received from any natural or legal person in accordance with Article 8(2) and subject to Article 8(3);
 - (ii) investigate complaints from any other supervisory authority or the Commission;
 - (iii) initiate investigations on an ex officio basis,
 - (iv) initiate investigations following a recommendation from a court or administrative authority that has concerns arising from any proceedings before such a court or administrative authority regarding a litigation funder's compliance with obligations or conditions associated with its authorisation.

Article 10

Coordination between supervisory authorities

1. Member States shall ensure that their supervisory authorities apply this Directive in close cooperation with the supervisory authorities of other Member States.
2. The Commission shall oversee and coordinate the activities of the supervisory authorities in performing the functions set out in this Directive, and shall convene and chair a network of supervisory authorities. The Commission shall adopt delegated acts in accordance with Article 11 in order to supplement this Directive by laying down the modalities for cooperation within the network of supervisory authorities, and shall revise them periodically, in close cooperation with the supervisory authorities.
3. The supervisory authorities may consult the Commission on any matter involving the implementation of this Directive. The Commission may issue guidelines, recommendations, best practice notices and advisory opinions to supervisory authorities on the implementation of this Directive, and in relation to any apparent inconsistency in

this regard, or in relation to the supervision of any litigation funders. The Commission may also set up a centre of competence to provide qualified expertise to court or administrative authorities seeking advice on how to assess litigation funders' activities within the Union.

4. Each supervisory authority shall set up a list of authorised litigation funders, communicate it to the Commission and make that list publicly available. Supervisory authorities shall update that list whenever there are changes to it and inform the Commission accordingly.
5. Each supervisory authority shall communicate, upon request, to the Commission and other supervisory authorities details of decisions taken with regard to the supervision of litigation funders, including details of decisions taken pursuant to Article 8(4), point (b).
6. Where a litigation funder has sought authorisation from a supervisory authority, and subsequently seeks authorisation from another, such supervisory authorities shall coordinate and share information to the extent appropriate, with a view to taking consistent decisions, while having due regard to diverging national rules.
7. Where a litigation funder is authorised by a supervisory authority in a Member State, but wishes to offer a third-party funding agreement for the benefit of a claimant or other intended beneficiary in another Member State, or for proceedings in another Member State it shall present proof of authorisation from its home Member State supervisory authority. Where a supervisory authority in that other Member State is aware of irregularities in the conduct of the litigation funder, it shall directly inform the responsible supervisory authority.

Article 11 *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 10(2) shall be conferred on the Commission for a period of 5 years from... [date of entry into force of the basic legislative act or any other date set by the co-legislators].

The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the 5-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in Article 10(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already

in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 10(2) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council.

Chapter IV

Third party funding agreements and activities of litigation funders

Article 12

Content of third-party funding agreements

Member States shall ensure that third-party funding agreements are required to be provided in writing in one of the official languages of the Member State in which the claimant and intended beneficiaries are resident, and presented in a clear and easily comprehensible manner and include as a minimum:

- a. the different costs and expenses that the litigation funder will cover;
- b. the share of any award or fees that will be paid to the litigation funder or any other third party, or any other financial costs to be borne, directly or indirectly, by the claimants, the intended beneficiaries, or both;
- c. a reference to the responsibility of the litigation funder as regards adverse costs, in accordance with Article 18 of this Directive;
- d. a clause specifying that any awards from which the fees of the funder are deductible will be paid in full first to the claimants who may then subsequently pay any agreed sums to litigation funders as fees or commission, retaining at least the minimum amounts provided for in this Directive;
- e. the risks that the claimants, intended beneficiaries or both are assuming, including:
 - i. the scope for escalating costs in the litigation, and how that impacts the financial interests of the claimants, beneficiaries or both;
 - ii. the strictly defined circumstances in which the third-party funding agreement can be terminated and the risks to claimants, beneficiaries or both in that scenario, and

- iii. any potential risk of having to pay adverse costs, including circumstances in which adverse costs insurance or indemnities may not cover such exposure.
- f. a disclaimer with regard to non-conditionality of funding in relation to procedural steps;
- g. a declaration of absence of conflict of interest by the litigation funder.

Article 13

Transparency requirements and avoidance of conflicts of interest

1. Member States shall require litigation funders to establish a policy and to implement internal processes for the avoidance and resolution of conflicts of interest. That policy and those internal processes shall be appropriate to the nature, scale and complexity of the litigation funder's business, and shall be set out in writing and made publicly available on the litigation funder's website. They shall also be clearly stated in an annex to any third-party funding agreement.
2. Member States shall require litigation funders to disclose to a claimant and intended beneficiaries in the third-party funding agreement all information that may reasonably be perceived as having the potential to give rise to a conflict of interest. Litigation funders' disclosures shall include at least the following:
 - (a) details of any arrangements that exist, financial or otherwise, between the litigation funder and any other undertaking that relate to the proceedings, including any arrangements with any relevant qualified entity, claims aggregator, lawyers, or other interested party;
 - (b) details of any relevant connection between the litigation funder and a defendant in the proceedings, in particular in relation to any situation of competition.

Article 14

Invalid agreements and clauses

1. Member States shall ensure that third-party funding agreements concluded with natural or legal persons who are not authorised to act as a litigation funder have no legal effect.
2. Member States shall ensure that third-party funders are not permitted to influence the decisions of a claimant in the course of proceedings in a manner that would benefit the litigation funder itself at the expense of the claimant. To that end, any clause in third-party funding agreements granting a litigation funder the power to take or influence decisions in relation to proceedings shall have no legal effect. Any such clause or arrangement consisting of, inter alia, the following shall have no legal effect:
 - (a) the grant of an explicit power to a litigation funder to take or influence decisions in the course of proceedings, such as with respect to specific claims pursued, settlement of the case, or management of expenses associated with the proceedings;
 - (b) the provision of capital or any other resource with a monetary value for the purposes of proceedings, contingent on the approval by third-party funders of its

specific use.

3. Member States shall provide that agreements in which a litigation funder is guaranteed to receive a minimum return on its investment before a claimant or intended beneficiary can receive their share have no legal effect.
4. Absent exceptional circumstances, where a litigation funding agreement would entitle a litigation funder to a share of any award that would dilute the share available to the claimant and the intended beneficiaries to 60% or less of the total award, including all damages amounts, costs, fees and others expenses, such an agreement shall have no legal effect.
5. Member States shall ensure that third-party funding agreements do not contain provisions that limit the liability of a litigation funder in the event of an order for adverse costs following unsuccessful proceedings. Provisions that purport to limit a litigation funder's liability for costs shall have no legal effect.
6. Member States shall ensure that the conditions governing third-party funding agreements do not permit the withdrawal of that funding, save in prescribed circumstances defined by national law in accordance with Article 15(1).
7. Claimants and intended beneficiaries shall be indemnified in respect of any losses caused by a litigation funder that entered into a third-party funding agreement which is found to be invalid. The rights of the claimants and of the intended beneficiaries of the proceedings shall not be affected.

Article 15

Termination of third-party funding agreements

1. Member States shall prohibit the unilateral termination of a third-party funding agreement by a litigation funder without the claimant's informed consent, except where a court or administrative authority has granted the litigation funder permission to terminate the agreement, having considered whether the interests of the claimant and intended beneficiaries would be adequately protected despite the termination.
2. Sufficient notice as provided for in national law shall be required to be given in order to terminate the third-party funding agreement.

Chapter V

Review by courts or administrative authorities

Article 16

Disclosure of the third-party funding agreement

1. Member States shall ensure that claimants or their representatives are required to inform the relevant court or administrative authority of the existence of a third-party funding

agreement and of the identity of the litigation funder and to provide, at the request of the court or the administrative authority or of the defendant, to the relevant court or administrative authority, a complete and unredacted copy of such third-party funding agreements relating to the proceedings concerned to the relevant court or administrative authority at the earliest stage of those proceedings. Member States shall also ensure that defendants are made aware by the court or the administrative authority of the existence of a third-party funding agreement, and of the identity of the litigation funder.

2. Member States shall ensure that courts or administrative authorities are empowered to review the third-party funding agreement in accordance with Article 17, at the request of a party to the proceedings, where that party has justified doubts in respect of the compliance of such third-party funding agreement with this Directive and any other applicable national law, or on their own initiative.

Article 17

Review of third-party funding agreements by courts or administrative authorities

Member States shall designate the competent court or administrative authority to perform the different judicial and administrative tasks provided for under this Directive. Such designation shall in particular specify that the court or administrative authority before which a privately funded case is brought is to conduct controls, without undue delay and at the request of a party to the proceedings or on their own initiative, on the impact of funding agreements on the cases before them, by exercising powers:

- (a) to make orders or give directions that are binding on a litigation funder, such as requiring the litigation funder to provide the funding as agreed in the relevant third-party funding agreement or requiring the litigation funder to make changes in respect of the relevant funding;
- (b) to assess the compliance of each third-party funding agreement with the provisions laid down in this Directive, particularly with the fiduciary duty owed to claimants and intended beneficiaries under Article 7, and, where that agreement is found not to be compliant, order the litigation funder to make the necessary changes, or declare a clause to be null and void in accordance with Article 14;
- (c) to evaluate the conformity of each third-party funding agreement with respect to the transparency requirements under Article 13;
- (d) to assess whether a third-party funding agreement entitles a litigation funder to an unfair, disproportionate or unreasonable share of any award as described in Article 14(4), and to annul or adjust such an agreement accordingly. Member States shall specify that in making such an assessment, competent courts or administrative authorities may take into consideration the characteristics and circumstances of the intended or ongoing proceedings including, as appropriate:
 - (i) the parties that are involved in the case, as well as the intended beneficiaries of the proceedings, and what they understood to be agreed as regards the amount the litigation funder would receive under the funding agreement, upon a successful outcome;

- (ii) the likely value of any award;
 - (iii) the value of a litigation funder's financial contribution and the proportion of the claimant's overall costs that is funded by the litigation funder, and
 - (iv) the proportion of any award that the claimant and intended beneficiaries stand to receive;
- (e) to impose any penalty the court or administrative authority deems appropriate to ensure compliance with this Directive;
- (f) to consult or seek expertise from persons with appropriate knowledge and independence to assist in the performance of the court's or administrative authority's assessment powers, including from any suitably qualified expert or from supervisory authorities.

Article 18

Responsibility for adverse costs

1. Where the claimant party has insufficient resources to meet adverse costs, Member States shall ensure that courts or administrative authorities are empowered to make cost orders against litigation funders, whether jointly or severally with claimants, following an unsuccessful outcome in proceedings. In such a case, courts or administrative authorities may require litigation funders to pay any appropriate adverse costs, having regard to:
- (a) the value and proportion of any award that the litigation funder would have received had the claim been successful;
 - (b) the extent to which any costs that are not paid by a litigation funder would instead fall on a defendant, the claimant, or any other intended beneficiaries;
 - (c) the conduct of the litigation funder throughout the proceedings and, in particular, its compliance with this Directive and whether its conduct has contributed to the overall cost of the proceedings; and
 - (d) the value of the litigation funder's initial investment.

Chapter VI

Final provisions

Article 19

Sanctions

1. Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive. Member States shall, [by .../without delay], notify the Commission of those rules and of those measures and shall notify it [, without delay,] of any subsequent amendment affecting them.

2. Supervisory authorities may in particular impose proportionate fines calculated on the basis of an undertaking's turnover, temporarily or indefinitely withdraw the authorisation to operate, and may impose other appropriate administrative sanctions.

Article 20

Review

1. No later than ...[(...) years after the date of application of this Directive], the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. The evaluation shall be conducted in accordance with the Commission's better regulation guidelines. In the report, the Commission shall, in particular, assess the effectiveness of the Directive, with particular regard to the level of fees or interest deducted from claimants' awards, including from intended beneficiaries, for the benefit of litigation funders, the impact litigation funders have on the level of dispute resolution activity and the extent to which third-party litigation funding has allowed better access to justice.
2. Member States shall provide the Commission, for the first time by ...[(...) years after the date of application of this Directive] and annually thereafter, with the following information necessary for the preparation of the report referred to in paragraph 1:
 - (a) the identity, number and type of entities that are recognised as authorised litigation funders;
 - (b) any changes to that list and the reasons therefor;
 - (c) the number and type of proceedings that are funded in whole or in part by a litigation funder;
 - (d) the outcomes of those proceedings in terms of the amounts earned by litigation funders in comparison to the awards made to claimants and intended beneficiaries.

Article 21

Transposition

1. Member States shall adopt and publish, by ... [day/month/year], the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply those measures from ... [day/month/year].

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 23

Addressees

This Directive is addressed to the Member States.

EXPLANATORY STATEMENT

“It is incredibly frustrating when a person wins a case, only to walk away almost empty-handed because the money has been soaked up by unfair legal fees. [...] The days of some litigation funders charging such excessive fees need to come to an end.” Attorney-General Martin Pakula from the Australian Labour Party in 2017 when he announced the review of the existing legal framework that covers the activities of litigation funders in legal proceedings.

To spare European citizens from the unjust legal outcomes that thousands of Australians – and others around the world – have had to face in recent years, this legislative own-initiative report aims to regulate third party litigation funding (TPLF) before it gains traction in all of our Member States. This particular type of commercial practice can be best understood as a business model whereby an investor pays for the litigation costs on behalf of a claimant or a representative of a group of claimants, in exchange for an agreed fee in the event that the legal proceeding is successful. The fee is usually a percentage of the award made or the settlement secured in favour of the funded claimant party.¹ Litigation funders themselves are not a party to the legal proceeding and have only an economic interest, not a legal interest in it.

TPLF originated in Australia but has since expanded into a global industry worth billions of Euros, which is today present in many jurisdictions including the USA, Canada, the United Kingdom and more recently, the EU. As confirmed by the European Parliamentary Research Service, TPLF in the EU is in a state of rapid growth.² Litigation funders are mainly interested in high value cases but do also invest in arbitration and insolvency cases. Investments in single cases are the norm although the so-called 'portfolio-funding' is becoming increasingly widespread over the last years.³ This model means that the litigation funder finances a bundle of claims under the same funding agreement in order to spread the investment risk. Together with the growing number of litigation funders in general and portfolio-funding investments in particular, one can also observe an increased cooperation of litigation funders with qualified entities, law firms as well as aggregators such as claims-collection or award-distribution-platforms combined with aggressive advertising.

Proponents of TPLF often argue that it improves access to justice and that it discourages wrongdoings. According to them, justice becomes more affordable to everyone by litigation funders bearing the risks and costs. TPLF would also help to close the gap in financial resources by weakening the defendant's ability to defeat the case through superior economic power. Eventually, proponents argue that it serves as a vehicle for the pursuit of low value claims, which would otherwise not be pursued.

However, the main argument for TPLF, the improvement of 'access to justice', is not borne out by experience. Instead, TPLF is a profit-making enterprise, in which justice for the claimant may or may not be a by-product. In its report, the Australian Parliament observed that litigation funders mainly invest in class action lawsuits on behalf of investors and

¹ See for instance Bentham Europe Limited (14 October 2014), Submission to the Ministry of Security and Justice, Dutch Draft Bill on Redress of Mass Damages in a Collective Action, par. 2.10 on page 4 (<https://www.internetconsultatie.nl/motiedijksma/reactie/7bf391e6-0b57-44c3-a650-b9797efb4c29>).

² See chapter 2.1 of the European added value assessment (p. 3-10) as well as chapter 2.1 / 2.2 of the annexed study p.49-54.

³ EPRS Study (2021): Responsible litigation funding. State of play on the EU private litigation funding landscape and on the current EU rules applicable to private litigation funding, p. 28 -29.

shareholders.⁴ Claims from employees or product liability claims from consumers are, on the other hand, regularly assessed as too risky, impossible to settle fast or not profitable enough. If litigation funders do invest in such cases of ordinary citizens, they are regularly demanding excessive returns. In Europe, rates of returns for litigation funders may be up to 300% or even 3.000%⁵. There are also various examples of litigation funders assuming effective control of litigation to further maximise their returns or to push for a settlement, without regard to the fairness of the financial outcome for the funded claimant party. In such cases, a losing defendant effectively transfers wealth to an unharmed investor, while claimants who have suffered a harm risk receiving little or no redress.

This report seeks to address these problems by proposing a new regulatory framework. Its provisions shall safeguard the integrity of our justice system by effectively protecting European citizens from financial exploitation by litigation funders. Ensuring that victims that suffer harm receive adequate compensation is key for the Rapporteur. With this report, he wants to create a rulebook for a proactive regulation of TPLF, which will help to avoid the problems faced in third countries and which are now starting to occur also in the EU. The Rapporteur regards the following points as necessities for the upcoming legislation towards litigation litigation funders:

- An authorization system managed by national supervisory authorities
- Capital adequacy requirements as well as an obligation to pay adverse costs
- Fiduciary relationship towards claimants
- Disclosure of TPLF agreement towards the court, the claimants and the defendant
- Strong safeguards against conflicts of interest
- A cap for fees to guarantee fair and proportionate returns for claimants
- Prohibition to take control over the proceedings or withdraw without clear justification

Some efforts have already been made to regulate TPLF. Recognizing the problems that stem from TPLF, Australia has recently introduced a requirement for litigation funders to hold an Australian financial services license. It has also completed a parliamentary inquiry into the regulation of TPLF in collective redress proceedings, in which some litigation funders have indicated that they would support further regulation in order to improve transparency and confidence in the system.⁶ Pending legislation also exists in Canada, in the province of Ontario, where a bill reforming the collective redress regime contains provisions on TPLF.

The Commission suggested in its 2013 Collective Redress Recommendations several provisions to underscore the need to regulate TPLF, for instance (a) the prohibition on litigation funders from charging excessive interest on the funds provided to fund the claim

⁴ See Australian Law Reform Commission (2019): An Inquiry into Class Action Proceedings and Third-Party Litigation Litigation funders, p 34.

⁵ See Bentham(2014): Submission to the Ministry of Security and Justice. Dutch Draft Bill on Redress of Mass Damages in a Collective Action, par. 2.15 on page 5 as well as 1266/7/7/16 Walter Hugh Merricks CBE v MasterCard Incorporated and Others – Judgment (CPO Application) [2017] CAT 16 | 21 Jul 2017 in section 99 and 100 on page 37 and 38. The funding agreement for the case Walter Hugh Merricks CBE versus Mastercard foresees as a total investment return “the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Proceeds up to £1 billion, plus 20% of the Undistributed Proceeds in excess of £1 billion.

⁶ Australian Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, 22 December 2020, par. 16.18 on p 293.

(Rec 16(c)) and (b) the prohibition on litigation funders from basing their remuneration or interest on the settlement amount awarded except where the funding agreement is regulated by a public authority (Rec 32).

This Recommendation only addressed TPLF safeguards for collective cases (and not the general regulation of TPLF, as it is required). Nevertheless, it is noteworthy that when the Commission reviewed Member State compliance with the Recommendation in 2018⁷ ('Commission 2018 Report'), it noted:

- “On this point [adoption of TPLF safeguards], the Recommendation has not been implemented in any of the Member States. None of them have regulated third party financing, let alone in accordance with the Recommendation.” (page 9)
- Only Slovenia “is the exception to this general situation, as (...) private third party funding is regulated in accordance with the principles set out in the Recommendation.” The report goes on to state that: “This general lack of the implementation means that unregulated and uncontrolled third party financing can proliferate without legal constraints, creating potential incentives for litigation in certain Member States.”

The EU’s 2018 Directive on representative actions for consumers also contains some provisions on TPLF in the context of collective action litigation that seek to address transparency as to sources of funds and conflicts of interest like Recital 52 and Art 10 (2a) (“unduly influence(d)”, “does not divert”) and Art 4 (1e) (“prevent influence”).

This report however argues - based on the arguments outlined above - that those provisions are not sufficient, and in any case only apply to a certain sub-set of disputes.

Soft law approaches have also proved not to be effective⁸. The only self-regulatory code (i.e. soft law) in Europe is the Association of Litigation Funders (ALF) in the UK. However, only 12 of the 80 or more litigation funders operating in Europe are a member. Moreover, the sanctions in the code are not effective. When the code is for example violated the funder may face a fine of up to GBP 500 (the equivalent of approximately EUR 570) or the exclusion from the organisation. After exclusion, it can continue any actions it pleases.

Furthermore, allowing Member States to regulate separately without coordination from the EU will lead to the proliferation of divergent outcomes, which will create inconsistent safeguards for the EU citizens across the internal market. As the Commission 2018 Report notes (on page 10): “(...) there will always be a possibility for fund providers based in one Member State to avoid stringent national rules by seeking to fund collective actions in another EU Member State, where collective redress mechanisms are available and private third party funding remains unregulated.”

⁷ 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 violation of rights granted under Union Law (2013/396/EU). Brussels, 25 01 2018, COM(2018) 40 final.

⁸ See chapter XX of the annexed study - UK example (describe): [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf)

As such, this report argues for the expansion of the existing regulatory framework by a new Directive, establishing minimum safeguards across the EU, while respecting Member States' wishes not to permit TPLF at all if it is incompatible with their domestic systems.

The Rapporteur rejects the view of some policy makers that the EU is immune to TPLF-related problems. The main ingredient for the discussed problems is the same as in Australia, Canada, the USA or Europe: actors seeking for profit maximization at the expense of claimants. Only strong legal safeguards combined with sound knowledge of the use of TPLF will prevent us from scenarios that occurred in other parts of the world. The European Union should use this matter to demonstrate to its citizens that the European Institutions are not only able to find solutions after a crisis has done already severe damage but that they can also act pre-emptively, at an early stage to stop the further erosion of our justice system and to guarantee adequate compensation and protection for our citizens.

INFORMATION ON ADOPTION IN COMMITTEE RESPONSIBLE

Date adopted	14.7.2022
Result of final vote	+: 18 -: 5 0: 0
Members present for the final vote	Pascal Arimont, Pascal Durand, Angel Dzhambazki, Ibán García Del Blanco, Virginie Joron, Sergey Lagodinsky, Gilles Lebreton, Maria-Manuel Leitão-Marques, Karen Melchior, Franco Roberti, Raffaele Stancanelli, Marie Toussaint, Axel Voss, Marion Walsmann, Lara Wolters, Javier Zarzalejos
Substitutes present for the final vote	Alessandra Basso, Daniel Buda, Antonius Manders, Emmanuel Maurel, Angelika Niebler, Yana Toom
Substitutes under Rule 209(7) present for the final vote	Nicola Beer

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

18	+
PPE	Pascal Arimont, Daniel Buda, Antonius Manders, Angelika Niebler, Axel Voss, Marion Walsmann, Javier Zarzalejos
RENEW	Nicola Beer, Pascal Durand, Karen Melchior, Yana Toom
S&D	Ibán García Del Blanco, Maria-Manuel Leitão-Marques, Franco Roberti, Lara Wolters
THE LEFT	Emmanuel Maurel
VERTS/ALE	Sergey Lagodinsky, Marie Toussaint

5	-
ECR	Angel Dzhambazki, Raffaele Stancanelli
ID	Alessandra Basso, Virginie Joron, Gilles Lebreton

0	0

Key to symbols:

+ : in favour

- : against

0 : abstention