

# The 2021 Third Party Funding Report and current legislative initiatives on EU level

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# Outline

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- 2021 TPF Report & TPLF Market in Europe
- Research Paper's conclusion
- The «Voss Report»
- TPF Eli Project

# March 2021- European Added value Assessment



## AUTHORS

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This paper has been drawn up by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

The study annexed to the European added value assessment was written by Professors Cristina Poncibò and Elena D'Alessandro, University of Turin, Law Department, at the request of the European Added Value Unit (EPRS).

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# November 2020- January 2021

Annex

NO  
arbitration

State of play of the EU private  
litigation funding landscape  
and the current EU rules  
applicable to private litigation  
funding

Research Paper

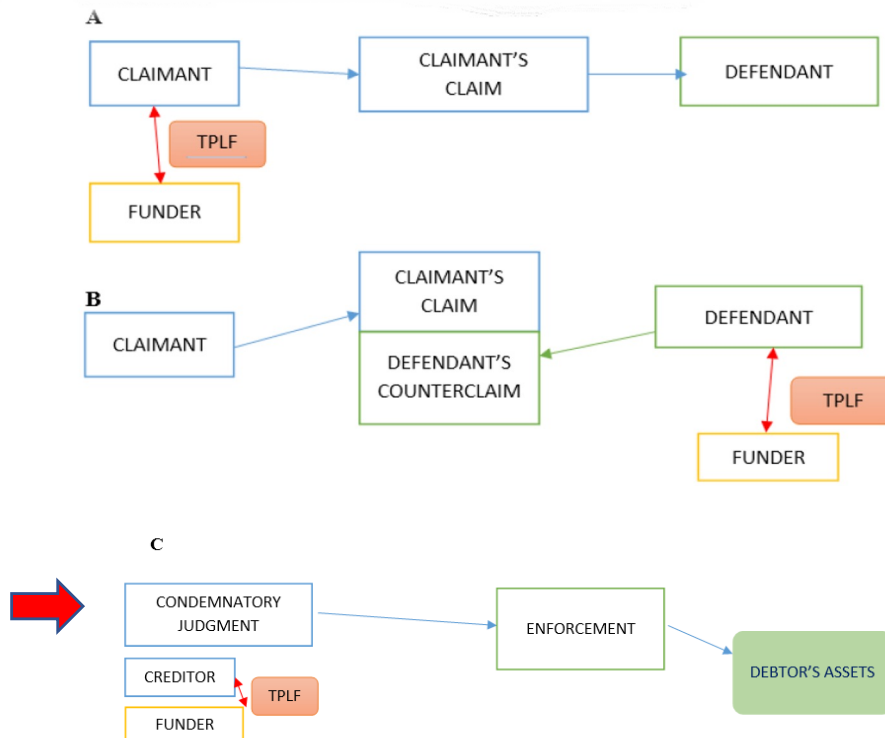
The aim of this study is to give a comprehensive overview of private litigation funding (or third-party litigation funding – TPLF) in the European Union. The study describes the main players on the European TPLF market (i.e. funders, claimants and lawyers). It also analyses the EU legal framework, case law and best practices to identify the regulatory gaps, assess them and discuss the relevant policy options.

*“The analysis was developed by focusing on a comparative study of the EU legal framework, **case law and literature**, together with quantitative (i.e. data collection) and qualitative research consisting of **interviews with funders** and experts in the field”*

# BTE, ATE, contingency fees, TPF

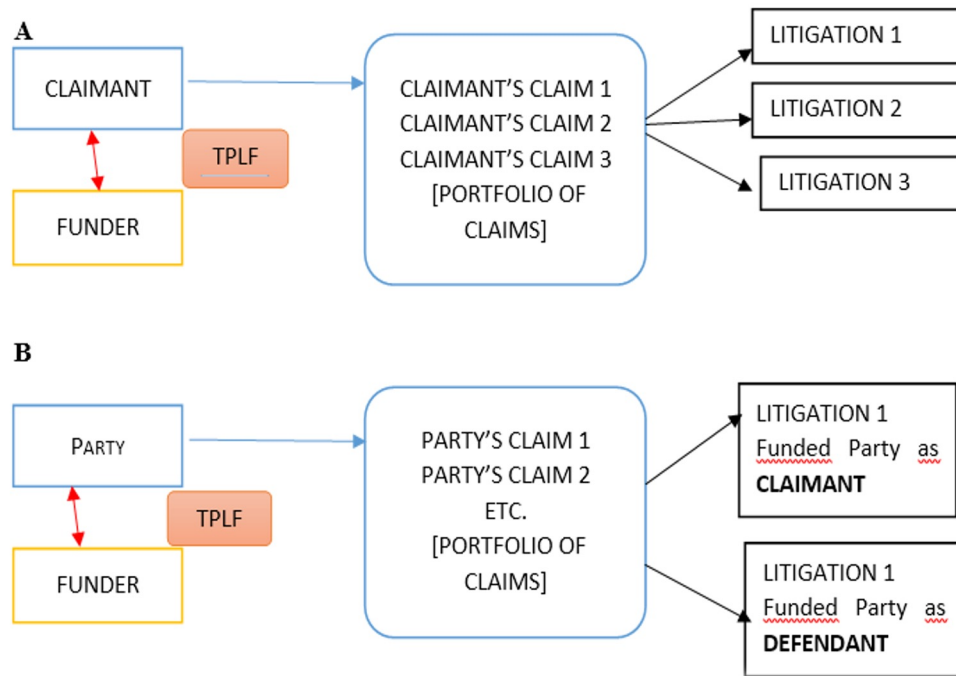
	BTE INSURANCE	ATE INSURANCE	CONTINGENCY FEES	THIRD PARTY LITIGATION FUNDING
Future and uncertain civil proceedings			<div style="border: 1px solid black; padding: 5px;"> <p>A common structure:</p> <ul style="list-style-type: none"> <li>• the “investor” provides funds ,be it a lawyer or a litigation funder;</li> <li>• agrees with a party involved in the case to be paid by a fixed percentage of the recovery, if that party is successful</li> </ul> </div>	
Payment of a premium	✓	✓		
Maximum insured amount	✓	✓		
Recovery sharing (if successful)			✓	✓
Covers all “costs” of the proceedings (fees, disbursements, opponent's costs)			?	✓
Party's legal representative as a party to the private funding agreement			✓	

# Funding of a single claim



# Portfolio Litigation Financing

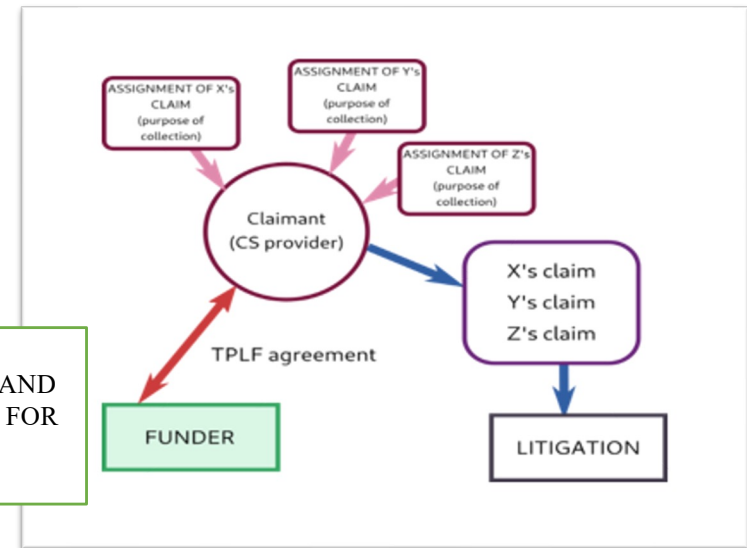
The funder can spread the risk on more than one claim, covering also smaller and unattractive claims that would otherwise not be financed singularly



# Combinations of different private funding methods



COMBINATIONS OF TPLF AND ASSIGNMENT OF CLAIMS FOR COLLECTION





# Setting the scene: TPLF Market in Europe (2021)

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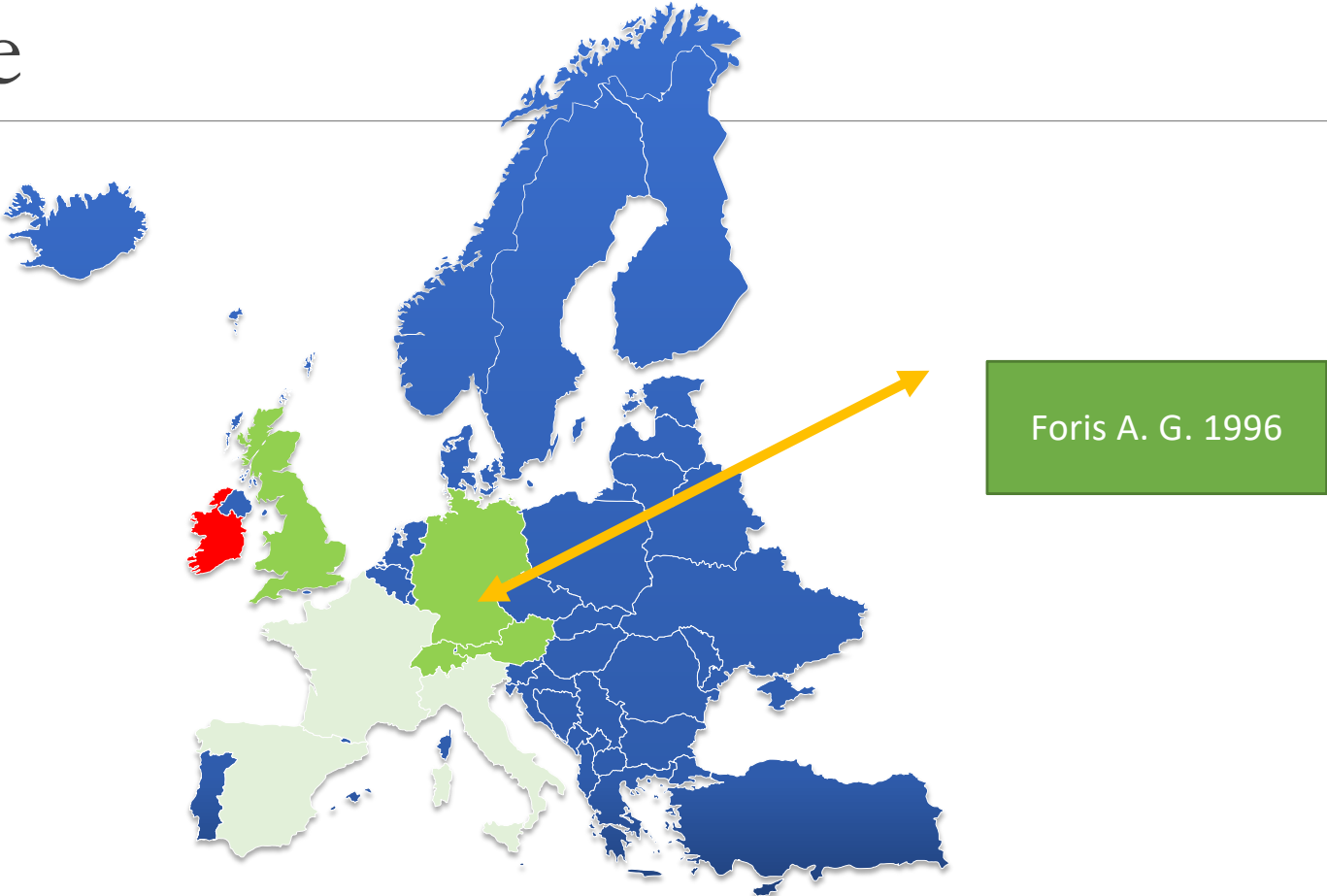
- *“the UK presents the largest market for TPLF*
- ***44 litigation funders** are active in the **UK**, which also operates across the EU*
- ***24 in the Netherlands**, and*
- *at least **13 in Germany**.*

*France follows closely behind, with some funders also located in Austria, Spain, Portugal and Ireland”\**

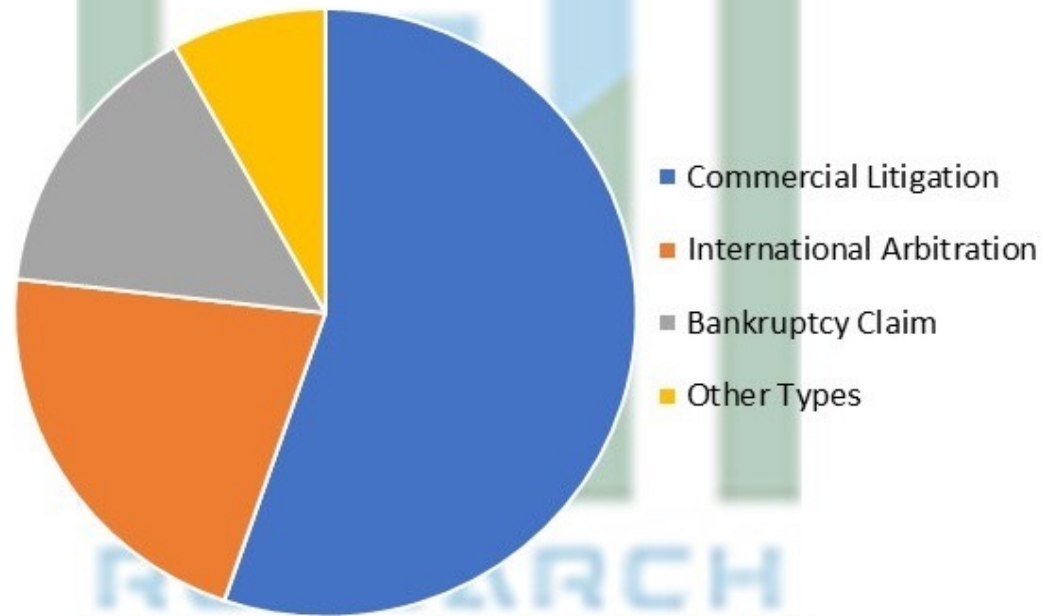
\*Responsible Private Funding of Litigation. European Added Value Assessment

# Europe

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## Global Litigation Funding Investment Market Share (%), By Type, By 2019



*Source: Industry & Primary Sources, ResearchNester*



# Global Litigation Funding Investment Market



## Growth Drivers

- Increasing Number of Lawsuit Funders Around the Globe
- Benefits Offered by Litigation Funding

## Global Market Value (USD Million), By End User, 2028



## Europe Market Share (% in terms of Value), By Country, 2028



**Key Players:** Apex Litigation Finance, Augusta Ventures Ltd., Burford Capital LLC, Woodsford Litigation Funding Ltd., Omni Bridgeway, Harbour Litigation Funding Ltd., Deminor, Balance Legal Capital LLP, and others

# Legal instruments EU- 1

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At **EU level**, the following **legal instruments** mention TPLF:

- Article 8.26 of the EU-Canada trade deal
- Article 3.8 of the EU-Singapore investment protection agreement
- Article 3.37 of the EU-Vietnam investment protection agreement

Where there is third party funding, the disputing party benefiting from it shall **disclose to the other disputing party** and to the **Tribunal the name and address of the third party funder**

ELI/UNIDROIT Model  
European Rules of  
Civil Procedure,  
Rule 245, Comments 1-4

Resolution of  
investment disputes  
between investors and  
States

# Legal Instruments EU- 2

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At **EU level**, the following **legal instruments** mention TPLF:

- Article 10 of **Directive 2020/1828/EU** of 25 November 2020 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC.

*Class members injured by a mass tort or consumer associations are often unwilling or incapable of investing the **amount of money needed** to achieve a successful lawsuit, they may refrain from seeking compensation. Such a dynamic hinders full access to justice and **TPLF may represent a viable solution to this.....** However, **concerns have been raised with regard to TPLF***

# Setting the scene: National Law

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At national level, **Greece** and **Ireland** <sup>①</sup> generally **prohibit** TPLF.

- In **Germany**, the German Federal Court **prohibited** the use of TPLF in **actions for confiscation of profits** pursuant to Section 10 of the German Act against Unfair Competition (*‘Gesetz gegen den unlauteren Wettbewerb’*).

By contrast:

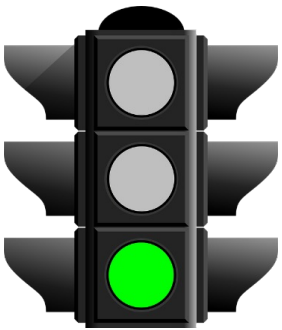
- In **Slovenia**, pursuant to the new legislation on **collective redress**, “Law of Collective Actions (Zakon o kolektivnih tožbah—ZkolT)” , **TPLF is permitted and regulated** by Article 59, in accordance with the principles set out in the Commission Recommendation of 11 June 2013.

<sup>①</sup> **Law Reform Commission 2023-Consultation Paper Third-Party Litigation Funding**



# Research Paper's conclusion

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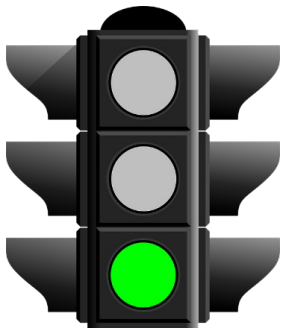


- Third party funding can **facilitate access to justice** for parties with legitimate high-value claims who may not easily be able to fund them, as not entitled to legal aid/ Third party funding can provide **equality of arms** for such parties
- Even if a funded party has the resources to bring a claim, the use of third party funding **takes the litigation costs away from the balance sheet**, including any potential adverse costs;
- Funders' due diligence ensures that cases that have substantial merit and good prospects of success are selected for litigation funding ("**meritorious claims**");
- **Third party funding can help to manage litigation risks** (risk-free disputes);



# Law Reform Commission 2023-Consultation Paper Third-Party Litigation Funding

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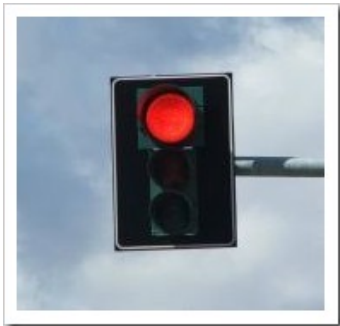


**Claimant Type 1** is the **claimant without resources**. For Claimant Type 1, third-party funding is the only means by which they can seek any degree of redress through the legal system unless some formal legal aid or contingent fee arrangement is available.

**Claimant Type 2** may have enough money to finance their own dispute resolution, but is nonetheless smaller and **less powerful than the party against which it wishes to pursue legal action**. Even if Claimant Type 2 manages to self-fund the matter, they will likely be outmatched in financial resources by their opponent.<sup>43</sup>

**Claimant Type 3** is a large, well-resourced corporation, with sufficient resources to allow them to participate in legal proceedings without funding from a third party. For Claimant Type 3, third-party funding is part of their corporate finance strategy, allowing them to “hedge” **risks** and manage legal disputes without negatively impacting their profit-and-loss statements.

# Research Paper's conclusion



Risks	Policy options
<b>Flood of litigation in portfolio litigation</b> - risks for the functioning of judicial systems	Find a balanced approach to facilitate access to justice through TPLF, at the same time limiting the risks posed by TPLF
<b>TPLF capital inadequacy</b> - Funders with insufficient cash on hand to fund in full their portfolio of investments in disputes may leave the funded party without financing	Ruling on insurance cover and/or capital adequacy for funders established in the EU
<b>Conflict of interests</b> - TPLF agreements may lead to undisclosed conflicts if there is a pre-existing relationship between the funder and the claimant's or the defendant's lawyers or between the claimant and the claimant's lawyer.	Establish a duty to disclose to the court and to the other party the fact that TPLF is being used, together with the name of the funder. Ensure that the funder does not seek to influence the procedural decisions of the claimant.
<b>Confidentiality</b> - In order to obtain TPLF, commercial and potentially sensitive information concerning the claimant and the potential defendant may be provided to the potential funder.	Establish a duty to disclose to the court and to the other party the fact that TPLF is being used.
<b>Defendant's recovery of procedural costs.</b>	Provide the defendant winning the case with a direct action against the funder for the recovery of procedural costs if the funded party fails to pay.

# Funder's Remuneration

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1. Likelihood of success (at least 60%)
  2. Presumable length of the civil proceedings
  3. Claim value
  4. Counterparty's financial strength.
- **The higher the litigation risk and the longer the civil proceedings, the greater the remuneration earned by the funder if the case is won.**
  - **High value claims**
  - **A funder is more likely to agree to fund a claim against a solvent counterparty, offering high prospects of recovering any sum that is awarded in the final judgment**

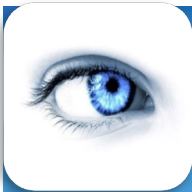
# Funder's Remuneration

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## The EPRS Study

*“A litigation funder typically takes a 20-50 % share of the amount awarded in the case, or a multiple of the funding provided, and **may charge excessive fees to the claimant, thus depriving him or her of a substantial part of the litigation's outcome**. In this way, the success of the result obtained by the claimant through successful access to justice may be compromised, as the claimant eventually receives a considerably lower compensation than that awarded by the court.*

*A possible remedy to the problem caused by excessively high remuneration fees would be the **introduction of a cap on funders' return rates**, thereby balancing private autonomy with the public interest of protecting the effectiveness of access to justice.” (Emphasis added) (page 22)*



CLAIMANT'S  
LAWYER

CLAIMANT



FUNDER

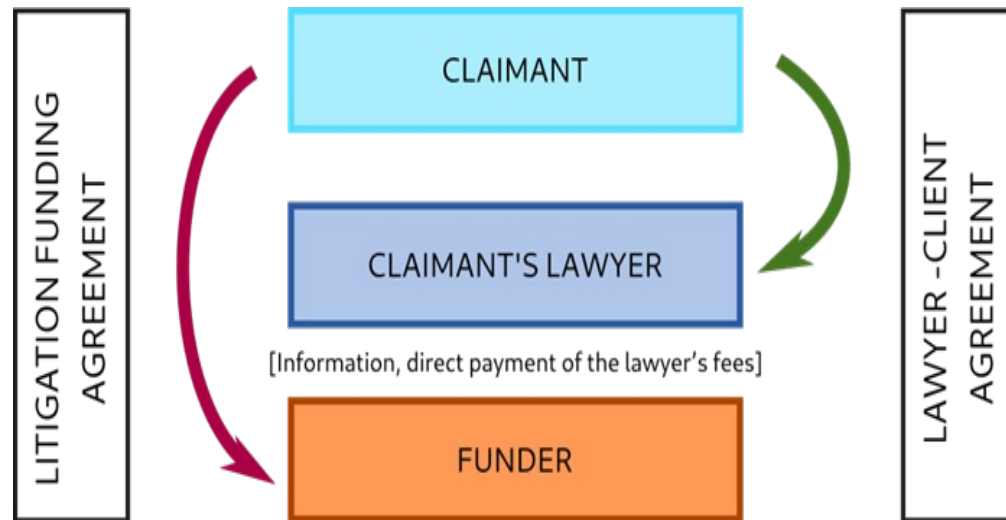
DEFENDANT

DEFENDANT'S  
LAWYER



# Ethical issues

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# Litigation funding

Protecting your rights should not be a question of money. Within Germany or abroad, individual or collective actions: We provide the funds required to assert your legal claims.



PLACE AN INQUIRY



The Global Leader in

Suche

Home Anwälte Orte

Alle Rechtsgebiete  Fachanwalt

Ort eingeben

Suche über Karte

Suchen

## Anwälte mit Profil

Sie möchten klagen, haben aber noch keinen Anwalt? Als Prozessfinanzierer haben wir oft mit Klägern zu tun, die erfolgsgeschwundene Fälle einbringen, allerdings noch keinen Anwalt mandatiert haben. Aufgrund unserer jahrelangen Erfahrung mit Geschäftsverfahren haben wir viele Anwälte kennengelernt und durch die Zusammenarbeit mit ihnen genau Einblicke in ihre Arbeitsweise erhalten.

Auf PROFIZ präsentieren wir Anwälte, die wir für die besten

# Regulatory options

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**Option 1:** Adopting an EU legislative instrument on certain minimum standards of TPLF (*“Strong Regulatory Approach”*)

**Option 2:** Self-regulation, left at the initiative of responsible funders (ALF, ELFA)



# EP'S initiative 17.06.2021 («Voss Report»)

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- Motion for EU Parliament Resolution with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))- Committee on Legal Affairs (JURI). Rapporteur: Axel Voss

-14/07/2022: voted in the JURI Committee

**European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))**

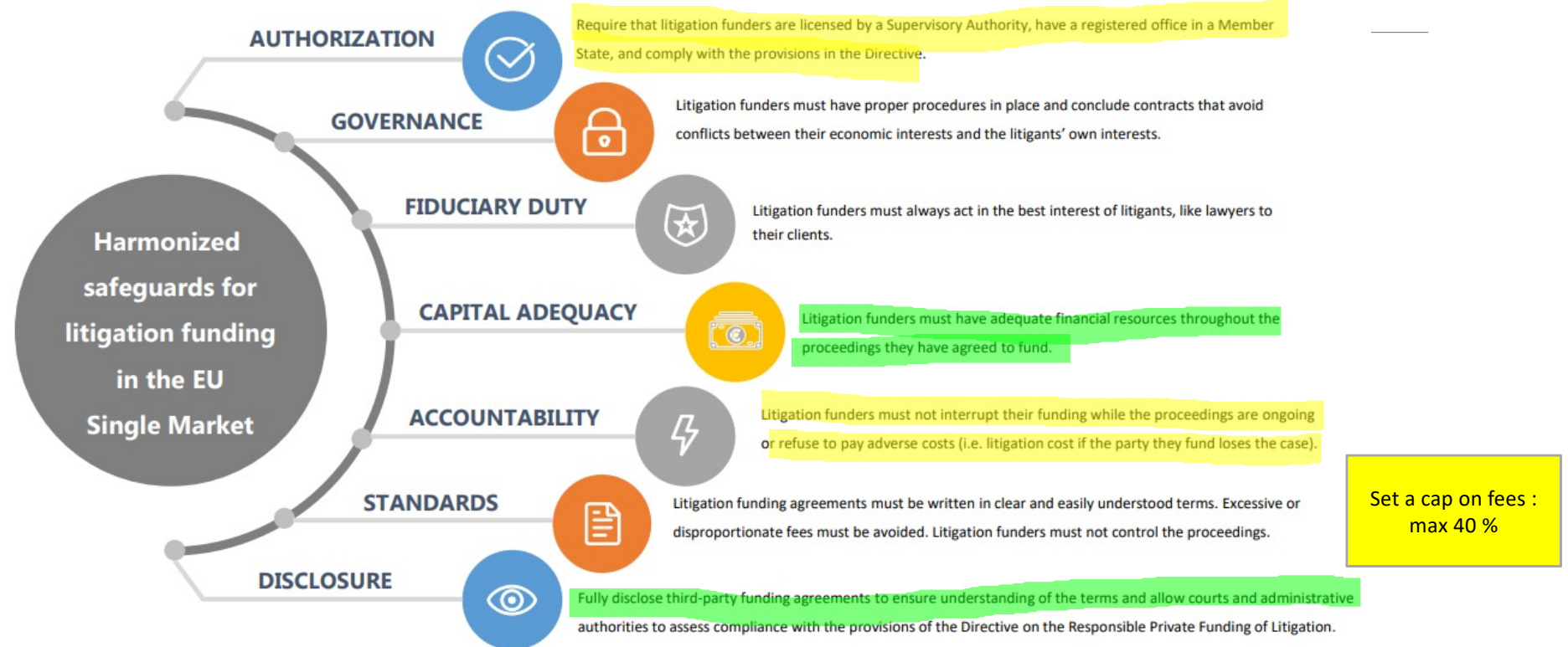


**Claimant as the  
only possible  
funded party**

*“In the  
United Kingdom, only 12 out of 50  
funders are members of the Association  
of Litigation Funders which operates  
a self-regulatory code”  
American Chamber of Commerce to the  
European Union*

# Responsible private funding of litigation

How to gain public confidence and optimize adequate compensation for claimants



# EP'S initiative

## 17.06.2021

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### What about Arbitration?

**Article 1 Draft Directive**  
**Subject Matter and purpose**

*This Directive is aimed at harmonising the rules of Member States applicable to third-party **litigation funders** ('litigation funders') and their authorised activities...*

**Compromise Proposal**

*The purpose of this Directive is to introduce minimum rules applicable to commercial third party litigation funders*

**Article 3**  
**Definitions**

[...] 'court or administrative authority' means a competent court, administrative authority, **arbitral body** or other body tasked with adjudicating on proceedings;



# Feedback on the Voss Report

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- On June 22, 2022, ILR and twelve European business and trade associations released a joint statement in support of the European Parliament Legal Affairs Committee legislative own-initiative report on Responsible Private Funding of Litigation.
- The CCBE welcomed the initiative of the European Parliament on a legal framework on responsible private funding of litigation (13.05.2022) *with some remarks...*
- Funders seem to prefer self-regulation. International Legal Finance Association (ILFA)'s criticism..

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# Feedback on the Voss Report

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July 2023: The EU Commission has reportedly **planned to conduct a mapping study of the existing European litigation funding landscape before rolling out any new rules.**

- **September 2022 [ELI project on Third Party Funding of Litigation](#) as a further source of inspiration for the EU legislator**

